

1           Regardless of the reason for this sea change in the FID's views toward  
2           licensing of trustees, allowing the FID to unilaterally impose such strictures—  
3  
4           particularly retroactively—would have devastating consequences for the State of  
5           Nevada, the financial community and even the citizens of Nevada.

6  
7           IV. CONCLUSION:

8           Accordingly, the UTA respectfully submits that the District Court should  
9           find that a foreclosure trustee need not be licensed as a debt collector or registered  
10           as a foreign collection agent and reverse the Adverse Decision.

11  
12  
13           DATED this \_\_\_\_\_ day of May, 2012

WRIGHT, FINLAY & ZAK, LLP

14  
15  
16           \_\_\_\_\_  
17           Donna Osborn, Esq.  
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23           UNITED TRUSTEES ASSOCIATION  
24  
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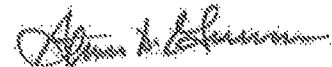
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CLERK OF THE COURT

1 **ORDER**  
2 **PAUL E. LARSEN**  
3 Nevada Bar No. 3756  
4 **LIONEL SAWYER & COLLINS**  
5 1700 Bank of America Plaza  
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9 (702) 383-8845 (Fax)  
10 *Attorneys for Petitioner*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 **QUALITY LOAN SERVICE CORPORATION,**  
14  
15 **Petitioner,**

Case No.: A-12-657580-J  
Dept. No.: XVI

16 **v.**

Date of Hearing: MAY 8, 2012  
Time of Hearing: 9:00 A.M.

17 **STATE OF NEVADA, DEPARTMENT OF**  
18 **BUSINESS AND INDUSTRY, FINANCIAL**  
19 **INSTITUTIONS DIVISION,**

20 **Respondent.**

21 **ORDER ON MOTION TO INTERVENE OF RANDOLPH BARTON AND**  
22 **SCHEDULING ORDER**

23 Randolph Barton's Motion to Intervene having come on regularly for hearing on the 8<sup>th</sup>  
24 day of May 2012, in Department XVI, the Honorable Timothy C. Williams, presiding; Randolph  
25 Barton, not being present but appearing by and through Craig B. Friedberg, Esq., and Geoffrey  
26 L. Giles, Esq., (Mr. Giles appearing telephonically); Respondent, The State of Nevada,  
27 Department of Business and Industry, Financial Institutions Divisions, appearing by and through  
28 its counsel of record, Daniel Ebihara, Esq.; and Petitioner, Quality Loan Service Corporation  
represented by Kristin A. Schuler-Hintz, Esq., and its counsel of record, Paul E. Larsen, Esq.

///

///

05-22-12 13:

1 The Court having read the papers and pleadings filed herein, and having considered the  
2 arguments of counsel, and good cause appearing therefore, does ORDER as follows:

- 3
- 4 1. Randolph Barton's motion to intervene is hereby denied and the notice of intent to  
5 participate is hereby stricken;
- 6
- 7 2. The oral motions to permit the filing of Amicus Curiae Briefs by Randolph Barton  
8 and the United Trustees Association is hereby granted;
- 9
- 10 3. All Amicus Curiae Briefs shall be limited to the record below in compliance with  
11 NRS 233B.135;
- 12
- 13 4. The briefing schedule set forth in NRS 233B.133 is hereby waived and the parties  
14 shall adhere to the following briefing schedule:
- 15
- 16
- 17 a. Appellant, Quality Loan Service Corporation shall file its initial brief on June 4,  
18 2012;
- 19 b. The Amicus Brief by the United Trustees Association is due on June 4, 2012;
- 20 c. Respondent, State of Nevada, Department of Business and Industry Financial  
21 Institutions Divisions, shall file its initial brief on July 6, 2012;
- 22 d. The Amicus Brief by Randolph Barton is due on July 6, 2012;
- 23 e. The Reply Brief of Quality Loan Service Corporation is due on August 6, 2012;
- 24 f. Thereafter the parties shall contact chambers to schedule Oral Argument. In the  
25 event the parties are unable to schedule Oral Argument, the parties will appear at  
26 a status conference on August 9, 2012, at 9:00 a.m., in Department XVI to  
27 schedule the matter for hearing.

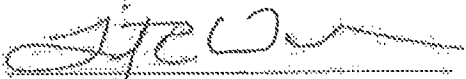
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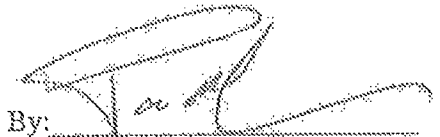
5. The Court will entertain oral argument by the parties only.

IT IS SO ORDERED.


DATED this 22<sup>nd</sup> day of April, 2012.

  
District Court Judge  
4

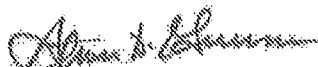
Respectfully Submitted,  
LIONEL SAWYER & COLLINS

By:   
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Approved as to form/content

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# EXHIBIT 9



CLERK OF THE COURT

1 PAUL E. LARSEN  
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9 *Attorneys for Petitioner*

DISTRICT COURT  
CLARK COUNTY, NEVADA

10 QUALITY LOAN SERVICE CORPORATION,

11 Petitioner,

12 v.

13 STATE OF NEVADA, DEPARTMENT OF  
14 BUSINESS AND INDUSTRY, FINANCIAL  
INSTITUTIONS DIVISION,

15 Respondent.

Case No.: A-12-657580-J

Dept. No.: XVI

DECISION AND ORDER  
GRANTING PETITION FOR  
JUDICIAL REVIEW PER NRS  
233B.130

16 Quality Loan Service Corporation's "Petition for Judicial Review per NRS 233B.130"  
17 (dated March 5, 2012) seeking review of the Decision of the Department of Business and  
18 Industry, Financial Institutions Division (dated February 12, 2012) came on for hearing on  
19 September 24, 2012, and the Court, having considered the Administrative Record, the briefs of  
20 the parties and Amicus Curae, and the arguments of counsel, does hereby issue its Decision and  
21 Order, and does hereby make the following Findings and Conclusions:

22 FINDINGS OF FACT

- 23 1. In a typical real estate transaction involving a Deed of Trust, a lender loans money to a  
24 borrower to purchase real property, and the parties contractually agree that the real  
25 property shall be held in trust by a Trustee, pursuant to a Deed of Trust, as security for  
26 the loan.  
27 2. The Deed of Trust typically contains a clause in which the borrower agrees that the  
28 Trustee may exercise the power of sale in the event of the borrower's default on the loan,

1 or other obligations, and typically also imposes other obligations upon the borrower  
2 such as maintaining liability and casualty insurance, keeping the property in good repair,  
3 and preventing waste of the property.

4 3. A Borrower's obligations under a Deed of Trust also typically include additional  
5 responsibilities, such as payment of taxes on the real property held in trust.

6 4. Petitioner Quality Loan Service Corporation ("Petitioner") is a Trustee (by original  
7 appointment or successive appointment) of Deeds of Trust, and has historically  
8 engaged in the exercise of the power of sale granted to Trustees by such Deeds of Trust  
9 and under NRS Chapter 107.

10 5. In the instance under review herein, Petitioners were Trustees on a Deed of Trust which  
11 held real property in trust to secure a loan for the purchase of such real property  
12 signed by Randolph Barton and Lori Ahmadi (collectively "Barton"); said Deed of  
13 Trust contained an explicit clause granting the Trustee the ability to exercise the power  
14 of sale in the event of the borrower's default.

15 6. Barton defaulted on the loan. After Barton defaulted on the loan, Petitioners noticed and  
16 conducted a sale of the real property held in trust for the Barton loan pursuant to  
17 procedures dictated by NRS chapter 107.

18 7. After Petitioner's sale of the real property held in trust as security for the defaulted  
19 Barton loan, the Respondent Department of Business of Business and Industry,  
20 Financial Institutions Division ("FID"), received a written complaint from Barton that  
21 Petitioner's actions constituted the "collection of a debt" requiring a license from the FID  
22 as a "collection agency." At that time, Petitioner had no such license. The FID issued  
23 a Cease and Desist Order, without further investigation, which ordered Petitioner to  
24 cease all activities as a trustee under NRS chapter 107, inter alia, until and unless  
25 Petitioner became licensed by the FID as a "collection agency".

26 8. The Cease and Desist Order was timely appealed by Petitioner, and an appeal hearing  
27 before the Commissioner of the FID was held on December 13, 2010.

28 9. After hearing evidence, arguments of counsel and briefs on the Issues, the FID

1 Commissioner one year later (on February 14, 2012,) issued his decision concluding,  
2 inter alia, that a Trustee's exercise of the power of sale pursuant to the procedure set forth  
3 under NRS Chapter 107 constitutes the collection of, or solicitation of payment of, a  
4 claim and the Commissioner therefore ruled that the Petitioner was required to be  
5 licensed as a collection agency by the FID in order to exercise the power of sale under a  
6 Deed of Trust or NRS Chapter 107.

- 7 10. Petitioner has timely appealed the FID's decision, and the Court has received the record  
8 of the Administrative Proceedings, the briefs of the parties and Amicus Curiae, and heard  
9 the arguments of counsel at hearing on September 24, 2012, and having considered the  
10 matter, now issues its decision on the Petitioner's Petition for Judicial Review.

11 CONCLUSIONS OF LAW

- 12 1. Under NRS Chapter 107, a Trustee has the ability to exercise the power of sale for real  
13 property held as security for a note upon the default of the borrower for that note.  
14 2. Pursuant to state policy articulated in NRS 80.015, 86.5483(1)(6) and 87A.615, until the  
15 passage and implementation of AB 284 in 2011, Trustees exercising the power of sale  
16 under a Deed of Trust did not be licensed to do business in the state of Nevada.  
17 3. Pursuant to applicable precedent, the exercise of the power of sale by a Trustee under  
18 NRS Chapter 107 is not "doing business" in Nevada. See e.g. Bonlecamp v. Vasquez, 107  
19 Nev. 377 (2004); McMillan v. United Mtg. Co., 82 Nev. 117 (1966); Brice v. Homefield  
20 Financial Inc., 2011 WL 4479736 (U.S. District Court, D. Nev. 2011)  
21 4. Pursuant to applicable precedent, the exercise of the power of sale under a Deed of Trust  
22 is not the collection or solicitation of payment of a claim See e.g. Brice v. Homefield,  
23 supra.  
24 5. As a matter of applicable law, the exercise of the power of sale by a Trustee under NRS  
25 Chapter 107, including giving the required notices and conducting sale of the real  
26 property held as security, is not the collection of debt or claim or the solicitation of  
27 payment of a debt or claim under NRS Chapter 649.  
28 6. Based upon the foregoing, a Trustee exercising the power of sale pursuant to the



1 procedures set forth in NRS chapter 107 is not required to obtain a license as a  
2 "collection agency" from the FID prior to exercising the power of sale under a Deed of  
3 Trust.

4 7. Because Petitioner, as a Trustee, was merely exercising the power of sale specifically  
5 granted under the Barton's Deed of Trust, as well as NRS Chapter 107, Petitioner was not  
6 collecting a debt or claim or soliciting the payment of a debt as defined in NRS Chapter  
7 649, and therefore was not required to be licensed by the FID as a collection agency.

8 8. Based upon the foregoing, the Cease and Desist Order issued by the FID against the  
9 Petitioner in 2010 was legally flawed, in that it required Petitioner to cease and desist  
10 exercising the Power of Sale under NRS Chapter 107 unless it were licensed as a  
11 collection agency under NRS Chapter 649.

12 9. Based upon the foregoing, the Decision of the FID was also legally flawed, in that:

13 (A) The notices required by NRS Chapter 107 in the event of  
14 default by the borrower are not the solicitation of  
15 payment of a debt or claim;

16 (B) The exercise of the power of sale by a Trustee pursuant to  
17 the procedures set forth in NRS Chapter 107 is not the  
18 collection of a debt or claim;

19 (C) The FID has no authority to regulate or oversee a Trustees  
20 exercise of the power of sale under, or issuance of the  
21 notices required by, NRS Chapter 107;

22 (D) Only the Judiciary, pursuant to a duly filed claim in District  
23 Court, has authority to review or oversee a  
24 Trustee's exercise of the power of sale, and its  
25 requisite notices, under NRS Chapter 107; and

26 (E) NRS chapter 649 gives the FID authority to regulate debt  
27 collection and collection agencies, but gives the FID  
28 no authority to regulate, license or oversee a Trustee's  
exercise of the power of sale under NRS Chapter 107.

10. Pursuant to NRS 233B.135, this Court has authority to reverse or affirm the Decision of  
the FID upon judicial review.

11. Because of the unique nature of real property, the use of a Deed of Trust to hold such  
real property as security for a real estate loan (which includes the Trustee's power of sale

- 1 by the contractual consent of the borrower), a Deed of Trust is not a "claim" or "debt"  
2 as defined by NRS Chapter 649.
- 3 12. NRS chapter 649 does not apply to the exercise of the power of sale under a Deed of  
4 Trust. Rather, only NRS Chapter 107 regulates the exercise of the power of sale  
5 pursuant to a Deed of Trust.
- 6 13. NRS Chapter 107 grants no regulatory authority or oversight of the power of sale by  
7 Trustees to any state executive agency. Rather, all regulatory authority for the exercise of  
8 the power of sale under NRS Chapter 107 is exclusively granted to the Judiciary, by  
9 actions filed in District Court (pursuant to NRS Chapter 107) challenging validity of  
10 the Trustee's exercise of the power of sale.
- 11 14. The FID has no regulatory, licensing or enforcement authority over a Trustee's exercise  
12 of the power of sale pursuant to NRS chapter 107.
- 13 15. If any Finding or Conclusion herein shall be more appropriately designated the other,  
14 they are hereby so designated.

15 NOW, THEREFORE based upon the foregoing Findings and Conclusions, the Court  
16 hereby ORDERS that the Petitioner's Petition for Judicial Review per NRS 233B.130 is granted,  
17 and pursuant to the Court's authority under NRS 233B.135, the Court hereby:

- 18 1. Reverses the Decision of the FID on the grounds that a Trustee's exercise of the power of  
19 sale under NRS Chapter 107 is not the collection of a debt or claim under NRS Chapter  
20 649, and therefore a Trustee who is only exercising the power of sale under NRS chapter  
21 107 is not required to obtain a license from the FID as a collection agency; and
- 22 2. Orders that the Cease and Desist Order issued herein by the FID in 2010 and the Decision

23 ///

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1 of the FID issued herein in 2012 are void ab initio due to legal error by the FID.

2  
3 IT IS SO ORDERED this 2<sup>nd</sup> day of January, 2012.

4  
5  
6   
DISTRICT COURT JUDGE

7  
8 For  
TIMOTHY C. WILLIAMS

9 PREPARED AND SUBMITTED:

10 LIONEL SAWYER & COLLINS

11  
12 By: 

13 PAUL E. LARSEN

14 Nevada Bar No. 3756

15 1700 Bank of America Plaza

16 300 South Fourth Street

17 Las Vegas, NV 89101

18 Attorneys for Petitioner

1 CERTIFICATE OF SERVICE

2 I HEREBY CERTIFY that on \_\_\_\_\_ day of \_\_\_\_\_, 2012, I sent by Email and U.S. Postal  
3 Service, first class mail, postage prepaid, a true and correct copy of the foregoing documents  
4 described as DECISION AND ORDER GRANTING PETITION FOR JUDICIAL REVIEW  
5 PER NRS 233B.130 to the following:

6  
7 Geoffrey L. Giles, Esq.  
8 527 California Avenue  
9 Post Office Box 93  
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17 Daniel D. Ebihara, Esq.  
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*Counsel for Respondent*

20  
21  
22  
23 \_\_\_\_\_  
An Employee of Lionel Sawyer & Collins  
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# EXHIBIT 10

C (21)

20050824-0000546

Assessor's Parcel Number: 125-16-412-011

Fee: \$34.00  
N/C Fee: \$25.00

~~Recording Requested By~~  
MOUNTAIN VIEW MORTGAGE COMPANY

08/24/2005 09:00:35

T20050154363

Requestor:  
NEVADA TITLE COMPANY

And When Recorded Return To:

MOUNTAIN VIEW MORTGAGE COMPANY  
7311 W. CHARLESTON #110  
LAS VEGAS, NEVADA 89117  
Loan Number: 05080100

Frances Deane DCI  
Clark County Recorder Pgs: 21

156-115-SD

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## DEED OF TRUST

MIN: [REDACTED]

### DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

- (A) "Security Instrument" means this document, which is dated AUGUST 17, 2005, together with all Riders to this document.  
(B) "Borrower" is JEFFREY W. BENKO, II, A MARRIED MAN AS HIS SOLE AND SEPARATE PROPERTY

Borrower is the trustor under this Security Instrument.

- (C) "Lender" is MOUNTAIN VIEW MORTGAGE COMPANY

Lender is a COLORADO CORPORATION organized and existing under the laws of COLORADO  
Lender's address is 7311 W. CHARLESTON #110, LAS VEGAS, NEVADA 89117

- (D) "Trustee" is NEVADA TITLE COMPANY  
2500 NORTH BUFFALO - SUITE 150, LAS VEGAS, NEVADA 89128

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

- (F) "Note" means the promissory note signed by Borrower and dated AUGUST 17, 2005

The Note states that Borrower owes Lender TWO HUNDRED SIXTY-THREE THOUSAND TWO HUNDRED AND 00/100 Dollars (U.S. \$ 263,200.00 ) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than SEPTEMBER 1, 2035

(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- |  |  |  |
|--|--|--|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider                         | <input type="checkbox"/> Second Home Rider                   |
| <input type="checkbox"/> Balloon Rider         | <input checked="" type="checkbox"/> Planned Unit Development Rider | <input checked="" type="checkbox"/> Other(s) (specify) _____ |
| <input type="checkbox"/> 1-4 Family Rider      | <input type="checkbox"/> Biweekly Payment Rider                    | <input type="checkbox"/> PREPAYMENT RIDER                    |

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

## TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

COUNTY

of

CLARK

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

SEE LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF AS EXHIBIT "A".  
A.P.N. #: 125-16-412-011

which currently has the address of 8121 PURSUIT COURT

[Street]

LAS VEGAS

, Nevada

89131

("Property Address")

[City]

[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an



institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in this Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payment is insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. **Application of Payments or Proceeds.** Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. **Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an

Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this

Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as

Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. **Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums

for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair

is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

**12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

**13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security

Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

**14. Extra Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

**15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

**16. Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. **Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

18. **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in full or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. **Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with



the requirements of Section 13) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

**21. Hazardous Substances.** As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, Hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

**NON-UNIFORM COVENANTS.** Borrower and Lender further covenant and agree as follows:

**22. Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note, and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lenders' election to cause the Property to be sold, and shall

cause such notice to be recorded in each county in which any part of the Property is located. Lender shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Assumption Fee. If there is an assumption of this loan, Lender may charge an assumption fee of U.S. \$

2/14/80 B.W.D. (Seal) \_\_\_\_\_ (Seal)  
JEREMY W. BENKO, II -Borrower -Borrower

\_\_\_\_\_  
-Borrower

\_\_\_\_\_  
-Borrower

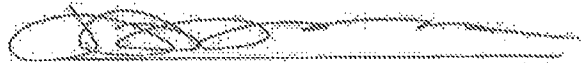
Witness:

DocMagic eReviews 800-649-1382  
www.docmagic.com

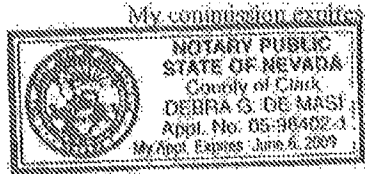
State of Nevada  
County of CLARK

This instrument was acknowledged before me on  
by JEFFREY W. BENKO, II

8/18/05

  
Notary Public

(Seal)



Escrow No. : 05-08-1115-SD

**EXHIBIT "A"**

**LEGAL DESCRIPTION**

**PARCEL ONE (1):**

LOT ONE HUNDRED TWENTY-SIX (126) IN BLOCK THREE (3) OF ELKHORN SPRINGS -- PARCEL 3B, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 65, OF PLATS, PAGE 39 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA, AMENDED BY CERTIFICATE OF AMENDMENT RECORDED JANUARY 26, 1995 IN BOOK 950126 AS DOCUMENT NO. 00908, OFFICIAL RECORDS.

**PARCEL TWO (2):**

A NON-EXCLUSIVE EASEMENT FOR USE AND ENJOYMENT IN AND TO THE "COMMON AREAS" AND ASSOCIATION PROPERTIES", AS PROVIDED FOR IN AND SUBJECT TO THAT CERTAIN MASTER DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND RESERVATION OF EASEMENTS FOR ELKHORN, RECORDED MARCH 22, 1995, IN BOOK 950322 AS DOCUMENT NO. 00346, OFFICIAL RECORDS.

Loan Number: [REDACTED]

## PLANNED UNIT DEVELOPMENT RIDER

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 17th day of AUGUST, 2005, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to MOUNTAIN VIEW MORTGAGE COMPANY, A COLORADO CORPORATION (the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

8121 PURSUIT COURT, LAS VEGAS, NEVADA 89131  
[Property Address]

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in

### COVENANTS, CONDITIONS AND RESTRICTIONS OF RECORD

(the "Declaration"). The Property is a part of a planned unit development known as

ELKHORN SPRINGS

[Name of Planned Unit Development]

(the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

**PUD COVENANTS.** In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

**A. PUD Obligations.** Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

**B. Property Insurance.** So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

What Lender requires as a condition of this waiver can change during the term of the loan. Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of property insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

**C. Public Liability Insurance.** Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

**D. Condemnation.** The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

**E. Lender's Prior Consent.** Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

**F. Remedies.** If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this PUD Rider.

 (Seal)  
JEFFREY W. BENKO, II -Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower



## PREPAYMENT RIDER

Loan Number [REDACTED]

Date: AUGUST 17, 2005

Borrower(s): JEFFREY W. BENKO, II

THIS PREPAYMENT RIDER (the "Rider") is made this 17th day of AUGUST 2005, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure repayment of Borrower's promissory note (the "Note") in favor of MOUNTAIN VIEW MORTGAGE COMPANY, A COLORADO CORPORATION

("Lender"). The Security Instrument encumbers the Property more specifically described in the Security Instrument and located at

8121 PURSUIT COURT, LAS VEGAS, NEVADA 89131

[Property Address]

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

### A. PREPAYMENT CHARGE

The Note provides for the payment of a prepayment charge as follows:

#### 4. BORROWER'S RIGHT TO PREPAY; PREPAYMENT CHARGE

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under the Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due dates of my monthly payment unless the Note Holder agrees in writing to those changes.

If the Note contains provisions for a variable interest rate, my partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase. If this Note provides for a variable interest rate or finance charge, and the interest rate or finance charge at any time exceeds the legal limit under

which a Prepayment penalty is allowed, then the Note Holder's right to assess a Prepayment penalty will be determined under applicable law.

If within TWELVE ( 12 ) months from the date the Security Instrument is executed I make a full Prepayment or one or more partial Prepayments, and the total of all such Prepayments in any 12-month period exceeds twenty percent (20%) of the original Principal amount of the loan, I will pay a Prepayment charge in an amount equal to SIX ( 6 ) months' advance interest on the amount by which the total of my Prepayments within any 12-month period exceeds twenty percent (20%) of the original Principal amount of the loan.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this Rider.

 (Seal)  
JEFFREY W. BENKO, II -Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

# EXHIBIT 11

Inst #: 201006020003345

Fees: \$216.00

MC Fee: \$0.00

06/02/2010 02:03:14 PM

Receipt #: 373714

Requestor:

FIDELITY NATIONAL DEFAULT S

Recorded By: ARO Pgs: 3

DEBBIE CONWAY

CLARK COUNTY RECORDER

Assessors Parcel No(s): 125-18-412-011  
Recording requested by:

When recorded mail to:  
Quality Loan Service Corp.  
2141 5th Avenue  
San Diego, CA 92101  
619-645-7711

Space above this line for recorders use only

TS # NV-10-365750-RM

Order # 100343756-NV-LPI

**Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of Trust**

NOTICE IS HEREBY GIVEN: That Quality Loan Service Corp. is either the original trustee, the duly appointed substituted trustee, or acting as agent for the trustee or beneficiary under a Deed of Trust dated 8/17/2008, executed by JEFFREY W. BENKO, II, A MARRIED MAN AS HIS SOLE AND SEPARATE PROPERTY, as Trustor, to secure certain obligations in favor of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR MOUNTAIN VIEW MORTGAGE COMPANY A COLORADO CORPORATION, as beneficiary, recorded 8/24/2008, as Instrument No. 20080824-0000546, in Book xix, Page xxx of Official Records in the Office of the Recorder of CLARK County, Nevada setting, among other obligations including 1 NOTE(S) FOR THE ORIGINAL sum of \$263,200.00, that the beneficial interest under such Deed of Trust and the obligations secured thereby are presently held by the beneficiary; that a breach of, and default in, the obligations for which such Deed of Trust is security has occurred in that payment has not been made of:

The installments of principal and interest which became due on 2/1/2009, and all subsequent installments of principal and interest through the date of this Notice, plus amounts that are due for late charges, delinquent property taxes, insurance premiums, advances made on senior liens, taxes and/or insurance, trustee's fees, and any attorney fees and court costs arising from or associated with the beneficiary's efforts to protect and preserve its security, all of which must be paid as a condition of reinstatement, including all sums that shall accrue through reinstatement or pay-off. This amount is no less than \$36,122.30 as of 6/22/2010 and will increase until your account becomes current. Nothing in this notice shall be construed as a waiver of any fees owing to the Beneficiary under the Deed of Trust pursuant to the terms of the loan documents.

That by reason thereof the present Beneficiary under such deed of Trust has executed and delivered a written Declaration of Default and Demand for Sale and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

TS No.: NV-10-365750-FM  
Notice of Default  
Page 3

**NOTICE**

You may have the right to cure the default hereon and reinstate the one obligation secured by such Deed of Trust above described. Section NRS 107.080 permits certain defaults to be cured upon the Payment of the amounts required by that statutory section without requiring payment of that portion of principal and interest which would not be due had no default occurred. As to owner occupied property, where reinstatement is possible, the time to reinstate may be extended to 5 days before the date of sale pursuant to NRS 107.080. The Trustor may have the right to bring a court action to assert the nonexistence of a default or any other defense of Trustor to acceleration and Sale.

