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

APPELLANTS' OPENING BRIEF

Appeal from Eighth Judicial District Court
Clark County, Nevada

The Honorable William Kephart

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NRAP 26.1 DISCLOSURE

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

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, Patricia Tagliamonte, and Bijan Laghaei are individuals. They will be referred to herein as "Plaintiffs" or "Appellants."

Nicholas A. Boylan of the Law Office of Nicholas A. Boylan, APC, and Shawn Christopher of the Christopher Legal Group have appeared for the foregoing parties and intend to do so before this Court.

Dated this 7th day of March 2018.

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JURISDICTIONAL STATEMENT

The written judgment appealed from was entered on June 7, 2017. Written notice of entry of this final judgment was served electronically on June 8, 2017. Pursuant to NRAP 4(a), Plaintiffs timely filed their notice of appeal of this written judgment on July 5, 2017.

ROUTING STATEMENT

Pursuant to NRAP 17(11), this Court presumptively retains this matter, as it raises a question of statewide public importance as a principal issue, concerning the possible interplay of Nevada's non-judicial foreclosure statutes (in NRS Chapter 107) and statutes regulating claim collection agencies in Nevada (in NRS Chapter 649). The case raises a substantial issue of first impression and an issue of public policy: Whether entities that qualify as collection agencies under NRS 649.020(1) are exempt from compliance with the license requirements of NRS Chapter 649 solely because they carry out their claim collection activities while purporting to act as non-judicial foreclosure trustees under deeds of trust pursuant to NRS Chapter 107. This Court has not yet addressed this important question. Given the significant harms unlicensed collection agency activities have caused in Nevada for at least the last decade, and that this case is a putative class action seeking remedies and injunctive state-wide relief that would be applicable to tens-of-thousands of Nevadans, resolution of this substantial issue of first impression

will require consideration of important public policies in Nevada that will have consequences throughout the Silver State, affecting tens of thousands of Nevadans.

STATEMENT OF ISSUES

A. Whether, as a matter of law under Nevada Rule of Civil Procedure ("NRCP") 12(b)(5), Defendants were exempted from compliance with the licensure and regulatory requirements found in NRS Chapter 649 simply because they carried out their extensive collection agency activities (which included collecting money for pay-off and reinstatement of defaulted loans, negotiating and executing forbearance agreements on defaulted loans with Nevada debtors, telephonic communications with Nevada debtors regarding collection of the defaulted loans, receiving and forwarding collected money to lenders, and sending written communications to Nevada debtors in which Defendants admitted they were debt collectors attempting to collect debts) while purporting to also act as trustees.

B. Whether, assuming the facts alleged (and proven in summary judgment filings) in the operative complaint to be true, Defendants engaged in claim collection agency activities in Nevada against Plaintiffs at a time when Defendants did not hold a license to do so, pursuant to NRS 649.075, or, in the alternative, did not register as a foreign collection agency, pursuant to NRS 649.171.

C. Whether, as a matter of law, Plaintiffs stated causes of action against Defendants for violation of Nevada's Deceptive Trade Practices Act, including NRS 598.0923(1), based on Defendants' unlicensed claim collection agency activities in Nevada against Plaintiffs.

D. Whether, as a matter of law, Plaintiffs have stated causes of action against Defendants for unjust enrichment.

STATEMENT OF THE CASE

This putative class action was filed in Nevada state court in October 2011 by Nevadans subject to Defendants' illegal collection agency activities and communications. (AA000005-AA000013.) Plaintiffs bring claims for statutory consumer fraud under NRS 41.600 and unjust enrichment on behalf of themselves and similarly-situated Nevadans. (AA004065-AA004224.) Defendants engaged in collection agency activities on lenders' behalf, seeking to collect and collecting on defaulted loans. (*Id.*) When doing so, Defendants lacked the license required by Nevada law to conduct debt collection agency activities in Nevada, and had not registered as foreign collection agencies with the Nevada Financial Institutions Division ("FID")'s Commissioner. (*Id.*) During their illegal and unlicensed Nevada collection agency activities, Defendants received and were unjustly enriched with illicit fees and costs (estimated at or above a quarter billion dollars), which amounts lenders added to their debt-claims against Nevadans, based on defaulted loans. (*Id.*)

Defendants removed the case to federal court, where it was eventually dismissed under Federal Rule of Civil Procedure 12(b)(6). (AA000032-AA000068.) The Ninth Circuit Court of Appeals reversed this dismissal in 2015, and remanded the case back with instructions to return it to Nevada state court.

(AA000038-AA000069; *Benko v. Quality Loan Serv. Corp.* (9th Cir. 2015) 789 F.3d 1111.)

In late 2015, the Nevada trial court permitted Plaintiffs to file their Second Amended Complaint ("SAC"). (AA000088-AA000228.) Defendants moved to dismiss the case under NRCP 12(b)(5). (AA000229-AA000782.) In February 2016, Judge Scann orally denied Defendants' motion as to Plaintiffs' first and second causes of action. (AA000783-AA000826.) The parties conducted very limited discovery for approximately a year, during which Plaintiffs filed no less than 15 motions to compel discovery, virtually all of which were granted at least in part. (*See* AA000846-AA001031.) No written order on Defendants' motion to dismiss was entered, partly due to Judge Scann's untimely death in July 2016. (*See* AA000910, AA004012.) The Discovery Commissioner struggled with the lack of a written order, and eventually suggested Plaintiffs seek clarification from the trial court. (AA000923, AA000927-AA000928.) She also suggested phasing of discovery likely did not make sense in light of the evidence. (*See* AA001006-AA001007, at 24-3.) Plaintiffs sought clarification from the trial court, which prompted it to consider dismissing the case as a matter of law under NRCP 12(b)(5). (*See* AA004012-AA004015.) After supplemental briefing was submitted at its request, the trial court formally dismissed Plaintiffs' claims as a matter of law pursuant to NRCP 12(b)(5). (AA005642-AA005658.)

I. INTRODUCTION

Based on the Third Amended Complaint ("TAC")'s allegations, and the voluminous evidence in the record, it is absolutely certain Defendants conducted a $300 million unlicensed Nevada business operation collecting debts (*i.e.*, claims), from at least 2007 to 2012. (*See, e.g.*, NRS 649.020.) The question presented by the trial court's order (hereafter "Order") is whether Defendants were "protected" (the trial court's terminology) from compliance with NRS Chapter 649, and the FID's entire regulatory scheme for debt collectors, simply because, after borrowers defaulted, Defendants became substitute 'non-judicial foreclosure trustees' ("trustees") as part of their dual[1] business model for claim collecting.

This Opening Brief presents the law and the facts conclusively demonstrating Defendants are debt collectors that are not "protected" from adherence to Nevada's debt collection regulatory scheme. The erroneous judgment must be reversed, according to unambiguous Nevada law, and the overwhelming majority of analogous appellate decisions from across the entire nation. Affirming the judgment would invite rogue and foreign collection agencies to trample Nevadans with no regulatory oversight, and would gut the FID's important protective functions.

[1] Because their lender-market, *i.e.*, clientele, wanted full service, Defendants combined two distinct and legally conflicting businesses into one operation.

A. Judge Kephart's True Reasoning Is Reflected in the Hearing Transcripts of March 14, 2017, and May 4, 2017 (Not the Fallacious Written Order Defendants Prepared)

The trial court's true reasoning and opinion that a foreign debt collection agency which is also serving as a trustee can do or perform any debt collection act, while unlicensed, unregulated and without any oversight by the FID, so long as the conduct is not quasi-criminal, is best reflected by its comments at the March 14, 2017, and May 4, 2017 hearings. (AA004036-AA004038.) The trial court gave examples of what it believed debt-collecting trustees could not do, such as physically arrest and take possession of debtors, take debtors' vehicles and clothing. (*Id.*) The trial court indicated operators of unlicensed debt collection businesses could send individuals to knock on debtors' doors and demand payment so long as they did so under a "trustee" title: "But when it comes to the house itself they can say, hey, you know, you owe me $100,000 on this. How are you going to pay? Are you going to pay it? If you are not going to pay it, I am going to come get it." (AA004037, at 28:14-17.)

At the May 4, 2017 hearing, the trial court relied on an unpublished Nevada federal district court order, *Bruce v. Homefield Fin., Inc.* (D. Nev. September 23, 2011) 2011 U.S. Dist. LEXIS 110243, and NRS 80.015 (and two statutes said to be

analogous by the trial court, *i.e.*, NRS 86.5483 and NRS 87A.615). (AA005601-AA005623.) Reliance on these inapplicable legal authorities was error.

B. The Defense-Drafted Written Order Improperly Remanufactured Judge Kephart's Ruling

After the March 14, 2017 hearing, all counsel expected Judge Kephart was going to dismiss the case under NRCP 12(b)(5) at the hearing on May 4, 2017. Defense counsel brought to the second hearing a proposed order designed specifically to misdirect review of the dismissal order in this Court. (*See* AA005626-AA005628.) The proposed order's content bore little resemblance to Judge Kephart's true ruling or reasoning. (*See* AA005631.) At the hearing, Plaintiffs objected the defense draft was "simply meant to pervert the record for the Supreme Court," and the trial court said, "I don't necessarily disagree with you. I have not read through it completely, but the reason I've raised the issue is that I think it's simpler than this." (AA005632.) Plaintiffs objected to any perversion of the record. (AA005631-AA005633.)

It is unclear why the trial court later signed the Order drafted by Defendants, but nevertheless the numerous defects are delineated specifically in Plaintiffs' May 23, 2017 letter brief to Judge Kephart. (*See* AA005639-AA005641.)

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II. STATEMENT OF THE FACTS

The trial court dismissed Plaintiffs' TAC, under NRCP 12(b)(5). (AA005642-AA005658.) Paragraphs 25 through 31 of the TAC are most critically relevant to Plaintiffs' appeal. (AA004081-AA004084.) In Paragraphs 25 through 28, Plaintiffs allege Defendants Quality Loan Service Corporation ("QLS"), MTC Financial, Inc. dba Trustee Corps ("MTC"), California Reconveyance Company ("CRC"), and National Default Servicing Corporation ("NDSC") together received approximately $300 million dollars of illicit fees and costs from Nevadans, from 2007 to 2012. (*Id.*) Paragraph 29 alleges Plaintiffs' debts were increased by the dollar amounts of the illegal payments Defendants received for their prohibited Nevada business activities. (AA004081-AA004082.) Paragraphs 1 through 15 also contain debt collector allegations and admissions by Defendants. (AA004066-AA004078.)

