IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY BENKO, a Nevada resident, et al., Appellants, vs. QUALITY LOAN SERVICE CORPORATION, a California Corporation, et al., Respondents.	Supreme Court Case No. 73484 Eighth Judicial District Court Case No. A-11-649875-C On Appeal from an Order Dismissing Case as A Matter of Law and Directing Judgment in Defendants' Favor with Prejudice in Connection with Plaintiffs' Third Amended Complaint

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NRAP 26.1 DISCLOSURE

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

California Reconveyance Company is a wholly owned subsidiary of JPMorgan Chase Bank, N.A. JPMorgan Chase Bank, N.A. is a wholly owned subsidiary of the publicly-held JPMorgan Chase & Co. No other publicly-held entity owns more than ten percent of the stock of JPMorgan Chase Bank, N.A.

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Dated this 9th day of May, 2018.

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STATEMENT OF THE ISSUES

1. Whether, as a matter of law, a trustee under a deed of trust, duly appointed and operating under the trust deed regulatory system of NRS Chapter 107, also must possess a collection agency license from the Commissioner of the Financial Institutions Division, under NRS Chapter 649, in order to act in the capacity of trustee.

2. Whether, as a matter of law, a person or entity, acting in the capacity of a trustee under a deed of trust without possessing a collection agency license, is engaged in the collection of "illicit" fees that constitute damages to the Plaintiffs and must be disgorged.

3. Whether Plaintiffs stated a claim for consumer fraud under Nevada Revised Statutes section 41.600 when Plaintiffs failed to adequately allege causation.

4. Whether Plaintiffs stated a claim for unjust enrichment under Nevada law despite the existence of an express, written contract in the form of a deed of trust that explicitly addresses the relationship and roles of Plaintiffs and Defendants.

COMBINED STATEMENT OF THE CASE AND FACTS

This appeal centers on the district court's proper rejection of fatally and irremediably defective Nevada state law claims contained in Plaintiffs' Third

Amended Complaint ("TAC"). In the underlying action, Plaintiffs[1]—a group of eighteen individual borrowers who defaulted on the mortgage loans secured by their residences and have had their homes foreclosed upon or are facing foreclosure—pursued class action claims for statutory consumer fraud and unjust enrichment against Defendants,[2] which are five otherwise independent trustees operating in accordance with the terms of Plaintiffs' deeds of trust. [AA004065-224][3]

Plaintiffs' claims do *not* stem from allegations that Defendants engaged in abusive or illegal debt collection activities, or that Plaintiffs were improperly foreclosed upon, or that Defendants violated a statutory duty contained within the applicable trust deed regulatory system prescribed by NRS Chapter 107. Instead, Plaintiffs' entire suit is based on Plaintiffs' allegation that Defendants—despite

[1] Plaintiffs-Appellants are 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.

[2] Defendants-Respondents are Quality Loan Service Corporation ("QLS"), MTC Financial, Inc. dba Trustee Corps ("MTC"), National Default Servicing Corporation ("NDSC"), and California Reconveyance Company ("CRC"). While Meridian Foreclosure Service dba Meridian Trust Deed Service ("Meridian") was named as a Defendant, Meridian is now defunct.

[3] References to the record will be to the page(s) of the Appellant's Appendix in the form of "AA____," or to the Respondents' Appendix in the form of "RA_____."

operating under the regulatory requirements of NRS Chapter 107—*also* needed to be licensed as a collection agency or registered as a foreign collection agent under NRS Chapter 649 in order to act in the capacity of trustee under the terms of a deed of trust. [AA004079-81, ¶¶ 20-24; AA004088-89, ¶ 43; AA004090, ¶ 51]

A. Plaintiffs' Claims.

Plaintiffs seek to impose liability on Defendants based on allegations that, in the course of performing their duties as trustees in accordance with the terms of Plaintiffs' respective deeds of trust, the Defendants: (i) discussed reinstatement, payoff, forbearance, or modification of the underlying mortgage loans secured by the deeds of trust with Plaintiffs; (ii) directed payment on the underlying mortgage loans secured by the deeds of trust to the respective lenders; (iii) forwarded monies relating to the underlying mortgage loans secured by the deeds of trust to the respective lenders; and (iv) forwarded the proceeds from foreclosure sales to the lenders. [AA004082] Plaintiffs also allege that Defendants sent notices that contained what is commonly referred to as a "mini-Miranda" warning. [AA004083] Plaintiffs contend that these actions constituted "illegal debt collection activities." [AA004084]

Plaintiffs' first claim for statutory consumer fraud alleges that Defendants' failure to possess a collection agency license or to register as foreign collection agents violated NRS 649.075 or NRS 649.171, thus constituting a deceptive trade

practice under NRS Chapter 598. [AA004089] In turn, these allegedly deceptive trade practices constitute statutory consumer fraud pursuant to NRS 41.600. [*Id.*] Plaintiffs claim that they sustained damages as a result of Defendants' failure to possess a collection agency license or to have registered as a collection agency and that Defendants received illicit revenue and profits. [*Id.*] Plaintiffs did not bring a standalone deceptive trade practices claim.

Plaintiffs' second claim for unjust enrichment alleges that Defendants received substantial payments for their performance of purported illegal collection agency activities (as set forth above), despite their failure to possess a collection agency license or to register as foreign collection agents. [AA004090] Plaintiffs contend that Defendants' retention of these payments is inequitable and seek disgorgement. [*Id.*] Conspicuously absent from this claim is any explanation regarding the detriment suffered by Plaintiffs relating to Defendants' unlicensed conduct.

B. Procedural History.

The TAC represents Plaintiffs' fifth attempt to plead viable claims, and the dismissal before the district court is the second dismissal as a matter of law obtained by Defendants. [AA000009-13; AA000021-27; RA000081-110; AA000088-228; AA004065-224; AA005642-58; RA000122-36; AA005642-58] Plaintiffs initially filed suit against Defendants in Nevada State Court on October

12, 2011, alleging claims of deceptive trade practices, unjust enrichment, trespass, quiet title, and elder abuse. [AA000009-13] Shortly thereafter, Plaintiffs amended their complaint to reassert the original claims, but removed the deceptive trade practices claim and added a consumer fraud claim. [AA000021-27] These claims were premised on the same theory outlined above—namely, that Defendants did not possess a collection agency license. [*Id.*]

On February 13, 2012, one of the defendants removed the case to federal court by asserting jurisdiction pursuant to the Class Action Fairness Act of 2005 ("CAFA"). [AA000032-37] On March 14, 2012, Plaintiffs filed a motion to remand the action to Nevada State Court. [RA000001-66] Defendants opposed remand. [RA000067-80] Thereafter, on April 12, 2012, Plaintiffs filed a motion for leave to file a Second Amended Complaint ("SAC"). [RA000081-110] The SAC sought to add four new plaintiffs and allegations designed to achieve remand based on CAFA's local controversy exception. [RA000088-110] Defendants opposed the motion for leave on grounds that any amended complaint was futile because non-judicial foreclosure trustees are not collection agencies and do not need to be separately licensed as collection agencies. [RA000111-21]

On January 2, 2013, the Nevada federal district court entered an order denying Plaintiffs' motion to remand because Plaintiffs could not satisfy their burden to establish an essential element of the local controversy exception,

granting Defendants' motions to dismiss, and denying in part Plaintiffs' motion to amend the complaint as futile and granting the motion to amend only to the extent the proposed SAC dismissed the trespass claim. [RA000122-36] Subsequently, Plaintiffs appealed the district court's rulings to the Ninth Circuit. [RA000137-38]

On June 18, 2015, the Ninth Circuit, in a split decision, issued its opinion, *Benko v. Quality Loan Service Corp.*, 789 F.3d 1111 (9th Cir. 2015), which focused solely on the local controversy exception to CAFA jurisdiction. [AA000038-68] The Court did not decide any of the legal issues underlying the claims and ordered the Nevada federal district court to remand the case to Nevada State Court. [*Id.* at AA000039]

The case was remanded to Nevada State Court on October 26, 2015. [AA000069] After remand, Plaintiffs filed a newly revised SAC, which added new named Plaintiffs and asserted causes of action for consumer fraud, unjust enrichment, and elder abuse. [AA000088-228]