To determine if reinstatement is possible and the amount, if any, to cure the default, contact:

JPMorgan Chase Bank, N.A.  
C/O Quality Loan Service Corp.  
2141 5th Avenue  
San Diego, CA 92101  
619-645-7711

To reach a Loss Mitigation Representative who is authorized to negotiate a Loan Modification, please contact:

JPMorgan Chase Bank, N.A.  
Contact: Patricia Oliver  
Department: Loss Mitigation Department  
Phone: 949-612-3338  
Email: patricia.l.oliver@jpmorgan.com

You may wish to consult a credit counseling agency to assist you. The Department of Housing and Urban Development (HUD) can provide you with the name and address of the local HUD approved counseling agency by calling their toll-free hotline at (800) 868-4287 or you can go to The Department of Housing and Urban Development (HUD) web site at [www.hud.gov/offices/hsg/sfh/hcc/hcc.htm](http://www.hud.gov/offices/hsg/sfh/hcc/hcc.htm).

If you have any questions, you should contact a lawyer or the governmental agency which may have insured your loan. Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale provided the sale is concluded prior to the conclusion of the foreclosure.

Dated: 6/2/2010

Quality Loan Service Corp., AS AGENT FOR  
BENEFICIARY  
BY: LSI Title Agency Inc.

By: *N. Gonzalez*

Norma Gonzalez,

State of CA

County of Orange

ss.

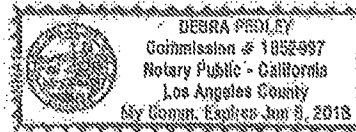
On JUN 2, 2010, before me, Debra Pedley a notary public,  
personally appeared Norma Gonzalez, who proved to me on the basis  
of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within  
instrument and acknowledged to me that he/she/they executed the same in his/her/their  
authorized capacity(ies), and that by his/her/their signature(s) on the instrument the  
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

*Debra Pedley*

Debra Pedley



THIS OFFICE IS ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION  
OBTAINED WILL BE USED FOR THAT PURPOSE.

As required by law, you are hereby notified that a negative credit report reflecting on your  
credit record may be submitted to a credit report agency if you fail to fulfill the terms of your  
credit obligations.

# EXHIBIT 12

APN #: 125-16-412-011  
Recording requested by:

When recorded mail to:  
Quality Loan Service Corp.  
2141 5th Avenue  
San Diego, CA 92101

The undersigned hereby affirm that there is no  
Social Security number contained in this document

Inst #: 201103080001518  
Fees: \$15.00  
N/C Fee: \$0.00  
03/08/2011 10:36:14 AM  
Receipt #: 699003  
Requestor:  
LSI TITLE AGENCY INC.  
Recorded By: BJB Pgs: 2  
DEBBIE CONWAY  
CLARK COUNTY RECORDER

Space above this line for recorder's use only

TS #: NV-10-365750-RM  
Order #: 100343756-NV-LPI

### NOTICE OF TRUSTEE'S SALE

**YOU ARE IN DEFAULT UNDER A DEED OF TRUST DATED 8/17/2005. UNLESS YOU  
TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC  
SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING  
AGAINST YOU, YOU SHOULD CONTACT A LAWYER.**

A public auction sale to the highest bidder for cash, cashier's check drawn on a state or national bank, check drawn by state or federal credit union, or a check drawn by a state or federal savings and loan association, or savings association, or savings bank specified in Section §102 to the Financial code and authorized to do business in this state, will be held by duly appointed trustee. The sale will be made, but without covenant or warranty, expressed or implied, regarding title, possession, or encumbrances, to pay the remaining principal sum of the note(s) secured by the Deed of Trust, with interest and late charges thereon, as provided in the note(s), advances, under the terms of the Deed of Trust, interest thereon, fees, charges and expenses of the Trustee for the total amount (at the time of the initial publication of the Notice of Sale) reasonably estimated to be set forth below. The amount may be greater on the day of sale.

#### **BENEFICIARY MAY ELECT TO BID LESS THAN THE TOTAL AMOUNT DUE.**

Trustor(s): JEFFREY W. HENKO, II, A MARRIED MAN AS HIS SOLE AND  
SEPARATE PROPERTY

Recorded: 8/24/2005 as Instrument No. 20050824-0000546 in book xxx, page xxx  
of Official Records in the office of the Recorder of CLARK County,  
Nevada;

Date of Sale: 3/31/2011 at 10:00 AM

Place of Sale: At the front entrance to Nevada Legal News located at 930 S. 4TH  
Street, Las Vegas, NV 89101

Amount of unpaid balance and other charges: \$301,862.86

The purported property address is: 8121 PURSUIT COURT  
LAS VEGAS, NV 89131

This property is sold as-is. Lender is unable to validate the condition, defects or disclosure issues of said property and buyer waives the disclosure requirements under NRS 113.130 by purchasing at this sale and signing the receipt of sale. The undersigned Trustee disclaims any liability for any incorrectness of the



property address or other common designation, if any, shown herein. If no street address or other common designation is shown, directions to the location of the property may be obtained by sending a written request to the beneficiary within 10 days of the date of first publication of this Notice of Sale.

If the Trustee is unable to convey title for any reason, the successful bidder's sole and exclusive remedy shall be the return of monies paid to the Trustee, and the successful bidder shall have no further recourse.

If the sale is set aside for any reason, the Purchaser at the sale shall be entitled only to a return of the deposit paid. The Purchaser shall have no further recourse against the Mortgagor, the Mortgagee, or the Mortgagee's Attorney.

Date: 3/7/2011

Quality Loan Service Corp.  
2141 5th Avenue  
San Diego, CA 92101  
619-643-7711 For NON SALE information only  
Sales Line: 714-730-2727 or Login to: [www.fidelityasap.com](http://www.fidelityasap.com)  
TOLL FREE: 1-866-758-1111  
Registration Line: 619-643-7711

Quality Loan Service Corp. by: Ronald Alonzo, as Authorized Agent.

State of California)  
County of San Diego)

On 3-7-11 before me, Michelle Nguyen a Notary Public, personally appeared Ronald Alonzo who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

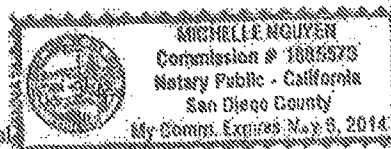
I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

Michelle Nguyen  
Michelle Nguyen

(Seal)




If you have previously been discharged through bankruptcy, you may have been released of personal liability for this loan in which case this letter is intended to exercise the note holders right's against the real property only.

**THIS NOTICE IS SENT FOR THE PURPOSE OF COLLECTING A DEBT. THIS FIRM IS ATTEMPTING TO COLLECT A DEBT ON BEHALF OF THE HOLDER AND OWNER OF THE NOTE. ANY INFORMATION OBTAINED BY OR PROVIDED TO THIS FIRM OR THE CREDITOR WILL BE USED FOR THAT PURPOSE.**

As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit report agency if you fail to fulfill the terms of your credit obligations.



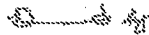
## AFFIDAVIT OF MAILING

Date: 3/9/2011  
T.S. No.: NV-10-365750-RM  
Loan No.:   
Mailing: Notice of Sale  
and Notice to Tenant

STATE OF California }  
COUNTY OF San Diego }

The declarant, whose signature appears below, states that (s)he is over the age of eighteen (18) years; is employed in San Diego County that his/her business address is at 2141 5th Avenue San Diego CA 92101. It is further declared that (s)he is readily familiar with business practices relative to the mailing of documents and that on 3/9/2011, a copy of the Notice of Sale and Notice to Tenant, of which the attached is a true and correct copy, was mailed in the ordinary course of business. The copy of the Notice of Sale and Notice to Tenant was placed in a sealed envelope and addressed to the person(s)/entity(ies) set forth below. Said mailing was sent by certified or registered mail and first class, with postage prepaid and then delivered to the United States Postal Service for delivery.

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



Affiant David Fry

JEFFREY W. BENKO II  
8121 PURSUIT COURT  
LAS VEGAS, NV 89131  
First Class and Cert. No. 71039628594180340547

JEFFREY W. BENKO II  
7825 ODYSSEUS AVE  
LAS VEGAS, NV 89131  
First Class and Cert. No. 71039628594180340646

JEFFREY W. BENKO, II  
8121 PURSUIT COURT  
LAS VEGAS, NV 89131  
First Class and Cert. No. 71039628594180340769

JEFFREY W. BENKO, II  
8121 PURSUIT CT  
LAS VEGAS, NV 89131-4592  
First Class and Cert. No. 71039628594180340851

MOUNTAIN VIEW MORTGAGE COMPANY  
7311 W. CHARLESTON #110

LAS VEGAS, NV 89117  
First Class and Cert. No. 71039628594180340967

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.  
P.O. BOX 2026  
FLINT, MI 48501-2026  
Electronic notice pursuant to agreement

MOUNTAIN VIEW MORTGAGE COMPANY, A COLORADO CORPORATION  
7311 W. CHARLESTON #110  
LAS VEGAS, NV 89117  
First Class and Cert. No. 71039628594180341094

MOUNTAIN VIEW MORTGAGE COMPANY, A COLORADO CORPORATION  
C/O MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.  
P.O. BOX 2026  
FLINT, MI 48501-2026  
First Class and Cert. No. 71039628594180341186

CITY OF LAS VEGAS SEWER  
400 E. STEWART AVE.  
LAS VEGAS, NV 89101  
First Class and Cert. No. 71039628594180341308

ELKHORN COMMUNITY ASSOCIATION, A NEVADA NON-PROFIT CORPORATION  
C/O KEN WILLIAMS  
1820 E SAHARA STE 101  
LAS VEGAS, NV 89104  
First Class and Cert. No. 71039628594180341421

ELKHORN COMMUNITY ASSOCIATION, A NEVADA NON-PROFIT CORPORATION  
C/O KEN WILLIAMS  
P O BOX 12117  
LAS VEGAS, NV 89112  
First Class and Cert. No. 71039628594180341520

JEFFREY W. BENKO, II  
8121 PURSUIT COURT  
LAS VEGAS, NV 89131  
First Class and Cert. No. 71039628594180341636

JEFFREY W. BENKO, II  
7825 ODYSSEUS AVE  
LAS VEGAS, NV 89131  
First Class and Cert. No. 71039628594180341698

Occupant/Resident  
8121 PURSUIT COURT  
LAS VEGAS, NV 89131  
First Class and Cert. No. 71039628594180341803

# EXHIBIT 13

Inst #: 201210020003632

Fees: \$15.00

N/C Fee: \$0.00

10/02/2012 01:03:04 PM

Receipt #: 1328564

Requestor:

LBI TITLE AGENCY INC.

Recorded By: MSH Pgs: 2

DEBBIE CONWAY

CLARK COUNTY RECORDER

APN No.: 125-16-412-011

Recording requested by:

When recorded mail to:  
Quality Loan Service Corporation  
2141 5th Avenue  
San Diego, CA 92101

TS No.: NV-10-385750-RM

Space above this line for recorders use only

Order No.: 100343756-NV-LPI

It is hereby affirmed that this document submitted for recording does not contain the social security number of any person or persons. (Per NRS 239B.030).

### Notice Of Rescission Of Notice Of Default

**NOTICE IS HEREBY GIVEN:** That the undersigned is either the original trustee or the duly appointed substituted trustee under a Deed of Trust dated 8/17/2005, executed by JEFFREY W. BENKO, II, A MARRIED MAN AS HIS SOLE AND SEPARATE PROPERTY, as Trustor, to secure certain obligations in favor of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR MOUNTAIN VIEW MORTGAGE COMPANY A COLORADO CORPORATION, as Beneficiary, recorded 8/24/2005, as Instrument No. 20050824-0000546, in book xxx, page xxx of Official Records in the Office of the Recorder of CLARK County, Nevada describing land therein as more fully described on the above referenced Deed of Trust.

Said obligations including one note for the sum of \$263,200.00.

Whereas, the present beneficiary under that certain Deed of Trust herein above described, heretofore delivered to the Trustee thereunder written Declaration of Default and Demand for Sale; and Whereas, Notice was heretofore given of breach of obligations for which said Deed of Trust is security and of election to cause to be sold the property therein described; and Whereas, a Notice of Default was recorded on the day and in the book and page set forth below:

Notice was recorded on 6/2/2010 in the office of the Recorder of CLARK County, Nevada, Instrument number, 201006020003345, in Book , Page , of Official Records.

**NOW; THEREFORE, NOTICE IS HEREBY GIVEN** that the present Beneficiary and/or the Trustee, does hereby rescind, cancel and withdraw said Declaration of Default and Demand for Sale and said Notice of Breach and Election to Cause Sale; it being understood, however, that

TS No.: NV-10-366750-RM  
Rescission of Notice of Default

this rescission shall not in any manner be construed as waiving or affecting any breach or default past, present or future under said Deed of Trust, or as impairing any right or remedy thereunder, but is, and shall be deemed to be, only an election, without prejudice, not to cause a sale to be made pursuant to said Declaration and Notice, and shall no way jeopardize or impair any right, remedy or privilege secured to the Beneficiary and/or the Trustee, under said Deed of Trust, nor modify nor alter in any respect any of the terms, covenants, conditions or obligations thereof, and said Deed of Trust and all obligations secured thereby are hereby reinstated and shall be and remain in force and effect the same as if said Declaration of Default and Notice of Breach had not been made and given.

Quality Loan Service Corporation, as Trustee

By: Vanessa F. Gonzalez

State of California  
County of San Diego

On 9-28-2012 before me, L. Brown a notary public, personally appeared Vanessa F. Gonzalez, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

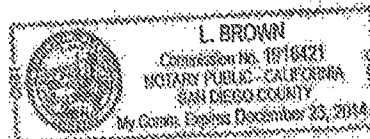
I certify under *PENALTY OF PERJURY* under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

L. Brown

(Seal)



# EXHIBIT 14



Inst #: 2011081900000371

Fee: \$10.00

N/C Fee: \$0.00

08/19/2011 08:02:24 AM

Receipt #: 885078

Requestor:

CAMCO

Recorded By: SUO Pgs: 2

DEBBIE CONWAY

CLARK COUNTY RECORDER

Return to:  
Attn: Kelly Mitchell  
Absolute Collection Services, LLC  
PO Box 12117  
Las Vegas, NV 89112  
(702) 531-3394 phone  
www.absolute-collection.com

APN # 125-16-412-011

### Notice of Delinquent Assessment Lien

This NOTICE OF DELINQUENT ASSESSMENT is being given pursuant to N.R.S. 117.70 et seq. or N.R.S. 116.3115 et. Seq. and N.R.S. 116.3116 through 116.3118 et. Seq. and the provisions of the Declaration of Covenants, Conditions and Restrictions (CC&Rs) of the Homeowners Association as follows:

Association Claimant: ELKHORN HOA Declarations of CC&Rs  
6/1/01 Instrument No: 03260, Book No.: 20010601 Page No: \_\_\_\_  
County of CLARK, and any and all amendments or annexations of record thereto.

The description of the common interest development unit against which this notice is being recorded is as follows: Legal Unit No.: 8121 Pursuit Ct, Elkhorn Springs-Parcel 3B Plat Book 65 Page 39 Lot 126 Block 3

The reputed owner is: JEFFREY BENKO II

Common address: 8121 Pursuit Ct., Las Vegas, NV 89131

Owner's mailing address: Same

#### DELINQUENCY #A2873

Total Amount due as of 8/18/11	\$1,633.25
--------------------------------	------------

Additional monies shall accrue under this claim at the rate of the claimant's periodic assessments, plus permissible late charges, costs of collection and interest and other charges, if any, that shall accrue subsequent to the date of this notice.

The acting agency for enforcement on this lien is:

ABSOLUTE COLLECTION SERVICES, LLC  
PO BOX 12117  
LAS VEGAS NV 89112  
(702) 531-3394  
[www.absolute-collection.com](http://www.absolute-collection.com)  
[customerservice@absolute-collection.com](mailto:customerservice@absolute-collection.com)

DATED: 8/18/11

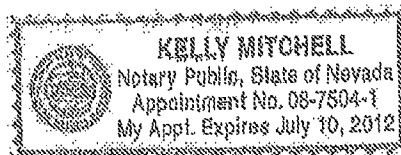
  
FAITH PORTER-TWARDOWSKI, Recording Agent

STATE OF NEVADA  
COUNTY OF CLARK

On August 18, 2011 before me, the undersigned, a Notary Public in and for said county, personally appeared, FAITH PORTER-TWARDOWSKI personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is subscribed to the within Instrument and acknowledged to me that he/she executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the Instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the Instrument.

WITNESS my hand and official seal.

  
KELLY MITCHELL, Notary Public



# EXHIBIT 15

Inst #: 201205170000477

Fees: \$18.00 N/C Fee: \$25.00

RPTT: \$25.50 Ex: #

06/17/2012 08:30:49 AM

Receipt #: 1155533

Requestor:

CAMCO

Recorded By: RNS Pgs: 4

DEBBIE CONWAY

CLARK COUNTY RECORDER

APN: 125-16-412-011

WHEN RECORDED MAIL DEED AND  
TAX STATEMENTS TO:

Elkhorn CA  
PO Box 12117  
Las Vegas NV 89112

Title No. A2873  
Account NO. 73273  
TS No. 11980178

SPACE ABOVE THIS LINE FOR RECORDER'S USE

**TRUSTEE'S DEED UPON SALE**

The undersigned declares:

- 1) The grantee herein WAS the foreclosing beneficiary
- 2) The amount of the unpaid debt together with costs was \$ 4,700.00
- 3) The amount paid by the grantee at the trustee sale was \$ 4,700.00
- 4) The documentary transfer tax is \$ 25.50
- 5) City Judicial District of LAS VEGAS

And Absolute Collection Services, LLC., as the duly appointed Trustee under the Notice of Delinquent Assessment hereinafter described, does hereby GRANT and CONVEY, but without warranty, express or implied, to: Elkhorn CA, PO Box 12117, Las Vegas NV 89112

(herein called Grantee), all of its right, title and interest in and to that certain property situated in the County of CLARK, State of NEVADA, described as follows:

**8121 Pursuit Ct., Las Vegas NV 89131**

Legal Description-shown on the Subdivision map recorded in Book No. 65 Page(s) 39, Lot 126, Block 3 Inclusive, of Maps of the Country of Clark, State of Nevada; See Exhibit A Attached

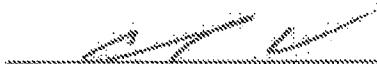
**AGENT STATES THAT:**

This conveyance is made pursuant to the powers granted to Elkhorn CA and conferred upon appointed trustee by the provisions of the Nevada Revised Statutes, the Elkhorn CA governing documents (CC&R's) recorded as Instrument number 03260 Book 20010601 on JUNE 1, 2001 and that certain Notice of Delinquent Assessment Lien

recorded on AUGUST 19, 2011 instrument number 0000371 Book 20110819 Official Records of CLARK County; and pursuant to NRS 117.070 et Seq. or NRS 116.3115 et Seq and NRS 116.3116 through 116.31168 et Seq. The name of the owner(s) of the property (trustor) was: JEFFREY BENKO II

Default occurred as set forth in a Notice of Default and Election to Sell, recorded on OCTOBER 21, 2011 as instrument 0001738 Book 20111021 which was recorded in the office of the recorder of said county. Absolute Collection Services, LLC. Has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale. Said property was sold by said agent, on behalf of ELKHORN CA at public auction on MAY 15, 2012 at the place indicated on the Notice of Sale. Grantee being the highest bidder at such sale, became the purchaser of said property and paid therefore to said agent the amount bid \$4,700.00 in lawful money of the United States, or by satisfaction, pro tanto, of the obligations then secured by the Delinquent Assessment Lien.

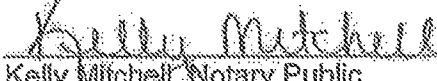
Dated: May 16, 2012

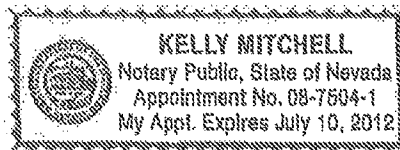
  
By Richard Kays on behalf of Absolute Collection Services

STATE OF NEVADA     )  
COUNTY OF CLARK    )

On 5/16/12 before me, Kelly Mitchell, personally appeared Richard Kays personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity, and that by signing his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and seal.

  
Kelly Mitchell, Notary Public



**EXHIBIT A**  
**LEGAL DESCRIPTION**

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF CLARK, STATE OF NEVADA, AND IS DESCRIBED AS FOLLOWS:

**PARCEL 1:**

LOT 126 IN BLOCK 3 OF ELKHORN SPRINGS -- PARCEL 3B, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 65 OF PLATS, PAGE 39 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA, AMENDED BY CERTIFICATE OF AMENDMENT RECORDED JANUARY 26, 1995 IN BOOK 950126 AS DOCUMENT NO. 00908, OFFICIAL RECORDS.

**PARCEL 2:**

A NON-EXCLUSIVE EASEMENT FOR USE AND ENJOYMENT IN AND TO THE "COMMON AREAS" AND ASSOCIATION PROPERTIES", AS PROVIDED FOR IN AND SUBJECT TO THAT CERTAIN MASTER DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND RESERVATION OF EASEMENTS FOR ELKHORN RECORDED MARCH 22, 1995 IN BOOK 950322 AS DOCUMENT NO. 00346, OFFICIAL RECORDS.

APN: 125-16-412-011

# EXHIBIT 16

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## INTRODUCTION

Petitioner Quality Loan Service (hereafter "Quality Loan"), stated, "This case does not involve a novel question of law." (Opening Brief 5:19-20). The Financial Institutions Division ("FID") agrees. By its own statements, Quality Loan admits to demanding money from borrowers to pay past due mortgages, selling homes at foreclosure sales to pay past due mortgages, and sending the money collected to the lender/creditors. The FID determined these acts constitute the conduct of a collection agency requiring a license. Quality Loan argues that they are not collection agency activities, and while they present numerous arguments, none are meritorious.

Quality Loan argues that because some courts have determined that foreclosure trustees are not "debt collectors" under the federal Fair Debt Collection Practices Act ("FDCPA"), then they should not be "collection agencies" under NRS Chapter 649. They argue this despite the fact that the FDCPA imposes separate consumer protection requirements and cannot infringe upon state laws. Petitioner argues that its administrative hearing involved improper rulemaking even though agencies are required to determine the "the legal rights, duties or privileges of a party" through a contested case. NRS 233B.032.

Finally, Quality Loan asserts that the Nevada Supreme Court has regulatory authority over foreclosure trustees and the FID lacks knowledge of the foreclosure trustee process. First, the FID is not required to have in-depth knowledge of the mediation and foreclosure process to enforce the requirements of NRS Chapter 649. Second, the Constitution of the State of Nevada separates the power to interpret laws to the judiciary and the power to enforce the law to the executive branch. Third, while courts have the power to award damages, reform contracts, and enjoin illegal activity, such action can only come after the filing of a civil complaint, discovery and trial on the merits. Such actions are instituted for compensating damage sustained by parties, not for regulation of an industry.

STATEMENT OF FACTS

On June 18, 2010, Mr. Geoffrey Giles, an attorney representing homeowner Randolph Barton, submitted a complaint to the FID regarding Quality Loan Service. The Complaint states that Quality Loan conducted a foreclosure sale of his client's home on behalf of a lender. As part of the complaint, Mr. Giles submitted a court order from Second Judicial District Court for the State of Nevada. The Order determined that Respondent was a "debt collector" pursuant to the federal FDCPA, 15 U.S.C. § 1692a, *et seq.* (AR 42).

The district court, however, refused to state whether Quality Loan Service was engaged in unlicensed activity pursuant to NRS Chapter 649, stating that such a finding would be "procedurally inappropriate." (AR 41:18-9). The district court went on to state:

NRS 649.390 provides explicitly that a verified complaint against any collection agency is to be filed with the Commissioner of the Financial Institutions, not this Court. Only following a determination by the Commissioner that Quality Loans is acting as a collection agency in the State without a necessary license can this Court address Barton's allegations that Quality has engaged in a deceptive trade practice for acting without the appropriate license...

(AR 41-2.) Consequently, the district court essentially instructed the complainant to seek a determination from the FID.

Mr. Giles submitted a complaint to the FID pursuant to the district court order. As part of the complaint, Mr. Giles attached the "Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of Trust" which was served on his client (AR 198). Quality Loan identifies itself in such Notice and Election to Cause Sale as "the original trustee, the duly appointed substituted trustee, or acting as the agent for the trustee or beneficiary under a Deed of Trust" and that "the obligations secured thereby are presently held by [Quality Loan as agent of the beneficiary]." (*Id.*)

Quality Loan goes on to state in such documents that the borrower may have "the right to cure the default hereon and reinstate the one obligation secured by such

1 Deed of Trust." The borrower is then directed to contact Quality Loan as follows:

2 To determine if reinstatement is possible and the amount, if  
3 any, to cure the default, contact:

4 MetLife Home Loans, a division of Metlife Bank NA  
5 C/O Quality Loan Service Corp.  
6 2141 Fifth Avenue,  
7 San Diego, CA 62101

8 (AR 199).

9 Quality Loan then filed a "Notice of Trustee's Sale" against the property. (AR  
10 200). In that notice, Quality Loan specifically states, "Unless you take action to protect  
11 your property, it may be sold at a public sale." Quality Loan, as trustee or agent of the  
12 trustee or beneficiary, conducts the sale and accepts the money to pay the existing  
13 note and charges secured by the Deed of Trust. Further, if title to the property cannot  
14 be conveyed at the sale, Quality Loan is obligated to return the money. "If the Trustee  
15 is unable to convey title for any reason, the successful bidder's sole and exclusive  
16 remedy shall be the return of the monies paid to the Trustee, and the successful bidder  
17 shall have no further recourse." (AR 201).

18 On October 14, 2010, the FID issued a Cease and Desist Order for unlicensed  
19 collection agency activity on the part of Quality Loan Services. (AR 168-175). On  
20 October 21, 2010, Respondent requested an administrative hearing on this matter. (AR  
21 176). On October 26, 2010, Quality Loan and FID agreed to stay the provisions of the  
22 Cease and Desist Order until the Commissioner of the FID had reached a  
23 determination regarding whether Quality Loan Services was required to be licensed.  
24 (AR 27-8). Consequently, at no time did Quality Loan Services cease operating during  
25 the period of the administrative process, nor was it subject to any administrative fine  
26 unless it was determined that they engaged in some act of misrepresentation or  
27 deception. *Id.*  
28

1 At the hearing, Mr. David Owen, chief financial officer for Quality Loan, testified  
2 that Quality Loan conducts foreclosure sales on homes which are in default; the primary  
3 reason for this is that they have not paid their mortgage payments. (AR 596; 13-  
4 5). If the borrower pays the defaulted amount avoiding a foreclosure sale, Quality Loan  
5 can accept the payments in a cashier's check or have the money wired directly to an  
6 account owned by Quality Loan. (AR 218). If the property is sold at auction, the money is  
7 received by Quality Loan and applied to the outstanding balance of the loan. Quality  
8 Loan states that it does not "apply" the funds to the mortgage. (AR 594; 8-13). However,  
9 the terms of the Deed of Trust specifically directs the Trustee, in this case, Quality Loan  
10 Service, to apply the proceeds of the sale to the holder of the security interest, the lender.  
11 "Trustee *shall* apply the proceeds of the sale in the following order: ... (b) to all sums  
12 secured by the Security Instrument..." (AR 305) (Emphasis added). Further, Mr. Owen  
13 stated that all of the money received from the sale is sent by Quality Loan to the lender.  
14 (AR 595; 6-7). He further stated that it was important to get as much money as possible  
15 from the auction and that it is part of Quality Loan's statutory responsibility to make sure  
16 the property goes to the highest bidder. (AR 599; 4-5 and 20-5).