Paragraph 30 makes clear, "Defendants' business in Nevada and their activities in Nevada were not strictly limited to filing and serving a Notice of Default and filing and serving a Notice of Sale." (AA004082.) As alleged, Defendants' Nevada business activities as collection agencies included, without limitation, pursuing claim collection, in writing and/or by phone, through (1) reinstatement or pay-off of defaulted debts, (2) forbearance agreements for defaulted debts, (3) or loan modification agreements; or (4) requesting and/or

directing payment on defaulted claims; receiving and collecting millions of dollars from Nevadans with respect to defaulted claims; forwarding monies collected from Nevadans on defaulted claims to Defendants' client lenders and/or loan servicers; pursuing claim collection through acquisition of security for defaulted debts, and thus making collection of claims that included security, and forwarding cash proceeds to lenders. (*Id.*)

Paragraph 31 alleges Defendants, in doing their illegal Nevada debt collection agency activities, were acting on behalf of third-party lenders and/or loan servicers. (AA004082-AA004084.) Upon default, lenders, *i.e.*, beneficiaries, declared all sums owed on the respective promissory notes for each Plaintiff and secured by a corresponding deed of trust, due and payable, and elected to have the respective homes sold to pay towards the defaulted loans. (*Id.*) Defendants then conducted their collection activities. (*Id.*) The lenders declared the respective loans were in default when referring the files to Defendants for collection. (*Id.*) Defendants told Plaintiffs their properties would be sold to satisfy their debts unless they could either remit the pay-off amount on the loans or the past due amounts owed to cure delinquency. (*Id.*) Defendants earlier and initially solicited and obtained the opportunity to act as trustees or agents of beneficiaries or trustees for deeds of trust, and did so for Nevada properties owned by Nevadans. (*Id.*) Defendants solicited and obtained the right to solicit and obtain partial and/or

reinstatement payments/pay-off amounts on loans, on lenders' behalf, as part of Defendants' activities to collect claims and/or debts from Plaintiffs. (*Id.*) Defendants issued notices to Plaintiffs as part of these debt collection activities, which notices stated in whole and/or in-part, and/or to the effect that: **"This is an attempt to collect a debt and any information obtained will be used for that purpose."** (*Id.*) Defendants' notices provided reinstatement and/or pay-off amounts relative to defaulted loans and further stated generally or to the effect that Plaintiff class members should send a cashier's check payable to Defendants and submit payments directly to Defendants' accounting offices. (*Id.*)

Defendants sent debt validation notices to Plaintiffs which stated generally, and/or in whole or in-part to the effect that: "We are attempting to collect a debt, and any information we obtain will be used for that purpose." (*Id.*) Defendants periodically issued wire instructions to Plaintiffs regarding their defaulted loans such that Plaintiffs could make payments on debts to Defendants. (*Id.*)

When Defendants received money from Plaintiffs as part of their collection activities, Defendants would forward amounts received to servicers or lenders for whom they were acting, as payment on outstanding, defaulted debts. (*Id.*) When Defendants sold Plaintiffs' property at foreclosure auction as part of their collection agency activities, Defendants would send the full amount of the sales price, *i.e.*, the money Defendants collected, to the lenders for whom Defendants

collected the debts. (*Id.*)

The exhibits attached to, and thereby incorporated into, the TAC constitute factual allegations against Defendants, to be considered by this Court. (*See* NRCP 10(c); *Baxter v. Dignity Health* (2015) 357 P.3d 927, 930-931; *Zohar v. Zbiegien* (2014) 334 P.3d 402, 404-405.) Many of these exhibits constitute Defendants' flat admissions they were debt collectors and attempting to collect debts. Exhibit "C" establishes QLS was seeking to execute its business of claim collection by any means helpful to the lenders, including a payment for an extension, loan modification, deed in lieu of foreclosure, receipts of full payment necessary to bring the loan current, *i.e.*, reinstatement, etc. (AA004101-AA004102.) Exhibit "AA" demonstrates NDSC was seeking to collect the funds itself, by means of a certified check payable to NDSC, on behalf of the lender. (AA004182-AA004185.) Exhibits "FF" and "GG" demonstrate MTC, on behalf of its lender-client, negotiated receipt of payment and a forbearance agreement from one of the Plaintiffs. (AA004205-AA004214; AA004078-AA004079, at ¶¶16-18.)

A. Despite Severe Restrictions, and Defendants' Obstruction, Plaintiffs Assembled Voluminous Evidence PROVING Defendants Engaged in Extensive Unlicensed Nevada Claim Collection Activities

Over Plaintiffs' repeated objections, the Discovery Commissioner imposed strict limitations on all discovery Plaintiffs attempted to obtain for about a year,

until the case was dismissed.[2] (*See* AA000846-AA001031.) Before dismissal, based on the evidence gathered, Plaintiffs were able to move for partial summary judgment against MTC, and oppose QLS, CRC, and MTC's summary judgment motions. (AA002525-AA003506; AA003537-AA003978; AA003998-AA004009; AA004659-AA005599.) (NDSC did not seek summary judgment.) In these filings, Plaintiffs described, assembled, and submitted overwhelming evidence, in the form of documentation and testimony, showing Defendants engaged in multifarious, unlicensed Nevada claim collection activities, targeting thousands of Nevadans, and taking for themselves hundreds of millions of dollars of revenue as a result of their illicit conduct, as Plaintiffs allege. (*Id.*)

Plaintiffs' summary judgement evidence provides a convenient and necessary tool for this Court to review the facts exemplifying Defendants' illicit claim collection. The Separate Statements of Facts Plaintiffs submitted provide an excellent summary of the evidence for this Court. Record citations for these critical documents include the following: Plaintiffs' Separate Statements of Facts in opposition to (1) MTC's summary judgment motion (AA003881-AA003897); (2) QLS' summary judgment motion (AA005079-AA005103); and (3) CRC's summary judgment motion (AA004718-AA004736); and in support of Plaintiffs' partial summary judgment motion against MTC (AA003041-AA003055).

[2] Defendants were entirely uncooperative, so Plaintiffs had to file approximately 16 motions to compel in about a year.

This Court must consider the massive summary judgment evidence in the record because Judge Kephart's NRCP 12(b)(5) dismissal order can only be affirmed on a record where it appears beyond a doubt that Plaintiffs can prove no set of facts entitling them to relief. (*Zohar, supra*, 333 P.3d at 402.) The above-cited Separate Statements of Facts, and the exhibits thereto, provide a sampling of the facts demonstrating Defendants' Nevada business of debt/claim collection, with examples as to particular Defendants.[3]

III. SUMMARY OF THE ARGUMENT

This case is about simple and sensible interpretation of plain statutory language barring unlicensed, foreign collection agencies from conducting debt collection agency activities in Nevada without obtaining required licenses and regulatory supervision from the FID. The trial court concluded Defendants' unlicensed Nevada collection activities could not, as a matter of law, make them liable for statutory consumer fraud and unjust enrichment. To reach this incorrect result, the trial court erroneously concluded Defendants were somehow exempt from NRS Chapter 649 licensure or otherwise protected by NRS Chapter 107, because they conducted their collection activities while purporting to serve as trustees.

[3] These detailed factual allegations could be added to a fourth amended complaint if this Court so indicates.

The trial court erroneously relied upon Nevada statutes that were not applicable or actually contradicted the trial court. NRS 80.015, NRS 86.5483, and NRS 87A.615, cited in the Order, by their terms do not exempt Defendants from needing to obtain collection agency licenses. These statutes expressly forbid their use for any such defense. The trial court erroneously relied on an unpublished federal trial court order construing NRS 80.015, even though the statutory language, and this Court's interpretation of it, made clear the trial court's interpretation was incorrect.

NRS Chapter 649's plain language and legislative history show the Nevada collection activities Defendants performed are collection of claims (*i.e.*, debts) under NRS 649.020. Plaintiffs' allegations and the voluminous evidence they presented to the trial court show Defendants engaged in Nevada claim collection agency activities when they were not licensed by the FID to do so. In carrying out these activities, Defendants regularly admitted in writing they were debt collectors seeking to collect debts.

The trial court did not dispute Plaintiffs' allegations or evidence that Defendants were in the unlicensed claim collection business, but erroneously ruled Defendants were nonetheless "protected" or exempt from liability by unspecified provisions of NRS Chapter 107. Absolutely nothing in NRS Chapter 107 "protects" or exempts Defendants from being collection agencies subject to FID

licensing (and regulation), under NRS 649.075. Defendants' Nevada collection agency activities likely violated their duties as trustees under Nevada law, including the duty of impartiality. Such trustees are barred by law from acting solely as agents of one side to deeds of trust (*e.g.*, acting as collection agents for lenders). Defendants violated their duty of impartiality in various ways, including negotiating, documenting, and executing loan modification agreements and attending mediations on behalf of lender-clients with debtors, attempting to collect and collecting on behalf of lender-clients payment of money on defaulted debts from Nevada debtors, and actively soliciting reinstatement or payment in full of debts as agents of lender-clients.

Plaintiffs' interpretation is consistent with NRS Chapter 107 and Chapter 649's plain language and the Nevada Legislature's intent. The judgement must be reversed.

IV. STANDARD OF REVIEW

This Court "reviews de novo an order granting a motion to dismiss for 'failure to state a claim upon which relief can be granted.'" (*Brown v. Eddie World, Inc.* (2015) 348 P.3d 1002, 1003 [citing NRCP 12(b)(5); *Buzz Stew, LLC v. City of N. Las Vegas* (2008) 124 Nev. 224, 227-28, 181 P.3d 670, 672].) This Court is to "assume that all facts alleged in the complaint are true," and "review all legal conclusions de novo." (*Id.* [citing *Buzz Stew, LLC, supra,* 124 Nev. at 228, 181

P.3d at 672].) The summary judgment evidence in this record is crucial, because: "[s]uch an order will be affirmed only where it appears beyond a doubt that the plaintiff could prove no set of facts . . . [that] would entitle him [or her] to relief." (*Zohar*, *supra*, 334 P.3d at 404-405, [internal quotation marks omitted; alterations in original; emphasis added].) This Court "reviews issues of statutory construction de novo." (*Id.* at 405.)

