the Court, including restitution (unjust enrichment) remedies related to illicit compensation received by Defendants, and/or the illicit profits of Defendants.

Restitution, also known as unjust enrichment, can be awarded in law or in equity. *See Restatement (Third) of Restitution and Unjust Enrichment* ("Restatement of Restitution, Third"), § 4 (2011); *American Master Lease LLC v. Idanta Partners, LLC* (2014) 225 Cal.App. 4th 1451, 1483. Thus, under Plaintiff Kallen's first cause of action for deceptive trade practice, pursuant to NRS 41.600(3)(a) or (b), restitution is available to Plaintiff Kallen (and the other Plaintiffs).[2] Even if it were true that the Plaintiffs did not suffer damages, which is absolutely not true, restitution is available based on the disgorgement (and accounting for) of the illicit gains/profits obtained by the Defendants as a result of their unlawful and statutorily-fraudulent practices committed against the Plaintiffs. *See American Master Lease LLC, supra*, 225 Cal.App. 4th at 1483. The Nevada Supreme Court has cited and utilized the Restatement of Restitution (in its various iterations) on multiple occasions.[3] Restitution by full disgorgement of Defendants' gains and profits, based on MTC's violation of law and conscious wrongdoing, is perfectly appropriate here, and causation is axiomatic. *Restatement of Restitution, Third*, § 51; *see also American Master Lease LLC, supra*, 225 Cal.App. 4th at 1483; *Guy Tel. & Tel. Co. v. Melbourne Int'l* (11th Cir. 2003) 329 F. 3d 1241.

In fact the disgorgement remedy rests upon one of the most critical foundations underlying the entirety of the law of restitution, which is, "A person is not permitted to profit by his own wrong." *Restatement of Restitution, Third*, § 3 [emphasis added]. For example, the comments to § 3 of the Restatement of Restitution, Third, explain that: "Restitution requires full disgorgement of profit by a conscious wrongdoer, not

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[2] Restitution/unjust enrichment was not considered by Judge Pro in *Picus v. Wal-Mart Stores Inc.* (D. Nev. 2009) 256 F.R.D. 651, which involved only traditional damages for affirmative misrepresentation in the sale of a product. Disgorgement was not an issue.

[3] *See, e.g., Monzo v. Eighth Judicial Dist. Court of Nev.* (2014) 331 P.3d 881; *Sanguinetti v. Strecker* (1978) 94 Nev. 200, 577 P.2d 404; *Namow Corp. v. Egger* (1983) 99 Nev. 590, 668 P.2d 265; *Wheeler Springs Plaza, LLC v. Beemon* (2003) 119 Nev. 260, 71 P.3d 1258.

just because of the moral judgment implicit in the rule of this section, but because any lesser liability would provide an inadequate incentive to lawful behavior. [emphasis added]; *see also American Master Lease LLC*, *supra*. "If A anticipates (accurately) that unauthorized interference with B's entitlement may yield profits exceeding any damages B could prove, A has a dangerous incentive to take without asking—since the nonconsensual transaction promises to be more profitable than the forgone negotiation with B. The objective of that part of the law of restitution summarized by the rule of § 3 is to frustrate any such calculation." *Restatement of Restitution, Third*, § 3. In *American Master Lease LLC*, the Court of Appeal explained it this way:

> Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost. There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment. Typically, the defendant's benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore the plaintiff to his or her original position. However, [m]any instances of liability based on unjust enrichment . . . do not involve the restoration of anything the claimant previously possessed . . . includ[ing] cases involving the disgorgement of profits ... wrongfully obtained . . . . [T]he public policy of this state does not permit one to take advantage of his own wrong regardless of whether the other party suffers actual damage. Where a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust . . . the defendant may be under a duty to give to the plaintiff the amount by which [the defendant] has been enriched.
>
> 225 Cal.App. 4th at 1482 [internal quotation marks and citations omitted; alterations in original].

The *American Master Lease LLC* Court of Appeal went on to note:

> Moreover, [i]t is not essential that money be paid directly to the recipient by the party seeking restitution . . . . The emphasis is on the wrongdoer's enrichment, not the victim's loss. In particular, a person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing the same unlawful actions again. Disgorgement

> may include a restitutionary element, but it may compel a defendant to surrender all money obtained through an unfair business practice . . . regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice. Without this result, there would be an insufficient deterrent to improper conduct that is more profitable than lawful conduct.
> *Id.* [internal quotation marks and citations omitted; alterations in original].

Here, Defendants, including CRC, expressly seek to capitalize by about $80 million dollars of profit obtained by their illegal actions interfering with the Plaintiffs' consumer rights (and occupation of their homes), and now Defendants specifically confirm that part of their defensive calculus is the argument that Plaintiffs suffered and/or can prove no damages were "caused" in any event!

3. Reasonable Attorney's Fees and Costs

As a matter of law, Plaintiff Kallen would also be entitled to an award of reasonable attorney's fees and costs under her first cause of action against CRC. *See* NRS 41.600(3)(c). The amount of such award, however, should be determined by the Court in due course.

2. CRC Was Unjustly Enriched, and Disgorgement of Its Ill-Gotten Gains Is Appropriate Here

a. Plaintiff Kallen Did Not Enter Into A Contract With CRC

As a matter of fact, Plaintiff Kallen never entered into a contract with CRC, and CRC has not presented any evidence to the contrary, as CRC was not a party to the deed of trust. (*See* CRC's Exhibit A-1; Boylan Declaration, at ¶ 35.) The analogous Nevada authority is the decision by the Supreme Court of Nevada in *Leasepartners Corp. v. The Robert L. Brooks Trust* (1997) 113 Nev. 747, 942 P.2d 182. In Nevada, unjust enrichment occurs whenever "a person has and retains a benefit which is equity and good conscience belongs to another." *Id.* at 756, 187-188. In *Leasepartners Corp.*, many related contracts existed between and among the

entities involved in the transactions at issue, but no contract existed between Leasepartners and the Brooks Trust. *Id.* Summary Judgment was therefore reversed. *Id.* As stated here, there is no contract between Plaintiffs and the Defendant collection agencies, CRC and Plaintiff Kallen specifically here. (*See* Defendant's Exhibit A-1; Boylan Declaration, at ¶ 35.) Although CRC was named as the trustee in the deed of trust, CRC seemingly does not contend that it was a party or a beneficiary to the deed of trust (or any other contract with Plaintiff Kallen), which disposes of CRC's assertion that the deed of trust somehow governs CRC's relationship with Plaintiff Kallen.

Under restitution, *i.e.*, unjust enrichment, the wrongdoer who obtains a benefit, gain, and/or illicit profit is required to disgorge all of that benefit, gain and/or profit to the victim if the conscious wrongdoing involved any type of fraud or undue pressure or coercion against a victim (here, we have statutory fraud in the form of a deceptive trade practice, as a matter of law, and illicit coercion against the victims by pursuing a foreclosure-styled collection process without a license, in order to intimidate the Nevada victims). *See Restatement of Restitution, Third*, § 14, at 199 [citing *Leeper v. Beltrami* (1959) 53 Cal.2d 195; *Wake Development Co. v. O'Leary* (1931) 118 Cal.App. 131; *McRae v. Pope* (1942) 311 Mass. 500; *Chandler v. Sanger* (1874) 114 Mass. 364; *Aronoff v. Levine* (1919) 190 A.D. 172; *Pape' v. Knoll* (1984) 69 Ore. App. 372]; *id.* at 202-203 [citing *Leeper*, *supra*; *Ogle v. Freeman* (1939) 150 Kan. 864; *Fairbanks v. Snow* (1887) 145 Mass. 153; *Bumgardner v. Corey* (1942) 124 W. Va. 373]; *see also generally id.* § 51.

CRC's motion for summary judgment does not reference or address one of the cornerstones of the Law of Restitution, as reflected in Section 3 of the Restatement of Restitution, Third, which prohibits "Wrongful Gain." The first comment to Section 3 states: "The present section marks one of the cornerstones of the law of restitution and unjust enrichment. The general principle it identifies is the one underlying the 'disgorgement' remedies in restitution, whereby a claimant potentially recovers more

than a provable loss so that the defendant may be stripped of a wrongful gain." *Restatement of Restitution, Third*, § 3, and cmt. a [emphasis added]. In other words, under Restitution, a knowing wrongdoer like CRC here cannot escape full liability and the disgorgement of illicit profit simply because the cash was not taken directly out of the hand of the plaintiff victim (although here, many of the Plaintiffs' homes were taken and sold and the resulting cash delivered to Defendants, which forwarded the cash to their creditor-clients and were paid fees therefor). *See Kossian v. American Nat. Ins. Co.* (1967) 254 Cal.2d 647; *Guy Tel & Tel. Co.*, *supra*. Comment (c) to Section 3 of the Restatement of Restitution, Third, states as follows in pertinent part:

> (c) *Recovery Exceeding the Claimant's Loss*
>
> When the defendant has acted in conscious disregard of the claimant's rights, the whole of the resulting gain is treated as unjust enrichment, even though the defendant's gain may exceed both (i) the measurable injury to the claimant, and (ii) the reasonable value of a license authorizing the defendant's conduct. Restitution from a conscious wrongdoer may therefore yield a recovery that is profitable to the claimant plaintiff—a result that is generally not permitted when the restitution claim is against an innocent recipient."
>
> *Restatement of Restitution, Third*, § 3, and cmt. c.

CRC's reference to Sections 42 and 43 of the *Restatement of Restitution, Third*, is misleading at best, as those sections deal with the availability of restitution in the context of intellectual property (and similar rights) and fiduciary or confidential relationships. Despite CRC's inaccurate explanatory parenthetical describing these sections, nothing in them purports to limit disgorgement and restitution in other contexts not discussed in those sections. CRC's reliance on Section 43 is especially strange, as it makes clear that true fiduciaries and those—such as CRC—who are not technically fiduciaries but occupy a relationship of trust or confidence may be required under the law of restitution to disgorge illicit profits or benefits obtained by the fiduciary or person in a position of trust and confidence. Thus, as Section 43 explains:

> [g]ain resulting from breach of fiduciary duty is a prime example of the unjust enrichment that the law of restitution condemns, and one function of the rule of

this section is to exclude the possibility of profit from this kind of wrongdoing. An equally fundamental goal of liability under § 43, and one which may be stated without reference to unjust enrichment, is to enforce by prophylaxis the special duties of the fiduciary. Restitution offers a further safeguard, beyond the fiduciary's liability to make good any injury, protecting the reliance of the beneficiary on the fiduciary's disinterested conduct. To this end, a liability in restitution by the rule of this section does not depend on proof either that the claimant has sustained quantifiable economic injury or that the defendant has earned a net profit from the transaction. It is enough that the fiduciary has acquired some asset or opportunity by a transaction in which the fiduciary was required to act solely in the interest of another.
[emphasis added].

Although, as explained below and in Plaintiffs' prior briefing, non-judicial foreclosure trustees in Nevada are not true fiduciaries of the parties to a deed of trust, they do owe a duty of impartiality and good faith to those parties, rendering them fiduciaries for the purposes of Section 43. *See* NRS 107.028(6); *see also Restatement of Restitution, Third*, § 43 [noting "[u]nless the context requires otherwise, the term 'fiduciary' is used in the following Comments to designate both technical fiduciaries and others owing equivalent duties in a particular transaction; while the term 'beneficiary' designates a person to whom any such duties are owed" and describing the consequences, including disgorgement, that may follow from such fiduciaries breach of their duties to their beneficiaries].

CRC's continued reliance on *Unionamerica Mortgage & Equity Trust v. McDonald* (1981) 97 Nev. 210, 626 P.2d 1272, is similarly misplaced. The per curiam opinion in that case involved a markedly different situation from the instant case. *Id.* A consumer protection statutory scheme was not involved or consciously violated by the defendant. *Id.* Statutory fraud did not exist in that case either. *Id.* The plaintiff had had full opportunity to remove the sign at any time. *Id.* The defendant had not committed any illegal conduct and had not made any use of the sign. *Id.* The governing lease provided for the removal of the sign upon breach of the lease. *Id.* Furthermore, there was no evidence supporting a finding that there had been an assumption of the lease, and the plaintiff had been informed that the sign was of no

interest to the defendant. *Id.* Under such circumstances, the plaintiff could not recover damages for unjust enrichment, since no unjust enrichment had occurred. *Id.*

b. The Deed of Trust is Irrelevant And Void As Authority To Commit Illegal Acts, So Unjust Enrichment Applies

CRC's continued reliance on the deeds of trust as authorization for its misconduct is equally misplaced. For instance, CRC was unjustly enriched by its receipt of money (no less than $3,501,103.22 in fees and costs from 2007-2012 alone; SS#28) for conducting unlicensed collection agency activities, which are illegal under Nevada law. Neither the deed of trust, nor any contract between private parties, can authorize or otherwise justify the commission of illegal acts, and the receipt of illicit compensation therefor. The issue is not simply the non-judicial foreclosure process that may be referenced in the deed of trust. CRC needed a license as a collection agency from the FID. And, the governing issue here concerns unlicensed claim collection agency activities described in the evidence, which are illegal acts under applicable Nevada law, as explained in Plaintiffs' previous papers and herein. CRC's argument that some provision in a deed of trust—to which it was not a party or a beneficiary—allowed it to conduct unlicensed claim collection agency activities in contravention of Nevada law cannot stand; any such provision in a deed of trust is void as a matter of public policy. *See Magill v. Lewis* (1958) 74 Nev. 381, 333 P.2d 717.

According to law, where the subject contract is unenforceable, the cause of action for unjust enrichment is valid. *Id.* 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*, *supra*, 74 Nev. 381, 333 P.2d 717; *Loomis v. Lange Fin. Corp* (1993) 109 Nev. 1121, 865 P.2d 1161. As a matter of strong Nevada public policy, defendants collectively cannot be allowed to enrich

themselves with perhaps as much as $80 million dollars in fees for conducting illegal acts against the Plaintiffs, *i.e.*, unlicensed claim collection agency activities. *See Loomis*, *supra*, 109 Nev. 1121, 865 P.2d 1161; *see also Webb v. Clark County School Dist.* (2009) 125 Nev. 611, 218 P. 3d 1239; *Vincent v. Santa Cruz* (1982) 98 Nev. 338, 647 P. 2d 379.

E. CRC Was Required to Hold a Collection Agency License from the FID during the Relevant Period, Which CRC Failed to Do

In their prior briefing, including their supplemental papers filed March 28, 2017, Plaintiffs have addressed at length many of Defendants' misstatements regarding the role of non-judicial foreclosure trustees under Nevada law, and what they are authorized by the Nevada legislature to do in their capacity as trustees. To make sure that the Court is not misled by Defendants, Plaintiffs must point out here several particular inaccuracies in Defendants' recent briefing (which CRC's motion for summary judgment purports to incorporate by reference).[4] First, although NRS 107.028(1) lists ten categories of persons or entities that may serve as non-judicial foreclosure trustees in Nevada, NRS Chapter 107 does not purport to define the "capacity of trustee exhaustively" as Defendants suggest. Rather, as the plain language of NRS 107.028(1) makes clear, NRS Chapter 107 clearly references other provisions of Nevada law, including NRS Chapter 649, as well as, for instance, NRS 662.245 (dealing with foreign trust companies) and NRS Chapter 669 (dealing with trust companies). These references reflect the Nevada legislature's plain intention that NRS Chapter 107 is to be interpreted consistent with these other statutory provisions, and does not insulate non-judicial foreclosure trustees from compliance with whatever other provisions of Nevada law are applicable to them. The fact that the Nevada legislature listed collection agencies as one of the categories of entities

[4] Given CRC's incorporation of its prior briefing by reference, Plaintiffs' related briefing, including those filed on March 28, 2017, and April 11, 2017, should be considered by the Court in ruling on CRC's motion for summary judgment.

that may serve as non-judicial foreclosure trustees should dispose of Defendants' assertions here, as it reflects the Nevada legislature's recognition that collection agencies under NRS Chapter 649 may serve as non-judicial foreclosure trustees. Despite Defendants' claims to the contrary, there is no indication that the Nevada legislature expected such collection agencies to be insulated from compliance with any other provision of Nevada law, including NRS Chapter 649, simply because they may serve as non-judicial foreclosure trustees.

Second, Defendants continue to mischaracterize Plaintiffs' position in this lawsuit as requiring all non-judicial foreclosure trustees to be licensed as collection agencies by the FID. As Plaintiffs previously have explained, however, that is not consistent with Plaintiffs' interpretation of NRS 649.020 and other provisions of Nevada law, including NRS Chapter 107. Although, as Plaintiffs correctly contend, non-judicial foreclosure is claim collection under NRS Chapter 649, not all foreclosure trustees will require licenses from the FID, either because they do not serve as trustees regularly enough for them to be deemed collection agencies or because they fall into one of the categories of persons and entities that are exempt from licensure under NRS 649.020. For instance, foreclosure trustees who serve in such capacity on an irregular or occasional basis would not be required to be licensed (since they would not be "engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in the collection" of claims). *See* NRS 649.020(1). Similarly, under Plaintiffs' proper interpretation, attorneys would not need to be licensed as collection agencies (unless they are "conducting collection agencies" also). *See* NRS 649.020(2)(g) *and* NRS 107.028(1)(a).

Thus, instead of trying to address Plaintiffs' actual arguments, Defendants, as they have done repeatedly in the past, have tried to defeat a strawman argument of their own devising by distorting and exaggerating Plaintiffs' actual interpretation of NRS Chapter 107 and NRS Chapter 649.

CRC's other arguments on this subject are equally weak. For instance, CRC notes that entities holding a state business registration are one of the categories authorized by Nevada law to act as non-judicial foreclosure trustees under a deed of trust, and contends that it "had all required licenses to act in the capacity of trustee" because it "continuously licensed by the Nevada Secretary of State to conduct business in Nevada since 2006." Motion, at 13. Yet, even assuming *arguendo* that CRC had the required state business registration, it does not follow that CRC necessarily had all required licenses: after all, since, as Plaintiffs contend and as Plaintiffs' proof demonstrates, CRC was also required to have a collection agency license, the fact that it may have had another license or registration does not relieve CRC of liability for failing to obtain the collection agency license that was required because of the nature and scope of CRC's business activities in the State of Nevada.

CRC's assertion that its conduct toward Plaintiff Kallen could not qualify as claim collection even under the most liberal definition of the phrase is also belied both by the authorities cited by Plaintiffs to the Court previously, including in their supplemental briefing of March 28, 2017, and April 11, 2017, but also by CRC's own admissions in its communications with Plaintiff Kallen that CRC was attempting to collect a debt! (CRC's Exhibit A-3 ISO CRC's Motion for Summary Judgment.) If CRC's activities qualified as debt collection under the FDCPA's more narrow definition—which CRC in its own documents admitted to Plaintiff Kallen was the case—then they would necessarily qualify as claim collection under the broader language of NRS 649.020(1). *See, e.g., McLaughlin v. Phelan Hallinan & Schmieg, LLP* (3d Cir. 2014) 756 F.3d 240, 246 ["It is reasonable to infer that an entity that identifies itself as a debt collector, lays out the amount of the debt, and explains how to obtain current payoff quotes has engaged in a communication related to collecting a debt. Thus, the Letter constitutes debt collection activity under the FDCPA and misrepresentations contained therein may provide a basis for relief."].

The self-serving testimony from two of CRC's former officers, Ms. Brignac and Ms. Irby, to the effect that they did not believe CRC was engaging in debt collection does not assist CRC in this regard. As a preliminary matter, cases in which a party's state of mind is an element of a cause of action are generally not appropriate for summary judgment, as such issues are questions of fact for the jury. *See, e.g.*, *Millspaugh v. Millspaugh* (1980) 96 Nev. 446, 448-449, 611 P.2d 201, 202 [reversing grant of summary judgment where "whether appellant should have learned, through the exercise of proper diligence, of the fraud or mistake when she met with her attorney in 1972, thereby triggering the statute of limitations . . . is a question of fact to be determined by the jury or trial court after a full hearing"]; *Bernard v. Rockhill Dev. Co.* (1987) 103 Nev. 132, 734 P.2d 1238, [whether defendant intentionally made false promises or fraudulently misrepresented its intention to perform a question of fact]; *Mendocino Envtl. Ctr v. Mendocino* (9th Cir. 1999) 192 F.3d 1283, 1302 [whether defendants "were involved in an unlawful conspiracy is generally a factual issue and should be resolved by the jury"].

Moreover, even assuming *arguendo* that their testimony was offered in good faith, Ms. Irby and Ms. Brignac's opinions as to why CRC was engaged or whether it qualified as a collection agency are not conclusive here as to CRC's knowledge or intentions. Moreover, CRC improperly assumes that the non-judicial foreclosure process and claim collection are necessarily mutually exclusive, when, in fact, that is not necessarily the case: after all, CRC was engaged, as its own contracts with its creditor-client, Chase Bank, show, for a variety of services, including the carrying out of non-judicial foreclosures on behalf of CRC's client. (SS#60-61.) These other services included, among other things, CRC contracting to receive reinstatement and payoff amounts from debtors on defaulted debts and to forward them by overnight mail to CRC's creditor-client; agreeing that it would not take its fees for its services out of reinstatement or payoff proceeds, but would remit the full amount to CRC's creditor-client, and submit a subsequent bill for CRC's services to the creditor-client;

CRC confirming with its creditor-client whether a partial payment to reinstate or payoff a defaulted debt could be accepted by CRC on behalf of its creditor-client; CRC agreeing to promptly return all telephone calls received by CRC and answer correspondence within one business day of receipt, whether the communications were from Chase Bank, a trustee, a borrower, or the borrower's counsel; CRC producing reinstatement quotes and payoff quotes and reviewing those quotes to ensure they complied with applicable law, and promptly sending to the creditor-client by overnight delivery all reinstatement and payoff amounts received by CRC; CRC promptly sending to its creditor-client all proceeds obtained from non-judicial foreclosure sales by CRC; CRC obtaining prior written approval from its creditor-client before postponing a foreclosure sale; CRC agreeing to consider all foreclosures, including sales, with its creditor-client's best interests in mind; CRC agreeing to indemnify its creditor-client for any costs arising from a reversal of a non-judicial foreclosure sale due to an error or omission by CRC; CRC agreeing to deliver good and marketable title following non-judicial foreclosure sales, including by advancing payments necessary to pay off outstanding property taxes or liens on the property; CRC agreeing to assist its creditor-client in post-foreclosure sale efforts to deal with tenants and occupants of foreclosed properties, and to take all steps necessary to preserve its creditor-client's right to pursue a deficiency judgment against deed of trust debtors; CRC agreeing to assist its creditor-client with deed-in-lieu transactions with Nevada debtors and to attempt to solicit loss mitigation workout options when initial foreclosure documents are sent to borrowers if permitted by applicable law; and CRC agreeing not to charge borrowers amounts that were not permitted by the borrowers' loan documents or prohibited by applicable law. (SS#60-61.)

Plaintiffs must also point out that the evidence presented in connection with CRC's motion and herein demonstrates that CRC's own representations regarding Ms. Brignac and her role at CRC are contradicted by her testimony in this case. The

records presented by CRC as part of its Exhibit A-14—CRC's certified business license records from the Nevada Secretary of State—shows that CRC represented for years to the Nevada Secretary of State that Ms. Brignac was the president (or equivalent) of CRC as well as a director in both 2014 and 2015. *See* Exhibit A-14 (for years 2014 and 2015). Ms. Brignac's unambiguous testimony at her deposition in this case, however, was that her employment by CRC ended in December 2013, when she went to work for ALAW (which had purchased the assets of CRC in 2013). (SS#63.)

F. The *Quality Loan Service* Order Is Neither Controlling Nor Persuasive Authority Here

In their supplemental briefing of March 28, 2017, and April 11, 2017, Plaintiffs have explained at length and in detail the various reasons why CRC's reliance on Judge Williams' order in the *Quality Loan Service* matter is misplaced. For the reasons stated in Plaintiffs' related briefing, the order is neither controlling nor persuasive authority here, despite CRC's assertions to the contrary, and should not guide the Court in its decision on CRC's motion for summary judgment.

G. CRC's Business Activities in the State of Nevada during the Relevant Period Determine the Adjudication of Plaintiffs' Motion

In their attached separate statement, Plaintiffs have offered powerful proof that CRC was required to be licensed as a collection agency by the FID pursuant to NRS 649.075, because of the nature and scope of CRC's business activities in Nevada during the relevant period. This evidence—including the incontrovertible evidence of CRC's collection activities with respect to former Plaintiffs Thomas and Kimberly Moore ("Moores")—is devastating to CRC's assertions that it did nothing more than required by statute as a foreclosure trustee or was not required to obtain a collection agency license from the FID.

CRC improperly seeks to have the Court consider only CRC's conduct with respect to Plaintiff Kallen, even though CRC's conduct toward other Nevada debtors would also be crucial to the Court's determination as to whether the nature and scope of CRC's business activities in Nevada rendered CRC a collection agent. Even assuming *arguendo* that only Plaintiff Kallen's individual claims[5] were before the Court at this time, it would not follow that evidence of CRC's collection activities related to other Nevada debtors—such as the Moores—would be irrelevant to adjudication of Plaintiffs' motion. After all, whether CRC was required to be licensed as a collection agency by the FID during the relevant period hinges on the full nature and scope of CRC's business activities in the State of Nevada during that time. 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) [emphasis added]. Thus, under the statutory definition, Plaintiffs seemingly must show that CRC did more than engage in one isolated instance of claim collection in order to demonstrate that CRC required a license because its claim collection activities were a primary or secondary object, business, or pursuit for it. (If CRC is suggesting that it would need to be licensed if it sought to collect on a claim from even one Nevada debtor, then Plaintiffs' evidence as to the Moores demonstrates that Plaintiffs' burden has been met.)

In allowing Plaintiffs to conduct discovery—albeit limited—into the nature and scope of Defendants' business activities in the State of Nevada, the Commissioner and the Court recognized that the conduct of CRC as to other Nevada debtors would need to be considered in determining whether CRC acted as a collection agency as to Plaintiff Kallen. Thus, that CRC eventually broke off its efforts to collect a debt from Plaintiff Kallen—for reasons that require further

[5] That is, Plaintiff Kallen's First and Second Causes of Action against CRC.

discovery—does not mean that CRC was not attempting to collect a claim from her, or that CRC did not require a collection agency license from the FID because of its business activities with respect to both Plaintiff Kallen and other Nevada debtors.

1. Whether CRC's Conduct Was Knowing Is a Material Factual Dispute

a. CRC Misinterprets the Language and Requirements of NRS 598.0923(1)

CRC, as the Defendants have in the past, mistakenly tries to mischaracterize Plaintiffs' burden by claiming that Plaintiffs must show that CRC conducted business knowing that doing so amounted to a violation of Nevada law. This is not what NRS 598.0923 states. As a preliminary matter, however, it is also worth noting that CRC is plainly incorrect in suggesting that the DTPA as a whole is not a strict liability statute. As QLS recognizes in its opposition papers to Plaintiffs' Motion for Partial Summary Judgment, some provisions of Nevada's DTPA do indeed impose liability for negligence; others are effectively strict liability provisions. *See* QLS Opposition, at 16 [discussing NRS 598.0918(1) and NRS 598.092(9)]. CRC's suggestions to the contrary are simply wrong.

Turning to the provision of the DTPA at issue here, NRS 598.0923(1) states in pertinent part that a "person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she knowingly . . . [c]onducts the business or occupation without all required state, county or city licenses." [emphasis added]. The plain language of this statute makes clear that "knowingly" modifies "conducts" the business, such that Plaintiffs must only show that CRC knowingly conducted the business itself (but not that CRC knew it was doing so in violation of Nevada law). This is not, as CRC misleadingly suggests, Plaintiffs' attempt to read the intent requirement reflected in "knowingly" out of the statute altogether, but simply the interpretation required by the statute's words and grammatical structure.

In order to construe the proper definition of the word "knowingly," as used in NRS 598.0923, the better practice is to look to the definition assigned to that term by

the Nevada legislature in NRS 281A.115 and NRS 624.024 instead of looking further afield.[6] In these provisions, the Nevada legislature gave 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." NRS 281A.115, NRS 624.024 [emphasis added]. CRC's interpretation of NRS 598.0923(1) would not be consistent with this definition because CRC seemingly would have NRS 598.0923(1) require proof of knowledge both of the facts that constitute the act or omission as well as of the prohibition against the act or omission. Had the Nevada legislature wished this to be the law, it could have revised the language of NRS 598.0923(1) so that it prohibited knowingly violating Nevada law by conducting the business or occupation while lacking the required licenses to do so.

The single trial court order from a federal district court in Nevada also does not assist CRC here. There, the federal district court dealt with a different provision of NRS 598.0923, which states that a "person engages in a 'deceptive trade practice' when in the course of his business or occupation he knowingly: . . . [v]iolates a state or federal statute or regulation relating to the sale or lease of good or services.'" *Sobel v. Hertz Corp.* (D. Nev. 2010) 698 F.Supp.2d 1218, 1230 [quoting NRS 598.0923(3)][alterations in original], *affirmed in part, reversed in part, and vacated in part by Sobel v. Hertz Corp.* (9th Cir. Jan. 5, 2017) 2017 U.S. App. LEXIS 217. Although the trial court in *Sobel* did not address the definition of "knowingly" as

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[6] Although CRC cites several provisions of Nevada law, including NRS 624.024 and NRS 218A.115, also cited by Plaintiffs here and in the past, CRC's reliance on the Restatement (Second) of Torts' discussion of distinctions between innocent and fraudulent misrepresentations under the common law is misplaced, as Plaintiffs have stated a statutory consumer fraud claim against CRC (not a common law fraud claim). Similarly, the Model Penal Code, also cited by CRC, is of little guidance here, insofar as *mens rea* in criminal cases is not comparable to the Nevada legislature's knowledge requirement at issue here in NRS 598.0923(1). Specifically, NRS 598.0923(1) does not require a person to "knowingly violate the DTPA" to be liable for statutory consumer fraud: it requires a person to knowingly conduct a business (while lacking the licenses required to do so in Nevada).

used in NRS 598.0923(3), it concluded that it required the plaintiff to establish that the defendant "intentionally circumvented the requirements" of a statute or "knowingly violated" a law. *Id.* Given the pertinent language of NRS 598.0923(3)—*i.e.*, the knowingly violated requirement—it was not unreasonable for the trial court to reach that conclusion, although the better reasoned approach would have been for the trial court to require only that the acts or omissions constituting the violation of law be knowingly done or omitted (and not that the defendant also know that it was thereby violating a law). *See* NRS 281A.115, NRS 624.024. In contrast, as explained above, "knowingly" as used in NRS 598.0923(1) modifies "conducts the business or occupation," which does not require knowledge that all required licenses were not obtained.

As noted above, CRC is wrong to suggest that the Nevada legislature has always required some wrongful intent for there to be a violation of the DTPA: some provisions of the DTPA do not require any wrongful intent at all by expressly omitting the word "knowingly" from the statutory language. Moreover, CRC's attempt to draw a parallel between the intent required to prove common law fraud and Nevada's statutory consumer fraud provisions ignores the fact that the Nevada Supreme Court has already ruled that "[s]tatutory offenses that sound in fraud [such as Nevada's NRS 598.0923(2) at issue there] are separate and distinct from common law fraud." *Betsinger v. D.R. Horton, Inc.* (2010), 232 P.3d 433, 436 [emphasis added]. In reaching this conclusion, the Nevada Supreme Court expressly noted with approval a ruling from the Arizona Court of Appeals construing Arizona's consumer protection statute. *Id.* at 435-436. There, the Arizona Court of Appeals had recognized that the "purpose of the consumer protection statute was to provide consumers with a cause of action that was easier to establish than common law fraud, and therefore, statutory fraud must only be proven by a preponderance of the evidence. *Id.* [citing *Dunlap v. Jimmy GMC of Tucson, Inc.* (Ariz. Ct. App. 1983) 136 Ariz. 338, 666 P.2d 83, 88-89][emphasis added]. Although, as Plaintiffs recognize,

NRS 598.0923(1) by its language does have an intent requirement, it is improper for CRC to assert, without adequate authority or analysis, that the intent required must be akin to that demanded for common law fraud, because that would ignore the fact that statutes such as the DTPA are intended to make it easier for victims of consumer fraud to establish claims than if they were limited to causes of action for common law fraud.

b. Plaintiffs Have Demonstrated that CRC Knowingly Conducted Business without Required State License

1. CRC Cannot Defeat Summary Judgment through Self-Serving Testimony on Subjective Element

When the only evidence presented of factual issues is self-serving and uncorroborated testimony, the Court is not bound to find the issues or disputes to be "genuine" for purposes of NRCP 56. *See DuBois v. Ass'n of Apartment Owners of 2987 Kalakaua* (9th Cir. 2006) 453 F.3d 1175, 1180. Thus, while the "summary judgment procedure is not available to test and resolve the credibility of opposing witnesses to a fact issue, . . . it may appropriately be invoked to defeat a lie from the mouth of a party against whom the judgment is sought, when that lie is claimed to be the source of a 'genuine' issue of fact for trial." *Aldabe v. Adams* (1965) 81 Nev. 280, 282, 402 P.2d 34, 35 [overruled on other grounds by *Siragusa v. Brown* (1998) 114 Nev. 1384, 1392-93, 971 P.2d 801, 806-07][citing *Short v. Hotel Riviera, Inc.* (1963) 79 Nev. 94, 374 P.2d 979 and *Schoener v. Waltman* (1954) 125 Cal.App.2d 182, 270 P.2d 543][emphasis added]; *see also Luciano v. St. Mary's Preferred Health Ins. Co.* (2016) 2016 Nev. Unpub. LEXIS 183, at *6-7 ["contradictory statements may be used against a party on a summary judgment motion when no reasonable justification exists to explain the contradiction"][citing *Aldabe*, *supra*, 81 Nev. at 282, 402 P.2d at 35 and *Nutton v. Sunset Station, Inc.* (Ct. App. 2015) 131 Nev. Adv. Op. 34, 357 P.3d 966, 976]; *Nutton*, *supra*, 131 Nev. Adv. Op. at 30-31, 357 P.3d at 976 ["The mere fact that a party seeks to proffer apparently inconsistent testimony or assert

apparently inconsistent positions at some point during the course of litigation does not, by itself, justify the granting of summary judgment against that party. The general rule is that a party cannot defeat summary judgment by contradicting itself in response to an already-pending NRCP 56 motion."][citing *Aldabe*, *supra*, 81 Nev. at 284-85, 402 P.2d at 36-37 and *Cleveland v. Policy Mgmt. Sys. Corp.* (1999) 526 U.S. 795, 806-07][emphasis added]; *Sawyer v. Sugarless Shops* (1990) 106 Nev. 265, 269, 792 P.2d 14, 16 ["The *Aldabe* court properly held that one cannot modify his or her own statements in an effort to create a genuine issue and to avoid summary judgment."][citing *Aldabe*, *supra*, 81 Nev. at 282, 402 P.2d at 35].

2. The Evidence, including CRC's Admissions, Shows CRC Knew It Was a Debt Collector

As shown above and in Plaintiffs' prior briefing on this issue, Defendants "cherry-pick" and tweak and twist limited allegations of the claim collection acts alleged in the Third Amended Complaint, while ignoring other key allegations **AND ALL THE EVIDENCE SUBMITTED IN THE RECORD**. The Nevada Supreme Court will not do that. As but one example, CRC presents the self-serving testimony of two of its former employees, Ms. Brignac and Ms. Irby, in which they opined that CRC was not a debt collector or that they did not believe it was a debt collector. CRC ignores, however, all the written and sworn admissions by Defendants, including CRC, saying and showing: "WE ARE DEBT COLLECTORS AND SEEKING TO COLLECT A DEBT AND WILL USE ALL INFORMATION FOR THAT PURPOSE," or words to that effect. (*See, e.g.*, SS#20-21, 56, 66.) The testimony of CRC's own employees and CRC's own documents show that CRC admitted it was a debt collector in its communications, both oral and in writing, with others, including Nevada debtors. (SS#20, 21, 30, 32, 56, 66.) CRC employees during the relevant period were required to have a recording as part of their voice mail message that admitted that CRC was a debt collector (or words to that effect). *Id.* These messages therefore would be heard by those calling CRC, including Nevada debtors.

Judge Scann openly expressed her belief that this alone created a fact issue precluding even summary judgment, and many appellate courts agree. Such admissions are undoubtedly evidence that must be taken into account in determining whether, under the circumstances, an entity is a debt collector under the FDCPA (or collection agencies under Nevada law). *See, e.g.*, *Gburek v. Litton Loan Servicing LP* (7th Cir. 2010) 614 F.3d 380, 386 n. 3 [reversing dismissal in a class action and noting that admission "does not automatically trigger the protections of the FDCPA, just as the absence of such language does not have dispositive significance."][emphasis added]; *Hart v. FCI Lender Servs.* (2d Cir. 2015) 797 F.3d 219, 226-227 [considering importance of including such language in a letter to a debtor and noting that "[w]e see no reason why we should not take it [i.e., a letter using such language] at its word"]; *McLaughlin v. Phelan Hallinan & Schmieg, LLP* (3d Cir. 2014) 756 F.3d 240, 246 ["It is reasonable to infer that an entity that identifies itself as a debt collector, lays out the amount of the debt, and explains how to obtain current payoff quotes has engaged in a communication related to collecting a debt."][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 in rejecting argument that admission 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 admission, "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 admission 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 warning [*i.e.*, admission] 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 make the admission] 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.* Use of such language is thus not dispositive standing alone, but it is not, as Defendants have suggested in the past, immaterial either. It is simply evidence that should be considered in determining whether the user of the language qualifies as a debt collector under the FDCPA.

Moreover, CRC's own witnesses testified that CRC management discussed whether to obtain a collection agency license from the FID, and that Chase Bank's lawyers required CRC to tell others, including Nevada debtors, that CRC was a debt collector (which, as reflected above, CRC did both in writing and orally). (SS#12, 20-21, 30, 32, 56, 66.) This is evidence showing, both directly and indirectly, that CRC knowingly operated its business in Nevada during the relevant period, and was aware of—and ignored—the licensing requirement imposed on collection agencies by Nevada law.

There is thus, at a minimum, a genuine and material dispute of fact as to whether CRC knowingly conducted its collection agency business without the required state License. Summary judgment must be denied on the merits for that reason alone.

2. CRC Did Not Act as the Impartial, Neutral Trustee Required by Nevada Law, But Was the Servant of Its Creditor-Client, Chase; Accordingly, in Any Event, CRC Is Not "Protected" by NRS 107

a. Nevada Law Required CRC to Be Neutral and Impartial in Its Dealings with Deed of Trust Borrowers and Beneficiaries

As discussed in detail in Plaintiffs' prior briefing, including the supplemental briefing of March 28, 2017, and April 11, 2017, requested by the Court, Nevada law required—and requires today—foreclosure trustees such as CRC here to "act

impartially and in good faith with respect to the deed of trust" and the parties to it (*i.e.*, the beneficiary and the Nevada debtor), and "in accordance with the laws" of Nevada. NRS 107.028(1). It is also unlawful for a trustee under a deed of trust to be the "beneficiary under the deed of trust for purposes of exercising the power of sale pursuant to NRS 107.080" or to "[l]end its name or its corporate capacity to any person who is not qualified to be the trustee under a deed of trust" or to "[a]ct individually or in concert with any other person to circumvent the requirements" of Nevada law as to who may act as a trustee under a deed of trust. *Id.* at (2)-(3). Although this duty of impartiality and good faith is not a true fiduciary obligation, foreclosure trustees are effectively required to act akin to agents of both the beneficiary and the debtor-grantor of the deed of trust. NRS 107.028(6); *see also Klem v. Washington Mutual Bank* (Wash. 2013) 176 Wn.2d 771, 788-798, 295 P.3d 1179, 1187-1190 [holding that QLS violated its duty of impartiality as a non-judicial foreclosure trustee under Washington law by deferring to its lender-client on whether to postpone a foreclosure sale, thereby impermissibly becoming a "mere agent" of the beneficiary only]; *Yvanova v. New Century Mort. Corp.* (Cal. 2016) 62 Cal.4th 919, 927, 365 P.3d 845, 850 [Under California law, the "trustee of a deed of trust is not a true trustee with fiduciary obligations, but acts merely as an agent for the borrower-trustor and lender-beneficiary."].

As illustrated by *Klem*, it is in fact a violation of that duty for a foreclosure trustee to act in ways that effectively make it the agent only of the deed of trust beneficiary (such as a trustee abdicating its independence by deferring to the beneficiary on matters that entrusted to the trustee, or, even more clearly, acting on behalf of the beneficiary in ways that are necessarily adverse to the debtor-grantor of the deed of trust). The importance of such impartiality and independence under Nevada law is reflected by NRS 107.028(2)'s requirement that trustees under deeds of trust not be beneficiaries under those very same deeds of trust.

It is necessarily a violation of the duty of impartiality for the foreclosure trustee to act for the beneficiary alone under the deed of trust by seeking to collect on the claim (*i.e.*, debt) that is tied to the deed of trust on behalf of the beneficiary. As even Defendants have conceded in the past, the claim collection process is necessarily supposed to be separate from the foreclosure activities of a trustee, because it would be a violation of the duty of impartiality for trustees to act as collection agencies toward their debtor-trustors while simultaneously owing a duty of impartiality and good faith under the deed of trust. What has gotten trustees repeatedly in big trouble—whether here in Nevada, Washington, or California—at least in part is their practice of engaging in collection agency activities on behalf of deed of trust beneficiaries while also purporting to serve as foreclosure trustees for those very same deeds of trust. Their very lucrative combination business model violates the law. As the proof presented by Plaintiffs in support of their Motion for Partial Summary Judgment shows, MTC's collection agency activities in Nevada have included doggedly pursuing Nevada trustor-debtors to collect on claims and acting adversely to debtors—to whom MTC owes a duty of impartiality and good faith—by, among other things, seeking to evict them from their homes following foreclosure, negotiating loan forbearance and modification agreements with debtors on behalf of MTC's creditor-clients, and aggressively collecting payments from Nevada debtors on defaulted debts so that MTC can remit those funds to its creditor-clients. The proof presented in support of Plaintiffs' opposition to CRC's motion here demonstrates that CRC engaged in some, if perhaps not all, of the activities described above that show MTC's collection agency activity. Thus, not only are these activities not protected by NRS Chapter 107, but foreclosure trustees are in fact prohibited by engaging in such activities with respect to their deed of trust debtors.

Defendants now contend a "trustee" can perform any and all unlicensed collection agency actions, other than criminal misconduct, because such is "implied" from NRS 107. Plaintiffs contend there is almost ZERO chance the Nevada Supreme

Court would concur. Judge Scann disagreed with Defendants, as reflected in the transcript by her reliance on Paragraph 23 of the Second Amended Complaint.

Defendants' suggestion that non-judicial foreclosure trustees have additional, implied powers beyond those expressly given by NRS 107 is also irrelevant here, as Defendants fail to identify what specific implied powers, if any, they contend non-judicial trustees have that would be relevant to the Court's decision. Notably, the two implied powers described in the decisions from Michigan and Iowa that Defendants cite in their supplemental briefing—specifically, the power to bid the property at the sale and the power to purchase the property at the sale—are, as Defendants concede elsewhere in their brief, powers that the Nevada legislature has specifically barred non-judicial foreclosure trustees from having. *Compare Kriv v. Northwestern Sec. Co.* (1946) 237 Iowa 1189, 24 N.W. 2d 751 *and Union Guardian Trust Co. v. Building Sec. Corp.* (1937) 280 Mich. 717, 276 N.W. 697, *with* NRS 107.081(1).[7] Pursuant to NRS 107.081(1), the trustee or its agent holding the non-judicial foreclosure sale "must not become a purchaser at the sale or be interested in any purchase at such a sale." [emphasis added].

Defendants have finally been flushed out, and away from their 5 years of false denials in this case: that they did nothing but file a notice of default and/or notice of sale. Now they say they can collect money—about 3-4 million dollars!—and engage in all collection agency activities alleged in the Third Amended Complaint (and

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[7] *Kriv* does not assist Defendants here for a second reason: it deals with powers of trustees in judicial foreclosure proceedings, which in Nevada at least are governed by different procedures than those applicable to non-judicial foreclosures. *See generally* NRS Chapter 40. In *Kriv*, the Iowa Supreme Court noted that the "court may authorize the trustee upon foreclosure to bid in the property" at the judicial foreclosure sale. *Kriv*, *supra*, at 1196 [emphasis added]. It thus offers little guidance as to what implied powers non-judicial foreclosure trustees may have. (For instance, because judicial foreclosures are subject to court supervision, concerns about trustees bidding at sales may be significantly less than bids at non-judicial foreclosure sales, which are not subject to such supervision. This is likely one reason why the Nevada legislature has expressly barred non-judicial foreclosure trustees from bidding at sales they conduct. NRS 107.081(1). *Union Guardian Trust Co.* also deals with judicial foreclosure proceedings, and thus is of little guidance here. *Union Guardian Trust Co.*, *supra*. The language Defendants rely on, moreover, is found in a concurring opinion in the case. *Id.* at 703. [concurring opinion by J. Potter].

shown by the evidence gathered in discovery so far) because it is "IMPLIED" in NRS 107 that they may do so.

The word "implied" appears at least three times on page 10 of Defendants' supplemental brief. This is a critical admission by Defendants that aids the Court's analysis. Defendants have admitted that nothing in NRS 107 expressly allows them to perform all of the alleged collection operations without a license under NRS 649. Defendants thus also admit that neither NRS 107 nor NRS 649 expressly exempts them from the license requirement for the numerous and various acts alleged. Defendants also admit that they have no answer for the fact that NRS 649.020(2) does not name and exclude foreclosure "trustees" from the license requirement, as it does lawyers and banks.

Defendants' complaint in their supplemental briefing that Plaintiffs' Third Amended Complaint does not allege violations of NRS Chapter 107 is especially remarkable here, as Defendants themselves have put their compliance with NRS Chapter 107 squarely at issue. In contending that NRS Chapter 107 authorized their misconduct and that they did nothing beyond what is allowed or required by NRS Chapter 107, Defendants have necessarily put at issue whether they violated NRS Chapter 107 during the relevant period. As shown in Plaintiffs' prior briefing and herein, Plaintiffs' allegations and proof demonstrate that Defendants, including CRC, violated their duties under NRS Chapter 107 in a number of ways, such that their reliance on it to insulate them from liability is misplaced.

b. CRC Acted as the Instrument or Alter Ego of Chase, CRC's Owner and Principal Creditor-Client, in Violation of CRC's Duty of Impartiality and Neutrality

The proof presented herewith in support of Plaintiffs' opposition to CRC's motion shows that CRC violated its duty of impartiality and neutrality under Nevada law because CRC during the relevant period was and acted as the instrument or alter ego of Chase Bank, CRC's owner and principal creditor-client. The control,

ownership, and direction of CRC by Chase Bank is evidenced in multiple ways here, as shown by Plaintiffs' powerful proof. For instance, CRC's own former president, Ms. Brignac, testified that she reported to Chase Bank on behalf of CRC regarding CRC's operations, including in Nevada, and that CRC was and is owned by Chase Bank. (SS#2, 16.) Chase Bank was CRC's primary client during the relevant period. (SS#7, 38, 50.) CRC was aware of the Nevada collection agency license requirement because there were discussions with Chase Bank lawyers about CRC obtaining that license. (SS#12.) CRC's reinstatement and payoff activities in Nevada were part of CRC's service to Chase Bank, in the course of which CRC would solicit and collect payments from Nevada borrowers to reinstate or pay off their defaulted debts, and remit those payments to CRC's creditor-clients (primarily, Chase Bank). (*See, e.g.*, SS#7, 8, 10, 11, 13, 14, 18, 22, 49.) The lawyers used by CRC were the Chase Bank lawyers—specifically, Chase Bank's in-house lawyers. (SS#19.) These lawyers required CRC, as a policy and practice, to inform borrowers in default that in fact CRC was a debt collector, which CRC did, both in writing and orally. (SS#20-21, 32.) These lawyers also prepared and provided CRC with templates and forms for CRC to use in as part of its collection agency activities in Nevada. (SS#31.) When CRC received telephone calls from debtors in default regarding obtaining a modification or some kind of forbearance for the defaulted loan, CRC's practice was to refer those calls on to Chase Bank. (SS#46.) CRC's own contracts from the relevant period with Chase Bank show that Chase Bank controlled CRC's practices, policies, and procedures as a business in detailed and far-reaching ways: CRC, for instance, contracted to promptly return all telephone calls and answer correspondence, to produce reinstatement and payoff quotes, to promptly send Chase Bank all reinstatement and payoff amounts and foreclosure sale proceeds received by CRC on Chase Bank's behalf, and that CRC would obtain Chase Bank's prior written approval before postponing a foreclosure sale (a manifest abdication of CRC's duty to act in good faith and impartially as trustee). (SS#60-61.) So far reaching was

Chase Bank's control of CRC's daily business operations that the paychecks for CRC employees came from Chase Bank (rather than CRC)! (SS#31.)

Thus, not only did CRC violate the duty of impartiality and good faith reflected in NRS 107.028(6), but Plaintiffs' proof also shows that CRC violated Nevada law by effectively allowing Chase Bank to serve as the trustee of deeds of trust to which Chase Bank was also the beneficiary! *See* NRS 107.028(2)-(3). CRC also assisted Chase Bank in circumventing the licensing requirements of NRS 107.028(1) by effectively lending Chase Bank CRC's name and corporate capacity so that Chase Bank effectively could serve as trustee in this way. By seeking to insulate itself from liability for its unlawful collection agency activities in Nevada by claiming adherence to NRS Chapter 107 and its purported "protections", CRC has put its compliance—and manifest lack thereof—with NRS Chapter 107 squarely at issue here.

III. CONCLUSION

For the reasons stated above, Defendant CRC's Motion for Summary Judgment should be denied in its entirety on the merits. Alternatively, pursuant to NRCP 56(f), the Court should deny CRC's motion and allow a full range of discovery from CRC to proceed forward, including, without limitation, the discovery necessary to defeat summary judgment after the discovery needed to properly adjudicate Plaintiffs' motions for class certification as to each Defendant.

DATED: April 21, 2017

LAW OFFICE OF NICHOLAS A. BOYLAN, APC

By: /s/ Nicholas A. Boylan
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DISTRICT COURT

CLARK COUNTY, NEVADA

JEFFREY BENKO, a Nevada resident; CAMILO MARTINEZ, a California resident; ANA MARTINEZ, a California 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	CASE NO: A-11-649857-C Dept. 19 **PLAINTIFFS' OBJECTIONS AND MOTION TO STRIKE ALL OR PORTIONS TO THE TESTIMONY/EVIDENCE OF DEBORAH BRIGNAC AND COLLEEN IRBY, SUBMITTED BY CRC IN SUPPORT OF ITS SUMMARY JUDGMENT MOTION** Date: May 9, 2017 Time: 9:00 a.m.

Plaintiffs,

v.

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.

I. INTRODUCTION

Prior to CRC ending its business, Deborah Brignac worked for CRC/Chase for over 20 years and currently works for the owner of co-defendant QLS, which is the attorneys McCarthy/Holthus. While with CRC, Brignac has testified and/or been personally sued hundreds of times and is the long-time professional witness utilized by CRC/Chase in cases of this kind. Her deposition, the videotape of which was provided to the Discovery Commissioner, shows a highly evasive and deceitful witness who has been trained to articulate Defendants contentions for two decades.

Remarkably, as its primary basis for seeking summary judgment, CRC relies upon the legal contentions, legal opinions and non-factual conclusions articulated by Ms. Brignac in her testimony on behalf of CRC/Chase. For example, and more specifically, CRC expressly relies on Ms. Brignac's legal contention and/or legal conclusion that CRC was not engaged in debt collection. For the reasons expressed

above and below, Plaintiffs object to the entirety of the deposition testimony of Deborah Brignac (and Ms. Irby, also of CRC history) that is submitted by CRC in support of its summary judgment motion. More specific objections to particular Brignac evidence relied upon by CRC are as follows:

A) For example, on grounds of improper legal conclusion, improper legal contention, improper legal argument, improper opinion and lacking foundation and improper conclusion lacking foundation, Plaintiffs object to each item in CRC's "Statement of Undisputed Facts," Nos. 32-38, as to each submission of Ms. Brignac's deposition testimony in support. For example, and without limitation, with respect to CRC's item No. 38, Ms. Brignac contends "We weren't collecting debts. We were foreclosing on mortgage loans."

B) For example, on grounds of improper legal conclusion, improper legal contention, improper legal argument, improper opinion and lacking foundation and improper conclusion lacking foundation, Plaintiffs object to the item in CRC's "Statement of Undisputed Facts," No. 39; CRC relies on the legal contention and legal conclusion testified by Ms. Irby that, "We are a foreclosure trustee and not a collection agent."