Since remand, and as detailed in the district court's order underlying this appeal, this case has followed a lengthy procedural path due in part to the loss of the Honorable Susan Scann. [AA0005642-658] On February 22, 2016, Judge Scann considered and orally granted in part Defendants' motion to dismiss Plaintiffs' SAC. [*Id.* at AA005649; AA000812 at 20-22] After raising questions

regarding the viability of the named Plaintiffs' claims, she suggested that initial discovery should be confined to the named Plaintiffs unless and until the Plaintiffs could demonstrate that their individual claims had merit. [AA000820-826] Judge Scann passed away on July 16, 2016. [AA005650] At the time of her death, Judge Scann had not signed or entered a written order with respect to Defendants' motion to dismiss. [*Id.*]

C. The District Court's Order Dismissing Plaintiffs' Claims As A Matter Of Law.

As a result of Judge Scann's commentary and Defendants' subsequent motion practice designed to implement her directive [RA000122-36], the Discovery Commissioner imposed a phased discovery schedule that initially focused on the viability of the named Plaintiffs' claims. [RA0000159, RA0000173] The case ultimately was reassigned to the Honorable William D. Kephart. [RA000165] On December 14, 2016, Plaintiffs sought leave to file the TAC. [AA001790-2096] Before the district court could rule on the motion for leave, Plaintiffs filed a motion for partial summary judgment against Defendant MTC Financial, Inc. [AA002525-3506] The district court entered an order on March 14, 2017 permitting the Plaintiffs to file the TAC. [AA004061-64] On the same day, the district court expressed an inclination to dismiss the case. [AA004035-36] Following a request from Plaintiffs, the district court invited the

parties to submit supplemental briefing on the core legal issues related to the allegations in the TAC. [AA004045] In addition to submitting such supplemental briefing, multiple Defendants filed motions for summary judgment. [AA004250-552; AA004561-658; RA001230-1826; RA001837-39]

After receiving supplemental briefing and holding another hearing [AA005600-638], the district court issued a written order on June 7, 2017 dismissing the TAC for failing to state a claim upon which relief could be granted. [AA0005642-658] Paying careful attention to the unique nature of deeds of trust and NRS Chapter 107—the statutory scheme directed at deeds of trust—and evaluating the statutory language of NRS Chapter 649 regulating collection agencies, the court unequivocally held:

- "Plaintiffs' allegations in the [TAC] and otherwise are acts taken by Defendants within the scope of the non-judicial foreclosure process as permitted by the deed of trust and NRS Chapter 107." [AA005652, ¶ 14]
- "A trustee acting pursuant to a deed of trust is not a collection agency under NRS 649, is not soliciting payment pursuant to NRS 649, is not collecting a debt under NRS 649, and does not need to be licensed or registered as a collection agency." [*Id.*, ¶ 13]
- "The acts allegedly performed by the Defendants in the [TAC] are

> authorized by the deeds of trust and plain language of NRS Chapter 107, which governs the conduct of trustees under deeds of trust. As a matter of law, trustees under deeds of trust that engage in non-judicial foreclosure activities permitted under NRS Chapter 107 are not collecting debts, are not collection agencies, and are not subject to Nevada licensing or registration requirements for collection agencies." [AA005653]

Following entry of judgment in favor of Defendants on the TAC, Plaintiffs initiated this appeal. [AA005659-65]

SUMMARY OF ARGUMENT

Both of Plaintiffs' claims rest upon two fundamental premises, each of which is necessary to sustain Plaintiffs' claims, and both of which are fatally and irremediably defective as a matter of law. The first is the proposition that a trustee under a deed of trust, duly appointed and operating under the trust deed regulatory system under NRS Chapter 107, *also* must possess a collection agency license from the Commissioner of the Financial Institutions Division ("FID"), under NRS Chapter 649, in order to act in the capacity of trustee. The second is that, if a person acts in the capacity of trustee under a deed of trust without possessing a collection agency license, any fees received for services actually rendered are "illicit" and constitute damages to the Plaintiffs that must be disgorged. Both of

these propositions are incorrect as a matter of law in ways that no further pleading or discovery can cure. Accordingly, the district court properly dismissed Plaintiffs' claims. This Court should affirm that dismissal.

ARGUMENT

I. STANDARD OF REVIEW.

This Court rigorously reviews orders granting motions to dismiss under NRCP 12(b)(5). *Facklam v. HSBC Bank USA*, 401 P.3d 1068, 1070 (Nev. 2017) (affirming order granting motion to dismiss). The Court will affirm a dismissal when "it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* (quoting *Buzz Stew, L.L.C. v City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008)). In conducting its analysis, the Court presumes the facts alleged in the complaint to be true, and reviews all legal conclusions de novo. *Id.* Conclusory allegations that lack supporting factual assertions are not entitled to a presumption of truth. *Jafbros, Inc. v. GEICO Indem. Co.*, 127 Nev. 1148, at *1, 373 P.3d 929 (2011). The Court will "affirm the order of the district court if it reached the correct result, albeit for different reasons." *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (affirming district court's judgment); *see also Munoz v. Branch Banking*, 131 Nev. Adv. Op. 23, 348 P.3d 689, 693 (2015) (affirming district court's ruling but applying different reasoning).

II. THE DISTRICT COURT DISPOSED OF THE CASE ON THE PLEADINGS AS A MATTER OF LAW—NOT SUMMARY JUDGMENT.

In their Opening Brief, Plaintiffs repeatedly assert (at 10-11, 14) that the Court "must consider" the summary judgment record in evaluating the district court's order. This assertion is unsupported by the Nevada authorities cited by Plaintiffs. *See, e.g.*, *Zohar v. Zbiegien*, 130 Nev. Adv. Op. 74, 334 P.3d 402, 406 (2014) (explaining that, in the context of medical malpractice suits, the court should read the complaint and expert affidavits together at the motion-to-dismiss stage). Instead, Nevada precedent is clear that, in an appeal from a NRCP 12(b)(5) order, "[t]he sole issue presented . . . *is whether a complaint states a claim for relief*." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) (citation omitted) (emphasis added). The Court's "task is to determine whether . . . the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief," and this test turns on "whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested." *Id.* (citation omitted). Accordingly, the Court need not and should not consider summary judgment evidence to determine whether the district court's order dismissing Plaintiffs' claims pursuant to Rule 12(b)(5) should be affirmed.

While the Court is not limited to the four corners of the complaint on a Rule

12(b)(5) motion, it should only consider evidence unattached to the complaint if "(1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 930 (2015) (discussing the contours of evidence appropriately considered at the motion-to-dismiss stage) (quotations and citations omitted). These factors do not apply, and the district court considered no such evidence. Accordingly, the authorities support that the evidentiary record should not be considered on appeal.

If the Court decides to review the district court's order as a summary judgment disposition (it should not), the Court will find that the allegations Plaintiffs most rely upon (which are asserted generally against "Defendants" as an undifferentiated group) do not apply to CRC. CRC served as trustee with respect to only *one* named plaintiff, Susan Kallen.[4] Ms. Kallen defaulted on her loan in July 2010 and has not made any subsequent payments. [RA001698; RA001702; RA001704 at 3-5; RA0001705 at 4-9] While Plaintiffs also argue (*e.g.*, at 6) that "Defendants" received "illicit fees and costs from Nevadans," Ms. Kallen admitted that she never paid a fee or cost to CRC. [RA001716 at 12-18; RA001723] While Plaintiffs also argue (*e.g.*, at 6-7) that "Defendants" illegally demanded payment

[4] Two other plaintiffs, Thomas Moore and Kimberly Moore, initially filed suit against CRC, but they dismissed their claims against CRC with prejudice in 2016. [AA001783-89]

from, or negotiated workouts with, borrowers in default, Ms. Kallen never received any demand for payment from, or negotiated a workout with, CRC. [RA001711-12 at 47:6-48:1; RA001714-15 at 63:25-64:10] Despite having been in default for 93 months, Ms. Kallen's loan has *not* been foreclosed, and she continues to live at the property without making payments. [RA001705 at 4-9; RA001706 at 18-21; RA001707 at 7-10]

Accordingly, the vast majority of the allegations and facts discussed in the Opening Brief do not apply to Ms. Kallen, who is mentioned only once in the 63-page brief (at 57). There, Plaintiffs argue that Ms. Kallen "received disturbing collection calls from CRC." [*Id.*] The allegation is false. Ms. Kallen actually testified that, after receiving the notice of default, "there was about a month span when I specifically received phone calls *that I would not answer* and voicemails *that I would not respond to*." [AA004797 (emphasis added] Ms. Kallen never spoke to anyone from CRC, and has no memory of the content of the voicemails she allegedly received, other than the convenient conclusion that they were for "debt collection." [AA004797-804; RA001869-70 at 29:21-30:11 (Ms. Kallen testified "I really have blocked it out" when asked about the content of the voicemails)] Significantly, Ms. Kallen testified that the calls came from a 602 (Arizona) area code; CRC has never used a phone number with that area code, nor

does it have offices in the state of Arizona. [AA004797; RA001871-72 at 36:16-37:16; RA001881, ¶ 21; RA001698; RA001897-1900; NRS 47.130]