V. ARGUMENT

A. The Trial Court Erroneously Relied upon Bruce v. Homefield

The trial court erroneously relied on an unpublished Nevada federal trial court order that misinterpreted Nevada law, and ignored this Court's interpretation of the relevant statutes. (*See Bruce v. Homefield Fin., Inc.* (D. Nev. Sept. 23, 2011) 2011 U.S. Dist. LEXIS 110243, at *6-7.) *Bruce* considered whether a foreign entity was subject to a cause of action for fraud because it was doing business in Nevada without being licensed. (*Id.*) Relying on NRS 80.015(1), the federal trial court erroneously concluded NRS 80.015 exempted the entity from licensure, because, in the court's view, the entity's actions in Nevada were to enforce mortgages and protect security interests in realty, and therefore it was not required to register with the Nevada Secretary of State, or otherwise comply with Nevada's licensure laws. (*Id.*)

1. The Statutory Language Is Clear

NRS 80.015(4)(b) disposes of *Bruce*, and the Order's reliance on it. It clearly states an exclusion from NRS Chapter 80 "does not affect the applicability of any other provision of law with respect to the person and may not be offered as a defense or introduced in evidence in any civil action, criminal action, administrative proceeding or regulatory proceeding to prove that the person is not doing business in this State, including without limitation, any civil action …. involving an alleged violation of Chapter …. 598 or 598A of N.R.S." (NRS 80.015(4)(b) [emphasis added].) *Bruce*'s assertion that entities such as Defendants are somehow excluded from the requirements of Nevada law is refuted by the statute's express text.

NRS 80.015 expressly limits its "doing business in" Nevada test to the application of NRS Chapter 80 alone. (NRS 80.015(4)(b).) NRS Chapter 80 deals only with foreign corporations which must register with the Nevada Secretary of State. NRS 80.010 requires foreign corporations to file certain items before commencing doing any business in Nevada. Subsection (4)(b) expressly prohibits Defendants from using NRS 80.015 as a defense in any civil action, including specifically a civil action for violation of NRS Chapter 598, which is this lawsuit's cornerstone. Given NRS 80.015(4)(b), it was improper for Defendants to rely on this statute as a defense, or to even introduce such information into the record, and for the trial court to allow such a defense.

Subsection (4)(b) is also devastating to any contention that "enforcing mortgages and security interests in property" based on defaulted debts owed to another (*i.e.*, Defendants' collection activities) without a license under NRS Chapter 649 does not constitute deceptive trade practice according to NRS Chapter 598. Subsection (4)(b)'s express language directly reflects the Legislature's intent to apply Nevada's deceptive trade practices law (and all other laws outside NRS Chapter 80) and remedies to unlicensed foreign collection agencies involved in conducting a business "collecting debts or enforcing mortgages and security interest in property securing the debts," in Nevada. ([emphasis added].) No other intended purpose is rational. It is dead on point, and applies directly to the collection business Defendants conducted for their lender-clients.

The Nevada Legislature has demonstrated it knows how to use NRS 80.015's "doing business" in Nevada test to exempt businesses from complying with other provisions of Nevada law when the Legislature wishes to do so. (*See* NRS 80.015(3) ["person who is not doing business in this State within the meaning of this section need not qualify or comply with any provision of this chapter, chapter 645A, 645B or 645E of NRS or title 55 or 56 of NRS" unless certain requirements are met][emphasis added].) The Nevada Legislature's refusal to make a similar exception for collection agencies to relieve them of complying with NRS 649.075 should dispose of any such argument.

Plaintiffs' interpretation makes sense. Otherwise, deceptive trade practices committed in Nevada by foreign, rogue companies collecting debts and enforcing mortgages and security interests in property, with or without a license, would be condoned and expressly authorized by the Nevada Legislature. It is inconceivable the Legislature would have expressly "exempted" and allowed foreign entities to commit fraud, deception, unlicensed activities, deceit, misappropriation, and breaches of duty in connection with acquiring notes, indebtedness, mortgages, and security interests in real or personal property, or to employ such deceptive practices in the conduct of securing or collecting debts or enforcing mortgages and security interest in property securing debts. (*See also generally Loomis v. Lange Fin. Corp.* (1993) 109 Nev. 1121, 865 P.2d 1161 [California real estate broker denied commission for failing to obtain license required by Nevada law to carry out Nevada business activities].)

2. This Court's Statutory Interpretation Is Clear

This Court, considering whether a party was doing business in Nevada for purposes of NRS 611.030's employment agency licensure statutes, expressly stated Nevada's "foreign corporations statutes specifically disavow their applicability to 'any other provision of law'" (such as NRS 611.030). (*RTTC Commons LLC v. The Saratoga Flyer, Inc.* (2005) 121 Nev. 34, 40, 110 P.3d 24, 28 [quoting NRS 80.015(4)(b)][emphasis added].) This Court explained "the two-prong test" (used

in evaluating "doing business" for purposes of NRS 80.015) is merely "instructive in determining whether Pinsker was 'doing business in this state' for the employment agency statutes at issue." (*Id.* [referring to *Simpson v. Viking Industries* (1991) 107 Nev. 119, 80 P.2d 512][emphasis added].) If *Bruce*'s interpretation of NRS 80.015—in defiance of NRS 80.015(4)(b)'s express language—were correct, the test used for "doing business" under NRS 80.015 would be not only instructive, but conclusive (which this Court in *RTTC Commons LLC* expressly recognized it is not).

NRS Chapter 80 establishes the basic filing requirements for foreign corporations operating a business in Nevada. NRS 80.010 mandates the resident agent and corporate information requirements. Following the logic of *Bruce* and the trial court here, all foreign businesses "collecting debts and enforcing mortgages," which are excluded from the definition of transacting business under NRS 80.0151(1)(h), must also be exempt from the entirety of NRS Chapter 649 related to collection agencies and thus NRS 649 is void as to rogue foreign entities, such as Defendants. It makes no sense. (*See RTTC Communs., LLC, supra*, 121 Nev. at 40, 110 P.3d at 28.) It also would be dangerous for Nevada.

In direct violation of NRS 80.015(4)(b) and this Court's interpretation of it, the Order mistakenly concluded NRS 80.015(1)(g) & (h) excludes "securing or collecting debts or enforcing mortgages and security interests in property securing

the debts" as transacting business in Nevada and therefore foreign entities such as Defendants are exempt from all consumer-protection laws of the State of Nevada. Not so. According to this Court, NRS 80.015 applies only to NRS Chapter 80. (*See RTTC Communs., LLC*, *supra*, 121 Nev. at 40, 110 P.3d at 28.) This is consistent with the plain language of NRS 80.015(4)(b).

B. Judge Kephart Erroneously Relied on NRS 86.5483 and NRS 87A.615

The Order also erroneously relied on NRS 86.5483 and NRS 87A.615. (*See* AA AA005603, at 4:24, AA005652-AA005653, at ¶16.) Neither statute was applicable, because they deal respectively with foreign limited liability companies and foreign limited partnerships, which Defendants, as corporations, were not.

Even if NRS 86.5483 and NRS 87A.615 somehow applied, the Order's reliance on them would be erroneous for the reasons detailed above for NRS 80.015. NRS 86.5483 and NRS 87A.615 address whether foreign entities are doing business in Nevada only for purposes of, respectively, NRS Chapter 86 and NRS Chapter 87A. (*See* NRS 86.5483(1) [limiting application to NRS Chapter 86]; NRS 87A.615(1) [limiting application to NRS Chapter 87A].) Just as NRS 80.015 has express language in its subsection (4)(b) making clear it may not be used as a defense, NRS 86.5483 and NRS 87A.615 have identical restrictive language, which should be interpreted in the same way this Court has interpreted NRS 80.015(4)(b). (*See* NRS 86.5483(4)(b); NRS 87A.615(4)(b); *see also RTTC*

Communs., LLC, supra, 121 Nev. at 40, 110 P.3d at 28.) Thus, even if these statutes somehow applied to Defendants, reliance on them would be plainly erroneous given their unambiguous statutory language, and this Court's reading of identical language in NRS 80.015(4)(b).

C. This Case Can Be Decided By Easy and Simple Reading of Statutory Language: NRS 649.020(1)

NRS 649.020(1) is the most critical Nevada statute here. It defines collection agency much more broadly than the federal statute—*i.e.*, the Fair Debt Collection Practices Act ("FDCPA")—as "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].) "Claim" means any obligation for the payment of money or its equivalent that is past due (e.g. money or property). (NRS 649.010.) NRS Chapter 649 is not limited to debt collection being a business' primary purpose, and it includes soliciting payments and obtaining in any manner payment of claims, even as a secondary object of business activity, and even if indirectly. Plaintiffs' allegations and evidence show, at an absolute minimum, debt collection was a secondary object of Defendants' business activities. (*See, supra*, Part II, pp. 6-11.) And, in any event, Defendants can do both. (*Reese v. Ellis, Painter, Ratterree & Adams LLP* (11th

Cir. 2012) 678 F.3d 1211, 1217-1218 ["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."].) Defendants admit they were soliciting and collecting payments on delinquent debts owed to client-lenders. (*See, supra*, Part II, pp. 6-11.) Even the basic foreclosure process of filing default notices constitutes debt collection under Nevada law. (NRS 649.020; *see also Glazer v. Chase Home Fin. LLC* (6th Cir. 2013) 704 F.3d 453, 455; *Wilson v. Draper & Goldberg PLLC* (4th Cir. 2006) 443 F.3d 373; *Alaska Trustee, LLC v. Ambridge* (Alas. 2016) 372 P.3d 207.)

Plaintiffs' exhibits, attached and incorporated into the TAC, show Defendants engaged in collection agency activity in Nevada. Exhibit "C", a QLS letter to Plaintiffs Martinez regarding their loan, is a straight-up, slam-dunk collection letter from a collection agency, as a matter of law, under all applicable authorities and any proper reading of NRS 649.020(1). (AA004101-AA004102.) It states the debt was in default and the lender had hired QLS to act as its agent to pursue the debt. (*Id.*) QLS outlined a variety of debt collection alternatives to avoid of foreclosure. (*Id.*) QLS called for payment of the total amount necessary to bring the loan current, among other options. (*Id.*) QLS gave notice of the threat of damages to Plaintiff by indicating they could be responsible for all of the fees and expenses if collection proceeded. (*Id.*) QLS stated in the letter, unequivocally: "We

are a debt collector." (*Id.* [emphasis added].)