C) Plaintiffs' further object to the testimony of Ms. Brignac submitted by CRC in support of its Statement of Undisputed Fact No. 32, on grounds that the CRC assertion is without foundation, constitutes a mischaracterization of the testimony, is misleading by omission with respect to the testimony and states an improper legal or lay conclusion and opinion. First, the deposition questions and answers cited by CRC do not relate to Plaintiff Kallen's loan, as contended by CRC in item No. 32. Second, with proper inferences from the testimony in favor of the Plaintiff, as a non-moving party, the full

testimony on point, which carries forward at least through p.71, effectively shows an admission by Brignac that the CRC services were to collect money to pay down the defaulted loans.

Respectfully submitted,

Dated: April 21, 2017

LAW OFFICE OF NICHOLAS A. BOYLAN
A Professional Corporation

By: /s/ Nicholas A. Boylan
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CASE NO: A-11-649857-C

Dept. 19

PLAINTIFFS' SEPARATE STATEMENT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Jury Trial Demanded

Hearing Date: May 9, 2017

Hearing Time: 9:00 a.m.

Plaintiffs,

v.

QUALITY LOAN SERVICE CORPORATION, a California Corporation; CRC 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.

Plaintiff Susan Kallen (collectively "Plaintiff" here) respectfully submits the following Separate Statement in Support of her Opposition to Defendant CRC's (or "Defendant") Summary Judgment Motion.

No.	Moving Party's Undisputed Material Facts	Supporting Evidence
1.	During the relevant period, Deborah Brignac was the President and/or Vice President of CRC; Brignac now works for the owners of Defendant QLS, McCarthy & Holthus.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 9, 35. **Exhibit "P"** (Ex. 19 to Brignac's deposition taken on September 9, 2016) (her LinkedIn page); authenticated by **Exhibit "K"** at pp. 304-305.
2.	Subject to reporting to Chase, specifically Chase employee Kevin	**Exhibit "K"** (Deborah Brignac's Deposition),

	Hickey, Deborah Brignac was responsible for the operations of CRC, which was and is owned by Chase Bank.	at pp. 32-35.
3.	Brignac was employed at CRC from 1992 to 2013. All 125 CRC's employees reported to Brignac, including through her managers, Irby and Chiu.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 41-45.
4.	CRC was performing its services in Nevada at least through 2011.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 55-57.
5.	Near the end, CRC had at least 4 people working in its payoff and reinstatement unit, with respect to the defaulted loans; CRC would work with Chase and the borrowers with respect to reinstatement of the defaulted loans; this was a service CRC conducted.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 59, 66-68.
6.	Of the monies received/collected, CRC maintained over $4 million dollars in its trust account, for which Brignac had responsibility. She was a signatory to the trust accounts, at Union Bank and/or Wells Fargo Bank.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 76-79. **Exhibit "P".**
7.	Chase Bank was CRC's primary client.	**Exhibit "K"** (Deborah Brignac's Deposition), at p. 82.
8.	With respect to the defaulted loans, the reinstatement and payoff business was a service CRC provided to Chase.	**Exhibit "K"** (Deborah Brignac's Deposition), at p. 84.
9.	Request for reinstatement and/or payoff of the defaulted loans came in from borrowers and/or from Chase itself.	**Exhibit "K"** (Deborah Brignac's Deposition), at p. 87.
10.	With respect to reinstatement and/or payoff of the defaulted loans, CRC received requests for information from various parties other than the borrower as well, and payoff quotes had to be requested in writing to CRC.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 92, 95.

11.	As admitted by the President of CRC, Brignac, the purpose of CRC's foreclosure services is to obtain money or property to pay the defaulted debt in full or in part.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 98-101.
12.	CRC was aware of the Nevada collection agency license requirement because there were discussions with Chase lawyers about CRC obtaining that license.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 106-107
13.	All funds received from borrowers by CRC would then be forwarded by CRC to the lender.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 118-121.
14.	All checks received from borrowers in default by CRC that were made payable to CRC would be endorsed by CRC and overnighted to the lender –client. CRC had a stamp to endorse the checks for that purpose.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 122-124.
15.	CRC's trust account ledger kept track of the funds from sales, and all funds from sales collected by CRC would go into its trust account and CRC would then issue checks to the lender-client. Typically, CRC received cashier checks made payable to CRC.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 127-128.
16.	The majority of CRC's communications with borrowers in default was by telephone communications. CRC was a subsidiary of Chase Bank.	**Exhibit "K"** (Deborah Brignac's Deposition), at p. 156.
17.	All of the various operational units of CRC received training regarding telephone communications with borrowers in default.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 111-113.
18.	The business of CRC was to perform "default services" for the lender-client.	**Exhibit "K"** (Deborah Brignac's Deposition), at p. 157.
19.	The lawyers utilized by CRC were the	**Exhibit "K"** (Deborah

	Chase lawyers, specifically the in-house Chase lawyers.	Brignac's Deposition), at pp. 158–159.
20.	As required by the Chase lawyers, the CRC policy and practice was to inform borrowers in default that in fact CRC was a debt collector.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 163–165.
21.	CRC's practice, according to Brignac, was to not make false statements to borrowers, and she says it never happened during her tenure at CRC. In writing as shown by **Exhibit "R"**, and admitted by Brignac: CRC stated to the borrowers in default that in fact CRC was a debt collector. Brignac at least indirectly admits this was a true statement.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 160-161, 163-165, 172-176. **Exhibit "R"** (Ex. 5 to Brignac's deposition taken on September 9, 2016) (letter to the Moores dated November 1, 2011); authenticated by **Exhibit "I"** at pp. 172-173.
22.	With respect to the defaulted debts, the lender was hired by CRC to perform services which included giving the borrowers specific payment instructions. In fact, CRC did give such payment instructions to borrowers.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 181–182.
23.	CRC provided the borrower in default the breakdown of fees and costs necessary to pay off the loan, including the costs and fees related to the work of CRC, which was added to the payoff or reinstatement amount applicable to the defaulted loan by CRC.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 191–193. **Exhibit "R"**.
24.	CRC, in its communications with the borrower, invited the borrower specifically to contact CRC (not the lender) to discuss payoff and reinstatement of the defaulted debt; it was in fact the CRC policy to invite the	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 193–194, 196-197.

	defaulted borrowers to contact CRC regarding collection of a loan by reinstatement and/or payoff of the defaulted debt.	
25.	In fact, it was the policy of CRC to instruct the borrowers to send to CRC the money necessary to payoff and/or reinstate the defaulted Nevada debts.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 198–199.
26.	Another debt collection related service provided by CRC to the lender, was to pay in advance the fees on behalf of the lender, as its agent, with respect to the lender's participation in the Nevada mediation program.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 215– 216.
27.	For all of the monies collected by CRC for reinstatement and/or payoff of the defaulted debts, pursuant to its contract with Chase, CRC was bound by various obligations for those services, one of which was to forward all money collected by CRC to Chase within 24 hours, and CRC did so as a general practice.	**Exhibit "K"** (Deborah Brignac's Deposition), at pp. 244–245. **Exhibit "T"** (Ex. 8 to Brignac's deposition taken on September 9, 2016); authenticated by **Exhibit "K"** at pp. 244-246.
28.	CRC has admitted that CRC received no less than $3,501,103.22 in fees and costs in Nevada between October 1, 2007 and December 31, 2012, from its creditor-client (and owner) JPMorgan Chase Bank, N.A.	**Exhibit "A"** (CRC's Second Supplemental Response to Plaintiffs' Interrogatory No. 18); authenticated by Boylan Declaration, at ¶ 2.
29.	CRC made collection phone calls to Plaintiff Kallen.	**Exhibit "J"** (Susan Kallen's Deposition), at pp. 28-29, 34-35, 39-41, 43, 58.
30.	Elena Martinez, an operational supervisor at CRC, testified that it was her signature on page 2 of Exhibit 1 to her deposition. She signed the document personally. The admission on the	**Exhibit "M"** (Elena Martinez's Deposition), at pp. 18-20.

	document that CRC is a debt collector was on the document when she signed it, and she believed it to be true at the time she signed it. She had been with CRC by then for approximately a year.	
31.	Ms. Martinez interacted with lawyers for Chase Bank during her time at CRC, and considers them CRC's legal team. These lawyers would help draft templates for CRC to use in its business activities, including in Nevada. Ms. Martinez considered both CRC and Chase to be her employers, as her paychecks came from Chase during all the years she was at CRC	**Exhibit "M"** (Elena Martinez's Deposition), at pp. 20-21.
32.	From 2009 to 2013, CRC employees all were required to have a recording as part of their voice mail message that admitted that CRC was a debt collector (or words to that effect). CRC employees were required to state in their recordings the following: their names, telephone number, department, and a clause about CRC being a debt collector. The language of the required recording was similar to the language found on Exhibit 1 to Ms. Martinez's deposition (admitting that CRC was a debt collector). Chase's legal team provided CRC with instructions, including as to the requirements for these recorded admissions.	**Exhibit "M"** (Elena Martinez's Deposition), at pp. 26-28.
33.	Most calls between borrowers and CRC were handled by CRC's payoff and reinstatement team.	**Exhibit "M"** (Elena Martinez's Deposition), at p. 29.
34.	CRC's payoff and reinstatement team handled a whole range of activities involved in the reinstatement and payoff	**Exhibit "M"** (Elena Martinez's Deposition), at pp. 34-35.

of defaulted loans. These activities included the team finding relevant information, communicating with creditor-client bank or banks to obtain the current information, including amounts necessary to reinstate or payoff the defaulted loans. CRC's team would then validate that information before providing it to the borrowers who were debtors in default. CRC's team would communicate with borrowers to clarify or provide more information regarding reinstatement and payoff of defaulted loans. CRC's team would gather money, including checks, that comes into CRC to reinstate or payoff a defaulted loan. Checks generally would go through a CRC clerk before being transmitted to someone on CRC's reinstatement and payoff team. The checks would be matched up to the defaulted debts and borrower's number. If made payable to CRC, the checks would be endorsed and sent to CRC's creditor-clients (e.g., Chase). If made payable to the creditor-clients directly, the checks would be passed on by CRC to the relevant creditor-client. If other problems arose, CRC's team would engage in additional communications, including regarding additional monies. On some occasions, the checks and the money received would be for reinstatement. On other occasions, they would be for payoff. At times the money received would be less than the amount required to reinstate or payoff the defaulted debt, so CRC's team would engage in further

	communication with defaulted borrowers to get the correct amount from them to reinstate or payoff the defaulted loans.	
35.	Ms. Martinez, who was working at CRC around the date of Exhibit 3 to the Martinez Deposition (CRC's Nov. 1, 2011 letter to the Moores), understands the document to be a statement of the amount the borrowers owed and the amount that would remove them from foreclosure or pay off the defaulted loan. The document is a payoff statement. If borrowers such as the Moores responded to such letters by making a payoff, they would be removed by CRC from the foreclosure process.	**Exhibit "M"** (Elena Martinez's Deposition), at pp. 49-50.
36.	The amounts listed by CRC on its payoff or reinstatement letters—including anticipated foreclosure costs or attorney or trustee fees—would have to be paid by borrowers to reintstate or payoff their defaulted loans. These amounts would include the trustee's fees charged by CRC. If a borrower paid more (e.g., in fees or costs) than were actually incurred or charged by CRC, then the borrower would be refunded that amount by CRC or its creditor-client.	**Exhibit "M"** (Elena Martinez's Deposition), at pp. 83-85.
37.	The purpose of the communication reflected in the template seen in Exhibit 5 to the Martinez Deposition is to have the borrower pay the amount overdue and in default on the loan, plus related expenses in order to pay off or reinstate the loan.	**Exhibit "M"** (Elena Martinez's Deposition), at pp. 86-89.
38.	All contracts from servicers (such as CRC's contract with Chase) were in	**Exhibit "M"** (Elena Martinez's Deposition),

	CRC's manual detailing servicer guidelines and the procedures the servicers wished CRC to follow in handling their files. Between 2009 and 2013, the majority of the defaulted loans handled by CRC were serviced by Chase, so CRC's contracts during that period were with Chase.	at pp. 93-94.
39.	CRC had two teams to handle processing sales and collecting proceeds from sales: a sales team and an "after-sales" team. The sales team would review the file on the sale date, and either proceed with the sale if able to, or not proceed (including placing the sale on hold if CRC received instructions from the lender or another party). The after-sales would handle the results of the sales including the proceeds CRC received from a sale.	**Exhibit "M"** (Elena Martinez's Deposition), at pp. 115-116.
40.	Colleen Irby, Operations Manager for CRC, was in charge of CRC's referrals team. This team received foreclosure referrals, reviewed trustee sale guarantees, and handled title issues on foreclosure properties. Receiving referrals means to open a foreclosure file, record the notice of default. Her team also sent out the notices for the foreclosure for the first phase of the foreclosure. She probably had as many as 30 employees on her team at its height.	**Exhibit "L"** (Colleen Irby's Deposition), at pp. 12-13.
41.	Every employee on Ms. Irby's referrals team had permission to speak by telephone with debtors. If borrowers called the office, everyone in the CRC office was able to take the call and get the information from borrowers that they	**Exhibit "L"** (Colleen Irby's Deposition), at p. 13.

	needed to have answered, her team would respond and provide information to debtors (if her team had responsive information) by telephone.	
42.	Mr. Domingo Santos oversaw the accounting group for CRC, including its bank accounts. He was working at CRC at least as early as 1999. He likely left CRC in approximately 2011.	**Exhibit "L"** (Colleen Irby's Deposition), at pp. 14-15.
43.	Money received by CRC for reinstatement or payoff of defaulted loans went to what was called by some CRC employees the "support team." The team was called by other employees the reinstatement and payoff team. The team reported to Huey Chiu during the last part of Ms. Irby's time at CRC.	**Exhibit "L"** (Colleen Irby's Deposition), at p. 15.
44.	CRC's reinstatement and payoff (or "support") team had approximately 5 or 6 employees on it in approximately 2013.	**Exhibit "L"** (Colleen Irby's Deposition), at pp. 16-17.
45.	Ms. Irby's role as Operations Manager at CRC included being in charge of procedures and training but she did not provide employees with training regarding telephone communications with debtors.	**Exhibit "L"** (Colleen Irby's Deposition), at p. 20.
46.	CRC's referrals team had few calls with debtors because the team was responsible for the early stages of the foreclosure process. Most calls with debtors occurred later in the foreclosure process when the sale was scheduled. Many of the calls that the referrals team would get would be from homeowners who received a notice of default and wanted to know who to contact at Chase (or other creditor-client) in order to get a	**Exhibit "L"** (Colleen Irby's Deposition), at pp. 20-22.

	modification or some kind of forbearance for the loan. CRC's referral team would usually pass such calls on to its creditor-client (Chase). CRC employees would give debtors the contact information for CRC's creditor-client's homeowner's assistance or modification teams (when debtors called seeking modification or forbearance).	
47.	Calls from debtors regarding reinstatement or payoff of defaulted debts usually would go to CRC's team that handled payoffs and reinstatements. If someone on the referral team got such a call, however, the call would be transferred to the support team (i.e., the team that handled reinstatements and payoffs).	**Exhibit "L"** (Colleen Irby's Deposition), at pp. 23-24.
48.	Ms. Irby, who now works for another company in the same industry as CRC, defines her work as performing "nonjudicial foreclosures for our clients in order for them to either -- for them to either sell the property to pay the debt or for them to get a response from the borrower to pay the debt." Her work involves helping her company's clients to "process the foreclosure in order to either sell the property to pay the debt or they [i.e., her company's clients] get paid by the borrower."	**Exhibit "L"** (Colleen Irby's Deposition), at pp. 39-40.
49.	According to CRC's Operations Manager, CRC passing money received from debtors to pay off or reinstate a defaulted loan to CRC's client, JPMorgan Chase, was "part of a service to our client to send that money to them	**Exhibit "L"** (Colleen Irby's Deposition), at p. 41.

D. Plaintiff's Claims Do Not Fail as a Matter of Law	17
1. Pursuant to NRS 41.600, Plaintiff Kallen Is Entitled to An Award for Damages, Equitable Relief, and an Award of Reasonable Attorney's Fees and Costs	17
a. Damages	17
b. Equitable Relief Is Also Available Here	20
c. Reasonable Attorney's Fees and Costs	23
2. CRC Was Unjustly Enriched, and Disgorgement of Its Ill-Gotten Gains Is Appropriate Here	23
a. Plaintiff Kallen Did Not Enter Into A Contract With CRC	23
b. The Deed of Trust is Irrelevant And Void As Authority To Commit Illegal Acts, So Unjust Enrichment Applies	27
E. CRC Was Required to Hold a Collection Agency License from the FID during the Relevant Period, Which CRC Failed to Do	28
F. The *Quality Loan Service* Order Is Neither Controlling Nor Persuasive Authority Here	33
G. CRC's Business Activities in the State of Nevada during the Relevant Period Determine the Adjudication of Plaintiffs' Motion	33
1. Whether CRC's Conduct Was Knowing Is a Material Factual Dispute	35
a. CRC Misinterprets the Language and Requirements of NRS 598.0923(1)	35
b. Plaintiffs Have Demonstrated that CRC Knowingly Conducted Business without Required State License	38
1.CRC Cannot Defeat Summary Judgment through Self-Serving Testimony on Subjective Element	38
2.The Evidence, including CRC's Admissions, Shows CRC Knew It Was a Debt Collector	39
2. CRC Did Not Act as the Impartial, Neutral Trustee Required by Nevada Law, But Was the Servant of Its Creditor-Client, Chase; Accordingly, in Any Event, CRC Is Not	41

"Protected" by NRS 107 **a. Nevada Law Required CRC to Be Neutral and Impartial in Its Dealings with Deed of Trust Borrowers and Beneficiaries** **b. CRC Acted as the Instrument or Alter Ego of Chase, CRC's Owner and Principal Creditor-Client, in Violation of CRC's Duty of Impartiality and Neutrality**	41 45
II. CONCLUSION	47

CASES	PAGES
Alaska Trustee, LLC v. Ambridge (Alas. 2016) 372 P.3d 207	17
Aldabe v. Adams (1965) 81 Nev. 280, 402 P.2d 34	38, 39
American Master Lease LLC v. Idanta Partners, LLC (2014) 225 Cal.App. 4th 1451	21,22
Ameritrade, Inc. v. First Interstate Bank (1989) 105 Nev. 696, 782 P.2d 1318	16
Aronoff v. Levine (1919) 190 A.D. 172	24
Aviation Ventures, Inc. v. Joan Morris, Inc. (2005) 121 Nev. 113, 110 P.3d 59	14, 15
Barket v. Hart (2013) 2013 Nev. Unpub. LEXIS 1879	16
Bernard v. Rockhill Dev. Co. (1987) 103 Nev. 132, 734 P.2d 1238	31
Betsinger v. D.R. Horton, Inc. (2010), 232 P.3d 433	37
Bumgardner v. Corey (1942) 124 W. Va. 373	24
Chandler v. Sanger (1874) 114 Mass. 364	24
Cleveland v. Policy Mgmt. Sys. Corp. (1999) 526 U.S. 795	39
Crippen v. Stites 346 B.R. 115 (E.D. Bkr. Pa. July 25, 2006)	41

DuBois v. Ass'n of Apartment Owners of 2987 Kalakaua (9th Cir. 2006) 453 F.3d 1175	38
Dunlap v. Jimmy GMC of Tucson, Inc. (Ariz. Ct. App. 1983) 136 Ariz. 338, 666 P.2d 83	38
Estes v. Love, Beal & Nixon, P.C. 2015 U.S. Dist. LEXIS 96715 (N.D. Okl. July 24, 2015)	41
Fairbanks v. Snow (1887) 145 Mass. 153	24
Gburek v. Litton Loan Servicing LP (7th Cir. 2010) 614 F.3d 380	40
Guy Tel. & Tel. Co. v. Melbourne Int'l (11th Cir. 2003) 329 F. 3d 1241	21, 25
Hansberry v. Lee (1940) 31 U.S. 32	7
Hart v. FCI Lender Servs. (2d Cir. 2015) 797 F.3d 219	40
Harrison v. Falcon Prods. (1987) 103 Nev. 558, 746 P.2d 642	16, 17
Klem v. Washington Mutual Bank (Wash. 2013) 176 Wn.2d 771, 295 P.3d 1179	42, 43
Kossian v. American Nat. Ins. Co. (1967) 254 Cal.2d 647	25
Kriv v. Northwestern Sec. Co. (1946) 237 Iowa 1189, 24 N.W. 2d 751	44, 45
Leasepartners Corp. v. The Robert L. Brooks Trust (1997) 113 Nev. 747, 942 P.2d 182	23, 24
Leeper v. Beltrami (1959) 53 Cal.2d 195	24
Loomis v. Lange Fin. Corp (1993) 109 Nev. 1121, 865 P.2d 1161	28
Luciano v. St. Mary's Preferred Health Ins. Co. (2016) 2016 Nev. Unpub. LEXIS 183, at *6-7	39
Magill v. Lewis (1958) 74 Nev. 381, 333 P.2d 717	27, 28
McLaughlin v. Phelan Hallinan & Schmieg, LLP (3d Cir. 2014) 756 F.3d 240	30, 40
McRae v. Pope (1942) 311 Mass. 500	24
Mendocino Envtl. Ctr v. Mendocino	31

(9th Cir. 1999) 192 F.3d 1283	
Millspaugh v. Millspaugh (1980) 96 Nev. 446, 611 P.2d 201	31
Montag v. Venetian Casino Resort, LLC (2015) 2015 Nev. Unpub. LEXIS 647	16
Monzo v. Eighth Judicial Dist. Court of Nev. (2014) 331 P.3d 881	21
Namow Corp. v. Egger (1983) 99 Nev. 590, 668 P.2d 265	21
Nutton v. Sunset Station, Inc. (Ct. App. 2015) 131 Nev. Adv. Op. 34, 357 P.3d 966	39
Pape' v. Knoll (1984) 69 Ore. App. 372	24
Phillips Petroleum Co. v. Shutts (1985) 472 U.S. 797	7
Picus v. Wal-Mart Stores Inc. (D. Nev. 2009) 256 F.R.D. 651	21
Richards v. Jefferson County Alabama (1996) 517 U.S. 793	7
Sanguinetti v. Strecker (1978) 94 Nev. 200, 577 P.2d 404	21
Sawyer v. Sugarless Shops (1990) 106 Nev. 265, 792 P.2d 14	39
Schoener v. Waltman (1954) 125 Cal.App.2d 182, 270 P.2d 543	39
Short v. Hotel Riviera, Inc. (1963) 79 Nev. 94, 374 P.2d 979	38
Siragusa v. Brown (1998) 114 Nev. 1384, 971 P.2d 801	38
Sobel v. Hertz Corp. (D. Nev. 2010) 698 F.Supp.2d 1218	37
Tocco v. Real Time Resolutions, Inc. (S.D. N.Y. Aug 13, 2014), 48 F. Supp. 3d 535	41
Unionamerica Mortgage & Equity Trust v. McDonald (1981) 97 Nev. 210, 626 P.2d 1272	26
Union Guardian Trust Co. v. Building Sec. Corp. (1937) 280 Mich. 717, 276 N.W. 697	44, 45
Valenzuela v. Nev. Dep't of Corr. (2012) 2012 Nev. Unpub. LEXIS 1568	16

Vincent v. Santa Cruz (1982) 98 Nev. 338, 647 P. 2d 379	28
Wake Development Co. v. O'Leary (1931) 118 Cal.App. 131	24
Webb v. Clark County School Dist. (2009) 125 Nev. 611, 218 P. 3d 1239	28
Wheeler Springs Plaza, LLC v. Beemon (2003) 119 Nev. 260, 71 P.3d 1258	21
Yeager v. Ocwen Loan Servicing, LLC. 2015 U.S. Dist. LEXIS 94149	40
Yvanova v. New Century Mort. Corp. (Cal. 2016) 62 Cal.4th 919, 365 P.3d 845	42, 43

I. INTRODUCTION

Incredibly, notwithstanding erroneous orders greatly restricting, phasing, and denying Plaintiffs critical discovery, and notwithstanding pervasive discovery obstruction by all of the Defendants for over a year, as shown by Plaintiffs' Separate Statement submitted herewith, Plaintiffs have assembled sufficient evidence to compel denial of CRC's motion on the merits. However, if the Court were to think otherwise, it is absolutely true that CRC's motion must nevertheless be denied under NRCP 56(f) because Plaintiffs have been wholly denied and/or obstructed from obtaining voluminous and critical discovery from CRC, as described below.

Plaintiffs respectfully request that the Court review Plaintiffs' evidence in detail, review the applicable law, and quickly and easily deny CRC's motion on the merits. Alternatively, pursuant to NRCP 56(f), the Court should deny CRC's motion and allow a full range of discovery from CRC to proceed forward, including, without limitation, the discovery necessary to defeat summary judgment after the discovery needed to properly adjudicate Plaintiffs' motions for class certification as to each Defendant.

The Court should begin its review by reading Plaintiffs' Separate Statement, submitted herewith, and the evidence referenced therein.

II. ARGUMENT

A. The Existing Evidence, with All Inferences Favorable to Plaintiffs, Demonstrates CRC's Liability, the Probable Fruits of Additional Discovery, and the Requirement that CRC's Motion Must Be Denied Based on the Existing Evidence, Now

The testimony of Plaintiff Kallen indicates she received disturbing collection calls from CRC. (SS#29.) CRC admits that it was paid millions of dollars in (illicit) fees/profits, and costs, for the operation of its unlicensed business against Nevada homeowners. (SS#28.) At all relevant times, CRC had at least 4-6 people working 8 hours per day in order to collect on defaulted loans by obtaining payoff and/or

reimbursement checks from the borrowers with respect to the defaulted loans. (SS#5, 44.) This was one of the services CRC provided to its lender-client. (SS#5, 8, 10-11, 13, 22-25, 27, 34-37, 43-44, 49-50, 55-58, 60-62, 66.) Accordingly, CRC routinely collected, processed and/or maintained over $4 million dollars in its trust account. (SS#6.) CRC received requests to collect and reinstate and/or payoff the defaulted loans from both borrowers and JPMorgan Chase Bank, N.A. ("Chase Bank"). (SS#9-10.) CRC would also receive such requests from other parties as well. (*Id.*)

As admitted by the former president of CRC, who reported to Chase Bank, Ms. Brignac, the purpose of CRC's foreclosure services was to obtain money or property to pay the defaulted debt in full or in part. (SS#11, *see also* SS#37, 48-49.) The evidence also shows that CRC was aware of the Nevada collection agency license requirement under the law, because CRC discussed obtaining that license with Chase Bank lawyers. (SS#12.) Furthermore, as required by the Chase Bank lawyers, it was CRC's policy and practice to admit and specifically inform the borrowers in default that in fact CRC was a debt collector. (SS#20, 21, 30, 32, 56, 66.) All checks collected by CRC for loan payments received from borrowers in default by CRC that were made payable to CRC would be endorsed by CRC and overnighted to its lender-client. (SS#14, 34, 61.) CRC even had a stamp to endorse the checks for that purpose. (SS#14.) CRC's trust account ledger kept track of all the funds from properly sales as well, and all monies collected form sales by CRC would go into its trust account and then CRC would issues checks to its lender/client. (SS#15.) Typically, CRC received cashier's checks made payable to CRC. (*Id.*) This is collection! NRS 649.020(1).

There is also no doubt that CRC had extensive telephone communications with borrowers in default. (SS#16-17, 29, 41, 61.) In fact, the majority of CRC's communications with borrowers in default was by telephone, and all personnel in the various operations units of CRC received training regarding telephone communications with borrowers in default. (*Id.*) Among the services related to defaulted debts performed for the lender by CRC was the act of giving borrowers

specific payment instructions for the debt collection. (SS#22.) In fact, CRC did give those payment instructions to the borrowers. (*Id.*) It was the policy of CRC to instruct the borrowers to send the money to CRC (not the lender) in order to payoff and/or reinstate the defaulted Nevada debts. (SS#25.) CRC also provided to the borrowers in default a break-down of fees and costs necessary to pay off the loan, including the fees and costs associated with the fees, charges and work performed by CRC for the lender. (SS#23, 36, 54.) These amounts were added to the amount of the debt for which collection was sought, such as to payoff amount and/or reinstatement amount for the loan. (*Id.*) In communication with the borrowers in default, CRC would specifically invite the borrower to contact CRC, not the lender, to discuss collecting the debt by means of payoff and/or reinstatement of the defaulted debt. (SS#24.) In fact it was CRC's policy and practice to invite the borrowers in default to contact CRC regarding collection of the loan by reinstatement and/or payoff of the defaulted debt. (*Id.*)

With respect to all monies collected from borrowers and others by CRC with respect to the defaulted debts, including reinstatement and/or payoff of the loans, pursuant to its contract with Chase Bank, CRC was bound by various obligations to Chase Bank with respect to its services, and one of those was to forward all money collected by CRC to Chase Bank within 24 hours of receipt; CRC did so as a general practice. (SS#27.) Among debt collection-related services provided by CRC to the lender, CRC would itself pay in advance the fees owed by and on behalf of the lender, as the lender's agent, with respect to the lender's participation in the Nevada Mediation Program. (SS#26.) CRC was and is owned and controlled by Chase Bank. (SS#2, 16, 28.) CRC workers even received their paychecks from Chase Bank. (SS#31.) Chase Bank was CRC's primary client. (SS#7, 38, 50.) CRC's operations manager, Ms. Colleen Irby, also admitted that CRC passed the money it collected from debtors for reinstatement and/or payoff of the defaulted loan to CRC's client, Chase Bank, as part of the service to the client which was to send that money to them

for them to collect the debt. (SS#49.)

From 2009 to 2013, all CRC employees were required to have a recording in place as part of their voice message that specifically admitted CRC was a debt collector (or words to that effect). (SS#32.) Chase Bank's legal team provided CRC with the instruction, including the specific requirements and content for these recorded debt-collector admissions to borrowers with whom CRC communicated regarding the defaulted loans. (*Id.*)

Under these circumstances, summary judgment must be denied on the merits, or, alternatively, NRCP 56(f) must be honored by granting Plaintiffs additional time to conduct the discovery, including as described in the supporting declaration of Plaintiffs' counsel. Boylan Declaration, at ¶¶ 2-16.

B. CRC's Motion for Summary Judgment Is Premature and Untimely

1. CRC's Motion Is Defective and Cannot Be Granted Because, Pursuant to the Discovery Commissioner's Recommendations, the Court Has Severely Limited Plaintiffs' Discovery to the Phase One "Issue"—Whether, as a General Matter, Defendants Conducted Business Activities in Nevada that Constituted "Unlicensed" Claim Collection, under NRS 649.020(1), and the Court, and the Court Restricted Discovery to the Named Plaintiffs Only

Unfortunately for the Plaintiffs, but important to CRC's instant motion for summary judgment, is the fact that this case has been upside down and backwards from the very beginning. As addressed in Plaintiffs' Clarification Motion, currently set to be heard on May 4, 2017, this case was improperly "phased," severely limiting Plaintiffs' discovery and their opportunity to develop key evidence, as a result of the Discovery Commissioner's interpretation of some general comments made by Judge Scann at the end of 12(b) motion hearing over a year ago. If there were any contouring of discovery whatsoever utilized in this case, the immediate focus should

have been on discovery related to class certification, so that the class certification motion could be heard first, and as promptly as possible, consistent with predominant class action jurisprudence and practice. Indeed, the Court seemingly recognized as much in its comments at the hearing before it on March 14, 2017. *See* March 14, 2017 Hearing Transcript, at 26:6-18.

As detailed in Plaintiffs' pending Motion for Clarification, the Commissioner herself has expressed similar doubts as to the wisdom of phasing discovery as she and the Court have done in this case, but the Commissioner felt bound by what she believed to be Judge Scann's intentions and phased discovery accordingly. *See* July 20, 2016 Hearing Transcript, at 14:20-15:3. Indeed, at the July 20, 2016 hearing on Defendants' motion to phase discovery, the Commissioner made the following significant remarks:

> Oh, I agree with you. Believe it or not, plaintiffs' counsel, I actually am persuaded by your perspective of the case. Had I seen you all initially, I might have done something a little bit differently. But having said that, I understand where the court [*i.e.*, Judge Scann] was coming from and I want to be able to make sure that we do this in a fashion that makes sense – for your clients as well.
> *Id.* [emphasis added]

At the subsequent hearing before the Commissioner on September 21, 2016, the Commissioner again made clear that she expected Defendants' dispositive motions for summary judgment would be filed at the end of Phase One of discovery. For instance, after making clear that Phase One of discovery would not include Plaintiffs being allowed discovery of "specific names [of Nevada debtors], identifications, and financial information" until Phase Two, the Commissioner noted:

> I suspect at some point we'll be in Phase 2, but I don't know that for certain because you'll [*i.e.*, Defendants] have to make your motions [for summary judgment] after Phase 1.
> September 21, 2016 Hearing Transcript, at 25:1-8 [emphasis added].

The Commissioner has also repeatedly promised Plaintiffs that they would

have adequate opportunity to conduct the discovery, both in Phase One and, later, Phase Two, necessary to Plaintiffs' case. For instance, at the July 20, 2016 hearing, the following exchange occurred:

> [DISCOVERY COMMISSIONER:] I promise you, plaintiffs' counsel, that when the time comes you'll have the discovery you need. Now you can't obviously move to certify the class until you have that discovery and I'm going to give that to you in Phase 2.
>
> MR. BOYLAN: Understood. But part of our opposition to summary judgment will be we were barred in discovery from getting the names of the critical witnesses needed to submit declarations.
>
> July 20, 2016 Hearing Transcript, at 41:19-24 [emphasis added].

Thus, the Commissioner (and the Court)'s expectation in phasing discovery has been that Defendants' motions for summary judgment would not come until the end of Phase One, so that Plaintiffs would have adequate time to conduct discovery and gather evidence needed to defeat those motions. CRC's filing its motion now, before the end of Phase One, not only defeats that expectation, but violates it.

Also, it is wrong to even consider, let alone grant, summary judgment against a single named Plaintiff (*i.e.*, here, Plaintiff Susan Kallen) in the circumstances of this case. For example, Plaintiffs have been absolutely prohibited by the Commissioner's recommendations and resulting orders, from any discovery related to other Nevada victims as witnesses, potential other Plaintiffs, potential other class representatives, and a wide body of evidence held by them to show and present diverse unlicensed claim collection agency practices by CRC and the other Defendants against citizens throughout the state of Nevada. *See* Court's two Orders of November 9, 2016, and Court's Order of December 7, 2016; *see also* Boylan Declaration, at ¶¶ 2-16. The evidence from these witnesses is needed to fully oppose summary judgment. (Affidavits from these witnesses cannot be obtained because the Orders prohibited Plaintiffs from obtaining their contact names and information from Defendants). *See* NRCP 56(f); *see also* Boylan Declaration, at ¶¶ 2-16. As a further, adverse and

improper result, if summary judgment were to occur in these circumstances as to a single Plaintiff, confusion, waste, and additional litigation would surely occur, because the thousands of other class members would not be bound by the adjudication (and, because the statute of limitations is tolled, new lawsuits by others would be quickly filed). Nothing would be accomplished, and further burdensome litigation for the Court would result.

There is good reason to determine class certification first. Even after certification, absent class members can only be bound to a class judgment on common issues, for which their interests were adequately represented. 5 Newberg & Conte, Newberg on Class Actions, §1623. If their individual issues were not litigated or adequately represented, *i.e.*, were not common, unnamed class members may ignore the judgment, collaterally attack it, or bring an independent action. *See id.* Constitutional due process disallows the effectiveness of a summary judgment against unnamed class members with respect to their individual issues. *See and compare Hansberry v. Lee* (1940) 31 U.S. 32; *Richards v. Jefferson County Alabama* (1996) 517 U.S. 793; *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797.

Also, full accounting discovery must first be allowed by the Court, so Plaintiffs can prove recovery for disgorgement from Defendants, including CRC. For example, zero document discovery of the Defendants' accounting records has been allowed in Phase One. Boylan Declaration, at ¶¶ 2-16.

2. CRC's Motion Violates the Court's Scheduling Order and the Instructions (and Promises) of the Discovery Commissioner Here

Consistent with the phasing of discovery imposed by the Commissioner and the Court here, the Commissioner and the Court have established the appropriate timelines for discovery and the filing of dispositive motions here. Thus, the Commissioner's original discovery scheduling order dated August 19, 2016 ("August 2016 Scheduling Order") provided that the parties would complete Phase One

discovery—which was to deal with the validity of the named Plaintiffs' claims against Defendants—by November 1, 2016. *See* August 2016 Scheduling Order, at 2. The parties were to file any dispositive motions—*i.e.*, CRC's motion for summary judgment here—on or before November 30, 2016. *Id.*

Because of the unprecedented level of Defendants' discovery misconduct and obstruction Plaintiffs had to battle, the Commissioner and the Court properly pushed these deadlines back to give Plaintiffs adequate time and opportunity to conduct discovery before being forced to respond to Defendants' anticipated motions for summary judgment. Most recently, the Commissioner and the Court extended the deadline for the close of Phase One discovery to June 9, 2017, with the deadlines for Defendants' dispositive motions for summary judgment to follow by July 10, 2017. *See* Court's Order of April 4, 2017 [adopting Commissioner's Report and Recommendations of March 20, 2017].

In this last Order, the Commissioner and Court specifically noted that "Phase I of discovery is limited to discovery needed in order to make the legal determination as to the validity of Plaintiffs' claims." *Id.* at 2 [emphasis added].

Consistent with these Orders and NRCP 56(f), the Commissioner and the Court, as discussed above, expected and intended that Defendants' anticipated motions for summary judgment would not be filed until after the end of Phase One of discovery, so that Plaintiffs would not be further prejudiced by having inadequate time to conduct the discovery needed to defeat Defendants' motions. Thus, for instance, as described above, the original scheduling order staggered the deadlines for the close of Phase One discovery and the filing of Defendants' motions for summary judgment, providing that the first deadline would be on November 1, 2016, while the second deadline would be November 30, 2016. Similarly, as detailed above, the Commissioner made it clear at the September 21, 2016 hearing that motions for summary judgment were to be made after Phase One discovery had concluded. September 21, 2016 Hearing Transcript, at 25:6-8.

Similarly, at the status hearing on discovery before the Commissioner on March 8, 2017, Plaintiffs' counsel repeatedly emphasized that Plaintiffs had not been given adequate time in Phase One to conduct the discovery needed to respond to the motions for summary judgment anticipated from Defendants CRC, QLS, and NDSC. *See, e.g.*, March 8, 2017 Hearing Transcript, at 4:7-21, 6:15-24. Plaintiffs' counsel, without objection from defense counsel in attendance, repeatedly noted that it was understood that motions for summary judgment from the defense were to be filed after Phase One had concluded:

> [Plaintiffs' Counsel:] MTC has kind of deviated from the schedule in terms of defense summary judgments. The contemplation was that after Phase 1 the Defendants would file summary judgment motions related to the Phase 1 issue, but MTC has already filed a summary judgment motion, actually a countermotion to ours, on that issue.
> *Id.* at 4:18-21 [emphasis added].

Plaintiffs' counsel also specifically noted that Plaintiffs "have months of additional Phase 1 discovery before we're going to be in the position to respond to the other Defendants' summary judgment motions." *Id.* at 6:17-19; *see also id.* at 6:22-23 [noting that, because of the many motions to compel Plaintiffs were forced to file already, Plaintiffs are "not close to being done on what we need in Phase 1 to oppose the completed motions" for summary judgment]. In part for these reasons, the Commissioner and the Court ultimately decided that the deadline for Phase I discovery would be extended to, at a minimum, June 9, 2017. Court's Order of April 4, 2017, at 2.

The Commissioner has made clear that she understands the reason for staggering the deadlines in this case is at least in part to give Plaintiffs the opportunity for discovery contemplated by NRCP 56(f). For instance, at the March 8, 2017 hearing before the Commissioner, the following revealing exchange occurred:

> MR. BOYLAN: But my primary concern that I want to bring to your attention

> again here is that we cannot face, given the Phase 1 limitations on discovery, we cannot face summary judgment motions without having adequate opportunity to gather the evidence.
> DISCOVERY COMMISSIONER: Okay.
> MR. BOYLAN: And –
> DISCOVERY COMMISSIONER: I understand that. I know what [NRCP] 56F is. I get it. I understand.
> March 8, 2017 Hearing Transcript, at 11:11-17 [emphasis added].

CRC, through its counsel, has repeatedly agreed that Defendants' motions for summary judgment were to follow after the close of Phase I discovery. For instance, at the hearing before the Commissioner on March 8, 2017, CRC counsel's statements clearly reflected the common understanding that defense motions for summary judgment were to be filed only after Phase 1 concluded:

> [CRC Counsel:] On a number of different topics the motions for summary judgment by all the Defendants contemplated at the end of Phase 1 have not been filed.
> March 8, 2017 Hearing Transcript, at 7:3-4 [emphasis added].

Later in the hearing, CRC counsel again noted that defense motions for summary judgment were to follow after Phase 1 discovery concluded (which, to date, has not occurred yet): "we don't know what the effect will be of not only what will happen next week [at the hearing before the Court on March 14, 2017], but what the outcome of every Defendants' motion for summary judgment will be, as contemplated at the end of Phase 1." *Id.* at 9:7-9 [emphasis added].

At the hearing before the Court on March 14, 2017, CRC counsel again admitted that Defendants' motions for summary judgment were only to be filed after Phase 1 of discovery was completed. During the hearing, for instance, the following exchange between CRC counsel and the Court occurred:

> [CRC Counsel:] So we were going to get to the end of that [Phase One of discovery] and we were going to do some summary judgment. We're holding our summary judgment motion to get through the phase one of discovery which –

> THE COURT: Um-hum.
> MR. SCARBOROUGH: – the Discovery Commissioner now says is going to be closing in June. I'm not anxious to do the additional discovery and spend all the money. I'll be happy to bring these legal issues forward. March 14, 2017 Hearing Transcript, at 34:4-12 [emphasis added].

Further discussion between the Court and counsel ensued, during which CRC counsel raised CRC's desire to respond to the supplemental briefing Plaintiffs would be providing the Court at its request. CRC counsel specifically noted that "I don't want to flood the court with more paper, I know there's a lot of paper," but wished for an opportunity to respond to Plaintiffs' supplemental briefing. *Id.* at 35:4-19. Notably, CRC did not seek permission to file its motion for summary judgment or otherwise indicate that it intended to do so, in violation of the Court's scheduling order and the expectations that have existed in this case since phasing was imposed. *See id.* Indeed, CRC counsel acknowledged that additional filings would burden the Court, but asked for permission to file a limited response to the supplemental briefing the Court requested from Plaintiffs:

> [CRC Counsel:] . . . And I would like to bring forward the law on that argument that supports the notion that if one is within the ambit of 107, this debt collector statute cannot, as a matter of law, apply.
> So if Mr. Boylan gets two weeks, I don't want to flood the court with more paper, I know there's a lot of paper. . . .
> . . .
> MR. SCARBOROUGH: I just want to do something which makes sense for the Court. But if we're going to argue this in some way and end up with some ruling –
> THE COURT: Um-hum.
> MR. SCARBOROUGH: – we would like a chance –
> THE COURT: Okay.
> MR. SCARBOROUGH: – to respond and then all come back here and argue. And we want to do whatever the Court would find of assistance to it. *Id.* at 4:7-25 [emphasis added].

The Court ultimately decided that Plaintiffs would submit supplemental briefing to the Court by March 28, 2017, and Defendants, including CRC, would have an

opportunity to respond to that briefing, including by presenting Defendants' flawed legal argument that those acting within the confines of NRS Chapter 107 were not engaging in debt collection. *Id.* at 36:1-24. (The parties have since completed the briefing requested by the Court.) At no point during the hearing did the Court agree or otherwise suggest that Defendants could bring their motions for summary judgment, which, according to the scheduling orders, were to be filed at the close of Phase One of discovery, before the Court at this time.

Instead, the Court decided to suspend all discovery pending the Court's resolution of Plaintiffs' Motion for Clarification (and related supplemental briefing). *See id.* at 44:20-23 [staying discovery at that time]. The Court's statements at the March 14, 2017 hearing also strongly suggest that the filing of additional motions—such as the motions for summary judgment subsequently filed by CRC and QLS—was not appropriate at this time. For instance, in discussing whether it would be appropriate to stay discovery at that time, Plaintiffs' counsel specifically discussed the "probability" that the Court would "effectively grant their [*i.e.*, Defendants'] [NRCP] 12(b) motion" in ruling on Plaintiffs' Motion for Clarification, and observed that that was what it "sounds like you're [*i.e.*, the Court] considering." *Id.* at 44:6-12. Plaintiffs' counsel noted that in that case, it would likely not make sense for the parties to continue discovery until the Court's ruling were made. *Id.* at 44:14-16. The Court expressly agreed with the analysis by Plaintiffs' counsel, and decided to suspend or stay all discovery at that point. *Id.* at 44:17-23. The Court's subsequent statements at the hearing and colloquy with Plaintiffs' counsel similarly reflect the apparent understanding that the Court would be considering whether to rule on Plaintiffs' claims effectively under a NRCP 12(b)(5) standard (which, if granted, would render any motion for summary judgment moot). *See id.* at 46:14-48:19.

///

3. CRC's Motion Was Improper Given the Court's Instructions at the March 14, 2017 Hearing; The Court and Plaintiffs Cannot Be Sandbagged

Thus, it has been the Order and clear understanding of all involved in this case—the Commissioner, Court, and the parties—that defense motions for summary judgment were only to be filed after the close of Phase One of discovery. The scheduling orders adopted by the Commissioner and the Court have reflected this understanding, and the comments of the Commissioner, Court, and the parties' counsel at hearings have consistently done so as well. Nothing at the March 14, 2017 hearing changed this approach or invited or allowed CRC (or other Defendants) to file motions for summary judgment. Indeed, the Court's rulings and statements at the hearing strongly suggest that such motions would be especially inappropriate, as those motions would only further flood the Court with papers, burdening both it and Plaintiffs, and likely would be rendered moot if the Court decided to effectively grant Defendants' NRCP 12(b)(5) challenge to Plaintiffs' claims. The Court's decision to stay discovery until the Court ruled on Plaintiffs' pending Motion for Clarification further demonstrates the impropriety of CRC moving for summary judgment at this time, as Plaintiffs have been denied the opportunity to conduct any discovery since the March 14, 2017 hearing, and, indeed, had their then-pending motion to compel CRC taken off calendar by the Commissioner until the Court's decision on the Motion for Clarification was made.

Under these circumstances, CRC's decision to file a motion for summary judgment was nothing short of an improper attempt to sandbag Plaintiffs (and the Court), especially as it has forced Plaintiffs to respond to a motion that may in all likelihood effectively be rendered moot if the Court decides to dismiss Plaintiffs' claims on a NRCP 12(b)(5) standard (as the Court strongly suggested at the March 14, 2017 hearing it was inclined to do). Plaintiffs have therefore repeatedly requested that CRC withdraw its motion for summary judgment pending the May 4, 2017 hearing on Plaintiffs' Motion for Clarification, but CRC has thus far declined to do

so. Rather than reward CRC for filing its motion prematurely in violation of the Court's applicable scheduling orders, the Court should deny CRC's motion for summary judgment at this time.

C. Plaintiffs Have Been Denied Adequate Opportunity to Conduct Discovery and Obtain the Proof Necessary to Fully Destroy CRC's Motion

The party requesting a continuance pursuant to NRCP 56(f) has the burden of showing by affidavit or declaration that "further discovery will lead to the creation of a genuine issue of material fact," and, early in a case, that the party has been diligent in conducting discovery. *Aviation Ventures, Inc. v. Joan Morris, Inc.* (2005) 121 Nev. 113, 117-118, 110 P.3d 59, 62-63 [A "motion for a continuance under NRCP 56(f) is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact."]. For reasons explained below and as supported in the attached declaration of Plaintiffs' counsel, Plaintiffs have met their burden here: the Court should grant Plaintiffs a continuance pursuant to NRCP 56(f) so that they can conduct additional discovery to comprehensively destroy CRC's motion for summary judgment.

1. Plaintiffs Have Been Diligent in Conducting Discovery regarding CRC, and Plaintiffs Have Met Their Burden of Showing How Further Discovery Would Lead to the Creation of a Genuine Issue of Material Fact

The Declaration of Nicholas A. Boylan submitted herewith addresses this issue at length, providing detailed examples of Plaintiffs' diligence in conducting discovery, the specific discovery sought by Plaintiffs, and the ways in which this discovery would likely lead to the creation of a genuine issue of material fact. Boylan Declaration, as ¶¶ 2-16. Also, the record, the evidence obtained so far from CRC and the other Defendants, the business model and market basket of default services offered by CRC and the other Defendants, and the limited witness statements

obtained so far, all indicate that much more evidence of CRC's liability will be forthcoming with proper and full discovery. *Id.* By analogy, perhaps the best specific indication of the types of evidence that will be obtained is reflected by the evidence obtained so far from Defendant MTC and itemized in Plaintiffs' Separate Statement in Opposition to MTC's supposed summary judgment counter-motion. With proper discovery, all that same evidence and more will come from CRC/JPMorgan Chase Bank, N.A. ("Chase Bank"). There is no doubt that CRC has been obstructing, evading and hiding appropriate discovery for over a year and utilizing, deceptively, Chase Bank's holding of critical data, documents, and witnesses, given that CRC ceased doing business in about 2013. For example, ¶¶ 2-16 of the Boylan Declaration is indicative of important CRC witnesses whose depositions have been requested for many months, but have been continuously delayed and evaded by CRC and Chase's multiple sets of $1,000.00 per hour lawyers. Keep in mind that highly restrictive "phasing" was ordered over objection and even then Plaintiffs had to file 16 motions to compel—all of which were erroneously denied at least in part. *Id.* at ¶¶ 2-16.

2. It Would Be an Abuse of Discretion for the Court to Deny Plaintiffs' NRCP 56(f) Request Here

As demonstrated above and in the supporting declaration of Plaintiffs' counsel, limited and phased discovery in this matter has been underway for only approximately a year, and Plaintiffs have been diligent in conducting discovery and gathering necessary evidence (despite the severe limitations imposed on discovery by the Commissioner and the Court and CRC's ongoing discovery obstruction). Boylan Declaration, at ¶¶ 2-16. Under these circumstances, it would be an abuse of discretion, warranting reversal, for the Court to deny Plaintiffs' NRCP 56(f) request and grant CRC's motion for summary judgment. *See Aviation Ventures, Inc, supra*, 121 Nev. at 117-118, 110 P.3d at 62-63 [summary judgment reversed where only 8 months had passed between filing of complaint and granting of motion and there was no evidence that the party opposing summary judgment had not been diligent in

conducting discovery]; *Montag v. Venetian Casino Resort, LLC* (2015) 2015 Nev. Unpub. LEXIS 647, *2-3 [trial court abused its discretion by not permitting further discovery under NRCP 56(f) at an "early state of the proceedings" when request for additional discovery complied with the rule, there was no indication the request was intended to cause delay, and the further discovery requested might create a genuine issue of material fact]; *Harrison v. Falcon Prods.* (1987) 103 Nev. 558, 746 P.2d 642 [reversing summary judgment granted within less than two years of filing of complaint given opposing party's diligence in pursuing the action, including through request for additional time to take depositions and seek admissions from moving party]; *Ameritrade, Inc. v. First Interstate Bank* (1989) 105 Nev. 696, 782 P.2d 1318 [reversing partial grant of summary judgment where less than 8 months had passed between filing of complaint and grant of summary judgment, the opposing party "had not been dilatory in pursuing discovery and has demonstrated its diligence by requesting additional time to obtain depositions"]; *Barket v. Hart* (2013) 2013 Nev. Unpub. LEXIS 1879, at *1-3 [reversing grant of summary judgment where opposing party submitted affidavit required by NRCP 56(f), "explained why further discovery was necessary, and showed that depositions of respondents had already been set and would be completed before the deadline established for conducting discovery"]; *Valenzuela v. Nev. Dep't of Corr.* (2012) 2012 Nev. Unpub. LEXIS 1568, at *1-3 [reversing grant of summary judgment where opposing party submitted affidavit required by NRCP 56(f), "explaining the factual evidence he expected to learn by deposing additional witnesses" and noting that "proceedings were still at a relatively early stage, as the summary judgment order was filed just over two years after the initation of the action and less than a year after appellant had properly filed a second amended complaint"].

Paraphrasing the Nevada Supreme Court in *Harrison*, "[u]nder these circumstances, granting summary judgment in this early stage of the proceedings" would be "an abuse of discretion." *Harrison*, *supra*, 103 Nev. at 560, 746 P.2d at

643.