17 On February 14, 2012, the Commissioner of the FID issued a Final Decision  
18 determining that the conduct of Quality Loan was that of a collection agency and it was  
19 required to be licensed pursuant to NRS Chapter 649. The Commissioner found that the  
20 lender declares the loan to be in default and refers the matter to Quality Loan to cause  
21 the sale of the property. (AR 641); see also Notice of Breach and Default and of Election  
22 to Cause Sale of Real Property Under Deed of Trust. (AR 320). Further, the  
23 Commissioner found that Quality Loan solicits lenders to perform its trustee services to  
24 collect defaulted mortgage loans. (*Id.*) Quality Loan requests and accepts direct  
25 payment from defaulting borrowers who wish to pay their outstanding mortgage balance  
26 and avoid foreclosure. (AR 642). The Commissioner determined that Quality Loan's acts  
27 of soliciting or collecting payment of claims owed to the lender are by definition, collection  
28 agency activities requiring licensure pursuant to NRS Chapter 649. (AR 652).

1 Further, after the property is sold at foreclosure auction, Quality Loan receives the  
2 entire sales proceeds and pays that money to the lender. (*Id.*) The act of collecting the  
3 money from the foreclosure sale and applying it to the outstanding balance of the note  
4 held by the lender is described in NRS 107.030(7). The Commissioner found that this  
5 statute requires Quality Loan to apply the auction proceeds to the payment of "the  
6 obligations or debts secured" by the note. (*Id.*) Consequently, the Commissioner  
7 concluded that the act of soliciting payment and receiving payment on behalf of the lender  
8 was conduct consistent with collection agency activity requiring licensure. (AR 643).

9 On February 29, 2012, Quality Loan filed a Petition for Reconsideration based  
10 upon the same arguments presented during the hearing of this matter. In its motion,  
11 Quality Loan fails to mention, as they do here, that the Legislature had amended NRS  
12 Chapter 107 to include the various entities which could conduct nonjudicial foreclosure.  
13 (AR 655-60). These legislative changes were effective after the time period relative to  
14 this matter. On March 8, 2012, the Commissioner denied the Petition. (AR 666-7).

#### 15 STANDARD OF REVIEW

16 The standard of review for petitions for judicial review is substantial evidence. In  
17 *Gilman v. Nevada State Bd. of Veterinary Medical Examiners*, 120 Nev. 263, 267-268,  
18 89 P.3d 1000,1003 (2004), the Nevada Supreme Court defined the standard as  
19 follows:

20 "On review, neither this court nor the district court may  
21 substitute its judgment or evaluation of the record developed  
22 at the agency level for that of the Board ...." Rather, the  
23 court must "review the evidence presented to the agency in  
24 order to determine whether the agency's decision was  
25 arbitrary or capricious and was thus an abuse of the  
26 agency's discretion." The decision of the agency will be  
27 affirmed if substantial evidence exists to support it.  
28 Substantial evidence is "that which a reasonable mind might  
accept as adequate to support a conclusion." Questions of  
law, however, are reviewed de novo.

*Id.* (footnotes omitted). The Court has also held that under the substantial evidence  
standard, the court "would not be free to disregard the Commissioner's findings merely



1 because the circumstances involved might also be reasonably reconciled with contrary  
2 findings of fact." *Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 874,  
3 893, 878 P.2d 913, 925 (1994) (citations omitted).

4 This case presents both issues of law and issues of fact to be reviewed by the  
5 Court. Here, the Commissioner's determination was based upon the finding that the  
6 conduct engaged in by Quality Loan was that of a collection agency and that the acts of  
7 soliciting and/or receiving payment of defaulted loans on behalf of the lender and  
8 foreclosing on real property for the purpose of paying an outstanding balance on a  
9 mortgage debt required a license under NRS Chapter 649.

#### 10 ARGUMENT

11 A. The Determination that Quality Loan Service was Acting in the  
12 Capacity of a Collection Agency was based upon the Plain, Clear and  
13 Unambiguous Language of the Statute.

14 1) The Plain Reading of the Statute Includes Foreclosure Trustee  
15 as a Collection Agency under NRS Chapter 649.

16 The Nevada Supreme Court has held that when a statute "is clear on its face, a  
17 court can not go beyond the statute in determining legislative intent." *Robert E. v.*  
18 *Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). In the present case, the  
19 statutes are clear and their meaning unambiguous. Petitioner Quality Loan Service has  
20 presented no argument that the statutes are ambiguous, yet it argues for an  
21 interpretation contrary to the plain, clear meaning of the applicable law.

22 NRS 649.020(1) defines collection agency as "all persons engaging, directly or  
23 indirectly, and as a primary or a secondary object, business or pursuit, in the collection of  
24 or in soliciting or obtaining in any manner the payment of a claim owed or due or asserted  
25 to be owed or due to another." NRS 649.010 defines claim as "any obligation for the  
26 payment of money or its equivalent that is past due."

27 NRS 649.075(1) prohibits engaging in the business of receiving payment for  
28 another of any claim without a license pursuant to NRS Chapter 649.

1 Except as otherwise provided in this section, a person shall  
2 not conduct within this State a collection agency or engage  
3 within this State in the business of collecting claims for  
4 others, or of soliciting the right to collect or receive payment  
5 for another of any claim, or advertise, or solicit, either in  
6 print, by letter, in person or otherwise, the right to collect or  
receive payment for another of any claim, or seek to make  
collection or obtain payment of any claim on behalf of  
another without having first applied for and obtained a  
license from the Commissioner.

7 The Nevada Supreme Court has held that if "the language of a statute is plain and  
8 unambiguous and its meaning clear and unmistakable, there is no room for  
9 construction, and the courts are not permitted to search for its meaning beyond the  
10 statute itself. *It is the prerogative of the Legislature, not this court, to change or*  
11 *rewrite a statute."* *Holiday Retirement Corp. v. State*, DIR, 274 P.3d 759, 761 (Nev.  
12 2012) (emphasis added) (citations and internal quotations omitted).

13 However, Quality Loan argues that this Court must rewrite NRS 649.020 where  
14 no exception is stated. The statute in this case is clear. NRS 649.020 defines a  
15 collection agency as a person who collects claims for another. NRS 649.020 defines  
16 claims as past due obligations to pay money.

17 The United Trustee Association (UTA) argues that since foreclosure trustee's  
18 have the legal title, that is the power to sell the property, they are not a collection  
19 agency under NRS Chapter 649. (UTA Amicus Brief at 6:16 – 7:18). However, owning  
20 the debt excludes a person from being a collection agency, having the legal ability to  
21 sell the collateral which secures the debt does not.<sup>1</sup> It is important to remember that a  
22 mortgage is not an outright transfer of property; it is a grant of the ability to sell the  
23 property. NRS 40.050 states "[a] mortgage of real property shall not be deemed a  
24 conveyance, whatever its terms, so as to enable the owner of the mortgage to take  
25 possession of the real property without a foreclosure and sale."

26  
27  
28 <sup>1</sup> The foreclosure process under NRS Chapter 107 is described in the Amicus  
Brief of Randolph Barton (4:19 – 6:3).

1 Moreover, simply agreeing to the process and form of collection does not remove  
2 the obligation to be licensed in the State of Nevada. In the case of *Loomis v. Lange*  
3 *Financial Corp.*, 109 Nev. 1121, 1128, 865 P.2d 1161, 1165 (1993), the Nevada  
4 Supreme Court determined that a company operating as a real estate broker without a  
5 license was not entitled to collect compensation because the act was in violation of  
6 state law. "Nevada follows the general rule that contracts made in contravention of the  
7 law do not create a right of action." *Id.* (citation and quotations omitted). The parties'  
8 agreement to a form of collecting on defaulted mortgage payments cannot circumvent  
9 the obligation to comply with the law.

10 Here, the Commissioner has determined that the demand for payment of past  
11 due mortgages and the foreclosure sale of homes to collect money for past due  
12 mortgages constitutes the act of a collection agency. As further defined by NRS  
13 649.075, a person engages in the act of operating a collection agency without a license  
14 if that person "engages in the business of collecting claims for others" or seeks to  
15 collect or "obtain payment of any claim on behalf of another." NRS 649.075(1).

16 **2) The Legislative Intent as Determined by the Language of the**  
17 **Statute Includes Quality Loan as a Collection Agency.**

18 The Commissioner's determination in this case was based entirely upon the plain  
19 meaning of the words contained in NRS Chapter 649. Where, as here, the language of  
20 the statute is only susceptible to one interpretation, no further analysis of statutory  
21 construction is required. The Nevada Supreme Court has stated, "When presented  
22 with a question of statutory interpretation, the intent of the legislature is the controlling  
23 factor and, if the statute under consideration is clear on its face, a court can not go  
24 beyond the statute in determining legislative intent." *Robert E. v. Justice Court of Reno*  
25 *Tp., Washoe County*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983), *citing*, *White v.*  
26 *Warden*, 96 Nev. 634, 636, 614 P.2d 536, 537 (1980).

27 The Commissioner's determination that Quality Loan's activities fall within these  
28 descriptions is based upon substantial evidence and entitled to deference. As the

1 Nevada Supreme Court stated, "This court gives deference to an agency's  
2 interpretation of its statutes and regulations "if the interpretation is within the language  
3 of the statute." *Holiday Retirement Corp. v. State*, DIR, 274 P.3d 759, 761 (Nev. 2012);  
4 quoting, *Dutchess Bus. Servs. v. State, Bd. of Pharm.*, 124 Nev. 701, 709, 191 P.3d  
5 1159, 1165 (2008).

6 Even if there was some confusion regarding whether the Legislature considered  
7 non-judicial foreclosure as an act of collection, the answer came in 2005 when the  
8 Legislature enacted NRS 649.020(3). It is clear from the history that the Legislature  
9 believed that the act of non-judicial foreclosure was in and of itself an act of collection.  
10 NRS 649.020(3)(a) specifically states that a community manager becomes a collection  
11 agency, and is required to be licensed, when it engages in the action of foreclosure on  
12 liens. The Nevada Legislature has determined that the act of foreclosure is the act of a  
13 collection agency. When this law was passed, there was no question that the act of non-  
14 judicial foreclosure was an act of collection. As one commentator stated:

15 It protects the consumers, because everybody doing the job  
16 is licensed by the same entity. *We have to be very careful,*  
17 *we are doing the most serious collection of all. We are*  
18 *taking somebody's home away from them. For that*  
19 *serious of a collection you should be a licensed*  
20 *collection agency....* Unfortunately, the biggest abuses,  
and costs being associated to the homeowner for these  
services are being done by the non-regulated, non-licensed  
management companies who want to act like a collection  
agency.

21 Hearing on S.B. 153 Before the Assembly Committee on Judiciary, 2005 Legis., 73<sup>rd</sup>  
22 Sess. 29-30 (May 10, 2005) (parenthetical included) (emphasis added).

23 While the amendment concerned "community managers" for homeowner  
24 associations, the statute determined that nonjudicial foreclosure was a means of  
25 collection.<sup>2</sup> As the U.S. District Court recently noted, the change in the law resulted in  
26

27 <sup>2</sup> The UTA Amicus Brief states that in the 40 year history of NRS Chapter 649  
28 there is no reported case against a foreclosure trustee. (Amicus Brief of United  
Trustee Association at 5:21-2) However, the Legislature did not include non-  
judicial foreclosure as an activity of a collection agency until 2005.

1 the FID pursuing unlicensed activity where it had not been done previously.

2 In 2005, NRS Section 649 was amended to remove various  
3 licensing exemptions. Amended NRS 649.020(3)(a) provides  
4 that a community manager is anyone "engaged in the  
5 management of a common-interest community if the  
6 community manager, or any employee, agent or affiliate of  
7 the community manager, performs or offers to perform any  
8 act associated with the foreclosure of a lien." In light of the  
2005 amendments, Kondrup and FID investigated ATC's  
collection operations. On September 12, 2008, Kondrup and  
FID issued a cease and desist order against ATC finding  
that they were a community manager subject to licensing.

9 *Ellis v. Alessi Trustee Corp.*, 2011 WL 5508913, 1 (D.Nev. 2011). While Quality Loan  
10 and UTA argue that the 2011 amendment to NRS 107.028 signified the intent to  
11 distinguish between collection agency and foreclosure trustees, that law was passed  
12 after the hearing in this matter and is irrelevant to this proceeding.<sup>3</sup>

13 Thus, the Legislature, not the FID, made the determination that non-judicial  
14 foreclosure constituted an act of collection. The United Trustee Association ("UTA")  
15 asserts that if this Court were to determine that Quality Loan Service was required to be  
16 licensed as a collection agency, economic chaos would necessarily follow. See,  
17 Amicus Brief by United Trustee Association at 13:19). While that argument is both  
18 irrelevant and not part of the record, it is beyond the issues this Court is to decide. The  
19 fact that licensure of other trustee entities may be required is not an insurmountable  
20 task. As Quality Loan Service has demonstrated, a collection agency license can be  
21 obtained. The possibility that other entities may be subject to liability under the FDCPA

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22  
23 <sup>3</sup> For the first time on appeal, Quality Loan argues that recent changes in the NRS  
24 107.028 referencing collection agencies as one of several entities or individuals  
25 qualified to serve as trustee under a deed of trust somehow impact whether Quality  
26 Loan is required to be licensed as a collection agency pursuant to NRS 649. However,  
27 that change occurred after the hearing took place and was not part of the record.  
28 Moreover, Quality Loan had the opportunity to argue this issue when it filed its Petition  
for Reconsideration and it failed to do so. The Commissioner's determination was  
made based upon the actions of Quality Loan and the law at the time of the hearing.  
Because it was not brought before the Commissioner for his review, it cannot be part of  
the consideration of this Court. NRS 233B.131.

1 or Nevada's Deceptive Trade Practices Act is a determination to be made by those  
2 courts if and when those cases are tried.

3                   3)     **NRS 649.020 Provides an Exclusive List of Entities Which are**  
4                             **Exempt from NRS Chapter 649 and Foreclosure Trustees are**  
5                             **Not Listed.**

6             The Legislature has enumerated the businesses which are meant to be excluded  
7 from the provisions of NRS Chapter 649. NRS 649.020(2) reads as follows:

8             2. "Collection agency" does not include any of the following  
9 unless they are conducting collection agencies:

10            (a) Individuals regularly employed on a regular wage or  
11 salary, in the capacity of credit men or in other similar  
12 capacity upon the staff of employees of any person not  
13 engaged in the business of a collection agency or making or  
14 attempting to make collections as an incident to the usual  
15 practices of their primary business or profession.

16            (b) Banks.

17            (c) Nonprofit cooperative associations.

18            (d) Unit-owners' associations and the board members,  
19 officers, employees and units' owners of those associations  
20 when acting under the authority of and in accordance with  
21 chapter 116 or 116B of NRS and the governing documents  
22 of the association, except for those community managers  
23 included within the term "collection agency" pursuant to  
24 subsection 3.

25            (e) Abstract companies doing an escrow business.

26            (f) Duly licensed real estate brokers, except for those  
27 real estate brokers who are community managers included  
28 within the term "collection agency" pursuant to subsection 3.

             (g) Attorneys and counselors at law licensed to practice  
in this State, so long as they are retained by their clients to  
collect or to solicit or obtain payment of such clients' claims  
in the usual course of the practice of their profession.

22 While Quality attempts to expand this list to include trustees that enforce security  
23 interests in real property, no such exemption exists in the enumerated exceptions of the  
24 statute. The Nevada Supreme Court has adopted the statutory construction principle of  
25 *expressio unis est exclusio alterius* (the mention of one thing implies the exclusion of  
26 another). *State v. Wyatt*, 84 Nev. 731, 448 P.2d 827 (1968), citing, *State v. Baker*, 8  
27 Nev. 141 (1872), *In Re Bailey's Estate*, 31 Nev. 377, 103 P. 232 (1909), *Ex Parte*

1 Arascada, 44 Nev. 30, 189 P. 619 (1920). The Ninth Circuit Court of Appeals described  
2 the principle as follows:

3 The canon of statutory construction *expressio unius est*  
4 *exclusio alterius*, which "creates a presumption that when a  
5 statute designates certain persons, things, or manners of  
6 operation, all omissions should be understood as  
7 exclusions," *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d  
8 881, 885 (9th Cir.2005).

9 In this case, NRS 649.020 lists practices which are not considered the business of a  
10 collection agency. The fact that the Legislature expressly set forth a list of exceptions  
11 indicates that it considered which practices should be excluded under the statute. As  
12 there is no mention of foreclosure trustees of security interests as excluded from the  
13 definition of "collection agency", they are presumed to be included. As the Nevada  
14 Supreme Court stated, "The principle is well established in the construction of statutes  
15 that, where certain things are enumerated as disqualifications, *then all other things*  
16 *are excluded*; this principle being expressed in the maxim, "*Expressio unius est*  
17 *exclusio alterius*." *In re Bailey's Estate*, 103 P. 232, 234 (Nev. 1909) (emphasis added).

18 **B. The Business of Enforcing Security Interests is Not, and Never has**  
19 **been, Exempt from State Licensing Requirements.**

20 Quality Loan argues that because NRS 80.015(1)(h) excludes "securing or  
21 collecting debts or enforcing mortgages and security interests in property securing the  
22 debts" as transacting business in the State of Nevada, then they are exempt from any  
23 and all regulation by this state. Aside from the fact that this argument contradicts Quality  
24 Loan's assertion that foreclosure trustees are regulated by the Nevada Supreme Court,  
25 this assertion is fundamentally incorrect and contradicted by the plain language of its  
26 provisions. This statute and the entirety of NRS Chapter 80 solely address the filing  
27 requirements for foreign corporations that operate in the State of Nevada. NRS 80.010  
28 establishes the filing requirements, resident agent and other corporate information  
requirements.

1 While this statute may exempt companies from filing as businesses with the  
2 Secretary of State, it does not effect an exemption from all state licensing requirements.  
3 We know this because that is what the statute says. Specifically, NRS 80.015(4)(b)  
4 states that an exclusion from this chapter "does not affect the applicability of any other  
5 provision of law with respect to the person and may not be offered as a defense or  
6 introduced in evidence in any civil action, criminal action, administrative proceeding or  
7 regulatory proceeding to prove that the person is not doing business in this State."  
8 (Emphasis added). Consequently, Quality Loan's assertion that it is excluded from the  
9 requirements of Nevada law is refuted by the same statute.<sup>4</sup>

10 Consequently, Quality Loan's use of federal court determinations to state that NRS  
11 Chapter 80 excludes licensure under NRS Chapter 649 is legally incorrect. None of the  
12 cases cited by Quality Loan or the UTA address the fact that NRS 80.015 cannot be  
13 claimed as a defense to state licensing requirements. See, *Bruce v. Homefield Financial,*  
14 *Inc.*, 2011 WL 4479736, 2 (D. (D.Nev. 2011) (The district court concluded that NRS  
15 80.015 excused MERS from the requirement "to register with the Nevada Secretary of  
16 State" not the FID); *Elwing v. Allied Home Mortg. Capital Corp.*, 2012 WL 1602783, 2  
17 (D.Nev. 2012) (The district court dismissed plaintiff's claim that defendants violated the  
18 Nevada's Deceptive Trade Practices Act "by recording the underlying notice of default  
19 without having a state business license."). Moreover, neither Quality Loan nor the UTA  
20 explain how this exemption for foreign foreclosure trustees would apply to domestic  
21 foreclosure trustees. Quality Loan Service attempts to confuse the exemption from  
22 obtaining a business license from the Secretary of State with the necessity of obtaining a  
23 collection agency license from the FID under NRS Chapter 649.

24  
25 <sup>4</sup> There are currently 319 foreign collection agencies certified in the State of  
26 Nevada. Were Quality Loan to prevail on this argument, a number of foreign  
27 corporations would be able to operate in this state without any regulatory oversight  
28 at all. The business of "collecting debts" is also excluded from the definition of  
transacting business under NRS 80.015(1)(h). As such, the requirements of foreign  
collection agencies to be registered in Nevada when collecting against Nevada  
residents would be declared void. NRS 649.171.



Moreover, even if this Court were to determine that the act of nonjudicial foreclosure does not require a collection agency license, the Commissioner's Final Decision found that the conduct of Quality Loan Service beyond the act of non-judicial foreclosure was the business of a collection agency and it was required to be licensed pursuant to NRS Chapter 649.

- The lender declares all sums secured by the deed of trust due and payable and elects to have the trust property sold to satisfy the defaulted loan. (AR 641: 12--16).
- Quality Loan solicits lenders to perform its trustee services to collect defaulted mortgage loans. (AR 641: 29-30)
- Quality Loan requests and accepts direct payment from defaulting borrowers who wish to pay their outstanding mortgage balance and avoid foreclosure. (AR 642:1-4).
- Quality Loan in its communication with borrowers states, "THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE." (AR 64124-6).<sup>5</sup>

None of these activities are required pursuant to NRS 107.080 prior to foreclosure. Pursuant to the Commissioner's findings, Quality Loan engaged in unlicensed activity which included soliciting and accepting payment for outstanding debt owed to others outside of and prior to any foreclosure actions under NRS Chapter 107.

**C. A Determination of Whether Quality Loan Service must Comply with NRS Chapter 649, Cannot and Should Not Depend upon the Inconsistent and Irrelevant Federal Court Decisions Concerning the FDCPA.**

- 1) **Federal Court Decisions Interpreting State Laws and Statutes are Not Binding Authority on This or Any Other State Tribunal.**

<sup>5</sup> The UTA argues that reliance upon this self-descriptive language is improper because federal courts have held that entities cannot be held liable under the FDCPA by complying with "mini-Miranda" provisions. (UTA Amicus Curiae Brief at 12: 23-13: 12). However, the FID is not claiming violations of the FDCPA. The FID is stating that it is a collection agency under NRS Chapter 649. Communicating and receiving information regarding a borrower's financial status and communicating that information to the lender is an act of a collection agency.

1       Petitioner Quality Loan presents federal cases which support their argument that it  
2 is not a "debt collector" pursuant to the federal Fair Debt Collection Practice Act (FDCPA),  
3 and therefore are not a collection agency pursuant to Nevada law. Decisions from federal  
4 courts, not state courts, are not binding authority regarding the interpretation of state law.

5       A federal court, even the United States Supreme Court, cannot issue a decision  
6 interpreting state law which is binding on that state's courts. *Leavitt v. Jane L.*, 518 U.S.  
7 137, 146, 116 S.Ct. 2068, 2073 (1996) ("the decision of a federal court (even this Court)  
8 on a question of state law is not binding on state tribunals.") Further, the Nevada  
9 Supreme Court has held that it will not be bound by a decision of a federal court on the  
10 interpretation of state law.

11               Decisions of the federal district court and panels of the federal  
12 circuit court of appeals are not binding upon this court. Even  
13 an en banc decision of a federal circuit court does not bind  
14 Nevada courts. Because this issue is not a matter of  
15 constitutional import, this court is free to interpret state law  
regarding the computational scheme to be applied in Nevada  
state courts.

16       *Custom Cabinet Factory of New York, Inc. v. Eighth Judicial Dist. Court ex rel. County of*  
17 *Clark*, 119 Nev. 51, 54, 62 P.3d 741, 742-3 (2003). Consequently, a federal court  
18 determination on the interpretation of state law is not binding of the FID nor this Court.

19               **2)    NRS Chapter 649 Was Not Modeled After the FDCPA and**  
20               **Therefore, Nevada Has No Obligation to Follow Court**  
21               **Decisions Interpreting the FDCPA to Determine the Meaning of**  
22               **NRS Chapter 649.**

23       Quality Loan relies on federal court cases which held that since foreclosure  
24 trustees are not debt collectors under the FDCPA, they are not required to be licensed as  
25 collection agencies under NRS Chapter 649. In *Karl v. Quality Loan Service Corp.* 759  
26 F.Supp.2d 1240, 1248 (D.Nev. 2010), the federal district court stated, "mortgagees and  
27 their beneficiaries, including mortgage servicing companies, are not debt collectors  
28 subject to the FDCPA" and are therefore not required to be licensed under NRS Chapter  
649. *Id.*, citing, *Mansour v. Cal-Western Reconveyance Corp.*, 618 F.Supp.2d 1178,

1 1182 (D.Ariz. 2009). However, the FDCPA and NRS Chapter 649 are not identical, and  
2 therefore, the definition contained in one statute cannot be applied to a different set of  
3 laws.<sup>6</sup>

4 The Nevada Supreme Court has stated that a court may look to other jurisdictions  
5 for interpretations of ambiguous statutes which are identical to Nevada law. *City of Las*  
6 *Vegas Downtown Redevelopment Agency v. Crockett*, 117 Nev. 816, 825, 34 P.3d 553,  
7 559 n. 14 (2001) (When statutory "language is ambiguous, a court should consult other  
8 sources such as legislative history, legislative intent, and analogous statutory provisions"),  
9 citing, *Moody v. Manny's Auto Repair*, 110 Nev. 320, 327, 871 P.2d 935, 940 (1994); 2B  
10 Norman J. Singer, *Statutes and Statutory Construction* § 52:02, at 282 (6th ed. 2000)  
11 ("When the legislature of a state adopts a statute which is identical or similar to one in  
12 effect in another state or country, the courts of the adopting state usually adopt the  
13 construction placed on the statute in the jurisdiction in which it originated.").