According to almost all the federal appellate courts, which issue the binding decisions that set the legal precedents which must be followed by federal trial courts, under the less stringent federal law (*i.e.*, the FDCPA), trustees conducting foreclosure activities are debt collectors. (*See Glazer*, *supra*, 704 F.3d at 455; *Wilson*, *supra*, 443 F.3d at 373; *Piper v. Portnoff Law Assocs.* (3rd Cir. 2005) 396 F.3d 227; *Reese*, *supra*, 678 F.3d 1211; *Romea v. Heiberger & Assocs.* (2nd Cir. 1998) 163 F.3d 111, 117; *Gburek v. Litton Loan Servicing LP* (7th Cir. 2010) 614 F.3d 380, 386; *Kaltenbach v. Richards* (5th Cir. 2006) 464 F.3d 524; *see also Rowe v. Educ. Credit Mgmt. Corp.* (9th Cir. 2009) 559 F.3d 1028.)

The *Wilson* decision is on all fours. As here, the defendants in *Wilson* relied on various unreported federal district court decisions. (*Wilson*, *supra*, 443 F.3d at 374.) The Fourth Circuit unambiguously rejected the defense contention they could not be "debt collectors" under the FDCPA because they were trustees foreclosing on a deed of trust. (*Id.*) As here, the defendants engaged in various debt collection activities, including sending letters and/or notices expressly admitting they were attempting to collect a debt. (*Id.* at 374-375; *see also Glazer*, *supra*, 704 F.3d at 455.)

Another straight-up collection letter from QLS dated May 7, 2009 is illustrative for the TAC: According to the letter, Plaintiff Hjorth's loan obligation

was in default and QLS was representing the lender. (AA004113.) QLS sought payment of the total delinquency at that time, $12,423.55, and asked to be contacted before payment was forwarded. (*Id.*) Unequivocally, the QLS debt validation notice is part of the collection agency process, and QLS concluded its communication by declaring in large bold type: "We are attempting to collect a debt, and any information we obtain will be used for that purpose." (*Id.* [emphasis added].) In their numerous writings to Plaintiffs, in their own words, Defendants have expressly, flatly, and unequivocally admitted the non-judicial foreclosure process is inherently a form of debt collection and they are debt collectors performing that business service. (*See id.*; *see also* Part II, *supra*, at pp. 6-11; *Wilson*, *supra*, 443 F.3d at 373; *Piper*, *supra*, 396 F.3d at 227; *Reese*, *supra*, 678 F.3d at 1211; *Romea v. Heiberger & Assocs.* (2nd Cir. 1998) 163 F.3d 111, 117; *Gburek*, *supra*, 614 F.3d at 386; *Kaltenbach*, *supra*, 464 F.3d at 524; *Glazer*, *supra*, 704 F.3d at 453; *Rowe*, *supra*, 559 F.3d at 1028.)

For years in this case, QLS also adamantly swore and denied to all state and federal courts it had any debt collection phone communications to pursue lenders' claims against putative class members. Included in the record is an internal QLS document suggesting the untruth of QLS's representations. (AA005577.) It shows telephonic contact between QLS and Plaintiff Benko. (*Id.*) QLS, at minimum, told him collection was to proceed: "EMC has not advised us to close out his file." (*Id.*)

Plaintiff Benko testified QLS placed numerous and harassing debt collection phone calls to him. (AA005162-AA005163.)

Also attached to the TAC is an example from NDSC: Under the plain text of NRS 649.020(1), NDSC's letter to Plaintiff Nico is a slam-dunk collection agency letter that required NDSC to obtain a license from the FID. (AA004184-AA004185.) NDSC communicated with Plaintiff Nico regarding payment on the defaulted loan, including the pay-off figure. (*Id.*) NDSC indicated the quoted amount could be paid in certified funds payable to NDSC, and they should be delivered to NDSC no later than February 26, 2010. (*Id.*) NDSC attached a loan "Reinstatement Quote," which provided the loan pay-off details, and shows the fees Defendants charged for their illicit collection agency activities in violation of Nevada law damaged Plaintiffs, because the fees were added to their loan balances. (*Id.*) Additional, overwhelming evidence of Defendants' claim collection activities under NRS 649.020(1) can be found herein. (*See*, *e.g.*, *supra,* Part II, pp. 6-11.)

D. Unlike NRS 645F.063, NRS Chapter 649 Does Not Exclude "Trustees" or Non-Judicial Foreclosure from Its Scope

1. NRS Chapter 649's Plain Language

NRS 649.020(1) very broadly defines "collection agency" under Nevada law. NRS 649.020(2) then provides several narrow exceptions to this broad

definition. (Under NRS 649.020(2), even those listed as exceptions are collection agencies under Nevada law if "they are conducting collection agencies.")

Thus, under NRS 649.020(2), banks, abstract companies doing 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, by definition, unless they are otherwise conducting collection agencies. (NRS 649.020(2).) Trustees are not excluded, and therefore are collection agencies whenever their Nevada activities qualify them as collection agencies!

2. The Legislative History of NRS Chapter 649

The Nevada Legislature revised NRS 649.020 in 2005 by adding new clarifying language regarding community managers (which, depending on the nature of their activities, may or may not be collection agencies under NRS 649.020). (*See* NRS 649.020(2)(d), (3), and (4).) A community manager is a collection agency if, "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." (*Id.*)

The 2005 revisions do not reflect any legislative intention to treat only non-judicial foreclosures of liens as claim collection. They reflect precisely the opposite intention, by clarifying that community managers who perform or offer to perform acts associated with lien foreclosure are subject to FID regulation as collection agencies (while community managers who do not do so are exempt from regulation). (*See* NRS 649.020(3).) These revisions reflect the Nevada Legislature's intention to add even more clarity to the broad collection agency definition found in NRS 649.020(1), and be more specific about a narrow exception to the definition for those community managers who are not involved in non-judicial foreclosures (while confirming community managers involved in such foreclosures are collection agencies who must be so licensed by the FID).

Although NRS 649.020's plain language reveals the error in the Order's interpretation, the legislative history further demonstrates the Nevada Legislature understands non-judicial foreclosures—whether of liens or deeds of trust—to be collection agency activity requiring FID licensure. (*See* Minutes of the Subcommittee of the Senate Committee on Commerce and Labor, 73rd Session, April 12, 2005, p. 3 ["[I]f you have a full-service management company, and some of the large ones are full-service, and you are offering to file liens, record

notices of default and go through the foreclosure process, . . . you have to meet the same licensing and the same qualifications as the actual foreclosure services that are out there."][ellipsis in original, emphasis added]; *id.* at p. 4 ["[I]f you are a management company or . . . community manager who is going to be collecting . . . , then you are going to be governed under 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].)

Any other interpretation of NRS 649.020 would lead to anomalous and perverse results: Community managers conducting non-judicial foreclosures of liens would be subject to FID regulation as collection agencies, while others who conduct non-judicial foreclosures—for instance, under deeds of trust—would be exempt from such regulation even if they otherwise qualify as collection agencies under NRS 649.020(1). This is not what the Nevada Legislature intended. Rather, the 2005 revisions show the Nevada Legislature recognized non-judicial foreclosure is claim collection activity, which Nevada regulates and supervises through the FID.

3. NRS 645F.063 Demonstrates the Legislature's Knowledge and Intent; Defendants Are Simply Wrong About NRS 649.020

Nothing in NRS 649.020 supports Defendants' ultimate contention here: That the Legislature intended to exempt trustees under deeds of trust from

Nevada's entire statutory and regulatory scheme for collection agencies. As shown herein, absolutely nothing in NRS Chapter 107 supports Defendants' erroneous "exemption" argument.[4] As a result, Defendants have no choice but to argue some implied and twisted interpretation of NRS 649.020(2), and contend the Legislature nevertheless intended to exempt trustees involved in the post-default collection process and who are conducting a multi-faceted default services and collection business.

In Nevada, mortgage servicers must be licensed, and, like collection agencies, extensively regulated by the FID, as shown by the variety of enforcement provisions in the Nevada Administrative Code's pertinent portions. (*See* NRS Chapter 645F; *see also* NAC 645F.). FID supervision includes examinations, audits, and investigations. Standards of practice and educational requirements for licensure are specifically regulated. (*Id.*) Those claiming exemption from the requirements have the burden of demonstrating qualification for such exemption. (NAC 645F.951.) Applicants for licensure must demonstrate experience, financial responsibility, character, and general fitness. (NAC645F.955.) Nevada regulations spell out requirements with respect to branch offices, qualified employees, fees required, and so on. (NAC645F.955; NAC645F.956; NAC645F.957; and

[4] The Order's linchpin statement is that the acts Defendants performed are authorized by the deed of trust and NRS Chapter 107's plain language. (AA005652, at ¶14.) Although Defendants prepared the Order, no citation of legal authority follows that statement. (*Id.*) Not a statute. Not a case. Nothing.

NAC645F.961.) All of this is comparable to collection agency regulation under NRS Chapter 649. (*See* NRS Chapter 649; NAC Chapter 649.)

NRS 645F.063 demonstrates the Legislature's true competence and intention with respect to expressly defining exceptions to the applicable regulatory framework. Under NRS 649.020(2), for example, banks and attorneys are expressly exempted, but deed of trust trustees are not. Compare the Legislature's meticulous handiwork:

> 'Mortgage servicer' means a person who directly services a mortgage loan, or who is responsible for interacting with a borrower, managing a loan account on a daily basis, including, without limitation, collecting and crediting periodic loan payments, managing any escrow account or enforcing the note and security instrument, either as the current owner of the promissory note or as the authorized agent of the current owner of the promissory note. The term includes a person providing such services by contract as a subservicing agent to a master servicer by contract. <u>The term does not include a trustee under a deed of trust, or the trustee's authorized agent, acting under a power of sale pursuant to a deed of trust</u>.
> (NRS 645F.063 [emphasis added.)

For this type of regulatory framework, the Legislature clearly demonstrated the knowledge, competence, and expertise to expressly carve out, exclude, and "exempt" deed of trust trustees, when it intends to do so.