D. Plaintiff's Claims Do Not Fail as a Matter of Law

1. Pursuant to NRS 41.600, Plaintiff Kallen Is Entitled to An Award for Damages, Equitable Relief, and an Award of Reasonable Attorney's Fees and Costs

1. Damages

To review causation the Court must first identify the remedies, including any injunctive relief and damages pled (put in issue), that are available under the law. *See* NRS 41.600. Here, the process is relatively easy. First, dismissal is prohibited because if Plaintiffs prove CRC operated illegally—*i.e.*, without the required license—the Court must grant an injunction against the illegal business, until CRC obtains the necessary license from the FID. (As to MTC and QLS the injunction would prohibit their business operations if they failed to renew/maintain their license from the FID, which they first obtained in response to this lawsuit in 2012.) Although CRC contends that it no longer operates as a business or is effectively defunct, injunctive relief still would be appropriate to enjoin CRC from resuming its operations in Nevada until it obtains an appropriate license from the FID (since nothing currently would prevent CRC from doing so if it chose to do so). True "causation" is axiomatic—or actually unnecessary, in terms of injunctive relief; in other words, as long as the collection agency activities are proven, the injunction must issue. *See Alaska Trustee, LLC v. Ambridge* (Alas. 2016) 372 P.3d 207 [summary judgement for plaintiff, and injunction issued].

As to other legal or equitable remedies pled, the allegations in the Third Amended Complaint and the evidence demonstrate that the money/profits obtained by CRC from its illegal business operations as fees and costs were added to the debts of the many thousands of Nevadans against whom CRC executed its illicit collection activities. Third Amended Complaint, ¶¶ 18, 25-29; (SS#54.) CRC's own witnesses admit that CRC's fees and costs were added to Nevada borrowers' defaulted debts,

and would need to be paid off by those borrowers to reinstate or payoff their defaulted debts. (SS#23, 36, 54.) Similarly, CRC's own Operations Manager testified at her deposition that CRC's fees and costs associated with foreclosure generally would be added to the obligations of the borrowers in default. (SS#54.)

Moreover, a central remedy pled here is disgorgement of CRC and the other Defendants' illicit gains/profits. So, again, "causation" is axiomatic—clear as a matter of law, because if illicit operations by CRC are proven then the profits gained thereby must be disgorged to the Plaintiffs, who were used and targeted and victimized by the illegal operations. CRC's accounting records for its Nevada files show the "causation," as to illicit money received by Defendants, but Plaintiffs thus far have been barred by the Commissioner and the Court from receiving those crucial records in Phase One of discovery.

Nonetheless, in response to Plaintiffs' Interrogatory No. 18, each Defendant, including CRC, has admitted millions of dollars were received, and the Third Amended Complaint so alleges in Paragraphs 30 and 34. Specifically as to CRC, CRC has admitted in its response to Interrogatory No. 18 that CRC received no less than $3,501,103.22 in fees and costs in Nevada between October 1, 2007 and December 31, 2012, from its creditor-client (and owner) Chase Bank. (SS#28.)

Consistent with language in the deed of trust upon which CRC relies, and as confirmed by the sworn testimony admissions from CRC's President, Deborah Brignac, and Operations Manager, Colleen Irby, the illicit fees and costs charged and received by CRC for its illegal work, including with respect to Plaintiff Kallen, would be added to Nevada debtors' obligations and thus the claim against the debtors by CRC's principal creditor-client, Chase Bank. (SS#23, 54.) As noted above, CRC's own witnesses admit that CRC's fees and costs were added to Nevada borrowers' defaulted debts, and would need to be paid off by those borrowers to reinstate or payoff their defaulted debts, and that CRC's fees and costs associated with foreclosure generally would be added to the obligations of the borrowers in default.

(SS#23, 36, 54.) (As reflected in Plaintiffs' pending Motion for Partial Summary Judgment against MTC, the facts alleged and proven are essentially the same as to each Defendant.) For Plaintiff Kallen, the amount was not less than $1,799.11. (SS#64.) That claim, in total, was money that CRC sought to effectively recover to the maximum extent possible, on behalf of its creditor-client, through the acquisition and sale of Plaintiff Kallen's home and the collection of the cash money paid therefor, which CRC would have collected into its own account and then passed on to its client, Chase Bank (SS#15, 39, 60-61.)[1]

CRC also improperly conflates the damages that Plaintiff Kallen has sustained (and that the Court may award her) with the illicit fees and costs that CRC received for its unlawful services relating to Plaintiff Kallen. Although Plaintiff Kallen's damages would include those fees and costs, she would also be entitled to an award of damages for other harm she sustained from CRC's unlawful conduct, including the significant emotional distress and other non-economic damages she suffered as a result of CRC's unlicensed collection agency activities in Nevada. (SS#65.)

Although Plaintiff Kallen has established damages here, CRC counsel previously admitted to the Commissioner at the July 20, 2016 hearing on Defendants' motion for phasing, that proof of damages was not required because Plaintiff Kallen's first cause of action was a statutory consumer fraud claim. Counsel's colloquy with the Commissioner is worth quoting at some length, as it reveals both the Commissioner's thinking in phasing discovery and CRC's previous position that Plaintiffs need not prove damages as part of Phase One:

> DISCOVERY COMMISSIONER: . . . I'm going to characterize Phase 1 as discovery in order to make legal determination as to the – to make the legal determination as to the validity of plaintiffs' claims. . . . And this is what I contemplate in this Phase 1 discovery. I contemplate that if necessary the

[1] That CRC's efforts, for reasons that remain unclear, were halted by CRC (or its creditor-client) does not, despite CRC's assertions to the contrary, mean that CRC did not attempt to collect a debt from Plaintiff Kallen, or that Plaintiff Kallen was not harmed by CRC's unlawful attempt to do so, including by improperly seeking to add CRC's fees and costs for its unlawful services to Plaintiff Kallen's debt.

> defendants can take the plaintiffs' depositions; if necessary. This may not be a true damages – it may be statutory, so I'm not sure we really have to have a proof of damages. I'm just not sure on that.
> MR. SCARBOROUGH [CRC Counsel]: Not from our perspective on Phase 1.
> July 20, 2016 Hearing Transcript, at 41:1-8 [emphasis added].

Thus, CRC's current position that Plaintiffs must provide proof of damages in order for their First Cause of Action to be valid is both inconsistent with CRC's prior representations to the Commissioner—which representations were taken into account in deciding whether and how to phase discovery—and legally incorrect (for reasons explained by Plaintiffs herein). CRC should be held to its prior position, especially as the Commissioner was correct that Plaintiffs need not prove damages, and, in any event, Plaintiff Kallen was damaged by CRC's misconduct.

2. Equitable Relief Is Also Available Here

> The governing portion of NRS 41.600 is as follows:
> 1. An action may be brought by any person who is a victim of consumer fraud.
> 2. As used in this section, "consumer fraud: means:
> . . .
> (e) A deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive.
> 3. If the claimant is the prevailing party, the court shall award the claimant:
> (a) Any damages that the claimant has sustained;
> (b) Any equitable relief that the court deems appropriate; and
> (c) The claimant's costs in the action and reasonable attorney's fees.

Accordingly, while damages can be included in the Court's award, equitable relief is also available and a distinct remedy provided by law, as well as costs and reasonable attorney's fees. Equitable relief includes, of course, an injunction prohibiting any Defendant, including CRC, from conducting or continuing its claim collection business in Nevada unless it maintains its collection agency license, and thus authorization from the FID. (This requires bonding and full compliance with all consumer protection regulations. *See* NAC 649.010 to 649.340.) Equally obvious is the fact that equitable relief includes a variety of possible equitable adjustments by

Foreclosure Trustees under Nevada Law	
3. Non-Judicial Foreclosure Trustees Are Not Authorized to Do All the Acts Alleged in the TAC	20
B. NRS Chapter 649 Does Not Exclude Trustees or Non-Judicial Foreclosure from Its Scope	25
1. The Nevada Legislature Did Not Intend to Exclude Trustees from the Definition of "Collection Agency" under Nevada Law	25
2. Non-Judicial Foreclosure Is Collection of a Claim	27
C. Concurrent Regulation Is Proper, Feasible, and Necessary	27
a. The Legislature Has Not Preempted FID Regulation of Collection Agency Trustees The Legislature Has Not Occupied the Entire Field of Regulation Here	28
b. Defendants' Cases Do Not Assist Them Here	31
c. Defendants' Interpretation Would Lead to Absurd and Perverse Results	33
d. Defendants Fail to Show Any Actual Conflict Here Such that Pre-emption Might Apply	34
e. Defendants' "Concurrent Regulation" Argument Is False Theory and Conjecture, and Inconsistent with the Statutes and Common Sense	37
III. CONCLUSION	37

CASES	PAGES
Alaska Trustee, LLC v. Ambridge (Alas. 2016) 372 P.3d 207	1
American Master Lease LLC v. Idanta Partners, LLC (2014) 225 Cal.App. 4th 1451, 1483	3,4,5,9, 10,11
Aronoff v. Levine (1919) 190 A.D. 172	14

Docket 73484 Document 2018-08227

Bumgardner v. Corey (1942) 124 W. Va. 373	14
Chandler v. Sanger (1874) 114 Mass. 364	14
City of Reno v. Sabini (1967) 83 Nev. 315, 319, 429 P.2d 559	31,32
Clark v. Capital Credit & Collection Servs. (9th Cir. 2006) 460 F.3d 1162	35
Crippen v. Stites 346 B.R. 115 (E.D. Bkr. Pa. July 25, 2006)	22,23
Crowley v. Duffrin (1993) 109 Nev. 597, 855 P.2d 536	32
Estes v. Love, Beal & Nixon, P.C. 2015 U.S. Dist. LEXIS 96715 (N.D. Okl. July 24, 2015)	23
Fairbanks v. Snow (1887) 145 Mass. 153	14
Falcke v. Douglas County (2000) 116 Nev. 583, 588, 3 P.3d 661	32
Flick Theater v. Las Vegas (1988) 104 Nev. 87, 89-90, 752 P.2d 235	28
Gburek v. Litton Loan Servicing LP (7th Cir. 2010) 614 F.3d 380, 386 n. 3	22
Goldman v. Standard Insurance Co. (9th Cir. 2003) 341 F.3d. 1023	30
Guy Tel. & Tel. Co. v. Melbourne Int'l (11th Cir. 2003) 329 F. 3d 1241	4,10,15
Hart v. FCI Lender Servs. (2d Cir. 2015) 797 F.3d 219, 226-227	22
International Game Technology, Inc. v. The Second Judicial District Court of The State of Nevada (2006) 122 Nev. 132, 154	29
Kerwin v. Remittance Assistance Corp. (D. Nev. 2008) 559 F. Supp. 2d 1117	35
Kossian v. American Nat. Ins. Co. (1967) 254 Cal.2d 647	15
Kriv v. Northwestern Sec. Co. (1946) 237 Iowa 1189, 24 N.W. 2d 751	21
Kuban v. McGimsey (1980) 96 Nev. 105, 110-111, 605 P.2d 623, 626	28

Lamb v. Mirin (1974) 90 Nev. 329, 332-33, 526 P.2d 80, 82	28,32
Leasepartners Corp. v. The Robert L. Brooks Trust (1997) 113 Nev. 747, 942 P.2d 182	13
Leeper v. Beltrami (1959) 53 Cal.2d 195	14
Loomis v. Lange Fin. Corp. (1993) 109 Nev. 1121	6,7,16
Magill v. Lewis (1958) 74 Nev. 381, 386, 333 P.2d 717	7,16
Martin Bloom Assocs., Inc. v. Manzie (D. Nev. 1975) 389 F. Supp. 848	6,7,8
McLaughlin v. Phelan Hallinan & Schmieg, LLP (3d Cir. 2014) 756 F.3d 240, 246	22
McRae v. Pope (1942) 311 Mass. 500	14
Monzo v. Eighth Judicial Dist. *Court of Nev.* (2014) 331 P.3d 881	4,10
Namow Corp. v. Egger (1983) 99 Nev. 590, 668 P.2d 265	4,10
Nevada Equities, Inc. v. Willard Pease Drilling Co. (1968) 84 Nev. 300, 440 P.2d 122	6,7
Ogle v. Freeman (1939) 150 Kan. 864	14
Pape' v. Knoll (1984) 69 Ore. App. 372	14
Picus v. Wal-Mart Stores Inc. (D. Nev. 2009) 256 F.R.D. 651	3,9
Public Employees Benefits Program v. Las Vegas Metropolitan Police Department (2008) 124 Nev. 138	30
Robken v. May (1968) 84 Nev. 433, 442 P.2d 913	6,7
Sanguinetti v. Strecker (1978) 94 Nev. 200, 577 P.2d 404	4,10
Unionamerica Mortgage & Equity Trust v. McDonald (1981) 97 Nev. 210, 626 P.2d 1272	15
Union Guardian Trust Co. v. Building Sec. Corp. (1937) 280 Mich. 717, 276 N.W. 697	21

Tocco v. Real Time Resolutions, Inc. 48 F. Supp. 3d 535 (S.D.N.Y. Aug. 13, 2014)	22
Vincent v. Santa Cruz (1982) 98 Nev. 338, 241, 647 P.2d 379	6,16
Wake Development Co. v. O'Leary (1931) 118 Cal.App. 131	14
Webb v. Clark County School Dist. (2009) 125 Nev. 611, 218 P. 3d 1239	16
Wheeler Springs Plaza, LLC v. Beemon (2003) 119 Nev. 260, 71 P.3d 1258	4,10
Yeager v. Ocwen Loan Servicing, LLC. 2015 U.S. Dist. LEXIS 94149, at *25-27 n.19	22

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.

I. DEFENDANTS' ALLEGED CONDUCT HAS INJURED PLAINTIFFS

A. Causation Is Shown as a Matter of Law; Alternatively, a Fact Issue Is Shown Such That Dismissal Cannot Be Granted

To review causation the Court must first identify the remedies, including any injunctive relief and damages pled (put in issue), that are available under the law. *See* NRS 41.600. Here, the process is relatively easy. First, dismissal is prohibited because if Plaintiffs prove Defendants have operated illegally—*i.e.*, without the required license—the Court must grant an injunction against the illegal business, until Defendants (*e.g.*, NDSC) obtain the license from the FID. As to MTC and QLS the injunction would prohibit their business operations if they failed to renew/maintain their license from the FID, which they first obtained in response to this lawsuit in 2012. True "causation" is axiomatic—or actually unnecessary, in terms of injunctive relief; in other words, as long as the collection agency activities are proven, the injunction must issue. *See Alaska Trustee, LLC v. Ambridge* (Alas. 2016) 372 P.3d 207 [summary judgement for plaintiff, and injunction issued].

As to other legal or equitable remedies pled, the allegations in the Third Amended Complaint and the evidence demonstrate that the money/profits obtained

by Defendants from their illegal business operations as fees and costs were added to the debts of the many thousands of Nevadans against whom Defendants executed their illicit collection activities. Third Amended Complaint, ¶¶ 18, 25-29; Separate Statement ISO Plaintiffs' Motion for Partial Summary Judgment as to MTC ("Separate Statement" or "SS"), #8. Moreover, a central remedy pled here is disgorgement of Defendants' illicit gains/profits. So, again, "causation" is axiomatic—clear as a matter of law, because if illicit operations by Defendants are proven then the profits gained thereby must be disgorged to the Plaintiffs, who were used and targeted and victimized by the illegal operations. The Defendants' accounting records for Nevada files show the "causation," as to illicit money received by Defendants.

In response to Plaintiffs' Interrogatory No. 18, each Defendant has admitted millions of dollars were received, and the Third Amended Complaint so alleges in Paragraphs 30 and 34.

The allegations and evidence is the same as to each Defendant, but MTC will be used to illustrate: As admitted by MTC's Senior Vice President of operations, the fees and costs charged by MTC for its illicit claim collection are added to the obligation/debt of the homeowner victim, such as the Plaintiff Sansotas in this case. (SS#8; **Ex. "2"**, at pp.107:18-23.) Although he attempted evasion and qualification, MTC's owner and CEO, Rande Johnsen, admitted essentially the same in his testimony. (SS#78; **Ex. "2"**, at p. 88.) Accordingly, consistent with Defendant's perceived authorization under the deed of trust, the illicit money that MTC put into its pocket for its illegal activity in Nevada was also added to its bank client's claim against the Plaintiff Sansotas and their property. The amount was just under $2,000.00. (SS#30.)

///

B. The Governing Statute Provides Equitable Relief, Remedies and Fees; Damages Are Not Required

The governing portion of NRS 41.600 is as follows:

1. An action may be brought by any person who is a victim of consumer fraud.
2. As used in this section, "consumer fraud: means:
. . .
(e) A deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive.
3. If the claimant is the prevailing party, the court shall award the claimant:
(a) Any damages that the claimant has sustained;
(b) Any equitable relief that the court deems appropriate; and
(c) The claimant's costs in the action and reasonable attorney's fees.

Accordingly, while damages can be included in the Court's award, equitable relief is also available and a distinct remedy provided by law, as well as costs and reasonable attorney's fees. Equitable relief includes, of course, an injunction prohibiting any Defendant from continuing its claim collection business in Nevada unless it maintains its collection agency license, and thus authorization from the FID. (This requires bonding and full compliance with all consumer protection regulations. *See* NAC 649.010 to 649.340.) Equally obvious is the fact that equitable relief includes a variety of possible equitable adjustments by the Court, including restitution (unjust enrichment) remedies related to illicit compensation received by Defendants, and/or the illicit profits of Defendants.

Restitution, also known as unjust enrichment, can be awarded in law or in equity. *See Restatement (Third) of Restitution and Unjust Enrichment* ("Restatement of Restitution, Third"), § 4 (2011); *American Master Lease LLC v. Idanta Partners, LLC* (2014) 225 Cal.App. 4th 1451, 1483. Thus, under Plaintiffs' first cause of action for deceptive trade practice, pursuant to NRS 41.600(3)(a) or (b), restitution is available to Plaintiffs.[1] Even if it were true, the Plaintiffs did not suffer damages, which is absolutely not true, restitution is available based on the disgorgement (and

[1] Restitution/unjust enrichment was not considered by Judge Pro in *Picus v. Wal-Mart Stores Inc.* (D. Nev. 2009) 256 F.R.D. 651, which involved only traditional damages for affirmative misrepresentation in the sale of a product. Disgorgement was not an issue.

accounting for) of the illicit gains/profits obtained by the Defendants as a result of their unlawful and statutorily-fraudulent practices committed against the Plaintiffs. *See American Master Lease LLC, supra*, 225 Cal.App. 4th at 1483. The Nevada Supreme Court has cited and utilized the Restatement of Restitution (in its various iterations) on multiple occasions.[2] Restitution by full disgorgement of Defendants' gains and profits, based on MTC's violation of law and conscious wrongdoing, is perfectly appropriate here, and causation is axiomatic. *Restatement of Restitution, Third*, § 51; *see also American Master Lease LLC, supra*, 225 Cal.App. 4th at 1483; *Guy Tel. & Tel. Co. v. Melbourne Int'l* (11th Cir. 2003) 329 F. 3d 1241.

In fact the disgorgement remedy rests upon one of the most critical foundations underlying the entirety of the law of restitution, which is, "A person is not permitted to profit by his own wrong." *Restatement of Restitution, Third*, § 3 [emphasis added]. For example, the comments to § 3 of the Restatement of Restitution, Third, explain that: "Restitution requires full disgorgement of profit by a conscious wrongdoer, not just because of the moral judgment implicit in the rule of this section, but because any lesser liability would provide an inadequate incentive to lawful behavior. [emphasis added]; *see also American Master Lease LLC, supra*. "If A anticipates (accurately) that unauthorized interference with B's entitlement may yield profits exceeding any damages B could prove, A has a dangerous incentive to take without asking—since the nonconsensual transaction promises to be more profitable than the forgone negotiation with B. The objective of that part of the law of restitution summarized by the rule of § 3 is to frustrate any such calculation." *Restatement of Restitution, Third*, § 3. In *American Master Lease LLC*, the Court of Appeal explained it this way:

> Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost. There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary

[2] *See, e.g., Monzo v. Eighth Judicial Dist. Court of Nev.* (2014) 331 P.3d 881; *Sanguinetti v. Strecker* (1978) 94 Nev. 200, 577 P.2d 404; *Namow Corp. v. Egger* (1983) 99 Nev. 590, 668 P.2d 265; *Wheeler Springs Plaza, LLC v. Beemon* (2003) 119 Nev. 260, 71 P.3d 1258.

> disgorgement, which focuses on the defendant's unjust enrichment. Typically, the defendant's benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore the plaintiff to his or her original position. However, [m]any instances of liability based on unjust enrichment . . . do not involve the restoration of anything the claimant previously possessed . . . includ[ing] cases involving the disgorgement of profits ... wrongfully obtained . . . . [T]he public policy of this state does not permit one to take advantage of his own wrong regardless of whether the other party suffers actual damage. Where a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust . . . the defendant may be under a duty to give to the plaintiff the amount by which [the defendant] has been enriched.
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> 225 Cal.App. 4th at 1482 [internal quotation marks and citations omitted; alterations in original].

The *American Master Lease LLC* Court of Appeal went on to note:

> Moreover, [i]t is not essential that money be paid directly to the recipient by the party seeking restitution . . . . The emphasis is on the wrongdoer's enrichment, not the victim's loss. In particular, a person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing the same unlawful actions again. Disgorgement may include a restitutionary element, but it may compel a defendant to surrender all money obtained through an unfair business practice . . . regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice. Without this result, there would be an insufficient deterrent to improper conduct that is more profitable than lawful conduct.
>
> *Id.* [internal quotation marks and citations omitted; alterations in original].

Here, Defendants expressly seek to capitalize by about $80 million dollars of profit obtained by their illegal actions interfering with the Plaintiffs' consumer rights (and occupation of their homes), and now Defendants specifically confirm that part of their defensive calculus is the argument that Plaintiffs suffered and/or can prove no damages were "caused" in any event!

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C. Defendants Fail to Show Their Fees Are Not Illicit

In an attempt to misdirect the Court and confuse the issues, Defendants incorrectly suggest that their alleged fees were not illicit, despite Defendants not having the collection agency licenses required by Nevada law. Defendants' reliance on a trio of cases from Nevada to support this argument is mistaken. *See Nevada Equities, Inc. v. Willard Pease Drilling Co.* (1968) 84 Nev. 300, 440 P.2d 122; *Robken v. May* (1968) 84 Nev. 433, 442 P.2d 913; *Martin Bloom Assocs., Inc. v. Manzie* (D. Nev. 1975) 389 F. Supp. 848.

As a preliminary matter, these cases do not address whether the fees at issue were illicit in general or with respect to third parties who received no benefit, but only whether the unlicensed persons involved could recover compensation for services rendered by them while lacking licenses required by Nevada law. *See Nevada Equities, Inc.*, *supra*; *Robken*, *supra*; *Manzie*, *supra*. Thus, whether unlicensed contractors or architects may recover from their consenting client for services rendered to them is not relevant to whether compensation for those services is otherwise illicit or with respect to third parties—such as Plaintiffs here—who have been damaged by having the fees and costs for those illicit services charged to their accounts by adding them to their debts (as occurred here).

Defendants' argument also fails to address the fact that "Nevada follows the general rule that 'contracts made in contravention of the law do not create a right of action.'" *Loomis v. Lange Fin. Corp.* (1993) 109 Nev. 1121, 1128. 865 P.2d 1161, 1165 [quoting *Vincent v. Santa Cruz* (1982) 98 Nev. 338, 241, 647 P.2d 379, 381]. Specifically discussing *Nevada Equities, Inc.*, the Nevada Supreme Court noted that it has "recognized a narrow exception" to this general rule, such as when the unlicensed person was not guilty of "serious moral turpitude" or had "substantially complied" with licensing scheme (by, for instance, obtaining a general license while lacking a more specific license for specialized services), as in *Nevada Equities, Inc.*

Id. [discussing *Nevada Equities, Inc.*, *supra*, and *Magill v. Lewis* (1958) 74 Nev. 381, 386, 333 P.2d 717, 720].

The specific facts in *Loomis* are instructive here. There, an "experienced and sophisticated corporate broker" entered into a contract for sale of real estate as a real estate broker while lacking the licensed required of real estate brokers by Nevada law.[3] *Id.* at 1129, 1165. The Nevada Supreme Court declined to apply the narrow exception established in *Magill* and *Nevada Equities, Inc.* to allow recovery of compensation for unlicensed services subsequently rendered, because the company's "actions in contravention of Nevada real estate law were blatant, substantial, and repeated"—just like Defendants repeated violations of Nevada collection agency licensing law here.[4] *Id.* In reaching this decision, the Nevada Supreme Court specifically noted that the Nevada legislature, as with collection agencies, has "enacted a comprehensive regulatory scheme" for real estate brokers "for the purpose of protecting the public in their dealings with persons in the real estate profession." *Id.* at 1127, 1164. Notably, the Nevada Supreme Court also did not rely, as in *Nevada Equities, Inc.*, *Manzie*, or *Robken*, on whether the statutory scheme specifically addressed if suit for recovery was barred by express statutory provisions. *Id.* at 1127-1129, 1164-1165. Instead, it concluded that the unlicensed real estate broker was

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[3] Comparable to the real estate licensing provisions at issue in *Loomis*, Nevada law provides that "[e]xcept as otherwise provided in this section, a person shall not conduct within this State a collection agency or engage within this State in the business of collecting claims for others, or of soliciting the right to collect or receive payment for another of any claim, or advertise, or solicit, either in print, by letter, in person or otherwise, the right to collect or receive payment for another of any claim, or seek to make collection or obtain payment of any claim on behalf of another without having first applied for and obtained a license from the Commissioner" of the FID. NRS 649.075; *see also* NRS 645.230 [stating that it is unlawful to, among other things, serve as a real estate broker "without first obtaining the appropriate license" to do so].

[4] Defendants' suggestion that there is no "equitable justification for the draconian remedy of forfeiture" of their illicit fees here is wrong for reasons reflected in both *Nevada Equities, Inc.* and *Loomis*. In the former, the Nevada Supreme Court allowed a narrow exception for recovery because, unlike Defendants here, the unlicensed party had substantially complied with Nevada's applicable regulatory licensing scheme. In contrast, in *Loomis*, the Nevada Supreme Court specifically noted that "blatant, substantial, and repeated" violations of a regulatory licensing scheme did not qualify as substantial compliance under the narrow exception reflected in *Nevada Equities, Inc. See Loomis*, *supra*, at 1129. As Plaintiffs have previously shown, Defendants' blatant, substantial, and repeated violations of Nevada's collection agency licensing laws are precisely the sort of misconduct that justifies forfeiture of their illicit fees obtained through the violations.

barred from recovering a fee for its unlawful real estate brokerage services. The Court should reach the same decision here: although it need not decide whether Defendants could recover payment from their creditor-clients for the services they unlawfully rendered without the required collection agency licenses, the Court should conclude, with respect to third parties such as Plaintiffs, those fees are indeed illicit.

In considering the merits of Defendants' argument, it must be borne in mind that this case does not involve contracts between Plaintiffs and Defendants for Defendants' unlicensed services. Thus, for instance, ours is not a situation in which the Plaintiff Sansotas met with MTC and expressly consented to receive services from MTC which would convey a benefit or substantial value to Plaintiff Sansotas or their home.[5] The Plaintiff Sansotas never met with MTC, never consented to their unlicensed services, and never obtained a benefit or substantial value from MTC. In fact, quite the opposite occurred: because of MTC's unlicensed services, the Plaintiff Sansotas suffered a detriment: they lost and perhaps prematurely lost the use of their home. There thus can be no hint of unfairness here (as in the cases relied on by Defendants here) if Defendants are required to disgorge the money they unlawfully received as payment of their illicit fees and costs.

Moreover, in terms of moral turpitude, the consumer protection statute in this case requires that Defendants knowingly conducted their business for them to be liable. The evidence will—and, in MTC's case, already does—show that Defendants were aware of circumstances strongly indicating that they were likely required to obtain a collection agency license from the FID. For example, the evidence presented in support of Plaintiffs' Motion for Partial Summary Judgment as to MTC shows that MTC considered obtaining such a license as early as 2009!

[5] Although the Plaintiff Sansotas are discussed here as an example, the same points apply to the other Plaintiffs here and the Defendants against which they have asserted claims in this lawsuit.

D. The Governing Statute Provides Equitable Relief, Remedies and Fees; Damages Are Not Required

The governing portion of NRS 41.600 is as follows:

1. An action may be brought by any person who is a victim of consumer fraud.
2. As used in this section, "consumer fraud: means:

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(e) A deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive.

3. If the claimant is the prevailing party, the court shall award the claimant:
(a) Any damages that the claimant has sustained;
(b) Any equitable relief that the court deems appropriate; and
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Accordingly, while damages can be included in the Court's award, equitable relief is also available and a distinct remedy provided by law, as well as costs and reasonable attorney's fees. Equitable relief includes, of course, an injunction prohibiting any Defendant from continuing its claim collection business in Nevada unless it maintains its collection agency license, and thus authorization from the FID. (This requires bonding and full compliance with all consumer protection regulations. *See* NAC 649.010 to 649.340.) Equally obvious is the fact that equitable relief includes a variety of possible equitable adjustments by the Court, including restitution (unjust enrichment) remedies related to illicit compensation received by Defendants, and/or the illicit profits of Defendants.

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> Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost. There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary

[7] *See, e.g., Monzo v. Eighth Judicial Dist. Court of Nev.* (2014) 331 P.3d 881; *Sanguinetti v. Strecker* (1978) 94 Nev. 200, 577 P.2d 404; *Namow Corp. v. Egger* (1983) 99 Nev. 590, 668 P.2d 265; *Wheeler Springs Plaza, LLC v. Beemon* (2003) 119 Nev. 260, 71 P.3d 1258.

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Here, Defendants expressly seek to capitalize by about $80 million dollars of profit obtained by their illegal actions interfering with the Plaintiffs' consumer rights (and occupation of their homes), and now Defendants specifically confirm that part of their defensive calculus is the argument that Plaintiffs suffered and/or can prove no damages were "caused" in any event!

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E. Evidence Shows Damage Caused and Suffered Here

1. MTC's Illicit Fees and Costs Were Added to Borrowers (e.g., Plaintiff Sansotas') Obligation, and Thus The Claim Against The Property, Which Claim Was 'Collected," Property Sold and Funds Passed By MTC To The Lender, Wells Fargo Bank

Consistent with language in the deed of trust upon which MTC relies, and as confirmed by the sworn testimony admission from MTC's Senior Vice-President and operations manager, Ms. Sherburn-Cole, the illicit fees and costs charged and received by MTC for its illegal work, including with respect to the Plaintiff Sansotas, were added to Nevada debtors' obligations and thus the claim against the debtors by MTC's principals, including Wells Fargo and other creditor-clients. (SS#7-10, 12-16, 30-31, 34-35, 43,49, 65, 67, 69-70, 73-74, 76, 77.) The facts alleged and proven are essentially the same as to each Defendant. For the Plaintiff Sansotas, the amount was just under $2,000. (SS#30.) That claim, in total, was effectively recovered to the maximum extent possible by MTC, on behalf of its client, through the acquisition and sale of the Plaintiff Sansotas' home and the collection of the cash money paid therefor, which MTC collected into its own account and then passed on to its client, Wells Fargo bank (SS#30-31, 43, 49.)

2. As an Example, Plaintiff Laghaei Also Has Damages Caused By Illicit Operations

Defendants disregard the proof Plaintiffs have presented related to the full nature and scope of their activities in the State of Nevada, both as to the putative class of Nevada debtors who were subject to unlawful collection activities and Plaintiff Laghaei more specifically. The undisputed material facts presented by Plaintiffs in support of their MTC-related Motion for Partial Summary Judgment, however, demonstrate that Plaintiff Laghaei also has suffered thousands of dollars in damages caused by MTC's misconduct.

MTC's own documents—produced by MTC in the course of discovery in this case—show that MTC negotiated a forbearance agreement with Plaintiff Laghaei in

2009 on behalf of its creditor-client. (SS#34.) In its own words—taken from these internal documents—MTC "placed borrower [i.e., Plaintiff Laghaei] in a forbearance agreement")—*i.e.*, negotiated and documented a forbearance agreement with Plaintiff Laghaei—on behalf of its client, FHLMC, relating to Plaintiff Laghaei's defaulted debt. *Id.* Pursuant to this forbearance agreement, MTC received (*i.e.*, collected) funds from Plaintiff Laghaei to reinstate his defaulted loan, which funds MTC sent to its creditor-client as payment on the loan. *Id.* MTC collected thousands of dollars from Mr. Laghaei on behalf of its creditor-client, FHLMC. *Id.* MTC also charged Plaintiff Laghaei a fee of no less than $150.00 for its services negotiating a forbearance agreement with him relating to his defaulted debt on behalf of its creditor-client, FHLMC, in 2009. (SS#35.) Insofar as MTC was not licensed by the FID at the time it directed these collection activities at Plaintiff Laghaei, MTC was not entitled to collect this money from Plaintiff Laghaei, or to charge him for its services in doing so. Plaintiff Laghaei's damages from MTC's statutory consumer fraud and deceptive trade practice would necessarily include at a minimum these amounts. Once the question of Plaintiffs' damages—rather than MTC's liability—is properly before the Court, the full amount of damages suffered by Plaintiff Laghaei are likely to be even higher.

F. Unjust Enrichment Is Applicable Here

1. Plaintiffs Did Not Enter Into A Contract With MTC

As a matter of fact, the Plaintiff Sansotas never entered into a contract with MTC. (SS#85.). The analogous Nevada authority is the decision by the Supreme Court of Nevada in *Leasepartners Corp. v. The Robert L. Brooks Trust* (1997) 113 Nev. 747, 942 P.2d 182. In Nevada, unjust enrichment occurs whenever "a person has and retains a benefit which is equity and good conscience belongs to another." *Id.* at 756, 187-188. In *Leasepartners Corp.*, many related contracts existed between and among the entities involved in the transactions at issue, but no contract existed

between Leasepartners and the Brooks Trust. *Id.* Summary Judgment was therefore reversed. *Id.* As stated here, there is no contract between Plaintiffs and the Defendant collection agencies, MTC specifically here. (SS#85.)

Under restitution, *i.e.*, unjust enrichment, the wrongdoer who obtains a benefit, gain, and/or illicit profit is required to disgorge all of that benefit, gain and/or profit to the victim if the conscious wrongdoing involved any type of fraud or undue pressure or coercion against a victim (here, we have statutory fraud in the form of a deceptive trade practice, as a matter of law, and illicit coercion against the victims by pursuing a foreclosure-styled collection process without a license, in order to intimidate the Nevada victims). *See Restatement of Restitution, Third*, § 14, at 199 [citing *Leeper v. Beltrami* (1959) 53 Cal.2d 195; *Wake Development Co. v. O'Leary* (1931) 118 Cal.App. 131; *McRae v. Pope* (1942) 311 Mass. 500; *Chandler v. Sanger* (1874) 114 Mass. 364; *Aronoff v. Levine* (1919) 190 A.D. 172; *Pape' v. Knoll* (1984) 69 Ore. App. 372]; *id.* at 202-203 [citing *Leeper*, *supra*; *Ogle v. Freeman* (1939) 150 Kan. 864; *Fairbanks v. Snow* (1887) 145 Mass. 153; *Bumgardner v. Corey* (1942) 124 W. Va. 373]; *see also generally id.* § 51.

Defendants' brief does not reference one of the cornerstones of the Law of Restitution, as reflected in Section 3 of the Restatement of Restitution, Third, which prohibits "Wrongful Gain." The first comment to Section 3 states: "The present section marks one of the cornerstones of the law of restitution and unjust enrichment. The general principle it identifies is the one underlying the 'disgorgement' remedies in restitution, whereby a claimant potentially recovers more than a provable loss so that the defendant may be stripped of a wrongful gain." *Restatement of Restitution, Third*, § 3, and cmt. a [emphasis added]. In other words, under Restitution, a knowing wrongdoer like Defendants here cannot escape full liability and the disgorgement of illicit profit simply because the cash was not taken directly out of the hand of the plaintiff victim (although here, the Plaintiffs' homes were taken and sold and the resulting cash delivered to Defendants, which forwarded the cash to their creditor-

clients and were paid fees therefor). *See Kossian v. American Nat. Ins. Co.* (1967) 254 Cal.2d 647; *Guy Tel & Tel. Co., supra.* Comment (c) to Section 3 of the Restatement of Restitution, Third, states as follows in pertinent part:

> (c) *Recovery Exceeding the Claimant's Loss*
> When the defendant has acted in conscious disregard of the claimant's rights, the whole of the resulting gain is treated as unjust enrichment, even though the defendant's gain may exceed both (i) the measurable injury to the claimant, and (ii) the reasonable value of a license authorizing the defendant's conduct. Restitution from a conscious wrongdoer may therefore yield a recovery that is profitable to the claimant plaintiff—a result that is generally not permitted when the restitution claim is against an innocent recipient."
>
> *Restatement of Restitution, Third*, § 3, and cmt. c.

Defendants' continued reliance on *Unionamerica Mortgage & Equity Trust v. McDonald* (1981) 97 Nev. 210, 626 P.2d 1272, is misplaced. The per curiam opinion in that case involved a markedly different situation from the instant case. *Id.* A consumer protection statutory scheme was not involved or consciously violated by the defendant. *Id.* Statutory fraud did not exist in that case either. *Id.* The plaintiff had had full opportunity to remove the sign at any time. *Id.* The defendant had not committed any illegal conduct and had not made any use of the sign. *Id.* The governing lease provided for the removal of the sign upon breach of the lease. *Id.* Furthermore, there was no evidence supporting a finding that there had been an assumption of the lease, and the plaintiff had been informed that the sign was of no interest to the defendant. *Id.* Under such circumstances, the plaintiff could not recover damages for unjust enrichment, since no unjust enrichment had occurred. *Id.*

2. The Deed of Trust is Irrelevant And Void As Authority To Commit Illegal Acts, So Unjust Enrichment Applies

Defendants' continued reliance on the deeds of trust as authorization for their misconduct is also misplaced. For instance, MTC was unjustly enriched by its receipt of money (almost $50 million from 2007-2012; SS#7, 67, 74) for conducting unlicensed collection agency activities, which are illegal under Nevada law. Neither the deed of trust, nor any contract between private parties, can authorize or otherwise

justify the commission of illegal acts, and the receipt of illicit compensation therefor. The issue is not simply the non-judicial foreclosure process that may be referenced in the deed of trust. MTC needed a license as a collection agency from the FID. And, the governing issue here concerns unlicensed claim collection agency activities described in the evidence, which are illegal acts under applicable Nevada law, as explained in Plaintiffs' moving papers and reply papers and herein. Defendants' argument that some provision in a deed of trust allowed them to conduct unlicensed claim collection agency activities in contravention of Nevada law cannot stand; any such provision in a deed of trust is void as a matter of public policy. *See Magill v. Lewis* (1958) 74 Nev. 381, 333 P.2d 717.

According to law, where the subject contract is unenforceable, the cause of action for unjust enrichment is valid. *Id.* 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*, *supra*, 74 Nev. 381, 333 P.2d 717; *Loomis*, *supra*, 109 Nev. 1121, 865 P.2d 1161. As a matter of strong Nevada public policy, defendants collectively cannot be allowed to enrich themselves with perhaps as much as $80 million dollars in fees for conducting illegal acts against the Plaintiffs, *i.e.*, unlicensed claim collection agency activities. *See Loomis*, *supra*, 109 Nev. 1121, 865 P.2d 1161; *see also Webb v. Clark County School Dist.* (2009) 125 Nev. 611, 218 P. 3d 1239; *Vincent v. Santa Cruz* (1982) 98 Nev. 338, 647 P. 2d 379.

II. DEFENDANTS WERE REQUIRED TO BE LICENSED AS COLLECTION AGENCIES

A. NRS Chapter 107 Does Not Authorize, Expressly or Otherwise, Defendants to Engage in the Misconduct Alleged in the TAC

1. Collection Agencies that Serve as Non-Judicial Foreclosure Trustees Must Be Licensed by the FID as Collection Agencies

In their prior briefing, including their supplemental papers filed March 28, 2017, Plaintiffs have addressed at length many of Defendants' misstatements regarding the role of non-judicial foreclosure trustees under Nevada law, and what they are authorized by the Nevada legislature to do in their capacity as trustees. To make sure that the Court is not misled by Defendnats, Plaintiffs must point out here two particular inaccuracies in Defendants' recent briefing. First, although NRS 107.028(1) lists ten categories of persons or entities that may serve as non-judicial foreclosure trustees in Nevada, NRS Chapter 107 does not purport to define the "capacity of trustee exhaustively" as Defendants suggest. Rather, as the plain language of NRS 107.028(1) makes clear, NRS Chapter 107 clearly references other provisions of Nevada law, including NRS Chapter 649, as well as, for instance, NRS 662.245 (dealing with foreign trust companies) and NRS Chapter 669 (dealing with trust companies). These references reflect the Nevada legislature's plain intention that NRS Chapter 107 is to be interpreted consistent with these other statutory provisions, and does not insulate non-judicial foreclosure trustees from compliance with whatever other provisions of Nevada law are applicable to them. The fact that the Nevada legislature listed collection agencies as one of the categories of entities that may serve as non-judicial foreclosure trustees should dispose of Defendants' assertions here, as it reflects the Nevada legislature's recognition that collection agencies under NRS Chapter 649 may serve as non-judicial foreclosure trustees. Despite Defendants' claims to the contrary, there is no indication that the Nevada legislature expected such collection agencies to be insulated from compliance with any other provision of Nevada law, including NRS Chapter 649, simply because they may serve as non-judicial foreclosure trustees.

Second, Defendants continue to mischaracterize Plaintiffs' position in this lawsuit as requiring all non-judicial foreclosure trustees to be licensed as collection agencies by the FID. As Plaintiffs previously have explained, however, that is not consistent with Plaintiffs' interpretation of NRS 649.020 and other provisions of

Nevada law, including NRS Chapter 107. Although, as Plaintiffs correctly contend, non-judicial foreclosure is claim collection under NRS Chapter 649, not all foreclosure trustees will require licenses from the FID, either because they do not serve as trustees regularly enough for them to be deemed collection agencies or because they fall into one of the categories of persons and entities that are exempt from licensure under NRS 649.020. For instance, foreclosure trustees who serve in such capacity on an irregular or occasional basis would not be required to be licensed (since they would not be "engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in the collection" of claims). *See* NRS 649.020(1). Similarly, under Plaintiffs' proper interpretation, attorneys would not need to be licensed as collection agencies (unless they are "conducting collection agencies" also). *See* NRS 649.020(2)(g) *and* NRS 107.028(1)(a).

Thus, instead of trying to address Plaintiffs' actual arguments, Defendants, as they have done repeatedly in the past, have tried to defeat a strawman argument of their own devising by distorting and exaggerating Plaintiffs' actual interpretation of NRS Chapter 107 and NRS Chapter 649.

2. Defendants Misstate the Role of Non-Judicial Foreclosure Trustees under Nevada Law

In their prior briefing, including their supplemental briefing filed on March 28, 2017, Plaintiffs have also discussed in detail the various ways in which Defendants have mischaracterized provisions of Nevada law as authorizing them to engage in the acts of claim collection that Plaintiffs' allegations, and, at least with respect to MTC, proof, show they engaged in for years in Nevada while lacking the required licenses from the FID for them to do so. Whether inadvertently or otherwise, Defendants continue to mischaracterize Nevada law with respect to non-judicial foreclosure trustees, and, specifically, what Nevada law authorizes or requires them to do as part of the non-judicial foreclosure process.

By way of example, Defendants incorrectly state that trustees begin the non-judicial foreclosure process by recording a notice of default and posting it at the borrower's property. However, the provision of Nevada law Defendants rely on, NRS 107.080(2)(c), makes clear that trustees are not in fact required to be the one that records and posts the notice of default: the beneficiary to the deed of trust, the successor in interest of the beneficiary, or the trustee may do so. Moreover, despite Defendants' assertions to the contrary, what information the notice of default must contain under Nevada law has varied over the years, including during the relevant period in this case. NRS 107.080(2)(c)(3)(I), cited by Defendants, was added to NRS Chapter 107 only in 2013, well after the period of time at issue here. Prior to 2013, the Nevada legislature did not detail—as NRS 107.080(2)(c)(3)(I) now does—what information the notice of default was required to contain. Even with respect to the current version of NRS 107.080(2)(c)(3)(I), Nevada law does not require the trustee to provide the notice of default: the beneficiary to the deed of trust or the beneficiary's successor in interest may do so.

Defendants' reliance on several of the uniform covenants contained in NRS 107.030 as giving non-judicial foreclosure trustees "broad statutory authority" is especially misguided, as those covenants are not, despite Defendants' apparent suggestions to the contrary, necessarily part of deeds of trust. Rather, as the plain language of NRS 107.030 makes clear, the covenants found in NRS 107.030 are "covenants, agreements, obligations, rights and remedies" that deeds of trust may adopt by reference. Nevada law makes clear, however, that these covenants are not mandatory, as "[n]othing in NRS 107.030 and 107.040 shall prevent the parties to any transfer in trust from entering into other, different or additional covenants or agreements than those set out in NRS 107.030." [emphasis added].

The crucial point that Defendants' often inaccurate description of trustees' powers misses, however, is that Plaintiffs do not dispute that trustees may do some of the things that Defendants contend they may do. Plaintiffs properly point out that

Defendants were required to first obtain a license from the FID to engage in such activities. Thus, for instance, it is undisputed that non-judicial foreclosure trustees may carry out non-judicial foreclosure sales, and generally are to apply the proceeds from those sales to the defaulted debts secured by the relevant deeds of trust. Plaintiffs properly contend, however, that, depending on the nature and scope of a trustee's actions, a trustee may qualify as a trustee and a collection agency (as the Nevada legislature plainly recognized in allowing collection agencies to serve as non-judicial foreclosure trustees). In such instances, the collection agency trustee must comply with its obligations under both NRS Chapters 107 and 649. Since Defendants' actions here, according to Plaintiffs' allegations and, as to MTC, proof, qualify them as collection agencies under Nevada law, Defendants were required to obtain appropriate licenses from the FID to carry out those actions in Nevada.

3. Non-Judicial Foreclosure Trustees Are Not Authorized to Do All the Acts Alleged in the TAC

Defendants now contend a "trustee" can perform any and all unlicensed collection agency actions, other than criminal misconduct, because such is "implied" from NRS 107. Plaintiffs contend there is almost ZERO chance the Nevada Supreme Court would concur. Judge Scann disagreed with Defendants, as reflected in the transcript by her reliance on Paragraph 23 of the Second Amended Complaint.

Defendants' suggestion that non-judicial foreclosure trustees have additional, implied powers beyond those expressly given by NRS 107 is also irrelevant here, as Defendants fail to identify what specific implied powers, if any, they contend non-judicial trustees have that would be relevant to the Court's decision. Notably, the two implied powers described in the decisions from Michigan and Iowa that Defendants cite—specifically, the power to bid the property at the sale and the power to purchase the property at the sale—are, as Defendants concede elsewhere in their brief, powers that the Nevada legislature has specifically barred non-judicial foreclosure trustees

from having. *Compare Kriv v. Northwestern Sec. Co.* (1946) 237 Iowa 1189, 24 N.W. 2d 751 *and Union Guardian Trust Co. v. Building Sec. Corp.* (1937) 280 Mich. 717, 276 N.W. 697, *with* NRS 107.081(1).[8] Pursuant to NRS 107.081(1), the trustee or its agent holding the non-judicial foreclosure sale "must not become a purchaser at the sale or be interested in any purchase at such a sale." [emphasis added].

Defendants have finally been flushed out, and away from their 5 years of false denials in this case: that they did nothing but file a notice of default and/or notice of sale. Now they say they can collect money—about 3-4 million dollars!—and engage in all collection agency activities alleged in the Third Amended Complaint (and shown by the evidence gathered in discovery so far) because it is "IMPLIED" in NRS 107 that they may do so.

The word "implied" appears at least three times on page 10 of Defendants' brief. This is a critical admission by Defendants that aids the Court's analysis. Defendants have admitted that nothing in NRS 107 expressly allows them to perform all of the alleged collection operations without a license under NRS 649. Defendants thus also admit that neither NRS 107 nor NRS 649 expressly exempts them from the license requirement for the numerous and various acts alleged. Defendants also admit that they have no answer for the fact that NRS 649.020(2) does not name and exclude foreclosure "trustees" from the license requirement, as it does lawyers and banks.

As shown above and in Plaintiffs' prior briefing on this issue, Defendants "cherry-pick" and tweak and twist limited allegations of the claim collection acts

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[8] *Kriv* does not assist Defendants here for a second reason: it deals with powers of trustees in judicial foreclosure proceedings, which in Nevada at least are governed by different procedures than those applicable to non-judicial foreclosures. *See generally* NRS Chapter 40. In *Kriv*, the Iowa Supreme Court noted that the "court may authorize the trustee upon foreclosure to bid in the property" at the judicial foreclosure sale. *Kriv*, *supra*, at 1196 [emphasis added]. It thus offers little guidance as to what implied powers non-judicial foreclosure trustees may have. (For instance, because judicial foreclosures are subject to court supervision, concerns about trustees bidding at sales may be significantly less than bids at non-judicial foreclosure sales, which are not subject to such supervision. This is likely one reason why the Nevada legislature has expressly barred non-judicial foreclosure trustees from bidding at sales they conduct. NRS 107.081(1). *Union Guardian Trust Co.* also deals with judicial foreclosure proceedings, and thus is of little guidance here. *Union Guardian Trust Co.*, *supra*. The language Defendants rely on, moreover, is found in a concurring opinion in the case. *Id.* at 703. [concurring opinion by J. Potter].

alleged in the Third Amended Complaint, while ignoring other key allegations **AND ALL THE EVIDENCE SUBMITTED IN THE RECORD**. The Nevada Supreme Court will not do that. As but one example, Defendants ignore all the written and sworn admissions by Defendants saying and showing: "WE ARE DEBT COLLECTORS AND SEEKING TO COLLECT A DEBT AND WILL USE ALL INFORMATION FOR THAT PURPOSE," or words to that effect. Judge Scann openly expressed her belief that this alone created a fact issue precluding even summary judgment, and many appellate courts agree.

Such admissions are undoubtedly evidence that must be taken into account in determining whether, under the circumstances, an entity is a debt collector under the FDCPA (or collection agencies under Nevada law). *See, e.g.*, *Gburek v. Litton Loan Servicing LP* (7th Cir. 2010) 614 F.3d 380, 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]; *Hart v. FCI Lender Servs.* (2d Cir. 2015) 797 F.3d 219, 226-227 [considering importance of including such language in a letter to a debtor and noting that "[w]e see no reason why we should not take it [i.e., a letter using such language] at its word"]; *McLaughlin v. Phelan Hallinan & Schmieg, LLP* (3d Cir. 2014) 756 F.3d 240, 246 ["It is reasonable to infer that an entity that identifies itself as a debt collector, lays out the amount of the debt, and explains how to obtain current payoff quotes has engaged in a communication related to collecting a debt."][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 in rejecting argument that use of 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.* Use of such language is thus not dispositive standing alone, but it is not, as Defendants have suggested in the past, immaterial either. It is simply evidence that should be considered in determining whether the user of the language qualifies as a debt collector under the FDCPA.

As a second example, Defendants complain that Plaintiffs' allegations regarding their negotiating and soliciting loan forbearance agreements or loan modification agreements are unclear. The Third Amended Complaint, however, makes clear that Defendants engaged in "claim collection through soliciting a forbearance agreement for the defaulted debts" and "through soliciting loan modification agreements with respect to the defaulted claims." Third Amended Complaint, ¶ 34. Paragraph 30 of the Third Amended Complaint, cited by Defendants, is to similar effect. Specifically as to Plaintiff Laghaei, Plaintiffs allege in the Third Amended Complaint that, in negotiating a loan forbearance agreement, with MTC's creditor-client, Plaintiff Laghaei "communicated with the lender's collection agent, MTC," and "was told by MTC representatives that a loan modification would be worked out for his loan" (as, in fact, occurred, as evidenced by the exhibits attached to the Third Amended Complaint). Third Amended

Complaint, ¶ 16. Moreover, Plaintiffs' proof in support of their Motion for Partial Summary Judgment against MTC establishes that MTC in fact negotiated a forbearance agreement with Plaintiff Laghaei in 2009 on behalf of MTC's creditor-client relating to Plaintiff Laghaei's defaulted debt, and received (*i.e.*, collected) funds from him to reinstate his defaulted loan, which funds MTC sent to its creditor-client as payment on the loan, and that MTC charged Plaintiff Laghaei a fee for its services in negotiating this agreement. SS#34-35. Defendants thus are being fundamentally disingenuous in claiming that it is unclear what misconduct Plaintiffs complain MTC engaged in with respect to Plaintiff Laghaei and forbearance agreements!