14 As the Commissioner's Final Decision states, NRS 649.075 is not ambiguous.  
15 Moreover, the language of the FDCPA and NRS Chapter 649 are not identical and  
16 contain separate and distinct provisions. While NRS 649.370 states that a violation of the  
17 FDCPA is a violation of state law, it does not necessarily mean that it is the only means of  
18 violating Chapter 649. A collection agency can violate state law by failing to properly  
19 segregate and maintain a client's trust account, NRS 649.355., by failing to draft specific,  
20 intelligible and unambiguous collection contracts with its customers, NRS 649.334(1), by  
21 failing to submit annual reports to the Commissioner, NRS 649.345, and by assigning the  
22 collection of a debt without the express written permission of the collection agent's

23  
24 <sup>6</sup> Quality Loan claims that courts have "consistently held" that foreclosure  
25 trustees are not engaged in the business of debt collection. However, courts have  
26 held that foreclosure trustees are debt collectors under the FDCPA. *Wilson v.*  
27 *Draper & Goldberg*, 443 F.3d 373, 378-9 (4th Cir. 2009) ("We hold that  
28 Defendants' foreclosure action was an attempt to collect a "debt," Defendants are  
not excluded from the definition of "debt collector" under 15 U.S.C.A. §  
1692a(6)(F)(i) merely because they were acting as trustees foreclosing on a  
property pursuant to a deed of trust, and Defendants can still be "debt collectors"  
even if they were also enforcing a security interest."). See also, Brief of Amicus  
Curiae Randolph Barton at 7:20-9:17.

1 customer. NRS 649.375(3). None of these Nevada requirements are proscribed under  
2 the FDCPA.

3 The stated purpose of the NRS Chapter 649 is to protect the rights of people who  
4 hire collection agencies *as well as the debtors*.

5 2. It is the purpose of this chapter to:

6 (a) Bring licensed collection agencies and their personnel  
under more stringent public supervision;

7 (b) Establish a system of regulation to ensure that persons  
8 using the services of a collection agency are properly  
represented; and

9 (c) Discourage improper and abusive collection methods.

10 NRS 649.045(2) (Emphasis added). The purpose of Chapter 649 is to regulate *all*  
11 aspects of collection agency activity. Consequently, if it were determined that the  
12 FDCPA was not applicable to foreclosure trustees, such a finding would not affect the  
13 other provisions of NRS Chapter 649 which do not concern abusive collection practices.

14 While the purpose of NRS Chapter 649 is to regulate *all* aspects of the business  
15 of debt collection, the purpose of the FDCPA is to "eliminate abusive debt collection  
16 practices by debt collectors." 15 U.S.C. § 1692(e). The differences do not end there.  
17 A "claim" under NRS 649.010 refers to "any obligation" which is past due. Not so under  
18 the FDCPA. The federal law restricts its coverage to debts by a "consumer" which are  
19 "primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5).  
20 Moreover, the FDCPA excludes from the definition of "debt collectors" those collection  
21 activities which are "incidental to a bona fide fiduciary obligation." 15 U.S.C. §  
22 1692a(6)(F)(i). However, the definition of a "collection agency" under Nevada law  
23 includes collection activity which is both "direct and indirect" as well as a "primary or  
24 secondary object" of their profession. NRS 649.020(1),

25 Finally, the FDCPA, itself, declares that its provisions should not be used to alter  
26 or eliminate collection agencies' responsibilities to comply with state law. Specifically,  
27 15 U.S.C. § 1692n of the FDCPA, states, "This title does not annul, alter, or affect, or  
28 exempt any person subject to the provisions of this title from complying with the laws of

1 any State ..." Here, again, the very law Petitioner asserts to claim that it is exempt from  
2 state law, states the direct opposite. The federal FDCPA is separate and distinct from  
3 NRS Chapter 649. The mere fact that some federal courts have declared that Quality  
4 Loan's practices may not be defined as collection activity under certain federal statutes  
5 does not mean that Quality Loan is exempt from all state regulation as a consequence.

6 **D. The FID Final Decision Does Not Infringe Upon Judicial Enforcement**  
7 **Nor Does It Require Regulatory Rulemaking In Order to Interpret NRS**  
8 **Chapter 649.**

9 **1) Administrative Rulemaking is Not Required Prior to An**  
10 **Administrative Hearing Determination of Unlicensed Activity.**

11 Quality Loan argues that if the FID were to require foreclosure trustee services to  
12 be licensed, it should have enacted a regulation through rulemaking procedures in  
13 order to implement that interpretation. Quality Loan cites to the Nevada Supreme  
14 Court's determinations regarding *ad hoc* rulemaking as the basis for their assertion.

15 The Nevada Supreme Court has drawn a distinction between rulemaking through  
16 an administrative hearing and an "interpretive ruling" whereby regulatory procedures are  
17 not required.

18 When an agency's action is challenged as violating the  
19 APA's notice and hearing requirements, it must be  
20 determined whether the agency engaged in rulemaking,  
21 such that the APA's safeguards for promulgating regulations  
22 apply, or whether the agency merely made an "interpretive  
23 ruling," in which case the APA rulemaking provisions do not  
24 apply. An agency engages in rulemaking when it  
25 promulgates, amends, or repeals "[a]n agency rule,  
26 standard, directive or statement of general applicability  
27 which effectuates or interprets law or policy, or describes the  
28 organization, procedure or practice requirements of any  
29 agency." An "interpretive ruling," on the other hand, "is  
merely a statement of how the agency construes a statute or  
a regulation according to the specific facts before it."

27 *Labor Com'r of State of Nevada v. Littlefield*, 123 Nev. 35, 39-40, 153 P.3d 26,  
28 29 (2007) (footnotes omitted).

1 NRS 233B.038(1)(a) defines a "regulation" as an "agency rule, standard,  
2 directive or statement of general applicability which effectuates or interprets law or  
3 policy, or describes the organization, procedure or practice requirements of any  
4 agency." However, the term specifically excludes an "agency decision or finding in a  
5 contested case." A contested case is a "proceeding ... in which the legal rights, duties  
6 or privileges of a party are required by law to be determined by an agency after an  
7 opportunity for hearing." NRS 233B.032. The term specifically includes "licensing." *Id.*

8 Moreover, the Commissioner determined that Quality Loan was engaged in  
9 unlicensed collection agency activity based upon the evidence presented at the  
10 hearing. The Commissioner made numerous findings presented through documents  
11 and testimony:

- 12 \* "Respondent is the replacement trustee regarding a deed of trust or is an  
13 agent of the trustee or beneficiary." (Commissioner's Findings of Fact AR  
14 341: 7-10).
- 15 \* "Respondent initially solicits and obtains the opportunity to act as trustee or  
16 agent of the beneficiary or trustee with regard to the deed of trust." (*Id.* at AR  
17 641: 19-21).
- 18 \* The facts also show that Respondent solicits and obtains the right to solicit  
19 and obtain payment/payoff amounts on behalf of lenders." (*Id.* at AR 641:  
20 22-3).
- 21 \* Quality Loan's notice "provides a payoff amount" and directs payment to  
22 Quality Loan. (*Id.* at AR 642:1-4).
- 23 \* Quality Loan "issued Wire Instructions containing instructions for defaulting  
24 borrowers with regard to making payment to Respondent via wire funds  
25 transfer." (*Id.* at AR 642: 8-9).
- 26 \* Quality Loan testified that when it receives money from the borrower, it sends  
27 "the entire amount received, if received by our office, to the lender." (*Id.* at  
28 AR 642: 10-2).
- \* "Testimony also established that when a property is sold at auction, the  
successful bidder pays the full amount of the sale price at the time of the sale  
and the money goes to Respondent and from Respondent to the lender." (*Id.*  
At AR 642: 13-5).

1 The Commissioner's Final Decision did not refer to or describe the activities of others  
2 who are engaged in the same or similar conduct.

3 Further, although the Commissioner determined that Quality Loan's activities,  
4 including those conducted pursuant to NRS Chapter 107, constituted collection activity,  
5 the decision was made under his authority under Nevada law. NRS 649.390 provides  
6 that the Commissioner may file and serve a cease and desist order when he  
7 "determines that an unlicensed person is engaging in an activity for which a license is  
8 required." NRS 649.390(2). Here, the FID issued the cease and desist order, and after  
9 the statutorily required hearing, where each party presented evidence and witnesses,  
10 the Commissioner concluded that the activities engaged in by Quality Loan Service  
11 required a license pursuant to NRS Chapter 649. As stated above, the fact that some  
12 of Quality Loan's actions were guided by another statute or that other companies may  
13 engage in similar activity does not excuse required licensure.

14 Finally, this decision was based solely upon the plain, clear reading of the  
15 applicable statutes. The Commissioner is not required to engage in rulemaking to  
16 interpret a statute where the meaning is clear. The Final Decision did not go beyond  
17 the provisions of the statute nor the definitions stated in the dictionary. The  
18 Commissioner only applied the law to the facts as presented. The applicability of the  
19 statute to this factual situation has already been determined by the Legislature.

20 Here, the Legislature has defined the word "claim" to mean "any obligation" that  
21 is past due, NRS 649.010; it has determined that a collection agency collects a claim  
22 for another, NRS 649.020(1); and it has declared that a person is engaged in  
23 unlicensed activity when collecting a claim without a license. NRS 649.075. The  
24 Commissioner is not required to provide statewide notices, convene a workshop, draft a  
25 small business impact statement, and/or establish an adoption hearing to create a  
26 regulation that that does nothing more than restate the clear terms of the statute.

27 **2) Licensure by the FID is Not a Conflict with Judicial Action by**  
28 **Aggrieved Parties.**

1       Petitioner Quality Loan argues that the Nevada Supreme Court, rather than the  
2 FID, is the sole regulatory authority over Quality Loan's activities. Petitioner states,  
3 "Indeed, only the Nevada Supreme Court has been delegated authority to adopt  
4 regulations under NRS Chapter 107." (Opening Brief at 13:10-2). However, there are  
5 no regulations in the Nevada Administrative Code for Chapter 107. The statute Quality  
6 Loan cited only authorizes the Nevada Supreme Court to draft rules concerning the  
7 foreclosure mediation process, NRS 107.086.

8               8. The Supreme Court shall adopt rules necessary to  
9 carry out the provisions of this section. The rules must,  
10 without limitation, include provisions:

11               (a) Designating an entity to serve as the Mediation  
12 Administrator pursuant to this section. The entities that may  
13 be so designated include, without limitation, the  
14 Administrative Office of the Courts, the district court of the  
15 county in which the property is situated or any other judicial  
16 entity.

17               (b) Ensuring that mediations occur in an orderly and  
18 timely manner.

19               (c) Requiring each party to a mediation to provide such  
20 information as the mediator determines necessary.

21               (d) Establishing procedures to protect the mediation  
22 process from abuse and to ensure that each party to the  
23 mediation acts in good faith.

24               (e) Establishing a total fee of not more than \$400 that  
25 may be charged and collected by the Mediation  
26 Administrator for mediation services pursuant to this section  
27 and providing that the responsibility for payment of the fee  
28 must be shared equally by the parties to the mediation.

29       NRS 107.086(8). This section concerns notice and mediation requirements prior to  
30 foreclosure. The Nevada Supreme Court fulfilled this requirement by adopting the  
31 Foreclosure Mediation Rules in 2009. (AR 39-48). The stated purpose of the  
32 Foreclosure Mediation Program is to "provide for the orderly, timely, and cost-effective  
33 mediation of owner-occupied residential foreclosures." FMPR Rule 1(2). Moreover,  
34 Quality Loan does not point to one provision of the Foreclosure Mediation Program or



1 NRS Chapter 107 which would conflict with the requirements to be licensed pursuant to  
2 NRS Chapter 649.<sup>7</sup>

3 There is no regulatory authority designated for any other provision of NRS  
4 Chapter 107. No agency has the power to draft regulations regarding the provisions of  
5 this chapter. The only penalty available for violating the provisions of the statute  
6 outside the mediation program is through civil action.

7 NRS 107.300 Penalty for failure to deliver statement; bar to  
8 recovery of certain damages.

9 1. A beneficiary who willfully fails to deliver a statement  
10 requested pursuant to NRS 107.200 or 107.210 within 21  
11 days after it is requested is liable to the person who  
12 requested the statement in an amount of \$300 and any  
13 actual damages suffered by the person who requested the  
14 statement.

15 2. A judgment awarded to a person who requested a  
16 statement pursuant to NRS 107.200 or 107.210 for failure to  
17 deliver a statement bars recovery of damages for any other  
18 failure to deliver that statement pursuant to a demand made  
19 within 6 months before or after the demand for which the  
20 judgment was awarded.

21 3. As used in this section, "willfully" means an intentional  
22 failure to comply with the requirements of NRS 107.200 or  
23 107.210 without just cause.

24 Consequently, the only way Quality Loan may be "regulated" is through a lawsuit filed  
25 by an aggrieved party who suffered an injury in fact. *Kirkpatrick v. Eighth Judicial Dist.*  
26 *Court ex rel County of Clark*, 118 Nev. 233, 241, 43 P.3d 998, 1004 (2002) ("To  
27 establish standing, Kirkpatrick must show that he has suffered an injury in fact, that  
28 there is a causal connection between the injury and the conduct complained of, and  
that it is likely that the injury will be redressed by a favorable decision.")

3) The Separation of Powers Doctrine Precludes the Legislature  
from Requiring the Supreme Court to Regulate Entity Practices  
to Ensure Compliance with Nevada Law.

7 The Commissioner's Final Decision refers to NRS 107.020, 107.030,  
107.025, 107.080. None of these statutes concern the mediation process or the  
Foreclosure Mediation Program Rules.

1 The Legislature did not give the Nevada Supreme Court the authority to regulate  
2 foreclosure trustee services, because the power to regulate the activities of business is  
3 a function of the executive branch. Nev. Const. Art. 5 § 7 (the Governor "shall see that  
4 the laws are faithfully executed.") Delegating executive power to the judiciary would  
5 constitute a violation of the separation of powers doctrine. *Commission on Ethics v.*  
6 *Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 - 1104 (2009) ("Nevada's Constitution  
7 goes one step further; it contains an express provision prohibiting any one branch of  
8 government from impinging on the functions of another."); *citing, Secretary of State v.*  
9 *Nevada State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004); Nev. Const.  
10 Art. 3 § 1 ("no persons charged with the exercise of powers properly belonging to one of  
11 these departments shall exercise any functions, appertaining to either of the others,  
12 except in the cases expressly directed or permitted in this constitution.")

13 In construing the statute to require the Nevada Supreme Court to regulate the  
14 activities of foreclosure trustees, Quality Loan is placing NRS 107.086 in direct conflict  
15 the Constitution's requirement that the powers of state government be separate. The  
16 U.S. Supreme Court has held that in such cases, statutes should be interpreted  
17 narrowly to avoid constitutional questions. Thus, an interpretation which requires the  
18 Nevada Supreme Court to regulate the activities of "non-judicial" foreclosure trustees  
19 should be rejected. *Schneider v. Smith*, 390 U.S. 17, 26, 88 S.Ct. 682, 687 (1968) (The  
20 Supreme Court reaffirmed the long history of legal authority which "admonishes courts  
21 to construe statutes narrowly so as to avoid constitutional questions.") In order to avoid  
22 the conflict with this constitutional principle, the statute should be read, as it was meant  
23 to be read, that the Nevada Supreme Court has no regulatory authority over the  
24 conduct of foreclosure trustees.

25 4) **Expertise in Every Area of An Entity's Business Practice Is Not**  
26 **a Requirement for Regulatory Authority.**

27 Quality Loan further argues that the FID does not possess the legal knowledge  
28 or background to regulate foreclosure trustee activity. However, Quality Loan fails to

1 mention how the judiciary branch has expertise over an activity which is "non-judicial" in  
2 nature. Additionally, the Nevada Supreme Court has recently ruled that expertise in an  
3 area does not preclude licensure.

4 In *State v. Nevada Ass'n Services*, 2012 WL 1923974, 3 (Nev.2012), the Nevada  
5 Supreme Court held that though the FID was the licensing authority for collection  
6 agencies receiving HOA assessments through non-judicial foreclosure, the FID had no  
7 jurisdiction to issue an advisory opinion regarding the amount and manner of fees the  
8 collection agency could charge or require that those fees be itemized in the collection  
9 agency contract. *Id.* ("We therefore, determine that the plain language of the statutes  
10 requires that the CCICCH and the Real Estate Division, and no other commission or  
11 division, interpret NRS Chapter 116. Consequently, the [FID] lacked jurisdiction to issue  
12 an advisory opinion interpreting NRS Chapter 116.") (parenthetical added).

13 Consequently, even if, as Quality Loan argues, the interpretation and  
14 construction of NRS Chapter 107 is under the regulatory power of the Nevada Supreme  
15 Court, the FID is not prohibited from but obligated to exercise its authority as a licensing  
16 agency over activities of foreclosure trustees that are subject to regulation pursuant to  
17 NRS Chapter 649.

### 18 CONCLUSION

19 Based upon the foregoing, the Division requests that this Honorable Court Deny  
20 Quality Loan Services Petition for Judicial Review and sustain the Commissioner's  
21 Findings of Fact, Conclusions of Law and Final Decision.

22 DATED, this 15 day of July, 2012.

23 CATHERINE CORTEZ MASTO

24 Attorney General

25 By 

26 Daniel D. Ebihara

27 Deputy Attorney General

28 Attorneys for State of Nevada

Financial Institutions Division

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on July 13<sup>th</sup>, 2012, I deposited in the U.S. mail, postage prepaid, via First Class Mail, a true and correct copy of the foregoing RESPONDENT'S ANSWERING BRIEF, addressed as follows:

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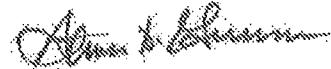
DATED this 13<sup>th</sup> day of July, 2012

By: /s/ Debra Turman  
An employee of the State of Nevada,  
Office of the Attorney General

# EXHIBIT 7

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11 UNITED TRUSTEES ASSOCIATION

12 EIGHTH JUDICIAL DISTRICT COURT

13 CLARK COUNTY, NEVADA

14  
15 QUALITY LOAN SERVICE CORPORATION,) Case No.: A-12-657580-J

) Dept. No.: XVI

16 Plaintiff,

17 v.

18 STATE OF NEVADA, DEPARTMENT OF  
19 BUSINESS AND INDUSTRY, FINANCIAL  
20 INSTITUTIONS DIVISION,

21 Defendant.

) AMICUS BRIEF OF UNITED  
) TRUSTEES ASSOCIATION IN  
) SUPPORT OF REVERSING DECISION  
) OF FINANCIAL INSTITUTIONS  
) DIVISION

22 STATEMENT OF INTEREST:

23 The United Trustees Association ("UTA" or "Amicus") hereby submits this Amicus  
24 Brief in support of an order reversing the Findings of Fact, Conclusions of Law and Final  
25 Decision ("Adverse Decision") of the Department of Business and Industry Financial Institution  
26 Division ("FID") that Quality Loan Service Corporation ("Quality"), in its capacity as a  
27 foreclosure trustee for non-judicial foreclosures in the State of Nevada, is required to first be  
28 licensed as a debt collector by the FID in order to conduct or participate in any non-judicial

1 foreclosures in Nevada. The FID has recently also commenced the process of asserting similar  
2 claims as to other foreclosure trustees.

3 The UTA is a national organization that, since 1968, has been the source for information,  
4 expertise, continuing education and opinion on trustee issues and practices for its members.  
5 UTA membership is comprised of those acting as trustees under real property deeds of trust,  
6 including employees of title companies, financial institutions, and independent companies. UTA  
7 members also work in allied and support organizations, including posting and publishing  
8 companies and computer service firms. Hundreds of UTA members, including foreclosure  
9 trustees, transact business in the State of Nevada. Quality is a member of the UTA as are some  
10 of the other entities who have been contacted by the FID with essentially identical claims that  
11 they must first be licensed as debt collectors.

12 The UTA has been actively involved in the legislative process of various States for over  
13 25 years. The UTA has previously filed amicus curiae briefs before, among others, the  
14 California Supreme Court, the California Courts of Appeal, the Federal Ninth Circuit Court of  
15 Appeals, and the United States Supreme Court in the cases of: *BFP v. Resolution Trust*  
16 *Corporation* (1994) 511 U.S. 531; *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281,  
17 216 Cal.Rptr. 438; *Trustors Security Service v. Title Recon Tracking Service* (1996) 49  
18 Cal.App.4th 592; *Prudential Home Mortgage Company, Inc. v. Superior Court* (1998) 66  
19 Cal.App.4th 1236; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428; *Kachlon v. Markowitz*  
20 (2008) 168 Cal.App. 4th 316; and *Mabry v. Orange County Superior Court*, (2010) 185  
21 Cal.App.4th 208.

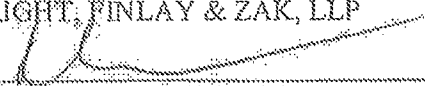
22 The purpose of this amicus brief is to assist the Court in determining that, within the  
23 meaning of NRS 233B.135(3), the Adverse Decision was: (1) In violation of constitutional or  
24 statutory provisions [specifically the governing provisions of NRS 107]; (2) In excess of the  
25 statutory authority of the agency; (3) Affected by other error of law; and/or (4) Arbitrary or  
26  
27  
28

1 capricious or characterized by abuse of discretion.<sup>1</sup> Under any proper and reasonable analysis,  
2 NRS Chapter 649 does not, and should not, apply to trustees conducting non-judicial foreclosure  
3 sale such that the trustees would need to be licensed as debt collectors by the State of Nevada, or  
4 at least registered as foreign collection agencies, in order to conduct such non-judicial  
5 foreclosure sales. To find otherwise would ignore the purpose and effect of NRS 107, and run  
6 contrary to the current state of the law, common practice and economic sense.

7 The UTA, through this brief, asserts that the answer to whether a trustee should be  
8 considered a "debt collector" under NRS Chapter 649 is a clear "no" and that holding the trustees  
9 to be required to be so licensed or registered runs counter to both the law and the practice in the  
10 State of Nevada, does not advance the purposes of NRS Chapter 649, runs counter to NRS  
11 Chapter 107, and that allowing the State of Nevada to treat foreclosure trustees as if they were  
12 collection agencies would risk creating an economic and legal morass for the State, for the  
13 borrowers, for the beneficiaries under the deeds of trust, and for the trustees.

14 DATED this 4<sup>TH</sup> day of June, 2012

WRIGHT, FINLAY & ZAK, LLP

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UNITED TRUSTEES ASSOCIATION

21 I. INTRODUCTION:

22 This Brief seeks to address the question of whether the Commissioner, in issuing the  
23 Adverse Decision that a foreclosure trustee must be licensed as a debt collector and/or registered  
24 as a foreign collection agency under Nevada law, was acting: (1) In violation of constitutional or  
25 statutory provisions [specifically the governing provisions of NRS 107]; (2) In excess of the  
26 statutory authority of the agency; (3) Affected by other error of law; and/or (4) Arbitrary or

27 \_\_\_\_\_  
28 <sup>1</sup> Although the UTA believes that the Adverse Decision was also "clearly erroneous in view of  
the reliable, probative and substantial evidence on the whole record," that is an issue best  
addressed, if at all, by Quality as a party rather than by the UTA as amicus.



1 capricious or characterized by abuse of discretion. The UTA contends that the Adverse Decision  
2 runs afoul of one or more of these defects and, accordingly, should be reversed.

3 NRS Chapter 649 was enacted in 1969 and, in NRS 649.045 expressly states:

4 The Legislature finds and declares that:

5 1. There exists in this State a need for more stringent regulatory  
6 control over collection agencies to ensure that they are composed only of  
7 responsible and well qualified personnel.

8 2. It is the purpose of this chapter to:

9 (a) Bring licensed collection agencies and their personnel under more  
10 stringent public supervision;

11 (b) Establish a system of regulation to ensure that persons using the  
12 services of a collection agency are properly represented; and

13 (c) Discourage improper and abusive collection methods.

14 Pursuant to NRS 649.010, the term "Claim" "means any obligation for the payment of  
15 money or its equivalent that is past due." Pursuant to NRS 649.020(1), the term "Collection  
16 agency" "means all persons engaging, directly or indirectly, and as a primary or a secondary  
17 object, business or pursuit, in the collection of or in soliciting or obtaining in any manner the  
18 payment of a claim owed or due or asserted to be owed or due to another." However, NRS  
19 649.020(2) expressly excludes certain categories of individuals and entities from that definition.<sup>2</sup>  
20 Foreclosure trustees are not specifically mentioned in Chapter 649 at all.

21 Indeed, as foreclosure trustees are, instead, expressly governed by NRS Chapter 107,  
22 there would seem to be no need for them to be mentioned in, let alone covered by, NRS Chapter  
23 649. Nowhere in Nevada's statutes is there any provision which even requires that foreclosure  
24 trustees be licensed.

25 The Nevada Financial Institutions Division ("FID") was created in 1983 and, among its  
26 duties, is expressly responsible for issuing regulations under, and providing enforcement of NRS  
27

28 <sup>2</sup> Both NRS 649.010 and 649.020 appear to be derived from an earlier Nevada statute, 1931  
NCL § 1420.01.

Chapter 649, including licensing and registration for domestic and foreign debt collection agencies.<sup>3</sup> There are no similar express provisions concerning the FID under NRS Chapter 107.

II. FACTS:

The UTA adopts the facts as set forth by Quality in its papers. In particular, the UTA notes that, on October 14, 2010, the Nevada Financial Institutions Division ("FID") issued a Cease and Desist Order ("Order") to Quality, stating, in pertinent part: "[Quality] is engaged in the business of a collection agency through filing foreclosure notices and conducting foreclosure sales on real property for mortgage companies and mortgage holders."<sup>4</sup> This is the only conduct relied on in the Order as a basis for determining that Quality has violated NRS 649.075. In accordance with Nevada law, Quality appealed the FID's Order to the Commissioner of the FID, and, on October 26, 2010, obtained a 90 day stay of enforcement of that Order. On February 14, 2012, the Commissioner found in favor of the FID and issued the Adverse Decision. Quality applied for rehearing but, on March 8, 2012, that request was also denied. This action followed.

Moreover, the FID has apparently been contacting *other* foreclosure trustees in the interim and issuing "cease and desist" letters and/or "show cause" letters to them on the same bases as it did to Quality. Although the UTA had sought to file an amicus briefs in the FID proceeding, the FID opposed those requests, pointing out that there was no existing mechanism for the filing of amici briefs in hearings before the Commissioner. The Commissioner has declined to allow the filing of any amicus brief by the UTA.