Even ignoring that none of CRC's alleged "collection activities" apply to Ms. Kallen, the Opening Brief is devoid of factual substance—and misleading—in its discussion of those activities:

- First, Plaintiffs argue (at 57) that CRC employed staff "to collect on defaulted loans by obtaining pay-off and/or reimbursement checks from borrowers." But the deponent cited for this argument actually testified that CRC worked with the lender "to obtain the necessary quotes *requested by borrowers* to reinstate and/or pay off their loans." [AA004827 (emphasis added); AA004876 ("the only time that we would provide a payoff figure is if we were requested by the borrower")] Of course, a trustee has a statutory right to provide such information to borrowers; doing so is not "claim collection." NRS 107.0805(1)(b)(3).
- Second, contrary to Plaintiffs' argument (*e.g.*, at 6) that Defendants' allegedly "illicit" fees were added to Plaintiffs' debts, CRC testified that a borrower need *not* pay CRC any fees in order to reinstate the loan and avoid foreclosure. [AA004988-89]

- Third, contrary to Plaintiffs' argument (*e.g.*, at 6-7) that "Defendants" illegally assisted the lender with loan modifications, CRC's former president testified that "I don't believe CRC handled any loan modifications." [AA004994]
- Finally, at all times that it performed trustee services in Nevada, CRC possessed a valid business registration, thus entitling it to perform services under Chapter 107. NRS 107.028(1)(d) (any "domestic or foreign entity which holds a current state business license" may serve as trustee under a deed of trust). [RA001657, ¶ 17; RA001779-1803]

Ms. Kallen has not asserted, and cannot assert, any viable claim against CRC.

III. THE DISTRICT COURT PROPERLY FOUND THAT DEFENDANTS WERE NOT REQUIRED TO BE LICENSED AS COLLECTION AGENCIES AS A MATTER OF LAW.

The first critical premise of the TAC is that Defendants were required to hold a collection agency license to perform various alleged acts in their capacity as trustees under NRS Chapter 107. [AA004088-90, ¶ 42-45, 50, 51] This assertion fails for at least three reasons. First, as part of a comprehensive regulatory system under NRS Chapter 107, the Nevada Legislature has *already decided* that a trustee need not possess a collection agency license. Second, the acts that Defendants allegedly performed do not constitute collection of a claim under NRS Chapter

649, the prescribing collection agency licensing regime. Third, the Nevada Legislature has occupied the entire field of non-judicial foreclosure regulation. Overlapping regulation of trustees by the FID Commissioner—the necessary result of holding that trustees are "collection agencies"—is thus preempted. Subjecting trustees and the non-judicial foreclosure process to *two* contradictory regulatory schemes is entirely unworkable.

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

The crux of Plaintiffs' argument is that the acts alleged in the TAC constitute claim collection under NRS Chapter 649. [AA004082-84, ¶¶ 30-31] While this is not correct (*see* Part III.B, *infra*), the argument is irrelevant because Chapter 107 authorizes *any* trustee to perform these acts without requiring the trustee to obtain a collection agency license. Thus, whether or not constituting claim collection, these acts are clearly within the scope of authority of a trustee as prescribed by the legislature in Chapter 107. The Court must read Chapter 649 together with Chapter 107 "in a way that harmonizes them as a whole." *State Dep't of Bus. & Indus., Fin. Inst. Div. v. Nevada Ass'n Servs., Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223, 1227 (2012) (FID Commissioner lacked jurisdiction to interpret real estate statutes). Dismissal in this case should be affirmed because Plaintiffs ask the Court to declare unlawful, under Chapter 649, what the

legislature has expressly authorized in Chapter 107.

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

A "deed of trust," unlike a mortgage, is a three-party security instrument among the trustor (usually a borrower), the beneficiary (usually a lender), and a *sui generis* entity called the "trustee." *Ho v. ReconTrust Co., N.A.*, 858 F.3d 568, 570 (9th Cir. 2017) (affirming dismissal of claims against trustee), *cert. denied*, 138 S. Ct. 504 (2017). The function of the trustee is to hold legal title to the borrower's property as security for the obligations owed to the lender. NRS 107.020 ("Transfers in trust of any estate in real property may be made . . . to secure the performance of an obligation or the payment of any debt"); *Snyder v. HSBC Bank, USA, N.A.*, 873 F. Supp. 2d 1139, 1148 (D. Ariz. 2012) (borrower "transfers legal title in real property to the trustee (legal title holder) as security for the performance . . . of obligations to the beneficiary (lender)"). The trustee is empowered either to re-convey legal title to the borrower upon full satisfaction of the secured obligation, or to sell the property at auction if the borrower defaults on the obligation. *Siegel v. American Sav. & Loan Ass'n*, 258 Cal. Rptr. 746, 747 (Ct. App. 1989) ("The trustee holds title to the property until the debt is repaid, at which time the title held by the trustee is reconveyed to the borrower"); *Ho*, 858 F.3d at 570 (trustee "is authorized to sell the property if the debtor defaults").

Thus, as the district court properly found, "[t]he deed of trust is, by itself, a protected property right and confers legal title to the subject property upon the trustee, which title is a real property interest in the subject property." [AA005651, ¶ 12]

The office of trustee, like the entire deed of trust system, is created by statute. NRS Chapter 107 prescribes the contours of trustee activity exhaustively. Under Chapter 107, the trustee is not a typical common-law trustee with fiduciary obligations to the beneficiary. Rather, the trustee serves as a type of "common agent" of the lender and the borrower, strictly for the purposes enumerated in the deed of trust. NRS 107.028(6) ("The trustee does not have a fiduciary obligation to the grantor or any other person having an interest in the property which is subject to the deed of trust"); *id.* (trustee "shall act impartially and in good faith with respect to the deed of trust and shall act in accordance with the laws of this State"); *Harlow v. MTC Fin., Inc.*, 865 F. Supp. 2d 1095, 1100 (D. Nev. 2012) (trustee viewed "as a common agent for the grantor and the beneficiary"). The legislature also has clarified that the beneficiary of a deed of trust may not serve as its own trustee. NRS 107.028(2). In other words, the deed of trust *must* be a three-party instrument; there is no way to avoid engaging the services of a qualified trustee.

Having created the *sui generis* office of trustee, the legislature is privileged

to determine who may hold that office. As the district court correctly recognized, "NRS 107 is not silent on licensing." [A005651, ¶ 11] The legislature made that determination in NRS 107.028, which adopts a broad list of 10 credentials one may possess in order to serve as trustee. NRS 107.028 provides 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;
>
> (c) A person licensed pursuant to chapter 669 of NRS;
>
> (d) A domestic or foreign entity which holds a current state business license issued by the Secretary of State pursuant to chapter 76 of NRS;
>
> (e) A person who does business under the laws of this State, the United States or another state relating to banks, savings banks, savings and loan associations or thrift companies;
>
> (f) A person who is appointed as a fiduciary pursuant to NRS 662.245;
>
> (g) A person who acts as a registered agent for a domestic or foreign corporation, limited-liability company, limited partnership or limited-liability partnership;
>
> (h) A person who acts as a trustee of a trust holding real property for the primary purpose of facilitating any transaction with respect to real estate if he or she is not regularly engaged in the business of acting as a trustee for such trusts;
>
> (i) A person who engages in the business of a collection agency pursuant to chapter 649 of NRS; or

> (j) A person who engages in the business of an escrow agency, escrow agent or escrow officer pursuant to the provisions of chapter 645A or 692A of NRS.

NRS 107.028(1). Among those that qualify are *any* "domestic or foreign entity which holds a current state business registration issued by the Secretary of State pursuant to chapter 76 of NRS." NRS 107.028(1)(d). Another category in the list is "[a] person who engages in the business of a collection agency pursuant to chapter 649 of NRS." NRS 107.028(1)(i). The disjunctive "or" in the statute separates each of the ten categories of credentials that can be used to qualify as a trustee. NRS 107.028(1). Contrary to the position advanced by Plaintiffs (at 41-44, 60-63), the use of the disjunctive "or" conclusively demonstrates that a trustee need *not* possess a collection agency license. *Anderson v. State*, 109 Nev. 1129, 1134, 865 P.2d 318, 321 (1993) (use of the disjunctive signals "one or the other, but not necessarily both" of the indicated possibilities). Had the legislature intended to require trustees to obtain a collection agency license, Chapter 107 would have included only one category of qualified trustee, not 10.