4. <u>The Regulatory Law Is Broad and Clear</u>

The critical differences between the FDCPA and NRS Chapter 649 are clear from each statute's stated purpose and scope. In enacting the FDCPA, Congress' limited purpose was <u>only</u> to eliminate <u>abusive</u> debt collection practices by debt

collectors. (*See* 15 U.S.C § 1692(e) ["It is the purpose of [the FDCPA] to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not . . . disadvantaged, and . . . to protect consumers against debt collection abuses."].)

Quite differently, the Nevada Legislature intended more stringent and comprehensive regulatory control over collection agencies through NRS Chapter 649. In addition to addressing abusive debt collection activities, Nevada regulates who engages in debt collection activities, including stringent qualifications and additional regulations on those engaging in such activities. (*See* NRS 649.045(2) ["It is the purpose of this chapter to: (a) [b]ring licensed collection agencies and their personnel under more stringent public supervision; (b) [e]stablish a system of regulation to ensure that persons using the services of a collection agency are properly represented; and (c) [d]iscourage improper and abusive collection methods."]; *see also* NRS 649.075 [requiring collection agencies to be licensed]; NRS 649.085 [listing the qualifications to obtain a license]; NRS 649.095 [listing the application requirements for a license]; NRS 649.167 [requiring branch offices to obtain a permit from the Commissioner]; NRS 649.295 [requiring the payment of a fee for a license].)

Nevada has empowered the FID to issue regulations to establish standards of practice for collection agencies in Nevada, including for the establishment and

maintenance of trust accounts to be used by collection agencies which are collecting debts. (NRS 649.054.) The FID has the power to regulate record-keeping by collection agencies, the preparation and filing of financial and other reports, and the handling of trust funds and accounts. (NRS 649.056.) To conduct their activities in Nevada, collection agencies must obtain a license (or exemption) from the FID. (NRS 649.075.) Nevada law states specific qualifications required for those who apply for a license. (NRS 649.085.) The FID may examine every applicant concerning the applicant's competency, experience, character, and qualifications. (NRS 649.095.) Each applicant must file an appropriate bond with the FID. (NRS 649.105.) Foreign collection agents are subject to additional and more particular regulation. (NRS 649.171.) Managers of collection agencies must have specific qualifications and be subject to examination by the FID. (NRS 649.175—NRS 649.205.)

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

the FDCPA only regulates any person who performs debt collection activities as the primary purpose of the business. NRS 649.020(1) is much broader, by design, and includes those whose collection activities are only a secondary object, business or pursuit. (*See* NRS 649.020(1).)

5. Across the Nation, the States Are Uniform

It is a simple fact, and a routine application of state statutes, that if your business is to pursue collection agency activity on defaulted debts by foreclosure, lawsuit, demands, issuing notices, sending letters, engaging in phone calls, requesting payments, requesting or discussing reinstatement of the defaulted debt, etc., and do so without a license, you have violated the law and committed illegal acts. (*See, e.g.*, *Finch v. LVNV Funding LLC* (Maryland App. 2013) 212 Md.App. 748 [class action]; *Badeen v. Par, Inc.* (Michigan 2014) 496 Mich. 75 [class action]; *Wade v. Regional Credit Association* (9th Cir. 1996) 87 F.3d 1098 [Idaho statute]; *Suttell & Assoc. v. Encore Capitol Group* (Wash. 2014) 181 Wash. 2d 329; *JHass Group LLC. v. Arizona Dept. of Financial Institutions* (Ariz. App. 2015) 238 Ariz. 377; *Simpson v. Cavalry SPV* (Ark. 2014) 440 S.W. 2d 335; *Commercial Service of Perry, Inc. v. Fitzgerald* (Colo.App. 1993) 856 P.2d 58; *Centurion Capital Corp. v. Druce* (N.Y. Slip Op. 26521) 828 N.Y.S. 2d 851; *Smith v. LVNV Funding LLC* (E.D. Tenn. 2012) 894 F.Supp.1045 [Tennessee statute]; *Veras v. LVNV Funding LLC* (D. N.J. Mar. 17, 2014) 2014 WL 1050512.)

E. Plaintiffs Respectfully Ask for Comprehensive Review of the Appellate Debt Collection Cases Most Likely to Be Persuasive to This Court

There are a variety of federal and state appellate decisions that help to answer the questions presented, and which were persuasive to Judge Scann when she orally denied Defendants' original NRCP 12(b)(5) motions. (AA000783-AA000826.) Nevada law under NRS 649.020 is much broader than the FDCPA, which means Defendants are most assuredly debt collectors under NRS 649.020's broad and remedial provisions if they are debt collectors under the FDCPA's more narrow definition. Under Nevada law, even if Defendants thought they were exempt from NRS Chapter 649, they were required to obtain certificates of exemption from the FID before conducting their collection activities in Nevada. (*See* NAC 649.105.) It is undisputed Defendants never obtained such exemptions. Under Nevada law, FDCPA violations are violations of Nevada's debt collection laws. (NRS 649.370.)

1. Supreme Court of Colorado: *Shapiro & Meinhold v. Zartman* (Colo. 1992) 823 P.2d 120, 123-24

In *Shapiro*, the defendants conducted non-judicial foreclosures to enforce the power of sale contained in deeds of trust securing promissory notes. (*Shapiro & Meinhold*, *supra*, 823 P.2d at 123-24.) The homeowners had defaulted on loans secured by realty. (*Id.*) Like Plaintiffs, the debtor-homeowners brought a class

action. (*Id.*) As here, the trial judge dismissed the case. (*Id.*) Acting en banc, the Colorado Supreme Court reversed the trial court. (*Id.*)

2. Supreme Court of Alaska: *Alaska Trustee, LLC v. Ambridge* (Alas. 2016) 372 P.3d 207

Like QLS and NDSC here, Alaska Trustee LLC was a foreclosure company, owned by an attorney, that handled reinstatement and pay-off in connection with various foreclosure activities. (*Alaska Trustee, LLC*, *supra*, 372 P.3d 207.) The Alaska Supreme Court affirmed the trial court's summary judgment determination in plaintiffs' favor, concluding Alaska Trustee and its attorney/owner were debt collectors, and Alaska Trustee's FDCPA violation constituted a deceptive trade practice prohibited by Alaska law. (*Id.*)

3. Sixth Circuit Court of Appeals: *Glazer v. Chase Home Fin. LLC* (6th Cir. 2013) 704 F.3d 453

In *Glazer*, as here, the defendants argued mortgage foreclosure was not debt collection. (*Glazer*, *supra*, 704 F.3d 453.) Like Judge Kephart, and unlike Judge Scann, the trial judge adopted the erroneous argument and dismissed the case. (*Id.*) In a unanimous opinion, the Sixth Circuit reversed. (*Id.*)

4. Fourth Circuit Court of Appeals: *Wilson v. Draper & Goldberg P.L.L.C.* (4th Cir. 2006)443 F.3d 373

The *Wilson* trial court, as here, concluded the defendants were acting as trustees foreclosing on a deed of trust and therefore they could not be debt collectors. (*Id.*) Accepting the erroneous defense arguments, the trial judge treated the defendants' motion to dismiss as a motion for summary judgment and granted it in the defendants' favor. (*Id.*) The Fourth Circuit reversed. (*Id.*)

5. Eleventh Circuit Court of Appeals: *Reese v. Ellis, Painter, Ratterree & Adams LLP* (11th Cir. 2012) 678 F.3d 1211

Here, again, the trial court erroneously determined the foreclosure process could not be debt collection, and the defendants were not subject to the debt collection laws. (*Reese, supra*, 678 F.3d 1211.) In a unanimous opinion, the Eleventh Circuit reversed. (*Id.*) The Eleventh Circuit was expressly cognizant of the statutory provisions of Georgia foreclosure law, including its law regarding the content of a foreclosure notice. (*Id.*) The Eleventh Circuit reinstated the putative class action. (*Id.*)

6. Third Circuit Court of Appeals: *Kaymark v. Bank of America, N.A.* (3rd Cir. 2015) 783 F.3d 168

In this case, once again, a trial court erroneously dismissed the lawsuit based on the theory that foreclosure cannot be violation of the debt collection laws (and this case involved judicial foreclosure). *Id.* In a unanimous opinion, the Third Circuit reversed the trial judge. (*Kaymark, supra*, 783 F.3d 168.)

7. Ninth Circuit Court of Appeals: *Mashiri v. Epsten, Grinnell & Howell* (9th Cir. 2017) 845 F.3d 984

In *Mashiri*, a unanimous panel of the Ninth Circuit reversed the trial judge's dismissal of the debt collection claim against a defendant who sent a notice in connection with perfection of a lien on realty. (*Mashiri, supra*, 845 F.3d 984.) As here, the *Mashiri* defendant was acting on behalf of another to whom money was owed pursuant to a real estate instrument analogous to a deed of trust. (*Id.*) The letter sent by the defendant to the homeowner sought payment for the past due amount. (*Id.*) The Ninth Circuit's unanimous panel declared that if entities enforcing security interests engage in activities that also constitute debt collection, they are held responsible as debt collectors because they are in fact subject to the debt collection laws. (*Id.*) *Mashiri*, quoting *Ho v. Recontrust Co., NA* (9th Cir. 2016) 840 F.3d 618, reiterated the limitation stated in *Ho* itself: "'We do not hold that the FDCPA intended to exclude all entities whose principal purpose is to enforce security interests. . . . We hold only that the enforcement of security interest is not always debt collection.'" (*Id.* [emphasis and ellipsis in original].) The unanimous panel therefore reversed the trial judge's erroneous dismissal.

F. Judge Scann Properly Rejected the NRS Chapter 107 "Protection" Argument

The TAC's allegations are even stronger, more comprehensive, and more complete than what Judge Scann found sufficient in the SAC. (*See, e.g.*, AA004077-AA004079; AA004081-AA004084, at ¶¶15-18, 25-29, 30 and 31.) And the TAC's exhibits add even greater weight.