III. TRUSTEES ARE NOT WITHIN THE SCOPE OF NRS 649:

It is significant that, in the approximately 40 year history of NRS Chapter 649, and the 27 year history of the FID, there does not appear to be a single reported case or opinion in Nevada that has held a foreclosure trustee to be a "debt collector" within the meaning of Nevada law. In fact, there are numerous slip opinions and orders (mostly from the Federal District Court in Nevada) which have specifically found that a foreclosure trustee was *not* required to be licensed

<sup>3</sup> See NRS 649.026, 649.075 -225, and 649.385 - 400.

<sup>4</sup> Order to Cease and Desist Unlicensed Activities, p.2, II.9-11 (Finding of Fact No. 5).

1 or registered under Nevada law.<sup>5</sup> Indeed, the District Court in *Maves*, *supra*, in a decision  
2 subsequently affirmed by the 9<sup>th</sup> Circuit Court of Appeal, expressly rejected a claim against  
3 Quality under NRS 598.0923 based on the lack of a State license, holding: "A foreclosure  
4 trustee does not have to be licensed to record a notice of default because a foreclosure trustee is  
5 not a debt collector."

6 Similarly, in the case of *Karl v. Quality Loan Serv. Corp.*, (D.Nev.2010) 759 F.Supp.2d  
7 1240, 1248, the District Court held that "[s]ecuring or collecting debts or enforcing mortgages  
8 and security interests in property securing the debts" does not even constitute "doing business" in  
9 Nevada under NRS 80.015(h)). Despite this, the FID seems determined to impose its own view  
10 of licensure on trustees.

11 The FID maintains a listing of licensed domestic and registered foreign collection  
12 agencies, accessible from its website. A review of these very lengthy lists reflects that only two  
13 domestic and one foreign corporation even utilize the word "trustee" as part of their business  
14 name.<sup>6</sup> It thus appears that most trustees operating in Nevada are neither licensed nor registered  
15 as debt collectors.

16 Quite frankly, until now, the FID has never taken a position that foreclosure trustees are  
17 required to be so licensed or registered. A review of prior enforcement orders from the FID  
18 dating back to 2008 did not turn up any prior instances where the FID has targeted a foreclosure  
19 trustee for violating Chapter 649, let alone issued a cease and desist order.<sup>7</sup>

20 The Nevada Attorney General's office has only weighed in on the issue of whether a  
21 foreclosure trustee needs to be licensed in one opinion, in 1988, which clearly argues against any  
22 extension of the term "debt collector" to a foreclosure trustee. In Opinion No. 88-2, issued on  
23

24 <sup>5</sup> See, e.g., *Maves v. First Horizon Home Loans* 2010 WL 3724264 at \*3 (D. Nev. Sept. 15,  
25 2010), holding that "[a] foreclosure trustee does not have to be licensed to record a notice of  
26 default because a foreclosure trustee is not a debt collector," *aff'd* 2011 WL 6256501 (9<sup>th</sup> Cir.  
27 Dec. 15, 2011); *Huck v. Countrywide Home Loans, Inc.* 2011 WL 3274041 at \*2-3 (D. Nev.  
28 July 29, 2011); *Kenneweg v. Indymac Bank, FSB*, 2011 WL 13853 at \*2 (D. Nev. Jan. 4,  
2011); *Martinez v. Bank of America Nat. Ass'n*, 2010 WL 4290921 at \*8-9 (D. Nev. Oct. 20,  
2010).

<sup>6</sup> [http://fid.state.nv.us/New\\_Qry\\_CollectionAgency.asp](http://fid.state.nv.us/New_Qry_CollectionAgency.asp)

1 March 7, 1988, the Nevada Attorney General's Office determined that a foreclosure trustee did  
2 not need to be licensed as an escrow company under NRS Chapter 645A in order to conduct non-  
3 judicial foreclosures. In reaching this conclusion, the Attorney General's office made at least  
4 two observations worth considering here:

5 (1) "Unlike the trustee in a deed of trust who actually becomes vested with legal  
6 title, an escrow agent merely holds 'evidence of title.'"

7 and

8 (2) "A trustee in a deed of trust is not a stranger to the underlying transaction but  
9 a necessary party to it. Further, there appears to be no prohibition against the  
10 beneficiary in a deed of trust or his attorney acting as trustee. . . A deed of trust  
11 would, therefore, not constitute an escrow under the common law definition. We  
can discern no intent by the legislature to change this aspect of the common law  
definition of 'escrow'."

12 As to the former, the fact that a trustee is already vested with legal title to the property being  
13 foreclosed upon negates the possibility of the foreclosure constituting debt collection activity.  
14 Again, NRS 649.020(1) defines "Collection agency" to mean "all persons engaging, directly or  
15 indirectly, and as a primary or a secondary object, business or pursuit, in the collection of or in  
16 soliciting or obtaining in any manner *the payment of a claim owed or due or asserted to be owed*  
17 *or due to another.*" [emphasis added] Clearly, as in the discussion of NRS 645A in AGO 88-2,  
18 the statute is designed to address the conduct of third parties.

19 In terms of the latter, a review of the legislative history of Chapter 649 and its various  
20 amendments over the years is telling. With the exception of the discussion of the 2005 and 2007  
21 amendments<sup>7</sup> to specifically apply Chapter 649 to "community managers" of common interest  
22 developments and condo hotels, non-judicial foreclosures are never even mentioned in  
23 connection with any of the "debt collection" statutes. The specificity of the amendments is itself  
24 telling.

25  
26  
27  
28 <sup>7</sup> [http://www.fid.state.nv.us/New\\_EnforcementActions.htm](http://www.fid.state.nv.us/New_EnforcementActions.htm).

<sup>8</sup> Senate Bill 153 (2005) and Assembly Bill 431 (2007).

1 Even if it arguably remains open to question whether the enforcement of a security  
2 interest is or is not considered a claim within the meaning of NRS 649.010M it would not be  
3 under the cases in this Circuit which have addressed the issue in the context of the FDCPA<sup>9</sup>--  
4 examining the statutory language itself, it is clear that the foreclosure trustee is not a collection  
5 agency as it is not *itself* engaged "as a primary or a secondary object, business or pursuit, in the  
6 collection of or in soliciting or obtaining in any manner the payment of a claim owed or due or  
7 asserted to be owed or due to another." Indeed, in the recent opinion in *Charov v. Perry*, 2010  
8 WL 2673662 at \*1 (D. Nev. Jun. 30, 2010), cited by the District Court in the *Maves* action,  
9 another District Court Judge held that recording a notice of default is not an attempt to collect a  
10 debt because the borrower already consented to allow the foreclosure trustee to record the notice  
11 upon default: "Even if it constitutes a debt collection attempt, which is highly doubtful,  
12 recordation of a notice of default cannot violate FDCPA because consent to make such a  
13 recordation upon default is necessarily given to a trustee in a deed of trust where state law  
14 requires such recordation as part of a non judicial foreclosure."<sup>10</sup>

15 Nevada courts often make reference to California decisions regarding similar California  
16 statutes in the absence of controlling Nevada authority. A review of California law also reflects  
17 the impropriety of treating a foreclosure trustee as if it were a debt collector. As an initial matter,  
18 California cases consistently hold that the trustee under a deed of trust owes only such duties as  
19 are *specifically* set forth by the California Civil Code or by contract. As stated in *I. E. Associates*  
20 *v. Safeco Title Insurance Company*, (1985) 39 Cal.3d 281, 287-89: "There are, moreover,  
21 persuasive policy reasons which militate against a judicial expansion of those duties. The  
22 nonjudicial foreclosure statutes -- an alternative to judicial foreclosure -- reflect a carefully  
23  
24

25 <sup>9</sup> *Hulse v. Ocwen Fed. Bank, FSB*, 195 F.Supp.2d 1188, 1204 (D. Or. 2002) ("the activity of  
26 foreclosing on the property pursuant to a deed of trust is not the collection of a debt within the  
27 meaning of the FDCPA."); *Earl v. Wachovia Mortgage FSB*, CV 09-2198, 2010 WL  
28 2336191, \*5 (D. Ariz. 2010); *Izenberg v. ETS Services, LLC*, 589 F. Supp. 2d 1193, 1199  
(C.D. Cal. Dec. 8, 2008); *Barbanti v. Quality Loan Service Corp.*, 2006 WL 3692638, at \*10  
(E.D.Wash. Dec. 11, 2006).

<sup>10</sup> 2010 WL 2673662 at \*1 (D. Nev. Jun. 30, 2010).

1 crafted balancing of the interests of beneficiaries, trustors, and trustees."<sup>11</sup> Further, under  
2 California law, it is well-recognized that the trustee under a deed of trust "is not a true trustee,  
3 and owes no fiduciary obligations; [it] merely acts as a common agent for the trustor and  
4 beneficiary of the deed of trust. [The trustee's] only duties are: (1) upon default to undertake the  
5 steps necessary to foreclose the deed of trust; or (2) upon satisfaction of the secured debt to  
6 reconvey the deed of trust."<sup>12</sup>

7 The same analysis seems (or should at least be deemed) to be true under NRS Chapter  
8 107 and, like the California Civil Code sections on non-judicial foreclosure, it should be held  
9 that Chapter 107M not 649--provides "the comprehensive statutory framework established to  
10 govern non-judicial foreclosure sales" and that it "is intended to be exhaustive."<sup>13</sup> Indeed, the  
11 United States District Court in Nevada has adopted this approach. In *Gomez v. Countrywide*  
12 *Bank, FSB*, 2009 WL 3617650 at \*8 (D. Nev. Oct. 26, 2009), the court stated:

13 The U.S. District Court for the Northern District of California recently found that  
14 a foreclosure trustee has a duty of care to a trustor, but that the scope of the duty  
15 is circumscribed by the statutes governing foreclosures. *Hendrickson v. Popular*  
16 *Mortgage Servicing, Inc.*, No. 09-00472-CW, 2009 WL 1455491, at \*7 (N.D.Cal.  
17 May 21, 2009) ("[T]he scope and nature of the trustee's duties in a nonjudicial  
18 foreclosure 'are exclusively defined by the deed of trust and the governing  
19 statutes. No other common law duties exist.' ~ (quoting *Pro Value Props., Inc. v.*  
20 *Quality Loan Serv. Corp.*, 88 Cal.Rptr.3d 381 [ , 384] (2009))). Therefore, there is  
21 no general duty of care here, but there is a duty of care as defined by the Nevada  
22 foreclosure statutes, assuming the Nevada Supreme Court would hold as the  
23 California Supreme Court did in *Pro Value Props., Inc.*

24 At least one District Court in Nevada has even adopted the California view that the trustee owes  
25 no fiduciary duties and is essentially just a common agent.<sup>14</sup>

26 Review of what the foreclosure trustee does and does not do provides further impetus for  
27 rejecting the FID's attempt to foist additional statutory obligations on the trustee beyond those  
28

25  
26 <sup>11</sup> *Id.*, at 288.

27 <sup>12</sup> *Vournas v. Fidelity National Title Ins. Co.*, (1999) 73 Cal.App.4th 668, 677.

28 <sup>13</sup> *Moeller v. Lien*, (1994) 25 Cal. App. 4th 822, 834; see also *Homestead Sav. v. Darmiento*,  
(1991) 230 Cal. App. 3d 424, 432-433.

<sup>14</sup> *Orzoff v. Bank of America, N.A.*, 2011 WL 1539897, at \*3-4 (D. Nev. Apr. 22, 2011).

1 contemplated by NRS Chapter 107. The trustee has little discretion beyond the express  
2 provisions of NRS Chapter 107 and the operative deed of trust. Unlike a true debt collector, a  
3 foreclosure trustee does not have latitude in deciding how to fulfill its obligations (it cannot  
4 deviate from the requirements of the law), cannot pursue any source of funds other from the sale  
5 of the secured property, cannot compromise the debt, cannot directly negotiate with the debtor to  
6 resolve the debt *and does not get paid depending on whether and how much debt is collected* but  
7 rather merely for following the procedures mandated under Chapter 107. To the extent that a  
8 trustee obtains any money in the course of a foreclosure, it is from the sale of the property, it acts  
9 as a mere conduit to disburse that money in accordance with the requirements of the governing  
10 law. Most significantly, though, unlike a true debt collector, the trustee is already vested with  
11 the legal title to the property it is selling merely by virtue of the deed of trust executed by the  
12 borrower.<sup>15</sup>

13 The cases applying California law also make clear that foreclosing on a deed of trust is  
14 not debt collection activity.<sup>16</sup> Although California no longer requires the licensing of debt  
15 collectors, their conduct is still governed by the Rosenthal Fair Debt Collection Practices Act,  
16 California Civil Code § 1788, et seq. The definition of "debt collector" under § 1788.2(c)<sup>17</sup> of  
17 the Act is similar to that of "collection agency" under NRS 649.020(1), set forth above; as  
18 recognized by the cases cited in footnote 12, in California, foreclosure activities are not treated  
19 as debt collection activity. Absent any indication to the contrary from the Nevada State  
20

21  
22 <sup>15</sup> See *Thomas v. BAC Home Loans Serv., LP* 2011 WL 6743044 at \*3 (Nev. S. Ct. Dec. 20,  
23 2011): "[A] deed of trust conveys to the trustee the legal title of the property for the purpose  
24 of securing the borrower's performance under the note and deed of trust for the benefit of the  
beneficiary."; *Summa Corp. v. Greenspun*, (1980) 96 Nev. 247, 252, 607 P.2d 569, 572.

25 <sup>16</sup> *Collins v. Power Default Servs., Inc.*, 2010 WL 234902, at \*3 (N.D.Cal. Jan.14, 2010)  
26 (and cases cited therein): "The law is clear that foreclosing on a deed of trust does not invoke  
the statutory protections of the RFDCPA." See also *Castenda v. Saxon Mortgage Servs., Inc.*,  
27 (E.D. Cal. 2009) 687 F.Supp.2d 1191, 2009: "[F]oreclosure pursuant to a deed of trust does  
not constitute debt collection under the RFDCPA."

28 <sup>17</sup> "The term 'debt collector' means any person who, in the ordinary course of business,  
regularly, on behalf of himself or herself or others, engages in debt collection. The term  
includes any person who composes and sells, or offers to compose and sell, forms, letters, and

1 legislature, there is no logical reason to interpret the two definitions differently. If a trustee  
2 conducting a non-judicial foreclosure in accordance with Nevada law is not actually engaged in  
3 debt collection activity, there is nothing it is doing for which a license as a collection agency  
4 should be required.

5 Again, in reality, the foreclosure trustee is paid solely for performing the tasks mandated  
6 by State foreclosure law; it does not engage in any activities *other than* those required or  
7 permitted by NRS Chapter 107 ~~and does not get paid any more or less if the borrower pays off~~  
8 ~~the loan or the property is sold at foreclosure~~. Since all Quality, or any trustee for that matter,  
9 does in the course of a Nevada foreclosure is to follow the dictates of Chapter 107 in selling  
10 property to which it already holds legal title, there is no collection activity for the FID to regulate  
11 here.

12 As noted above, the purposes of Chapter 649 are set forth in § 649.045(2). Of the three  
13 purposes listed, only the latter two have any bearing on the question of whether an entity not  
14 previously treated as a collection agency need nonetheless be licensed as one to carry out its  
15 business:

- 16 (b) Establish a system of regulation to ensure that persons using the  
services of a collection agency are properly represented; and
- 17 (c) Discourage improper and abusive collection methods.

18 The persons utilizing the services of a foreclosure trustee are not the ones seeking to require that  
19 the trustee be licensed and are more than adequately protected by existing law, particularly the  
20 strictures of Chapter 107. Those same strictures already preclude the possibility of improper and  
21 abusive collection practices and/or provide the appropriate remedy should they occur. No non-  
22 judicial foreclosure sale can take place in Nevada absent compliance with Chapter 107 and,  
23 therefore, the stated purposes of NRS 649 do not compel requiring the licensing of trustees.

24 Moreover, NRS Chapter 107 similarly contains no reference to mandatory licensing  
25 under Chapter 649 for foreclosure trustees. Indeed, the Commissioner's reliance, in finding  
26 against Quality, on the concept that the Legislature is presumed to have knowledge of existing  
27

28 other collection media used or intended to be used for debt collection, but does not include an



1 statutes [¶ 25 of Findings] further supports a rejection of the argument that foreclosure trustees  
2 need to be licensed as debt collectors. Chapter 107 was recently amended by the Nevada  
3 legislature pursuant to AB 284 and AB 273, effective October 1, 2011; by way of which the  
4 Legislature added specific new requirements governing who can act as a foreclosure trustee in  
5 Nevada. Significantly, while the Legislature noted that *one of* the ten types of entities authorized  
6 to act as a foreclosure trustee is "a person who engages in the business of a collection agency  
7 pursuant to Chapter 649" [NRS 107.28(1)(i)], the Legislature made clear that was ONLY ONE  
8 of the ways in which an entity could be qualified to act as a foreclosure trustee in Nevada.  
9 Chapter 107 most certainly does not require that ALL parties acting as foreclosure trustee be  
10 licensed under Chapter 649. If the Nevada Legislature had intended to require such licensure as  
11 a precondition for any foreclosure, it would have amended Chapter 107 to say so.

12 The Commissioner's reliance in the Findings [¶ 26] on the legislative history of NRS  
13 649.020(3), governing the requirement that management companies engaging in foreclosure be  
14 licensed, seems self-defeating as it proves the fallacy of the Commissioner's argument for  
15 broader applicability. The Legislature was there specifically deciding that a particular class of  
16 entity, management companies which also themselves elect to engage in foreclosure services,  
17 need to be licensed. Had the Legislature intended that all foreclosure activities require a debt  
18 collection license, it would have been far easier to enact that more general statute rather than the  
19 precisely circumscribed law it passed instead. When the Legislature is so specific as to the  
20 object of its enactments, there is no rational basis to extend that application to other, unrelated  
21 entities. When presented with a second opportunity to apply Chapter 649 to all foreclosure  
22 trustees, in passing AB 284 and AB 273, the Nevada Legislature again chose not to do so.

23 Nor can the Commissioner properly rely on the inclusion of the so-called "mini-Miranda"  
24 under 15 USC § 1692e(11) in any communication which a trustee might send to a borrower  
25 [Findings ¶ 15]. As held in the recent case of *Boosahda v. Providence Dane LLC* 2012 WL  
26 268345 at \*3 (4<sup>th</sup> Cir. Jan. 31, 2012):

27  
28

attorney or counselor at law."

1 [I]f the use of the statutorily required disclaimer is sufficient to establish an  
2 FDCPA claim, debt collectors will be placed in a conundrum, exposed to liability  
3 for both including the disclaimer and for omitting it. *Cf. Lewis v. ACB Business*  
4 *Servs., Inc.*, 135 F.3d 389, 399N400 (6th Cir.1998) ("[t]o punish [debt collector]  
5 for compliance with [§ 1692e(1)] [by disclosing] that it is an 'attempt[ ] to  
6 collect on a debt' would be an absurd result that we decline to reach."); *Wade v.*  
7 *Reg'l Credit Ass'n*, 87 F.3d 1098, 1100 (9th Cir.1996) (finding no FDCPA  
8 violation based on "informational" disclaimer and noting that debt collector  
9 "would have violated the Act had it not included this statement"). Put simply, a  
10 debt collector should not be penalized for taking the precaution of including the  
11 disclaimer within its initial written communication to the debtor, in the event the  
12 debt is subject to the FDCPA. In any case, Providence's disclaimer is not  
13 sufficient to satisfy Boosahda's burden of showing the credit card debt was  
14 consumer debt. See *Golliday v. Chase Home Fin., LLC*, 761 F.Supp.2d 629, 636  
15 (W.D.Mich.2011) (concluding plaintiff's reliance on disclaimer insufficient to  
16 defeat summary judgment as to firm's debt collector status and observing that firm  
17 should not be faulted when it "errs on the side of caution" by including  
18 disclaimer).

19 There are also the practical realities which warrant reconsideration of the FID's position  
20 here. If trustees were required to hold collection licenses, or to register as foreign collection  
21 agencies, as a prerequisite to any Nevada foreclosure sale, the question would inevitably arise as  
22 to whether the tens of thousands of foreclosure sales already conducted in this State using an  
23 unlicensed foreclosure trustee were valid. In many instances, these properties have already been  
24 sold to third parties (either through the foreclosure sale to investors or by the foreclosing lender  
25 to new families thereafter). It would clearly cause economic chaos, not to mention result in a  
26 tsunami of litigation, were these sales allowed to be challenged on this basis. Further delay and  
27 economic disruption would also come from having to restart the process for the thousands of  
28 foreclosures which are still pending but have not yet gone to sale.

As is, borrowers' lawyers have already been bringing a flurry of lawsuits raising all sorts  
of challenges to the foreclosure process in an effort to slow, if not stop, the process entirely.<sup>18</sup>

<sup>18</sup> See, e.g., *In re Mortgage Electronic Registration Systems (MERS) Litigation*, MDL Docket  
No. 09-2119-JAT, a multi-district litigation matter in which plaintiffs argue, among other things,  
that the mere use of MERS as a nominee beneficiary voids the deeds of trust securing their loans.  
On September 30, 2010, Judge Teiborg granted the motions to dismiss of the various defendants  
in the six class actions that are part of the MDL, albeit with leave to amend. *In re Mortgage*

1 These efforts rarely succeed in the long-run but the short-term goal of delaying the sales, and  
2 allowing the borrowers to remain in possession (typically without making any mortgage or rent  
3 payments at all) has been an end for them in and of itself.

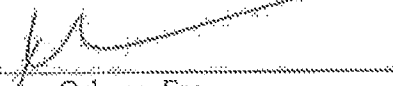
4 Regardless of the reason for this sea change in the FID's views toward licensing of  
5 trustees, allowing the FID to unilaterally impose such stricturesM particularly retroactivelyM  
6 would have devastating consequences for the State of Nevada, the financial community and even  
7 the citizens of Nevada.

8 IV. CONCLUSION:

9 Accordingly, the UTA respectfully submits that the District Court should find that a  
10 foreclosure trustee need not be licensed as a debt collector or registered as a foreign collection  
11 agent and reverse the Adverse Decision.

12  
13 DATED this 4th day of June, 2012

WRIGHT, FINLAY & ZAK, LLP

14  
15   
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28 *Electronic Registrations Systems (MERS) Lit.* --- F.Supp.2d ----, 2010 WL 4038788, (D.Ariz.,  
Sept. 30, 2010).

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The undersigned does hereby affirm that the preceding AMICUS BRIEF OF UNITED TRUSTEES ASSOCIATION IN SUPPORT OF REVERSING DECISION OF FINANCIAL INSTITUTIONS DIVISION filed in Case No. A-12-657580-J does not contain the social security number of any person.

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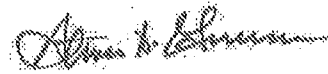
The undersigned hereby certifies that on this day 4<sup>TH</sup>, of June 2012, I served copies of the "AMICUS BRIEF OF UNITED TRUSTEES ASSOCIATION IN SUPPORT OF REVERSING DECISION OF FINANCIAL INSTITUTIONS DIVISION", to the parties listed below by:

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# EXHIBIT 8



CLERK OF THE COURT

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16 EIGHTH JUDICIAL DISTRICT COURT  
17 CLARK COUNTY, NEVADA

18	QUALITY LOAN SERVICE CORPORATION,) Case No.: A-12-657580-J
19	) Dept. No.: XVI
20	Plaintiff, )
21	) MOTION FOR LEAVE TO FILE AMICUS
22	) BRIEF OF UNITED TRUSTEES
23	) ASSOCIATION IN SUPPORT OF
24	) REVERSING DECISION OF FINANCIAL
25	) INSTITUTIONS DIVISION
26	)
27	)
28	Defendant. )

29 The United Trustees Association ("UTA" or "Amicus") respectfully moves this Court,  
30 pursuant to NRAP Rule 29, for leave to file the attached Amicus Brief in support of an order  
31 reversing the Findings of Fact, Conclusions of Law and Final Decision ("Adverse Decision") of  
32 the Department of Business and Industry Financial Institution Division ("FID") that Quality Loan  
33 MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF REVERSING

DECISION OF FID

1 Service Corporation ("Quality"), in its capacity as a foreclosure trustee for non-judicial  
2 foreclosures in the State of Nevada, is required to first be licensed as a debt collector by the FID  
3 in order to conduct or participate in any non-judicial foreclosures in Nevada. The FID has  
4 recently also commenced the process of asserting similar claims as to other foreclosure trustees.

5  
6 Specifically, the purpose of this Amicus Brief is to assist the Court in determining that  
7 the Adverse Decision was: (1) In violation of constitutional or statutory provisions [specifically  
8 the governing provisions of NRS 107]; (2) In excess of the statutory authority of the agency; (3)  
9 Affected by other error of law; and/or (4) Arbitrary or capricious or characterized by abuse of  
10 discretion, and that, accordingly, NRS Chapter 649 does not, and should not, apply to trustees  
11 conducting non-judicial foreclosure sale such that the trustees would need to be licensed as debt  
12 collectors by the State of Nevada, or at least registered as foreign collection agencies, in order to  
13 conduct such non-judicial foreclosure sales. Instead, NRS 107 provides the comprehensive and  
14 exclusive statutory scheme governing the rights and duties of foreclosure trustees.

15  
16 The UTA, through this brief, asserts that the answer to whether a trustee should be  
17 considered a "debt collector" under NRS Chapter 649 is a clear "no" and that holding the trustees  
18 to be required to be so licensed or registered runs counter to both the law and the practice in the  
19 State of Nevada, does not advance the purposes of NRS Chapter 649, runs counter to NRS  
20 Chapter 107, and that allowing the State of Nevada to treat foreclosure trustees as if they were  
21 collection agencies would risk creating an economic and legal morass for the State, for the  
22 borrowers, for the beneficiaries under the deeds of trust, and for the trustees.