Holding that a trustee must possess a collection agency license would render meaningless the statutory provisions making nine *other* credentialed categories sufficient to qualify a person as trustee. Courts "avoid statutory interpretation that renders language meaningless or superfluous." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011) (refusing to endorse interpretation of statute that

rendered statutory word meaningless). When determining the "plain meaning of a statute," the Court must "read its provisions as a whole, and give effect to each of its words and phrases." *Davis v. Beling*, 128 Nev. Adv. Op. 28, 278 P.3d 501, 508 (2012) (interpreting statute to give effect to the full provision and intent of the statute). Holding that a trustee must possess a collection agency license would impermissibly *eliminate* 90 percent of the statutory language. The Court should look to the plain words of NRS 107.028 to determine that a person need not, in all events, possess a collection agency license to act in the capacity of trustee under a deed of trust. *State v. Beemer*, 51 Nev. 192, 199-200, 272 P. 656, 658 (1928) (when legislative intent is "clear and unambiguous" from "the words employed in the statute in question," a court "is not permitted to search for its meaning beyond the statute itself").

2. The Role of Trustee is Broad.

The legislature's determination that a Chapter 107 trustee need not possess a collection agency license disposes of the case, because Chapter 107 expressly or impliedly authorizes the trustee to perform each and every act alleged in the TAC. While the trustee's responsibilities are not limited to foreclosure, Plaintiffs' allegations of improper conduct relate exclusively to the foreclosure process. [AA004082, ¶ 30] In their Opening Brief (at 3), Plaintiffs contend that affirming the district court's judgment "would invite rogue and foreign collection agencies

to trample Nevadans with no regulatory oversight." This hyperbolic argument and other assertions in the Opening Brief (at 55-56) directly conflict with the extensive statutory framework that sets forth each step of the non-judicial foreclosure process under which trustees act. The trustee begins this process by recording a notice of default and posting notice at the borrower's property. NRS 107.080(2)(c); NRS 107.087(1)(a). The notice of default must describe the borrower's breach of the deed of trust and may give notice that the lender has accelerated the loan balance. NRS 107.080(3)(a). The trustee must include a form by which the borrower may elect to mediate with the lender, and contact information for a person with authority to negotiate a loan modification. NRS 107.086(2)(a)(1), (3). The notice also must include the contact information of the trustee "who is authorized to provide information relating to the foreclosure status of the property." NRS 107.080(2)(c), NRS 107.087(1)(b)(2).

The trustee also has statutory authority to send the borrower a written statement containing the following information: (i) the amount of payment required to correct the deficiency and reinstate the underlying obligation, as of the date of the statement; (ii) the amount in default; (iii) the principal amount of the obligation secured by the deed of trust; (iv) the amount of accrued interest and late charges; (v) a good faith estimate of all fees imposed in connection with the exercise of the power of sale; and (vi) contact information for obtaining the most

current amounts due and a local or toll-free telephone number where the borrower may obtain the most current amounts due. NRS 107.080(2)(c)(3). This statement is required by statute to contain the ominous language, "NOTICE - YOU ARE IN DANGER OF LOSING YOUR HOME!" NRS 107.085(3)(b). The trustee must also send a similar notice to guarantors and sureties of the debt, who have no interest in the property itself. NRS 107.095.

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

The trustee has authority to sell the property if the borrower fails to reinstate the loan or otherwise cure the breach of the deed of trust. NRS 107.080(1) ("a

power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation"). Both before and after the sale, the trustee has broad statutory authority to protect the beneficiary's interests. Prior to any sale, the trustee has the right to file a civil action "for the appointment of a receiver" of the trust property. NRS 107.100(1). The trustee may also intervene, and prosecute or settle, "any suit or action affecting the conveyed premises." NRS 107.030 (Uniform Covenant 3). After a sale, the trustee has authority to collect the proceeds and, on behalf of the beneficiary, to apply the proceeds to the cost of the sale, the trustee's fees, and to satisfy the secured obligation. *Id.* (Uniform Covenant 7). If the high bidder at the sale fails to pay the amount bid, the trustee may sue to "recover the amount of the loss, with costs, *for the benefit of the party aggrieved*." NRS 107.083(2) (emphasis added). Chapter 107 even contemplates that the trustee may become the holder of the note or otherwise be "entitled to enforce the obligation or debt secured by the deed of trust." NRS 107.080(2)(c)(2). If the trustee incurs costs performing any of its duties, the trustee may demand that the borrower pay to the trustee all sums necessary to cover those costs. NRS 107.030 (Uniform Covenant 4).

Importantly, the rights expressly granted to the trustee by Chapter 107 are not the limit of the trustee's powers. "It is the universal rule of statutory construction that wherever a power is conferred by statute, everything necessary to

carry out the power and make it effectual and complete will be implied." *Checker, Inc. v. Public Serv. Comm'n*, 84 Nev. 623, 629-30, 446 P.2d 981, 985 (1968) (powers expressly granted to state agency supplemented by implication). "The grant of an express power is always attended by the incidental authority fairly and reasonably necessary or appropriate to make it effective . . . . That which is clearly implied, is as much a part of the law as that which is expressed." *Id.* at 630, 446 P.2d at 985 (quoting *Juzek v. Hackensack Water Co.*, 225 A.2d 335, 342 (1966)).

Courts in other jurisdictions have applied this "universal rule" of construction to trustees under deeds of trust. *E.g.*, *Kriv v. Northwestern Sec. Co.*, 24 N.W.2d 751, 755 (Iowa 1946) (trustee has a right to bid the property at the sale that is "implied by the power to foreclose"), *aff'd*, 29 N.W.2d 865 (1947); *Union Guardian Trust Co. v. Building Sec. Corp.*, 276 N.W. 697, 699 (Mich. 1937) (trustee has the "implied power" to purchase the property at the sale).

3. The Role of Trustee Encompasses All of the Acts Alleged in the TAC.

Taken together, the foregoing statutory provisions and their natural implications encompass all of the acts alleged in the TAC. The district court properly held that "[t]he acts allegedly performed by Defendants in the Third Amended Complaint are authorized by the deed of trust and the plain language of NRS Chapter 107" and "are acts taken by Defendants within the scope of the non-

judicial foreclosure process." [A005652, ¶ 14] As a general matter, the Court should take note that Chapter 107 grants the trustee authority to file lawsuits against the borrower and others—which is clearly more analogous to "claim collection" than anything alleged in the TAC. *See* NRS 107.030(3). The legislature has expressly authorized these activities, and whether or not the trustee possesses a collection agency license, the acts alleged in the TAC are permissible.

Specifically, Plaintiffs first allege that Defendants collected money from borrowers to reinstate or pay off defaulted loans in foreclosure. [AA004082, ¶ 30(a), (b), (d), (f)] The power to do so is implied by the trustee's statutory status as "common agent" of the beneficiary and the borrower. The trustee has express statutory authority to communicate the amount of the defaulted debt and "the foreclosure status of the property," to receive the proceeds if the property goes to sale, and to apply the proceeds to the borrower's debt. NRS 107.080(2)(c)(3), 107.087(1). This statutory scheme contemplates that the borrower might send a reinstatement check to the trustee with which the borrower has communicated about the sale, and the trustee, as "common agent" of both parties, logically would have authority to receive the check, just as the trustee would had the sale occurred. It makes no difference to the borrower if a check is written to the trustee or the beneficiary, so long as the funds are properly applied and the sale is cancelled. If the trustee mishandles the check, the borrower has legal remedies under the

statute. NRS 107.028(7); NRS 107.080(8)(a) (providing for treble damages against the trustee).[5]

Second, Plaintiffs allege that Defendants transferred payments received from the borrower, or proceeds received from the auction sale, to the lender to apply to the defaulted loans. [AA004082, ¶ 30(g), (h)] This is encompassed by express statutory language. *See* NRS 107.030 (Uniform Covenant 7) (trustee may apply sale proceeds to the defaulted debt).