As they did for years in federal court, Defendants falsely represented to Judge Scann they did nothing more than give notices of default and conduct sales—and thus they did none of the activities alleged in the SAC's Paragraph 23. (*See, e.g.*, AA000818.) She was inclined to believe their untruths and was openly skeptical Plaintiffs could ever prove the allegations in Paragraph 23. (*See* AA000812.) But, because she knew Plaintiffs had valid legal claims if their allegations were proven, she knew this Court would reverse her if she granted Defendants' NRCP 12(b)(5) motion and did not allow Plaintiffs the opportunity for discovery to prove their allegations. (*Id.*)

In their original NRCP 12(b)(5) motion papers, Defendants cited and argued protection by NRS 107 at least 15 times. (*See, e.g.*, AA000229-AA000255.) Defendants vigorously urged at the hearing before Judge Scann that NRS 107 fully insulated, protected, and exempted them from liability based on the SAC's allegations. For example, MTC counsel specifically argued, based on the deed of trust, the approval of the deed of trust by the Nevada Legislature, and the approval of the foreclosure process by the Nevada Legislature, that the SAC did not allege

conduct which fell outside of what the Legislature approved in the foreclosure statutes. (AA000794- AA000795.) Defense counsel repeated those arguments and amplified them by direct reference to Paragraph 23, as the following exchange occurred:

> MR. REYNOLDS: But my other issue is there are no – paragraph 23 is – are simply conclusions that are based on the actual notices that the Court's already got. It's the notice of default and the notice of trustee sale. There's no allegation that my client did anything other than act in accordance with the foreclosure statute. If the Court grants the motion and says, okay, amend and say something, then we've got something, but you can't come in consistent with the local rules of pleading, as well as Rule 11, and just say you're a collection agency and we don't care about this foreclosure statute, but by the way, we're incorporating the very notices we're complaining about. That's not the way pleading works.
>
> And that's why I'm saying maybe they get the right to amend the first claim, but the Court should sustain it because they're not really alleging a fact that takes it outside of the foreclosure statute and that's what they have to do, unless they're just saying as a matter of law it doesn't matter. And they're not saying that. They're saying it's possible to be a foreclosure company in Nevada and not have to be licensed. Okay, then plead what the heck people did as to your parties.
>
> THE COURT: Well, paragraph 23 does, although it doesn't name you – let's see. Yeah, it does, MTC Financial.
>
> . . .
>
> MR. REYNOLDS: Take a look at it. Read it again, it's all that.
>
> THE COURT: Well, it says, "Plaintiff bor ***RTTC Commons*** rs were told by defendants that unless they could either remit the payoff on the loan or past due amounts, the amount owed to cure the delinquency on the account, their respective properties would be sold to satisfy the debt."
>
> . . .
>
> THE COURT: Okay. Well, I'm going to allow – I'm still going to deny 1 and 2.

(AA000819-AA000820.)

Judge Scann properly and unequivocally rejected Defendants' NRS 107 "protection" argument in denying their NRCP 12(b)(5) motion as to Plaintiffs' first and second causes of action. (*Id.*)

G. Defendants' Activities Are Collection of Claims under NRS 649.020

The Order states, without any citation to any authority, that the "acts allegedly performed by Defendants . . . are authorized by the deed of trust and the plain language of NRS Chapter 107." (AA005652, at ¶14.) If there truly were something in NRS Chapter 107's "plain language" (or a deed of trust) supporting the Order's conclusory statement, the trial court—or the defense counsel that drafted the Order—should have been able to cite it specifically. The failure to do so speaks volumes.

The unsupported assertion is wrong, but regardless of the trial court's erroneous theory, it cannot be applied to the facts alleged in Plaintiffs' operative complaint, *i.e.*, Defendants' various business activities in this case. (*See* AA004077-AA004079, AA004081-AA004084, at ¶¶15-18, 25-29, 30-31.) The TAC's allegations and exhibits, and the voluminous deposition testimony and other submitted evidence obtained from Defendants, take them far outside the theoretical "protection" the trial court believed was somehow provided by unidentifiable sections of NRS 107.

The evidence and allegations show Defendants solicited from their banking clients defaulted debts for purposes of collection (*Id.*; *see also* AA003142, at 150:23-AA003143, at 151:16); Defendants collected on behalf of their banking clients millions of dollars from Nevada debtors who were in default, including for loan reinstatement, loan payoff, loan modification, etc. (*.e.g.*, AA003498-AA003499; AA005364; AA005228; AA005578; AA005568; AA005448-AA005450; AA004753-AA004760); Defendants collected the equivalent of money, *i.e.*, property, outside of the foreclosure process, by acting on behalf of their banking clients to obtain a deed in lieu of foreclosure from defaulted Nevada debtors (*e.g.*, AA003134, at 140:10-AA003141, at 147:12); Defendants, expressly seeking payment orally and in writing, including payment by cashier's check or wire transfer, communicated with Nevada debtors in default requesting payment of monies owed to their banking clients (*e.g.*, AA004973-AA004974); Defendants collected money from third parties (including family members and/or friends of debtors) with respect to the defaulted debts of Nevada homeowners and passed that money on to their banking clients (*e.g.*, AA003101-AA003103); Defendants provided their banking clients a variety of additional default and debt collection-related services, such as lien monitoring, eviction, REO sales, loan workouts, loan modifications, mediation representation and coordination, bid coordination, other alternatives to foreclosure, and collecting and forwarding money from property

sales (*e.g.*, AA004733-AA004734; AA005409-AA005411; AA003134, at 140:10-AA003141, at 147:12.)

H. Absolutely Nothing in NRS Chapter 107 "Protects" or Exempts Defendants from Being Collection Agencies Subject to FID Licensing under NRS 649.020

Which section of NRS Chapter 107 states companies doing the collection business of foreclosing on deeds of trust as a trustee are exempt from NRS Chapter 649? Plaintiffs have looked for about 7 years and cannot find any such statement anywhere in NRS Chapter 107.

Which section of NRS Chapter 649 states companies who make millions from banks doing the collection business of default services and foreclosing on a deed of trust as a trustee (after default) are exempt from NRS 649.075? Plaintiffs have looked for 7 years and cannot find that statement anywhere in NRS Chapter 649. Plaintiffs see only NRS 649.020(2), which states the exemptions, and makes no mention of deeds of trust or trustees executing foreclosures after default. It does mention banks and lawyers, expressly. Plaintiffs refuse to conclude or assume the Nevada Legislature was incompetent or ignorant in this formulation of exemptions. (*Compare* NRS 645F.063 [defining "mortgage servicer" and expressly noting it does not include a trustee under a deed of trust].)

1. Nevada Law Does Not Exempt Collection Agencies from

Licensure

Nothing in NRS Chapter 107, properly construed, exempts collection agencies from being licensed as collection agencies by the FID, as required by Nevada law, because they purport to carry out their collection activities as trustees. NRS 107.028 was originally enacted in May 2011 as part of Assembly Bill No. 284, which, in pertinent part, stated that the "trustee under a deed of trust must be:"

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

As originally enacted, NRS 107.028 limited those who could serve as trustees under deeds of trust to (1) licensed Nevada attorneys, (2) licensed title insurers or title agents, or (3) trust companies licensed by Nevada (or otherwise exempt from licensing by Nevada law).

In June 2011, the Nevada Legislature amended NRS 107.028 through Assembly Bill No. 273, which, in pertinent part, added seven other categories, including licensed collection agencies under NRS 649, to NRS 107.028(1)'s list of those who could serve as trustees under deeds of trust in Nevada. (Assembly Bill No. 273 also made NRS 107.028 effective October 1, 2011, rather than July 1, 2011 as originally drafted.)

On May 30, 2011, Senator Wiener explained that the pertinent portions of AB No. 273 "revises Section 6 of Assembly Bill No. 284 that requires the trustee under a deed of trust to be an attorney licensed in Nevada, a title insurer or title agent authorized to do business in Nevada, or person licensed as a trust company or otherwise exempt from the requirements to be a licensed trust company in this State." Nevada State Legislature, Journal of the Senate (5/30/11) at 4284. In Senator Wiener's view:

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

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

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

Taken in their proper context and in light of the full legislative history of NRS 107.028, Senators Wiener and Roberson's remarks make clear the Nevada Legislature was concerned certain local companies might be put out of business because they were not licensed as attorneys, title insurers or title agents, or licensed as trust companies or otherwise exempt from licensing in Nevada as trust companies. The Nevada Legislature therefore expressly allowed several additional categories, including licensed collection agencies, to serve as trustees. Here, the Defendants are unlicensed, foreign collection agencies. Senators Wiener and Roberson's remarks make clear they were concerned certain local, Nevada businesses might be harmed by too strict a requirement that they be licensed as trust companies. There is nothing to suggest the Nevada Legislature thereby meant to exempt these categories of persons or entities from complying with their other licensing obligations under Nevada law: specifically, as it relates to collection agencies, from the requirement they be licensed or certified by the FID as collection agencies under NRS Chapter 649. Simply put, nothing in NRS 107.028 repeals or displaces or excludes NRS 649.020(1) *et seq.*, when the business involved meets the statutory definition of a collection agency therein.

2. Defendants' Collection Agency Activities Were Not Authorized or "Protected" by NRS 107, and, in Fact, Likely Violated Their Duties as Trustees under Nevada Law

a. Nevada Trustees Owe a Duty of Impartiality to Both Deed of Trust Beneficiaries and Debtors: Nevada Law Bars Trustees from Acting Solely as the Agent of One Side to Deeds of Trust (*i.e.*, Collection Agent for Lenders)

Under Nevada law, the beneficiary to a deed of trust is expressly barred from serving as the trustee on the deed of trust. (NRS 107.028(2) ["A trustee under a deed of trust must not be the beneficiary of the deed of trust for the purposes of exercising the power of sale pursuant to NRS 107.080."].) Thus, while lending institutions may serve as trustees under deeds of trust, they are in fact forbidden by Nevada law from doing so on any deeds of trust of which they are also the beneficiaries. (*Id.*)

Nevada foreclosure trustees owe a duty of impartiality and good faith to the beneficiary and trustor (*i.e.*, Nevada debtor) to the deed of trust, and are required to "act in accordance with the laws" of Nevada. (NRS 107.028(6).) Although not a true fiduciary obligation, 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 [QLS violated its duty of impartiality as a trustee under Washington law by deferring to its lender-client on whether to postpone a foreclosure sale, thereby impermissibly becoming "mere agent" of the beneficiary

only]; *Yvanova v. New Century Mort. Corp*. (Cal. 2016) 62 Cal.4th 919, 927, 365 P.3d 845, 850.)