23  
24 The UTA is a national organization which, since 1968, has been the source for  
25 information, expertise, continuing education and opinion on trustee issues and practices for its  
26 members. UTA membership is comprised of those acting as trustees under real property deeds  
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28

1 of trust, including employees of title companies, financial institutions, and independent  
2 companies. UTA members also work in allied and support organizations, including posting and  
3 publishing companies and computer service firms. Hundreds of UTA members, including  
4 foreclosure trustees, transact business in the State of Nevada. Quality Loan Service Corporation  
5 ("Quality") is a member of the UTA.  
6

7 As the FID seeks to challenge the right of foreclosure trustees to conduct non-judicial  
8 foreclosures in Nevada, and, taken to its inevitable conclusion, could result in voiding even those  
9 foreclosure sales which have already occurred, the UTA has a clear interest in its outcome. The  
10 UTA offers a significant background and unique perspective on the issues which it believes will  
11 be of assistance to the Court in determining their merits on this appeal.  
12

13 The UTA has been actively involved in the legislative process of various States for over  
14 25 years. The UTA has previously filed amicus curiae briefs before, among others, the  
15 California Supreme Court, the California Courts of Appeal, the Federal Ninth Circuit Court of  
16 Appeals, and the United States Supreme Court in the cases of: *BFP v. Resolution Trust*  
17 *Corporation* (1994) 511 U.S. 531;  
18 *Maves v. First Horizon Home Loans* 2011 WL 6256501 (9<sup>th</sup> Cir. Dec. 15, 2011); *I.E. Associates*  
19 *v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 216 Cal.Rptr. 438; *Trustors Security Service v.*  
20 *Title Recon Tracking Service* (1996) 49 Cal.App.4th 592; *Prudential Home Mortgage Company,*  
21 *Inc. v. Superior Court* (1998) 66 Cal.App.4th 1236; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th  
22 428; *Kachlon v. Markowitz* (2008) 168 Cal.App. 4th 316; and *Mabry v. Orange County Superior*  
23 *Court*, (2010) 185 Cal.App.4<sup>th</sup> 208.  
24  
25

26 Given the importance and broad impact of these issues on the State, the borrowers, the  
27 beneficiaries and the trustees, and the considerable economic impact this opinion could have on  
28

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF REVERSING  
DECISION OF FID



1 them, it is respectfully requested that the Court grant this Motion and allow the filing of the  
2 Amicus Brief attached hereto as Exhibit 1.

3 DATED this 21<sup>st</sup> day of May, 2012

WRIGHT, FINLAY & ZAK, LLP

4  
5  
6 Donna Osborn, Esq.  
Nevada State Bar Number 006527  
7 5532 S. Fort Apache Road, Suite 110  
8 Las Vegas, NV, 89148  
9 (702) 475-7964; Fax: (702) 946-1345  
Attorneys for Amicus  
UNITED TRUSTEES ASSOCIATION

10 AFFIRMATION

11 Pursuant to NRS 239B.030

12 The undersigned does hereby affirm that the preceding MOTION FOR LEAVE TO  
13 FILE AMICUS BRIEF OF UNITED TRUSTEES ASSOCIATION IN SUPPORT OF  
14 REVERSING DECISION OF FINANCIAL INSTITUTIONS DIVISION filed in Case No.  
15 A-12-657580-J does not contain the social security number of any person.

16  
17 DATED this 21<sup>st</sup> day of May, 2012.

WRIGHT, FINLAY & ZAK, LLP

18  
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20 Donna Osborn, Esq.  
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Exhibit 1

Exhibit 1

Exhibit 1

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EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

QUALITY LOAN SERVICE CORPORATION,) Case No.: A-12-657580-J

Plaintiff,

v.

STATE OF NEVADA, DEPARTMENT OF  
BUSINESS AND INDUSTRY, FINANCIAL  
INSTITUTIONS DIVISION,

Defendant.

) Dept. No.: XVI

) AMICUS BRIEF OF UNITED TRUSTEES  
) ASSOCIATION IN SUPPORT OF  
) REVERSING DECISION OF FINANCIAL  
) INSTITUTIONS DIVISION

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1 The UTA has been actively involved in the legislative process of various  
2 States for over 25 years. The UTA has previously filed amicus curiae briefs  
3 before, among others, the California Supreme Court, the California Courts of  
4 Appeal, the Federal Ninth Circuit Court of Appeals, and the United States Supreme  
5 Court in the cases of: *BFP v. Resolution Trust Corporation* (1994) 511 U.S. 531;  
6 *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 216 Cal.Rptr. 438;  
7 *Trustors Security Service v. Title Recon Tracking Service* (1996) 49 Cal.App.4th  
8 592; *Prudential Home Mortgage Company, Inc. v. Superior Court* (1998) 66  
9 Cal.App.4th 1236; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428; *Kachlon v.*  
10 *Markowitz* (2008) 168 Cal.App. 4th 316; and *Mabry v. Orange County Superior*  
11 *Court*, (2010) 185 Cal.App.4<sup>th</sup> 208.

12 The purpose of this amicus brief is to assist the Court in determining that,  
13 within the meaning of NRS 233B.135(3), the Adverse Decision was: (1) In  
14 violation of constitutional or statutory provisions [specifically the governing  
15 provisions of NRS 107]; (2) In excess of the statutory authority of the agency; (3)  
16 Affected by other error of law; and/or (4) Arbitrary or capricious or characterized  
17 by abuse of discretion.<sup>1</sup> Under any proper and reasonable analysis, NRS Chapter  
18 649 does not, and should not, apply to trustees conducting non-judicial foreclosure  
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28 <sup>1</sup> Although the UTA believes that the Adverse Decision was also "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," that is an issue best addressed, if at all, by Quality as a party rather than by the UTA as amicus.

1 sale such that the trustees would need to be licensed as debt collectors by the State  
2 of Nevada, or at least registered as foreign collection agencies, in order to conduct  
3 such non-judicial foreclosure sales. To find otherwise would ignore the purpose  
4 and effect of NRS 107, and run contrary to the current state of the law, common  
5 practice and economic sense.  
6  
7

8 The UTA, through this brief, asserts that the answer to whether a trustee  
9 should be considered a "debt collector" under NRS Chapter 649 is a clear "no" and  
10 that holding the trustees to be required to be so licensed or registered runs counter  
11 to both the law and the practice in the State of Nevada, does not advance the  
12 purposes of NRS Chapter 649, runs counter to NRS Chapter 107, and that allowing  
13 the State of Nevada to treat foreclosure trustees as if they were collection agencies  
14 would risk creating an economic and legal morass for the State, for the borrowers,  
15 for the beneficiaries under the deeds of trust, and for the trustees.  
16  
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19

20 DATED this \_\_\_\_ day of May, 2012

WRIGHT, FINLAY & ZAK, LLP

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I. INTRODUCTION:

This Brief seeks to address the question of whether the Commissioner, in issuing the Adverse Decision that a foreclosure trustee must be licensed as a debt collector and/or registered as a foreign collection agency under Nevada law, was acting: (1) In violation of constitutional or statutory provisions [specifically the governing provisions of NRS 107]; (2) In excess of the statutory authority of the agency; (3) Affected by other error of law; and/or (4) Arbitrary or capricious or characterized by abuse of discretion. The UTA contends that the Adverse Decision runs afoul of one or more of these defects and, accordingly, should be reversed.

NRS Chapter 649 was enacted in 1969 and, in NRS 649.045 expressly states:

The Legislature finds and declares that:

1. There exists in this State a need for more stringent regulatory control over collection agencies to ensure that they are composed only of responsible and well qualified personnel.

2. It is the purpose of this chapter to:

(a) Bring licensed collection agencies and their personnel under more stringent public supervision;

(b) Establish a system of regulation to ensure that persons using the services of a collection agency are properly represented; and

(c) Discourage improper and abusive collection methods.

Pursuant to NRS 649.010, the term "Claim" "means any obligation for the payment of money or its equivalent that is past due." Pursuant to NRS 649.020(1),

1 the term "Collection agency" "means all persons engaging, directly or indirectly,  
2 and as a primary or a secondary object, business or pursuit, in the collection of or  
3 in soliciting or obtaining in any manner the payment of a claim owed or due or  
4 asserted to be owed or due to another." However, NRS 649.020(2) expressly  
5 excludes certain categories of individuals and entities from that definition.<sup>2</sup>  
6  
7 Foreclosure trustees are not specifically mentioned in Chapter 649 at all.  
8

9 Indeed, as foreclosure trustees are, instead, expressly governed by NRS  
10 Chapter 107, there would seem to be no need for them to be mentioned in, let alone  
11 covered by, NRS Chapter 649. Nowhere in Nevada's statutes is there any  
12 provision which even requires that foreclosure trustees be licensed.  
13  
14

15 The Nevada Financial Institutions Division ("FID") was created in 1983 and,  
16 among its duties, is expressly responsible for issuing regulations under, and  
17 providing enforcement of NRS Chapter 649, including licensing and registration  
18 for domestic and foreign debt collection agencies.<sup>3</sup> There are no similar express  
19 provisions concerning the FID under NRS Chapter 107.  
20  
21

## 22 II. FACTS:

23 The UTA adopts the facts as set forth by Quality in its papers. In particular,  
24 the UTA notes that, on October 14, 2010, the Nevada Financial Institutions  
25  
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27 <sup>2</sup> Both NRS 649.010 and 649.020 appear to be derived from an earlier Nevada statute, 1931 NCL  
28 § 1420.01.

<sup>3</sup> See NRS 649.026, 649.075 -225, and 649.385 - 400.  
6



1 Division ("FID") issued a Cease and Desist Order ("Order") to Quality, stating, in  
2 pertinent part: "[Quality] is engaged in the business of a collection agency through  
3 filing foreclosure notices and conducting foreclosure sales on real property for  
4 mortgage companies and mortgage holders."<sup>4</sup> This is the only conduct relied on in  
5 the Order as a basis for determining that Quality has violated NRS 649.075. In  
6 accordance with Nevada law, Quality appealed the FID's Order to the  
7 Commissioner of the FID, and, on October 26, 2010, obtained a 90 day stay of  
8 enforcement of that Order. On February 14, 2012, the Commissioner found in  
9 favor of the FID and issued the Adverse Decision. Quality applied for rehearing  
10 but, on March 8, 2012, that request was also denied. This action followed.

15 Moreover, the FID has apparently been contacting *other* foreclosure trustees  
16 in the interim and issuing "cease and desist" letters and/or "show cause" letters to  
17 them on the same bases as it did to Quality. Although the UTA had sought to file  
18 an amicus briefs in the FID proceeding, the FID opposed those requests, pointing  
19 out that there was no existing mechanism for the filing of amici briefs in hearings  
20 before the Commissioner. The Commissioner has declined to allow the filing of  
21 any amicus brief by the UTA.

25 // //

26 // //

28 <sup>4</sup> Order to Cease and Desist Unlicensed Activities, p.2, 11.9-11 (Finding of Fact No. 5).

1           III. TRUSTEES ARE NOT WITHIN THE SCOPE OF NRS 649:

2           It is significant that, in the approximately 40 year history of NRS Chapter  
3  
4 649, and the 27 year history of the FID, there does not appear to be a single  
5 reported case or opinion in Nevada that has held a foreclosure trustee to be a "debt  
6 collector" within the meaning of Nevada law. In fact, there are numerous slip  
7 opinions and orders (mostly from the Federal District Court in Nevada) which have  
8 specifically found that a foreclosure trustee was *not* required to be licensed or  
9 registered under Nevada law.<sup>5</sup> Indeed, the District Court in *Maves, supra*, in a  
10 decision subsequently affirmed by the 9<sup>th</sup> Circuit Court of Appeal, expressly  
11 rejected a claim against Quality under NRS 598.0923 based on the lack of a State  
12 license, holding: "A foreclosure trustee does not have to be licensed to record a  
13 notice of default because a foreclosure trustee is not a debt collector."  
14

15  
16           Similarly, in the case of *Karl v. Quality Loan Serv. Corp.*, (D.Nev.2010) 759  
17 F.Supp.2d 1240, 1248, the District Court held that "[s]ecuring or collecting debts  
18 or enforcing mortgages and security interests in property securing the debts" does  
19 not even constitute "doing business" in Nevada under NRS 80.015(h)). Despite  
20 this, the FID seems determined to impose its own view of licensure on trustees.  
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27 <sup>5</sup> See, e.g., *Maves v. First Horizon Home Loans* 2010 WL 3724264 at \*3 (D. Nev. Sept. 15,  
28 2010), 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," *aff'd* 2011 WL 6256301 (9<sup>th</sup> Cir.  
Dec. 15, 2011); *Huck v. Countrywide Home Loans, Inc.* 2011 WL 3274041 at \*2-3 (D. Nev. July  
8

1 The FID maintains a listing of licensed domestic and registered foreign  
2 collection agencies, accessible from its website. A review of these very lengthy  
3 lists reflects that only two domestic and one foreign corporation even utilize the  
4 word "trustee" as part of their business name.<sup>6</sup> It thus appears that most trustees  
5 operating in Nevada are neither licensed nor registered as debt collectors.  
6

7  
8 Quite frankly, until now, the FID has never taken a position that foreclosure  
9 trustees are required to be so licensed or registered—a review of prior enforcement  
10 orders from the FID dating back to 2008 did not turn up any prior instances where  
11 the FID has targeted a foreclosure trustee for violating Chapter 649, let alone  
12 issued a cease and desist order.<sup>7</sup>  
13

14  
15 The Nevada Attorney General's office has only weighed in on the issue of  
16 whether a foreclosure trustee needs to be licensed in one opinion, in 1988, which  
17 clearly argues against any extension of the term "debt collector" to a foreclosure  
18 trustee. In Opinion No. 88-2, issued on March 7, 1988, the Nevada Attorney  
19 General's Office determined that a foreclosure trustee did not need to be licensed  
20 as an escrow company under NRS Chapter 645A in order to conduct non-judicial  
21 foreclosures. In reaching this conclusion, the Attorney General's office made at  
22 least two observations worth considering here:  
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28 29, 2011); *Kernweg v. Indymac Bank, FSB*, 2011 WL 13853 at \*2 (D. Nev. Jan. 4, 2011);  
*Martinez v. Bank of America Nat. Ass'n*, 2010 WL 4290921 at \*8-9 (D. Nev. Oct. 20, 2010).  
<sup>6</sup> [http://fid.state.nv.us/New\\_Qry\\_CollectionAgency.asp](http://fid.state.nv.us/New_Qry_CollectionAgency.asp)

1 (1) "Unlike the trustee in a deed of trust who actually becomes vested  
2 with legal title, an escrow agent merely holds 'evidence of title.'"

3 and

4 (2) "A trustee in a deed of trust is not a stranger to the underlying  
5 transaction but a necessary party to it. Further, there appears to be no  
6 prohibition against the beneficiary in a deed of trust or his attorney  
7 acting as trustee....A deed of trust would, therefore, not constitute an  
8 escrow under the common law definition. We can discern no intent by  
9 the legislature to change this aspect of the common law definition of  
'escrow'."

10 As to the former, the fact that a trustee is already vested with legal title to the  
11 property being foreclosed upon negates the possibility of the foreclosure  
12 constituting debt collection activity. Again, NRS 649.020(1) defines "Collection  
13 agency" to mean "all persons engaging, directly or indirectly, and as a primary or a  
14 secondary object, business or pursuit, in the collection of or in soliciting or  
15 obtaining in any manner *the payment of a claim owed or due or asserted to be*  
16 *owed or due to another.*" [emphasis added] Clearly, as in the discussion of NRS  
17 645A in AGO 88-2, the statute is designed to address the conduct of third parties.  
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21 In terms of the latter, a review of the legislative history of Chapter 649 and  
22 its various amendments over the years is telling. With the exception of the  
23 discussion of the 2005 and 2007 amendments<sup>8</sup> to specifically apply Chapter 649 to  
24 "community managers" of common interest developments and condo hotels, non-  
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28 <sup>7</sup> [http://www.fid.state.nv.us/New\\_EnforcementActions.htm](http://www.fid.state.nv.us/New_EnforcementActions.htm).

<sup>8</sup> Senate Bill 153 (2005) and Assembly Bill 431 (2007).

1 judicial foreclosures are never even mentioned in connection with any of the "debt  
2 collection" statutes. The specificity of the amendments is itself telling.

3  
4 Even if it arguably remains open to question whether the enforcement of a  
5 security interest is or is not considered a claim within the meaning of NRS  
6 649.010—it would not be under the cases in this Circuit which have addressed the  
7 issue in the context of the FDCPA<sup>9</sup>—examining the statutory language itself, it is  
8 clear that the foreclosure trustee is not a collection agency as it is not *itself* engaged  
9  
10 "as a primary or a secondary object, business or pursuit, in the collection of or in  
11 soliciting or obtaining in any manner the payment of a claim owed or due or  
12 asserted to be owed or due to another." Indeed, in the recent opinion in *Charov v.*  
13 *Perry*, 2010 WL 2673662 at \*1 (D. Nev. Jun. 30, 2010), cited by the District Court  
14 in the *Maves* action, another District Court Judge held that recording a notice of  
15 default is not an attempt to collect a debt because the borrower already consented  
16 to allow the foreclosure trustee to record the notice upon default: "Even if it  
17 constitutes a debt collection attempt, which is highly doubtful, recordation of a  
18 notice of default cannot violate FDCPA because consent to make such a  
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26 <sup>9</sup> *Hulse v. Owen Fed. Bank, FSB*, 195 F.Supp.2d 1188, 1204 (D. Or. 2002) ("the activity of  
27 foreclosing on the property pursuant to a deed of trust is not the collection of a debt within the  
28 meaning of the FDCPA."); *Earl v. Wachovia Mortgage FSB*, CV 09-2198, 2010 WL 2336191,  
\*5 (D. Ariz. 2010); *Izenberg v. ETS Services, LLC*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. Dec.  
8, 2008); *Barbanti v. Quality Loan Service Corp.*, 2006 WL 3692638, at \*10 (E.D. Wash. Dec.  
11, 2006).

1 recordation upon default is necessarily given to a trustee in a deed of trust where  
2 state law requires such recordation as part of a non judicial foreclosure."<sup>10</sup>

3  
4 Nevada courts often make reference to California decisions regarding similar  
5 California statutes in the absence of controlling Nevada authority. A review of  
6 California law also reflects the impropriety of treating a foreclosure trustee as if it  
7 were a debt collector. As an initial matter, California cases consistently hold that  
8 the trustee under a deed of trust owes only such duties as are *specifically* set forth  
9 by the California Civil Code or by contract. As stated in *I. E. Associates v. Safeco*  
10 *Title Insurance Company*, (1985) 39 Cal.3d 281, 287-89: "There are, moreover,  
11 persuasive policy reasons which militate against a judicial expansion of those  
12 duties. The nonjudicial foreclosure statutes -- an alternative to judicial foreclosure  
13 -- reflect a carefully crafted balancing of the interests of beneficiaries, trustors, and  
14 trustees."<sup>11</sup> Further, under California law, it is well-recognized that the trustee  
15 under a deed of trust "is not a true trustee, and owes no fiduciary obligations; [it]  
16 merely acts as a common agent for the trustor and beneficiary of the deed of trust.  
17 [The trustee's] only duties are: (1) upon default to undertake the steps necessary to  
18 foreclose the deed of trust; or (2) upon satisfaction of the secured debt to reconvey  
19 the deed of trust."<sup>12</sup>

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27 <sup>10</sup> 2010 WL 2673662 at \*1 (D. Nev. Jun. 30, 2010).

28 <sup>11</sup> *Id.* at 288.

<sup>12</sup> *Vournas v. Fidelity National Title Ins. Co.*, (1999) 73 Cal.App.4th 668, 677.  
12

1 The same analysis seems (or should at least be deemed) to be true under  
2 NRS Chapter 107 and, like the California Civil Code sections on non-judicial  
3 foreclosure, it should be held that Chapter 107—not 649—provides “the  
4 comprehensive statutory framework established to govern non-judicial foreclosure  
5 sales” and that it “is intended to be exhaustive.”<sup>13</sup> Indeed, the United States  
6 District Court in Nevada has adopted this approach. In *Gomez v. Countrywide*  
7 *Bank, FSB*, 2009 WL 3617650 at \*8 (D. Nev. Oct. 26, 2009), the court stated:  
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9

11 The U.S. District Court for the Northern District of California recently  
12 found that a foreclosure trustee has a duty of care to a trustor, but that  
13 the scope of the duty is circumscribed by the statutes governing  
14 foreclosures. *Hendrickson v. Popular Mortgage Servicing, Inc.*, No.  
15 09-00472-CW, 2009 WL 1455491, at \*7 (N.D.Cal. May 21, 2009)  
16 (“[T]he scope and nature of the trustee’s duties in a nonjudicial  
17 foreclosure ‘are exclusively defined by the deed of trust and the  
18 governing statutes. No other common law duties exist.’” (quoting *Pro*  
19 *Value Props., Inc. v. Quality Loan Serv. Corp.*, 88 Cal.Rptr.3d 381 [,  
20 384] (2009))). Therefore, there is no general duty of care here, but  
21 there is a duty of care as defined by the Nevada foreclosure statutes,  
22 assuming the Nevada Supreme Court would hold as the California  
23 Supreme Court did in *Pro Value Props., Inc.*

24 At least one District Court in Nevada has even adopted the California view that the  
25 trustee owes no fiduciary duties and is essentially just a common agent.<sup>14</sup>  
26

27 Review of what the foreclosure trustee does and does not do provides further  
28 impetus for rejecting the FID’s attempt to foist additional statutory obligations on

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27 <sup>13</sup> *Moeller v. Lien*, (1994) 25 Cal. App. 4th 822, 834; see also *Homestead Sav. v. Darmiento*,  
28 (1991) 230 Cal. App. 3d 424, 432-433.

<sup>14</sup> *Orzoff v. Bank of America, N.A.*, 2011 WL 1539897, at \*3-4 (D. Nev. Apr. 22, 2011).

1 the trustee beyond those contemplated by NRS Chapter 107. The trustee has little  
2 discretion beyond the express provisions of NRS Chapter 107 and the operative  
3 deed of trust. Unlike a true debt collector, a foreclosure trustee does not have  
4 latitude in deciding how to fulfill its obligations (it cannot deviate from the  
5 requirements of the law), cannot pursue any source of funds other from the sale of  
6 the secured property, cannot compromise the debt, cannot directly negotiate with  
7 the debtor to resolve the debt *and does not get paid depending on whether and how*  
8 *much debt is collected* but rather merely for following the procedures mandated  
9 under Chapter 107. To the extent that a trustee obtains any money in the course of  
10 a foreclosure, it is from the sale of the property, it acts as a mere conduit to  
11 disburse that money in accordance with the requirements of the governing law.  
12 Most significantly, though, unlike a true debt collector, the trustee is already vested  
13 with the legal title to the property it is selling merely by virtue of the deed of trust  
14 executed by the borrower.<sup>15</sup>

15 The cases applying California law also make clear that foreclosing on a deed  
16 of trust is not debt collection activity.<sup>16</sup> Although California no longer requires the

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25 <sup>15</sup> See *Thomas v. BAC Home Loans Serv., LP* 2011 WL 6743044 at \*3 (Nev. S. Ct. Dec. 20,  
26 2011): "[A] deed of trust conveys to the trustee the legal title of the property for the purpose of  
27 securing the borrower's performance under the note and deed of trust for the benefit of the  
28 beneficiary."; *Summa Corp. v. Greenspun*, (1980) 96 Nev. 247, 252, 607 P.2d 569, 572.

<sup>16</sup> *Collins v. Power Default Servs., Inc.*, 2010 WL 234902, at \*3 (N.D.Cal. Jan.14, 2010) (and  
cases cited therein): "The law is clear that foreclosing on a deed of trust does not invoke the  
statutory protections of the RFDCPA." See also, *Castenda v. Saxon Mortgage Servs., Inc.*, (E.D.  
14



1 licensing of debt collectors, their conduct is still governed by the Rosenthal Fair  
2 Debt Collection Practices Act, California Civil Code § 1788, et seq. The definition  
3 of "debt collector" under § 1788.2(c)<sup>17</sup> of the Act is similar to that of "collection  
4 agency" under NRS 649.020(1), set forth above; as recognized by the cases cited in  
5 footnote 12, in California, foreclosure activities are not treated as debt collection  
6 activity. Absent any indication to the contrary from the Nevada State legislature,  
7 there is no logical reason to interpret the two definitions differently. If a trustee  
8 conducting a non-judicial foreclosure in accordance with Nevada law is not  
9 actually engaged in debt collection activity, there is nothing it is doing for which a  
10 license as a collection agency should be required.

15 Again, in reality, the foreclosure trustee is paid solely for performing the  
16 tasks mandated by State foreclosure law; it does not engage in any activities *other*  
17 *than* those required or permitted by NRS Chapter 107 and does not get paid any  
18 more or less if the borrower pays off the loan or the property is sold at foreclosure.

21 Since all Quality, or any trustee for that matter, does in the course of a Nevada

25 Cal. 2009) 687 F.Supp.2d 1191, 2009: "[F]oreclosure pursuant to a deed of trust does not  
26 constitute debt collection under the RFDCPA."

27 <sup>17</sup> "The term 'debt collector' means any person who, in the ordinary course of business, regularly,  
28 on behalf of himself or herself or others, engages in debt collection. The term includes any  
person who composes and sells, or offers to compose and sell, forms, letters, and other collection  
media used or intended to be used for debt collection, but does not include an attorney or  
counselor at law."

1 foreclosure is to follow the dictates of Chapter 107 in selling property to which it  
2 already holds legal title, there is no collection activity for the FID to regulate here.

3  
4 As noted above, the purposes of Chapter 649 are set forth in § 649.045(2).  
5 Of the three purposes listed, only the latter two have any bearing on the question of  
6 whether an entity not previously treated as a collection agency need nonetheless be  
7 licensed as one to carry out its business:  
8

- 9 (b) Establish a system of regulation to ensure that persons  
10 using the services of a collection agency are properly  
11 represented; and  
12 (c) Discourage improper and abusive collection methods.

13 The persons utilizing the services of a foreclosure trustee are not the ones seeking  
14 to require that the trustee be licensed and are more than adequately protected by  
15 existing law, particularly the strictures of Chapter 107. Those same strictures  
16 already preclude the possibility of improper and abusive collection practices and/or  
17 provide the appropriate remedy should they occur. No non-judicial foreclosure  
18 sale can take place in Nevada absent compliance with Chapter 107 and, therefore,  
19 the stated purposes of NRS 649 do not compel requiring the licensing of trustees.  
20  
21  
22

23 Moreover, NRS Chapter 107 similarly contains no reference to mandatory  
24 licensing under Chapter 649 for foreclosure trustees. Indeed, the Commissioner's  
25 reliance, in finding against Quality, on the concept that the Legislature is presumed  
26 to have knowledge of existing statutes [¶ 25 of Findings] further supports a  
27 rejection of the argument that foreclosure trustees need to be licensed as debt  
28

1 collectors. Chapter 107 was recently amended by the Nevada legislature pursuant  
2 to AB 284 and AB 273, effective October 1, 2011; by way of which the Legislature  
3  
4 added specific new requirements governing who can act as a foreclosure trustee in  
5 Nevada. Significantly, while the Legislature noted that *one of* the ten types of  
6  
7 entities authorized to act as a foreclosure trustee is "a person who engages in the  
8  
9 business of a collection agency pursuant to Chapter 649" [NRS 107.28(1)(i)], the  
10  
11 Legislature made clear that was ONLY ONE of the ways in which an entity could  
12  
13 be qualified to act as a foreclosure trustee in Nevada. Chapter 107 most certainly  
14  
15 does not require that ALL parties acting as foreclosure trustee be licensed under  
16  
17 Chapter 649. If the Nevada Legislature had intended to require such licensure as a  
18  
19 precondition for any foreclosure, it would have amended Chapter 107 to say so.