Third, Plaintiffs allege that Defendants performed "acquisition of the security for the defaulted debt." [*Id.*, ¶ 30(h)] Taken literally, this allegation is incorrect because the trustee cannot acquire the property at a trustee's sale. NRS 107.081(1) ("The agent holding the sale must not become a purchaser at the sale or be interested in any purchase at such a sale"). If Plaintiffs mean to argue that

[5] Plaintiffs contend (at 8, 12, 21-23) that the inclusion of what is referenced in the trade as a "mini-Miranda" warning compels the Court to find Defendants are operating as debt collectors. The district court correctly rejected this argument, finding "the so-called 'mini-Miranda' warnings . . . do not transform trustees into collection agencies under Nevada law." [AA005653, ¶ 17 ("holding the mini-Miranda 'disclaimer isn't sufficient to show that ReconTrust is a debt collector' and finding '[d]ebt collector isn't an elective category. It's determined objectively, based on the activities of the entity in question"') (quoting *Ho v. ReconTrust Co., N.A.*, 840 F.3d 618, 623 n.7 (9th Cir. 2016))] In addition, Plaintiffs' own cited authority supports the district court's determination. *E.g.*, *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 386 n.3 (7th Cir. 2010) (recognizing inclusion of mini-Miranda warning "does not automatically trigger the protections of the FDCPA, just as the absence of such language does not have dispositive significance").

Defendants engaged in claim collection merely by selling the property, then this is within the statutory authority of a trustee. NRS 107.080(1) (conferring power of sale on trustee).

Fourth, Plaintiffs allege that Defendants pursued claim collection "through a forbearance agreement" or "through loan modification agreements." [AA004082, ¶ 30(c), (e)] It is not clear what conduct Plaintiffs challenge here. Forbearance and modification are alleged specifically only by two sets of plaintiffs. Plaintiffs Camilo and Ana Martinez allege that Defendant QLS communicated that their lender was interested in pursuing forbearance or modification, but that foreclosure proceedings would continue unless such an agreement were reached. [A004067-68, ¶ 2] Plaintiff Bijan Laghaei alleges that Defendant MTC told him not to be concerned about the foreclosure notice because the lender was apparently going to modify Mr. Laghaei's loan. [A004078, ¶ 16] These statements are within the trustee's authority to communicate "the foreclosure status of the property." NRS 107.087(1)(b)(2).

Finally, Plaintiffs assert (at 21) that "[e]ven the basic foreclosure process of filing default notices constitutes debt collection under Nevada law." [*See also* AA004066-72, ¶¶ 1-7; AA004073-77, ¶¶ 9-13, 15; AA004092-98; AA004103-11; AA004118-127; AA0004131-33; AA004149-50; AA004156-58; AA004164-66; AA004169-72; AA004177-80; AA004201-204] NRS 107 explicitly authorizes

trustees to begin the foreclosure process by publicly recording notices of default. NRS 107.080(2)(c). Were this "basic foreclosure process" an act of claim collection, none of the nine other credentialed categories enumerated by the legislature would permit one to act in the capacity of trustee. This is not what the legislature intended.[6]

The Court may dispose of this case without even considering whether the acts alleged in the TAC constitute "claim collection" under NRS Chapter 649. The legislature has permitted any trustee to perform these acts, and has clearly and unambiguously provided that a person may act in the capacity of trustee without possessing a collection agency license. Accordingly, Plaintiffs impermissibly ask the Court to declare unlawful what the legislature has expressly authorized. This Court should affirm the judgment of the trial court. [AA005652, ¶ 15 (holding "Defendants are not required to obtain a collection agency license or certificate of registration under NRS Chapter 649 in order to perform the acts alleged in the Third Amended Complaint because they fall within the ambit of NRS Chapter 107")]

[6] Plaintiffs' position is at odds with the concession they made before the district court. [AA005653, ¶ 18 ("In addition, counsel for Plaintiffs conceded at oral argument that, if a trustee takes no action with respect to a borrower other than issuing a notice of default or breach or exercising the power of sale, [then] the trustee's actions are 'within 107'")]

4. Plaintiffs' Impartiality Argument is Unavailing.

In their Opening Brief (at 45-55, 59-60), Plaintiffs make much of a trustee's duty of impartiality and assert that Defendants violated this duty by acting as agents of the lenders. This argument is untethered to any allegations contained in the TAC and thus is not properly before the Court either at the NRCP 12(b)(5) stage or on appeal. *See, e.g.*, *Ferlingere v. Burkholder*, No. 69125, 2016 WL 1394341, at *1 (Nev. Ct. App. Mar. 29, 2016) (sustaining dismissal despite evidence offered by the plaintiff outside the pleadings because the complaint itself did not provide defendants with "fair notice of the nature and basis of a legally sufficient claim") (citation omitted). Plaintiffs cannot informally supplement their complaint now—nearly seven years after the Defendants' non-judicial foreclosure activities directed at Plaintiffs—to allege new causes of action for an alleged violation of NRS 107. Any violations of NRS 107 must be timely asserted in the district court under the procedure prescribed by NRS 107. *See, e.g.*, NRS 107.080(5), 107.560.[7]

[7] In their Opening Brief (at 48-49), Plaintiffs launch a number of allegations specifically directed at CRC in an attempt to demonstrate that CRC abdicated its responsibility to remain impartial. The basis of CRC's alleged impartiality violation is that CRC was the alter ego of lender JP Morgan Chase, N.A. ("Chase"). However, the TAC is devoid of allegations related to Chase or any alter ego/instrumentality relationship between CRC and Chase. [AA004081, ¶ 24] Additionally, the TAC alleges that CRC performed a single act of wrongdoing—that CRC recorded a notice of default on Ms. Kallen's property on January 1,

Moreover, even if Plaintiffs could properly assert such a claim, it fails on the merits. As addressed in Section III(A)(1), *supra*, Defendants are obligated to act as common agents of the borrower and the lender, and—as the foregoing statutes make clear—this role necessarily includes taking *some* direction from the lender. Moreover, NRS 107.028(6) provides a presumption that a trustee has acted impartially and in good faith if the trustee acts in compliance with the provisions of NRS 107.080. This presumption applies here inasmuch as Plaintiffs do not allege that Defendants violated any provision of NRS 107.080.[8]

Plaintiffs' heavy reliance on *Klem v. Washington Mut. Bank*, 295 P.3d 1179 (Wa. 2013) (at 45-47), does not and cannot save their claims against Defendants for a number of reasons. *Klem* considered whether a trustee's decision to defer to the lender on whether to postpone a foreclosure sale constituted an unfair or deceptive trade practice. *Id.* at 1188. This is a key distinction because Plaintiffs

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2011. [AA004075, ¶ 11] This act predates the amendment to NRS 107.028 that introduced the impartiality language on which Plaintiffs rely. A.B. No. 273, § 15, 76th Leg., 2011 Sess. (Nev. 2011) ("This act becomes effective on October 1, 2011"). Thus, there are no allegations against CRC in the TAC that could be construed as violations of Chapter 107, even under the theory now espoused by Plaintiffs.

[8] Plaintiffs contend (at 53) that "Defendants are substitute trustees installed after default, for the specific purpose of debt collection." [*See also* Opening Brief at 3] This is demonstrably false, as CRC was the original trustee listed in the deed of trust that Ms. Kallen executed and was identified to perform foreclosure services in the event Ms. Kallen defaulted on the mortgage securing her deed of trust. [AA000196-97] In addition, NRS 107 authorizes the appointment of new trustees and public recording of substitution of trustees. NRS 107.028(4), (5).

did not assert a claim for deceptive trade practices, and there are no allegations (in the TAC or otherwise) that any Defendant engaged in similar conduct against any Plaintiff.

Moreover, Plaintiffs' assertion that *Klem* is applicable to (or instructive on) Nevada law is directly undercut by Plaintiff's own acknowledgement (at 46) that Washington law differs significantly from Nevada law in that Washington law *does* impose a fiduciary duty on trustees, whereas Nevada law does not. Finally, the court in *Klem* made clear that any violation of a trustee's duty of impartiality results in a void sale, having title quieted, or exposing a trustee to a deceptive trade practices claim. *Klem*, 295 P.3d at 1188-89. Plaintiffs seek no such relief (and many cannot, as they remain in their homes)—instead, they request monetary damages that have no connection to any alleged harm sustained. As such, *Klem* is inapplicable and cannot be used to bolster Plaintiffs' failed claims against Defendants.