Such conduct by non-judicial foreclosure trustees is not authorized by NRS Chapter 107, as negotiating, documenting, and executing such agreements goes well beyond a trustee's authority to "provide information relating to the foreclosure status of the property" under NRS 107.087. Indeed, as explained in Plaintiffs' prior briefing, such conduct is in fact barred by NRS Chapter 107, because trustees engaging in such misconduct necessarily and improperly violate their duty of impartiality under NRS 107.028 to deed of trust borrowers by acting adversely toward them on behalf of their creditor-clients.

Defendants' complaint in their briefing that Plaintiffs' Third Amended Complaint does not allege violations of NRS Chapter 107 is especially remarkable here, as Defendants themselves have put their compliance with NRS Chapter 107 squarely at issue. In contending that NRS Chapter 107 authorized their misconduct and that they did nothing beyond what is allowed or required by NRS Chapter 107, Defendants have necessarily put at issue whether they violated NRS Chapter 107 during the relevant period. As shown in Plaintiffs' prior briefing and herein, Plaintiffs' allegations and proof demonstrate that Defendants violated their duties under NRS Chapter 107 in a number of ways, such that their reliance on it to insulate them from liability is misplaced.

B. NRS Chapter 649 Does Not Exclude Trustees or Non-Judicial Foreclosure from Its Scope

1. The Nevada Legislature Did Not Intend to Exclude Trustees from the Definition of "Collection Agency" under Nevada Law

In what can only be described as a fundamental misinterpretation (or misstatement) of Nevada law, Defendants incorrectly assert that the Nevada legislature intended to exclude non-judicial foreclosure trustees from the definition of "collection agency" found in NRS 649.020(1). The plain language and structure of NRS 649.020, however, reveal Defendants are simply wrong.

NRS 649.020(1) provides for a broad definition of "collection agency" under Nevada law.[9] NRS 649.020(2) then provides for several narrow exceptions to this broad definition; crucially, however, NRS 649.020(2) specifically provides that those listed as exceptions are nonetheless collection agencies under Nevada law "they are conducting collection agencies." Thus, pursuant to NRS 649.020(2), banks, abstract companies doing an escrow business, or lawyers "licensed to practice in" Nevada ("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 collection agencies unless they are conducting collection agencies. NRS 649.020(2).

In 2005, the Nevada legislature revised NRS 649.020 by, as pertinent here, adding new language regarding community managers, which, depending on the nature of their activities, may or may not be collection agencies as defined by NRS 649.020. (The revised language is reflected in NRS 649.020(2)(d), (3), and (4).) Specifically, a community manager is a collection agency under NRS 649.020 if,

[9] Specifically, NRS 649.020(1) states that "'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."

"while engaged in the management of a common-interest community . . . the community manager, or any employee, agent or affiliate of the community manager, performs or offers to perform any act associated with the foreclosure of a lien pursuant to NRS 116.31162 to 116.31168, inclusive." NRS 649.020(3)(a). "Collection agency" does not include "any other community manager while engaged in the management of a common-interest community."

Despite Defendants' incorrect assertion to the contrary, the 2005 revisions to NRS 649.020 do not reflect the Nevada legislature's intention to make only non-judicial foreclosures of liens deemed claim collection under Nevada law. In fact, the revisions reflect precisely the opposite intention: first, the 2005 revisions make clear that community managers who perform or offer to perform acts associated with the foreclosure of liens are subject to regulation by the FID as collection agencies, while community managers who do not do so are exempt from regulation. The revisions thus reflect the Nevada legislature's intention to carve out a narrow exception to the broad collection agency definition found in NRS 649.020(1) for those community managers who are not involved in non-judicial foreclosures of liens, while deeming community managers involved in such foreclosures to be collection agencies that require collection agency licenses from the FID.

Although the plain language of NRS 649.020 reveals the error in Defendants' argument, the legislative history of the 2005 revisions further demonstrates that the Nevada legislature understands non-judicial foreclosures—not only of liens but pursuant to deeds of trust—to be collection agency activity requiring licensure from the FID. *See Minutes of the Subcommittee of the Senate Committee on Commerce and Labor, 73rd Session, April 12, 2005*, p. 3 [stating "if 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 services that are out there."][ellipsis in original, emphasis added]; *id.* at p.

4 [stating "if you are a management company or . . . community manager who is going to be collecting . . . , then you are going to be governed under NRS 649, which governs other foreclosure services and you are no longer exempted from being a collection agency. You are now a collection agency."][emphasis added, ellipses in original]. Defendants' interpretation of NRS 649.020 would thus lead to the anomalous and perverse result that community managers who conduct non-judicial foreclosures of liens would be subject to FID regulation as collection agencies, while others who conduct non-judicial foreclosures—for instance, as here, pursuant to deeds of trust—would not be exempt from such regulation even if they otherwise qualified as collection agencies under NRS 649.020(1). This surely is not what the Nevada legislature intended. Rather, the revisions of NRS 649.020 in 2005 reflect the Nevada legislature's recognition that non-judicial foreclosure—whether of liens or pursuant to deeds of trust—is claim collection activity.

2. Non-Judicial Foreclosure Is Collection of a Claim

In their prior briefing, including their supplemental papers filed March 28, 2017, Plaintiffs have addressed at length the arguments and authorities showing that non-judicial foreclosure is, as Plaintiffs correctly contend, collection of a claim under Nevada law. To ease the burden on the Court, Plaintiffs hereby incorporate by this reference those prior arguments and authorities herein.

C. Concurrent Regulation Is Proper, Feasible, and Necessary

1. The Legislature Has Not Preempted FID Regulation of Collection Agency Trustees

In their March 28, 2017, supplemental brief, Plaintiffs explain at length the reasons why it would be absurd to conclude that NRS Chapter 107 was intended by the Nevada legislature to occupy the entire field of regulation of non-judicial foreclosure trustees. In Nevada, to determine whether the Nevada legislature intended

to occupy an entire field, the courts "must look to the 'whole purpose and scope of the legislative scheme'" in question. *Kuban v. McGimsey* (1980) 96 Nev. 105, 110-111, 605 P.2d 623, 626 [quoting *Lamb v. Mirin* (1974) 90 Nev. 329, 332-33, 526 P.2d 80, 82]. For pre-emption to apply, there must be "clear and unquestionable indication from legislative acts" that "legislation was intended [by the legislature] to occupy the entire field." *Id.* [internal quotation marks omitted]; *see also Flick Theater v. Las Vegas* (1988) 104 Nev. 87, 89-90, 752 P.2d 235, 237. There must also be an actual conflict between Nevada statutes and the regulations, ordinances, or rules at issue. *See Flick Theater*, *supra*, at 89, 237 ["The city did not exceed the legislative authority granted under NRS 278.0222 because the ordinances in question are not in conflict with the state statute" and noting that the statutes at issue did not "constitute a comprehensive statutory scheme . . . and do not indicate any attempt by the state to occupy the field"]. As in *Flick Theater*, there is not only insufficient evidence of intention by the Nevada legislature to occupy the entire field, but actually evidence—as explained in Plaintiffs' March 28, 2017 briefing and below—that the Nevada legislature vested in the FID the authority to regulate those trustees who qualify as collection agencies (just as it vest in other authorities the power to regulate those trustees who qualify as attorneys, trust companies, and so forth). Defendants' repeated assertions that NRS 107 is a comprehensive legislative scheme do not make it true.

a. The Legislature Has Not Occupied the Entire Field of Regulation Here

NRS Chapter 107 does not occupy the entire field of regulation because the Nevada legislature clearly and expressly intended a collection agency that conducts non-judicial foreclosures to satisfy the requirements of both NRS Chapter 107 and

NRS Chapter 649. NRS 107.028(1)[10] provides a list of persons/entities that are qualified to serve as a trustee under a deed of trust. Among those who are qualified to be a trustee is "a person who engages in the business of a collection agency pursuant to chapter 649 of NRS". NRS 107.028(1)(i). By permitting a licensed collection agency under NRS Chapter 649 to be a trustee and to conduct non-judicial foreclosures, the Nevada legislature reflected its intent to require a collection agency to be subject to both NRS Chapter 649 and NRS Chapter 107. In fact, nowhere in NRS Chapter 107 did the Nevada legislature indicate that a collection agency serving as a trustee under a deed of trust is only required to comply with the requirements of NRS Chapter 107. Furthermore, NRS Chapter 107 does not prohibit the application of the other provisions of the NRS, including NRS Chapter 649, to deeds of trust and/or the enforcement of deeds of trust.

Thus, the enactment of NRS 107.028, which expressly permits a collection agency licensed pursuant to NRS Chapter 649 to be a trustee, rebuts Defendants' contention. When the Nevada legislature enacted NRS 107.028, the license requirement under NRS 649.075 was already in existence.[11] The Nevada legislature is, therefore, presumed to have knowledge of existing NRS 649.075 when it enacted NRS 107.028. *See International Game Technology, Inc. v. The Second Judicial District Court of The State of Nevada* (2006) 122 Nev. 132, 154. Had the Nevada legislature recognized and held concerns about conflicts in regulating trustees under NRS Chapter 107 due to the application of NRS Chapter 649, it would not have included a collection agency in the list of persons who are qualified to be a trustee. *See* NRS 107.028. It would have expressly excluded them (or would have expressly indicated its intent, by clear and unquestionable evidence, that NRS Chapter 649 was not to apply to such trustees). NRS Chapter 107 is clearly not intended to occupy the

[10] NRS 107.028 became effective on October 1, 2011. State Assemb. 273, 2011 Leg., 76th Sess. (Nev. 2011).

[11] The most recent version of NRS 649.075 was approved on June 13, 2007, and became effective on January 1, 2008— approximately three years prior to the enactment of NRS 107.028. *See* State Assemb. 127, 2007 Leg., 74th Sess. (Nev. 2007).

entire field of regulation. Beyond any doubt, the Nevada legislature knows how to exempt specific entities from statutory mandates, controls, and prohibitions (as is evidenced by the specific licensure exemptions found in NRS 649.020(2)). Defendants cannot argue that a "trustee" is expressly exempted under the statutory dictates of NRS 649 or NRS 107 from being licensed as a collection agency, because no such express exemption is found in either NRS 649 or NRS 107 for collection agencies.

Moreover, the enactment of NRS 107.028 shows the prior intent of the Nevada legislature that such businesses engaged in the foreclosure process must be licensed and regulated under NRS 649 *et seq. Public Employees Benefits Program v. Las Vegas Metropolitan Police Department* (2008) 124 Nev. 138; *Goldman v. Standard Insurance Co.* (9th Cir. 2003) 341 F.3d. 1023.

Furthermore, even the 2009-2010 version of NRS Chapter 107 renders Defendants' contention inapplicable. The 2009-2010 version of NRS Chapter 107 provided a set of procedures a trustee must follow to conduct a proper non-judicial foreclosure, preventing only abusive foreclosure process. It neither regulates who may be qualified to engage in foreclosure activities and who engages in such activities, nor indicates what other regulations the State of Nevada wants to impose on those who do engage in such activities. Thus, the prior version left the field open to regulation, including by the FID, to the extent those regulations were not inconsistent with provisions of NRS Chapter 107.

The Nevada debt collection statutes offer a much more rigorous regulatory scheme than simply preventing abusive debt collection activities. NRS Chapter 649 determines and regulates those who engage in collection activities. *See* NRS 649.020 [defining "Collection Agency"]; NRS 649.171 [requiring a person who is not licensed as a collection agency in the state to obtain a certificate of registration as a

foreign collection agency]; Nevada Administrative Code[12] ("NAC") 649.013; NAC 649.105 [requiring a person who is not required to obtain a license to obtain an exemption from the Commissioner prior to engaging in collection activities]. The statutes go further to determine and regulate who may be qualified to engage in such activities. *See* NRS 649.075 ["[A] person shall not conduct within this State a collection agency or engage . . . in the business of collecting claims for others . . . ."]; NRS 649.085 [providing the qualifications an applicant must satisfy in order to obtain a license]. Furthermore, the Nevada debt collection statutes impose additional requirements on collection agencies. NRS 649.095 requires a certain manner in which an application for a license must be made and the contents of which a person seeking license must provide. NRS 649.295 requires a collection agency to pay certain fees corresponding to each category. It also requires a particular manner in which a collection agency must conduct its business. *See, e.g.*, NRS 649.315 [requiring a collection agency to display its license and certificate]; NRS 649.332 [providing the requirements to satisfy in order to verify debt]; NRS 649.375 [determining prohibited practices of a collection agency]; NAC 649.250 [providing prerequisites to conducting debt collection business].

b. Defendants' Cases Do Not Assist Them Here

The handful of cases cited by Defendants regarding this subject are distinguishable in at least two crucial respects: (1) they generally deal with statutory schemes that the Nevada Supreme Court concludes are comprehensive, and (2) they generally deal with clear conflicts between those schemes and regulations or ordinances. *City of Reno v. Sabini* (1967) 83 Nev. 315, 319, 429 P.2d 559, 561, cited by Defendants, does not assist them here, as it only recognizes that the Nevada legislature may choose to preempt an entire field of regulation. In *Reno*, however, the

[12] Pursuant to NRS 649.053, the Nevada legislature has vested the Commissioner of the FID with the power to adopt necessary regulations to carry out the provisions of NRS Chapter 649.

Nevada Supreme Court concluded that the legislature had delegated part of the power at issue (specifically, regulation of public employment) to political subdivisions of the state (*e.g.*, municipalities). *Id.* In *Reno*, the Nevada Supreme Court concluded that Reno's delegation in turn of this power delegated to it by the Nevada legislature was unlawful insofar as Reno failed to provide its delegate (the city manager) with standards and criteria to guide him in the performance of his delegated ministerial duties. *Id. Falcke v. Douglas County* (2000) 116 Nev. 583, 588, 3 P.3d 661, 664, also cited by Defendants, merely stands for the proposition that a county ordinance is subordinate to a statute if the two conflict. As explained below, however, Defendants have failed to show that there is any actual conflict between NRS Chapter 107 and regulation by the FID of collection agencies acting as non-judicial foreclosure trustees.

The two remaining cases relied on by Defendants also do not apply here because in both cases the Nevada Supreme Court concluded that the Nevada legislature had intended to adopt comprehensive schemes for the regulation of particular subjects and that those schemes were in direct conflict with the local regulations on the same subjects at issue in these cases. *See Lamb v. Mirin* (1974) 90 Nev. 329, 526 P.2d 80; *Crowley v. Duffrin* (1993) 109 Nev. 597, 855 P.2d 536. Here, however, as explained above, NRS Chapter 107 does not reflect a comprehensive scheme adopted by the Nevada legislature to occupy the entire field relating to non-judicial foreclosure, but in fact expressly provides for concurrent regulation of non-judicial foreclosure trustees by appropriate entities, including the FID and the State Bar of Nevada. Moreover, as explained below, Defendants fail to show that there is an actual conflict between NRS Chapter 107 and regulation by the FID of collection agencies acting as non-judicial foreclosure trustees.[13]

[13] If such a conflict were found to exist with regard to particular regulations by the FID, the appropriate course would be for Defendants to challenge those regulations on the ground that they were in conflict with Nevada statutes, rather than seek to challenge regulation by the FID in general. *See, e.g.*, *Lamb*, *supra* [particular ordinance in clear conflict with a state statute deemed pre-empted].

c. Defendants' Interpretation Would Lead to Absurd and Perverse Results

Defendants' flawed contention that NRS Chapter 107 occupies the entire field of regulation must be rejected because it would lead to absurd and perverse results. According to Defendants, because NRS Chapter 107 provides procedures a trustee must follow to conduct non-judicial foreclosures, it most necessarily occupy the entire field of regulation, even to the extent of insulating Defendants from compliance with other, applicable provisions of Nevada law (such as NRS Chapter 649). This misinterpretation would lead to absurd results. For instance, by law, an "attorney licensed to practice law" in Nevada may act as a trustee under a deed of trust and conduct a non-judicial foreclosure sale. *See* NRS 107.028(1)(a) [permitting an attorney to be a trustee]. In his or her capacity as an attorney, such a person must comply with the regulations for attorneys established by the Nevada Supreme Court. *See, e.g.*, Nev. Sup. Ct. R. 210 [requiring attorneys to meet the annual minimum continuing legal education requirements]; *id.* 54 [requiring to pay certain fees to practice as an attorney and counselor at law]. However, by Defendants' logic, any such rules and regulations that govern attorneys (*i.e.*, CLE requirements, fees, etc.) would be rendered void and/or inapplicable simply because the attorney is a substitute trustee under a deed of trust and performs the duties of a trustee in non-judicial foreclosures. It makes no sense, and surely is not what the Nevada legislature intended by allowing licensed Nevada attorneys to serve as non-judicial foreclosure trustees in Nevada.

Similarly, if, according to Defendants' logic, NRS Chapter 107 exhaustively delineates the rights and liabilities of non-judicial foreclosure trustees in Nevada, those guilty of grave breaches of Nevada law would, perversely, be insulated from civil and criminal liability simply because they committed those breaches ostensibly in their capacity as non-judicial foreclosure trustees. By way of example, an attorney serving as a non-judicial foreclosure trustee who willfully misappropriated or

embezzled the proceeds of a non-judicial foreclosure sale they conducted would be clearly subject to the civil sanctions provided for in NRS Chapter 107. By Defendants' logic, however, that same attorney could not be subject to any additional sanctions—whether civil or criminal—by, for instance, the appropriate law enforcement authorities or State Bar of Nevada, because the Nevada legislature would have preempted the field. Are Defendants seriously suggesting that such an attorney could not be disbarred by the State Bar of Nevada simply because the attorney was acting as a non-judicial foreclosure trustee or that a bank that engaged in similar misconduct could not be criminally prosecuted for doing so? To state the issue in this way is to realize the fundamental flaw of Defendants' argument and the perverse consequences that would flow from it were the Court to adopt it.

d. Defendants Fail to Show Any Actual Conflict Here Such that Pre-emption Might Apply

Second, Defendants fail to show that there is an actual—or even likely—conflict here between NRS Chapter 107 and any other statute, ordinance, or regulation, such that pre-emption could apply. The conflicts described by Defendants on p. 19 of their brief, are imagined, not real. For instance, publishing or posting information about a non-judicial foreclosure sale is not the same thing—at all—as publishing a list of debtors (forbidden by NRS Chapter 649). Similarly, restrictions on collection agencies' power to assess interest and fees are not actually in conflict with NRS Chapter 107, as the latter leaves it to the parties to the deed of trust to fix by contract the terms as to payment of fees and costs, consistent with other provisions of Nevada law. *See* NRS 107.030 and 107.040 and 107.050. Defendants effectively concede as much by apparently recognizing that NRS Chapter 107 is silent as to such matters. That the Nevada legislature has declined to regulate such matters through NRS Chapter 107, while addressing them through other provisions of Nevada—such as NRS 649—or delegating its power to others—such as the Commissioner of the

FID—is perfectly consistent with the Nevada legislature's approach to legislation generally. *See, e.g.*, *Flick Theater*, *supra*, 104 Nev. at 90, 752 P.2d at 237 ["The state has delegated to the city express authority to regulate the location of sexually oriented businesses. . . . the intent of the state, as clearly manifested in the above statutes, is to vest in local government the authority to regulate such matters as they see fit."]; *see also Reno*, *supra*, 83 Nev. at 319, 429 P.2d at 561 [recognizing that state may "delegate part of that power [over regulation of public employment] to political subdivisions of the state through the general law"].

The purported conflict between what Defendants contend is trustees' immunity from liability when they rely on in good faith on information received from a beneficiary and debt collectors' reliance on information received from creditors is similarly manufactured by Defendants to create a conflict where none in fact exists. As a preliminary matter, the federal trial court order relied on by Defendants deals exclusively with liability under the FDCPA, and not Nevada's collection agency statutes at issue here. *See Kerwin v. Remittance Assistance Corp.* (D. Nev. 2008) 559 F. Supp. 2d 1117, 1125-1126. Moreover, in that matter, the federal district court specifically noted that, under the FDCPA, "if a debt collector reasonably relies on the debt reported by the creditor, the debt collector will not be liable for any errors." *Id.* [internal quotation marks omitted; emphasis added][quoting *Clark v. Capital Credit & Collection Servs.* (9th Cir. 2006) 460 F.3d 1162, 1177. The federal trial court went on to note that whether reliance on a creditor's information is reasonable "depends on whether the creditor has provided accurate information in the past." *Id.* Thus, Defendants' purported conflict between reasonable reliance on information provided by a creditor and good faith reliance on information provided by a beneficiary is imagined, rather than real. After all, whether a non-judicial foreclosure trustee can be deemed to have relied in good faith on information provided by a creditor-client beneficiary would also seem to depend at least in part on whether the particular beneficiary had provided accurate information in the past!

Defendants' contention that trustees do not have the same obligation as collection agencies to respond to debtor disputes concerning the debt and to verify the debt also seemingly conflicts with Defendants' own contentions in their brief. For instance, Defendants themselves claim that trustees must be authorized to provide information relating to the foreclosure status of the property. *See* Defendants' Brief, at p. 8 [citing NRS 107.080(2)(c)(3)(VI) and NRS 107.087(1)(b)(2)]. Defendants also contend that trustees have authority to provide borrowers with written statements containing, among other information, the amount of money required to correct deficiencies and reinstate the defaulted debt, the principal amount of the debt secured by the deed of trust, and a good faith estimate of fees imposed in connection with the non-judicial foreclosure. *See id.* at pp. 8-9. Moreover, it is fundamental, as Defendants concede, that non-judicial foreclosure trustees in Nevada must "act impartially and in good faith with respect to the deed of trust and shall act in accordance with the laws" of Nevada. NRS 107.028(6). Defendant QLS has suggested that this duty requires non-judicial foreclosure trustees in Nevada to, among other things, monitor the reinstatement process before carrying out a non-judicial foreclosure and must also make sure that the security interest being foreclosed on has not been wiped out by foreclosure of a senior lien on the property. Although Plaintiffs, for reasons explained in their prior briefing and herein, disagree with Defendants in their interpretation of NRS Chapter 107 and foreclosure trustees' duties under it, Plaintiffs must point out that, according to Defendants' own broad reading of NRS Chapter 107, non-judicial foreclosure trustees would indeed seemingly have a duty to respond to debtor disputes regarding the debt and verify the debt in order to make sure that they could carry out a non-judicial foreclosure on the debt in good faith.

///

e. Defendants' "Concurrent Regulation" Argument Is False Theory and Conjecture, and Inconsistent with the Statutes and Common Sense

In response to this lawsuit filed in 2011, in a matter of months, after many years of collecting illicit millions of profits, QLS and MTC obtained their collection agency licenses from the FID—even though all their sworn testimony proves there was no change in their business activities in Nevada.

The world has not crumbled for QLS and MTC, now that they are "regulated" under NRS 649 and under the supervision of the FID. The confusion, disruption and hysteria argued by Defendants have not occurred.

Apparently now admitting, for example, that they collected millions from Nevada debtors on defaulted loans, and funneled the money to their collection clients, Defendants again argue that NRS 107 provides sufficient rules and penalties for all their conduct and actions, so NRS 649 must not apply. That contention borders on the absurd. Nothing in NRS 107 speaks to any of the traditional or historically abusive collection practices commonly known and regulated by the federal government and state governments. Nothing in NRS 107 prohibits, addresses or provides a remedy for abusive collection phone calls in the middle of the night. Nothing in NRS 107 expressly prohibits improper collection threats, such as threatening to take a legal action, such as repossession of the home, while not possessing the right to do so at the time the threat is made. Nothing in NRS 107 requires the trustee to disclose in writing that it is a debt collector, that all information will be used to collect on the debt, and that the debtor may dispute the specific amount claimed to be in default. Unlike the regulations issued by the FID pursuant to NRS 649, nothing in NRS 107 incorporates the prohibitions, rights and remedies of the FDCPA. In terms of the Nevada Deceptive Trade Practices Act unlike with respect to NRS 649, nothing in NRS 598.0923(1) incorporates and remedies as a deceptive trade practice a violation of NRS 107. Defendants greatly

stretch and distort NRS 107. For example, contrary to Defendants express contention, NRS 107.028(3) does not prohibit various deceptive trade practices. That section disallows only one very narrow and specific type of transgression, that being a trustee lending its name to or conspiring with another person not listed in subsection 1. Reading and comparing the entirety of NRS 107 with the numerous and various claim collection activities alleged and proven against the Defendants here, the Nevada Supreme Court will surely (and rather easily) reach the conclusion that these Defendants are not "protected" by an implied exemption from NRS 649 that is somehow derived from the text of NRS 107.

III. CONCLUSION

The motions to dismiss by all Defendants must be denied.

DATED: April 11, 2017

LAW OFFICE OF NICHOLAS A. BOYLAN, APC

By: /s/ Nicholas A. Boylan
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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 April 11, 2017, I served a true and correct copy of the foregoing:

- **PLAINTIFFS' REPLY TO DEFENDANTS CALIFORNIA RECONVEYANCE COMPANY'S REQUEST TO DISMISS THE THIRD AMENDED COMPLAINT (AND JOINDERS)**

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 California resident; ANA MARTINEZ, a California 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,

v.

CASE NO: A-11-649857-C

Dept. 19

PLAINTIFFS' OPPOSITION TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Jury Trial Demanded

Hearing Date: May 9, 2017

Hearing Time: 9:00 a.m.

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.

TABLE OF CONTENTS	PAGES
I. INTRODUCTION	1
II. ARGUMENT	1
A. The Existing Evidence, with All Inferences Favorable to Plaintiffs, Demonstrates CRC's Liability, the Probable Fruits of Additional Discovery, and the Requirement that CRC's Motion Must Be Denied Based on the Existing Evidence, Now	1
B. CRC's Motion for Summary Judgment Is Premature and Untimely	4
1. CRC's Motion Is Defective and Cannot Be Granted Because, Pursuant to the Discovery Commissioner's Recommendations, the Court Has Severely Limited Plaintiffs' Discovery to the Phase One "Issue"—Whether, as a General Matter, Defendants Conducted Business Activities in Nevada that Constituted "Unlicensed" Claim Collection, under NRS 649.020(1), and the Court, and the Court Restricted Discovery to the Named Plaintiffs Only	4
2. CRC's Motion Violates the Court's Scheduling Order and the Instructions (and Promises) of the Discovery Commissioner Here	7
3. CRC's Motion Was Improper Given the Court's Instructions at the March 14, 2017 Hearing; The Court and Plaintiffs Cannot Be Sandbagged	13
C. Plaintiffs Have Been Denied Adequate Opportunity to Conduct Discovery and Obtain the Proof Necessary to Fully Destroy CRC's Motion	14
1. Plaintiffs Have Been Diligent in Conducting Discovery regarding CRC, and Plaintiffs Have Met Their Burden of Showing How Further Discovery Would Lead to the Creation of a Genuine Issue of Material Fact	14
2. It Would Be an Abuse of Discretion for the Court to Deny Plaintiffs' NRCP 56(f) Request Here	15

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Introduction

Plaintiffs' recent supplemental brief, entitled Plaintiffs' "Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss the Third Amended Complaint ("Opposition")," is an opposition to a motion to dismiss in name only.[1] Asked by this Court to present his five best supporting cases, Plaintiffs' counsel instead used the opportunity to present 48 pages of factual material, misdirection, and conclusory advocacy without the benefit of supporting law. To put it simply, the Opposition changes nothing—Plaintiffs' claims are not legally viable and should be rejected as a matter of law.

Plaintiffs' Third Amended Complaint (3/15/17) ("TAC") rests upon two fundamental premises, each of which is necessary to sustain Plaintiffs' claims, and both of which are fatally and irremediably defective as a matter of law. The first is the proposition that a trustee under a deed of trust, duly appointed and compliant with all requirements of the trust deed regulatory system under NRS Chapter 107, *also* must possess a collection agency license from the Commissioner of the Financial Institutions Division ("FID"), under NRS Chapter 649, in order to act in the capacity of trustee. The second is that, if a person acts in the capacity of trustee under a deed of trust without possessing a collection agency license, any fees that he receives for services actually rendered are "illicit" and constitute damages to the plaintiffs that must be disgorged. Both of these propositions are wrong as a matter of law in ways that no further pleading or discovery, either taken to date or to be had in the future, can cure. Because the TAC is unsustainable at its core, it cannot stand and should be dismissed.

Argument

I. THE ALLEGED MISCONDUCT HAS NOT INJURED ANY PLAINTIFF.

Plaintiffs' premise is that if Defendants pursued unlicensed claim collection (they did not), then the fees Defendants allegedly received for that service are "illicit" and must be disgorged.[2]

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[1] No motion to dismiss the Third Amended Complaint has been filed.

[2] *See* TAC, ¶¶ 27, 29 (Defendants allegedly "received illicit fees and costs"); *id.*, ¶ 36(d) (defendants allegedly received "illegal gains from pursuing illegal debt and/or claim collection agency activities against Plaintiffs"); *id.*, ¶ 42 (defendants "received illicit revenue and/or profits"); *id.*, ¶ 52 ("each Defendant was unjustly enriched by virtue of the fact that it received a

This premise is not supported under Nevada law. Nevada law is clear: compensation received by an unlicensed service provider is *not* "illicit" unless the licensing statute so provides—and Chapter 649 does not. Thus, Plaintiffs cannot state any claim for damages or disgorgement of any fees. While this is sufficient, standing alone, to dispose of the entire TAC, Plaintiffs' claims also fail for want of any conceivable theory of causation, and because Defendants' right to receive fees is protected by statute and the deed of trust. Thus, regardless of whether Defendants were required to possess a collection agency license to act as trustees (they were not), each claim in the TAC is fatally and irremediably deficient because no injury conceivably exists under the alleged facts.

A. Defendants' Alleged Fees Are Not Illicit.

Plaintiffs' only theory of injury is that Defendants received fees that are "illicit" because Defendants were not licensed as collection agencies. This argument fails because, under Nevada law, an unlicensed person may lawfully receive compensation for services rendered unless the licensing statute provides otherwise:

> A comparable provision [barring compensation] does not appear in Chapter 534 relating to water well drillers. The penalty therein provided is fine, imprisonment, or both. NRS 534.190. When the [licensing] statute provides for sanctions other than forfeiture of the right to sue on the contract, an unlicensed person is not precluded from maintaining an action to recover on the contract.

Nevada Equities, Inc. v. Willard Pease Drilling Co., 84 Nev. 300, 302, 440 P.2d 122, 123 (1968) (unlicensed well driller permitted to receive payment); *Robken v. May*, 84 Nev. 433, 434, 442 P.2d 913 (1968) (unlicensed architect permitted to receive payment); *see also Martin Bloom Assocs., Inc. v. Manzie*, 389 F. Supp. 848, 852 (D. Nev. 1975) ("the fact that plaintiff rendered only architectural services while unlicensed does not work a forfeiture of its right to sue for fees due under such a contract").

The determinative fact in these cases was that the licensing statutes at issue do not prohibit an unlicensed person from receiving or retaining compensation; rather, they provide for enforcement by means of criminal penalties and fines. *Nevada Equities*, 84 Nev. at 302,

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fee which it was not legally entitled to receive and/or retain under Nevada State law" and "should not be entitled to retain these illicit benefits to the detriment of Plaintiffs").

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440 P.2d at 123; *Robken*, 84 Nev. at 434, 442 P.2d at 913. The Nevada Supreme Court distinguished those statutes from other licensing statutes that expressly preclude unlicensed persons from seeking compensation. *See, e.g.*, NRS 624.320 (unlicensed contractor may not "bring or maintain any action in the courts of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter"). As the District of Nevada explained, forfeiture of compensation for services rendered "could be enforced only by express legislative mandate," and "was not intended" as a remedy for failure to procure a license where the legislature did not include it in the statutory scheme. *Martin Bloom*, 389 F. Supp. at 851.

Like the statutes in *Nevada Equities*, *Robken*, and *Martin Bloom*, nowhere does Chapter 649 prohibit an unlicensed collection agency from receiving or retaining compensation for services actually rendered. Rather, just like the statutes in those cases, the sanctions imposed for operating an unlicensed collection agency are administrative fines and criminal penalties. NRS 649.435; NRS 649.440. Accordingly, Plaintiffs' theory of injury—and with it, the entire TAC—fails as a matter of law because Chapter 649 does not mandate that Defendants forfeit their alleged compensation.[3]

B. No Plaintiff Can Prove Causation Under The Consumer Fraud Statute.

A consumer fraud claimant may recover damages only for her actual losses *caused* by an act of consumer fraud. NRS 41.600(3)(a) (court may award damages "that the claimant *has sustained*") (emphasis added); *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009) (plaintiff must prove that an act of consumer fraud "caused damage to the plaintiff"); *Goldberg v. Central Credit Mgmt., Inc.*, 2:11-cv-00305-MMD-GWF, 2012 WL 6042194, at *4

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[3] The Supreme Court in *Nevada Equities* stated an alternative ground for its holding that an unlicensed well driller is entitled to compensation: "We shall not condone a forfeiture in the absence of any ascertainable public policy requiring us to do so." *Id.*, 84 Nev. at 303, 440 P.2d at 123. Because it was not suggested that the driller "was wanting in experience, financial responsibility, or indeed, in any particular detrimental to the safety and protection of the public," the Supreme Court refused to condone a forfeiture of the driller's contractual fees. *Id.* Similarly, here, Plaintiffs have not alleged any basis to believe that any defendant was incompetent to execute the office of trustee or risked danger to the public for want of a collection agency license. Thus, there is no equitable justification for the draconian remedy of forfeiture. *Id.*

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(D. Nev. Dec. 3, 2012) (fraud claim failed because the plaintiff "has not adequately pled damages" caused by defendant's failure to have a license as a collection agency); *see also Clark County Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 396, 168 P.3d 87, 96 (2007) (causation is an essential element of a tort claim).

Plaintiffs cannot conceivably connect any hypothetical injury to Defendants' alleged misconduct—collecting claims without a license. Merely lacking a collection license is not the type of conduct that plausibly could cause a person to suffer damages. No plaintiff has alleged, and none can possibly demonstrate, that her circumstances today would be any different had Defendants possessed a license, or had a licensed collection agency (rather than Defendants) done the acts that Defendants allegedly performed. Clearly, because each plaintiff admittedly defaulted, *somebody* was entitled under the deeds of trust and NRS Chapter 107 to pursue foreclosure, and it makes no difference to Plaintiffs who performed that act or what licenses that person had acquired.

C. Defendants Were Not Unjustly Enriched.

Unjust enrichment is a form of quasi-contractual relief that requires proof of "a benefit conferred on the defendant by the plaintiff . . . under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." *Unionamerica Mortgage & Equity Trust v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981) (reversing judgment for plaintiff) (quotations and citations omitted). A claim for unjust enrichment necessarily fails when "there is an express, written contract, because no agreement can be implied when there is an express agreement." *LasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975,* 113 Nev. 747, 755, 942 P.2d 182, 187 (1997); *see also Garand v. JPMorgan Chase Bank,* 532 Fed. Appx. 693, 695-96 (9th Cir. 2013) (applying Nevada law, citing *LasePartners* and affirming dismissal of unjust enrichment claim against bank and Chapter 107 trustee because the "rights and obligations of the parties are dictated by express contracts—the first mortgage note and deed of trust"); *Parker v. Greenpoint Mortgage Funding Inc.,* 3:11-cv-00039-ECR-RAM, 2011 WL 2923949, at *9 (D. Nev. July 15, 2011) (dismissing unjust enrichment claim based on deed of trust because plaintiff cannot premise the claim on "actions

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that are controlled by a contract to which Plaintiff is a party").

Here, Plaintiffs entered into express contracts when they executed the deeds of trust encumbering their property. The deeds of trust provide for the ability to foreclose and completely govern the lender's right to charge Plaintiffs for certain fees and costs incurred in enforcing its security instrument. These rights are further protected by statute. NRS 107.077(7) ("A trustee may charge a reasonable fee to the trustor or the owner of the land for services relating to the preparation, execution or recordation of a reconveyance or release pursuant to this section"); NRS 107.030 (Uniform Covenant 4) (trustee may charge costs to borrower). Because the deed of trust completely governs the relationships among Plaintiffs, Defendants, and the lenders concerning the payment of fees, no claim for unjust enrichment is available. *Goodwin v. Executive Trustee Servs., LLC*, 680 F. Supp. 2d 1244, 1255 (D. Nev. 2010) (dismissing claim for unjust enrichment), *aff'd*, *Goodwin v. Countrywide Home Loans Inc.*, 578 Fed. Appx. 688 (9th Cir. 2014).

II. DEFENDANTS WERE NOT REQUIRED TO BE LICENSED AS COLLECTION AGENCIES.

The other critical premise of the TAC is that Defendants were required to hold a collection agency license to perform various alleged acts in their capacity as trustees under NRS Chapter 107. [TAC, ¶¶ 42-45, 50, 51] This assertion fails for at least three reasons. First, as part of a comprehensive regulatory system under NRS Chapter 107, the Nevada legislature has *already decided* that a trustee need not possess a collection agency license. Second, the acts that Defendants allegedly performed do not constitute collection of a claim under NRS Chapter 649, the prescribing collection agency licensing regime. Third, the Nevada legislature has occupied the entire field of non-judicial foreclosure regulation. Overlapping regulation of trustees by the FID Commissioner—the necessary result of holding that trustees are "collection agencies"—is thus preempted. Indeed, subjecting trustees and the non-judicial foreclosure process to *two* contradictory regulatory schemes is entirely unworkable. The parties do not appear to disagree on this point, as Plaintiffs themselves acknowledge (at 33) that "the claim collection process is *necessarily supposed to be separate* from the foreclosure activities of a trustee." (emphasis in

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original).

A. NRS Chapter 107 Expressly Authorizes The Trustee To Perform The Acts Alleged In The TAC.

The crux of Plaintiffs' argument is that the acts alleged in the TAC constitute claim collection under NRS Chapter 649. [TAC, ¶¶ 30-31] While this is not correct (*see* Part II.B, *infra*), the argument is irrelevant because Chapter 107 authorizes *any* trustee to perform these acts without requiring any trustee to obtain a collection agency license. Thus, whether or not constituting claim collection, these acts are clearly within the scope of authority of a trustee as prescribed by the legislature in Chapter 107. This Court must read Chapter 649 together with Chapter 107 "in a way that harmonizes them as a whole." *State Dep't of Bus. & Indus., Fin. Inst. Div. v. Nevada Ass'n Servs., Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223, 1227 (2012) (FID Commissioner lacked jurisdiction to interpret real estate statutes). Thus, the TAC must be dismissed because Plaintiffs ask the Court to declare unlawful, under Chapter 649, what the legislature has expressly authorized in Chapter 107.

1. The Legislature Created the Office of Trustee, and Has Declared That a Person Need not Possess a Collection Agency License to Act in the Capacity of Trustee.

A "deed of trust," unlike a mortgage, is a three-party security instrument among the trustor (usually a borrower), the beneficiary (usually a lender), and a *sui generis* entity called the "trustee." *Ho v. ReconTrust Co., N.A.*, 840 F.3d 618, 619-20 (9th Cir. 2016) (affirming dismissal of claims against trustee). The function of the trustee is to hold legal title to the borrower's property as security for the obligations owed to the lender. NRS 107.020 ("Transfers in trust of any estate in real property may be made . . . to secure the performance of an obligation or the payment of any debt"); *Snyder v. HSBC Bank, USA, N.A.*, 873 F. Supp. 2d 1139, 1148 (D. Ariz. 2012) (borrower "transfers legal title in real property to the trustee (legal title holder) as security for the performance . . . of obligations to the beneficiary (lender)"). The trustee is empowered to either re-convey legal title to the borrower upon full satisfaction of the secured obligation, or to sell the property at auction if the borrower defaults on the obligation. *Siegel v. American Sav. & Loan Ass'n*, 258 Cal. Rptr. 746, 747 (Ct. App. 1989) ("The trustee holds title to the property until

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the debt is repaid, at which time the title held by the trustee is reconveyed to the borrower"); *Ho*, 840 F.3d at 620 (trustee "is authorized to sell the property if the debtor defaults").

The office of trustee, like the entire deed of trust system, is a creature of statute. NRS Chapter 107 defines the capacity of trustee exhaustively. Under Chapter 107, the trustee is not a typical common-law trustee with fiduciary obligations to the beneficiary. Rather, the trustee serves as an impartial "common agent" of the lender and the borrower, beholden to neither, and strictly for the purposes enumerated in the deed of trust. NRS 107.028(6) ("The trustee does not have a fiduciary obligation to the grantor or any other person having an interest in the property which is subject to the deed of trust"); *id.* (trustee "shall act impartially and in good faith with respect to the deed of trust and shall act in accordance with the laws of this State"); *Harlow v. MTC Fin., Inc.*, 865 F. Supp. 2d 1095, 1100 (D. Nev. 2012) (trustee viewed "as a common agent for the grantor and the beneficiary"). The legislature also has clarified that the beneficiary of a deed of trust may not serve as its own trustee. NRS 107.028(2). In other words, the deed of trust *must* be a three-party instrument; there is no way to avoid engaging the services of a qualified trustee.

Having created the *sui generis* office of trustee, the legislature is privileged to determine who may hold that office. It has done so in NRS 107.028, which adopts a broad list of 10 credentials that a person may possess in order to serve as trustee. For example, *any* "domestic or foreign entity which holds a current state business registration issued by the Secretary of State pursuant to chapter 76 of NRS" may serve as a Chapter 107 trustee. NRS 107.028(1)(d). Another category in the list is "[a] person who engages in the business of a collection agency pursuant to chapter 649 of NRS." NRS 107.028(1)(i). The use of the disjunctive "or" to separate this category from the other nine conclusively demonstrates that a trustee need *not* possess a collection agency license. *Anderson v. State*, 109 Nev. 1129, 1134, 865 P.2d 318, 321 (1993) (use of the disjunctive signals "one or the other, but not necessarily both" of the indicated possibilities). Had the legislature intended to require trustees to obtain a collection agency license, Chapter 107 would have included only one category of qualified trustee, not 10.

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Indeed, holding that a trustee must possess a collection agency license would render meaningless the statutory provisions making nine *other* credentials sufficient to qualify a person as trustee. Courts "avoid statutory interpretation that renders language meaningless or superfluous." *Hobbs v. State*, 127 Nev. 234, 238, 251 P.3d 177, 179 (2011) (refusing to endorse interpretation of statute that rendered statutory word meaningless). When determining the "plain meaning of a statute," the Court must "read its provisions as a whole and give effect to each of its words and phrases." *Davis v. Beling*, 128 Nev. Adv. Rep. 28, 278 P.3d 501, 508 (2012) (interpreting statute to give effect to the full provision and intent of the statute). Holding that a trustee must possess a collection agency license would impermissibly *eliminate* 90 percent of the statutory language. In sum, the Court should look to the plain words of NRS 107.028 to determine that a person need not possess a collection agency license to act in the capacity of trustee under a deed of trust. *State v. Beemer*, 51 Nev. 192, 199-200, 272 P. 656, 658 (1928) (when legislative intent is "clear and unambiguous" from "the words employed in the statute in question," a court "is not permitted to search for its meaning beyond the statute itself").

2. The Role of Trustee is Broad.

While the trustee's responsibilities are not limited to foreclosure, Plaintiffs' allegations of improper conduct are related exclusively to the foreclosure process. [TAC, ¶ 30] The trustee begins that process by recording a notice of default and posting notice at the borrower's property. NRS 107.080(2)(c). The notice of default must describe the borrower's breach of the deed of trust and may give notice that the lender has accelerated the loan balance. NRS 107.080(2)(c)(3)(I). The trustee must include a form by which the borrower may elect to mediate with the lender, and contact information for a person with authority to negotiate a loan modification. NRS 107.086(2)(a)(1), (3). The notice also must include the contact information of the trustee "who is authorized to provide information relating to the foreclosure status of the property." NRS 107.080(2)(c)(3)(VI), NRS 107.087(1)(b)(2).

The trustee also has statutory authority to send the borrower a written statement containing the following information: (i) the amount of payment required to correct the deficiency and reinstate the underlying obligation, as of the date of the statement; (ii) the amount

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in default; (iii) the principal amount of the obligation secured by the deed of trust; (iv) the amount of accrued interest and late charges; (v) a good faith estimate of all fees imposed in connection with the exercise of the power of sale; and (vi) contact information for obtaining the most current amounts due and a local or toll-free telephone number where the borrower may obtain the most current amounts due. NRS 107.080(2)(c)(3). This statement is required by statute to contain the ominous language, "NOTICE - YOU ARE IN DANGER OF LOSING YOUR HOME!" NRS 107.085(3)(b). The trustee must also send a similar notice to guarantors and sureties of the debt, who have no interest in the property itself. NRS 107.095.

After the trustee has allowed the statutory period following the notice of default to expire, and only after receiving a certificate from the Nevada Foreclosure Mediation Program Administrator (regardless of whether the borrower elected to mediate the foreclosure) [NRS 107.086(2)(e)], the trustee must record a notice of sale [NRS 107.080(4)]. The trustee must also post the notice of sale for twenty successive days in a public place in the county where the property is located and must publish a copy of the notice three times (once a week for three consecutive weeks), in a newspaper of general circulation in the same county. NRS 107.080(2)(c)(4)(b)-(c). The trustee must also post the notice of sale on the residential property, and the notice of sale must include the contact information of the trustee "who is authorized to provide information relating to the foreclosure status of the property." NRS 107.080(2)(c)(4)(d), 107.087(1).

Of course, the trustee has authority to sell the property if the borrower fails to reinstate the loan or otherwise cure his breach of the deed of trust. NRS 107.080(1) ("a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation"). Both before and after the sale, the trustee has broad statutory authority to protect the beneficiary's interests. Prior to any sale, the trustee has the right to file a civil action "for the appointment of a receiver" of the trust property. NRS 107.100(1). The trustee may also intervene, and prosecute or settle, "any suit or action affecting the conveyed premises." NRS 107.030 (Uniform Covenant 3). After a sale, the trustee has authority to collect the proceeds and, on behalf of the beneficiary, to apply the proceeds to the cost of the sale, the trustee's fees, and to satisfy the secured obligation. NRS

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107.030 (Uniform Covenant 7). If the high bidder at the sale fails to pay the amount bid, the trustee may sue him to "recover the amount of the loss, with costs, *for the benefit of the party aggrieved.*" NRS 107.083(a) (emphasis added). Chapter 107 even contemplates that the trustee may become the holder of the note or otherwise be "entitled to enforce the obligation or debt secured by the deed of trust." NRS 107.080(2)(c)(2). And if the trustee incurs costs performing any of its duties, the trustee may demand that the borrower pay to the trustee all sums necessary to cover those costs. NRS 107.030 (Uniform Covenant 4).

Importantly, the rights expressly granted to the trustee by Chapter 107 are not the limit of the trustee's powers. "It is the universal rule of statutory construction that wherever a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied." *Checker, Inc. v. Public Serv. Comm'n*, 84 Nev. 623, 629-30, 446 P.2d 981, 985 (1968) (powers expressly granted to state agency supplemented by implication). "The grant of an express power is always attended by the incidental authority fairly and reasonably necessary or appropriate to make it effective . . . . That which is clearly implied, is as much a part of the law as that which is expressed." *Id.* at 630, 446 P.2d at 985 (quoting *Juzek v. Hackensack Water Co.*, 225 A.2d 335, 342 (1966)). Courts in other jurisdictions have applied this "universal rule" of construction to trustees under deeds of trust. *E.g.*, *Kriv v. Northwestern Sec. Co.*, 24 N.W.2d 751, 755 (Iowa 1946) (trustee has a right to bid the property at the sale that is "implied by the power to foreclose"), *aff'd*, 29 N.W.2d 865 (1947); *Union Guardian Trust Co. v. Building Sec. Corp.*, 276 N.W. 697, 703 (Mich. 1937) (trustee has the "implied power" to purchase the property at the sale).

3. The Role of Trustee Encompasses all of the acts Alleged in the TAC.

Taken together, the foregoing statutory provisions and their natural implications encompass all of the acts alleged in the TAC. As a general matter, the Court should note that Chapter 107 grants the trustee authority to pursue lawsuits against the borrower and others—which is clearly more analogous to "claim collection" than anything alleged in the TAC. Because the legislature has expressly authorized these activities, whether or not the trustee possesses a

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collection agency license, it would be absurd to hold that the acts alleged in the TAC are not permissible unless the trustee possesses such a license.

Specifically, Plaintiffs first allege that Defendants collected money from borrowers to reinstate or pay off defaulted loans in foreclosure. [TAC, ¶¶ 30(a), (b), (d), (f)] While Chapter 107 does not mandate the trustee to collect reinstatement funds, the power to do so is clearly implied by the trustee's power to communicate the amount of the defaulted debt and "the foreclosure status of the property," to receive the proceeds if the property goes to sale, and to apply the proceeds to the borrower's debt. NRS 107.080(2)(c)(3)(I), 107.087(1). Clearly, the trustee may advise the borrower that the property will be sold unless the borrower pays the necessary reinstatement amount, and if the property goes to sale, the trustee is authorized to collect the proceeds and apply them to the debt. It is implied in this scheme that the borrower might send a reinstatement check to the trustee with whom he has communicated about the sale, and the trustee should have implied authority to receive the check, just as he would if the sale actually occurred. Indeed, it makes no difference to the borrower if he writes a check to the trustee or the beneficiary, so long as the funds are properly applied and the sale is cancelled. If the trustee mishandles the check, the borrower has legal remedies under the statute. NRS 107.028(7); NRS 107.080(8)(a) (providing for treble damages against the trustee).

Second, Plaintiffs allege that Defendants transferred payments received from the borrower, or proceeds received from the auction sale, to the lender to apply to the defaulted loans. [TAC, ¶¶ 30(g), (h)] This is clearly encompassed by the express statutory language. *See* NRS 107.030 (Uniform Covenant 7) (trustee may apply sale proceeds to the defaulted debt). Third, Plaintiffs allege that Defendants performed "acquisition of the security for the defaulted debt." [TAC, ¶ 30(h)] Taken literally, this allegation is incorrect because the trustee cannot acquire the property at a trustee's sale. NRS 107.081(1) ("The agent holding the sale must not become a purchaser at the sale or be interested in any purchase at such a sale"). If Plaintiffs mean to say that Defendants engaged in claim collection merely by selling the property, then clearly this is within the statutory authority of a trustee. NRS 107.080(1) (conferring power of sale on trustee).

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Finally, Plaintiffs allege that Defendants pursued claim collection "through a forbearance agreement" or "through loan modification agreements." [TAC, ¶¶ 30(c), (e)] It is not clear what conduct is being alleged here. Forbearance and modification are alleged specifically only by two sets of plaintiffs. Plaintiffs Camilo and Ana Martinez allege that Defendant Quality Loan Service Corporation ("QLS") communicated that their lender was interested in pursuing forbearance or modification, but that foreclosure proceedings would continue unless such an agreement were reached. [*Id.*, ¶ 2] And Plaintiff Bijan Laghaei similarly alleges that Defendant MTC Financial, Inc. told him not to be concerned about the foreclosure notice because the lender was apparently going to modify Mr. Laghaei's loan. [*Id.*, ¶ 16] These statements are clearly within the trustee's authority to communicate "the foreclosure status of the property." NRS 107.087(1)(b)(2).

In sum, the Court may dispose of this case without even considering whether the acts alleged in the TAC constitute "claim collection" under NRS Chapter 649. The legislature has permitted any trustee to perform these acts, and has clearly and unambiguously provided that a person may act in the capacity of trustee without possessing a collection agency license. Accordingly, Plaintiffs impermissibly ask the Court to declare unlawful what the legislature has expressly authorized. Defendants are entitled to judgment as a matter of law.[4]

B. NRS Chapter 649 Does Not Purport To Regulate Trustees Or Non-Judicial Foreclosure.

While not necessary to resolve this matter, analysis of the collection agency statutes in NRS Chapter 649 similarly demonstrates that the legislature did not intend to classify all Chapter 107 trustees as "collection agencies" who must possess a license from the FID Commissioner.

[4] Plaintiffs' Memorandum (at 25-29) repeatedly contends that Defendants violated NRS 107, but the TAC does not allege any violations of NRS 107. Plaintiffs cannot amend their complaint now—years after the Defendants' non-judicial foreclosure activities directed at Plaintiffs—to allege new causes of action for violation of NRS 107. Any violations of NRS 107 must be timely brought in this Court under the procedure prescribed by NRS 107. *See, e.g.*, NRS 107.080(5), 107.560.

Plaintiffs also make speculative assertions (at 40) as to why CRC left the Nevada market, but there is no evidence supporting Plaintiffs' speculation. Such speculation has no relevance to the interpretation of a statute.