16 The Commissioner's reliance in the Findings [¶ 26] on the legislative history  
17  
18 of NRS 649.020(3), governing the requirement that management companies  
19  
20 engaging in foreclosure be licensed, seems self-defeating as it proves the fallacy of  
21  
22 the Commissioner's argument for broader applicability—the Legislature was there  
23  
24 specifically deciding that a particular class of entity, management companies  
25  
26 which also themselves elect to engage in foreclosure services, need to be licensed.  
27  
28 Had the Legislature intended that all foreclosure activities require a debt collection  
license, it would have been far easier to enact that more general statute rather than  
the precisely circumscribed law it passed instead. When the Legislature is so

1 specific as to the object of its enactments, there is no rational basis to extend that  
2 application to other, unrelated entities. When presented with a second opportunity  
3 to apply Chapter 649 to all foreclosure trustees, in passing AB 284 and AB 273,  
4 the Nevada Legislature again chose not to do so.  
5

6 Nor can the Commissioner properly rely on the inclusion of the so-called  
7 “mini-Miranda” under 15 USC § 1692e(11) in any communication which a trustee  
8 might send to a borrower [Findings ¶ 15]. As held in the recent case of *Boosahda*  
9 *v. Providence Dane LLC* 2012 WL 268345 at \*3 (4<sup>th</sup> Cir. Jan. 31, 2012):  
10

11 [I]f the use of the statutorily required disclaimer is sufficient to  
12 establish an FDCPA claim, debt collectors will be placed in a  
13 conundrum, exposed to liability for both including the disclaimer and  
14 for omitting it. *Cf. Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389,  
15 399–400 (6th Cir.1998) (“[t]o punish [debt collector] for compliance  
16 with [§ 1692e(11)] [by disclosing] that it is an ‘attempt[ ] to collect  
17 on a debt’ would be an absurd result that we decline to reach.”); *Wade*  
18 *v. Reg'l Credit Ass'n*, 87 F.3d 1098, 1100 (9th Cir.1996) (finding no  
19 FDCPA violation based on “informational” disclaimer and noting that  
20 debt collector “would have violated the Act had it not included this  
21 statement”). Put simply, a debt collector should not be penalized for  
22 taking the precaution of including the disclaimer within its initial  
23 written communication to the debtor, in the event the debt is subject to  
24 the FDCPA. In any case, Providence's disclaimer is not sufficient to  
25 satisfy Boosahda's burden of showing the credit card debt was  
26 consumer debt. See *Golliday v. Chase Home Fin., LLC*, 761  
27 F.Supp.2d 629, 636 (W.D.Mich.2011) (concluding plaintiff's reliance  
28 on disclaimer insufficient to defeat summary judgment as to firm's  
debt collector status and observing that firm should not be faulted  
when it “errs on the side of caution” by including disclaimer).

There are also the practical realities which warrant reconsideration of the  
FID's position here. If trustees were required to hold collection licenses, or to

1 register as foreign collection agencies, as a prerequisite to any Nevada foreclosure  
2 sale, the question would inevitably arise as to whether the tens of thousands of  
3  
4 foreclosure sales already conducted in this State using an unlicensed foreclosure  
5 trustee were valid. In many instances, these properties have already been sold to  
6  
7 third parties (either through the foreclosure sale to investors or by the foreclosing  
8 lender to new families thereafter). It would clearly cause economic chaos, not to  
9  
10 mention result in a tsunami of litigation, were these sales allowed to be challenged  
11 on this basis. Further delay and economic disruption would also come from having  
12  
13 to restart the process for the thousands of foreclosures which are still pending but  
14 have not yet gone to sale.

15 As is, borrowers' lawyers have already been bringing a flurry of lawsuits  
16  
17 raising all sorts of challenges to the foreclosure process in an effort to slow, if not  
18 stop, the process entirely.<sup>18</sup> These efforts rarely succeed in the long-run but the  
19  
20 short-term goal of delaying the sales, and allowing the borrowers to remain in  
21 possession (typically without making any mortgage or rent payments at all) has  
22  
23 been an end for them in and of itself.  
24

25 <sup>18</sup> See, e.g., *In re Mortgage Electronic Registration Systems (MERS) Litigation*, MDL Docket  
26 No. 09-2119-JAT, a multi-district litigation matter in which plaintiffs argue, among other things,  
27 that the mere use of MERS as a nominee beneficiary voids the deeds of trust securing their loans.  
28 On September 30, 2010, Judge Tellborg granted the motions to dismiss of the various defendants  
in the six class actions that are part of the MDL, albeit with leave to amend. *In re Mortgage  
Electronic Registrations Systems (MERS) Lit.* --- F.Supp.2d ---, 2010 WL 4038788, (D.Ariz.,  
Sept. 30, 2010).

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

Electronically Filed  
May 10 2018 08:29 a.m.  
Eighth Judicial District Court  
Case No. A-11-649875-1  
Elizabeth A. Brown  
Clerk of Supreme Court

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

---

**RESPONDENTS' APPENDIX**  
**(VOLUME 6 of 8)**

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1 QLS is not required to be licensed by the state as a debt collector); *Contreras v. Master Fin. Inc.*,  
2 2011 U.S. Dist. LEXIS 996 (D.Nev. 2011); *Regas v. Freemont Invs. Loan*, 2010 U.S. Dist. LEXIS  
3 132925 (D.Nev. 2010); *Erickson v. PNC Mortg.*, 2011 U.S. Dist. LEXIS 46387 (D.Nev. 2011).

4 To be clear, including the litigation with the actual FID, QLS has been to Court over this  
5 matter 7 times. All 7 times, the final outcome has been that QLS is not required to be a licensed  
6 debt collector under Nevada law. In fact the cases QLS has been able to find, at least 13 times  
7 individuals have made allegations against foreclosure trustees that they must be licensed as a debt  
8 collector through the FID. There is no way the named Plaintiffs will be able to prove that QLS  
9 knew that it was required to be licensed as a debt collector when QLS is in possession of multiple  
10 orders stating that QLS is NOT required to hold a license as a debt collector. (Ex. 9.) No intent  
11 to violate the statute can be established as to QLS, and therefore, summary judgment should be  
12 granted on Plaintiffs' claim under the deceptive trade practices act.

13 **F. THE PLAINTIFFS CANNOT MEET THE "DOING BUSINESS" ELEMENT**  
14 **OF THE NUDTPA BECAUSE QLS IS NOT "DOING BUSINESS" IN NEVADA**

15 NRS § 598.0923(1) states a person engages in a deceptive trade practice when in the  
16 course of his or her business or occupation, he or she knowingly conducts business without all  
17 required state, county, or city licenses. This requires that QLS must be engaged in or doing  
18 business in this state. Yet, the Nevada legislature has listed certain activities which do not  
19 constitute doing business in this state. Specifically, NRS §80.015 states that:

20 "The following activities do not constitute doing business in this state....

21 (g) Creating or acquiring indebtedness, mortgages, and security interest in real or personal  
property;

22 (h) securing or collecting debts or enforcing mortgages and security interest in property  
23 securing debts

24 The Nevada Federal District Court has dismissed NUDTPA claims under the premise that  
25 they cannot meet the "doing business" requirement of the statute by operation of law. *March v.*

1 *Pinnacle Mortg. of Nev.*, 2011 U.S. Dist. LEXIS 117185 (D.Nev. 2011). In fact, the ruling of  
2 Judge Williams (Ex. 9) specifically adopted the exact same reasoning. QLS is not “doing  
3 business” sufficient for the NUDTPA to apply due to acts of Nevada legislature because QLS is  
4 enforcing a mortgage. This is yet another reason this complaint must be dismissed and judgment  
5 should be entered for QLS.

6 **G. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON THE**  
7 **PLAINTIFFS’ UNJUST ENRICHMENT CLAIM**

8 The Plaintiffs have also brought a claim for Unjust Enrichment in this case, claiming that they  
9 deserve all of QLS’s profits because QLS did not have a debt collection license. This cause of  
10 action fails.

11 “Unjust enrichment is the unjust retention of a benefit to the loss of another or the  
12 retention of money or property of another against the fundamental principles of justice or equity  
13 and good conscience.” *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 363 n.2, 741 P.2d 802,  
14 804 n.2 (1987); *see also Unionamerica Mortg. & Equity Trust v. McDonald*, 97 Nev. 210, 626  
15 P.2d 1272, 1274 (1981). The essential elements of unjust enrichment “are a benefit conferred on  
16 the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and  
17 retention by the defendant of such benefit.” *Topaz Mut. Co. v. Marsh*, 108 Nev. 845, 856, 839  
18 P.2d 606, 613, 1992 Nev. LEXIS 155, \*19 (Nev. 1992), citing *Unionamerica Mtg.*, 97 Nev. at  
19 212.

20 It is improper to grant summary judgment on an unjust enrichment claim where the subject  
21 matter of the claim pertains to an express contract. “[U]njust enrichment or recovery [under]  
22 quasi-contract [principles] applies to situations where there is no legal contract but where the  
23 person sought to be charged is in possession of money or property which in good conscience and  
24 justice [should not be retained].” *LeasePartners Corp. v. Brooks Trust*, 113 Nev. 747, 756, 942  
25 P.2d 182, 187 (1997) (quoting 66 Am. Jur. 2d Restitution § 11 (1973)). “To permit recovery by



1 quasi-contract where a written agreement exists would constitute a subversion of contractual  
2 principles.” *Lipshie v. Tracy Investment Co.*, 39 Nev. 370, 379, 566 P.2d 819, 824 (1977). Here,  
3 each of the Plaintiffs has an express written contract – the Deed of Trust – which governs the  
4 relationship between the parties. Plaintiffs’ unjust enrichment claim arises out of enforcing the  
5 terms of their deeds of trust and the fees collected in connection therewith from the beneficiary of  
6 the deed of trust, (not the Plaintiffs). (See Second Am. Compl. ¶ 21 [“Plaintiffs’ debts were  
7 increased by the dollar amount of illegal payments received by [Defendants’] for their illegal  
8 conduct].) But by the express terms of the Deeds of Trust, the beneficiaries were entitled to  
9 recover those fees and costs incurred in the course of collecting the secured debt. Since Plaintiffs’  
10 unjust enrichment claim arises out of the subject matter of the express terms of a contract,  
11 Plaintiffs cannot recover under an unjust enrichment – or quasi-contract – theory.

12 Further, unjust enrichment only permits a plaintiff to recover money that the defendant  
13 wrongfully received *from the plaintiff*. See *Unionamerica Mortg.*, 97 Nev. at 212 (quoting *Dass*  
14 *v. Epplen*, 424 P.2d 779, 780 (Colo. 1967)) (“The essential elements of quasi contract are a  
15 benefit conferred on the defendant by the plaintiff . . . .). Here, none of the foreclosure fees that  
16 QLS earned were paid by Plaintiffs; said fees were paid by the lender who hired QLS to conduct  
17 the foreclosures. In fact, all the Plaintiffs except one, received a bankruptcy discharge, the  
18 properties were foreclosed on, and it appears the Plaintiffs paid nothing to the beneficiaries of the  
19 deeds of trust for foreclosure fees/costs. Thus, Plaintiffs have not established that QLS received  
20 any benefit that should rightfully belong to Plaintiffs, and QLS is entitled to summary judgment  
21 on this claim.

22 ///

23 ///

24 ///

1 **CONCLUSION**

2 For the foregoing reasons, the Court should grant summary judgment to QLS. Plaintiffs  
3 are bound by the preclusive effect of the final administrative decision rendered in the FID action  
4 that QLS is not a debt collector and is not required to hold a debt collector's license. While  
5 Plaintiffs attempt to avoid that ruling by alleging that QLS took actions outside the statutory  
6 foreclosure process, Plaintiffs have no evidence demonstrating a genuine issue of fact on any  
7 point. As such, QLS is entitled to judgment as a matter of law.

8  
9 Dated: April 3, 2017

10 **McCARTHY & HOLTHUS, LLP**

11 By: /s/ Thomas N. Beckom Esq.  
12 Thomas N. Beckom Esq. 12554  
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# EXHIBIT 1



STATE OF NEVADA  
DEPARTMENT OF BUSINESS AND INDUSTRY  
FINANCIAL INSTITUTIONS DIVISION

2705 E. Desert Inn Road, Suite 100  
Las Vegas, Nevada 89121  
(702) 486-6120

1178 Fairview Drive, Ste 201  
Carson City, Nevada 89701  
(775) 687-5922

In Re:

QUALITY LOAN SERVICE  
CORPORATION,

ORDER TO CEASE AND DESIST  
UNLICENSED ACTIVITIES AND NOTICE  
OF RIGHT TO APPEAL

Respondent.

ORDER TO CEASE AND DESIST UNLICENSED ACTIVITIES  
AND NOTICE OF RIGHT TO APPEAL

The State of Nevada Department of Business and Industry, Financial Institutions Division (hereinafter "Division") hereby orders QUALITY LOAN SERVICE CORPORATION, (hereafter "Respondent") to cease and desist from any and all activities which are covered under Nevada Revised Statutes (NRS) Chapter 649.

JURISDICTION

1. The business of collecting claims for others or of soliciting the right to collect or receive payment for another of any claim in the State of Nevada is governed by chapter 649 of the Nevada Revised Statutes (NRS) and chapter 649 of the Nevada Administrative Code (NAC). The Division has primary jurisdiction for the licensing and regulation of persons operating and/or engaging in collection services. NRS 649.026.

2. Pursuant to the authority vested by NRS Chapter 649, the Division hereby makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

3. Respondent QUALITY LOAN SERVICE CORPORATION is a business registered with the State of California Secretary of State. Respondent's resident agent is KRISTIN A. SCHULER-HINTZ located at 9510 West Sahara Ave., Suite 110, Las Vegas, Nevada, 89117

4. Respondent solicits collection business through its website address, www.qualityloans.com. On its website, Respondent states that it is engaged in the business of "non-judicial foreclosure processing."

5. Respondent is engaged in the business of a collection agency through filing foreclosure notices and conducting foreclosure sales on real property for mortgage companies and mortgage holders.

6. Respondent is not now and has never been licensed as a collection agency by the Division.

7. Respondent engaged in the business as a collection agency in the State of Nevada without first obtaining a license to do so.

8. The Division has received a complaint from a resident of the State of Nevada that Respondent had attempted to collect a claim against the resident.

9. On February 13, 2009, Respondent filed Notice of Breach and Default and Election to Cause Sale of Real Property under Deed of Trust on behalf of Horizon First Home Loan Corporation.

10. In the notification, Respondent claims they are "the agent for the trustee or beneficiary under a Deed of Trust" and that "the obligations secured thereby are presently held by the [Respondent]."

11. Respondent goes on to state that the borrower may have "the right to cure the default hereon and reinstate the one obligation secured by such Deed of Trust." The borrower is then directed to contact Respondent as follows:

To determine if reinstatement is possible and the amount, if any, to cure the default, contact:

MetLife Home Loans, a division of Metlife Bank NA  
c/o Quality Loan Service Corp.  
2141 Fifth Avenue,  
San Diego, CA 62101

12. The Nevada District Court, Second District, in case no. CV09-1845, *Barton, et al. v. First Horizon Home Loan Corporation, et al.*, determined that Respondent was a debt collector as a matter of law based upon the activities Respondent conducted in the State of Nevada.

13. Respondent's actions are a willful and intentional violation of the laws of the State of Nevada.

14. If any finding of fact is more properly characterized as a conclusion of law, it shall be considered as such.

#### CONCLUSIONS OF LAW

15. NRS 649.075(1) reads as follows:

Except as otherwise provided in this section, a person shall not conduct within this State a collection agency or engage within this State in the business of collecting claims for others, or of soliciting the right to collect or receive payment for another of any claim, or advertise, or solicit, either in print, by letter, in person or otherwise, the right to collect or receive payment for another of any claim, or seek to make collection or obtain payment of any claim on behalf of another without having first applied for and obtained a license from the Commissioner.

16. NRS 649.395 provides the Commissioner to take disciplinary action for any violation of NRS Chapter 649.

NRS 649.390 Investigation of verified complaint concerning unlicensed person; order to cease and desist; administrative fines; suit to recover fine; cumulative penalties.

1. The Commissioner shall conduct an investigation if he receives a verified complaint from any person that sets forth reason to believe that an unlicensed person is engaging in an activity for which a license is required pursuant to this chapter.

1 2. If the Commissioner determines that an unlicensed person  
2 is engaging in an activity for which a license is required pursuant to  
3 this chapter, the Commissioner shall issue and serve on the  
4 person an order to cease and desist from engaging in the activity  
5 until such time as the person obtains a license from the  
6 Commissioner.

7 3. If a person upon whom an order to cease and desist is  
8 served does not comply with the order within 30 days after service,  
9 the Commissioner shall, after notice and opportunity for a hearing:

10 (a) Impose upon the person an administrative fine of \$10,000;  
11 or

12 (b) Enter into a written consent agreement with the person  
13 pursuant to which the person agrees to cease and desist from all  
14 unlicensed activity in this State relating to the collection of debts,  
15 and impose upon the person an administrative fine of not less than  
16 \$5,000 and not more than \$10,000.

17 -- The imposition of an administrative fine pursuant to this  
18 subsection is a final decision for the purposes of judicial review.

19 4. The Commissioner shall bring suit in the name and on  
20 behalf of the State of Nevada against a person upon whom an  
21 administrative fine is imposed pursuant to subsection 3 to recover  
22 the amount of the administrative fine:

23 (a) If no petition for judicial review is filed pursuant to NRS  
24 233B.130 and the fine remains unpaid for more than 90 days after  
25 notice of the imposition of the fine; or

26 (b) If a petition for judicial review is filed pursuant to NRS  
27 233B.130 and the fine remains unpaid for more than 90 days after  
28 exhaustion of any right of appeal in the courts of this State  
resulting in a final determination that upholds the imposition of the  
fine.

5. A person's liability for an administrative fine is in addition to  
any other penalty provided in this chapter.

17. Pursuant to NRS 649.440, the Commissioner can impose administrative fines  
of not more than \$10,000.00 for any violation of this chapter.

In addition to any other remedy or penalty, the Commissioner may  
impose an administrative fine of not more than \$10,000 upon a  
person who:

1. Without a license or certificate, conducts any business or  
activity for which a license or certificate is required pursuant to the  
provisions of this chapter; or

2. Violates any provision of this chapter or any regulation  
adopted pursuant thereto.

1        18.    Respondent has violated NRS 649.075 by collecting payments on behalf of  
2 another and seeking "to make collection or obtain payment of any claim on behalf of another."  
3        19.    Respondents have violated NRS 649.075 by "soliciting the right to collect or  
4 receive payment for another of any claim."  
5        20.    Respondent has violated NRS 649.075 by engaging in the business of collecting  
6 payments for another in the State of Nevada.  
7        21.    Pursuant to NRS 649.395, the Commissioner hereby orders Respondent to  
8 cease and desist all activity covered under NRS Chapter 649 and will set a hearing to  
9 determine any administrative fine to be imposed.  
10       22.    Any conclusion of law which is more properly characterized as a finding of fact  
11 shall be considered as such.  
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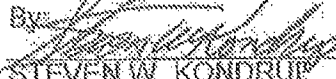


ORDER

IT IS HEREBY ORDERED that Respondent QUALITY LOAN SERVICE CORPORATION shall CEASE AND DESIST from operating and/or engaging in the business of "collecting claims for others, or of soliciting the right to collect or receive payment for another of any claim, or advertise, or solicit, either in print, by letter, in person or otherwise, the right to collect or receive payment for another of any claim, or seek to make collection or obtain payment of any claim on behalf of another" within the State of Nevada unless and until such time Respondent becomes licensed by the Division pursuant to NRS Chapter 649.

DATED this 14<sup>th</sup> day of October 2010.

STATE OF NEVADA  
DEPARTMENT OF BUSINESS AND INDUSTRY  
FINANCIAL INSTITUTIONS DIVISION

By:   
STEVEN W. KONDRUP  
Deputy Commissioner

APPEAL RIGHTS

RESPONDENT HAS THE RIGHT TO REQUEST A HEARING IN THIS MATTER. If you wish to request a hearing you must file a request within thirty (30) days after this Order to Cease and Desist was served on the Respondent.

Your request for a hearing must be delivered to:

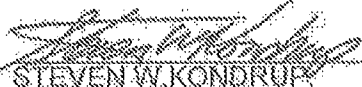
FINANCIAL INSTITUTIONS DIVISION  
STATE OF NEVADA, DEPARTMENT OF BUSINESS  
AND INDUSTRY  
2785 E. Desert Inn Road, Suite 180  
Las Vegas, Nevada 89121

Other important rights you have are listed in Nevada Revised Statutes Chapters 649 and 233B and the Nevada Administrative Code Chapter 649.

DATED this 14<sup>th</sup> day of October, 2010.

STATE OF NEVADA  
DEPARTMENT OF BUSINESS  
AND INDUSTRY  
FINANCIAL INSTITUTIONS DIVISION

By:

  
STEVEN W. KONDROUP  
Deputy Commissioner

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Department of Business and Industry, Financial Institutions Division, and that on the 15th day of October, 2010, I deposited in the U.S. mail, postage prepaid, via First Class Mail and Certified Return Receipt Requested, a true and correct copy of the foregoing ORDER TO CEASE AND DESIST UNLICENSED ACTIVITIES AND NOTICE OF RIGHT TO APPEAL, addressed as follows:

Quality Loan Service Corporation  
Attn: Kristin A. Schuler-Hintz, Resident Agent  
9510 W. Sahara Ave., Suite 110  
Las Vegas, NV 89117

Certified Mail: 7009 2250 0001 8861 4676

DATED this 15<sup>th</sup> day of October, 2010

By: Ruth Cervantes

U.S. Postal Service	
CERTIFIED MAIL RECEIPT	
OFFICIAL USE	
Postage \$	
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Registered Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	
Postmark Here	
Quality Loan Service Corporation Attn: Kristin A. Schuler-Hintz Resident Agent 9510 W. Sahara Ave., Suite 110 Las Vegas, NV 89117	

7009 2250 0001 8861 4676

000008

RA001263

# EXHIBIT 2

1 LIONEL SAWYER & COLLINS  
2 PAUL E. LARSEN, Nevada Bar # 3756  
3 300 Fourth Street, #1700  
4 Las Vegas, NV 89101  
5 Phone (702) 383-8888  
6 Fax (702) 383-8845  
7 email: plarsen@lionelsawyer.com

8 Attorney for:  
9 Quality Loan Service Corporation

10 STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY  
11 FINANCIAL INSTITUTIONS DIVISION

12 IN RE:

13 QUALITY LOAN SERVICE  
14 CORPORATION,

15 REQUEST FOR EXPEDITED HEARING

16 NOTICE OF APPEAL OF ORDER TO  
17 CEASE AND DESIST UNLICENSED  
18 ACTIVITIES AND NOTICE OF RIGHT TO  
19 APPEAL

20 COMES NOW QUALITY LOAN SERVICE CORPORATION and hereby APPEALS  
21 the Cease and Desist Order issued on October 14, 2010 and *requests an expedited hearing.*

22 Said request for expedited hearing is based on the fact that Quality Loan Service only  
23 advances non judicial foreclosures pursuant to applicable Nevada Law and does not collect debts  
24 and is not subject to being a licensed collection agency. Quality Loan Service also respectfully  
25 requests an immediate ruling in this request for expedited treatment, in order to avoid undue  
26 interruption of pending proceedings.

27 ///

28 ///

///

1  
2 Quality Loan Service also respectfully requests the stay of any enforcement action  
3 pending an immediate hearing on this matter.  
4

5 Dated: 10/21/2010

LIONEL SAWYER & COLLINS

6  
7 By:   
8

9 PAUL E. LARSEN, Nevada Bar # 3756  
10 300 South Fourth Street, 17th Floor  
11 Las Vegas, Nevada 89101  
12 Attorneys for Quality Loan  
13 Service Corporation  
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1 POINTS AND AUTHORITIES

2 STATEMENT OF FACTS

3 Quality Loan Service Corporation (hereinafter "Quality") is a California corporation.  
4 Quality has been incorporated in the State of California since 1988, has been registered as a  
5 foreign corporation in Nevada since 1988, and has been doing business solely as a non-judicial  
6 foreclosure trustee since that time.

7 Quality is not now, nor has it ever been in the business of collecting debts and does not  
8 now, nor has it ever held, or been required to hold a license as a debt collector in any state in  
9 which it does business.

10 Quality does not fall within the general definition of a "debt collector" under either  
11 Federal or State Law as Quality only advances non-judicial foreclosures in the State of Nevada  
12 pursuant to NRS 107.080 et seq.,<sup>1</sup> wherein Quality serves solely as either the agent of the  
13 beneficiary or the duly substituted trustee for the purpose of conducting only non-judicial  
14 foreclosures in the State of Nevada.

15 NRS 107.080 et seq., makes no reference to the Federal Fair Debt Collection  
16 Practices Act or "FDCPA" (or Chapter 649 of the NRS) nor does NRS 107.080 require that a  
17 beneficiary or trustee engaged in Nevada foreclosures follow the requirements of the FDCPA. In  
18 accordance with NRS 107.080, Quality records a Notice of Default in the official records of the  
19 County in which the property subject to the Deed of Trust is located. Thereafter, Quality mails  
20 to the interested parties a copy of the recorded notice of Default, along with the Election to  
21 Mediate and required forms relative to an election to mediate. Quality has the Notice of Default  
22 posted at the subject real property and ensures that the "Danger Notice" and copy of the  
23 promissory note are posted at the subject real property pursuant to NRS 107.085. None of these  
24 acts are debt collection.

25  
26  
27  
28 <sup>1</sup> See Exhibit 1 hereto, a true and correct copy of NRS 107.080 through NRS 107.110.

1 If the Borrower seeks contact information regarding loss mitigation, Quality makes  
2 available contact information for the beneficiary or servicer or state agency to permit the  
3 borrower to obtain loss mitigation assistance from said agency. This, too, is not debt collection.

4 If the Borrower requests reinstatement information Quality will obtain from the  
5 beneficiary and provide the total amount of the reinstatement. This is not debt collection.