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

Contrary to the assertions in the Opening Brief (at 20-32, 39-40), analysis of the collection agency statutes in NRS Chapter 649 similarly demonstrates that the legislature did not intend to classify all Chapter 107 trustees as "collection agencies" that must possess a license from the FID Commissioner. As the district

court found, "NRS 649 recognizes the difference between debt collection and the exercise of real property interests under deeds of trust." [AA005651, ¶ 13]

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

Foreclosure of an assessment lien by a "community manager" is the only non-judicial foreclosure act referenced in Chapter 649. NRS 649.020(3)(a). The district court correctly found that, "[b]y including this special addendum, the legislature expressed both its understanding that non-judicial foreclosure is not claim collection and its intention to make only one type of non-judicial foreclosure subject to collection agency regulation." [AA005651-52, ¶ 13 (citing *Cramer v. State Dep't of Motor Vehicles*, 126 Nev. 388, 394, 240 P.3d 8, 12 (2010) (applying presumption that "the expression of one thing is the exclusion of another") (citations omitted))] The district court properly reasoned that, "[u]nlike a trustee under a deed of trust, a community manager foreclosing an assessment lien does not own or have a real property interest in the common-interest community or condominium hotel association." [A005652, ¶ 13] Moreover, it is not surprising that "community managers" are specially included in NRS 649 because "community managers" are not subject to the type of extensive regulation that

governs trustees.[9]

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

A "collection agency" is a person "engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in the collection of or in soliciting or obtaining in any manner the payment of a *claim* owed or due or asserted to be owed or due to another." NRS 649.020(1) (emphasis added). A "claim" is "any obligation for the payment of money or its equivalent that is past due." NRS 649.010.

Under these definitions, Plaintiffs' arguments have no merit because the object of a non-judicial foreclosure is to enforce a lien against real property. Real property is not money or the equivalent of money. *E.g.*, *Stoltz v. Grimm*, 100 Nev. 529, 533, 689 P.2d 927, 930 (1984) (real property "unique"); *Baroi v. Platinum Condo. Dev., L.L.C.*, 874 F. Supp. 2d 980, 984 (D. Nev. 2012) (explaining that

[9] Plaintiffs purport (at 26-27) to point to the legislative history of NRS 649, but Plaintiffs' cited authority concerns real estate brokers, barbers, cosmetologists, and occupational licensing (and not NRS 649). Even if the cited authority was what Plaintiffs purported it to be, legislative history is not to be considered where the meaning of the statute is clear. *State v. State of Nev. Emps. Ass'n, Inc.*, 102 Nev. 287, 289-90, 720 P.2d 697, 699 (1986) (holding that unambiguous plain language of a statute obviates the need to consult the legislative history). Moreover, even if the Court were to consider the language purportedly quoted by Plaintiffs, it does not indicate that non-judicial foreclosure trustees acting in accordance with a deed of trust and operating under the regulatory framework of NRS 107 are subject to NRS 649.020.

damages are often an inadequate remedy in real estate transactions because real property is unique). Further, because the borrower, in signing the deed of trust, *already conveyed* title to the trustee, the trustee does not "collect" or "obtain" anything from the borrower through the sale. Thus, pursuing non-judicial foreclosure through the required statutory procedures is not the collection of a "claim" under NRS Chapter 649.

To be clear, Plaintiffs have alleged that Defendants did more than simply administer a trustee's sale. But as described above, all of the alleged conduct was incidental to the sale and a mandatory part of the statutory foreclosure process. The trustee's purpose in performing such acts is not to obtain payment of a claim, but rather to conduct a trustee's sale that will be *valid* under the statute. Part of the mandatory statutory procedure involves communications about the amount of the debt and the foreclosure status of the property, and these communications may very well inspire the borrower to make a payment to the trustee or the beneficiary. That does not change the fact that the purpose of the communication is to validly enforce a lien as prescribed by statute.[10]

[10] Practically every Nevada state and federal trial court to have considered these issues have both adopted and espoused this view. *See Quality Loan Serv. Corp. v. State*, No. 12A657580, 2013 WL 6911859, at *2 (Nev. Dist. Ct. Jan. 3, 2013) (reversing FID administrative decision requiring trustees to possess a collection license; "the exercise of the power of sale under a Deed of Trust is not the collection or solicitation of payment of a claim"); *Padilla v. PNC Mortg.*, No.

In their Opening Brief, Plaintiffs cite no cases holding to the contrary. Instead, Plaintiffs rely (at 20-23, 33-36) primarily on cases from other jurisdictions interpreting the federal Fair Debt Collection Practices Act ("FDCPA"). The district court correctly rejected these cases. [AA005653, ¶ 17 n.1 ("The Court also finds unpersuasive the various FDCPA cases cited by Plaintiffs from beyond Nevada and beyond the Ninth Circuit")] These cases are inapposite because they do not address NRS Chapters 107 or 649, nor do they hold that a trustee must

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3:11-cv-0326-LRH-VPC, 2011 WL 3585484, at *4 (D. Nev. Aug. 15, 2011) ("it is well established that non judicial foreclosures are not an attempt to collect a debt under the Fair Debt Collection Practice Act and similar state statutes"); *Erickson v. PNC Mortg.*, No. 3:10-cv-0678-LRH-VPC, 2011 WL 1626582, at *3 (D. Nev. Apr. 27, 2011) (dismissing deceptive trade practices claim and holding that "[a] foreclosure trustee does not have to be licensed to record a notice of default because a foreclosure trustee is not a debt collector"); *Smith v. Community Lending, Inc.*, 773 F. Supp. 2d 941, 944 (D. Nev. 2011) (dismissing deceptive trade practices claim based on "the allegation that the foreclosing entities did not have a 'collector's license'" because foreclosure does not constitute a debt collection activity); *Camacho-Villa v. Great W. Home Loans*, No. 3:10-CV-210-ECR-VPC, 2011 WL 1103681, at *5 (D. Nev. Mar. 23, 2011) (concluding that initiating foreclosure in accordance with a deed of trust does not constitute debt collection); *Karl v. Quality Loan Serv. Corp.*, 759 F. Supp. 2d 1240, 1248 (D. Nev. 2010) (rejecting deceptive trade practices claim for allegedly conducting debt collection activities in Nevada without the requisite license by recording a notice of default because QLS "was not acting as a debt collector [and] did not need to be licensed as one"), *aff'd*, 553 F. App'x 733 (9th Cir. 2014); *Maves v. First Horizon Home Loans*, No. 3:10-CV-00396-LRH-VPH, 2010 WL 3724264, at *3 (D. Nev. Sept. 15, 2010) (dismissing deceptive trade practices claim under NRS 598.0923(1) against trustee for alleged failure to have a collection agency license because "[a] foreclosure trustee does not have to be licensed to record a notice of default because a foreclosure trustee is not a debt collector"), *aff'd*, 461 F. App'x 636 (9th Cir. 2011).

obtain a collection agency license under the laws of any state (the FDCPA is not a licensing statute). Whether an entity must possess a particular license under the laws of a particular state is a different question than whether an entity is a "debt collector" under federal law subject to the requirements of the FDCPA.

Worse, Plaintiffs ask the Court to ignore Nevada law in favor of a *minority* interpretation of the FDCPA that the Ninth Circuit Court of Appeals definitively rejected in *Ho*. In *Ho*, the Ninth Circuit held that non-judicial foreclosure is not the collection of a "debt" (the federal equivalent of a "claim" under Nevada law) because "[t]he object of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower." *Id.* at 571. The Ninth Circuit did not take "foreclosure" narrowly to mean merely the act of selling the property, but rather any "actions taken to facilitate a non-judicial foreclosure" (such as the statutory conduct alleged in this case). *Id.* at 572. If administering the sale itself does not make the trustee a "debt collector," then the trustee "must be able to maintain that status when it takes the statutorily required steps to conduct the trustee's sale." *Id.* at 573. Any other holding would divorce the trustee's conduct from its context. *Id.* That such conduct may induce the borrower to pay the debt is irrelevant, because "that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings actually commence." *Id.* at 572.

In rejecting the plaintiff's FDCPA claim in *Ho*, the Ninth Circuit expressly

affirmed what it called the "leading case" of *Hulse v. Ocwen Fed. Bank FSB*, 195 F. Supp. 2d 1188 (D. Or. 2002). *Hulse*, like *Ho*, followed the same reasoning as the district court in this case. *Hulse*, 195 F. Supp. 2d at 1204; *Ho*, 858 F.3d at 572. The Ninth Circuit also expressly declined to follow the two cases Plaintiffs heavily rely upon (at 21, 34-35), *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013), and *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), finding them "unpersuasive" and not sufficiently attuned to "the nuances of [state] foreclosure law." *Ho*, 858 F.3d at 572, 574. The Ninth Circuit correctly observed that the trustee's activities that are required by statute "were designed to *protect* the debtor. They are entirely different from the harassing communications that the FDCPA was meant to stamp out." *Id.* at 574. The same is true of the acts allegedly performed by Defendants in this case pursuant to their statutory authority as trustees.