Although, as reflected in *Klem*, Washington law differs from that of Nevada and California in considering trustees to owe fiduciary obligations to both beneficiaries and debtors under deeds of trust, these States agree that at a minimum, trustees must act impartially and in good faith as effectively the agents for both sides of the deed of trust. (*See Klem, supra*, 176 Wn.2d at 788-798, 295 P.3d at 1187-1190; *Yvanova*, *supra*, 62 Cal.4th at 927, 365 P.3d at 850; NRS 107.028(6).) As illustrated by *Klem*, it is a violation of that duty for trustees to act in ways that effectively make them the agent only of the beneficiary (such as a trustee abdicating its independence by deferring to the beneficiary on matters entrusted to the trustee, or, even more clearly, acting on behalf of the beneficiary in ways that are necessarily adverse to the deed of trust debtor-grantor). The importance of such impartiality and independence is reflected by NRS 107.028(2)'s requirement that trustees under deeds of trust not be beneficiaries under those deeds of trust.

The Washington Supreme Court in *Klem* concluded QLS breached its duty of impartiality as a trustee in Washington by deferring entirely to the beneficiary as to whether a foreclosure sale should be postponed, thereby improperly acting as the agent of the beneficiary only. (*Klem, supra*, 176 Wn.2d at 788-798, 295 P.3d at

1187-1190.) In doing so, QLS "abdicated its duty to act impartially toward both sides" and instead "merely honored an agency relationship with one" side (its creditor-beneficiary client). (*Id.* at 791-792, 1188-1189.) The Washington Supreme Court ruled the "practice of a trustee in a nonjudicial foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion as an impartial third party with duties to both sides is an unfair or deceptive act or practice and satisfies the first element" of Washington's Consumer Protection Act. (*Id.*)

b. Defendants Violated Their Duty of Impartiality by Acting Solely as Deed of Trust Beneficiaries' Agents

The allegations and proof Plaintiffs presented in the record demonstrate Defendants violated their duty of impartiality under NRS 107.028(6) by contracting with their lender-clients to act as their agents as part of their business activities in Nevada, and in fact so acting as their agents. For instance, MTC agreed that it would act on behalf of its lender-clients in carrying out evictions of foreclosed homeowners, which would necessarily entail MTC taking an adverse position to these Nevada debtors that MTC was seeking to evict. (AA002736; *see also* AA004733-AA004734.) As trustees are required by Nevada law to be impartial and act in good faith toward debtors and beneficiaries under deeds of trust—as NRS 107.028(6) demonstrates—then the undisputed material facts show

MTC violated Nevada law in this respect as well by breaching its duty of impartiality toward Nevada debtors. Such misconduct belies any assertion MTC's activities were consistent with—and, indeed, in some respects even required or protected by—Nevada law on trustees or NRS Chapter 107.

The proof in the record shows CRC violated its duty of impartiality because CRC was and acted as the instrument or alter ego of Chase, CRC's owner and principal creditor-client. Chase's control, ownership, and direction of CRC are shown in multiple ways by Plaintiffs' powerful proof. For example, CRC's own former president testified she reported to Chase on CRC's behalf regarding its operations, including in Nevada; CRC was and is owned by Chase. (AA004814-AA004816; AA004753-AA004760.) Chase was CRC's primary client. (AA004833.) CRC's own contracts from the relevant period show Chase 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 pay-off quotes, to promptly send Chase all reinstatement and pay-off amounts and foreclosure sale proceeds CRC received on Chase's behalf, and to obtain Chase'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). (AA004733-AA004734.)

Chase's control of CRC's daily business operations was so far reaching the paychecks for CRC employees came from Chase! (AA004967-AA004968.)

Not only did CRC violate the duty of impartiality reflected in NRS 107.028(6), but the evidence shows CRC violated Nevada law by effectively allowing Chase to serve as the trustee of deeds of trust to which Chase was also the beneficiary! (*See* NRS 107.028(2)-(3).) CRC also assisted Chase in circumventing the licensing requirements of NRS 107.028(1) by effectively lending Chase CRC's name and corporate capacity so Chase 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 with NRS Chapter 107 at issue.

As reflected in documents QLS produced in discovery, it was QLS' practice, policy, and procedure in Nevada to receive detailed instructions from its creditor-clients regarding bidding by QLS at the non-judicial foreclosure sales that QLS conducted. (AA005383-AA005384; AA005461; AA005238-AA005246; AA005463; *see also*, *supra*, Part II, pp. 6-11.) These instructions would state, among other things, the market value of the properties, the total debt amount, the final bid amount, and instructions regarding bidding. (*Id.*) As to Plaintiff Benko, for instance, QLS was expressly instructed by its client to add its fees and costs to the total debt amount and make a total debt bid at the non-judicial foreclosure sale

(including QLS' fees and costs). (*Id.*) Similar instructions were given to QLS as to the Plaintiff Scintas. (*Id.*)

c. NRS Chapter 107 Prohibits Trustees from Negotiating Loan Modification Agreements and Attending Mediation on Clients' Behalf with Debtors Because Doing So Conflicts with Trustees' Duty of Impartiality

The TAC specifically alleges 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." (AA004085, at ¶ 34.) Paragraph 30 is to similar effect. (AA004082.) Plaintiff Laghaei, in negotiating a loan forbearance agreement, "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 TAC). (AA004078, at ¶16.) Plaintiffs' allegations and proof show MTC agreed to and in fact did act on its lender-clients' behalf in preparing loan modification or forbearance agreements or loan workouts with Nevada debtors, thereby violating MTC's duty of impartiality. (AA003132-AA003141; AA003425-AA003469; AA003204; AA003044-AA003045; *see also*, *supra*, Part II, pp. 6-11.)

MTC's own documents—produced in discovery—show it negotiated a forbearance agreement with Plaintiff Laghaei in 2009 on behalf of its creditor-client. (*Id.*) 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, relating to Plaintiff Laghaei's defaulted debt. (*Id.*) 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 Plaintiff Laghaei. (*Id.*) MTC charged Plaintiff Laghaei a fee of no less than $150.00 for negotiating a forbearance agreement with him relating to his defaulted debt. (*Id.*) Because it was not licensed by the FID when conducting these collection activities, MTC was not entitled to collect this money, or to charge Plaintiff Laghaei for its services in doing so. MTC's client authorized MTC to enter into loan forbearance plans on the client's behalf with Nevada debtors relating to their defaulted debts. (*Id.*)

QLS also had a "retention" department that acted as agent and middleman for lenders, obliged, directed, and paid by lender clients and under their contracts, to facilitate and achieve collections by loan modification or forbearance deals, according to QLS sworn testimony and inferences therefrom. (AA005247-AA005280; AA005298-AA005299; AA005347-AA005348; AA005393-AA005394; AA005571-AA005575; *see also*, *supra*, Part II, pp. 6-11.) It was QLS

practice and procedure in Nevada to negotiate, document, and execute forbearance agreements with Nevada debtors on behalf of QLS' clients. (AA005248-AA005280.) QLS had and used generic templates for this purpose, and generic letters enclosing the forbearance agreements. (*Id.*) Pursuant to these forbearance agreements and cover letters, down payments under the forbearance agreements were to be made to QLS (not lenders), by certified cashier's checks. (*Id.*)

Because Nevada law requires trustees to act impartially and in good faith with respect to deeds of trust, and the trustor-debtors and creditor-beneficiaries of them, Defendants engaging in these activities as agents only of lender-clients (*i.e.*, beneficiaries) necessarily meant Defendants violated their statutory duty of impartiality, since Defendants acted adversely to trustor-debtors in such transactions. (*See, e.g.*, *Klem*, *supra*, 176 Wn.2d at 788-798, 295 P.3d at 1187-1190 [QLS violated its duty of impartiality as a 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].) Negotiating a loan forbearance deal with one side as the agent only of the opposing side is not an impartial action in the transaction! NRS Chapter 107 does not protect such activities by trustees; it expressly forbids them because they violate the duty of impartiality.

d. NRS Chapter 107 Prohibits Trustees from

Attempting to Collect or Collecting on Clients' Behalf Payment of Money on Defaulted Debts from Nevada Debtors Because Doing So Conflicts with Trustees' Duty of Impartiality

The duty of impartiality prohibits Defendants from attempting to collect or collecting for clients payment of money on defaulted debts from Nevada debtors for which Defendants are trustees. Nevada law does not protect trustees who regularly collect money from Nevada debtors as part of their Nevada business activities for payment on these debtors' defaulted debts, and forbids such conduct. Neither NRS Chapter 107 nor NRS Chapter 649 authorizes or requires trustees to actively and regularly solicit or demand Nevada debtors make payments on defaulted debts so trustees can collect and remit those payments to creditor-clients. Defendants are substitute trustees installed after default, for the specific purpose of debt collection. The statutes do not authorize trustees to demand payments be sent directly to trustees so they can collect and remit the funds. (*See, supra*, Part II, pp. 6-11.)

Defendants previously contended there is a "common-sense distinction" between trustees and collection agencies. (AA000243, at 14 n. 3.) While trustees must "act impartially when engaging in non-judicial foreclosure activities" pursuant to NRS 107.028(6), "[c]ollection agencies engaging in collection of a

claim must be partial to the person owed the debt and engage in dogged pursuit to collect the claim; as a result, foreclosure activities are not part of the claim collection process." (*Id.*) At the March 14, 2017 hearing, CRC counsel alluded to this distinction, noting "if you're a trustee to a three-party contract, as we all know, very different from a debt collector who's acting on behalf of the entity to whom or to which the debt is owed, totally different relationships." (AA004043, at 34:18-21 [emphasis added].) Bingo!

It violates the duty of impartiality for trustees to act for beneficiaries alone by seeking to collect claims (*i.e.*, debts) tied to deeds of trust. (*Klem, supra*, 295 P.3d at 1189-1190.) The claim collection process is supposed to be separate from trustees' foreclosure activities, because trustees could not be impartial—as required by Nevada law—to debtor-trustors while simultaneously seeking to collect money on their defaulted debts. While licensed collection agencies may serve as trustees, they cannot serve in both capacities simultaneously, because doing so breaches the duty of impartiality owed to both beneficiary and trustor.