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1. The Legislature Intended to Exclude Trustees From the Definition of "Collection Agency."

The only act of non-judicial foreclosure referenced in Chapter 649 is the foreclosure of an assessment lien by a "community manager," an entity that the legislature specially included in the definition of "collection agency." NRS 649.020(3)(a). By including this special addendum to what is otherwise a general definition, the legislature expressed both its understanding that non-judicial foreclosure is not generally claim collection, and its intention to make only one type of non-judicial foreclosure subject to regulation as claim collection. *Cramer v. State Dep't of Motor Vehicles*, 126 Nev. 388, 394, 240 P.3d 8, 12 (2010) (applying presumption that "the expression of one thing is the exclusion of another") (quotations and citations omitted).

2. Enforcing a Security Interest Is not Collection of a "Claim."

A "collection agency" is a person "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). A "claim" is "any obligation for the payment of money or its equivalent that is past due." NRS 649.010. Under these definitions, Plaintiffs' arguments have no merit because "the exercise of the power of sale under a Deed of Trust is not the collection or solicitation of payment of a claim." *Quality Loan Service Corp. v. State*, No. 12A657580, 2013 WL 6911859, at *2 (Nev. Dist. Ct. Jan. 3, 2013) ("*Quality Loan*").[5]

In overturning the FID decision relied upon by Plaintiffs (at 15-16), the district court in *Quality Loan* explained that incidental activities such as "giving the required notices" do not constitute "the collection of debt or claim or the solicitation of payment of a debt or claim." *Id.* The court reasoned: "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.* at *3. Thus, "a Trustee exercising the power of sale pursuant

[5] Plaintiffs attack (at 20-24) Judge Williams' decision based on its reference to NRS 80.015. Defendants do not rely on NRS 80.015, and NRS 80.015 is not necessary to conclude that Plaintiffs' claims fail as a matter of law.

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to the procedures set forth in NRS chapter 107 is not required to obtain a license as a 'collection agency' from the FID prior to exercising the power of sale under a Deed of Trust." *Id.* at *2. Importantly, the FID—the party with the greatest interest in the licensing of collection agencies—chose to accept the Nevada state court's decision on behalf of the state and chose not to seek review by the Nevada Supreme Court. The *Quality Loan* decision is consistent with the holding of every other Nevada court to consider this issue.[6]

In their Memorandum, Plaintiffs cite no cases holding to the contrary. Instead, Plaintiffs rely exclusively on cases from other jurisdictions interpreting the federal Fair Debt Collection Practices Act ("FDCPA"). These cases are inapposite because they do not address NRS Chapters 107 or 649, nor do they hold that a trustee must obtain a collection agency license under the laws of *any* state (the FDCPA, of course, is not a licensing statute). Whether an entity must possess a particular *license* under the laws of a particular state is a different question than whether an entity is a "debt collector" under federal law subject to the requirements of the FDCPA.

Indeed, the United States Supreme Court has specifically directed lower courts to avoid interpreting the FDCPA in a manner that would interfere with areas of historical state concern, such as foreclosure and business licensing. *Sheriff v. Gillie*, 136 S. Ct. 1594, 1602 (2016) (appellate court erred in interpreting FDCPA in a manner that interfered with state's arrangement

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[6] *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 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 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 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 initiating foreclosure pursuant to a deed of trust does not constitute debt collection); *Karl v. Quality Loan Serv. Corp.*, 759 F. Supp. 2d 1240, 1248 (D. Nev. 2010) (rejecting deceptive trade practices claim 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 Fed. Appx. 733 (9th Cir. 2014); *Maves v. First Horizon Home Loans*, No. 3:10-cv-00396-LRH-VPH, 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").

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for collection of debts owed to state). In *Ho v. ReconTrust Co.*, 840 F.3d 618 (9th Cir. 2016), the Ninth Circuit applied this "federalism canon" in refusing to impose the FDCPA on top of California's foreclosure regulatory scheme. *Id.*, 840 F.3d at 626 ("When one interpretation of an ambiguous federal statute would create a conflict with state foreclosure law and another plausible interpretation would not, we must adopt the latter interpretation"). Another panel of the Ninth Circuit fully endorsed *Ho*. *Dowers v. Nationstar Mortgage, LLC*, -- F.3d --, 2017 WL 1192207, at *4 (9th Cir. 2017) (affirming dismissal of claims against servicer related to enforcement of a security interest under a deed of trust pursuant to *Ho*). This Court should do the same and decline to hold that Defendants must obtain Nevada collection agency licenses merely because some courts in other states have held that trustees in those states, operating under state foreclosure statutes that are not even discussed in those cases, are "debt collectors" under the federal FDCPA.

Further, Plaintiffs' FDCPA analogy is undercut by the Ninth Circuit's recent decision in *Ho*, which rejected the Fourth and Sixth Circuit decisions Plaintiffs rely upon, holding that a trustee is *not* a "debt collector" under the FDCPA. *Ho*, 840 F.3d at 621 (declining to follow *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)). *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984 (9th Cir. 2017), which Plaintiffs rely upon (at 11-12) is not to the contrary, because that case did not involve a trustee or a foreclosure but, rather, involved a law firm that sent a letter demanding payment of late homeowners' association dues. *Id.* at 986. Legions of Nevada district court cases (cited in Defendants' prior briefs) also have held that non-judicial foreclosure is not debt collection under the FDCPA.

Plaintiffs' analogy is further weakened by the fact that most of their cases are inapposite by their own terms. Two of the seven cases (at 6-7) (*Alaska Trustee, LLC v. Ambridge*, 372 P.3d 207 (Alaska 2016), and *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992)) are *state* court decisions from Alaska and Colorado, and thus are not definitive statements of federal law in those states. Indeed, the applicable law in Alaska is set forth in *Ho*, not the state court's pronouncement in *Alaska Trustee*, and Colorado federal district courts have followed the "majority position" in holding that foreclosure is *not* debt collection. *E.g.*, *Obduskey v. Fargo*,

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Civil Action No. 15-cv-01734-RBJ, 2016 WL 4091174, at *3 (D. Colo. Jul. 19, 2016) (dismissing complaint). Another two cases (at 8, 11) (*Glazer v. Chase Home Fin. LLC,* 704 F.3d 453 (6th Cir. 2013), and *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015)) do not involve trustees or deeds of trust at all, but rather, the process of *judicial* foreclosure, which is fundamentally different because it involves obtaining a personal judgment against the borrower. This case, in contrast, does not involve any effort to impose personal liability on any plaintiff. And the differences between this case and *Mashiri* have already been discussed.

In sum, there is clearly a battle in the federal courts over the meaning of the FDCPA, which ultimately may be decided by the U.S. Supreme Court. This Court has no need to fire any shots in that battle here. Rather, the Court can and should resolve this case based upon existing principles of *Nevada* law. The law in Nevada is Chapter 107 and Chapter 649, which have already been ably interpreted and applied to these facts by Judge Williams in *Quality Loan*. The Court should harmonize Nevada law by following *Quality Loan*, not the minority position in the federal cases cited by Plaintiffs, or the FID decision that was *reversed* in *Quality Loan*.

C. Concurrent Regulation Of The Trustee By The Legislature, The Courts, And The FID Commissioner Is Impermissible, Unworkable, And Unnecessary.

Finally, any lingering doubt concerning the legislature's intention after the foregoing independent analyses of Chapter 107 and Chapter 649 is dispelled by considering the interplay between the two regulatory systems. A side-by-side consideration conclusively demonstrates that the legislature never intended to regulate non-judicial foreclosure in Nevada using *both* systems.

1. The Legislature Has Preempted FID Regulation of Trustees.

Plaintiffs' Memorandum regarding preemption (at 41-45) is rife with conclusory arguments and devoid of substance and supporting case law. The Court should disregard these unsupported and self-serving conclusions. Indeed, based on supporting authorities, "[w]henever a legislature sees fit to adopt a general scheme for the regulation of a particular subject, local control over the same subject, through legislation, ceases." *Lamb v. Mirin*, 90 Nev. 329, 332, 526 P.2d 80, 82 (1974) (municipal taxicab regulations preempted by "comprehensive taxicab regulatory scheme" created by state legislature); *City of Reno v. Saibini*, 83 Nev. 315, 319, 429

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P.2d 559, 561 (1967) ("the legislature may choose to preempt the entire field of regulation"). Any body of government that "obtain[s] [its] authority from the legislature" is subject to legislative preemption. *Falcke v. Douglas County*, 116 Nev. 583, 588, 3 P.3d 661, 664 (2000) (overturning regulation). This principle has been extended to preclude action by the district courts that encroaches upon a comprehensive legislative scheme. *Crowley v. Duffrin*, 109 Nev. 597, 605, 855 P.2d 536, 541 (1993) (overturning judicial rule that constituted an "unauthorized and an invalid encroachment on a lawfully enacted state statute").

As detailed in Part II.A, *supra*, the Nevada legislature has created a comprehensive statutory scheme for the regulation of trustees, the deed of trust system, and the non-judicial foreclosure process. Indeed, the legislature has occupied the entire field of non-judicial foreclosure; every aspect of the process is created and regulated by statute. *See* NRS 107.080 *et seq.*; *Edelstein v. Bank of New York Mellon*, 128 Nev. Adv. Rep. 48, 286 P.3d 249, 255 (2012) ("the trustee may sell the property to satisfy the obligation only after certain statutory requirements are met"); *In re Grant*, 303 B.R. 205, 210 (Bankr. D. Nev. 2003) ("Foreclosure procedures must be followed or the sale will be invalid").

In addition to the discussion in Part II.A, the legislature has exhaustively defined the immunities and liabilities that the legislature intended trustees to have. Deceptive conduct by the trustee is specifically prohibited. NRS 107.028(3). The trustee is subject to criminal prosecution, and is civilly liable for actual damages, a $1,000 statutory penalty, costs, and fees for failure to timely record a re-conveyance of the deed of trust when the borrower pays off the loan. NRS 107.077(3), (9). More generally, a court "must award" a $5,000 statutory penalty, treble damages, fees and costs, and an injunction against exercising the power of sale, whenever the trustee violates Chapter 107. NRS 107.028(7); NRS 107.080(8)(a). The borrower may petition to have a completed sale declared void if the trustee does not "substantially comply" with the applicable provisions of Chapter 107. NRS 107.080(5). In contrast, the trustee is not liable for certain acts taken in reliance on the borrower [NRS 107.079(4)], not liable for a "good faith error resulting from reliance on information provided by the beneficiary regarding the nature and the amount of the default" [NRS 107.028(6)], and is not subject to suit merely in its capacity as

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trustee [NRS 107.029].[7]

Given this comprehensive statutory scheme, the FID is preempted from simultaneously regulating trustees, deeds of trust, and the non-judicial foreclosure process. The FID is an agency created by the legislature and "obtains its authority from the legislature" to regulate collection agencies. *See* NRS 232.510(2)(a) (establishing the FID); NRS 649.051 (Commissioner entitled to enforce Chapter 649); NRS 649.053 (Commissioner empowered to adopt regulations); *Falcke*, 116 Nev. at 588, 3 P.3d at 664. As such, it lacks authority to impose its own regulatory agenda on a field that has been occupied by the legislature. *Id.*; *Lamb*, 90 Nev. at 332, 526 P.2d at 82. But a holding by the Court that trustees are "collection agencies" under NRS Chapter 649 would give the Commissioner plenary authority to regulate the non-judicial foreclosure process in derogation of the standards already imposed by the legislature.

Involving the FID in Nevada's comprehensive foreclosure regulation scheme would create inconsistencies, unanticipated conflicts, and jurisdictional disputes among the legislature, the courts, and the FID. The Commissioner will become the sole arbiter of who may serve as trustee, and may impose his own peculiar standards in derogation of NRS 107.028. NRS 649.075(1) ("a person shall not conduct within this State a collection agency . . . without having first applied for and obtained a license from the Commissioner"); NRS 649.085 (Commissioner has sole discretion to deem application "satisfactory"). Further, under Chapter 649, the Commissioner has broad authority to promulgate regulations concerning the "method and manner" of practically every aspect of a collection agency's business, including "[h]andling trust funds and accounts," "[u]sing fair practices for the . . . collection of accounts," and "[t]he operation of such other phases of the business as may be necessary to promote the best interests of the industry and the public." NRS 649.056(1)(c), (e), (f). If non-judicial foreclosure constitutes collection of a claim, then holding here as Plaintiffs demand would place the entire foreclosure process under the Commissioner's jurisdiction. Obviously, the process of non-judicial foreclosure cannot be subject to *two* entirely different regulatory regimes.

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[7] There are no allegations in the TAC that Defendants violated Chapter 107.

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This concern is not limited to what the Commissioner might do in the future. Problematic inconsistencies already exist within the statutes today. For example, NRS 649.375 creates, among other things, restrictions on a collection agency's right to assess interest and fees, which are not part of the current foreclosure regulatory scheme or the deed of trust. *See* NRS 649.375(2). The same statute also prohibits a collection agency from publishing or posting "any list of debtors." NRS 649.375(7). Publishing and posting information about a sale, which necessarily reveals the identity of the debtor, is a required part of the foreclosure process. *See* Part II.A, *supra*. As another example, Chapter 107 gives trustees immunity from liability when they rely in good faith upon information provided by the beneficiary. *See* Part II.A, *supra*. A collection agency does not enjoy the same immunity. *See Kerwin v. Remittance Assistance Corp.*, 559 F. Supp. 2d 1117, 1125 (D. Nev. 2008) (finding that "though reliance on information provided by creditors can excuse the debt collector from errors . . . the validity of this reliance depends on whether the creditor has provided accurate information in the past") (citation omitted). Collection agencies have obligations to respond to debtor disputes concerning the debt and to "verify" the debt, an obligation trustees do not have. NRS 649.332.

To avoid these absurd and unnecessary conflicts, the Court should hold that application of Chapter 649 to persons acting in the capacity of trustee under a deed of trust is preempted by the comprehensive legislative scheme found within NRS Chapter 107. *E.g.*, *Falcke*, 116 Nev. at 588, 3 P.3d at 664; *Quality Loan*, 2013 WL 6911859, at *3 ("all regulatory authority for the exercise of the power of sale under NRS Chapter 107 is exclusively granted to the Judiciary, by actions filed in District Court (pursuant to NRS Chapter 107) challenging validity of the Trustee's exercise of the power of sale").

2. The Purpose of Chapter 649 Does not Support Extending That Statute to Trustees.

Even if Chapter 649, as applied to trustees, were not preempted by Chapter 107 (it is), the conflicts and inconsistencies just described would, in any event, support a finding that the legislature did not intend for the Commissioner to regulate trustees as "collection agencies." The Court must construe Chapter 649 in light of its intended purposes. *E.g.*, *Washington v. State*, 117

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Nev. 735, 739, 30 P.3d 1134, 1136 (2001) (statutes should be read "in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results"). The legislature sought in regulating collection agencies to "[b]ring licensed collection agencies and their personnel under more stringent public supervision" and "[d]iscourage improper and abusive collection methods." NRS 649.045(2)(a), (c). The application of Chapter 649 to trustees under deeds of trust does not further this policy. Obviously, for all of the reasons discussed, the trustee under a deed of trust is already extensively regulated and subject to severe statutory liabilities for misconduct. There is no need for "more stringent public supervision" of trustees.

Further, because the office of trustee exists solely by virtue of statute, has rights and liabilities created by statute, and is required by statute to serve impartially for the limited purpose of releasing or enforcing a trust deed, the role of trustee is inherently distinct from that of a loan servicer or debt collector.[8] Debt collectors do not have contracts with the debtor regulating their rights and duties *vis-à-vis* the debtor. Trustees are parties to the deed of trust with the debtor. Trustees are entitled to a fee regardless of whether the borrower pays the lender or not. *E.g.*, NRS 107.030 (Uniform Covenant 4) (trustee may charge costs to borrower). And while debt collectors have wide latitude in the methods they utilize to boost collections, trustees must adhere to strict contractual and statutory procedures for each and every step they take in the non-judicial foreclosure process. *See* Part I.A, *supra*. These facts, along with the inconsistencies and jurisdictional conflicts just described, further demonstrate that the legislature never intended to subject trustees to the jurisdiction of the FID—and that doing so would be bad policy.

[8] In fact, Chapter 107 excludes "a trustee under a deed of trust . . . acting under a power of sale pursuant to a deed of trust" from the definition of "mortgage servicer," whose duties include "interacting with a borrower . . . collecting and crediting periodic loan payments . . . [and] enforcing the note and security instrument." NRS 107.440. This clearly evidences an intent to treat trustees differently from mortgage servicers.

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Relief Requested

CRC respectfully asks the Court to dismiss the TAC in its entirety with prejudice.

DATED this 4th day of April, 2017.

SMITH LARSEN & WIXOM

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2017, I served a true and correct copy of the foregoing **Defendant California Reconveyance Company's Response to Plaintiffs' "Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss the Third Amended Complaint"** on counsel by e-mail transmission to the persons listed below, pursuant to EDCR 8.05(a):

Nicholas A. Boylan LAW OFFICES OF NICHOLAS A. BOYLAN, APC and Shawn Christopher CHRISTOPHER LEGAL GROUP Attorneys for Plaintiff	nablawfirm@gmail.com sc@christopherlegal.com
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Kristin A. Schuler-Hintz MCCARTHY & HOLTHUS Attorneys for Defendant Quality Loan Service Corporation	khintz@mccarthyholthus.com

I hereby certify that on April 4, 2017, I served a true and correct copy of the foregoing **Defendant California Reconveyance Company's Response to Plaintiffs' "Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss the Third Amended Complaint"** by First Class Mail as follows:

Antoinette Gill 4754 Deer Forest Las Vegas, Nevada 89139 Plaintiff Pro Per	Meridian Foreclosure Service d/b/a MTDS, Inc. d/b/a Meridian Trust Deed Service 9999 Amber Field Street Las Vegas, Nevada 89178 Defendant Pro Per

/s/Elise Fossum
An Employee of Smith Larsen & Wixom

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CLERK OF THE COURT

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TB #13-77449

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JEFFREY BENKO, et al., Plaintiff, vs. QUALITY LOAN SERVICE CORPORATION, et al.. Defendants.	Case No.: A649857 Dept. No.: XIX

NATIONAL DEFAULT SERVICING CORPORATION'S JOINDER TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT"

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NATIONAL DEFAULT SERVICING CORPORATION'S JOINDER TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT"

COMES NOW Defendant National Default Servicing Corporation (hereinafter "NDSC"), by and through its counsel of record, Gregory L. Wilde, Esq., of Tiffany & Bosco, P.A., and hereby joins in Defendant California Reconveyance Company's Response To Plaintiffs' "Memorandum Of Points And Authorities In Opposition To Defendants' Motion To Dismiss The Third Amended Complaint" which was filed on April 4, 2017.

DATED this 4th day of April, 2017.

TIFFANY & BOSCO, P.A.

/s/ Kevin S. Soderstrom

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2017 I electronically served a copy of the above NATIONAL DEFAULT SERVICING CORPORATION'S JOINDER TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT" to:

Katie Weber, Esq.
Michael R. Brooks, Esq.

Lawrence G. Scarborough, Esq.
Kristin A. Schuler-Hintz, Esq.

Jessica R. Maziarz, Esq.
Michael E. Sullivan, Esq.

Richard J. Reynolds, Esq.
Shawn Christopher, Esq.

Allan Ceran, Esq.
Nicholas A. Boylan, Esq.

I further certify that on this 4th day of April, 2017 I placed a copy of the above NATIONAL DEFAULT SERVICING CORPORATION'S JOINDER TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT" into a sealed envelope and mailed it via regular mail, postage prepaid, addressed to:

Antoinette Gill
4754 Deer Forest
Las Vegas, NV 89139

Meridian Foreclosure Service dba MTDS, Inc. dba Meridian Trust Deed Service
9999 Amber Field St.
Las Vegas, NV 89178

/s/ Felecia DiVirgilio

An employee of Tiffany & Bosco, P.A.

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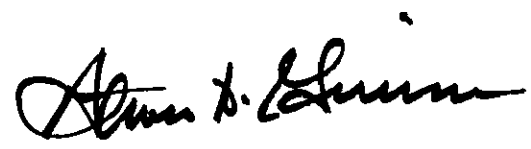

CLERK OF THE COURT

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Attorneys for
QUALITY LOAN SERVICE CORPORATION

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

JEFFREY BENKO; a Nevada resident; CAMILO MARTINEZ; a California resident; ANA MARTINEZ; a Nevada resident; FRANK SCINTA, a Nevada resident; JACQUELINE SCITA, 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; ANOTOINETTE GILL; a Nevada resident; JESSE HENNIGAN, a Nevada resident; KIM MOORE; a Nevada resident; THOMAS MOORE; a Nevada resident; SUSAN KALLEN, a Nevada resident; ROBET MANDARICH, a Nevada resident, JAMES NICO, a Nevada resident; and PATRICIA TAGLIAMONTE a Nevada resident Plaintiff, 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.	Case No. A-11-649857-C Dept. No. 19 **QUALTY LOAN SERVICE CORPORATION'S SUBSTANTIVE JOINDER TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS THE THIRD AMENDED COMPLAINT**

COMES NOW QUALITY LOAN SERVICE CORPORATION ("QLS"), by and through its attorneys of record Thomas N. Beckom, Esq. and Kristin Schuler Hintz, Esq. of the law firm McCarthy & Holthus, LLP, and hereby files this joinder to CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS THE THIRD AMENDED COMPLAINT. QLS joins in full with the arguments of CRC, would like to clarify a few points, and additionally explicate why a separate Motion to Dismiss was filed.

I. INTRODUCTION

For clarities sake to this Court , QLS has filed a Motion to Dismiss the Third Amended Complaint and in the Alternative Motion for Summary Judgment which they have separately noticed for hearing. Many of the co-parties in this action have fully argued the preclusive effect of the FID matter before Judge Williams, however QLS was the actual party to that action. It is QLS's position that they have defenses in this action which are simply unavailable to the co-defendants here based on QLS's actual party status and QLS therefore would like to maintain a clean record of this point.

Irrespective, even assuming *arguendo* that the FID proceedings never occurred, there is simply nothing anywhere in this case that these foreclosure trustees have acted in any manner outside of the scope of Nevada Trustee statute to take them into the realm of debt collection sufficient to require licensure. CRC is unequivocally correct that these claims as plead fail as a matter of law. QLS joins in CRC brief, incorporates all its briefing in opposition to the MSJ against MTC as well as it's own Motion for Summary Judgment current pending before this Court.

/…/…/

/…/…/

II. LAW AND ARGUMENT

A. THE PLAINTIFF'S CASES ARE SIMPLY NOT ON POINT

The Plaintiffs in this matter were instructed to present 6 cases in order to demonstrate the viability of their claims. All of them arise under the Federal Fair Debt Collection Practices Act. None of them involve Nevada Foreclosure Trustee being licensed under Nevada State Collection licensing law or even the Nevada Deceptive Trade Practices Act. These cases are not on point for the reasons delineated *infra.*

The First example that the Plaintiffs provide is *Shapiro* from Colorado under Colorado's CRCP 120. *Shapiro & Meinhold v. Zartman* 823 P.2d 120 (1992). The be clear, the offending provisions was actually a Colorado Rule of Civil Procedure Applicable in Court Actions. *Id.* The offending party was actually a law firm and the offending statute was the Fair Debt Collection Practices Act. *Id.* Under the Fair Debt Collection Practices Act, a debt collector must bring court actions to collect a debt in the County in which the property is located. *Id.*CRCP allows really property to be sold under execution in any County via judicial action. *Id.* This case involved attorneys functioning in a Court proceeding and whether or not Federal Venue provisions under Federal Law apply to those attorneys. This is not now or has it ever been about whether or not a neutral foreclosure trustee under Nevada law is required to hold a debt collectors license. *Glazer* has a similar problem. Ohio has no third party neutral contained in their foreclosure laws and their foreclosures are entirely judicial. *Glazer* again concerned the application of Federal Law to the judicial foreclosure process, which is marketedly different from Nevada's third party neutral framework. *Glazedr v. Chase Home Fin., LLC*704 F.3d 453 (6th Cir. App. 2013).*Wilson* does appear to provide the foreclosure framework of a third party neutral yet again, this involved a foreclosure trustee under the Fair Debt Collection Practices Act. *Wilson v. Draper & Goldberg P.L.L.C* 443 F.3d 373 (4th Cir. 2006). *Reese* also involves being "dunned" by an attorney in the

context of foreclosure law in Georgia. *Reese v. Ellis, Painter, Ratteree & Adams* LLP 678 F.3d 1211 (11th Cir. 2012). Kaymark oddly enough involves again a judicial foreclosure in Georgia. *Kaymark v. Bank of Am. N.A.*. 783 F.3d 168 (3rd Cir. 2015). Finally, *Mashiri* involves a law firm representing a homeowners association. *Mashiri v. Epsten Grinnel & Howell*845 F.3d 984 (9th Cir. 2017). *Alaska Trustee*[1]does involve a Alaskan Trustee under the Fair Debt Collection Practices act, yet the 9th Circuit Court of Appeals considered this reasoning and sided with the dissent in that case in *H.o Ho v. Recontrsut Co. N.A.* 840 F.ed 618 (2016).

None of them involve Nevada licensing law as a collection agency, but instead involve liability under Federal Debt Collection law and none of these cases even involve Nevada's unique foreclosure law. None of these cases are on point. The only courts which have actually considered the claims at issue here in Nevada have all resulted in final ruling that Nevada foreclosure trustee are not debt collectors[2] for purposes of Nevada's state licensing law. There has never been a final decision of a court anywhere which has stated that Nevada Foreclosure Trust must be licensed under NRS Chapter 648 and this issue has been raised multiple times in multiple courts.

B. THE PLAINTIFF'S BRIEFING DEMONSTRATES THAT THE DOCTRINES OF ISSUE AND CLAIM PRECLUSION CERTAINLY APPLY AT LEAST TO QLS IN THIS CASE

At the Plaintiff's memorandum of points and authorities at pages 24 & 25 the Plaintiffs attempt to fully reelitigate a decided issue of licensure status with the FID by advocating that the decision of Commissioner Burns of the FID, which was overturned on judicial review, is the

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[1] *Alaska Trustee, LLC v. Ambridge* 372 372 P.3d 207 (Ak 2016).

[2] *Charov v. Perry*, 2010 U.S. Dist. LEXIS 65798 (D.Nev. 2010); *Maves v. First First Horizon Home Loans*, 2010 U.S. Dist. LEXIS 973878 (D.Nev. 2010) *Contreras v. Master Fin. Inc.*, 2010 U.S. Dist. LEXIS 118017 (D.Nev. 2010) *Barlow v. BNC Mort. Inc.*, 2011 U.S. Dist. LEXIS 96327 (D.Nev. 2011) *Gillespie v. Coutrywide Bank FSB*, 2011 U.S. Dist. LEXIS 93118 (D.Nev. 2011) *Martinez v. Bank of Am. Bat'l Ass'n*, 2010 U.S. Dist LEXIS 113378 (D.Nev. 2010) *March v. Pinnacle Mortg. of Nev.*, 2011 U.S. Dist. LEXIS 117185 (D.Nev. 2011) *Rinehold v. Indymac Bank FSB*, 2011 U.S. Dist. LEXIS 896 (D.Nev. 2011) *Kenneweg v. Indymac Bank*, 2011 U.S. Dist. LEXIS 661 (D.Nev. 2011) *Contreras v. Master Fin. Inc.*, 2011 U.S. Dist. LEXIS 996 (D.Nev. 2011); *Regas v. Freemont Invs. Loan*, 2010 U.S. Dist. LEXIS 132925 (D.Nev. 2010); *Erickson v. PNC Mortg.*, 2011 U.S. Dist. LEXIS 46387 (D.Nev. 2011)

correct decision here. It is important to remember the procedural posture of this case at this juncture and in context. QLS was a party to a joint Motion to Dismiss at the outset of this case. The Joint Motion to Dismiss sought to apply the order of Judge Williams not just to QLS but to all of the co-defendants in this action.

QLS in this instance will provide a preliminary "peak" at a motion which they would like to be heard separately in this instance as QLS has a marketedly different fact pattern from the other co-defendants in this matter. Claim preclusion (barring parties from litigating claims that were or could have been brought in prior litigation) applies if (1) the same parties ***or their privies*** are involved in both cases, (2) a valid final judgment has been entered, and (3) the subsequent action is based upon the same claims or any part of them that were or could have been brought in the first case. *Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 915 (Nev. 2014) (emphasis added). Issue preclusion is an equitable doctrine employed to conserve judicial resources, maintain consistency, and avoid harassment of oppression of a party in serial litigation. *Id.* at 916. Issue preclusion requires that: (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. *Id.* (citing *Five Star Capital Corp. v. Rudy*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (emphasis added).

Claim preclusion should apply to QLS in this case. QLS litigated this matter with the FID and received a valid final judgment. *See QLS's MSJ* Filed April 4, 2017. The FID litigation fully involved QLS's debt collection licensure status. *Id.* Moreover, the Nevada Financial Institutions Division acted as *parens patriae* and thereby representatives of all property owners in Nevada which places them in privity with the Plaintiffs in this matter. *Alaska Sport Fishing Ass'n v. Exon Corp* 34 F.3d 769 (9th Cir 1994) *also Nevada v. Bank of Am. Corp* 672 F.3d 661 (9th Cir 2012)

NRS §649.400. If QLS is in compliance with the FID regulations, it simply makes little sense to repeatedly drag them into Court to answer for this alleged wrong over and over again.

In contrast the Plaintiffs refer to *Klem* as some type of proof that the Defendants in this matter have committed some type of wrong here. *Opp to MTD* pp.28-30. The *Klem* case is simply not on point. A deceptive trade practice in Washington State is "an act or practice which has a capacity to deceive a substantial portion of the public." *Klem v. Wash Mut. Bank* 176 Wn.2d 771 (2013). In *Klem* QLS failed to postpone a foreclosure sale in which there was contested guardianship proceeding involving allegations of elder abuse in which there was several hundreds of thousands of dollars in equity in a piece of residential real property which would have provided for the care of an elderly ward of the State of Washington. *Id.* It was unclear at that time that this specific action would was a deceptive trade practice under Washington Law. *Id.* It is worth noting that the Plaintiffs use this fact pattern to argue that MTC, not QLS, has committed a deceptive trade practice by failed to hold a collection license in the state of Nevada. Nevada however is simply not as expansive as Washington. NRS §598.0915 through NRS §598.0925 expressly defines deceptive trade practices in Nevada and none of them involve "an act or practice which has a capacity to deceive a substantial portion of the public" in the expansive manner defined in Washington. Moreover, Trustees in Nevada are limited to liability via NRS §107.028(7) to treble damages or $5,000.00 plus attorney's fees.

Nothing the Plaintiffs have cited has anything to do with the licensure of QLS and moreover QLS is simply not required to be licensed at all. This arguement is essentially *ad hominem* which is not on point.

C. THESE ALLEGATIONS ARE NOT DECEPTIVE TRADE PRACTICES BECAUSE ALL OF THE DEFENDANTS ARE IN COMPLIANCE WITH THE ORDERS AND RULES OF THE FID

As has been more thoroughly brief in QLS's own independent Motion for Summary Judgment, QLS is in compliance with the rules and statutes which govern foreclosure trustees and

QLS even goes as far as to be in compliance with the rules of the Financial Institutions Divisions. NRS §598.0955, entitled "Applicability of NRS 598.0903 to 598.0999 inclusive" states in pertinent part:

> "1. The provisions of NRS 598.0903 to NRS 598.0999 inclusive do not apply to:
>
> **a. Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state or local governmental agency"** (Emphasis Added)

The Plaintiffs with therefore, under the Deceptive Trade Practices act need to necessarily show that the Defendants are not in compliance with the law. The Plaintiffs however have failed to do any such thing. The only thing that has been demonstrated on this record is that the FID attempted one time to compel a foreclosure trustee to obtain a debt collection license and was overturned by the District Court on a petition for judicial review.

D. ALL OF THESE ALLEGATIONS MERELY DEMONSTRATE COMPLIANCE WITH ALL STATUTES AND LAWS

QLS files this joinder to CRC's motion as CRC is unequivocally correct in their assertions. The role of trustee is extremely broad and there is simply no allegations or even facts should by the Plaintiffs in their supplemental opposition which demonstrate that CRC, MTC, NDSC, or QLS has taken any action which is outside of these basic statutory duties. QLS will briefly reiterate it's position below, yet ultimately the Plaintiffs in this matter have demonstrateD no facts or allegations which show that any individual was acting outside of it's statutory mandate.

Again for emphasis In the State of Nevada there are ten (10) different types of entities which can function as trustees. They are:

1. An attorney
2. A title insurer
3. A Trust Company

4. Any domestic or foreign entity which holds a current state business registration issued by the Secretary of State
5. All banks and related entities;
6. Court appointed fiduciaries;
7. Registered Agents;
8. The trustee of a trust holding company;
9. Collection agencies licensed under Chapter 649
10. Any entity engaged in the business of escrow.

NRS §107.028(1)

QLS would point out that between subsections (i) and (j) of NRS §107.028 is the word "or." The Nevada Supreme Court has noted that the disjunctive "or" as opposed to the conjunctive "and", means one or the other but not necessarily all. *Anderson v. State* 109 Nev. 1129, 1134 (1993). By Plaintiffs interpretation, any entity which engages in the basic duties o a foreclosure trustee automatically becomes a Chapter 649 Collection Agency, yet this would not make sense statutorily. Excluded from the term "collection agency" are the following 7 individuals or entities:

1. The Individual Employees of "Credit Men" or businesses attempting to collect debts owed
2. Banks
3. Nonprofit cooperatives
4. Homeowners Associations
5. Abstract companies
6. Real Estate Brokers
7. Attorneys
   NRS §649.020(2)

There are no less than 8 various types of entities and people, over and above NRS Chapter 649 collection agencies, which are specifically allowed by statute and are not expressly exempt from the FID licensing scheme. The only over lap is "attorney's". If all trustees were required to be licensed Debt Collectors then at a minimum then NRS §107.028 would merely say "attorneys" and collection agencies licensed under NRS Chapter 649. It does not.

/…/…/

/…/…/

1. Trustee's are Required to Be Involved in the Loan Modification Process

The Plaintiffs now argue that loan workout are a violation of trustee duties of MTC and therefore MTC, and by implication every other party to this action, is now an unlicensed debt collector. This is inaccurate and being involved in the loan modification process again is a critical duty of a foreclosure trustee in Nevada.

NRS 107.530, entitled "Effect of submitting application for foreclosure prevention alternative" states in pertinent part:

> 1. If a borrower submits an application for a foreclosure prevention alternative offered by, or through, the borrower's mortgage servicer or mortgagee or the beneficiary of the deed of trust, then the mortgage servicer, mortgagee, trustee, beneficiary of the deed of trust or an authorized agent of such a person may not commence a civil action for a foreclosure sale pursuant to NRS 40.430 involving a failure to make a payment required by a residential mortgage loan, record a notice of default and election to sell pursuant to subsection 2 of NRS 107.080 or a notice of sale pursuant to subsection 4 of NRS 107.080, or conduct a foreclosure sale until one of the following has occurred:
>
> (a) The borrower fails to submit all the documents or information required to complete the application within 30 calendar days after the date of the initial acknowledgment of receipt of the application sent to the borrower pursuant to NRS 107.520.
>
> (b) The mortgage servicer, mortgagee or beneficiary of the deed of trust makes a written determination that the borrower is not eligible for a foreclosure prevention alternative, and any appeal period pursuant to subsection 5 has expired.
>
> (c) The borrower does not accept a written offer for a foreclosure prevention alternative within 14 calendar days after the date on which the offer is received by the borrower.
>
> (d) The borrower accepts a written offer for a foreclosure prevention alternative, but defaults on, or otherwise breaches the borrower's obligations under, the foreclosure prevention alternative.

A Nevada foreclosure trustee must be involved in the foreclosure mediation process, as processing a foreclosure while a foreclosure prevention alternative is pending violates Nevada law. It is unclear as to how QLS, or any of these entities, would fulfill a statutory mandate to not process a foreclosure while there is a foreclosure prevention alternative pending if they are not involved in the foreclosure prevent alternative process.

Additionally, and more pragmatically speaking, even before this statute was enact, a foreclosure trustees hands off approach to foreclosure prevention alternatives would be an unmitigated disaster. Again "trustee shall act impartially and in good faith with respect to the deed

of trust and shall act in accordance with the laws of this State." NRS §107.028(6). A hands off trustee could potentially find itself in a position where a loss mitigation alternative had been submitted and approved yet no one would inform the trustee. Unknown to the trustee, the property continues to sale and a third party purchaser, and potentially a bona fide purchaser, suddenly becomes involved. The trustee displaces the homeowners, whom is now current on their mortgage. The trustee is now liable on a wrongful foreclosure claim by the borrower. *Collins v. Union Federal Sav. & Loan Ass'n* 99 Nev. 284 (1983)(stating a wrongful foreclosure is one that takes places where there is no breach of condition or failure of performance by the mortgagor.). The trustee is now liable for treble damages stemming from this sale and the loss of the house. NRS §107.080(8). The homeowner is now homeless through no fault of their own. The trustee is now liable to the purchaser for this failure as the current title holder. NRS §107.028.

In sum, a common sense reading of the statute and the pragmatic realities of this very delicate situation indicates that if a trustee is truly acting in good faith then yes it is important for a trustee to know and understand the current status of the underlying loan obligation. Finally and logically QLS is hard pressed to believe that a foreclosure trustee is not acting in "good faith", as is there statutory mandate, towards the deed of trust my not trying to assist in keeping Nevadans in their homes. Also a trustee is not acting in "good faith" but monitoring this process as many of the lenders are bound by the National Mortgage Settlement agreement which prevents dual tracking of foreclosure during the foreclosure process[3].

2. Collecting Money and Acting as the Middle Man to Pay Off Deeds of Trust is a Basic Duty of A Foreclosure Trustee and as such No FID License is Required

Nevada Foreclosure Trustee, at their option, may involve themselves in the reinstatement process. NRS §107.080(2)(c)(3)(Stating that a foreclosure trustee may sent a written statement of the amount of payment required to make good the deficiency in perform, avoid the exercise of the

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[3] Available at http://www.nationalmortgagesettlement.com/ (Last Visited April 4, 2017)

power of sale, and reinstate the terms and conditions). NRS §107.080(2) states that the trustee has an affirmative duty to monitor the restatement process prior to exercising the power of sale in the performance of their neutral good faith duties to both the beneficiary of the deed of trust and the grantor/ obligaor. NRS §107.080(2)(stating that the power of sale may not be exercised by a trustee until either the conclusion of a 15 or 35 day period has run from the notice of sale). In fact the Foreclosure Trustee must monitor this reinstatement process up until 5 days before the sale. NRS §107.080(2)(b).

Additionally, the Plaintiff in this instance ignores the plan mandates of the foreclosure mediation program in Nevada regarding collection of fees. For example, Nevada Foreclosure Mediation Rule 5 provides that provides that the Grantor/ Debtor may pay the trustee fees for the foreclosure mediation program and if the fees are paid directly to the trustee, then the trustee is to deposit the fees into their account and forward the fees to the mediator. The Plaintiffs also decry MTC involvement in deed in lieu yet NFMP 11specifically contemplates that a borrower may surrender the property and deliver keys to the property to the trustee. NFMR 11(1)(a). In fact NFMR 8 specifically provides that foreclosure trustees are involved in loan workouts.

There is one key difference here throughout all of this. All a minimum NRS §649.020 requires that a collection agency be collecting payment of a claim owed or due or asserted to be owed or due to another. MTC, nor any other party to this action, in this specific instance has done any such thing. Foreclosure trustee do not have a fiduciary obligation to anyone and are actually not allowed to act for the mortgage beneficiary by operation of statute. In this regard, assuredly they are the "middle men" in a very awkward, but economically necessary, process. Trustee are required to track and facilitate the reinstatement process in a neutral fashion and in a manner that protects both the homeowner as well as the mortgage lender. Foreclosure Trustees are required to collect this money and apply it as appropriate and/ or foreclose on the property. In fact it would

make little sense for an entity acting for the benefit of the laws of State of Nevada, the lender, and the borrower to not assure the themselves that a debt was actually owed.

In sum however the key different however is that the trustee does not act for the benefit of the lender or the homeowner but for the benefit of the law. If MTC say for example, pursued deficiency actions against borrower over and above simply foreclosing on the property this would be a marketedly different story. Yet as long a foreclosure trustee is operating within the confines of NRS Chapter 107, then there is simply no basis for a finding that they are a "collection agency" as has previously been found by the 8th Judicial District Court and specifically as to QLS. There is simply nothing alleged by the Plaintiffs that is outside the confines of normal trustee duties such as collecting on a deficiency judgment.

3. Senior Lien Monitoring is a Basic Duty of A Foreclosure Trustee and as such No FID License is Required

In a similar vein, a foreclosure trustee is required to monitor all encumbrances of record for multiple different reasons. This is not some butler service provided to lender's, but a necessary statutory duty delineated by Nev. Rev. St. Chapter 107. A Trustee that monitor's liens continues to be only functioning in their capacity as a foreclosure trustee, which is simply not a collection agency. All interests of record must be protected by the neutral foreclosure trustee under Nevada law. This is not "collection." For example trustees monitor reinstatements under NRS §107.080 (2) for all encumbrances against the property. Logically, in the furtherance of neutral trustee duties Foreclosure Trustees must monitor senior lien activity to assure there is still a valid security interest to foreclose on. A trustee acting in their neutral position could simply not, in good faith, foreclose on a security interest which had been wiped out by a previous foreclosure of a senior lien as has been seen multiple times by in the post *SFR* in Nevada HOA litigation. Moreover, a senior lien may have requested notice pursuant to NRS §107.090. Monitoring senior

liens is a necessary and indispensible party of foreclosure trustee work. This does not elevate any of this into collection activity.

CONCLUSION

For the foregoing reasons, the Court should respectfully conclude this matter. Plaintiffs are bound by the preclusive effect of the final administrative decision rendered in the FID action that QLS is not a debt collector and is not required to hold a debt collector's license. Moreover, all these actions are compliant with Nevada law and simply not a deceptive trade practice.

Dated: April 4, 2017

McCARTHY & HOLTHUS, LLP

By: /s/ *Thomas N. Beckom, Esq*
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CLARK COUNTY, NEVADA

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Plaintiffs,

v.

CASE NO: A-11-649857-C

Dept. 19

PLAINTIFFS' REPLY TO MTC'S OBJECTION, FOR THE MAY 4, 2017 HEARING

Jury Trial Demanded

Hearing Date: May 4, 2017

Hearing Time: 9:00 a.m.

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.

I. MTC PERVERTS THE RECORD

MTC's "Objection" is entirely dishonest. MTC claims that its defective Summary Judgment "Cross-Motion" is the only motion pending before the Court (with Plaintiffs' Summary Judgment Motion). In fact, as reflected by the record and the Transcript of the Hearing on March 14, 2017, Plaintiffs' Motion for Clarification and Entry of Order was pending and remains pending. It is that motion which relates directly to the clarification and issuance of a written Order on the Motions to Dismiss that were denied by Judge Scann in February, 2016.

At the hearing of March 14, 2017, the Court sought additional briefing related to the Motions to Dismiss heard by Judge Scann, which must now be considered only in light of the operative complaint, which is the Third Amended Complaint. It was filed and made operative pursuant to a motion and a definitive Order issued by the Court allowing the amendment. Any confusion of the record can be laid on the steps of defendants, and the lack of a written order on the 12(b) motion for over a year.

As reflected by the entirety of the Transcript of the Hearing on March 14, 2017, the Court was concerned with the Motion to Dismiss issues, including the relevant case authority, the inter-relationship, queried by the Court, between NRS

649 and NRS 107, the actual determination made by Judge Scann and any relevance of Judge William's Order in the prior QLS matter. Plaintiffs therefore briefed the issues consistent with the Court's request and statements at the hearing of March 14, 2017. (See Hearing Transcript dated March 14, 2017, e.g., pp. 20-39). CRC has filed a roughly similar brief (expressly asking for dismissal), with multiple joinders, including by MTC.

Also, near the conclusion of the March 14, 2017 hearing, there was a dialogue between the Court and MTC's counsel, Mr. Ceran. That exchange seemed to indicate that MTC's summary judgment motion is not set (and surely not to be heard on May 4, 2017). In fact, after Mr. Ceran mentioned a "reset," the Court commented to the effect that if the motions to dismiss were granted by the Court on May 4, 2017, the Court would most likely thereafter grant MTC's summary judgment motion, at a time yet to be determined.[1] (See Hearing Transcript dated March 14, 2017, pp. 40-41).

II. THE NINTH CIRCUIT MINORITY CONFUSION

The instant case is grounded in the unlicensed collection agency services solicited and executed by the foreign Defendants in the state of Nevada. The allegations and evidence show that Defendants offered a variety of default and collection services, often but not exclusively in connection with foreclosure services. Everything involved here turns on the collection agency services solicited and performed in Nevada by the Defendants, without a license from the FID. This basic fact is one of several reasons why the Ninth Circuits odd, minority ruling in Dowers v. NationStar Mortgage is inapplicable and unpersuasive here.

A second, compelling reason that Dowers is suspect here, if not meaningless, is the failure of the Court to discuss, cite or even acknowledge the existence of the

[1] Plaintiffs reserve all positions and contentions regarding whether this intended process would be procedurally defective.

Nevada Supreme Court's controlling holding in Betsinger v. D.R. Horton, Inc. (Nev. 2010) 232 P.3d 433. This Court must follow Betsinger, supra.

The collection agency services executed by the foreign Defendants against Nevada homeowners without a license from the FID were illegal - - they had no right to execute these services adversely to the Plaintiffs, and the collection actions therefore constitute a deceptive trade practice, as a matter of law, pursuant to NRS 598.0923(1).

Also, in Dowers, notwithstanding that the case centered on a loan servicer, not the foreclosure trustee, the panel expressly concluded that one section of the FDCPA applied to substitute trustees pursuing foreclosure actions under state law and pursuant to a statutory deed of trust. In Dowers, the Court reversed the trial court's erroneous dismissal, regarding 15 U.S.C. §1692f(6).

The reality is simply: the FDCPA is much narrower and quite different from NRS 649. This has been explained in several prior briefs submitted by Plaintiffs in this case. The statutory scheme is different, and the critical language of the statute in Nevada, NRS 649.020(1) is different. Unless expressly exempted from NRS 649 by name in NRS 649.020(2), which does not exempt foreclosure trustee, all businesses falling within the definition of NRS 649.020(1) must first obtain a license from the FID.

No provision of NRS 649 was examined or adjudicated by the Court in Dowers. As perhaps noted recently by a conflict with the Nevada Supreme Court involving constitutional interpretation, it appears that the credibility of the Ninth Circuit continues to wane. More and more, decisions issued by the Ninth Circuit seem ill – conceived. The bizarre opinion from the Ninth Circuit enjoining enforcement of the President's executive order suspending the entry of potential terrorist aliens, until proper vetting, is just one example. Many in Congress again seek to divide the Ninth Circuit, and that Court is increasingly referred to as the Ninth Circus. In this vein, it seems inexplicable that the panel which issued the

Dowers decision failed to cite or discuss the Ninth Circuit's 2017 decision in Mashiri v. Espten, Grinnell & Howell, 845 F.3d 984 (9th Cir. 2017). The unanimous court in Mashiri made clear that the previous Ho decision was severely limited, and reiterated by express language and its holding that any entity who engages in collection agency activities, beyond a precise and limited statutory filing, can be a debt collector subject to all the laws and rules of the FDCPA. In Mashiri, the Court reversed the trial court's erroneous dismissal order. Candidly, in trying to define its minority view, which is contrary to all other federal circuit courts, the Ninth Circuit seems confused.

DATED: April 6, 2017

LAW OFFICE OF NICHOLAS A. BOYLAN, APC

By: /s/ Nicholas A. Boylan
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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 April 6, 2017, I served a true and correct copy of the foregoing:

- **PLAINTIFFS' REPLY TO MTC'S OBJECTION, FOR THE MAY 4, 2017 HEARING**

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Plaintiffs,

v.

CASE NO: A-11-649857-C

Dept. 19

PLAINTIFFS' REPLY TO DEFENDANTS CALIFORNIA RECONVEYANCE COMPANY'S REQUEST TO DISMISS THE THIRD AMENDED COMPLAINT (AND JOINDERS)

Jury Trial Demanded

Hearing Date: May 4, 2017

Hearing Time: 9:00 a.m.

TABLE OF CONTENTS	PAGES
I. DEFENDANTS' ALLEGED CONDUCT HAS INJURED PLAINTIFFS	1
A. Causation Is Shown as a Matter of Law; Alternatively, a Fact Issue Is Shown Such That Dismissal Cannot Be Granted	3
B. The Governing Statute Provides Equitable Relief, Remedies and Fees; Damages Are Not Required	6
C. Defendants Fail to Show Their Fees Are Not Illicit	9
D. The Governing Statute Provides Equitable Relief, Remedies and Fees; Damages Are Not Required	12
E. Evidence Shows Damage Caused and Suffered Here	
1. MTC's Illicit Fees and Costs Were Added to Borrowers (e.g., Plaintiff Sansotas') Obligation, and Thus The Claim Against The Property, Which Claim Was 'Collected," Property Sold and Funds Passed By MTC To The Lender, Wells Fargo Bank	12
2. As an Example, Plaintiff Laghaei Also Has Damages Caused By Illicit Operations	13
F. Unjust Enrichment Is Applicable Here	
1. Plaintiffs Did Not Enter Into A Contract With MTC	15
2. The Deed of Trust is Irrelevant And Void As Authority To Commit Illegal Acts, So Unjust Enrichment Applies	
II. DEFENDANTS WERE REQUIRED TO BE LICENSED AS COLLECTION AGENCIES	16
A. NRS Chapter 107 Does Not Authorize, Expressly or Otherwise, Defendants to Engage in the Misconduct Alleged in the TAC	16
1. Collection Agencies that Serve as Non-Judicial Foreclosure Trustees Must Be Licensed by the FID as Collection Agencies	16
2. Defendants Misstate the Role of Non-Judicial	18

they are debt collectors." 840 F.3d at 622. *Ho* addressed whether a trustee's communications—limited solely to pursuing non-judicial foreclosure—were debt collection activities for purposes of the FDCPA. *Id.* at 619-20, 623. In contrast to this case, the trustee sought to enforce a secured loan and sent a notice of default that did not request payment but instead "merely informed Ho that the foreclosure process had begun, explained the foreclosure timeline, apprised her of her rights and stated that she could contact [the lender] (not [the trustee]) if she wished to make a payment." *Id.* at 623. We held that*HN8*[] where an entity is engaged solely in the enforcement of a security interest and not in debt collection, like the trustee and unlike Epsten, it is subject only to § 1692f(6) rather than the full scope of the FDCPA. *See id.* at 622 ("We do *not* hold that the FDCPA intended to exclude all [**13] entities whose principal purpose is to enforce security interests. . . . We hold only that the enforcement of security interests is not always debt collection.").

Because Epsten sent the May Notice as a debt collector attempting to collect payment of a debt—irrespective of whether it also sought to perfect the HOA's security interest and preserve its right to record a lien in the future—it is subject to the full scope of the FDCPA, including § 1692g and § 1692e. *See id.* Epsten's attempt to escape liability under § 1692g and § 1692e therefore fails.

B.

As noted above, Mashiri argues that she alleged a violation of § 1692g on two grounds. First, she argues that the May Notice requested payment by a date that was inconsistent with a debtor's right to dispute the debt within thirty days from receipt of the notice. Second, she argues that Epsten's threat to record a lien within thirty-five days of the date of the letter overshadowed her right to dispute the debt. We address each of these arguments below, and hold that Mashiri has alleged a plausible § 1692g violation on both grounds.

HN9[] The FDCPA requires a debt collector to send the debtor a written notice that informs the debtor of the amount of the debt, to whom the debt is owed, her [**14] right to dispute the debt within thirty days of receipt of the letter, and her right to obtain verification of the debt.[6] Because the [*991] notice must inform the debtor of her right to obtain verification of the debt, the notice is commonly referred to as a "validation" notice. However, "[t]he statute is not satisfied merely by inclusion of the

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[6] *HN10*[] Section 1692g(a) provides that the debt collector must notify the debtor of the following:

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will [**15] provide the consumer with the name and address of the original creditor, if different from the current creditor.

required debt validation notice; the notice Congress required must be conveyed effectively to the debtor." *Swanson v. S. Or. Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1988).

Importantly, *HN11*[] notice of the debtor's right to dispute the debt and to request the name of the original creditor must not be overshadowed or inconsistent with other messages appearing in the communication.[7] 15 U.S.C. § 1692g(b). Overshadowing or inconsistency may exist where language in the notice would "confuse a least sophisticated debtor" as to her validation rights. *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1997). In other words, "[u]nder the law of this circuit, whether the initial communication violates the FDCPA depends on whether it is likely to deceive or mislead a hypothetical 'least sophisticated debtor.'" *Id.* at 1431 (internal quotation marks omitted).