The Tenth Circuit has correctly observed that the law as set forth in *Ho* is the "majority position" in the federal courts. *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221 (10th Cir. 2018) (rejecting FDCPA claim against enforcer of security interest). Plaintiffs attempt to avoid these cases by citing (at 20-23) inapposite cases. These cases involved demands by law firms to pay money, unconnected

with any statutory foreclosure process;[11] debt collectors who initiated judicial proceedings to obtain a personal judgment against the debtor for the payment of money;[12] one case involving a claim against a mortgage *servicer*;[13] and two *state* cases that have interpreted the FDCPA *inconsistently* with the federal court of appeals that covers the particular state.[14] None of Plaintiffs' cases is pertinent here.

Plaintiffs ask this Court to engraft a minority interpretation of a federal statute onto a Nevada state licensing law. As recognized in *Ho*, Plaintiffs' approach is particularly inappropriate because the United States Supreme Court has specifically instructed lower courts *not* to construe the FDCPA in a manner that would interfere with "traditional areas of state concern," such as foreclosure and business licensure. *Ho*, 858 F.3d at 576. This Court need not, and should not,

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[11] *Mashiri v. Epstein Grinnell & Howell*, 845 F.3d 984 (9th Cir. 2017) (cited at 36); *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012) (cited at 20-21); *Piper v. Portnoff Law Assocs. Ltd.*, 396 F.3d 227 (3d Cir. 2005) (cited at 22).

[12] *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015) (cited at 35); *Romea v. Heiberger & Assocs.*, 163 F.3d 111 (2d Cir. 1998) (cited at 22); *Kaltenbach v. Richards*, 464 F.3d 524 (5th Cir. 2006) (cited at 22); *Rowe v. Educational Credit Mgmt. Corp.*, 559 F.3d 1028 (9th Cir. 2009) (cited at 22).

[13] *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010) (cited at 22).

[14] *Shapiro & Meinhold & Zartman*, 823 P.2d 120 (Colo. 1992) (cited at 33) (contradicting interpretation of Tenth Circuit); *Alaska Trustee, LLC v. Ambridge*, 372 P.3d 207 (Alaska 2016) (cited at 34) (contradicting interpretation of Ninth Circuit).

look any further than the simple definition of "claim" under Nevada law to hold that statutory conduct undertaken to facilitate a valid trustee's sale is not "claim collection" within the meaning of NRS Chapter 649. [A005652, ¶ 15 ("Like our sister court's decision in *Quality Loan*, this Court finds that enforcing a security interest in real property through the non-judicial foreclosure process as alleged in the Third Amended Complaint and as outlined by NRS Chapter 107 is not the collection or solicitation of payment of a claim. Accordingly, Defendants are not required to obtain a collection agency license or certificate of registration under NRS Chapter 649 in order to perform the acts alleged in the Third Amended Complaint because they fall within the ambit of NRS Chapter 107")][15]

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

Finally, any lingering doubt concerning the legislature's intention after the foregoing independent analyses of Chapter 107 and Chapter 649 is dispelled by considering the interplay between the two regulatory regimes. Contrary to Plaintiffs' position (at 60-63), a side-by-side discussion, presented in the next two sections, conclusively demonstrates that the legislature never intended to regulate

[15] At page 32 of the Opening Brief, Plaintiffs also present a string citation of ten state cases. The purpose of the citation is not clear because the citations are presented with no analysis, and because multiple citations are incorrect and do not correlate to the cited case. A review of the cases with correct citations reveals that none of the cited cases addresses trustees or the non-judicial foreclosure process.

non-judicial foreclosure in Nevada using *both* chapters.

1. The Legislature Has Preempted FID Regulation of Trustees.

"Whenever a legislature sees fit to adopt a general scheme for the regulation of a particular subject, local control over the same subject, through legislation, ceases." *Lamb v. Mirin*, 90 Nev. 329, 332, 526 P.2d 80, 82 (1974) (municipal taxicab regulations preempted by "comprehensive taxicab regulatory scheme" created by state legislature); *City of Reno v. Saibini*, 83 Nev. 315, 319, 429 P.2d 559, 561 (1967) ("the legislature may choose to preempt the entire field of regulation"). Any body of government that "obtain[s] [its] authority from the legislature" is subject to legislative preemption. *Falcke v. County of Douglas*, 116 Nev. 583, 588, 3 P.3d 661, 664 (2000) (overturning regulation). This principle has been extended to preclude action by the district courts that encroaches upon a comprehensive legislative scheme. *Crowley v. Duffrin*, 109 Nev. 597, 606, 855 P.2d 536, 542 (1993) (overturning judicial rule that constituted an "unauthorized and an invalid encroachment on a lawfully enacted state statute").

As detailed in Part III.A, *supra*, the Nevada Legislature has created a comprehensive statutory scheme for the regulation of trustees, the deed of trust system, and the non-judicial foreclosure process. The legislature has occupied the entire field of non-judicial foreclosure; every aspect of the process is created and

regulated by statute. *See* NRS 107.080 *et seq.*; *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 513, 286 P.3d 249, 255 (2012) ("the trustee may sell the property to satisfy the obligation only after certain statutory requirements are met"); *In re Grant*, 303 B.R. 205, 210 (Bankr. D. Nev. 2003) ("Foreclosure procedures must be followed or the sale will be invalid").

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

capacity as trustee [NRS 107.029].[16]

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

Involving the FID in Nevada's comprehensive foreclosure regulation scheme would create inconsistencies, unanticipated conflicts, and jurisdictional disputes among the legislature, the courts, and the FID. The Commissioner will become the sole arbiter of who may serve as trustee, and may impose his own

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

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

This concern is not limited to what the Commissioner might do in the future. Problematic inconsistencies already exist. For example, NRS 649.375 creates, among other things, restrictions on a collection agency's right to assess interest and fees, which are not part of the current foreclosure regulatory scheme or the deed of trust. *See* NRS 649.375(2). The same statute also prohibits a collection agency from publishing or posting "any list of debtors." NRS

649.375(7). Publishing and posting information about a sale, which necessarily reveals the identity of the debtor, is a required part of the foreclosure process. *See* Part III.A, *supra*. Chapter 107 also gives trustees immunity from liability when they rely in good faith upon information provided by the beneficiary. *See* Part III.A, *supra*. A collection agency does not enjoy the same immunity. *See Kerwin v. Remittance Assistance Corp.*, 559 F. Supp. 2d 1117, 1125 (D. Nev. 2008) (finding that "though reliance on information provided by creditors can excuse the debt collector from errors . . . the validity of this reliance depends on whether the creditor has provided accurate information in the past") (citations omitted). Collection agencies have obligations to respond to debtor disputes concerning the debt and to "verify" the debt, an obligation trustees do not have. NRS 649.332.

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

2. The Purpose of Chapter 649 Does Not Support Extending Its Reach to Trustees.

Even if Chapter 649, as applied to trustees, were not preempted by Chapter 107 (it is), the conflicts and inconsistencies just described would support a finding that the legislature did not intend for the Commissioner to regulate trustees as "collection agencies." The Court must construe Chapter 649 in light of its intended purposes. *E.g.*, *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001) (statutes should be read "in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results"). The legislature sought in regulating collection agencies to "[b]ring licensed collection agencies and their personnel under more stringent public supervision" and "[d]iscourage improper and abusive collection methods." NRS 649.045(2)(a), (c). The application of Chapter 649 to trustees under deeds of trust does not further this policy. The trustee under a deed of trust is already extensively regulated and subject to severe statutory liabilities for misconduct. There is no need for "more stringent public supervision" of trustees.