What has gotten some trustees repeatedly in big trouble—whether 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 trustees for those deeds of trust. Defendants' very lucrative combination business model violates Nevada law. As the proof in the record

shows, MTC's Nevada collection agency activities have included doggedly pursuing Nevada debtors to collect on claims and acting adversely to debtors—to whom MTC owes a duty of impartiality—by, among other things, seeking to evict them from their homes following foreclosure, negotiating loan forbearance and modification agreements with them on behalf of MTC's creditor-clients, and aggressively collecting payments from them on defaulted debts so MTC can remit those funds to creditor-clients. (*See, e.g.*, AA002736; AA003132-AA003141; AA003425-AA003469; AA003204; AA003044-AA003045; *see also* AA004733-AA004734.) The other Defendants engaged in similar improper activities. (*See*, *supra*, Part II, pp. 6-11.) NRS Chapter 107 does not protect these activities; trustees are prohibited from engaging in them.

e. Nevada Trustees Are Barred from Actively Soliciting Reinstatement or Payment in Full of Debts as Agents of Beneficiaries Alone

NRS 107.080(2)(c)(3) does not authorize Nevada trustees to inject themselves into the defaulted debt reinstatement process as Defendants have regularly done in Nevada. (*See*, *supra*, Part II, pp. 6-11.) The current version of NRS 107.080(2)(c)(3) mandates that Nevada debtors under deeds of trust be sent a written statement with several categories of information, including "the amount in default" on the debt, "the principal amount of the obligation or debt secured by the

deed of trust," the amount of payment required to reinstate the loan and avoid foreclosure, and the "principal amount of accrued interest and late charges." This written statement need not come from trustees: instead, it can come from the "beneficiary or its successor in interest, the servicer of the obligation or debt secured by the deed of trust or the trustee, or an attorney representing any of those persons." (NRS 107.080(2)(c)(3).) NRS 107.080(2)(b) and NRS 107.080(2) more generally put limits on the time before which trustees may exercise the power of sale and require certain notices be given—not necessarily by trustees—at specified times prior to foreclosure. (*See* NRS 107.080(2).)

Nothing in NRS 107.080 requires payments on defaulted debts be sent to trustees, so they can collect and remit to creditor-clients. Trustees are not authorized by NRS 107.080(2) to be involved in the reinstatement process, such as, for instance, by soliciting Nevada debtors to make payments on defaulted debts directly to trustees so they can collect and remit to banks. Such conduct violates trustees' duty of impartiality because trustees thereby become beneficiaries' agents alone in seeking to collect money.

Nothing in NRS 107.080(c) authorizes trustees to engage in the variety of activities Plaintiffs allege in their TAC (and prove in the record) Defendants regularly engaged in for years as part of their collection agency activity in Nevada. (*See, supra*, Part II, pp. 6-11.) MTC currently provides both full service default

services and foreclosure services to its clients. (AA003134, at 140:10-AA003141, at 147:12.) The two categories of services provided by MTC are distinct: full service default services include collection services such as handling deed-in-lieu of foreclosure transactions, senior lien monitoring, negotiating loan forbearance agreements, post-foreclosure sale conveyances, and other services. (AA003134, at 140:10-AA003141, at 147:12.)

CRC engaged in similar improper collection activities in Nevada. The testimony of Plaintiff Kallen indicates she received disturbing collection calls from CRC. (AA004797-AA004805.) CRC had at least 4-6 people working 8 hours per day in order to collect on defaulted loans by obtaining pay-off and/or reimbursement checks from borrowers with respect to defaulted loans. (AA004826-AA004828; AA004895-AA004896.) This was one of the services CRC provided to its lender-client. (AA004826-AA004828; AA004834; AA004836-AA004837; AA004838-AA004841; AA004847-AA004850; AA004870-AA004879; AA004882-AA004883; AA004973-AA004974; AA004985-AA004993; AA004894-AA004896; AA004904; AA004905-AA004906; AA004730-AA004735.)

CRC routinely collected, processed, and/or maintained over $4 million dollars in its trust account. (AA004829-AA004832; AA004942-AA004945.) CRC

received requests to collect and reinstate and/or pay-off defaulted loans from both borrowers and Chase. (AA004835-AA004837.)

CRC's former president, who reported to Chase, admitted the purpose of CRC's foreclosure services was to obtain money or property to pay defaulted debts in full or in part. (AA004838-AA004841.) Chase's lawyers required CRC to admit and inform borrowers in default it was a debt collector. (AA004862-AA004864.) This is collection! (NRS 649.020(1).)

QLS engaged in similar misconduct: in just one of many QLS departments, which had about fifty employees, QLS had between 500 and 1,000 telephone communications with borrowers in default each day. (AA005335-AA005336.) For reinstatement (*i.e.*, collection of payments to make defaulted loans current), QLS directed borrowers to deliver funds to QLS' accounting department. (AA005341-AA005342.) This pure collection activity is not found anywhere in NRS Chapter 107. QLS had a collection department performing collections of money to reinstate and pay-off loans—with about 15 people doing this work 8 hours a day, in 2007 through 2012. (AA005338-AA005340.) QLS admitted under oath it collected money from defaulted borrowers and deposited it into its trust account, and then issued checks to banking clients—usually sending money overnight. (AA005345.) QLS processed forty-one thousand (41,000) Nevada files before obtaining its license from the FID in 2012, and QLS received at least $19 million in fees and

$86 million dollars in costs for that massive, illegal business operation in Nevada (from 2007 to 2012 alone). (AA005362-AA005363; AA005364; AA005228; AA005578; AA005568; AA005448-AA005450.)

3. The Nevada Legislature Amended Nevada Law to Make Even Clearer Its Intention Trustees Be Independent of Beneficiaries and Impartial to Borrowers

a. The Changes Made by NRS 107.028

In 2011, the Nevada Legislature confirmed trustees must be independent of deed of trust beneficiaries by enacting NRS 107.028. As expressly stated by NRS 107.028(2), a "trustee under a deed of trust must not be the beneficiary of the deed of trust for the purposes of exercising the power of sale pursuant to NRS 107.080." The importance of trustees' independence was reinforced by the Nevada Legislature's recognizing trustees owe a duty of impartiality and good faith with respect to deeds of trust to both beneficiaries and debtors, and "shall act in accordance with the laws of this State." (NRS 107.028(6).)

The Washington Supreme Court has eloquently explained why the importance of the duty of impartiality cannot be overstated:

> [T]he trustee in a nonjudicial foreclosure action has been vested with incredible power. Concomitant with that power is an obligation to both sides to do more than merely follow an unread statute and the beneficiary's directions. . . . If the trustee acts only at the direction of the beneficiary, then the trustee is a mere agent of the beneficiary and a deed of trust no longer embodies a three party transaction. If the trustee were truly a mere agent of

> the beneficiary there would be, in effect, only two parties, with the beneficiary having tremendous power and no incentive to protect the statutory and constitutional property rights of the borrower. (*Klem*, *supra*, 295 P.3d at 1189-1190 [emphasis added].)

In enacting NRS 107.028(2) & (6), the Nevada Legislature removed any doubt as to the nature of trustees' duties to beneficiaries and debtors, and expressly prohibited beneficiaries from serving as trustees under deeds of trust of which they are the beneficiaries, because doing so would mean there were really only two sides, with beneficiaries having tremendous power over borrowers, and no incentive to protect borrowers' rights.

b. The Nevada Legislature Did Not Intend NRS Chapter 107 to Occupy the Entire Field of Regulation

NRS Chapter 107 does not occupy the entire field of regulation because the Nevada Legislature clearly and expressly intended collection agencies conducting non-judicial foreclosures to satisfy both NRS Chapter 107 and NRS Chapter 649's requirements. NRS 107.028 provides a list of those who are qualified to serve as trustees under deeds of trust. It expressly includes "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 trustees, the Nevada Legislature reflected its intent to require collection agencies to be subject to both NRS Chapter 649 and NRS Chapter 107 when acting as trustees. Nowhere in NRS Chapter 107 does the Nevada Legislature indicate a

collection agency serving as a trustee is only required to comply with NRS Chapter 107's requirements. NRS Chapter 107 does not prohibit the application of other provisions of Nevada law, including Chapter 649, to enforcement of deeds of trust.

When the Nevada Legislature enacted NRS 107.028, which expressly permits collection agencies licensed under NRS Chapter 649 to be trustees, NRS 649.075's license requirement already existed. The Nevada Legislature is presumed to have known of NRS 649.075 when it enacted NRS 107.028, and to have intended NRS 649.075 would apply. (*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 had concerns about conflicts in regulating trustees under NRS Chapter 107 due to NRS Chapter 649, it would not have included collection agencies in the list of those qualified to be trustees. (*See* NRS 107.028.) It would have expressly excluded them (or stated NRS Chapter 649 did not apply).

NRS 107.028 shows the Nevada Legislature's intent that businesses engaged in the foreclosure collection process must be licensed and regulated under NRS 649.75 *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.)

Nevada's debt collection statutes offer a 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 [foreign entities not licensed as collection agencies in Nevada must obtain certificate of registration as foreign collection agencies]; NRS 649.053 [empowering the FID Commissioner to adopt necessary regulations to carry out NRS Chapter 649's provisions]; Nevada Administrative Code ("NAC") 649.013; NAC 649.105 [those not required to obtain license must obtain exemption from the Commissioner before engaging in collection activities].) The statutes regulate who are 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].)

Nevada places additional requirements on collection agencies. NRS 649.095 details the manner in which application for license must be made and the information those seeking licenses must provide. NRS 649.295 requires collection agencies to pay certain fees corresponding to each category. NRS Chapter 649 and NAC Chapter 649 detail the particular manner in which collection agencies must conduct business. (*See*, *e.g.*, NRS 649.315 [requiring display of license and

certificate]; NRS 649.332 [requirements to satisfy in order to verify debt]; NRS 649.375 [prohibited practices]; NAC 649.250 [prerequisites to conducting debt collection business].)

VI. CONCLUSION

Plaintiffs respectfully request this Court reverse the judgment, and remand the matter for further proceedings consistent with this Court's decision.

Dated this 7th day of March 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that, except as indicated herein below, this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I hereby certify that this brief complies with the requirements of NRAP 32, including NRAP 32(a)(4)-(6). This brief has been prepared in a proportionally-spaced typeface (Times New Roman) of 14 points, using Microsoft Word 2010, and is double-spaced. Excluding the parts of the brief exempted by NRAP 32(a)(7)(c), the brief contains 13,995 words.

Dated this 7th day of March 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of the Law Office of Nicholas A. Boylan, APC, and not a party to this action, and that on March 7, 2018, I e-served a true and correct copy of the foregoing on those listed below:

- **APPELLANTS' OPENING BRIEF**

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

Executed on March 7, 2018.

_/s/ Marina Vaisman__
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