1.

Turning to Mashiri's first basis for a § 1692g violation, Mashiri claims that the May Notice did not provide a debtor thirty days in which to dispute the debt. We have previously observed that *HN12*[] a § 1692g violation would result if a debt collector demanded payment prior to the expiration of the thirty-day dispute period to which debtors are entitled. As we explained in *Terran*:

> A demand for payment within less than the thirty-day timeframe necessarily requires the debtor to [forgo] the statutory right to [**16] challenge the debt in writing within thirty days, or suffer the consequences. For this reason, requiring a payment that would eliminate the debt before the debtor can challenge the validity of that debt directly conflicts with the protections for debtors set forth in section 1692g.

Id. at 1434.

In this case, the May Notice demanded payment within thirty-five days of the *date* of the letter, which is inconsistent with a debtor's right to dispute a debt within thirty days of *receipt* of the letter. By the time a debtor receives such a letter, there may be fewer than thirty days before payment is due.[8] Moreover, even if the debtor received the letter promptly, in order for the payment to be received within thirty-five days of the date of the letter, the debtor would likely need to mail the payment prior to the thirtieth day of the dispute period. *See Chauncey v. JDR Recovery Corp.*, 118 F.3d 516, 519 (7th Cir. 1997). The least sophisticated debtor, when [*992] confronted with such a notice, would reasonably forgo her right to thirty days in which to dispute the debt and seek

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[7] The terms "overshadowing" and "inconsistent" are often used interchangeably. *See, e.g., Pollard v. Law Office of Mondy L. Spaulding*, 766 F.3d 98, 104 (1st Cir. 2014) ("We note at the outset that, in the section 1692g milieu, courts do not always distinguish between violations based on the overshadowing of a validation notice and violations based on inconsistencies.").

[8] Although Epsten asks us to take judicial notice of a certified mail receipt showing that Mashiri received the May Notice on May 2, 2013, the district court did not consider the certified mail receipt, and we decline to do so as well. The date on which Mashiri received the May Notice is irrelevant because *HN13*[] we undertake an "*objective* analysis that takes into account whether the least sophisticated debtor would likely be misled by a communication." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1017 (9th Cir. 2012) (emphasis added and internal quotation marks omitted).

verification. The infringement of the debtor's right to thirty days in which to dispute the debt plausibly violates § 1692g. *See Terran*, 109 F.3d at 1434.

2.

Mashiri alleged a plausible § 1692g violation for the additional reason that the least [**17] sophisticated debtor may not understand, on the basis of the May Notice, that *HN14*[↑] upon notifying Epsten of a dispute, debt collection activities would "cease . . . until the debt collector obtains verification of the debt . . . and a copy of such verification . . . is mailed to the consumer by the debt collector." 15 U.S.C. § 1692g(b). Rather, the May Notice stated that a lien "will" be recorded if Mashiri "fail[ed] to pay." The least sophisticated debtor would likely (and incorrectly) believe that even if she disputed the debt and Epsten had not yet mailed verification of the debt to her, Epsten would record a lien on the thirty-fifth day after the date of the letter. "In this manner, the letter effectively overshadows the disclosed right to dispute by conveying an inaccurate message that exercise of the right does not have an effect that the statute itself says it has." *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 105 (1st Cir. 2014).

Epsten relies on *Shimek v. Weissman, Nowack, Curry & Wilco, P.C.*, 374 F.3d 1011 (11th Cir. 2004) (per curiam) for the proposition that, upon receipt of a request for debt verification, the FDCPA does not require a debt collector to take affirmative action to stop the recording of a lien that had already been filed. That case, however, correctly recognizes that *HN15*[↑] "sending a lien to the clerk of the court [for filing] *after* a [**18] verification of the debt was requested is clearly contrary to § 1692g(b)'s requirement that a debt collector shall 'cease collection of the debt' once the verification is requested." *Id.* at 1014. In addition, *Shimek* is factually inapposite because "[u]nder Georgia law, the filing of a lien by a creditor is a necessary step for securing payment of a debt," and the Eleventh Circuit "assum[ed] the propriety of filing the lien with the Court Clerk contemporaneously with the demand letter." *Id.* at 1013-14. *HN16*[↑] In California, pursuant to the Davis-Stirling Act, a homeowners' association may not record a lien with a county recorder's office contemporaneously with mailing the demand letter, but instead must provide notice of the debt at least thirty days prior to recording a lien, during which time a debtor-homeowner may dispute the debt. Cal. Civ. Code § 5660.

The obligations imposed on the HOA pursuant to the FDCPA, including the provision requiring suspension of debt collection activities pending debt verification, are thus consistent with the requirements the HOA must satisfy pursuant to the Davis-Stirling Act. *HN17*[↑] The HOA's right to record a lien thirty days after providing notice under section 5660 is not absolute, but instead is dependent on whether the homeowner disputes the [**19] debt. Indeed, pursuant to the Davis-Stirling Act, if the homeowner disputes the debt and requests an informal dispute resolution proceeding, the HOA must participate in dispute resolution "prior

to recording a lien." Cal. Civ. Code § 5670.

In this context, the threat of recording of a lien is a debt collection activity, which under the FDCPA must cease if the debtor-homeowner disputes the debt and the debt collector has not yet mailed verification of the debt to the debtor-homeowner. The Davis-Stirling Act does not mandate otherwise. Epsten was obligated to explain such debt validation rights in an effective manner. *See Swanson*, 869 F.2d at 1225. In [*993] failing to do so, the threat of filing a lien overshadowed Mashiri's right to dispute the debt, in violation of § 1692g. Because Mashiri has plausibly alleged a violation of § 1692g on the basis of inconsistency and overshadowing, we reverse the district court's dismissal of that claim.

IV. Conclusion

We hold that Mashiri has plausibly alleged a claim under § 1692g, and we reverse the district court's dismissal of that claim. Because we reverse the district court's dismissal of Mashiri's § 1692g claim, we reverse the district court's dismissal of Mashiri's claims that depended on § 1692g and arose under § 1692e(5), the Rosenthal [**20] Act, and the Unfair Competition Law.[9]

REVERSED and REMANDED.

End of Document

[9] To the extent Mashiri asserted claims under § 1692e, the Rosenthal Act, or the Unfair Competition Law on grounds unrelated to her § 1692g claim, Mashiri does not challenge the district court's dismissal of those claims.

Caution
As of: March 27, 2017 3:08 PM EDT

Reese v. Ellis, Painter, Ratterree & Adams LLP

United States Court of Appeals for the Eleventh Circuit

May 1, 2012, Decided; May 1, 2012, Filed

No. 10-14366

Reporter
678 F.3d 1211 *; 2012 U.S. App. LEXIS 8839 **; 23 Fla. L. Weekly Fed. C 986; 2012 WL 1500108

IZELL REESE, RAVEN REESE, Plaintiffs - Appellants, versus ELLIS, PAINTER, RATTERREE & ADAMS, LLP, Defendant - Appellee.

Prior History: [**1] Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 1:09-cv-02435-WCO.

Core Terms

law firm, documents, promissory note, debt collector, foreclosure, security interest, collection, notice, debt collection, alleges, collect a debt, lender, Deed, mortgage, demand for payment, real property, purposes, district court, dunning

Case Summary

Procedural Posture

Plaintiff debtors filed a putative class action suit against defendant law firm alleging communications violated the Federal Debt Collection Practices Act, 15 U.S.C.S. § 1692e. The United States District Court for the Northern District of Georgia dismissed the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The debtors appealed.

Overview

The district court found that the firm was not a debt collector under 15 U.S.C.S. § 1692a(6) and that the letter and documents it sent were not covered by § 1692e. Under the promissory note, the debtors were consumers who were to pay money to the lender, and their obligation to do so arose from a transaction involving property that was primarily for the debtors' personal, family, or household purposes. The promissory note was a debt within the plain language of § 1692a(5). The firm's letter and enclosed documents were an attempt to collect that debt and the complaint sufficiently alleged that the notice was a communication related to the collection of a debt within the meaning of § 1692e. Even if the firm intended the letter and documents to give notice of the foreclosure to the debtors, they also demanded payment on the underlying debt. The fact that the letter and documents related to the enforcement of a security interest did not prevent them from also relating to the collection of a debt within the meaning of § 1692e. The

complaint contained enough factual content to allow a reasonable inference that the firm was a debt collector because it regularly attempted to collect debts.

Outcome

The judgment of the district court was reversed, and the case was remanded for further proceedings.

LexisNexis® Headnotes

Banking Law > Consumer Protection > Fair Debt Collection > Liability for Violations

HN1[] 15 U.S.C.S. § 1692k(a)(2) provides that plaintiffs may recover statutory damages from a debt collector for any violation of the Federal Debt Collection Practices Act, 15 U.S.C.S. § 1692e.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN2[] An appellate court reviews de novo a district court's interpretation of a statute.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] An appellate court reviews de novo the grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), accepting the allegations in the complaint as true and construing them in the light most favorable to a plaintiff. A complaint must state a facially plausible claim for relief, and a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Commercial Law (UCC) > General Provisions (Article 1) > Definitions & Interpretation > Purchasers & Purchases

Commercial Law (UCC) > ... > Definitions & General Concepts > Definitions > Security Interests

Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation

HN4[] A promissory note is a contract evidencing a debt and specifying terms under which one party will pay money to another. O.C.G.A. § 11-9-102(a)(64) states promissory note means an instrument that evidences a promise to pay a monetary obligation. By contrast, a security interest is not a promise to pay a debt; it is an interest in some collateral that a lender can take if a debtor does not fulfill a payment obligation. A mortgage is a type of security interest with real property as the collateral. Ga. Code Ann. § 44-14-30 states a mortgage in this state is only security for a debt and passes no title.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

Banking Law > Consumer Protection > Fair Debt Collection > Unfair Practices

HN5[] The Federal Debt Collection Practices Act (FDCPA), 15 U.S.C.S. § 1692e, prohibits a debt collector from using a false, deceptive, or misleading representation or means in connection with the collection of any debt. 15 U.S.C.S. § 1692e. That means in order to state a plausible FDCPA claim under § 1692e, a plaintiff must allege, among other things, (1) that the defendant is a debt collector and (2) that the challenged conduct is related to debt collection.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

HN6[] The Federal Debt Collection Practices Act (FDCPA), 15 U.S.C.S. § 1692e, broadly defines the word debt: The term debt means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. 15 U.S.C.S. § 1692a(5).

Commercial Law (UCC) > ... > Default > Default & Enforcement of Security Interests > General Overview

Real Property Law > Financing > Foreclosures > General Overview

HN7[] O.C.G.A. § 44-14-162.2 requires a party initiating a non-judicial foreclosure to notify the debtor no later than 30 days before the date of the proposed foreclosure.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN8[] A communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest. A debt is still a debt even if it is secured.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

HN9[] A debt collector is 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. 15 U.S.C.S. § 1692a(6). So a party can qualify as a debt collector by either using an instrumentality of interstate commerce or the mails in operating a business that has the principal purpose of collecting debts or by regularly attempting to collect debts.

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Judges: Before DUBINA, Chief Judge, CARNES, Circuit Judge, and FORRESTER,* District Judge.

Opinion by: CARNES

Opinion

[*1214] CARNES, Circuit Judge:

Izell and Raven Reese defaulted on a loan that they had secured by giving the lender a mortgage on their property. A law firm representing the lender sent the Reeses a letter and documents demanding payment of the debt and threatening to foreclose on the property if they did not pay it. The Reeses then filed a putative class action lawsuit against the law firm alleging that the communication violated the Federal Debt Collection Practices Act, 15 U.S.C. § 1692e. The district [**2] court dismissed the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), finding that the law firm was not a "debt collector" under § 1692a(6) and that the letter and documents it sent were not covered by § 1692e. This is the Reeses' appeal.

I.

The Reeses currently live on a piece of property in Roswell, Georgia, that they purchased in 2004 with the help of a $650,000 loan from Provident Funding Associates, L.P.[1] To get that loan, the Reeses signed a promissory note and executed a security deed giving Provident a mortgage on their property. A few years later, the Reeses defaulted on the promissory note.

On June 3, 2009, Provident's law firm, Ellis, Painter, Ratterree & Adams LLP ("the Ellis law firm"), mailed the Reeses a collection or "dunning" notice, which consisted of a cover letter and three documents. The subject line of the cover letter states:

> RE: Note, dated July 23, 2004, in the principal [**3] amount of $650,000.00 from Izell Reese and Raven Reese to Provident Funding Associates, L.P.
> Security Deed, dated July 23, 2004, from Izell Reese and Raven Reese to Mortgage Electronic Registration Systems, Inc., as nominee for Provident Funding Associates, L.P., describing certain real property known as 4037 Thessa Cove, Roswell, Georgia.

The first paragraph of the letter describes Provident as the "Lender" and "current holder of the above-referenced Note . . . and Security Deed," and explains that the Ellis law firm represents Provident. The letter continues:

> This letter is to advise you that your Note has been and is declared to be in

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* Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

[1] Because this is an appeal from a Rule 12(b)(6) dismissal, we draw the facts from the allegations in the complaint, which we accept as true and construe in the light most favorable to the plaintiffs. See Powell v. Thomas, 643 F.3d 1300, 1302 (11th Cir. 2011).

default for non-payment and Lender hereby demands full and immediate payment of all amounts due and owing thereunder.

This letter is also to advise you that [Provident] intends to enforce the provisions of the Note and Security Deed relative to payment of attorney's fees. In accordance with Georgia law, you are hereby notified that unless you pay all amounts due and owing under the Note and Security Deed within ten (10) days of the date you receive this letter, reasonable attorney's fees will be added to the total amount for which collection is sought.

Unless [**4] your loan is satisfied in accordance with this demand, the foreclosure sale of the above-referenced real property will be conducted....

A partner of the Ellis law firm signed the letter. Under the signature is a disclaimer in bold font that says: "THIS LAW FIRM MAY BE ATTEMPTING TO COLLECT A DEBT ON BEHALF OF THE ABOVE-REFERENCED LENDER."

[*1215] The first of the three documents attached to the letter is a "NOTICE OF SALE UNDER POWER," which states that Provident plans to sell the Reeses' property at a public auction on July 7, 2009. The second document is entitled "NOTICE REQUIRED BY THE FAIR DEBT COLLECTION PRACTICES ACT[,] 15 USC 1601 ET SEQ, AS AMENDED," which explains that the debt described in the cover letter would be presumed valid unless the Reeses disputed its validity within thirty days. The third document explains that military service members have additional statutory rights to avoid foreclosure. Printed in big, bold letters at the bottom of the second document is this warning: "THIS LAW FIRM IS ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED BY U.S. WILL BE USED FOR THAT PURPOSE." (Emphasis added.) The bottom of the third document contains a similar warning: "THIS LAW [**5] FIRM IS ACTING AS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT."

A few months after receiving the dunning letter and documents, the Reeses filed in federal district court a complaint against the Ellis law firm for violations of the FDCPA. The complaint alleges that the law firm is a "debt collector," that it "sought to collect debts" from the Reeses, and that its letter contains "false, deceptive[,] or misleading representation[s]" in violation of 15 U.S.C. § 1692e.[2] The Reeses filed the complaint and sought statutory damages on behalf of a proposed class consisting of the "more than five hundred" people who received similar letters and documents from the Ellis law firm.*HN1*[⚲] See 15 U.S.C. § 1692k(a)(2) (providing that plaintiffs may recover statutory damages from a debt collector for any violation of the FDCPA). They attached to the complaint the entire contents of the dunning notice (the cover letter and the three attached documents).

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[2] The complaint alleges that the Ellis law firm's letter made two misrepresentations of Georgia law. The first is the letter's statement that the owner of the real property after the foreclosure sale "will [**6] be entitled to immediate possession of the real property." The second is that any tenants on the property would also have to vacate the property after the sale.

The Ellis law firm moved to dismiss the complaint for failure to state a claim, arguing that the firm is not subject to the requirements of § 1692e because it is not a "debt collector" and sending the letter and other documents did not amount to debt collection activity but instead was merely an attempt to enforce a client's security interest. A magistrate judge issued a report recommending granting that motion to dismiss, which the district court did.

II.

HN2[] We review de novo a district court's interpretation of a statute. United States v. Dodge, 597 F.3d 1347, 1350 (11th Cir. 2010) (en banc). *HN3*[] We also review de novo the grant of a motion to dismiss under Rule 12(b)(6), "accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." Belanger v. Salvation Army, 556 F.3d 1153, 1155 (11th Cir. 2009). A complaint must state a facially plausible claim for relief, and "'[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable [**7] inference that the defendant is liable for the misconduct alleged.'" Wooten v. Quicken Loans, Inc., 626 F.3d 1187, 1196 (11th Cir. 2010) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)). Because the Ellis law firm's dunning letter and enclosed documents were attached to the [*1216] Reeses' complaint as an exhibit, we treat them as part of the complaint for Rule 12(b)(6) purposes. See Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997).

A.

We begin our analysis by highlighting the difference between a promissory note and a security interest. *HN4*[] A promissory note is a contract evidencing a debt and specifying terms under which one party will pay money to another. See Black's Law Dictionary 1089 (8th ed. 2004) (defining "promissory note" as an "unconditional written promise, signed by the maker, to pay absolutely and in any event a certain sum of money either to, or to the order of, the bearer or a designated person"); see also Ga. Code Ann. § 11-9-102(a)(64) ("'Promissory note' means an instrument that evidences a promise to pay a monetary obligation . . . ."). By contrast, a security interest is not a promise to pay a debt; it is an interest [**8] in some collateral that a lender can take if a debtor does not fulfill a payment obligation. See Black's Law Dictionary 1384 (8th ed. 2004) (defining a "security" as "[c]ollateral given or pledged to guarantee the fulfillment of an obligation"). A mortgage is a type of security interest with real property as the collateral. See Black's Law Dictionary 1031 (8th ed. 2004); see also Ga. Code Ann. § 44-14-30 ("A mortgage in this state is only security for a debt and passes no title.").

This case involves both a promissory note and a security interest. The Ellis law firm's letter to the Reeses states that the Reeses had granted to Provident a "Note" for $650,000 (a promissory note) and had given Provident a "Security Deed" in their real property (a mortgage). Under that promissory note and security deed, Provident was entitled to foreclose on the

Reeses' property if they defaulted on the promissory note.

B.

With the distinction between a promissory note and a security interest in mind, we turn to the question of whether the Reeses' complaint states a plausible claim for relief. *HN5*[] The FDCPA prohibits a "debt collector" from using a "false, deceptive, or misleading representation or means in connection [**9] with the collection of any debt." 15 U.S.C. § 1692e. That means in order to state a plausible FDCPA claim under § 1692e, a plaintiff must allege, among other things, (1) that the defendant is a "debt collector" and (2) that the challenged conduct is related to debt collection.

The analysis is clearer if we start with the second element and evaluate whether the Reeses' complaint sufficiently alleges that the Ellis law firm's letter and enclosures are an attempt to collect a "debt" within the meaning of the FDCPA. That evaluation involves a question of statutory interpretation and "begins where all such inquiries must begin: with the language of the statute itself." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989). *HN6*[] The FDCPA broadly defines the word "debt":

> The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5).

That definition clearly encompasses the Reeses' [**10] payment obligations under the promissory note at issue in this case. Under that promissory note, the Reeses are consumers who must pay money to Provident, [*1217] and their obligation to do so arose from a transaction involving property that is primarily for the Reeses' personal, family, or household purposes (they live on the property). The promissory note is a "debt" within the plain language of § 1692a(5). See Michael Bourff v. Rubin Lublin, LLC, 674 F.3d 1238, 2012 U.S. App. LEXIS 5613, No. 10-14618, 2012 WL 971800, at *2 (11th Cir. Mar. 15, 2012) (treating a letter requesting payment on a promissory note secured by a mortgage as "an attempt at debt collection" within the meaning of the FDCPA); see also Kojetin v. C U Recovery, Inc., 212 F.3d 1318, 1318 (8th Cir. 2000) (per curiam) (treating a promissory note signed in connection with a car loan as a debt within the meaning of the FDCPA); cf. Ga. Code Ann. § 13-1-11 (stating that a "note" is "evidence of indebtedness").

The fact that the Reeses' obligation to pay off the promissory note is a "debt" for FDCPA purposes does not end the inquiry. The next question is whether the Ellis law firm's letter and enclosed documents are an attempt to "collect" that debt. They [**11] are. The letter, which was attached to the complaint, states that the "Lender hereby demands full and immediate

payment of all amounts due." (Emphasis added.) It also threatens that "unless you pay all amounts due and owing under the Note," attorney's fees "will be added to the total amount for which collection is sought." (Emphasis added.) Not only that, but one of the three documents enclosed with the letter specifically states that the law firm "IS ATTEMPTING TO COLLECT A DEBT," and another states "THIS LAW FIRM IS ACTING AS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT." In light of all that language stating that the law firm is attempting to collect a debt, the complaint sufficiently alleges that the notice is a communication related to "the collection of [a] debt" within the meaning of § 1692e.

Trying to avoid the unavoidable meaning of its statements, the Ellis law firm argues that the letter and documents are not debt-collection activity because the purpose was simply to inform the Reeses that Provident intended to enforce its security deed through the process of non-judicial foreclosure.*HN7*[] See Ga. Code Ann. § 44-14-162.2 (requiring a party initiating a non-judicial foreclosure [**12] to notify the debtor "no later than 30 days before the date of the proposed foreclosure"). In other words, we should ignore the language in the letter and documents that demands payment on the promissory note in favor of what the firm says was the purpose (of the firm or of the letter and documents it sent, or both). If we will do that, the firm argues, we will see that the letter and documents were not an attempt to collect a debt within the meaning of § 1692e but merely an attempt to enforce a security interest.

That argument wrongly assumes that a communication cannot have dual purposes. Even if the Ellis law firm intended the letter and documents to give notice of the foreclosure to the Reeses, they also could have—and did—demand payment on the underlying debt. Georgia law does not require a demand for payment of the debt to be included in a notice of foreclosure, but the law firm included one anyway. See Ga. Code Ann. § 44-14-162.2 (listing what must be included in a notice of foreclosure). The fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of § 1692e.

The [**13] rule the Ellis law firm asks us to adopt would exempt from the provisions of § 1692e any communication that attempts to enforce a security interest regardless of whether it also attempts to collect the underlying debt. That rule would create a loophole in the FDCPA. A [*1218] big one. In every case involving a secured debt, the proposed rule would allow the party demanding payment on the underlying debt to dodge the dictates of § 1692e by giving notice of foreclosure on the secured interest. The practical result would be that the Act would apply only to efforts to collect unsecured debts. So long as a debt was secured, a lender (or its law firm) could harass or mislead a debtor without violating the FDCPA. That can't be right. It isn't. *HN8*[] A communication related to debt collection does not become unrelated to debt collection simply because it also relates

to the enforcement of a security interest. A "debt" is still a "debt" even if it is secured. See, e.g., Gburek v. Litton Loan Servicing LP, 614 F.3d 380, 386 (7th Cir. 2010) (holding that a letter threatening foreclosure while also offering to discuss "foreclosure alternatives" qualified as a communication related to debt collection activity [**14] within the meaning of § 1692e); Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 376 (4th Cir. 2006) ("[The] 'debt' remained a 'debt' even after foreclosure proceedings commenced."); Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 234 (3d Cir. 2005) (holding that a collection letter's threat to execute a lien if payment is not made on a debt "does not change [the law firm's] communications to the [debtors] into something other than an effort to collect that debt"); Romea v. Heiberger & Assocs., 163 F.3d 111, 117 (2d Cir. 1998) (holding that a notice sent in connection with eviction proceedings was a communication related to debt collection because the notice aimed "at least in part to induce [the debtor] to pay the back rent she allegedly owed").[3]

C.

We now turn to whether the complaint plausibly alleges that the Ellis law firm is a "debt collector" within the meaning of the FDCPA. *HN9*[] A "debt collector" is

> 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.

15 U.S.C. § 1692a(6) (emphasis added). So a party can qualify as a "debt collector" by either using an "instrumentality of interstate commerce or the mails" in operating a business that has the principal purpose of collecting debts or by "regularly" attempting to collect debts.

The complaint contains enough factual content to allow a reasonable inference that the Ellis law firm is a "debt collector" because it regularly attempts to collect debts. The complaint alleges that the law firm is "engaged in the business of collecting debts owed to others incurred for personal, family[,] or household purposes." It also alleges that in the year before the complaint was filed the firm had sent to more than 500 people "dunning notice[s]" [**16] containing "the same or substantially similar language" to that found in the letter and documents attached to the complaint in this case. That's enough to constitute regular debt collection within the meaning of § 1692a(6).

The district court dismissed the complaint because it concluded that the Reeses' allegations were insufficient to state [*1219] that the Ellis law firm was a "debt collector" and insufficient to state that the letter and documents were sent to the Reeses "in connection with the collection of

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[3] Because we hold that the Ellis law firm's demand for payment on the promissory note was debt-collection activity within the meaning of the FDCPA, we do not reach the question of whether enforcing a security interest is itself debt-collection activity covered by the statute. That is, we do not decide whether a party enforcing a security interest without demanding payment on the underlying debt is attempting to collect a debt within [**15] the meaning of § 1692e.

[a] debt" within the meaning of § 1692e. For the reasons we have discussed, we disagree.

The judgment of the district court is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this opinion.

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As of: March 27, 2017 2:53 PM EDT

Shapiro & Meinhold v. Zartman

Supreme Court of Colorado

January 13, 1992, Decided

NO. 90SC758

Reporter
823 P.2d 120 *; 1992 Colo. LEXIS 5 **; 16 BTR 17

SHAPIRO AND MEINHOLD, GERALD M. SHAPIRO, DON H. MEINHOLD, P.C., HALIGMAN AND LOTTNER, P.C., KEVIN H. BURKE & ASSOCIATES, P.C., JANET M. ADAMS, in her official capacity as Clerk of the Denver District Court and on behalf of the class of persons herein described, E. MARIE GARDNER, in her official capacity as Clerk of the El Paso District Court and on behalf of the class of persons herein described, PATRICIA PATTERMAN, in her official capacity as Clerk of the Boulder District Court and on behalf of the class of persons herein described, Petitioners, v. JAMES ZARTMAN, MARY DeLANCY, ROBERT MORPHEW, Individually and on behalf of the class of persons herein described, Respondents.

Prior History: [**1] Certiorari to the Colorado Court of Appeals

Disposition: JUDGMENT AFFIRMED

Core Terms

debt collector, attorneys, consumer, activities, real property, debt collection, legal action, foreclosures, collection, exempt, security interest, purposes, debt collection practice, principal purpose, securing, motion to dismiss, trial court, proceedings, abusive

Case Summary

Procedural Posture

Petitioners, attorneys, their law firms, and class representative clerks of court, appealed the decision of the Colorado Court of Appeals, which reversed a trial court order dismissing respondent debtors' suit against the attorneys and their law firms under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.S. § 1692-1692o.

Overview

Under Colo. R. Civ. P. 120, the attorneys and their law firms sought, in judicial districts other than those where the subject realty was located, foreclosure orders against the debtors, who had defaulted on obligations secured with deeds of trust held by the law firms' clients. The debtors responded with a declaratory judgment action that the attempt violated the FDCPA, specifically 15 U.S.C.S. § 1692i, which required that suits to enforce interests in realty be brought in the judicial district

where the realty was located. The trial court granted the law firms' motions to dismiss, but the court of appeals reversed. On appeal by the attorneys, their law firms, and class representative clerks of court, the court held that the appellate standard applied to reviewing a motion to dismiss demanded the following conclusions: (1) under 15 U.S.C.S. § 1692a(6), the attorneys were debt collectors; (2) because the attorneys were debt collectors under the FDCPA, they had to comply with the venue requirement stipulated in 15 U.S.C.S. § 1692i; and (3) the FDCPA did not exempt the attorneys merely because foreclosures constituted a substantial portion of their debt collection activities.

Outcome

The court affirmed the appellate court decision that the attorneys were debt collectors under the Fair Debt Collection Practices Act, and remanded the cause to the district court for further proceedings consistent with the directions in the court's opinion.

LexisNexis® Headnotes

Civil Procedure > Remedies > General Overview

HN1[&] Colo. R. Civ. P. 120 allows an interested party to seek a court order authorizing a sale under a power of sale contained in an instrument.

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Remedies > General Overview

HN2[&] Colo. R. Civ. P. 120(f) provides that, for the purposes of this section, a consumer obligation is any obligation (i) as to which the obligor is a natural person, and (ii) is incurred primarily for a personal, family, or household purpose. Any proceeding under this Rule involving a consumer obligation or an instrument securing a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which such consumer resides at the commencement of the proceeding, unless the obligation is secured by a deed of trust to a public trustee, in which case the proceedings under this Rule may be brought and heard in any county.

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Remedies > General Overview

HN3[&] Any proceeding under Colo. R. Civ. P. 120 which does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Banking Law > Consumer Protection > Fair Debt Collection > Liability for Violations

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Fair Debt Collection Practices Act

HN4[] 15 U.S.C.S. § 1692k provides for civil liability for failure to comply with any provision of the Fair Debt Collection Practices Act, § 1692-1692o.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Fair Debt Collection Practices Act

HN5[] See 15 U.S.C.S. § 1692i.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN6[] A short and plain statement of the claim showing that the pleader is entitled to relief is all that Colo. R. Civ. P. 8(a)(2) requires. In determining a motion to dismiss a complaint, a court must accept all averments of material fact contained in the complaint as true. Colo. R. Civ. P. 12(b)(5). A complaint is sufficient to withstand a motion to dismiss if the plaintiff states a claim that would entitle him to relief. The same standards for determining a motion to dismiss apply to both the trial court and the appellate court.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Fair Debt Collection Practices Act

HN7[] To state a claim for relief under section 15 U.S.C.S. § 1692i, the debtors must allege sufficient facts in their complaint to show that a "debt collector" brought a "legal action" against them "to enforce an interest in real property securing a consumer's obligation" in a county other than that in which the real property is located.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Fair Debt Collection Practices Act

HN8[] 15 U.S.C.S. § 1692a(6) defines the term debt collector 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 attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. For the purpose of section 15 U.S.C.S. § 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Fair Debt Collection Practices Act

HN9[] 15 U.S.C.S. § 1692i specifies that the action must be brought against a consumer. 15 U.S.C.S. § 1692a(3) defines a consumer as any natural person obligated or allegedly obligated to pay any debt. Under this definition, some debtors, such as corporations or other entities, may not be consumers.

Governments > Legislation > Interpretation

HN10[] A court's primary task in construing a statute is to give effect to the legislative purpose underlying the enactment. To determine legislative purpose, an appellate court first looks to the statutory language itself, giving words and phrases their commonly accepted and understood meaning. Where the statutory language is clear and unambiguous there is no need to resort to interpretative rules of statutory construction; the statute, in that instance, should be applied as written, since it may be presumed that the general assembly means what it clearly says.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Fair Debt Collection Practices Act

HN11[] See 15 U.S.C.S. § 1692a(6).

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Fair Debt Collection Practices Act

HN12[] 15 U.S.C.S. § 1692f(6) does not limit the definition of debt collectors, but rather enlarges the category of debt collectors for the purpose of § 1692f(6).

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Fair Debt Collection Practices Act

HN13[] The Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692-1692o, should be construed liberally because its purposes are remedial.

Banking Law > Consumer Protection > Fair

Debt Collection > General Overview

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Fair Debt Collection Practices Act

HN14[] The 15 U.S.C.S. § 1692a(6) definition of the term debt collector includes one who "directly or indirectly" engages in debt collection activities on behalf of others. Since a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt, those who engage in such foreclosures are included within the definition of debt collectors if they otherwise fit the statutory definition.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Fair Debt Collection Practices Act

HN15[] Attorneys who otherwise meet the 15 U.S.C.S. § 1692a(6) definition are debt collectors for purposes of the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692-1692(o).

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Attorneys for Respondents

Judges: EN BANC. ERICKSON

Opinion by: ERICKSON

Opinion

[*121] JUSTICE ERICKSON delivered the Opinion of the Court.

We granted certiorari to review *Zartman v. Shapiro & Meinhold,* 811 P.2d 409 (Colo. App. 1990), and now affirm. We [**2] limited our review to a determination of whether the petitioners, attorneys who

sought to enforce a power of sale contained in a deed of trust securing a note pursuant to C.R.C.P. 120, are "debt collectors" for purposes of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692-1692o (1988) (FDCPA).

The named respondents, James Zartman, Mary DeLancy, and Robert Morphew (debtors), allegedly defaulted on consumer loans secured by real property in Colorado. The petitioners, Shapiro and Meinhold, Gerald M. Shapiro, Don H. Meinhold, P.C., Haligman and Lottner, P.C., and Kevin H. Burke & Associates, P.C. (attorneys), represented creditors who held the security interests. Pursuant to C.R.C.P. 120, the attorneys, on behalf of the secured creditors, sought court orders authorizing the sale of real property securing the loans. The foreclosure proceedings, as permitted by C.R.C.P. 120(f), [1] were brought in counties [*122] other than those in which the real property was located.

[**3] The debtors, individually and on behalf of a class of similarly situated debtors, brought this action against the attorneys for damages and declaratory relief. They claim the attorneys violated section 1692i of the FDCPA by filing the C.R.C.P. 120 actions in counties other than those in which the property was located. [2] Section 1692i provides in relevant part:

HN5[↑] Legal actions by debt collectors

(a) Any debt collector who brings any legal action on a debt against any consumer shall

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action *only in a judicial district or similar legal entity in which such real property is located;* . . . .

. . . .

(b) Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.

(Emphasis added.)

[**4] The trial court granted the attorneys' motion to dismiss for failure to state a claim upon which relief can be granted and entered a ruling and order that provided in pertinent part:

[Debtors] bring suit alleging that the filing of C.R.C.P. 120 actions in counties other

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[1] *HN1*[↑] C.R.C.P. 120 allows an interested party to seek a court order "authorizing a sale under a power of sale contained in an instrument." *HN2*[↑] Subsection (f) provides:

Venue. For the purposes of this section, a consumer obligation is any obligation (i) as to which the obligor is a natural person, and (ii) is incurred primarily for a personal, family, or household purpose. Any proceeding under this Rule involving a consumer obligation or an instrument securing a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which such consumer resides at the commencement of the proceeding, *unless the obligation is secured by a deed of trust to a public trustee, in which case the proceedings under this Rule may be brought and heard in any county.* *HN3*[↑] Any proceeding under this Rule which does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(Emphasis added.)

[2] The action was pursuant to *HN4*[↑] 15 U.S.C. § 1692k, which provides for civil liability for failure to comply with any provision of the FDCPA.

than where the real property is located violates the venue provision of the Federal Fair Debt Collection Practices Act. The act requires that all legal actions brought by debt collectors to enforce an interest in real property be brought in the county where the real property is located. [Attorneys] argue that Rule 120 proceedings do not constitute "legal actions" under the Federal Fair Debt Collection Practices Act. The Court agrees. A Rule 120 proceeding is a non-judicial proceeding limited in scope to a summary determination of the issue of default. As such, it is not a legal action to which the venue provision of the act is applicable.

[Debtors] further allege that the law firm defendants are debt collectors under the act and subject to its provisions by virtue of the fact that they file Rule 120 actions. [Attorneys] argue that their actions in filing Rule 120 actions do not bring them under the purview of the [**5] act. The Court agrees. The purpose of the act is to regulate traditional debt collection activities. [Attorneys'] actions do not fall within this category of activities.

The court of appeals reversed the trial court's dismissal and determination that the attorneys were not debt collectors under the FDCPA and remanded the case to the trial court for further proceedings.

I

The debtors contend they alleged sufficient facts to support a claim that the attorneys are debt collectors under 15 U.S.C. § 1692a(6) (1988) for the purposes of the filing requirement contained in section 1692i. We agree.

In their amended complaint the debtors alleged that the attorneys are "'debt collectors' because they use the mails in their business, the principal purpose of which is the collection of debts, and regularly collect or attempt to collect consumer debts." As to each defendant, debtors also asserted, "A substantial part of their practice involves collections, including foreclosures of real estate."

HN6[↑] "A short and plain statement of the claim showing that the pleader is entitled to relief" is all that C.R.C.P. 8(a)(2) requires. *See Hinsey v. Jones,* 159 Colo. 326, 329, 411 P.2d 242, 244 (1966). [**6] In determining a motion to dismiss a complaint, a court must accept all averments of material fact contained in the complaint as true. C.R.C.P. 12(b)(5); *Board of County Comm'rs v. City of Thornton,* 629 P.2d 605, 609 (Colo. 1981). A complaint is sufficient to withstand a motion to dismiss if the plaintiff states a claim that would entitle [*123] him to relief. *Dillinger v. North Sterling Irrigation Dist.,* 135 Colo. 100, 101, 308 P.2d 608, 609 (1957). The same standards for determining a motion to dismiss apply to both the trial court and the appellate court. *See Espinoza v. O'Dell,* 633 P.2d 455, 467 (Colo. 1981); *McDonald v. Lakewood Country Club,* 170 Colo. 355, 461 P.2d 437 (1969).

HN7[↑] To state a claim for relief under section 1692i, the debtors must allege sufficient facts in their complaint to show that a "debt collector" brought a "legal action" [3] against them "to enforce an interest

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[3] Certiorari has not been granted to review the court of appeals

in real property securing a consumer's [4] [**8] obligation" in a county other than that in which the real property is located. The issue is whether the [**7] debtors' averments support their claim that the attorneys are debt collectors. *HN8*[↑] Section 1692a(6) defines the term debt collector 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 attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. [5]

The debtors' averments, which must be accepted as true in considering the merits of the motion to dismiss, substantially track the statutory definition of a debt collector and are sufficient to state a claim for relief.

II

The attorneys assert that, except for 15 U.S.C. § 1692f(6) (1988), they are exempted from the provisions of the FDCPA because the principal purpose of their businesses is the enforcement of security interests, or foreclosures. The attorneys admit that those engaged in traditional debt collection activities are subject to all the provisions of the FDCPA. They contend, however, that those in a "business the principal purpose of which is the enforcement of security interests" are subject only to section 1692f(6), [6] and not to the filing requirements of section 1692i.

[**9] We recently stated in *Griffin v. S.W. Devanney & Co.*, 775 P.2d 555, 559 (Colo. 1989), and again in *Darby v. All J Land & Rental Co.*, No. 90SA512, slip op. at 4 (Colo. Nov. 25, 1991):

> *HN10*[↑] [A] court's primary task in construing a statute is to give effect to the legislative purpose underlying the enactment. *E.g.*, *Colorado Common Cause v. Meyer*, 758 P.2d 153, 160 (Colo. 1988); *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987); *Engelbrecht v. Hartford Accident and Indemnity Co.*, 680 P.2d 231, 233 (Colo. 1984). To determine legislative purpose we first look to the statutory language itself, giving words and phrases their commonly accepted and understood meaning. *Colorado Common Cause*, 758

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decision that a C.R.C.P. 120 proceeding is a legal action for the purposes of the FDCPA.

[4] *HN9*[↑] Section 1692i specifies that the action must be brought against a consumer. Section 1692a(3) defines a consumer as "any natural person obligated or allegedly obligated to pay any debt." Under this definition, some debtors, such as corporations or other entities, may not be consumers. The debtors in this case, however, were consumers.

[5] The statute lists specific categories of persons not included within the term "debt collector." *See* 15 U.S.C. § 1692a(6)(A)-(F).

[6] Section 1692f(6) prohibits debt collectors from

> taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if --
>
> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
>
> (B) there is no present intention to take possession of the property; or
>
> (C) the property is exempt by law from such dispossession or disablement.

No violations of section 1692f(6) are alleged here.

P.2d at 160; *Guenther,* 740 P.2d at 975; *People v. District Court,* 713 P.2d 918, 921 [*124] (Colo. 1986). Where the statutory language is clear and unambiguous there is no need to resort to interpretative rules of statutory construction; the statute, in that instance, should be [**10] applied as written, since it may be presumed that the General Assembly meant what it clearly said. *E.g., State Board of Equalization v. American Airlines, Inc.,* 773 P.2d 1033, 1040 (Colo. 1989).

A plain reading of section 1692a(6) indicates that any person who qualifies under the first sentence in the definition is a debt collector for purposes of the FDCPA. In addition, *HN11*[⇑] section 1692a(6) states, "For the purpose of section 1692f(6) of this title, [the term debt collector] *also includes* any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." (Emphasis added.) *HN12*[⇑] The latter provision does not limit the definition of debt collectors, but rather enlarges the category of debt collectors for the purpose of section 1692f(6). *Lyman v. Town of Bow Mar,* 188 Colo. 216, 222, 533 P.2d 1129, 1133 (1975) ("the word 'include' is ordinarily used as a word of extension or enlargement"). If Congress had intended to exempt from the FDCPA one whose principal business is the enforcement of security interests, it would [**11] have provided an exception in plain language.

HN13[⇑] The FDCPA should be construed liberally because its purposes are remedial. *See Colorado & S. Ry. v. State R.R. Comm.,* 54 Colo. 64, 77, 129 P. 506, 512 (1912). Section 1692(e) states:

> 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 competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

If the definition of debt collectors is construed liberally, with the remedial purpose of the statute in mind, the attorneys are not exempt merely because their collection activities are primarily limited to foreclosures. *HN14*[⇑] The section 1692a(6) definition of the term debt collector includes one who "directly or indirectly" engages in debt collection activities on behalf of others. Since a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt, those who engage in such foreclosures are included within the definition of debt collectors if they [**12] otherwise fit the statutory definition.

Our interpretation of section 1692a(6) is consistent with *Crossley v. Lieberman,* 868 F.2d 566 (3d Cir. 1989). In *Crossley* the court held that an attorney who regularly engaged in debt collection activities was a debt collector under section 1692a(6), even though twenty-two of the thirty-two cases the attorney filed in the Court of Common Pleas were mortgage foreclosures. *Id.* at 569-70. Our interpretation does not conflict with those cases that have found that the attorneys involved were not debt collectors. *Compare Merles v. Devitt,* 734 F. Supp.

872, 873-74 (W.D. Wis. 1990) (attorney not a debt collector because he did not *regularly* conduct *collection activities) with National Union Fire Insurance Co. v. Hartel,* 741 F. Supp. 1139 (S.D.N.Y. 1990) (stating in dicta that an attorney who engaged only in legal activities was not a "debt collector but basing determination that section 1692i was not applicable on fact that debt was not a consumer debt). The attorneys are not exempted from the definition of debt collectors [**13] merely because a substantial portion of their debt collection activities was foreclosures.

The history of the FDCPA supports the interpretation that *HN15*[↑] attorneys who otherwise meet the section 1692a(6) definition are debt collectors. Originally, an attorney "collecting a debt as an attorney on behalf of and in the name of a client" was exempted from the FDCPA. 15 U.S.C. § 1692a(6)(F) (1977) (amended 1986). In 1986, Congress repealed the attorney exemption. *See* 15 U.S.C. § 1692a(6) (1988). Nevertheless, the attorneys contend that a lawyer whose debt collection is limited to legal activities is not a debt collector and is not subject to the FDCPA. The attorneys [*125] misconstrue the amendment. Rather than restricting the attorney exception to those attorneys whose debt collection practices are limited to legal activities, Congress deleted the exception altogether. Therefore, we conclude that debt collectors include attorneys whose practices are limited to purely legal activities so long as they otherwise meet the definition contained in section 1692a(6).

By eliminating the attorney exemption, Congress [**14] sought to eliminate abusive legal and non-legal debt collection activities and to eliminate any competitive advantage previously given collection lawyers. *See* H.R. Rep. No. 405, 99th Cong., 2d Sess. 4-6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1754-56. The attorneys suggest that Congress intended to restrict only non-legal activities because legal activities are not abusive. However, the filing of a C.R.C.P. 120 action in a county other than where the property is located, as alleged in this case, results in added cost and expense to a debtor who is required to file his response in a county where he has no ties. Allowing attorneys to endeavor to enforce a power of sale in a county where the real estate is not situated gives attorneys a competitive advantage over other debt collectors who must file in the county where the property is located. *See* 15 U.S.C. § 1692i (requiring legal actions by debt collectors to be brought in the county where the property is located). Congress recognized and addressed these issues by eliminating any distinction between attorney and lay debt collectors. *See* H.R. Rep. No. 405, 99th Cong., 2d Sess. [**15] 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1754.

III

The trial court misinterpreted the definition of debt collectors in 15 U.S.C. § 1692a(6) (1988). If the attorneys fit the definition in the first sentence of section 1692a(6), they are debt collectors for the purposes of the FDCPA. We conclude that the debtors alleged sufficient facts to state a claim that the attorneys are debt collectors, and that

the trial court erred in dismissing the debtors' claim.

The answer to the question presented on certiorari of whether the attorneys here are debt collectors requires a factual determination that has not been decided below or briefed in this court.

Accordingly, we affirm the court of appeals decision reversing the district court order and remanding to the district court for further proceedings that shall be consistent with the directions contained in this opinion.

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Caution
As of: March 27, 2017 3:07 PM EDT

Wilson v. Draper & Goldberg, P.L.L.C.

United States Court of Appeals for the Fourth Circuit

December 1, 2005, Argued ; April 5, 2006, Decided

No. 05-1392

Reporter
443 F.3d 373 *; 2006 U.S. App. LEXIS 8243 **

KAREN WILSON, Plaintiff-Appellant, v. DRAPER & GOLDBERG, P.L.L.C.; L. DARREN GOLDBERG, Defendants-Appellees.

Prior History: [**1] Appeal from the United States District Court for the District of Maryland, at Baltimore. (CA-04-2917-WDQ). William D. Quarles, Jr., District Judge.

Disposition: REVERSED AND REMANDED.

Core Terms

debt collector, foreclosure, collecting, trust deed, Defendants', fiduciaries, foreclosing, foreclosure proceeding, security interest, district court, bona fide, incidental, regularly, fiduciary obligation, attorneys, lawyers, principal purpose, collect a debt, law firm, communicating, exemption, mortgage, lender, notice

Case Summary

Procedural Posture
Plaintiff mortgagor appealed from a judgment of the United States District Court for the District of Maryland, at Baltimore, which was entered in favor of defendants, a law firm and one of its lawyers, in the mortgagor's action for violation of the Fair Debt Collection Practices Act in connection with defendants' initiation of foreclosure proceedings against her.

Overview
The district court concluded that, because defendants were acting as substitute trustees foreclosing on a deed of trust, they could not be "debt collectors" under the Act and that any actions they took in connection with the foreclosure could not be challenged as violations of the Act. On appeal, the court disagreed with defendants' argument that they were not acting in connection with a "debt." Defendants informed the mortgagor that her failure to make mortgage payments entitled the bank which held the mortgage to immediate payment of the balance of her loan, as well as fees, penalties, and interest due. These amounts were all "debts" under 15 U.S.C.S. § 1692a(5) of the Act. The court rejected defendants' contention that foreclosure by a trustee under a deed of trust was not the enforcement of an obligation to pay money or a "debt," but was a termination of the debtor's equity of redemption relating to the

debtor's property. Reversing, the court ruled that defendants did not come under an exception from the general definition of "debt collector" found in 15 U.S.C.S. § 1692a(6)(F)(i). Defendants could still be "debt collectors" even if they were also enforcing a security interest.

Outcome

The court reversed the district court's grant of summary judgment to defendants and remanded for proceedings consistent with its opinion.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] The United States Court of Appeals for the Fourth Circuit reviews a district court's grant of summary judgment de novo, viewing any facts and inferences drawn from them in the light most favorable to the nonmoving party.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2[] Where the questions the United States Court of Appeals for the Fourth Circuit must address in a case are matters of statutory interpretation based on essentially undisputed facts, its review is plenary.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Banking Law > Bank Activities > Customer-Bank Relations > Fiduciary Relationships

Civil Procedure > Attorneys > General Overview

Real Property Law > Financing > Foreclosures > General Overview

HN3[] Trustees, including attorneys, acting in connection with a foreclosure can be "debt collectors" under the Fair Debt Collection Practices Act.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

HN4[] To be a "debt collector," there must first be a "debt." The Fair Debt Collection Practices Act defines a "debt" as: any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. 15 U.S.C.S.. § 1692a(5)

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Real Property Law > Financing > Foreclosures > General Overview

HN5[] The United States Court of

Appeals for the Fourth Circuit sees no reason to make an exception to the Fair Debt Collection Practices Act when the debt collector uses foreclosure to collect a debt instead of other methods.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

HN6[] The Fair Debt Collection Practices Act generally defines a "debt collector" 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 attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. 15 U.S.C.S. § 1692a(6).

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

HN7[] The Fair Debt Collection Practices Act contains an exception to the definition of "debt collector" that covers any person collecting or attempting to collect any debt due another to the extent such activity is incidental to a bona fide fiduciary obligation. 15 U.S.C.S. § 1692a(6)(F)(i)

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Real Property Law > Financing > Foreclosures > General Overview

Real Property Law > Ownership & Transfer > Agents & Fiduciaries

HN8[] The critical inquiry in determining whether trustees are fiduciaries benefitting from the exception of 15 U.S.C.S. § 1692a(6)(F)(i) is whether a trustee's actions are incidental to a bona fide fiduciary obligation. The United States Court of Appeals for the Fourth Circuit concludes that a trustee's actions to foreclose on a property pursuant to a deed of trust are not "incidental" to its fiduciary obligation. Rather, they are central to it.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Civil Procedure > Attorneys > General Overview

HN9[] The Fair Debt Collection Practices Act applies to attorneys who regularly engage in consumer debt collection activity, even when that activity consists of litigation.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Civil Procedure > Attorneys > General Overview

HN10[] If the principal purpose of a lawyer's work is the collection of debts, he is a "debt collector" under the Fair Debt Collection Practices Act.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

HN11[] 15 U.S.C.S. § 1692f(6) applies to those whose only role in the debt collection process is the enforcement of a security interest. In other words, this provision is not an exception to the definition of debt collector, it is an inclusion to the term debt collector. It serves to include as debt collectors, for the purposes of § 1692f(6), those who only enforce security interests. It does not exclude those who enforce security interests but who also fall under the general definition of "debt collector."

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

HN12[] If parties meet the statutory definition of "debt collector," they can be covered by all sections of the Fair Debt Collection Practices Act, not just 15 U.S.C.S. § 1692f(6), regardless of whether they also enforce security interests.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Civil Procedure > Attorneys > General Overview

HN13[] A lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly "attempts" to "collect" those consumer debts. Since a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt, those who engage in such foreclosures are included within the definition of debt collectors if they otherwise fit the statutory definition.

Counsel: ARGUED: Howard Robert Erwin, Jr., Baltimore, Maryland, for Appellant.

Rita Ting-Hopper, DRAPER & GOLDBERG, P.L.L.C., Leesburg, Virginia, for Appellees.

ON BRIEF: Scott R. Grigsby, DRAPER & GOLDBERG, P.L.L.C., Leesburg, Virginia, for Appellees.

Judges: Before WIDENER, WILKINSON, and TRAXLER, Circuit Judges. Judge Traxler wrote the majority opinion, in which Judge Wilkinson joined. Judge Widener wrote a dissenting opinion.

Opinion by: TRAXLER

Opinion

[*374] TRAXLER, Circuit Judge:

Karen Wilson brought this action against the law firm of Draper & Goldberg, P.L.L.C., and one of its lawyers, L. Darren Goldberg (collectively, "Defendants"), for violation of the Fair Debt Collection Practices Act (the "Act") in connection with Defendants' initiation of foreclosure proceedings against her. Defendants filed a motion to dismiss for failure to state a claim, arguing that they were not covered by the Act. The district court treated the motion as one for summary judgment, and granted it in favor of Defendants. The district court [**2] concluded that, because Defendants were acting as substitute trustees foreclosing on a deed of trust, they could not be "debt collectors" under the Act and that any actions they took in connection

with the foreclosure could not be challenged as violations of the Act. Wilson appeals, and we reverse and remand.

I.

HN1[↑] We review a district court's grant of summary judgment de novo, viewing any facts and inferences drawn from them in the light most favorable to Wilson, the nonmoving party. *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 958 (4th Cir. 1996). *HN2*[↑] The questions we address in this case are matters of statutory interpretation based on essentially undisputed facts. As a result, our review is plenary. *See United Energy Servs. v. Fed. Mine Safety Health Admin.*, 35 F.3d 971, 974 (4th Cir. 1994).