Further, because the office of trustee exists solely by virtue of statute, has rights and liabilities created by statute, and is required by statute to serve for the limited purpose of releasing or enforcing a trust deed, the role of trustee is

inherently distinct from that of a loan servicer or debt collector.[17] Debt collectors do not have contracts with the debtor regulating their rights and duties *vis-à-vis* the debtor. But Trustees are parties with the borrower to the deed of trust. Trustees are entitled to a fee regardless of whether the borrower pays the lender or not. *E.g.*, NRS 107.030 (Uniform Covenant 4) (trustee may charge costs to borrower). While debt collectors have wide latitude in the methods they utilize to increase collections, trustees must adhere to strict contractual and statutory procedures for each and every step they take in the non-judicial foreclosure process. [*See* Part III.A, *supra*] These facts, along with the inconsistencies and jurisdictional conflicts described, further demonstrate that the legislature never intended to subject trustees to the jurisdiction of the FID—doing so would create improper policy.[18]

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

[18] The district court found that, "under multiple statutes, enforcement of security interests in real property does not constitute doing business in the State of Nevada." [A005652, ¶ 16] Defendants do not rely on this as a basis for affirming the district court's dismissal of the TAC. Although the statutes at issue state that enforcement of a security interest is among those activities that do not constitute doing business in the state of Nevada, they also state that this is not a defense in civil proceedings involving alleged violation of the deceptive trade practices act. NRS 80.015(1)(h), 4(b); NRS 86.5483(1)(h), 4(b); NRS 87A.615(1)(h), 4(b).

IV. EVEN IF DEFENDANTS WERE REQUIRED TO BE LICENSED UNDER NRS CHAPTER 649, PLAINTIFFS LACK A COGNIZABLE INJURY, DEFEATING THEIR CLAIMS AS A MATTER OF LAW.

Although the district court did not need to consider Defendants' other arguments in reaching its decision, there are other independent grounds justifying the court's order dismissing all claims in the TAC as a matter of law. The Court should affirm dismissal on these grounds as well. *Rosenstein*, 103 Nev. at 575, 747 P.2d at 233 ("this court will affirm the order of the district court if it reached the correct result, albeit for different reasons"); *see also Ledbetter v. State*, 122 Nev. 252, 260, 129 P.3d 671, 677 (2006) ("[W]e will affirm a district court's correct decision . . . even if it gave an incorrect reason for doing so").

Plaintiffs' premise is that, if Defendants pursued unlicensed claim collection (they did not), then the fees Defendants allegedly received for that service are "illicit" and must be disgorged.[19] This premise is not supported by Nevada law.

Despite this language, courts in civil proceedings have held that entities enforcing security interests are not doing business in the state of Nevada. *E.g.*, *Bruce v. Homefield Fin., Inc.*, No. 2:10-CV-2164-KJD-PAL, 2011 WL 4479736, at *2 (D. Nev. Sept. 23, 2011). Although the Court may have its own view as to the impact of these statutes, they are not necessary to conclude that Plaintiffs' claims here fail as a matter of law. The other reasoning advanced by the district court and Defendants here provides ample basis for this Court to affirm.

[19] *See* AA004081-82, ¶¶ 27, 29 (Defendants allegedly "received illicit fees and costs"); AA04086, ¶ 36(d) (defendants allegedly received "illegal gains from pursuing illegal debt and/or claim collection agency activities against Plaintiffs"); AA004088, ¶ 42 (defendants "received illicit revenue and/or profits"); AA004090, ¶ 52 ("each Defendant was unjustly enriched by virtue of the fact that it received a

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

A. Defendants' Alleged Fees Are Not Illicit.

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

> A comparable provision [barring compensation] does not appear in Chapter 534 relating to water well drillers. The penalty therein provided is fine, imprisonment, or both. NRS 534.190. When the [licensing] statute provides for sanctions other than forfeiture of the

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

> right to sue on the contract, an unlicensed person is not precluded from maintaining an action to recover on the contract.

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

The determinative fact in these cases was that the licensing statutes at issue do not prohibit an unlicensed person from receiving or retaining compensation; rather, they provide for enforcement by means of criminal penalties and fines. *Nevada Equities*, 84 Nev. at 302, 440 P.2d at 123; *Robken*, 84 Nev. at 434, 442 P.2d at 913. There, the Courts distinguished those statutes from other licensing statutes that expressly preclude unlicensed persons from seeking compensation. *See, e.g.*, NRS 624.320 (unlicensed contractor may not "bring or maintain any action in the courts of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter"). As a Nevada federal court has explained, forfeiture of compensation for services rendered "could be enforced only by express

legislative mandate," and "was not intended" as a remedy for failure to procure a license where the legislature did not include it in the statutory scheme. *Martin Bloom*, 389 F. Supp. at 851.

Like the statutes in *Nevada Equities*, *Robken*, and *Martin Bloom*, nowhere does Chapter 649 prohibit an unlicensed collection agency from receiving or retaining compensation for services actually rendered. Rather, just like the statutes in the referenced cases, the sanctions imposed for operating an unlicensed collection agency are administrative fines and criminal penalties (there is no allegation either is appropriate here). NRS 649.435; NRS 649.440. Accordingly, Plaintiffs' theory of injury—and with it, the entire TAC—fails as a matter of law because Chapter 649 does not mandate that Defendants forfeit their alleged compensation.[20]

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

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

A consumer fraud claimant may recover damages only for actual losses *caused* by an act of consumer fraud. NRS 41.600(3)(a) (court may award damages "that the claimant *has sustained*") (emphasis added); *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009) (plaintiff must prove that an act of consumer fraud "caused damage to the plaintiff"); *Goldberg v. Central Credit Mgmt., Inc.*, No. 2:11-cv-00305-MMD-GWF, 2012 WL 6042194, at *4 (D. Nev. Dec. 3, 2012) (fraud claim failed because the plaintiff "has not adequately pled damages" caused by defendant's failure to have a license as a collection agency); *see also Clark Cty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 396, 168 P.3d 87, 96 (2007) (causation is an essential element of a tort claim).

Plaintiffs cannot conceivably connect any hypothetical injury to Defendants' alleged misconduct—collecting claims without a license. Lacking a collection license is not the type of conduct that plausibly could cause a person to suffer damages here. No Plaintiff has alleged, and none can demonstrate, that any Plaintiffs' circumstances today would be any different had Defendants possessed a license, or had a licensed collection agency (rather than Defendants) done the acts that Defendants allegedly performed. The Plaintiffs admittedly defaulted on their deeds of trust. Those deeds of trust and NRS Chapter 107 permit foreclosures to

proceed, regardless of whether the trustee has a license.

C. Nor Were Defendants Unjustly Enriched.

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

Here, Plaintiffs entered into express contracts when they executed the deeds of trust encumbering their property. [AA000259-83; AA000316-494; AA000513-623] The deeds of trust provide for the ability to foreclose and completely govern the lender's right to charge Plaintiffs for certain fees and costs incurred in enforcing its security instrument. [AA000259-83 (at sections 14 and 22 of the deed of trust); AA000316-456 (at sections 14 and 22 of the deeds of trust); AA00457-70 (at sections 8 and 18 of the deed of trust); AA000471-94 (at section 14 and 22 of the deed of trust); AA000513-623 (at sections 14 and 22 of the deeds of trust)] These rights are further protected by statute. NRS 107.077(7) ("A trustee may charge a reasonable fee to the trustor or the owner of the land for services relating to the preparation, execution or recordation of a reconveyance or release pursuant to this section"); NRS 107.030 (Uniform Covenant 4) (trustee may charge costs to borrower). The deed of trust completely governs the relationships among Plaintiffs, Defendants, and the lenders concerning the payment of fees. Consequently, no claim for unjust enrichment is available. *Goodwin v. Executive Trustee Servs., LLC*, 680 F. Supp. 2d 1244, 1255 (D. Nev. 2010) (dismissing claim for unjust enrichment), *aff'd*, *Goodwin v. Countrywide Home Loans Inc.*, 578 F. App'x 688 (9th Cir. 2014).

V. THE COURT SHOULD NOT ENTERTAIN PLAINTIFFS' REQUEST TO AMEND THEIR COMPLAINT.

In a footnote (at 11 n.1), Plaintiffs suggest they should have the opportunity to file yet another amended complaint—which would bring their tally to *six complaints* in this case since initiating suit almost seven years ago. Plaintiffs did not seek leave or request to file a fourth amended complaint before the district court. Accordingly, Plaintiffs waived this issue and the Court should decline consideration of any further amendments to the complaint. *Dubray v. Coeur Rochester Inc.*, 112 Nev. 332, 337 n.2, 913 P.2d 1289, 1292 n.2 (1996) ("because this point was not urged at the proceedings below, this court deems the issue waived on appeal").

RELIEF REQUESTED

For the reasons stated herein, the Court should affirm the district court's judgment in favor of Defendants.

Dated this 9th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 13,384 words.

3. Finally, I hereby certify that 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 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.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 9, 2018, I served a true and correct copy of the foregoing **CALIFORNIA RECONVEYANCE COMPANY'S ANSWERING BRIEF** on counsel by e-mail transmission to the persons listed below:

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