Chase Manhattan Mortgage Corporation ("Chase") retained Defendants to foreclose on Wilson's property due to her alleged failure to make mortgage payments. Defendants wrote Wilson on September 2, 2003, to announce that she was in default on her loan and that they were preparing foreclosure papers. Defendants' letter stated that "federal [**3] law requires us to advise you that this letter is written pursuant to the provisions of the Fair Debt Collection Practices Act .... This letter is an attempt to collect a debt." J.A. 43. Defendants also sent Wilson a "VALIDATION [*375] OF DEBT NOTICE" pursuant to the Act, which gave specific information concerning "the amount of the debt," the "creditor to whom the debt is owed," and the procedure for validating the debt. J.A. 44. The notice, however, expressly stated that Defendants were not "debt collectors" or acting in connection with the collection of a "debt." J.A. 44. Shortly after receiving the letter, Wilson wrote Defendants to dispute the debt and to request that they verify it with Chase.

On September 11, 2003, Defendants commenced foreclosure proceedings. One week later, Wilson's attorney advised Defendants that he represented Wilson and that Defendants should only communicate with him regarding the dispute. Nevertheless, on October 6, 2003, Defendants' "Sales Department" wrote directly to Wilson, not her attorney, to inform her that the foreclosure sale of her home would go forward on October 17, 2003. The letter again stated that it was an attempt to collect a debt. J.A. 45.

[**4] On October 9, 2003, Wilson's attorney requested a complete statement of Wilson's account indicating all interest, late charges and other charges, the interest rate, and all payments since the inception of the mortgage. In what Defendants claim was a response to Wilson's attorney, Defendants wrote directly to Wilson on October 15, 2003, providing the "amount to reinstate the above account," a balance of payments due, and instructions that any funds paid should be by cashiers check made payable to Chase and sent to Defendants. J.A. 47. As with previous letters, the letter stated "This notice is an attempt to collect a debt." J.A. 47. Prior to completing the foreclosure, Chase and Wilson resolved their dispute.

In 2004, Wilson commenced this action, alleging that Defendants violated the Act by failing to verify the debt, by continuing collection efforts after she had contested the

debt, and by communicating directly with her when they knew she was represented by counsel. Defendants moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted, arguing [**5] that they were not acting in connection with a "debt" and that they were not "debt collectors" as those terms are defined by the Act.

The district court treated the motion as one for summary judgment because, in addition to the pleadings, it considered an affidavit and exhibit submitted by Defendants showing that the law firm was acting as a substitute trustee on a deed of trust when it communicated with Wilson. The district court granted summary judgment in favor of Defendants, ruling that "trustees foreclosing on a property pursuant to a deed of trust are not 'debt collectors' under the [Act]," J.A. 153, and that "actions taken by a trustee in foreclosing on a property pursuant to a deed of trust may not be challenged as [Act] violations," J.A. 154.

II.

Because we believe the district court misinterpreted the scope of the Act, and conclude that *HN3*[↑] trustees, including attorneys, acting in connection with a foreclosure can be "debt collectors" under the Act, we reverse and remand.

A.

HN4[↑] To be a "debt collector," there must first be a "debt." The Act defines a "debt" as:

> any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which [**6] the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, [*376] whether or not such obligation has been reduced to judgment.

15 U.S.C.A. § 1692a(5) (West 1998).

We disagree with Defendants' argument that they were not acting in connection with a "debt." Defendants notified Wilson that she was in "default in [her] Deed of Trust Note payable to the Lender ... [and] that the Lender [had] accelerated the *debt*." J.A. 43 (emphasis added). Defendants informed Wilson that her failure to make mortgage payments entitled Chase to immediate payment of the balance of her loan, as well as fees, penalties, and interest due. These amounts are all "debts" under the Act, because they were "obligations ... to pay money arising out of a transaction in which the ... property ... which [is] the subject of the transaction [is] primarily for personal, family, or household purposes." 15 U.S.C.A. § 1692a(5).

Defendants contend that foreclosure by a trustee under a deed of trust is not the enforcement of an obligation to pay money or a "debt," but is a termination [**7] of the debtor's equity of redemption relating to the debtor's property. In essence, Defendants argue that Wilson's "debt" ceased to be a "debt" once foreclosure proceedings began. Defendants rely on reported and unreported district court decisions, including *Hulse v. Ocwen Federal Bank, FSB*, 195 F. Supp. 2d

1188 (D. Ore. 2002), which reasoned that "foreclosing on a deed of trust is an entirely different path [than collecting funds from a debtor]. Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property." *Id.* at 1204; *see also Heinemann v. Jim Walter Homes, Inc.*, 47 F. Supp. 2d 716, 722 (N.D. W. Va. 1998) (stating that, to the extent the *pro se* complaint could be read to allege violation of the Act within the statute of limitations, the Act would not apply "since the trustees were not collecting on the debt at that time but merely foreclosing on the property pursuant to the deed of trust"), *aff'd*, 173 F.3d 850 (4th Cir. 1999) (unpublished table decision).

We disagree. Wilson's "debt" remained a "debt" even after foreclosure proceedings commenced. [**8] *See Piper v. Portnoff Law Assocs.*, 396 F.3d 227, 234 (3d Cir. 2005) ("The fact that the [Pennsylvania Municipal Claims and Tax Liens Act] provided a lien to secure the Pipers' debt does not change its character as a debt or turn PLA's communications to the Pipers into something other than an effort to collect that debt."). Furthermore, Defendants' actions surrounding the foreclosure proceeding were attempts to collect that debt. *See Romea v. Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998) (concluding that an eviction notice required by statute could also be an attempt to collect a debt); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992) ("[A] foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt."). Defendants' argument, if accepted, would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt. *HN5*[] We see no reason to make an exception to the Act when the debt collector uses foreclosure instead of other methods. *See Piper*, 396 F.3d at 236 [**9] ("We agree with the District Court that if a collector were able to avoid liability under the [Act] simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the [Act].")(internal quotation marks omitted).

Furthermore, in this case, Defendants' October 15 letter to Wilson contained a specific request for money to "reinstate the above account" even after the foreclosure [*377] proceedings began. J.A. 47. The letter instructed Wilson to pay the amount, over half of which was for foreclosure fees, by cashiers check made payable to Chase and to send it to Defendants. By sending a letter seeking payment of an amount to "reinstate the above account" and directing Wilson to pay that amount by cashiers check, Defendants sought to collect an "obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C.A. § 1692a(5); *cf. Crossley v. Lieberman*, 868 F.2d 566, 570 (3d Cir. 1989) ("The letter unequivocally states that [the [**10] attorney] himself is collecting

the money. Nowhere is it intimated that [the debtor] was to send money to [the lender] directly. Thus [the attorney] is a debt collector."). [1]

Thus, Defendants attempted to collect a "debt."

B.

We now turn to Defendants' argument that, even if they were acting in connection with a debt, they fall under an exception from the general definition of "debt collector." *HN6*[] The Act generally defines a "debt collector" 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 attempts to collect, directly or indirectly, debts owed or due or asserted [**11] to be owed or due another.

15 U.S.C.A. § 1692a(6) (West 1998).

Defendants argue they fall under *HN7*[] the exception to "debt collector" that covers "any person collecting or attempting to collect any debt ... due another to the extent such activity ... is incidental to a bona fide fiduciary obligation." 15 U.S.C.A. § 1692a(6)(F)(i) (West 1998). Defendants claim that, because they were acting as trustees foreclosing on a property pursuant to a deed of trust, they were fiduciaries benefitting from the exception of § 1692a(6)(F)(i).

We disagree. The fact that trustees foreclosing on a deed of trust are fiduciaries only partially answers the question. Rather, *HN8*[] the critical inquiry is whether a trustee's actions are "incidental to a bona fide fiduciary obligation." *Id.* We conclude that a trustee's actions to foreclose on a property pursuant to a deed of trust are not "incidental" to its fiduciary obligation. Rather, they are central to it. Thus, to the extent Defendants used the foreclosure process to collect Wilson's alleged debt, they cannot benefit from the exemption contained in § 1692a(6)(F)(i). *Cf.* FTC Official Staff Commentary [**12] On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50103 (Fed. Trade Comm'n Dec. 13, 1988) ("The exemption (i) for bona fide fiduciary obligations or escrow arrangements applies to entities such as trust departments of banks, and escrow companies. It does not include a party who is named as a debtor's trustee solely for the purpose of conducting a foreclosure sale (i.e., exercising a power of sale in the event of default on a loan).").

Nor is it relevant that Defendants were attorneys. Generally speaking, all lawyers are fiduciaries for their clients. As discussed above, however, the more important [*378] question is whether Defendants' actions were "incidental" to their fiduciary obligation. We conclude that they are not. Furthermore, it is well-established that lawyers can be "debt collectors" even if conducting litigation. *See Heintz v. Jenkins*, 514 U.S. 291, 299, 115 S. Ct. 1489, 131 L.

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[1] We cannot accept Defendants' argument that the letter was in response to a request by Wilson's lawyer. Defendants' letter was sent to Wilson and not her attorney, made no reference to her attorney's request, was not signed by anyone, and failed to provide much of the information her lawyer requested.

Ed. 2d 395 (1995) *HN9*[] ("The Act applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation."). In fact, the Act as originally enacted exempted attorneys from its coverage, but Congress amended the Act in 1986 "to [**13] provide that any attorney who collects debts on behalf of a client shall be subject to the provisions of [the] Act." Pub. L. No. 99-361, 100 Stat. 768 (codified at 15 U.S.C.A. 1692a); *see also Carroll v. Wolpoff & Abramson*, 961 F.2d 459, 461 (4th Cir. 1992) (discussing repeal of the attorney exemption). *HN10*[] If the principal purpose of a lawyer's work is the collection of debts, he is a "debt collector" under the Act. *See Scott v. Jones*, 964 F.2d 314, 316-17 (4th Cir. 1992).

Thus, Defendants cannot benefit from § 1692a(6)(F)(i)'s exception to the definition of "debt collector" merely because they were trustees foreclosing on a property pursuant to a deed of trust.

C.

Defendants also allege that they cannot be held liable as charged in the complaint because Wilson has only alleged violations of portions of the Act that do not apply to them. They refer to a portion of the definition of "debt collector" that states, "for the purpose of section § 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement [**14] of security interests." 15 U.S.C.A. § 1692a(6). According to Defendants, because they are engaged in a business "the principal purpose of which is the enforcement of security interests," they can only be a "debt collector" under the one section expressly provided, 15 U.S.C.A. § 1692f(6). Because Wilson alleged no violation of § 1692f(6), Defendants argue that they cannot be liable under the Act.

We disagree. *HN11*[] This provision applies to those whose *only* role in the debt collection process is the enforcement of a security interest. *See Jordan v. Kent Recovery Servs., Inc.*, 731 F. Supp. 652, 657 (D. Del. 1990)("It thus appears that Congress intended an enforcer of a security interest, such as a repossession agency, to fall outside the ambit of the FDCPA except for the provisions of § 1692f(6)."). In other words, this provision is not an exception to the definition of debt collector, it is an inclusion to the term debt collector. It serves to include as debt collectors, for the purposes of § 1692f(6), those who only enforce security interests. It does not exclude those who enforce security interests but who also fall [**15] under the general definition of "debt collector." *See Piper*, 396 F.3d at 236 ("Section 1692a(6) thus recognizes that there are people who engage in the business of repossessing property, whose business does not primarily involve communicating with debtors in an effort to secure payment of debts.").

Thus, *HN12*[] if Defendants meet the statutory definition of "debt collector," they can be covered by all sections of the Act, not just § 1692f(6), regardless of whether they also enforce security interests.

III.

The district court incorrectly concluded that Defendants could not be held liable under the Act. We hold that Defendants' foreclosure action was an attempt to collect a "debt," Defendants are not excluded [*379] from the definition of "debt collector" under 15 U.S.C.A. § 1692a(6)(F)(i) merely because they were acting as trustees foreclosing on a property pursuant to a deed of trust, and Defendants can still be "debt collectors" even if they were also enforcing a security interest. As a result, we reverse and remand.

On remand, Wilson can show that Defendants meet the definition of "debt collector" by demonstrating that they use "any instrumentality [**16] of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or ...regularly collect[]or attempt[]to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C.A. § 1692a(6); *see also Heintz*, 514 U.S. at 294 *HN13*[↑] ("[A] lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts."); *Crossley*, 868 F.2d at 569-70 (relying on volume of attorney's mortgage foreclosure actions to show he was a debt collector); *Shapiro*, 823 P.2d at 124 (" Since a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt, those who engage in such foreclosures are included within the definition of debt collectors if they otherwise fit the statutory definition.").

Our decision is not intended to bring every law firm engaging in foreclosure proceedings under the ambit of the Act. Nevertheless, it is well-established that the Act applies to lawyers "who 'regularly' engage in consumer-debt-collection [**17] activity, even when that activity consists of litigation." *Heintz*, 514 U.S. at 299. Congress enacted the Act to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C.A. 1692(e) (West 1998); *see also Carroll*, 961 F.2d at 460. As such, lawyers who regularly engage in consumer-debt-collection activity should not be allowed to thwart this purpose merely because they proceed in the context of a foreclosure. [2]

[**18] Moreover, Defendants allegedly initiated over 2300 foreclosure actions in Maryland in 2003. There is no reason that a law firm handling this volume of foreclosures would be any more ill-equipped to comply with the Act than a more "traditional" debt collection agency. Defendants appear to have been aware that the Act could apply to their conduct, as their letters to Wilson contained clear references to the Act, including the notice "this is an attempt to collect a debt." *See* 15 U.S.C.A. § 1692e(11) (West 1998).

We reverse the district court's grant of

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[2]Of course, whether a law firm or not, a company's own efforts to collect overdue payments from its own delinquent clients would not ordinarily make it a "debt collector" under the Act, which specifically refers to those who collect debts "owed or due or asserted to be owed or due *another*." 15 U.S.C.A. § 1692a(6) (emphasis added); *see also Nielsen v. Dickerson*, 307 F.3d 623, 634 (7th Cir. 2002) ("Creditors who are attempting to collect their own debts generally are not considered debt collectors under the statute.").

summary judgment to Defendants and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED

Dissent by: WIDENER

Dissent

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I begin with the full text of the fiduciary exception to the statutory definition of "debt collector":

> The term [debt collector] does not include--
>
> (F) any person collecting or attempting to collect any debt owed or due or [*380] asserted to be owed or due another to the extent such activity (I) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement.

15 U.S.C. 1692a(6) [**19] . It is undisputed that defendants were trustees on the deed of trust. (JA 22, 41.) This means that they were fiduciaries as a matter of law. See *Bunn v. Kuta*, 109 Md. App. 53, 674 A.2d 26, 32 (Md. Ct. Spec. App. 1996); *Whitlow v. Mountain Trust Bank*, 215 Va. 149, 207 S.E. 2d 837, 840 (Va. 1974). [1] And there is no reason to doubt their bona fides. But the majority offers a different reason to avoid the exception: defendants' actions were "central" to their fiduciary duties, not "incidental" as the statute provides. Slip op. 7.

Such a construction of the statute is not logical, I suggest. "Incidental" means "occurring merely by chance or without intention or calculation" or "being likely to ensue as a chance or minor consequence." *Merriam-Webster Collegiate Dictionary* 586 (10th ed. 2000). And "central" is defined as "of cardinal importance: essential, principal." *Id.* at 185. [**20] Even assuming that a foreclosure is "central" to the defendants' duties, the majority conclusion that a central task incident to the duty is not exempted does not follow from the premise. If the exception covers the minor unintended acts relating to incidental fiduciary duties, it must cover the principal acts as well. Otherwise the exception would accomplish very little, for the majority definition excludes "other bona fide fiduciaries" which are included in the Senate Report, infra. [2]

The legislative history of the fiduciary exception further erodes the majority reasoning. It shows that [**21] the original House version of the bill did not include the exception for fiduciaries. See H.R. Rep. No. 95-131, at 4, 11, 17-18 (Mar. 29, 1977). Only later did the Senate add it. See 123 Cong. Rec. at 27384 (Aug. 5, 1977) (text of Senate version); see also *id.* at 28109-13 (House adopting Senate amendments). So

[1] The offices of Draper & Goldberg are in Virginia, the deed of trust in question is in Maryland.

[2] The appellate cases mentioning the exception do not bear upon this case. See *Pelfrey v. Educ. Credit Mgmt. Corp.*, 208 F.3d 945 (11th Cir. 2000) (per curiam), aff'g 71 F. Supp. 2d 1161 (N.D. Ala. 1999) (applying exception to assignee of guarantor of defaulted student loan); *Buckman v. Am. Bankers Ins. Co. of Fla.*, 115 F.3d 892, 895 (11th Cir. 1997) (not considering exception).

including the exception within the statute was a deliberate act. Moreover, the Senate committee report explained the purpose of the amendment:

> The committee does not intend the definition [of debt collector] to cover the activities of trust departments, escrow companies, *or other bona fide fiduciaries*. (Italics added.)

S. Rep. No. 95-382, at 3, reprinted at 1977 U.S.C.C.A.N. 1695, 1698; see also *id.* at 1701. This explanation is on point and unambiguous. We should not ignore such unambiguous text, especially when it is augmented by the balance of the legislative history referred to.

Yet the FTC Staff Commentary, which is the only authority particular to the fiduciary exception cited by the majority, does just that. The Commentary provides that the exception does not apply to trustees named "solely for the purpose of conducting a foreclosure sale. [**22] " [3] This innovation conflicts not only with the statutory text but also with the Senate report set forth [*381] above. We have declined to follow the Commentary in past FDCPA cases upon discerning such a conflict, see *Scott v. Jones*, 964 F.2d 314, 317 (4th Cir. 1992), and we should do so again here. Our obligation not to follow the FTC Commentary is reinforced by the Commentary's self-doubt which appears at the beginning of the Commentary. Reciting that the Supreme Court has held that the Commentary was not binding and not entitled to deference when it conflicted with the plain language of the statute, the Commentary continued:

> "It is not clear whether the FTC has the authority to issue the Commentary [and] courts have little difficulty disregarding Commentary positions [viewed] as incorrect." JA 129, see *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995).

Tellingly, even this self-abnegation *overstates* the FTC's authority under the Act which the statute itself limits:

> Neither the [Federal Trade] Commission nor any other agency referred to in subsection (b) of this section may promulgate trade regulation rules or other [**23] regulations with respect to the collection of debts by debt collectors as defined in this subchapter.

15 U.S.C. § 1692l(d). This provision, like the fiduciary exception, is unambiguous. So is its legislative history:

> "I want to make a special point: No Federal agency will write regulations for this legislation." 123 Cong. Rec. 10241 (Apr. 4, 1977) (statement of Rep. Annunzio).

And § 1692l(d) too, was itself an amendment. See *id.* at 10255 (statement of Rep. Rousselot noting amendment); see also the Senate Report, 1977 U.S.C.C.A.N. at 1703, which describes making of the FTC regulations as "prohibited." For various reasons given by courts which have cited the FTC Commentary, they decline to give

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[3] Limiting by their appointment the duty of the trustees to be "*solely* for the purpose of conducting a foreclosure sale" is not shown in the record in this case. (Italics added.)

it *Chevron* deference, [4] instead analyzing it as contrary to the statute or in terms of power to persuade, or lack thereof. See, e.g., *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 493 n. 1 (5th Cir. 2004); *Scott*, supra, 964 F.2d at 317. But the majority relies upon the FTC Commentary. This, despite the fact that the single sentence deemed dispositive does not explain, or pretend to explain, [**24] the legislative history including the Senate Report, rather it contradicts the statutory text and the Senate report as if Congress were not the principal instrument of public policy.

> "... it is equally--and emphatically--the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 194, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).

Even setting aside our duty to look first to Congress, I can think of no rationale for the agency's position other than a Shakespearean distrust of lawyers. And the Commentary's other policy flaws are plain: for [**25] instance, it fails to recognize that the duty of a lawyer-trustee under such a deed of trust runs to the property and, as well, to the borrower and the lender. See, e.g., *White v. Simard*, 152 Md. App. 229, 831 A.2d 517, 524-25 (Md. Ct. App. 2003); *Powell v. Adams*, 179 Va. 170, 18 S.E. 2d 261, 262-63 (Va. 1942). This difference between a lawyer-trustee and a lawyer who is merely a debt collector, although patent, is not explained. [5]

Accordingly, I would affirm.

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[4] *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

[5] The trustee, for example, must publicly account for the distribution of the proceeds of the sale. See generally *In re Trustee's Sale*, 67 Va. Cir. 204 (Circuit Court of the City of Norfolk, 2005).

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DISTRICT COURT

CLARK COUNTY, NEVADA

JEFFREY BENKO, a Nevada resident; CAMILO MARTINEZ, a California resident; ANA MARTINEZ, a California 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

CASE NO: A-11-649857-C

Dept. 19

NOTICE OF PLAINTIFFS SUBMISSION OF EVIDENCE FOR PURPOSES OF MAY 4, 2017 HEARING

Date: May 4, 2017
Time: 9:00 a.m.

Plaintiffs,

v.

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.

In preparation for the May 4, 2017 hearing, Plaintiffs expressly (again) and respectfully submit to the Court for review and consideration on May 4, 2017, the previously filed evidence and materials:

1. PLAINTIFFS' SEPARATE STATEMENT IN SUPPORT OF: PLAINTIFFS' PRELIMINARY OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES TO DEFENDANT MTC FINANCIAL INC.'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFFS RAYMOND SANSOTA AND FRANCINE SANSOTA; AND PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT MTC

2. DECLARATION OF RAYMOND SANSOTA IN SUPPORT OF PLAINTIFFS' PRELIMINARY OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES TO DEFENDANT MTC FINANCIAL INC.'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE,

PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFFS RAYMOND SANSOTA AND FRANCINE SANSOTA

3. DECLARATION OF NICHOLAS A. BOYLAN IN SUPPORT OF 1) PLAINTIFFS' PRELIMINARY OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES TO DEFENDANT MTC FINANCIAL INC.'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFFS RAYMOND SANSOTA AND FRANCINE SANSOTA; AND 2) PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT MTC; EXHIBITS "1" – "6"

4. PLAINTIFFS' OBJECTION AND RESPONSE TO QUALITY LOAN SERVICE CORPORATION'S OPPOSITION TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT

5. PLAINTIFF' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT MTC

6. PLAINTIFF' PRELIMINARY OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES TO DEFENDANT MTC FINANCIAL INC.'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFFS RAYMOND SANSOTA AND FRANCINE SANSOTA

Additional copies will not be submitted again, as the materials were previously filed, with a courtesy copy also delivered to the Court.

DATED: March 29, 2017

Respectfully Submitted,

LAW OFFICE OF NICHOLAS A. BOYLAN, APC

By: /s/Nicholas A. Boylan
NICHOLAS A. BOYLAN, ESQ.
Attorney for Plaintiffs

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 March 29, 2017, I served a true and correct copy of the foregoing:

- **NOTICE OF PLAINTIFFS SUBMISSION OF EVIDENCE FOR PURPOSES OF MAY 4, 2017 HEARING**

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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.: XIX

DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT"

Hearing Date: May 4, 2017
Hearing Time: 9:00 a.m.

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

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APPELLANTS' APPENDIX

VOLUME 19

Appeal from Eighth Judicial District Court
Clark County, Nevada

The Honorable William Kephart

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ALPHABETICAL INDEX

DATE	TITLE	VOLUME	PAGES
03/28/17	ANSWER OF DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS TO THIRD AMENDED COMPLAINT OF PLAINTIFFS	18	AA004237-AA004249
10/12/11	COMPLAINT FOR DAMAGES	1	AA000001-AA00013
01/03/17	DECLARATION OF KEIKO J. KOJIMA IN SUPPORT OF DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	10	AA002307-AA002322
09/28/16	DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S ANSWER TO SECOND AMENDED COMPLAINT OF PLAINTIFFS JEFFREY BENKO, CAMILO MARTINEZ, ANA MARTINEZ, FRANK SCINTA, JACQUELINE SCINTA, SUSAN HJORTH, RAYMOND SANSOTA, FRANCINE SANSOTA, SANDRA KUHN, JESUS GOMEZ, SIL VIA GOMEZ, DONNA HERRERA, JESSE HENNIGAN, KIM MOORE, THOMAS MOORE, SUSAN KALLEN, ROBERT MANDARICH AND JAMES NICO	5	AA001032-AA001045
01/03/17	DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' MOTION TO LEAVE TO FILE THIRD AMENDED COMPLAINT	9	AA002199-AA002206
04/04/17	DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS	18, 19	AA004561-AA004583

	THE THIRD AMENDED COMPLAINT"		
01/03/17	DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	9	AA002199-AA002206
12/18/15	DEFENDANTS' JOINT MOTION TO DISMISS SECOND AMENDED COMPLAINT	1,2, & 3	AA000229-AA000628
10/24/16	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	6, 7, 8	AA001713-AA001769
02/05/16	DEFENDANTS' JOINT REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT	4	AA000757-AA000782
12/18/15	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	1,2, & 3	AA000629–AA000637
01/03/17	DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	9	AA002207-AA002230
12/18/15	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'		AA000638-AA000647

	SECOND AMENDED COMPLAINT		
12/19/11	FIRST AMENDED COMPLAINT FOR DAMAGES; PROOF OF SERVICE	1	AA00014–AA00031
07/20/16	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	4	AA000846-AA000906
09/21/16	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	4, 5	AA000907-AA001031
10/26/16	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	8	AA001770-AA001782
01/11/17	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	10, 11	AA002376-AA002508
02/17/17	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	15	AA003507-AA003536
03/08/17	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	16, 17	AA003979-AA003997
02/22/16	HEARING BEFORE THE HONORABLE SUSAN SCANN, DISTRICT COURT JUDGE	4	AA000783-AA000826
02/07/17	HEARING BEFORE THE HONORABLE WILLIAM D. KEPHART, DISTRICT COURT JUDGE	11	AA002509-AA002524
03/14/17	HEARING BEFORE THE HONORABLE WILLIAM D. KEPHART, DISTRICT COURT JUDGE	17	AA004010–AA004060
05/04/17	HEARING BEFORE THE HONORABLE WILLIAM D. KEPHART, DISTRICT COURT JUDGE	23	AA005600-AA005638
03/29/16	MTC FINANCIAL INC. DBA TRUSTEE	4	AA000835-

	CORPS' ANSWER TO SECOND AMENDED COMPLAINT		AA000845
04/04/17	NATIONAL DEFAULT SERVICING CORPORATION'S JOINDER TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT"	19	AA004584-AA004586
06/08/17	NOTICE OF ENTRY OF ORDER DISMISSING CASE AS A MATTER OF LAW AND DIRECTING JUDGMENT IN DEFENDANTS' FAVOR IN CONNECTION WITH PLAINTIFFS' THIRD AMENDED COMPLAINT WITH PREJUDICE	23	AA005642-AA005658
03/15/17	NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	17, 18	AA004225-AA004236
12/14/16	NOTICE OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	8, 9	AA001790-AA002096
03/29/17	NOTICE OF PLAINTIFFS' SUBMISSION OF EVIDENCE FOR PURPOSES OF MAY 4, 2017 HEARING	18	AA004553-AA004560
02/13/12	NOTICE OF REMOVAL	1	AA00032–AA00037
02/13/12	OPINION FROM THE NINTH CIRCUIT COURT OF APPEALS IN *BENKO V. QUALITY LOAN SERVICE CORP.*	1	AA00038-AA00068
06/07/17	ORDER DISMISSING CASE AS A	23	AA005642-

	MATTER OF LAW AND DIRECTING JUDGMENT IN DEFENDANTS' FAVOR IN CONNECTION WITH PLAINTIFFS' THIRD AMENDED COMPLAINT WITH PREJUDICE		AA005658
03/14/17	ORDER RE PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	17	AA004061-AA004064
10/21/15	ORDER OF REMAND FROM FEDERAL COURT	1	AA00088-AA00087
05/23/17	PLAINTIFFS' MAY 23, 2017 LETTER BRIEF TO COURT REGARDING PROPOSED ORDER	23	AA005639-AA005641
03/28/17	PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE TAC	18	AA004250-AA004552
10/07/16	PLAINTIFFS' MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANTS' JOINT NRCP 12(B)(5) MOTIONS	5, 6, 7	AA001046-AA001712
07/05/17	PLAINTIFFS' NOTICE OF APPEAL OF COURT'S ORDER OF JUNE 7, 2017	23	AA005659-AA005665
04/24/17	PLAINTIFFS' NOTICE OF FILING DOCUMENTS UNDER SEAL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT	21	AA004999-AA005007
03/07/17	PLAINTIFFS' OBJECTION AND RESPONSE TO QUALITY LOAN SERVICE CORPORATION'S OPPOSITION TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT	15, 16	AA003686-AA003834
04/21/17	PLAINTIFFS' OPPOSITION TO	19, 20, 21	AA004659-

	DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT		AA004998
01/18/16	PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT; PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT	3, 4	AA000648-AA000756
04/28/17	PLAINTIFFS' OPPOSITION TO DEFENDANT QUALITY LOAN SERVICE CORPORATION'S MOTION FOR SUMMARY JUDGMENT	21, 22, 23	AA005008-AA005599
03/07/17	PLAINTIFFS' PRELIMINARY OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES TO DEFENDANT MTC FINANCIAL INC.'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFFS RAYMOND SANSOTA ANDFRANCINE SANSOTA; DECLARATION OF RAYMOND SANSOTA IN SUPPORT OF PLAINTIFFS' PRELIMINARY OPPOSITION TO MTC'S MOTION FOR SUMMARY JUDGMENT; PLAINTIFF REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT	16	AA003835-AA003978
03/10/17	PLAINTIFFS' PRELIMINARY RESPONSE TO MTC FINANCIAL INC. DBA TRUSTEE CORPS'OBJECTIONS TO SANSOTAS' SEPARATE STATEMENT IN SUPPORT OF SANSOTAS' MOTION FOR PARTIAL SUMMARY JUDGMENT	17	AA003998-AA004009

12/21/16	PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANTS' JOINT NRCP 12(B)(5) MOTIONS	9	AA002097-AA002196
03/07/17	PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT MTC	15	AA003537-AA003685
01/10/17	PLAINTIFFS' REPLY BRIEF RE PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	10	AA002323-AA002375
04/11/17	PLAINTIFFS' REPLY TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S REQUEST TO DISMISS THE THIRD AMENDED COMPLAINT (AND JOINDERS)	19	AA004610-AA004658
04/06/17	PLAINTIFFS' REPLY TO MTC'S OBJECTION, FOR MAY 4, 2017 HEARING	19	AA004660-AA004609
02/06/17	PLAINTIFFS' (SANSOTAS) MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MTC FINANCIAL, INC.; PLAINTIFFS' SEPARATE STATEMENT IN SUPPORT OF PLAINTIFFS' (SANSOTAS) MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MTC FINANCIAL, INC.; DECLARATION OF NICHOLAS A. BOYLAN IN SUPPORT OF PLAINTIFFS' (SANSOTAS) MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MTC FINANCIAL, INC.	11, 12, 13, 14, 15	AA002525-AA003506
03/15/16	QUALITY LOAN SERVICE CORPORATION'S ANSWER TO COMPLAINT	4	AA000827-AA000834
12/29/16	QUALITY LOAN SERVICE	9	AA002197-

	CORPORATION'S LIMITED OPPOSITION TO MOTION TO AMEND		AA002198
04/04/17	QUALITY LOAN SERVICE CORPORATIONS' SUBSTANTIVE JOINDER TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT"	19	AA004587-AA004650
01/03/17	REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	9, 10	AA002231-AA002306
11/25/15	SECOND AMENDED COMPLAINT OF PLAINTIFFS JEFFREY BENKO, CAMILO ARTINEZ, ANA MARTINEZ, FRANK SCINTA, JACQUELINE SCINTA, SUSAN HJORTH, RAYMOND SANSOTA, FRANCINE SANSOTA, SANDRA KUHN, JESUS GOMEZ, SILVIA GOMEZ, DONNA HERRERA, JESSE HENNIGAN, KIM MOORE, THOMAS MOORE, SUSAN KALLEN, ROBERT MANDARICH AND JAMES NICO	1	AA00088–AA000228
12/05/16	NOTICE OF ENTRY OF STIPULATION AND ORDER TO DISMISS PLAINTIFFS KIM MOORE AND THOMAS MOORE WITH PREJUDICE	8	AA001783-AA001789
03/15/17	THIRD AMENDED COMPLAINT OF PLAINTIFFS JEFFREY BENKO, CAMILO MARTINEZ, ANA MARTINEZ, FRANK SCINTA, JACQUELINE SCINTA, SUSAN HJORTH, RAYMOND SANSOTA,	17	AA004065-AA004224

	FRANCINE SANSOTA, SANDRA KUHN, JESUS GOMEZ, SILVIA GOMEZ, DONNA HERRERA, JESSE HENNIGAN, SUSAN KALLEN, ROBERT MANDARICH, JAMES NICO, AND BIJAN LAGHAEI		

CHRONOLOGICAL INDEX

DATE	TITLE	VOLUME	PAGES
10/12/11	COMPLAINT FOR DAMAGES	1	AA000001-AA00013
12/19/11	FIRST AMENDED COMPLAINT FOR DAMAGES; PROOF OF SERVICE	1	AA00014–AA00031
02/13/12	NOTICE OF REMOVAL	1	AA00032–AA00037
02/13/12	OPINION FROM THE NINTH CIRCUIT COURT OF APPEALS IN *BENKO V. QUALITY LOAN SERVICE CORP.*	1	AA00038-AA00068
10/21/15	ORDER OF REMAND FROM FEDERAL COURT	1	AA00088-AA00087
11/25/15	SECOND AMENDED COMPLAINT OF PLAINTIFFS JEFFREY BENKO, CAMILO ARTINEZ, ANA MARTINEZ, FRANK SCINTA, JACQUELINE SCINTA, SUSAN HJORTH, RAYMOND SANSOTA, FRANCINE SANSOTA, SANDRA KUHN, JESUS GOMEZ, SILVIA GOMEZ, DONNA HERRERA, JESSE HENNIGAN, KIM MOORE, THOMAS MOORE, SUSAN KALLEN, ROBERT MANDARICH AND JAMES NICO	1	AA00088-AA000228
12/18/15	DEFENDANTS' JOINT MOTION TO DISMISS SECOND AMENDED COMPLAINT	1,2, & 3	AA000229-AA000628
12/18/15	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	1,2, & 3	AA000629-AA000637
12/18/15	DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS' REQUEST	3	AA000638-AA000647

CHRONOLOGICAL INDEX

	FOR JUDICIAL NOTICE IN SUPPORT OF JOINDER IN AND TO THE FOLLOWING: DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT		
01/18/16	PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT; PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT	3, 4	AA000648-AA000756
02/05/16	DEFENDANTS' JOINT REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT	4	AA000757-AA000782
02/22/16	HEARING BEFORE THE HONORABLE SUSAN SCANN, DISTRICT COURT JUDGE	4	AA000783-AA000826
03/15/16	QUALITY LOAN SERVICE CORPORATION'S ANSWER TO COMPLAINT	4	AA000827-AA000834
03/29/16	MTC FINANCIAL INC. DBA TRUSTEE CORPS' ANSWER TO SECOND AMENDED COMPLAINT	4	AA000835-AA000845
07/20/16	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	4	AA000846-AA000906
09/21/16	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	4, 5	AA000907-AA001031
09/28/16	DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S ANSWER TO SECOND AMENDED COMPLAINT OF PLAINTIFFS	5	AA001032-AA001045

	JEFFREY BENKO, CAMILO MARTINEZ, ANA MARTINEZ, FRANK SCINTA, JACQUELINE SCINTA, SUSAN HJORTH, RAYMOND SANSOTA, FRANCINE SANSOTA, SANDRA KUHN, JESUS GOMEZ, SIL VIA GOMEZ, DONNA HERRERA, JESSE HENNIGAN, KIM MOORE, THOMAS MOORE, SUSAN KALLEN, ROBERT MANDARICH AND JAMES NICO		
10/07/16	PLAINTIFFS' MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANTS' JOINT NRCP 12(B)(5) MOTIONS	5, 6, 7	AA001046-AA001712
10/24/16	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	6, 7, 8	AA001713-AA001769
10/26/16	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	8	AA001770-AA001782
12/05/16	NOTICE OF ENTRY OF STIPULATION AND ORDER TO DISMISS PLAINTIFFS KIM MOORE AND THOMAS MOORE WITH PREJUDICE	8	AA001783-AA001789
12/14/16	NOTICE OF PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	8, 9	AA001790-AA002096
12/21/16	PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR CLARIFICATION AND ENTRY OF ORDER RE FEBRUARY 2016 HEARING ON DEFENDANTS' JOINT	9	AA002097-AA002196

CHRONOLOGICAL INDEX

	NRCP 12(B)(5) MOTIONS		
12/29/16	QUALITY LOAN SERVICE CORPORATION'S LIMITED OPPOSITION TO MOTION TO AMEND	9	AA002197-AA002198
01/03/17	DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	9	AA002199-AA002206
01/03/17	DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	9	AA002207-AA002230
01/03/17	REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	9, 10	AA002231-AA002306
01/03/17	DECLARATION OF KEIKO J. KOJIMA IN SUPPORT OF DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	10	AA002307-AA002322
01/10/17	PLAINTIFFS' REPLY BRIEF RE PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	10	AA002323-AA002375
01/11/17	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	10, 11	AA002376-AA002508
02/07/17	HEARING BEFORE THE HONORABLE WILLIAM D.	11	AA002509-AA002524

	KEPHART, DISTRICT COURT JUDGE		
02/06/17	PLAINTIFFS' (SANSOTAS) MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MTC FINANCIAL, INC.; PLAINTIFFS' SEPARATE STATEMENT IN SUPPORT OF PLAINTIFFS' (SANSOTAS) MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MTC FINANCIAL, INC.; DECLARATION OF NICHOLAS A. BOYLAN IN SUPPORT OF PLAINTIFFS' (SANSOTAS) MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST MTC FINANCIAL, INC.	11, 12, 13, 14, 15	AA002525-AA003506
02/17/17	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	15	AA003507-AA003536
03/07/17	PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT MTC	15	AA003537-AA003685
03/07/17	PLAINTIFFS' OBJECTION AND RESPONSE TO QUALITY LOAN SERVICE CORPORATION'S OPPOSITION TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT	15, 16	AA003686-AA003834
03/07/17	PLAINTIFFS' PRELIMINARY OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES TO DEFENDANT MTC FINANCIAL INC.'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFFS RAYMOND SANSOTA AND FRANCINE SANSOTA; DECLARATION OF RAYMOND SANSOTA IN SUPPORT OF	16	AA003835-AA003978

CHRONOLOGICAL INDEX

	PLAINTIFFS' PRELIMINARY OPPOSITION TO MTC'S MOTION FOR SUMMARY JUDGMENT; PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT		
03/08/17	HEARING BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER	16, 17	AA003979-AA003997
03/10/17	PLAINTIFFS' PRELIMINARY RESPONSE TO MTC FINANCIAL INC. DBA TRUSTEE CORPS'OBJECTIONS TO SANSOTAS' SEPARATE STATEMENT IN SUPPORT OF SANSOTAS' MOTION FOR PARTIAL SUMMARY JUDGMENT	17	AA003998-AA004009
03/14/17	HEARING BEFORE THE HONORABLE WILLIAM D. KEPHART, DISTRICT COURT JUDGE	17	AA004010–AA004060
03/14/17	ORDER RE PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	17	AA004061-AA004064
03/15/17	THIRD AMENDED COMPLAINT OF PLAINTIFFS JEFFREY BENKO, CAMILO MARTINEZ, ANA MARTINEZ, FRANK SCINTA, JACQUELINE SCINTA, SUSAN HJORTH, RAYMOND SANSOTA, FRANCINE SANSOTA, SANDRA KUHN, JESUS GOMEZ, SILVIA GOMEZ, DONNA HERRERA, JESSE HENNIGAN, SUSAN KALLEN, ROBERT MANDARICH, JAMES NICO, AND BIJAN LAGHAEI	17	AA004065-AA004224
03/15/17	NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	17, 18	AA004225-AA004236

CHRONOLOGICAL INDEX

03/28/17	ANSWER OF DEFENDANT MTC FINANCIAL INC. dba TRUSTEE CORPS TO THIRD AMENDED COMPLAINT OF PLAINTIFFS	18	AA004237-AA004249
03/28/17	PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE TAC	18	AA004250-AA004552
03/29/17	NOTICE OF PLAINTIFFS' SUBMISSION OF EVIDENCE FOR PURPOSES OF MAY 4, 2017 HEARING	18	AA004553-AA004560
04/04/17	DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT"	18, 19	AA004561-AA004583
04/04/17	NATIONAL DEFAULT SERVICING CORPORATION'S JOINDER TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT"	19	AA004584-AA004586
04/04/17	QUALITY LOAN SERVICE CORPORATIONS' SUBSTANTIVE JOINDER TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S RESPONSE TO PLAINTIFFS' "MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT"	19	AA004587-AA004650

CHRONOLOGICAL INDEX

04/06/17	PLAINTIFFS' REPLY TO MTC'S OBJECTION, FOR MAY 4, 2017 HEARING	19	AA004660-AA004609
04/11/17	PLAINTIFFS' REPLY TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S REQUEST TO DISMISS THE THIRD AMENDED COMPLAINT (AND JOINDERS)	19	AA004610-AA004658
04/21/17	PLAINTIFFS' OPPOSITION TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT	19, 20, 21	AA004659-AA004998
04/24/17	PLAINTIFFS' NOTICE OF FILING DOCUMENTS UNDER SEAL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT CALIFORNIA RECONVEYANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT	21	AA004999-AA005007
04/28/17	PLAINTIFFS' OPPOSITION TO DEFENDANT QUALITY LOAN SERVICE CORPORATION'S MOTION FOR SUMMARY JUDGMENT	21, 22, 23	AA005008-AA005599
05/04/17	HEARING BEFORE THE HONORABLE WILLIAM D. KEPHART, DISTRICT COURT JUDGE	23	AA005600-AA005638
05/23/17	PLAINTIFFS' MAY 23, 2017 LETTER BRIEF TO COURT REGARDING PROPOSED ORDER	23	AA005639-AA005641
06/08/17	NOTICE OF ENTRY OF ORDER DISMISSING CASE AS A MATTER OF LAW AND DIRECTING JUDGMENT IN DEFENDANTS' FAVOR IN CONNECTION WITH PLAINTIFFS' THIRD AMENDED COMPLAINT WITH PREJUDICE	23	AA005642-AA005658

CHRONOLOGICAL INDEX

07/05/17	PLAINTIFFS' NOTICE OF APPEAL OF COURT'S ORDER OF JUNE 7, 2017	23	AA005659-AA005665

Caution
As of: March 27, 2017 3:14 PM EDT

Kaymark v. Bank of Am., N.A.

United States Court of Appeals for the Third Circuit

December 10, 2014, Argued; April 7, 2015, Opinion Filed

No. 14-1816

Reporter
783 F.3d 168 *; 2015 U.S. App. LEXIS 5548 **

DALE KAYMARK, individually and on behalf of other similarly situated current and former homeowners in Pennsylvania, Appellant v. BANK OF AMERICA, N.A.; UDREN LAW OFFICES, P.C.

Subsequent History: US Supreme Court certiorari denied by Udren Law Offices, P.C. v. Kaymark, 136 S. Ct. 794, 193 L. Ed. 2d 710, 2016 U.S. LEXIS 258 (U.S., 2016)
Motion denied by, Remanded by Kaymark v. Udren Law Offices, P.C., 2016 U.S. Dist. LEXIS 171061 (W.D. Pa., Dec. 12, 2016)
Motion denied by Kaymark v. Udren Law Offices, P.C., 2017 U.S. Dist. LEXIS 34420 (W.D. Pa., Mar. 10, 2017)

Prior History: [**1] On Appeal from the United States District Court for the Western District of Pennsylvania. (W.D. Pa. No. 2-13-cv-00419). District Judge: Honorable Cathy Bissoon.
Kaymark v. Bank of Am., N.A., 11 F. Supp. 3d 496, 2014 U.S. Dist. LEXIS 43057 (W.D. Pa., 2014)

Core Terms

foreclosure complaint, debt collection, ascertainable loss, attorneys', consumer, mortgage, debt collector, Notice, collection, alleges, damages, services, foreclosure action, foreclosure, exemption, district court, violations, deceptive, disputed, internal quotation marks, misrepresentations, speculative, default, unfair, state court, misrepresenting, practices, remedies, engages, reasons

Case Summary

Overview

HOLDINGS: [1]-A debtor's claim that certain statements in a lender's foreclosure complaint violated the FDCPA was erroneously dismissed because the fact that the debt collection activity involved a foreclosure complaint, rather than a debt collection letter, did not remove it from the FDCPA's purview; [2]-The debtor's alleged injury from a possible lien on his property from not-yet-performed services, which shrank to zero after the filing of the foreclosure action, was too speculative, standing alone, to quality for the protection of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 Pa. Stat. Ann. § 201-9.2(a); [3]-As the debtor's UTPCPL claim failed, his claim under the Pennsylvania Fair Credit

Extension Uniformity Act, 73 Pa. Stat. Ann. § 2270.1 et seq., necessarily also failed; [4]-The debtor failed to plead damages for a breach of contract claim.

Outcome

Affirmed in part and reversed in part.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] Appellate courts exercise plenary review over a district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual allegations, taken as true, to state a claim to relief that is plausible on its face. Courts accept all factual allegations as true and construe all inferences in the light most favorable to the plaintiff.

Governments > Legislation > Interpretation

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

HN2[] As remedial legislation, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.S. § 1692 et seq., must be broadly construed in order to give full effect to these purposes, and, as such, courts analyze a communication giving rise to an FDCPA claim from the perspective of the least sophisticated debtor.

Banking Law > Consumer Protection > Fair Debt Collection > Unfair Practices

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN3[] The holding in McLaughlin v. Phelan Hallinan & Schmieg, LLP, 756 F.3d 240 (3d Cir. 2014), which held that certain conduct in a debt collection demand letter, rather than a foreclosure complaint, violated the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq., extends to foreclosure complaints.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

Banking Law > Consumer Protection > Fair Debt Collection > Unfair Practices

HN4[] If a communication meets the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq., definition of an effort by a debt collector to collect a debt from a consumer, it is not relevant that it came in the context of litigation.

Governments > Legislation > Interpretation

HN5[] Courts should disfavor interpretations of statutes that render language superfluous.

Governments > Legislation > Interpretation

HN6[] Congress is presumed to be aware of a judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN7[] A communication cannot be uniquely exempted from the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq., because it is a formal pleading or, in particular, a complaint.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN8[] The statute defines a "communication" under the Fair Debt Collection Practices Act as the conveying of information regarding a debt directly or indirectly to any person through any medium. 15 U.S.C.S. § 1692a(2).

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN9[] A complaint served on the debtor is a communication subject to the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692a(2).

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN10[] Nowhere does the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.S. § 1692 et seq., exclude foreclosure actions from its reach. On the contrary, foreclosure meets the broad definition of "debt collection" under the FDCPA, and it is even contemplated in various places in the statute.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

Governments > Legislation > Interpretation

HN11[] Absent a finding that the result will be so absurd as to warrant implying an exemption for Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq., claims involving foreclosure actions, courts are not empowered to disregard the plain language of the statute.

Banking Law > Consumer Protection > State Law > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN12[] If a debt collector or creditor engages in an unfair or deceptive debt collection act or practice under the Pennsylvania Fair Credit Extension Uniformity Act, 73 Pa. Stat. Ann. § 2270.1 et seq., it shall constitute a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann.

§ 201-1 et seq., or by engaging in certain unfair or deceptive acts or practices, in violation of 73 Pa. Stat. Ann. § 201-20 2(4)(v) (representing that services have characteristics they do not have) and (xxi) (engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Banking Law > Consumer Protection > State Law > General Overview

HN13[] To maintain a private right of action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, a plaintiff must demonstrate (1) ascertainable loss of money or property, real or personal, 73 Pa. Stat. Ann. § 201-9.2(a), (2) "as a result of" the defendant's prohibited conduct under the statute, 73 Pa. Stat. Ann. § 201-9.2(a).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Banking Law > Consumer Protection > State Law > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN14[] Where the Pennsylvania Supreme Court has not definitively addressed what constitutes ascertainable loss under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-9.2(a), a federal district court must predict how that court would rule if faced with the issue, and, in doing so, the decision of an intermediate state court is particularly relevant.

Banking Law > Consumer Protection > State Law > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN15[] Ascertainable loss under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-9.2(a), must be established from the factual circumstances surrounding each case, but that the loss must be non-speculative.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Banking Law > Consumer Protection > State Law > General Overview

HN16[] The Pennsylvania Unfair Trade Practices and Consumer Protection Law explicitly provides that any person who suffers an ascertainable loss may bring a private action to recover actual damages." 73 Pa. Stat. Ann. § 201-9.2. A plaintiff must have "suffered harm" as a result of the defendant's wrongful conduct. The test of whether damages are remote or speculative has nothing to do with the difficulty in

calculating the amount, but deals with the more basic question of whether there are identifiable damages. Thus, damages are speculative only if the uncertainty concerns the fact of damages rather than the amount.

Banking Law > Consumer Protection > State Law > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN17[] The Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL) references "ascertainable loss of money or property, real or personal," 73 Pa. Stat. Ann. § 201-9.2 and there may be situations in which a lien against a consumer's property provides a sufficiently concrete loss that a consumer need not pay off before bringing a UTPCPL claim to remedy her rights.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Banking Law > Consumer Protection > State Law > General Overview

HN18[] A plaintiff must experience some non-speculative loss to make that harm actionable under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-9.2(a).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Banking Law > Consumer Protection > State Law > General Overview

HN19[] The Pennsylvania Fair Credit Extension Uniformity Act, 73 Pa. Stat. Ann. § 2270.1 et seq., Pennsylvania's analogue to the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq., prohibits unfair methods of competition and unfair or deceptive acts or practices with regard to the collection of debts. 73 Pa. Stat. Ann. § 2270.2.

Banking Law > Consumer Protection > State Law > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN20[] The text of Pennsylvania Fair Credit Extension Uniformity Act (FCEUA) enforcement provision reads: If a debt collector or creditor engages in an unfair or deceptive debt collection act or practice under this act, it shall constitute a violation of the Pennsylvania Fair Credit Extension Uniformity Act (UTPCPL), 73 Pa. Stat. Ann. § 2270.1 et seq. 73 Pa. Stat. Ann. § 2270.5(a). The FCEUA therefore does not provide its own private cause of action; rather, it is enforced through the remedial provision of the UTPCPL. The inclusion of a violation of the FCEUA as also being a violation of the UTPCPL evinces a clear intent by the legislature that FCEUA claims be treated in the same manner as other private action claims under the UTPCPL. FCECUA claims therefore must plead that a

plaintiff suffered an ascertainable loss as a result of a defendant's prohibited action. If the FCEUA can only be enforced to the extent the UTPCPL's private remedy is invoked, a plaintiff cannot state a claim for relief under the FCEUA if he cannot state a claim for relief under the UTPCPL.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN21[] To allege breach of contract in Pennsylvania, a plaintiff must show (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages.

Counsel: Jonathan R. Burns, Esq., Michael P. Malakoff, Esq. ARGUED, Malakoff, Doyle & Finberg, Pittsburgh, PA, for Appellant Dale Kaymark.

Thomas L. Allen, Esq. ARGUED, Nellie E. Hestin, Esq., Pittsburgh, PA; Marc A. Goldich, Esq., Andrew J. Soven, Esq., Philadelphia, PA, for Appellee Bank of America, N.A.

Jonathan J. Bart, Esq. ARGUED, Wilentz, Goldman & Spitzer, Philadelphia, PA, for Appellee Udren Law Offices, P.C.

Judges: Before: FUENTES, FISHER and KRAUSE, Circuit Judges.

Opinion by: FISHER

Opinion

[*171] OPINION OF THE COURT

FISHER, *Circuit Judge*.

Dale Kaymark defaulted on a mortgage held by Bank of America, N.A. ("BOA"). On behalf of BOA, Udren Law Offices, P.C. ("Udren") initiated foreclosure proceedings against Kaymark in state court. The body of the Foreclosure Complaint listed certain not-yet-incurred fees as due and owing, which Kaymark alleges violated several state and federal fair debt collection [*172] laws and breached the mortgage contract. Because we conclude that Kaymark has sufficiently pled that the disputed fees constituted actionable misrepresentation under the [**2] Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, we will reverse the District Court's order dismissing certain FDCPA claims against Udren but affirm its dismissal of all other claims.

I.

A.

Kaymark refinanced his home in Coraopolis, Pennsylvania, in December 2006, executing a note for $245,600 and granting BOA a mortgage. The mortgage was insured by Fannie Mae ("FNMA"). The terms of the mortgage state, in pertinent part:

> Lender may charge Borrower fees for services *performed in connection with* Borrower's default and for the purpose of protecting Lender's interest in the Property and rights under this Security Agreement, including, but not limited to,

> attorneys' fees, property inspection and valuation fees.
>
> . . . .
>
> If the default is not cured as specified . . . . Lender shall be entitled to collect all expenses *incurred* in pursuing the remedies provided in this Section [], including, but not limited to, attorneys' fees and costs of title evidence to the extent permitted by Applicable Law.

App. 72a (P 14), 75a (P 22) (emphases added).

Kaymark experienced a drop in income in June 2011 and failed to make his mortgage payments. On August 1, 2011, BOA sent Kaymark an "Act 91 Notice" of pre-foreclosure [**3] delinquency pursuant to Pennsylvania's Housing Finance Agency Law, 35 P.S. § 1680.403c, which requires mortgage-holders considering foreclosure to send homeowners a notice as a prerequisite to initiating formal action. An Act 91 notice must, among other things, include an itemized breakdown of the total amount past due as of the date of the notice and inform the homeowner that he is entitled to thirty days plus three additional days for mailing to meet with a consumer credit counseling agency to attempt to resolve the delinquency. *Id.* Kaymark alleges his Act 91 Notice was improper by attempting to collect three months payment when, at the date of mailing, Kaymark was only two months in arrears, and by misrepresenting the time within which Kaymark had to meet with a credit agency as thirty days, instead of thirty-three days.

Over a year later, on September 13, 2012, Udren, on behalf of BOA, filed a verified Foreclosure Complaint against Kaymark in the Court of Common Pleas of Allegheny County, Pennsylvania. The body of the Foreclosure Complaint included an itemized list of the total debt, stating that the following items were due and owing as of July 12, 2012:

> Unpaid Principal Balance $213,224.26
>
> Accumulated [**4] Interest (07/01/2011-07/12/2012) $13,452.47
>
> Accumulated Late Charges $177.74
>
> Escrow Deficit / (Reserve) $1,935.45
>
> Title Report $325.00
>
> Attorney Fees $1,650.00
>
> Property Inspection $75.00
>
> Grand Total [*173] $230,839.92
>
> The above figures are calculated as of 07/12/2012[.] App. 47a.

Kaymark alleges that the $1,650 in attorneys' fees, $325 in title report fees, and $75 in property inspection fees (or $2,050 total) were not actually incurred as of July 12, two months before the foreclosure action was filed on September 13. Kaymark also alleges that the fees were improperly calculated on a fixed basis. Appellees retort that fixed fees are contemplated under the FNMA servicing guide, which sets the maximum foreclosure fee, or cap, for attorneys' fees at $1,650. *See* App. 85a-86a.

Kaymark contested the foreclosure action, which is still pending in the Allegheny County Court of Common Pleas. As such,

Kaymark has never paid the disputed fees. The parties do not dispute that these fees were ultimately incurred in the course of the foreclosure action or that the fees were ultimately reasonable. *See* App. 6a n.4.

B.

In February 2013, Kaymark filed a complaint on behalf of himself and a putative class against BOA and [**5] Udren (collectively, "Appellees") in the Court of Common Pleas of Allegheny County. In the original complaint, Kaymark alleged that Appellees violated the Pennsylvania Loan Interest and Protection Law ("Act 6"), 41 P.S. § 101 *et seq.*, because the Foreclosure Complaint sought attorneys' fees which were not "actually incurred" upon commencement of the foreclosure action. *Id.* § 406. Appellees removed the case to the U.S. District Court for the Western District of Pennsylvania and filed motions to dismiss on the grounds that Kaymark's mortgage exceeded the maximum baseline figure to be governed under Act 6.

In response, Kaymark filed an amended complaint, asserting the following four counts on the bases of the alleged misrepresentations in the Foreclosure Complaint and/or Act 91 Notice: Count I, against BOA, for violating § 2270.4(b)(5)(ii), (v), (x), and (6)(i) of the Pennsylvania Fair Credit Extension Uniformity Act ("FCEUA"), 73 P.S. § 2270.1 *et seq.*; Count II, against Udren, for violating §§ 1692e(2)(A), (5), (10), and 1692f(1) of the FDCPA; Count III, against both BOA and Udren, for violating the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 *et seq.*, by virtue of the violations of the FCEUA or by engaging in certain "unfair or deceptive acts or [**6] practices," in violation of § 201-2(4)(v) and (xxi); and Count IV, against BOA, for common law breach of contract.

BOA and Udren again moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The Magistrate Judge issued a Report and Recommendation ("R&R") to grant the motions on December 11, 2013. It reasoned that Kaymark's FDCPA claim that Appellees were not authorized to list not-yet-incurred flat fees in the Foreclosure Complaint was "rather hypertechnical," App. 136a, and that "nowhere do the loan documents or any state or federal law prohibit listing attorneys' fees and other fixed costs at the time of filing the complaint, but are reasonably expected to be incurred," App. 135a. It also explained that Kaymark "pled himself out of the state causes of action" because he did not show any actual loss or damage. App. 125a.

The District Court adopted the R&R and granted the motions to dismiss in their entirety, with prejudice, on March 31, 2014. Agreeing that the inclusion of not-yet-incurred fees was not prohibited by the mortgage contract or other state or federal laws, the District Court dismissed the [*174] FDCPA claim. It also concluded that Kaymark failed to demonstrate an actual loss as a result of the alleged [**7] misrepresentations, and, therefore, that he failed to state a claim under the UTPCPL and the FCEUA. For the same reasons (i.e.,

failure to plead actual loss), the District Court dismissed Kaymark's breach of contract claim against BOA. Kaymark timely appealed.

II.

The District Court exercised jurisdiction over Kaymark's FDCPA claim under 28 U.S.C. § 1331 and supplemental jurisdiction over Kaymark's state-law claims under 28 U.S.C. § 1367. This Court exercises jurisdiction under 28 U.S.C. § 1291.

HN1[↑] We exercise plenary review over a district court's grant of a motion to dismiss under Rule 12(b)(6). *See Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 120 (3d Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual allegations, taken as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). We accept all factual allegations as true and construe all inferences in the light most favorable to the plaintiff. *Id.*

III.

A.

Congress enacted the FDCPA in 1977 "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). The Court has repeatedly held that *HN2*[↑] "[a]s remedial legislation, the FDCPA must be broadly construed in order to give full effect to these purposes," *Caprio v. Healthcare Revenue Recovery Grp., LLC*, 709 F.3d 142, 148 (3d Cir. 2013), and, as such, we analyze the communication giving rise to the FDCPA claim "from the perspective of [**8] the least sophisticated debtor," *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008) (internal quotation marks omitted).

Kaymark alleges that, by attempting to collect fees for legal services not yet performed in the mortgage foreclosure, Udren violated 15 U.S.C. § 1692e—specifically, § 1692e(2)(A), (5), and (10)—which imposes strict liability on debt collectors who "use any false, deceptive, or misleading representation or means in connection with the collection of any debt," and § 1692f(1) by attempting to collect "an[] amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

Bearing on these claims, the parties dispute the relevance of our intervening decision in *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240 (3d Cir. 2014)—decided by this Court after the District Court's order. In *McLaughlin*, we held that nearly-indistinguishable conduct in a debt collection demand letter, rather than a foreclosure complaint, violated the FDCPA. We now conclude that *HN3*[↑] *McLaughlin's* holding extends to foreclosure complaints, and we reverse the District Court's order dismissing certain FDCPA claims against Udren.

1.

Timothy McLaughlin defaulted on a mortgage held by CitiMortgage.

CitiMortgage referred the issue to Phelan Hallinan [**9] & Schmieg, LLP ("PHS"), which sent McLaughlin a demand letter on June 7, 2010, itemizing the total amount of debt due as of May 18, 2010, as $365,488.40. *Id.* at 243. The debt included two line items relevant here: $650 in "Attorney's Fees" [*175] and $550 for "Costs of Suit and Title Search." *Id.* (internal quotation marks omitted). Like in the case at bar, "McLaughlin assert[ed], among other things, that these fees and costs had not actually been incurred as of the date stated in the Letter," *id.*, constituting actionable misrepresentation under § 1692e(2) ("The false representation of—(A) the character, amount, of legal status of any debt; or (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.") and (10) ("The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.") of the FDCPA.

When McLaughlin filed a class action complaint, the district court held, among other things, that "estimating the amount of attorneys' fees in an itemized debt collection notice does not violate the FDCPA," *id.* (internal quotation marks omitted), and dismissed McLaughlin's claims. On appeal, this [**10] Court reversed:

> Nothing [in the Letter] says [the amount owed on the debt] is an estimate or in any way suggests that it was not a precise amount. As the drafter of the Letter, PHS is responsible for its content and for what the least sophisticated debtor would have understood from it. If PHS wanted to convey that the amounts in the Letter were estimates, then it could have said so. It did not. Instead, its language informs the reader of the specific amounts due for specific items as of a particular date. If the amount actually owed as of that date was less than the amount listed, then, construing the facts in the light most favorable to McLaughlin as we must when reviewing the dismissal under Rule 12(b)(6), McLaughlin has stated a claim that the Letter misrepresents the amount of the debt in violation of § 1692e(2) and (10).

Id. at 246 (internal citations omitted).

The facts in *McLaughlin* are virtually indistinguishable from the case at bar. Here, the Foreclosure Complaint also plainly "inform[ed] the reader of the specific amounts due for specific items as of a particular date," *id.*, two months prior to the date the Foreclosure Complaint was filed. Udren also did not convey that the disputed fees were estimates or imprecise amounts. [**11] Thus, pursuant to *McLaughlin*, the Foreclosure Complaint conceivably misrepresented the amount of the debt owed, forming a basis for violations of § 1692e(2)(A) and (10).

By extension, it follows that Kaymark has sufficiently alleged that Udren's attempt to collect those misrepresented fees was not "expressly authorized" by the mortgage contract or permitted by law. § 1692f(1).[1]

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[1] The district court dismissed this claim in *McLaughlin*, and McLaughlin [**12] did not challenge it on appeal. *See McLaughlin*, 756 F.3d at 244 n.5.

To be sure, Kaymark expressly agreed to the collection of certain fee categories, such as "attorneys' fees, property inspection and valuation fees." App. 72a (¶ 14). But the contract also specified that BOA could only charge for "services *performed* in connection with" the default and collect "all expenses *incurred*" in pursuing authorized remedies. App. 72a (¶ 14), 75a (¶ 22) (emphases added). While such language is arguably capable of more than one meaning, we must view the Foreclosure Complaint through the lens of the least-sophisticated consumer and in the light most favorable to Kaymark. In this perspective, the most natural reading is that Udren was not authorized to collect fees for not-yet-performed legal services and expenses, [*176] forming a basis for a violation of §1692f(1).[2]

This conclusion is not a departure from our sister Circuits, which have held that demanding fees in the collection of debts in a way *contrary to the underlying agreement* is actionable under the FDCPA. *See Kojetin v. C U Recovery, Inc.*, 212 F.3d 1318 (8th Cir. 2000) (per curiam) (finding FDCPA violation where the debt collector charged a collection fee based on a percentage of the principal balance of the debt due rather than the "actual cost[]" of collection as stipulated in the loan agreement); *Bradley v. Franklin Collection Serv., Inc.*, 739 F.3d 606, 610 (11th Cir. 2014) (finding § 1692f(1) violation where debtor "agreed to pay the actual costs of collection," not "a percentage above the amount of his outstanding debt that was unrelated to the actual costs to collect that debt") (per curiam). Likewise, Kaymark agreed to pay attorneys' fees and other expenses that were actually incurred in connection with the default, not fees that might eventually be incurred.

However, because Udren did not "threat[en] to take an[] action that cannot legally be taken," 15 U.S.C. § 1692e(5), such as falsely threatening to file suit, *[**13] see Brown v. Card Serv. Ctr.*, 464 F.3d 450, 454-55 (3d Cir. 2006), Kaymark fails to state a claim under § 1692e(5).

The false communication in *McLaughlin* was a debt collection letter; here, of course, it is a Foreclosure Complaint. Accordingly, to determine whether Kaymark has sufficiently stated an FDCPA claim, we must decide whether this distinction is fatal.

2.

The thrust of Udren's argument is that pleadings—in particular, foreclosure complaints—cannot be the basis of FDCPA claims. However, the statutory text, as well at the case law interpreting the text, renders this argument meritless.

In *Heintz v. Jenkins*, the Supreme Court established that attorneys "engage[d] in consumer-debt-collection activity, even when that activity consists of litigation" are covered by the FDCPA. 514 U.S. 291, 299, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). In so holding, the Court explained that Congress repealed an express exemption from the definition of "debt collector" in an earlier version of the statute for "any

[2] Because there is no such language for fixed fees, we will presume that they were not prohibited by the mortgage contract (or, in any event, intertwined with the argument that the fees be actually incurred).

attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." *Id.* at 294 (quoting Pub. L. No. 95-109, § 803(6)(F), 91 Stat. 874, 875 (1977)). Once Congress amended the law without creating another exemption to fill its void, the Court explained, "Congress intended that lawyers be subject to the [FDCPA] whenever they meet the general 'debt collector' definition." *Id.* at 295 [**14] ; *see* 15 U.S.C. § 1692a(6) (defining debt collector as "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."). That the FDCPA covers attorneys engaged in debt collection litigation is well-established law in this Circuit, *see, e.g., Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 234 (3d Cir. 2005) (*HN4*[] "[I]f a communication meets the [FDCPA's] definition of an effort by a 'debt collector' to collect a 'debt' from a 'consumer,' it is not relevant that it came in the context of litigation."), and there is no dispute here that Udren [*177] acted as a "debt collector" when, by filing the Foreclosure Complaint, it "attempt[ed] to collect" a debt on behalf of BOA. 15 U.S.C. § 1692a(6).

But Congress did not stop there. Subsequent to *Heintz*, Congress twice amended the statute and exempted "formal pleading[s] made in connection with a legal action" from 15 U.S.C. § 1692e(11), *as amended* Pub. L. No. 104-208, § 2305(a), 110 Stat. 3009, 3009-425 (1996), and "communication[s] in the form of [] formal pleading[s]" from § 1692g(d), *as amended* Pub. L. No. 109-351, § 802(a), 120 Stat. 1966 (2006), two provisions not here at issue. If Congress intended that all conduct in the course of formal pleadings be exempt from the FDCPA, then these express exemptions would be superfluous, and *HN5*[] "courts should disfavor interpretations of statutes that render language superfluous." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992). Furthermore, as the Fourth Circuit explained, "the fact that the amendment[s] occurred after *Heintz* further indicates that Congress was aware of the Court's interpretation of the FDCPA and accepted it, except for the narrow exemption[s] it provided for formal pleadings" in §§ 1692e(11) and 1692g(d). *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 231 (4th Cir. 2007); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982) (*HN6*[] "Congress is presumed to be aware of a[] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . ." (internal quotation marks omitted)). If Congress had wanted to exclude formal pleadings from the protections of the FDCPA under any of its other provisions, it could have done so. It did not. Thus, except for §§ 1692e(11) and 1692g(d), "[t]he amendment[s] by [their] terms in fact [**15] suggest[] that *all* litigation activities, *including* formal pleadings, are subject to the FDCPA." *Sayyed*, 485 F.3d at 231.

We conclude that *HN7*[] a communication cannot be uniquely exempted from the

FDCPA because it is a formal pleading or, in particular, a complaint. This principle is widely accepted by our sister Circuits. *See, e.g., Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 535 (6th Cir. 2014) ("The fact that the [alleged violation] appears in a lawsuit or other court filing does not diminish the threatening nature of the communication for purposes of the FDCPA."); *James v. Wadas*, 724 F.3d 1312, 1316 (10th Cir. 2013) ("[T]he FDCPA 'applies to the litigating activities of lawyers,' which, as other circuits have held, may include the service upon a debtor of a complaint to facilitate debt collection efforts . . . .") (quoting *Heintz*, 514 U.S. at 294)); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1032 (9th Cir. 2010) ("To limit the litigation activities that may form the basis of FDCPA liability to exclude complaints served personally on consumers to facilitate debt collection, the very act that formally commences such a litigation, would require a nonsensical narrowing of the common understanding of the word 'litigation' that we decline to adopt."); *Sayyed*, 485 F.3d at 229 (subjecting interrogatories and summary judgment motions to the FDCPA); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. 2000) (finding § 1692e(2) and (10) violations where debt collector's "allegation in its state court complaint . [**16] . . gave a false impression as to the legal status it enjoyed"). And, while we have not directly decided the issue, this Court has extended the FDCPA to state court complaints, *see Glover v. F.D.I.C.*, 698 F.3d 139, 152 n.8 (3d Cir. 2012) (explaining that the law firm, "[i]n filing the Foreclosure Complaint against Glover," indisputably met the definition [*178] of "debt collector" under the FDCPA), and so has the Supreme Court, *see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010) (deciding the scope of the FDCPA's bona fide error defense on the basis of a notice attached to mortgage foreclosure complaint).

Udren makes two further attempts to distinguish foreclosure complaints from debt collection letters, both of which must fail.

First, Udren contends that a complaint, because it is directed to the *court*, is not a communication to the *consumer* subject to §§ 1692e and 1692f. This argument cannot be sustained. *HN8*[] The statute defines a "communication" under the FDCPA as "the conveying of information regarding a debt directly *or indirectly* to any person through any medium." 15 U.S.C. § 1692a(2) (emphasis added). Interpreting this provision in *Allen ex rel. Martin v. LaSalle Bank, N.A.*, where we decided whether a communication made to a consumer's attorney was governed by § 1692f, we held that "[i]f an otherwise improper communication would escape [**17] FDCPA liability simply because that communication was directed to a consumer's attorney, it would undermine the deterrent effect of strict liability." 629 F.3d 364, 368 (3d Cir. 2011); *see also id.* at n.6 (noting that the *Heintz* Court also referred to a communication from a debt collector to a consumer's attorney, though it did not directly decide that question).

So too for pleadings filed with the court and served on the consumer. Because the Foreclosure Complaint was served on Kaymark (directly or indirectly through his attorney), he was the intended recipient of the communication. *See Donohue*, 592 F.3d at 1031-32 (holding that *HN9*[] a complaint served on the debtor is a communication subject to the FDCPA).[3] Courts have only held that a complaint misleads the judge, rather than the consumer, when, for instance, the plaintiff *specifically pled* that a materially-false attachment to a complaint "would mislead the Cook County judge handling his case." *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 941 (7th Cir. 2011); *see id.* at 939 (noting that this allegation was "[u]nlike most lawsuits under the [FDCPA]"). This is not that case. Here, the Foreclosure Complaint was unquestionably a communication directed at Kaymark in attempt to collect on his debt.

Udren's second argument is that foreclosure actions cannot be the basis of FDCPA claims because Kaymark has to his avail the protections of the Pennsylvania Rules of Civil Procedure and because the *Heintz* Court noted that the FDCPA has the "apparent objective of preserving creditors' judicial remedies." 514 U.S. at 296.

[*179] Similar arguments have been raised and rejected. In *Simon v. FIA Card Services, N.A.*, we refused to categorically [**19] preclude FDCPA claims because the claim arose in a pending bankruptcy proceeding, referencing the Supreme Court's "reluctan[ce] to limit the FDCPA because other, preexisting rules and remedies may also apply to the conduct alleged to violate the [FDCPA]." 732 F.3d 259, 276 (3d Cir. 2013). We explained that "[t]he proper inquiry . . . is whether the FDCPA claim raises a direct conflict between the [Bankruptcy] Code or Rules and the FDCPA, or whether both can be enforced." *Id.* at 274; *see also Germain*, 503 U.S. at 253 ("Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." (internal citations omitted)).

HN10[] Nowhere does the FDCPA exclude foreclosure actions from its reach. On the contrary, foreclosure meets the broad definition of "debt collection" under the FDCPA, *see McLaughlin*, 756 F.3d at 245 (defining "debt collection" as "activity undertaken for the general purpose of inducing payment"), and it is even contemplated in various places in the statute, *see, e.g.*, 15 U.S.C. § 1692i (discussing procedures for "action[s] to enforce an interest in real property securing

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[3] Moreover, rejecting similar arguments that Udren raised in this case, the Ninth [**18] Circuit explained:

> [Defendant] Quick Collect suggests that a complaint, because it can be corrected by amending the offending pleading, should not constitute an actionable communication. But all communications can be "amended" in this way by simply sending out a subsequent communication correcting the error. Sections 1692e and 1692f do not suggest that otherwise unlawful representations are permitted so long as they are followed up, at some later time, with a communication correcting the statements that gave rise to the communication's unlawful nature. We see no reason to treat complaints differently where there was no effort to correct the error before an answer was filed.

Donohue, 592 F.3d at 1032 n.1. We agree that simply because a complaint is amendable is not a justification for removing it from the protections of the FDCPA.

the consumer's obligation"); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013) (explaining why "[f]oreclosure's legal nature . . . does not prevent it from being debt collection"). Udren would have us "create [**20] an enormous loophole in the [FDCPA] [by] immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt." *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006). We will not. Like the Court explained previously, "if a collector were able to avoid liability under the FDCPA simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the FDCPA." *Piper*, 396 F.3d at 236 (internal quotation marks omitted).

In any event, the prudence of maintaining parallel FDCPA claims is not ours to decide; it is Congress's, and its intent is clear for the reasons discussed. *HN11*[] Absent a finding that "the result [will be] so absurd as to warrant implying an exemption for" FDCPA claims involving foreclosure actions, we are not empowered to disregard the plain language of the statute. *Heintz*, 514 U.S. at 295. Thus, Udren's arguments are more "properly addressed to Congress," which "is, of course, free to amend the statute accordingly." *Jerman*, 559 U.S. at 604.

Given our holding in *McLaughlin* based on nearly-indistinguishable facts, we conclude that the fact that the debt collection activity at issue here involves a foreclosure complaint, rather than a debt collection letter, does not remove it from the FDCPA's [**21] purview under *McLaughlin*. We will reverse the order dismissing Kaymark's §§ 1692e(2)(A), (10), and 1692f(1) claims against Udren, and we will affirm the order dismissing the § 1692e(5) claim.

B.

Kaymark next alleges that, by misrepresenting or overcharging fees in the Foreclosure Complaint, BOA and Udren[4] violated the UTPCPL by virtue of [*180] the violations of the FCEUA, 73 P.S. § 2270.5(a) (*HN12*[] "If a debt collector or creditor engages in an unfair or deceptive debt collection act or practice under [the FCEUA], it shall constitute a violation of the [UTPCPL]."), or by engaging in certain "unfair or deceptive acts or practices," in violation of 73 P.S. § 201-202(4)(v) (representing that services have characteristics they do not have) and (xxi) ("Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.").

HN13[] To maintain a private right of action under the UTPCPL, a plaintiff must demonstrate (1) "ascertainable loss of money or property, real or personal," *id.* §

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[4] While Udren is correct that attorneys are exempt from liability under the UTPCPL if the alleged misconduct concerns the adequacy of their legal representation, attorneys engaged in debt collection—considered an "act of trade or commerce" within the definition of the UTPCPL—are not. *See Beyers v. Richmond*, 594 Pa. 654, 937 A.2d 1082, 1088-89, 1093 (Pa. 2007) (plurality); *Yelin v. Swartz*, 790 F. Supp. 2d 331, 337-38 (E.D. Pa. 2011). Because the parties do not dispute that Udren's alleged misconduct here stems from its debt collection activities, [**22] we do not immunize it from liability.

201-9.2(a), (2) "as a result of" the defendant's prohibited conduct under the statute, *id.*; *see Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 854 A.2d 425, 438 (Pa. 2004). Assuming *arguendo* that Kaymark has pled a violation of the UTPCPL, we conclude that Kaymark fails to allege ascertainable loss, and we do not reach Appellees' alternative argument that Kaymark also failed to establish reliance.

The crux of Kaymark's theory of ascertainable loss is that the "lien" on his property from the mortgage was inflated by not-yet-performed services, "resulting in a corresponding, precisely quantifiable, diminishment in his interests in property." Appellant's Br. at 38. He reasons that, for a period of time before any services were performed, he had to pay $2,050 extra—the total overcharged amount on the debt—to cure his default and avoid foreclosure. The District Court rejected Kaymark's so-called "lien" theory, concluding that his "argument is couched in forward-looking speculative terms." App. 5a. On the facts presented in this case, we agree.

HN14[] Because the Pennsylvania Supreme Court has not [**23] definitively addressed what constitutes ascertainable loss under the statute, "we must predict how that court would rule if faced with the issue," and, in doing so, "[t]he decision of an intermediate state court is particularly relevant." *Covington v. Cont'l Gen. Tire, Inc.*, 381 F.3d 216, 218 (3d Cir. 2004). Lower state courts reason that*HN15*[] "[a]scertainable loss must be established from the factual circumstances surrounding each case," *Agliori v. Metro. Life Ins. Co.*, 2005 PA Super 253, 879 A.2d 315, 321 (Pa. Super. 2005), but that the loss must be non-speculative, *Schwarzwaelder v. Fox*, 2006 PA Super 61, 895 A.2d 614, 619 (Pa. Super. 2006); *see also Benner v. Bank of America, N.A.*, 917 F. Supp. 2d 338, 360 (E.D. Pa. 2013) ("[A]n actual loss of money or property must have occurred to state a cognizable UTPCPL claim."). Based on the plain language of the statute, we find this interpretation persuasive.

HN16[] The statute explicitly provides that any person who suffers an ascertainable loss "may bring a private action to recover *actual damages.*" 73 P.S. § 201-9.2 (emphasis added). Indeed, a plaintiff must have "suffered harm" as a result of the defendant's wrongful conduct. *Yocca*, 854 A.2d at 438. Kaymark's "lien" theory is untenable because he has not suffered actual loss. He alleges, in essence, that the alleged *misrepresentations* in the Foreclosure Complaint deprived him of his property to the extent of the misrepresentations. However, Kaymark was never deprived of his property and never paid the disputed fees alleged to have deprived him of his property. [**24] He very well could have, and did, contest the foreclosure action, which is still pending in state [*181] court. And despite Kaymark's ability to quantify the damages by the inverse of the allegedly inflated fees, "[t]he test of whether damages are remote or speculative has nothing to do with the difficulty in calculating the amount, but deals with the more basic question of whether there are identifiable damages. . . . Thus, damages are speculative only if the uncertainty concerns the *fact* of damages

rather than the *amount." Pashak v. Barish*, 303 Pa. Super. 559, 450 A.2d 67, 69 (Pa. Super. 1982) (internal quotation marks omitted).

Of course, *HN17*[] the statute references "ascertainable loss of money *or property*, real or personal," 73 P.S. § 201-9.2 (emphasis added), and there may be situations in which a lien against a consumer's property provides a sufficiently concrete loss that a consumer need not pay off before bringing a UTPCPL claim to remedy her rights. *See Brock v. Thomas*, 782 F. Supp. 2d 133, 143-44 (E.D. Pa. 2011) (denying motion to dismiss UTPCPL claim where equity theft scheme left victim's home encumbered by lien). However, losses can range from the speculative to the concrete, and, here, whether Kaymark would have cured his debt but for those fees is by definition speculative. It is plausible that the alleged misrepresentations deterred [**25] Kaymark or other homeowners from curing their delinquencies—even if only on a temporary basis and even if that amount was negligible compared to the total debt. But *HN18*[] a plaintiff must experience some non-speculative loss to make that harm actionable under the UTPCPL. *Cf. Schwarzwaelder*, 895 A.2d at 619 (dismissing plaintiffs' argument under the UTPCPL that they "would have" benefited from renegotiating their agent's commission if they had known all the facts as "wholly speculative"). Kaymark's temporary injury, which by all accounts shrank to zero after the filing of the foreclosure action, is too speculative, standing alone, to quality for the protection of the UTPCPL.

The recent decision by the Supreme Court of Pennsylvania interpreting the case law on a closely-related issue lends further support to this conclusion. In *Grimes v. Enterprise Leasing Co., LLC*, 105 A.3d 1188 (Pa. 2014), a plaintiff brought, among other things, a UTPCPL claim against the Enterprise Leasing Company of Philadelphia ("Enterprise") for seeking allegedly fraudulent and excessive fees that, like here, she did not pay. The Superior Court held that the plaintiff suffered an ascertainable loss by incurring costs to retain an attorney to prevent Enterprise from collecting the debt. Enterprise argued on appeal [**26] that, if the Superior Court was correct, any plaintiff could show ascertainable loss by merely hiring a lawyer "without actually suffering a loss of money or property." *Id.* at 1192. The Supreme Court agreed with Enterprise for two primary reasons. First, it did not want to allow a plaintiff to "manufacture the 'ascertainable loss' required to bring a private UTPCPL claim simply by obtaining counsel." *Id.* at 1193. Second, confirming our analysis above, it distinguished the case law on which the Superior Court relied because "[i]n [those] cases, the plaintiff had alleged a *specific loss* of money." *Id.* at 1194 (emphasis added).[5]

Because Kaymark has not adequately pled

[5] While the court also noted that the plaintiff did not allege ascertainable loss from the "unpaid bill, standing alone," *Grimes*, 105 A.3d at 1193, we find *Grimes* instructive for determining ascertainable loss here. The thrust of the opinion reads that because the plaintiff did not pay the disputed fees and therefore could not plead ascertainable loss, she cannot manufacture that loss with attorneys' fees. *See id.* at 1193-94.

ascertainable loss from the fees he did not pay and currently disputes, his claim fails. We therefore affirm the District [*182] Court's order dismissing the UTPCPL claim [**27] against BOA and Udren.

C.

HN19[↑] The FCEUA, Pennsylvania's analogue to the FDCPA, prohibits "unfair methods of competition and unfair or deceptive acts or practices with regard to the collection of debts." 73 P.S. § 2270.2. Kaymark alleges that by misrepresenting the amount of the debt in the Foreclosure Complaint and Act 91 Notice, BOA violated several FCEUA provisions, which are identical to the FDCPA violations asserted. *Compare id.* § 2270.4(b)(5)(ii), (v), (x), and (6)(i), *with* 15 U.S.C. §§ 1692e(2)(A), (5), (10), and 1692f(1).

HN20[↑] The text of the FCEUA's enforcement provision reads: "If a debt collector or creditor engages in an unfair or deceptive debt collection act or practice under this act, it shall constitute a violation of the [UTPCPL]." 73 P.S. § 2270.5(a). The FCEUA therefore does not provide its own private cause of action; rather, it is enforced through the remedial provision of the UTPCPL. While the Supreme Court of Pennsylvania has not ruled on its interpretation of § 2270.5(a), a Superior Court construing the statute recently concluded that "[t]he inclusion of a violation of the FCEUA as also being a violation of the UTPCPL[] evinces a clear intent by our Legislature that FCEUA claims be treated in the same manner as other private action claims under the UTPCPL. . . . FECUA [sic] claims therefore [**28] must plead that a plaintiff suffered an ascertainable loss *as a result of* a defendant's prohibited action." *Kern v. Lehigh Valley Hosp., Inc.*, 2015 PA Super 19, 108 A.3d 1281, 2015 WL 344623, at *5 (Pa. Super. 2015) (citing 1 Pa.C.S. § 1932); *see also Benner*, 917 F. Supp. 2d at 360 (holding that plaintiff's FCEUA claim, "as brought under the UTPCPL," failed because he did not show ascertainable loss).[6] We find this interpretation persuasive and, indeed, logical. If the FCEUA can only be enforced to the extent the UTPCPL's private remedy is invoked, then it follows that Kaymark cannot state a claim for relief under the FCEUA if he cannot state a claim for relief under the UTPCPL.

As discussed, Kaymark failed to allege ascertainable loss because he cannot point to actual damages as a result of the disputed fees listed in the Foreclosure Complaint. Much less can the alleged deficiencies in the *pre-foreclosure* Act 91 Notice—the purpose of which is to provide debtors with information about programs to support them in their debt—form the basis of any such loss.[7] Therefore, we affirm the District Court's order dismissing Kaymark's FCEUA claim against BOA.

D.

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[6] Where the state's highest court has not definitively ruled on an issue, we consider the decisions of the state's intermediate appellate courts. *See Covington*, 381 F.3d at 218.

[7] We do not reach BOA's argument that an Act 91 Notice [**29] can never be the basis of an FCEUA violation. We hold, simply, that Kaymark fails to allege ascertainable loss on the basis of the Act 91 Notice in this case.

End of Document

Finally, we affirm the District Court's order dismissing Kaymark's breach of contract claim against BOA for failure to plead resultant damages. *HN21*[] To allege breach of contract in Pennsylvania, a plaintiff must show "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." *Omicron Sys., Inc. v. Weiner*, 2004 PA Super 389, 860 A.2d 554, 564 (Pa. Super. 2004) (internal quotation marks omitted).

[*183] Kaymark relies on the same arguments asserted in his UTPCPL and FCEUA claims to show damages in his breach of contract claim. Specifically, he alleges the unincurred, fixed fees in the Foreclosure Complaint diminished his property interests in his home. Importing here the same reasons for rejecting those claims above, we conclude that Kaymark fails to plead resultant damages because he did not incur any non-speculative loss of property or pay the disputed fees or expenses. As such, we affirm the District Court's order dismissing Kaymark's breach of contract claim and do not reach BOA's alternative argument that Kaymark failed to plead breach of [**30] duty.

IV.

For the reasons set forth above, we will reverse the District Court's order dismissing Kaymark's 15 U.S.C. §§ 1692e(2)(A), (10), and 1692f(1) claims against Udren and affirm the District Court's order dismissing Kaymark's § 1692e(5), UTPCPL, FCEUA, and breach of contract claims.

Cited
As of: March 27, 2017 3:14 PM EDT

Mashiri v. Epsten Grinnell & Howell

United States Court of Appeals for the Ninth Circuit

October 4, 2016, Argued and Submitted, Pasadena, California; January 13, 2017, Filed

No. 14-56927

Reporter
845 F.3d 984 *; 2017 U.S. App. LEXIS 665 **; 2017 WL 127565

ZAKIA MASHIRI, Plaintiff-Appellant, v. EPSTEN GRINNELL & HOWELL; DEBORA M. ZUMWALT; DOES 1-25, Defendants-Appellees.

Prior History: [**1] Appeal from the United States District Court for the Southern District of California. D.C. No. 3:14-cv-00839-JLS-RBB. Janis L. Sammartino, District Judge, Presiding.

Disposition: REVERSED and REMANDED.

Core Terms

Notice, debt collector, verification, security interest, thirty days, recording, mailed, disputed, overshadowed, collection, days, debt collection, record a lien, homeowners', consumer, sophisticated, validation, argues, notify, district court, foreclosure, thirty-five, debt collection practice, resolving a dispute, demand for payment, requirements, thirty-day, violations, dependant, entities

Case Summary

Overview

HOLDINGS: [1]-A law firm that was attempting to collect a homeowner's debt to a homeowners' association (HOA) was subject to the full scope of the FDCPA, not just 15 U.S.C.S. § 1692f(6), because the firm sent notice to the homeowner as a debt collector, irrespective of whether it also sought to perfect the HOA's security interest and preserve its right to record a lien in the future; [2]-The homeowner sufficiently alleged that the law firm violated 15 U.S.C.S. § 1692g because the notice demanded payment within 35 days of the date of the letter, which was inconsistent with the right under the FDCPA to dispute the debt within 30 days of receipt of the letter; [3]-The homeowner also alleged a plausible § 1692g violation because the threat of filing a lien 35 days after the date of the letter overshadowed the homeowner's right to dispute the debt.

Outcome

Judgment reversed; case remanded.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil

Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] A court of appeals reviews de novo a dismissal under Fed. R. Civ. P. 12(b)(6). For purposes of its review, the court of appeals accepts the complaint's well-pleaded factual allegations as true and construes all inferences in favor of the plaintiff. The complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Banking Law > Consumer Protection > Fair Debt Collection > Unfair Practices

HN2[] Congress enacted the Fair Debt Collection Practices Act (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 competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses. 15 U.S.C.S. § 1692(e). In furtherance of these stated goals, the FDCPA subjects "debt collectors" to civil damages for engaging in certain abusive practices while attempting to collect debts.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN3[] Ordinarily, the U.S. Court of Appeals for the Ninth Circuit declines to consider arguments raised for the first time on appeal. The Ninth Circuit has, however, recognized an exception where the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.

Banking Law > Consumer Protection > Fair Debt Collection > Unfair Practices

HN4[] 15 U.S.C.S. § 1692f(6) prohibits taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement.

Banking Law > Consumer Protection > Fair Debt Collection > Liability for Violations

HN5[] For the purposes of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.S. § 1692 et seq., the word "debt" is synonymous with "money." The FDCPA imposes liability only when an entity is attempting to collect debt.

Banking Law > ... > Banking &

Finance > Consumer Protection > State Law

Banking Law > ... > Banking & Finance > Consumer Protection > Fair Debt Collection

Real Property Law > Common Interest Communities > Homeowners Associations

HN6[] The Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 et seq., which functions as the state analogue of the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq., does not exempt homeowners' associations attempting to collect overdue assessment fees pursuant to Cal. Civ. Code § 5660.

Banking Law > ... > Banking & Finance > Consumer Protection > Fair Debt Collection

HN7[] For purposes of the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq., if entities that enforce security interests engage in activities that constitute debt collection, they are debt collectors.

Banking Law > ... > Banking & Finance > Consumer Protection > Fair Debt Collection

HN8[] Where an entity is engaged solely in the enforcement of a security interest and not in debt collection, it is subject only to 15 U.S.C.S. § 1692f(6) rather than the full scope of the Fair Debt Collection Practices Act (FDCPA). The U.S. Court of Appeals for the Ninth Circuit has not held that the FDCPA intended to exclude all entities whose principal purpose is to enforce security interests. The Ninth Circuit has held only that the enforcement of security interests is not always debt collection.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN9[] The Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq., requires a debt collector to send the debtor a written notice that informs the debtor of the amount of the debt, to whom the debt is owed, her right to dispute the debt within thirty days of receipt of the letter, and her right to obtain verification of the debt. Because the notice must inform the debtor of her right to obtain verification of the debt, the notice is commonly referred to as a validation notice. However, the statute is not satisfied merely by inclusion of the required debt validation notice; the notice Congress required must be conveyed effectively to the debtor.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN10[] 15 U.S.C.S. § 1692g(a) provides that a debt collector must notify a debtor of the following: (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (4) a statement that if the consumer notifies the debt collector in writing within the

thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN11[] Notice of a debtor's right to dispute the debt and to request the name of the original creditor must not be overshadowed or inconsistent with other messages appearing in the communication. 15 U.S.C.S. § 1692g(b). Overshadowing or inconsistency may exist where language in the notice would confuse a least sophisticated debtor as to her validation rights. In other words, under the law of the Ninth Circuit, whether the initial communication violates the Fair Debt Collection Practices Act depends on whether it is likely to deceive or mislead a hypothetical "least sophisticated debtor."

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN12[] A 15 U.S.C.S. § 1692g violation will result if a debt collector demands payment prior to the expiration of the thirty-day dispute period to which debtors are entitled. A demand for payment within less than the thirty-day timeframe necessarily requires the debtor to forgo the statutory right to challenge the debt in writing within thirty days, or suffer the consequences. For this reason, requiring a payment that would eliminate the debt before the debtor can challenge the validity of that debt directly conflicts with the protections for debtors set forth in § 1692g.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN13[] Under the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq., a court undertakes an objective analysis that takes into account whether the least sophisticated debtor would likely be misled by a communication.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN14[] Under the Fair Debt Collection Practices Act, upon notifying a debt collector of a dispute, debt collection activities will cease until the debt collector obtains verification of the debt and a copy of such verification is mailed to the consumer by the debt collector. 15 U.S.C.S. § 1692g(b).

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN15[] Sending a lien to the clerk of the court for filing after a verification of the debt has been requested is clearly contrary to 15 U.S.C.S. § 1692g(b)'s requirement that a debt collector shall cease collection of the debt once the verification is requested.

Real Property Law > Common Interest Communities > Homeowners Associations

Real Property Law > Encumbrances > Liens > Nonmortgage Liens

HN16[] In California, pursuant to the Davis-Stirling Common Interest Development Act, a homeowners' association may not record a lien with a county recorder's office contemporaneously with mailing a demand letter, but instead must provide notice of the debt at least thirty days prior to recording a lien, during which time a debtor-homeowner may dispute the debt. Cal. Civ. Code § 5660.

Real Property Law > Encumbrances > Liens > Nonmortgage Liens

Real Property Law > Common Interest Communities > Homeowners Associations

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN17[] A homeowners' association's (HOA's) right to record a lien thirty days after providing notice under Cal. Civ. Code § 5660 is not absolute, but instead is dependent on whether the homeowner disputes the debt. Indeed, pursuant to the Davis-Stirling Common Interest Development Act, if the homeowner disputes the debt and requests an informal dispute resolution proceeding, the HOA must participate in dispute resolution prior to recording a lien. Cal. Civ. Code § 5670. In this context, the threat of recording of a lien is a debt collection activity, which under the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq., must cease if the debtor-homeowner disputes the debt and the debt collector has not yet mailed verification of the debt to the debtor-homeowner. The Davis-Stirling Act does not mandate otherwise. The debt collector is obligated to explain such debt validation rights in an effective manner.

Summary:

SUMMARY[**]

Fair Debt Collection Practices Act

The panel reversed the district court's dismissal for failure to state a claim of an action under the Fair Debt Collection Practices Act.

The plaintiff alleged that the defendant sent her a debt collection letter demanding payment of an assessment fee from her homeowners' association. The panel held that the plaintiff stated plausible claims for

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[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

relief because the collection letter contained language that overshadowed and conflicted with her FDCPA debt validation rights under 15 U.S.C. § 1692g when reviewed under the "least sophisticated debtor" standard.

The panel rejected the defendant's argument that in sending the collection letter, it merely sought to perfect a security interest and was therefore subject only to the limitations in 15 U.S.C. § 1692f(6).

Counsel: Asil Marhiri (argued), Mashiri Law Firm, San Diego, California, for Plaintiff-Appellant.

Anne Lorentzen Rauch (argued), Mandy D. Hexom, and Rian W. Jones, Epsten Grinnell & Howell APC, San Diego, California, for Defendants-Appellees.

Judges: Before: Dorothy [**2] W. Nelson and Richard A. Paez, Circuit Judges, and Elaine E. Bucklo,* District Judge.

Opinion by: Richard A. Paez

Opinion

[*985] PAEZ, Circuit Judge:

Zakia Mashiri ("Mashiri") appeals the dismissal of her complaint alleging that the [*986] law firm of Epsten Grinnell & Howell and attorney Debora M. Zumwalt (collectively, "Epsten") committed unlawful debt collection practices in violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq.*, the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act"), Cal. Civ. Code §§ 1788 *et seq.*, and the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.* Mashiri alleges that Epsten sent her a debt collection letter in May 2013 demanding payment of an assessment fee from her homeowners' association. She alleges that the letter contained language that overshadowed and conflicted with her FDCPA right to thirty days in which to dispute the debt. On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the district court dismissed Mashiri's FDCPA claims, concluding that the collection letter satisfactorily explained her right to dispute the debt and therefore did not improperly threaten to record a lien. Because Mashiri's state law claims were dependant on her FDCPA claims, the court also dismissed Mashiri's Rosenthal Act and Unfair Competition Law claims. [**3]

We hold that the district court erred. Mashiri has alleged a plausible claim for relief because the collection letter contains language that overshadows and conflicts with her FDCPA debt validation rights when reviewed under the "least sophisticated debtor" standard. We also reject Epsten's argument, raised for the first time on appeal, that in sending the collection letter, it merely sought to perfect a security interest and is therefore subject only to the limitations in § 1692f(6). We hold that Epsten is subject to the full scope of the FDCPA. We reverse and remand for further proceedings consistent with this Opinion.

I.

* The Honorable Elaine E. Bucklo, United States District Judge for the Northern District of Illinois, sitting by designation.

Mashiri alleges that she owns a home in San Diego, California and is a member of the Westwood Club homeowners' association ("HOA").[1] As a member, Mashiri incurs annual assessment fees. Mashiri failed to pay in a timely manner the $385 fee assessed in July 2012.

In a collection letter dated May 1, 2013 (the "May Notice"), Epsten, on behalf of the HOA, sought to collect Mashiri's overdue assessment fee, as well as corresponding late, administrative, and legal fees. The May Notice also included a warning that failure to pay the assessment fee would result in the HOA recording a lien [**4] against Mashiri's property. This notice is required by section 5660 of the Davis-Stirling Common Interest Development Act, Cal. Civ. Code §§ 4000 *et seq.*, which governs the collection of overdue homeowners' association assessments.[2] The May Notice stated, in pertinent part:

> This letter is to advise you that **$598.00** is currently owing on your Association assessment account. Failure to pay your assessment account in full within thirty-five (35) days from the date of this letter will result in a lien being recorded against your property upon authorization of the Board of Directors. All [*987] collection costs incurred will be charged to your account.
>
> **Unless you notify this office within 30 days of receiving this notice that you dispute the validity of the debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within thirty (30) days of receiving this notice that the debt, or any portion thereof, is disputed, we will obtain verification of the debt or a copy of the judgment against you (if applicable) and a copy of [] such verification or judgment will be mailed to you.**
>
> . . . .
>
> You have the right to inspect the association records pursuant to Corporations Code Section 8333. You may submit a written [**5] request to meet with the Board to discuss a payment plan for this debt. You shall not be liable to pay the charges, interest and costs of collection if it is determined the assessment was paid on time to the Association. You have the right to dispute the assessment debt by submitting a written request for dispute resolution to the association pursuant to the association's "meet and confer" program required in Civil Code Section [5900] et seq., and the Board offers to participate in dispute resolution. You have the right to request alternative dispute resolution with a neutral third party pursuant to Civil Code Section [5925] et seq. before the association may initiate foreclosure against your separate

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[1] The facts are derived from the complaint and its accompanying exhibits, as well as documents that the district court judicially noticed.

[2] The Davis-Stirling Act "consolidated the statutory law governing condominiums and other common interest developments." *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 62 Cal. Rptr. 3d 177, 183 (Cal. Ct. App. 2007) (internal quotation marks omitted). In enacting the Davis-Stirling Act, the California legislature "intended to protect homeowners from being foreclosed upon for small sums of delinquent assessments." *Huntington Cont'l Town House Ass'n v. Miner*, 222 Cal. App. 4th Supp. 13, 167 Cal. Rptr. 3d 609, 612 (Cal. App. Dep't Super. Ct. 2014).

interest, except that binding arbitration shall not be available if the association intends to initiate a judicial foreclosure.

. . . .

IMPORTANT NOTICE: IF YOUR SEPARATE INTEREST IS PLACED IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR ASSESSMENTS, IT MAY BE SOLD WITHOUT COURT ACTION.

. . . .

This is a communication from a debt collector attempting to collect a debt and any information obtained will be used for that purpose.

Accompanying the May Notice, Epsten included copies of Mashiri's account statement and the [**6] HOA's assessment collection policy.

On or about May 20, 2013, in a letter to Epsten, Mashiri disputed the debt and requested that Epsten validate it. Mashiri also stated that she never received a bill for the July 2012 assessment fee. Approximately two weeks later, on June 5, Epsten responded with another copy of Mashiri's account statement.

On June 18, 2013, Epsten, on behalf of the HOA, recorded a lien on Mashiri's property in the amount of $928, reflecting the $598 she previously owed and $330 in additional legal fees. Three days later, on June 21, Mashiri sent the HOA a check for $385. In a letter accompanying the check, Mashiri disputed the balance of the debt. As required by the Davis-Stirling Act, on June 24, Epsten notified Mashiri of the lien. Cal. Civ. Code § 5675(e).

Mashiri ultimately filed her complaint alleging violations of the FDCPA, the Rosenthal Act, and the Unfair Competition Law based on the contents of the May Notice. Epsten subsequently moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The district court granted Epsten's motion to dismiss, concluding, *inter alia*, that the May Notice "complied with the clarity and accuracy requirements" of the FDCPA and therefore [**7] "did not threaten to take action that could not legally be taken" as prohibited by the FDCPA. The district court dismissed Mashiri's state law claims as dependant on [*988] her FDCPA claims. Mashiri timely appealed.

II.

HN1[↑] We review de novo a dismissal under Rule 12(b)(6). *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). For purposes of our review, we accept the complaint's well-pleaded factual allegations as true and construe all inferences in favor of Mashiri. *Id.* The "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

III.

HN2[] Congress enacted 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 competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). In furtherance of these stated goals, "[t]he FDCPA subjects 'debt collectors' to civil damages for engaging in certain abusive practices while [**8] attempting to collect debts." *Ho v. ReconTrust Co., NA*, 840 F.3d 618, 620 (9th Cir. 2016).

Mashiri challenges the district court's ruling that she did not allege a plausible violation of § 1692g of the FDCPA, and its corresponding dismissal of the § 1692e(5) and state law claims that depended on her § 1692g claim. *See* 15 U.S.C. § 1692g. She argues that the May Notice violated § 1692g for two reasons. First, she contends that the May Notice demanded payment sooner than the expiration of the debtor's thirty-day dispute period. Second, she claims that by threatening to record a lien within thirty-five days, irrespective of whether she disputed the debt, Epsten failed to explain effectively a debtor's right to dispute the debt. Epsten counters that it was not attempting to collect a debt and therefore the May Notice needed to comply only with the obligations in § 1692f(6) of the FDCPA relating to enforcement of security interests. Epsten further argues that even if it is subject to § 1692g, it complied with the statutory requirements. We turn first to whether Epsten is subject solely to § 1692f(6), and then discuss whether Mashiri has sufficiently alleged a violation of § 1692g and related claims.

A.

For the first time in its answering brief, Epsten argues that it is subject only to § 1692f(6)[3] because it sent the May Notice to perfect the HOA's right to record an assessment [**9] lien against Mashiri's property under California Civil Code section 5660. *HN3*[] "Ordinarily, we decline to consider arguments raised for the first time on appeal." *Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2003). [*989] We have, however, recognized an exception where "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004) (quoting *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985)). Here, Epsten presents a legal issue concerning the applicability of FDCPA provisions when a debt collector seeks, in part, to perfect a security interest and preserve the creditor's right to record a lien. The pertinent facts, including the communications between

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[3] *HN4*[] Section 1692f(6) prohibits:

> Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
>
> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
>
> (B) there is no present intention to take possession of the property; or
>
> (C) the property is exempt by law from such dispossession or disablement.

Epsten and Mashiri, are not disputed. In addition, Mashiri responded to Epsten's argument in her reply brief and therefore suffers no prejudice if we consider the argument. *See Dream Palace*, 384 F.3d at 1005. Accordingly, we address the issue.

The [**10] FDCPA defines "debt" as "*any* obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5) (emphasis supplied); *see also Ho*, 840 F.3d at 621 (*HN5*[] "For the purposes of the FDCPA, the word 'debt' is synonymous with 'money.'"). "The FDCPA imposes liability only when an entity is attempting to collect debt." *Ho*, 840 F.3d at 621.

The contents of the May Notice plainly belie Epsten's contention that it did not attempt to collect a debt. The May Notice requested payment of Mashiri's homeowner's assessment fee, stating: "This letter is to advise you that **$598.00** is currently owing on your Association assessment account. *Failure to pay* your assessment account in full within thirty-five (35) days from the date of this letter will result in a lien being recorded against your property." *See supra* at 5 (emphasis added). Mashiri's obligation to pay the assessment fee relates to her household and arises from her membership in the HOA. The overdue assessment fee is a debt under § 1692a(5).

Epsten nonetheless argues that, [**11] based on the definition of a "debt collector" under § 1692a(6),[4] entities engaged in the enforcement of security interests are subject only to § 1692f(6). There was, however, no existing security interest for Epsten to enforce at the time it sent the May Notice because a lien had yet to be recorded against Mashiri's property. Rather than seeking to *enforce* an existing security interest or lien, the May Notice sought to collect Mashiri's overdue assessment fee and to make necessary disclosures that would perfect the HOA's security interest and permit it to record a lien at a later date. *See* Cal. Civ. Code § 5660 (providing that "[a]t least 30 days prior to recording a lien upon the separate interest of the owner of record to collect a debt that is past due under Section 5650, the association shall notify the owner of record in writing by certified mail" of specified information).[5]

[*990] In addition, Epsten's interpretation of § 1692a(6) is incorrect. As we recently observed in *Ho*, *HN7*[] "[i]f entities that enforce security interests engage in activities that constitute debt collection,

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[4] Section 1692a(6) provides, in pertinent part:

> 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. . . . For the purpose of section 1692f(6) of this title, such term [**12] also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.

[5] We also note that *HN8*[] the Rosenthal Act, which functions as "the state analogue of the FDCPA," does not exempt homeowners' associations attempting to collect overdue assessment fees pursuant to California Civil Code § 5660. *See Ho v. ReconTrust Co., NA*, 840 F.3d 618, 623 n.8 (9th Cir. 2016).