6 If the Borrower elects to mediate Quality will request the financial information required  
7 pursuant to NRS 107.086 (and the Foreclosure Mediation Rules promulgated on July 21, 2010).  
8 Additionally, at that time, an attorney is retained by the lender/beneficiary to participate in the  
9 mediation process. Neither of these acts is debt collection.

10 Quality, as the duly appointed Trustee under the Deed of Trust, causes to be posted,  
11 published, recorded and mailed the Notice of Sale, pursuant to NRS 107.080. Quality also  
12 causes to be posted and mailed the Notice to Tenants pursuant to NRS 107.087. No debt  
13 collection.

14 As demonstrated above, Quality engages in none of the activities that are the hallmarks of  
15 debt collection: Quality does not call borrowers, demand payment, file suit, send dunning letters,  
16 etc. Most importantly and most telling, Quality has no interest in whether or not any funds are  
17 ever tendered or collected from a borrower by its activities and has no vested interest in the  
18 outcome of the process, whether it is the reinstatement of the loan or the completion of the  
19 foreclosure sale. Quality is paid by the holder of a note secured by a deed of trust to simply  
20 conduct a foreclosure sale pursuant to the laws of the State of Nevada.

21 **A. QUALITY LOAN SERVICE IS NOT A DEBT COLLECTOR**

22 Pursuant to Nevada law, enforcing a security interest in real property is specifically  
23 excluded from the definition of what constitutes doing business in Nevada.

24 NRS 80.015, provides, in pertinent part:

25 NRS 80.015 Activities not constituting doing business.

26  
27  
28 <sup>2</sup> See Exhibit 2 hereto, a true and correct copy of the current Foreclosure Mediation Rules and Trustee Forms.



1 1. For the purposes of this chapter, the following activities do not constitute  
2 transacting business in this State:

3 (a) Maintaining, defending or settling any proceeding;

4  
5 (g) Creating or acquiring indebtedness, mortgages and security interests in  
6 real or personal property;

7 (h) Securing or collecting debts or *enforcing mortgages and security interests*  
8 *in property securing the debts;*

9 (i) Owning, without more, real or personal property;

10 ... (Emphasis added)

11 The Nevada legislature has specifically excluded the enforcement of mortgage interest in  
12 property from what constitutes doing business in Nevada. Indeed, in *Ernestberg v. Mortgage*  
13 *Investors Group* 2010 U.S. Dist. Lexis 4560 (D. Nev. 2009), the Court held that First American  
14 Title, a business directed at enforcing mortgage rights, was not even required to register with the  
15 Secretary of State as a foreign corporation.<sup>3</sup>

16 NRS 649.020 defines a "collection agency" as all persons engaging, directly or indirectly,  
17 and as a primary or a secondary object, business or pursuit, in the collection of or in soliciting or  
18 obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to  
19 another. As previously stated, Quality does not solicit the payment of a debt; Quality has no  
20 interest whatsoever in whether or not the debt is paid. The United States District Court for the  
21 District of Nevada, Judge Robert Clive Jones, recently held in *Long v. National Default*  
22 *Servicing Corporation* 2010 U.S. Dist. Lexis 92344 (D. Nev. 2010), that when a Defendant is in  
23 the business of enforcing security interests, not collecting debts, the Defendant did not fall within  
24 the general definition of a debt collector.

25  
26  
27  
28 <sup>3</sup> See Exhibit 3 hereto, a true and correct copy of *Ernestberg v. Mortgage Investors Group*, 2010 U.S. Dist. Lexis  
4560 (D. Nev. 2009).

1 Thus, the weight of authority in Nevada is that pursuing a non judicial foreclosure is not  
2 debt collection; as such Quality is not a debt collector and is not required to be licensed as such.<sup>4</sup>

3 Additionally, Courts outside of Nevada have held that the activity of non-judicial  
4 foreclosure is not "debt collection" under the FDCPA. *Hulse v. Ocwen Fed. Bank, FSB*, 195 F.  
5 Supp. 2d 1188 (D. Or. 2002).<sup>5</sup> The reason for this rule is that the object of foreclosure is not the  
6 collection of money: "Foreclosing on a trust deed is distinct from the collection of the obligation  
7 to pay money. The FDCPA is intended to curtail objectionable acts occurring in the process of  
8 collecting funds from a debtor. But, foreclosing on a trust deed is an entirely different path.  
9 Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its  
10 interest in the property." *Id.* at 1204. Because foreclosure is not debt collection under the  
11 FDCPA, "any actions taken . . . in pursuit of the actual foreclosure may not be challenged as  
12 FDCPA violations." *Id.*

13 The purpose of the notice of default (the first step of a non judicial foreclosure in  
14 Nevada) is to provide borrowers with notice of their default and the lender's election to sell the  
15 property in satisfaction of the debt. See NRS 107.080(2)(b); See generally *Ernestberg, supra*.  
16 (The notice of breach and election to sell is not an attempt to collect the debt from the borrower.)  
17 In *Maynard v. Cannon*, 650 F. Supp. 2d 1138, 1143-1144 (D. Utah 2006)<sup>6</sup> (citing *Shimek v.*  
18 *Weissman, Nowack, Curry & Wilco, P.C.*, 374 F.3d 1011 (11<sup>th</sup> Cir. 2004)), the Court stated that  
19 "the filing of a lien by a creditor is a necessary step for securing payment of a debt". It is an  
20 attempt to satisfy the borrower's obligation by resorting to property that secures the debt.  
21 Nevada statutes permit non-judicial foreclosure. See NRS 107.080. The State requires  
22 recordation of a notice of default to commence non-judicial foreclosure and the notice of default  
23 must describe the deficiency in performance or payment. NRS 107.080(2)(b); NRS 107.080(3).  
24 Accordingly, recordation and mailing of the notice of default cannot violate FDCPA. See

25  
26  
27 \* See Exhibit 4 hereto, a true and correct copy of *Long v. National Default Servicing Corporation* 2010 U.S. Dist.  
Lexis 92344 (D. Nev. 2010).

28 <sup>5</sup> See Exhibit 5 hereto, a true and correct copy of *Hulse v. Ocwen Fed. Bank, FSB*, 195 F.Supp. 2d. 1188.

<sup>6</sup> See Exhibit 6 hereto, a true and correct copy of *Maynard v. Cannon*, 650 F. Supp. 2d 1138, 1143-1144 (D. Utah 2006).

1 *Maynard* at 1144. (FDCPA is not so broad as to prohibit recordation of a notice of default).  
2 "The intent behind the FDCPA was to prohibit abusive collection practices, not to outlaw  
3 foreclosure when there is an express security agreement and breach of an obligation." *Maynard*  
4 at 1143.

5 Further, citing *Maynard*, Courts in Nevada have already stated that recording a notice of  
6 default and election to sell is not an attempt to collect a debt because the borrowers' consent to  
7 make such a recordation upon default is given to the trustee where state law requires such  
8 recordation as part of the non-judicial foreclosure. *Charov v. Perry*, 2010 U.S. Dist. LEXIS  
9 65798 (D. Nev. 2010).<sup>7</sup>

10 As recently as September 15, 2010, Federal District Court Judge Hicks in *Maves v. First*  
11 *Horizon Home Loans* 2010 U.S. Dist. Lexis 97387 (D. Nev. 2010)<sup>8</sup> held:

12 QLS<sup>9</sup> acted as the foreclosure trustee in this matter. A  
13 foreclosure trustee does not have to be licensed to record  
14 a notice of default because a foreclosure trustee is not a  
15 debt collector. (Citations omitted.) Accordingly, QLS is  
16 entitled to judgment as a matter of law that it did not violate  
17 Nevada's Unfair and Deceptive Trade Practices Act and the  
18 court shall grant defendants' motion in this respect.<sup>10</sup>

19 The weight of authority in Nevada is that pursuing a non judicial foreclosure is not debt  
20 collection but the enforcement of a contractual right and property interest and as such Quality  
21 does not meet the definition of "Collection Agency" as set forth in NRS 649.020 and is not  
22 subject to the licensing requirements of NRS 649.<sup>11</sup> Further, the provisions of NRS

23 <sup>7</sup> See Exhibit 7 hereto, a true and correct copy of *Charov v. Perry*, 2010 U.S. Dist. LEXIS 65798 (D. Nev. 2010).

24 <sup>8</sup> See Exhibit 8 hereto, a true and correct copy of *Maves v. First Horizon Home Loans* 2010 U.S. Dist. Lexis 97387  
(D. Nev. 2010).

25 <sup>9</sup> QLS is the same company as Quality.

26 <sup>10</sup> Please note that while the Order uses the general description "license" the Complaint and opposition to motion for  
summary judgment specifically refer to Chapter 649 and there was no required "foreign collector's license".

27 <sup>11</sup> In accord see also, Exhibit 9 hereto, a true and correct copy of *Crode v. Trinity Mortg. Assur. Corp.* 2009 U.S.  
28 Dist. Lexis 89808; Exhibit 10 hereto, a true and correct copy of *Mansour v. Cal-Western Reconveyance Corp.*, 612  
F. Supp. 2d 1178 (D. AZ 2010); Exhibit 11 hereto, a true and correct copy of *Salazar v. Lehman Brothers Bank*,  
2010 U.S. Dist. Lexis 108737 (D. AZ 2010) holding, "It is well established that "foreclosing on a property pursuant  
to a deed of trust is not the collection of a debt within the meaning of the FDCPA." (Citations omitted.).

1 649.020(3)(a) are inapplicable as Quality is *not* a community manager and advances no  
2 foreclosure proceedings pursuant to NRS 116 et. seq. or NRS 116B et. seq.

3 **B. QUALITY REQUESTS AN EXPEDITED HEARING IN THIS MATTER AS THE**  
4 **ISSUANCE OF THE CEASE AND DESIST ORDER HAS A SUBSTANTIAL NEGATIVE**  
5 **IMPACT**

6 The Deputy Commissioner has issued its Cease and Desist Order in this matter without  
7 any notice to Quality or providing Quality any opportunity to discuss this issue. Quality was not  
8 given any prior opportunity to be heard, no notice, not even a phone call. The investigation was  
9 done without the Department even asking Quality to explain its activities.

10 Quality has been engaged in the business of non-judicial foreclosure in the State of  
11 Nevada since 1988. In that time Quality has been a party to a number of judicial proceedings  
12 wherein its practices and procedures relative to the completion of non-judicial foreclosures have  
13 been before the various Courts. At no time prior to the issuance of the Court's interim order on  
14 June 9, 2010, in the *Barton* case has a Court found Quality to be a debt collector.<sup>12</sup>  
15 Unfortunately, the Court in *Barton* makes a crucial and mistaken assumption, that Quality  
16 "acquired" the debt (*Barton* page 6, line 10) and that the loan was "assigned" to Quality  
17 (*Barton*, page 6, line 13). However, in actual fact Quality does not acquire the loan nor does  
18 Quality acquire the debt. Quality is merely the Trustee under the deed of trust, Quality only  
19 acquires the ability to enforce the security interest against the subject real property pursuant to  
20 NRS 107.080 et. seq.

21 Indeed, in the Third Judicial District Court for the County of Lyon, in the case of *Ford v.*  
22 *Weinstein*, the Court dealing with the same set of facts, circumstances, and business practices  
23 held the exact opposite to the Court in *Barton*.<sup>13</sup> The court held in relevant part:

- 24 3. Rhonda Ford and Daniel Weinstein's claim that MTGLQ Investor,  
25 L.P. or its foreclosure trustee was a debt collector under the Federal  
26 Debt Collection Practices Act or NRS 649.671 are rejected;

27 <sup>12</sup> See Exhibit 12 hereto, a true and correct copy of the Court's order in the Second Judicial District of Nevada in  
28 *Barton v. First Horizon*. The *Barton* order was an interim order that is not appealable as it is not final. Further, the  
court said that this Department must decide if Quality is subject to being licensed, not that it had to be licensed.

<sup>13</sup> See Exhibit 13 hereto, *Ford v. MTGLQ*, CI 20145 rejecting Plaintiff's claim that the foreclosure trustee was a  
debt collector under FDCPA or NRS 649.671

1 4. Rhonda Ford and Daniel Weinstein's claim that MTGLQ Investor,  
2 L.P. engaged in deceptive trade practices under NRS 41.600 is  
3 rejected;

4 Similarly, the weight of the authority in the Ninth Circuit is that a non-judicial  
5 foreclosure is not debt collection. The weight of the relevant authority in Nevada is also that  
6 Quality is not a debt collector.<sup>14</sup>

7 In addition, it appears that during the 20+ years Quality has been doing in business in  
8 Nevada, the Financial Institutions Division has never received a complaint about Quality's  
9 business practices. In fact, the only Complaint before this agency has ever been made against  
10 Quality relies on no specific action of Quality.

11 Justifiably relying on the industry standard, the weight of general authority, and specific  
12 holdings within the courts of Nevada, interpreting Nevada State law regarding licensing, Quality  
13 has continued its proceedings following Nevada foreclosure law.

14 Expedited hearing in this matter is crucial as Quality has a substantial number of non-  
15 judicial foreclosures currently pending in the State of Nevada; this Agency's Order will  
16 significantly impact not only Quality but the many varied citizens of the State of Nevada  
involved in those foreclosures negatively:

- 17 a. Consumers who are awaiting the completion of foreclosure to start  
18 reestablishing their credit will be negatively impacted;
- 19 b. Consumers who are awaiting their opportunity to mediate will be  
20 negatively impacted;
- 21 c. Neighborhoods will continue to suffer blight and decline when  
22 foreclosures are not completed in a timely fashion;
- 23 d. The struggling Nevada economy will suffer setbacks as more properties  
24 are placed into limbo where *neither* can consumers pay the mortgage on

25  
26  
27 <sup>14</sup> Courts have consistently held that foreclosure is not an action intended to "collect a debt" under the FDCPA, and  
28 therefore cannot be a basis for violations of the FDCPA. *See, e.g., Quintero Family Trust v. Onwest Bank, F.S.B.*,  
2010 U.S. Dist. LEXIS 6613, 2010 WL 2618729, (S.D. Cal. 2010); *Diessner v. Mortgage Elec. Registration Sys.*,  
618 F. Supp. 2d 1184, 1188-89 (D. Ariz. 2009); *Izenberg v. ETS Servs., LLC*, 539 F. Supp. 2d 1193, 1199 (C.D. Cal.  
2008)

1 the subject property nor can the beneficiary revitalize the property by  
2 placing it back into the chain of commerce; and

3 e. The owners of the notes secured by the deed of trust in which Quality is  
4 the duly appointed trustee will suffer a loss for each day Quality is  
5 prevented from proceeding with its contractual and statutory rights.

6 As unfortunate as it is, completion of foreclosure is a necessary step to economic  
7 recovery of this State and the Country as a whole.

8 CONCLUSION

9 Quality respectfully requests that the Commissioner (1) withdraw the cease and desist  
10 order pending a hearing on this matter (2) set this matter for an expedited hearing and (3) make a  
11 determination that Quality is not a collection agency and subject to the licensing provisions of  
12 Chapter 649 of the Nevada Revised Code. Quality also respectfully requests an immediate  
13 ruling on its request for expedited hearing.

14 Respectfully submitted,

15  
16 Dated: 10/21/2010

17 LIONEL SAWYER & COLLINS

18  
19 By: 

20 PAUL E. LARSEN, Nevada Bar # 3756  
21 300 South Fourth Street, Fl 1700  
22 Las Vegas, Nevada 89101  
23 Attorneys for Quality Loan  
24 Service Corporation  
25  
26  
27  
28

IN SUPPORT OF REQUEST FOR EXPEDITED HEARING AND APPEAL

Comes now the declarant, David Owen, who declares as follows:

- 5 22

1 beneficiary of the Deed of Trust and utilizes a title company to sign and  
2 record the Notice of Default as Quality's agent.

3 b) A copy of the Notice of Default with the recording date shown thereon is  
4 be sent by registered or certified mail within 10 calendar days of the  
5 actual recordation to the required parties last known address if different  
6 than the address specified in the Deed of Trust. *The Notice of Default*  
7 *and Election to Sell must describe the deficiency in performance or*  
8 *payment. See NRS § 107.080 (3)(a).*

9 c) Effective July 1, 2009, along with the Notice of Default, Quality must  
10 mail to the grantor by registered or certified mail, return receipt  
11 requested, with postage prepaid, an Election to Mediate Form which  
12 includes the required information found in NRS § 107.086 2(3). The  
13 Form must be completed by the required person(s) within 30 days of the  
14 date that the Notice of Default was mailed to the grantor. [See NRS §  
15 107.086(2)(a)(3) and NRS § 107.086 (2)(c)]

16 d) Effective June 1, 2010, a Financial Statement and Housing Affordability  
17 Worksheet must also be included with the Notice of Default. [See  
18 Amended Foreclosure Mediation Rule 5.5]

19 e) As of July 1, 2009, at least 60 days prior to the date of the Trustee's Sale,  
20 Quality must mail to the grantor a separate Danger Notice which includes  
21 a copy of the Original Promissory Note. [See NRS § 107.085]

22 f) Beginning October 1, 2009 a copy of the Notice of Default is posted in a  
23 conspicuous place on the property not later than three (3) business days  
24 after the Notice of Default is recorded. [See NRS § 107.080]

25 g) Beginning October 1, 2009, a separate Danger Notice is posted in a  
26 conspicuous place on the property and mailed, with a certificate of  
27 mailing issued by the United States Postal Service, to any tenant or  
28 subtenant, if any, other than the grantor or his successor in interest, in



1 actual occupation of the premises not later than 3 business days after the  
2 Notice of the Sale is given. [See NRS § 107.080 and NRS § 107.087]

3 h) After expiration of the 3-month period following the recording of the  
4 Notice of Default and only after having received a Certificate from the  
5 Nevada Foreclosure Mediation Program Administrator does Quality  
6 generate and record a Notice of Trustee's Sale [See NRS § 107.080]  
7 Quality executes the Notice of Trustee's Sale as the duly appointed  
8 Trustee. Quality must record a copy of the Certificate of Mediation in the  
9 County in which the property is located. [See NRS § 107.086(2)(c)]

10 i) At least 20 days before the date of the scheduled sale Quality mails a  
11 copy of the Notice of Trustee's Sale to all required parties, including the  
12 borrower, by way of certified mail, return receipt requested, and by way  
13 of regular US mail. [See NRS § 107.090(4)]

14 j) The Notice of Trustee's Sale is then posted in three public places of the  
15 township or city where the property is situated and where the property is  
16 to be sold for 20 days. Three days after the Notice of Trustee's Sale is  
17 recorded it is also posted on the property to be sold.

18 k) The Notice of Trustee's Sale is published on three separate occasions,  
19 once each week for three consecutive weeks, in a newspaper of general  
20 circulation in the county where the property is located.

21 l) Beginning October 1, 2009, a separate Notice to Tenant must be posted in  
22 a conspicuous place on the property and mailed, with a certificate of  
23 mailing issued by the United States Postal Service to any tenant or  
24 subtenant, if any, other than the grantor or his successor in interest, in  
25 actual occupation of the premises not later than 3 business days after the

26 Notice of the Sale is recorded. [See NRS § 107.080. NRS § 107.087]

27 m) If a sale of property pursuant to NRS § 107.080 is postponed by oral  
28 proclamation the sale must be postponed to a later date at the same time

1 and location. If such a sale has been postponed by oral proclamation  
2 three (3) times, any new sale information must be provided by Notice as  
3 provided in NRS § 107.080. [See NRS § 107.082]

4 n) All sales of property pursuant to NRS § 107.080 must be made at auction  
5 to the highest bidder and must be made between the hours of 9 a.m. and 5  
6 p.m. The agent holding the sale must not become a purchaser at the sale  
7 or be interested in any purchase at such a sale. [See NRS § 107.081]

8 o) After the Trustee's sale is completed Quality issues the Trustee's Deed  
9 Upon Sale such that it can be recorded in the county in which the  
10 property is located within 30 days of the completed Trustee's sale. [NRS  
11 § 107.080(8)]

12 5. During the foreclosure process Quality does NOT contact the Borrower by  
13 phone to seek collection of the outstanding debt and only sends the above  
14 referenced mailings that can include, depending on the desire of the  
15 beneficiary/loan servicer, information advising the borrower that help may be  
16 available through various loss mitigation programs that may be offered by the  
17 beneficiary/loan servicer.

18 6. Should the borrower contact Quality to address the available loss mitigation  
19 options Quality will act as a facilitator to assist both the borrower and the  
20 beneficiary/loan servicer to hopefully reach a resolution. During this process  
21 Quality makes no decision whatsoever relative to whether or not a specific  
22 program will be made available to the borrower or on what is ultimately agreed  
23 to relative to the payment of the debt; this decision sits solely with the borrower  
24 and the beneficiary/loan servicer.

25 7. If during the foreclosure process the Borrower contacts Quality to ascertain what  
26 is owed Quality will obtain the required information from the beneficiary/loan  
27 servicer and forward the pay-off and/or reinstatement quotes to the borrower if  
28 requested by the beneficiary/loan servicer. Pursuant to Nevada law the

1 beneficiary is required to provide the borrower, as well as any other party who  
2 holds an interest in the subject real property, with these figures. Quality does  
3 not contact the borrower to offer pay-off and/or reinstatement quotes.

4 8. During the foreclosure process Quality will address any and all issues raised by  
5 the borrower, no matter how small by referring the borrower to the appropriate  
6 source as Quality has no independent ability to negotiate payment or modify the  
7 foreclosure process except as authorized by statute. Quality truly appreciates the  
8 impact of the foreclosure on the borrower and therefore has implemented policy  
9 and procedures that are designed to assist the borrower whenever possible in  
10 hopes that the negative impact of the pending foreclosure can be reduced as  
11 much as possible.

12 9. If the Borrower elects to mediate Quality will request the financial information  
13 required pursuant to NRS 107.086 (and the Foreclosure Mediation Rules  
14 promulgated on July 21, 2010).

15 10. Expedited hearing in this matter is crucial as Quality has a substantial number  
16 (in the thousands) of non-judicial foreclosures currently pending in the State of  
17 Nevada and the Cease and Desist Order that has been issued negatively impacts  
18 the borrowers, the beneficiaries, and the citizens of the state of Nevada:

- 19 a. Consumers who are awaiting the completion of foreclosure to start reestablishing  
20 their credit will be negatively impacted by the delay;  
21 b. Consumers who are awaiting their opportunity to mediate will be negatively  
22 impacted by the delay;  
23 c. Neighborhoods will continue to suffer blight and decline when foreclosures do  
24 not complete in a timely fashion; (in order for the homes to be acquired by new  
25 owners)  
26 d. The struggling Nevada economy will suffer setbacks as more properties are  
27 placed into a limbo where neither can consumers pay the mortgage on the subject  
28

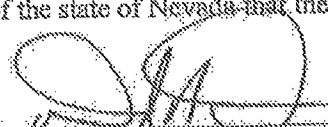
1 property nor can the beneficiary revitalize the property by placing it back into the  
2 chain of commerce.

3 e. The owners of the notes secured by the deed of trust in which Quality is the duly  
4 appointed trustee will suffer a loss for each day Quality is prevented from  
5 proceeding with its contractual and statutory rights.

6 11. To the best of my knowledge, Quality has never been contacted by the  
7 Department of Business and Industry for the State of Nevada for any reason prior  
8 to receiving the subject Order to Cease and Desist.

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

11 Dated: 10/20/2010

  
David Owen  
Chief Operations Officer for  
Quality Loan Service Corporation

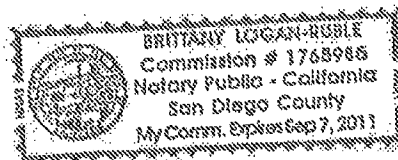
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13  
14 State of California )  
15 County of San Diego )  
16

17 On 10/20/2010 before me, Brittany Logan-Ruble  
18 personally appeared David Owen, who proved to me on the basis  
19 of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within  
20 instrument and acknowledged to me that he/she/they executed the same in his/her/their  
21 authorized capacity(ies), and that by his/her/their signature(s) on  
22 the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the  
instrument.

21 I certify under PENALTY OF PERJURY under the laws of the State of California that the  
22 foregoing paragraph is true and correct.

23 WITNESS my hand and official seal.

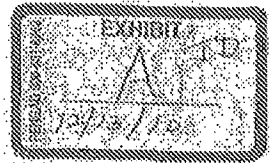
24 Signature:  (Seal)  
25



RECEIPT OF COPY

I hereby certify that on the \_\_\_\_\_ day of October, 2010, I received a true and correct copy of the foregoing Request for Hearing in Response to Order to Cease and Desist Unlicensed Activities and Notice of Right to Appeal.

State of Nevada Department of Business and Industry  
Financial Institutions Division  
2785 East Desert Inn Road, Suite 160  
Las Vegas, NV 89121



3285 E. Desert Inn Road, Suite 100  
Las Vegas, Nevada 89121  
(702) 496-4100

STATE OF NEVADA  
DEPARTMENT OF BUSINESS AND INDUSTRY  
FINANCIAL INSTITUTIONS DIVISION

1179 Fairview Drive, Ste 201  
Carson City, Nevada 89101  
(775) 687-2022

In Re:

QUALITY LOAN SERVICE  
CORPORATION,

ORDER TO CEASE AND DESIST  
UNLICENSED ACTIVITIES AND NOTICE  
OF RIGHT TO APPEAL

Respondent.

ORDER TO CEASE AND DESIST UNLICENSED ACTIVITIES  
AND NOTICE OF RIGHT TO APPEAL

The State of Nevada Department of Business and Industry, Financial Institutions Division (hereinafter "Division") hereby orders QUALITY LOAN SERVICE CORPORATION, (hereafter "Respondent") to cease and desist from any and all activities which are covered under Nevada Revised Statutes (NRS) Chapter 649.

JURISDICTION

1. The business of collecting claims for others or of soliciting the right to collect or receive payment for another of any claim in the State of Nevada is governed by chapter 649 of the Nevada Revised Statutes (NRS) and chapter 649 of the Nevada Administrative Code (NAC). The Division has primary jurisdiction for the licensing and regulation of persons operating and/or engaging in collection services. NRS 649.026.

2. Pursuant to the authority vested by NRS Chapter 649, the Division hereby makes the following Findings of Fact, Conclusions of Law, and Order.

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FINDINGS OF FACT

3. Respondent QUALITY LOAN SERVICE CORPORATION is a business registered with the State of California Secretary of State. Respondent's resident agent is KRISTIN A. SCHULER-HINTZ located at 9510 West Sahara Ave., Suite 110, Las Vegas, Nevada, 89117

4. Respondent solicits collection business through its website address, [www.qualityloans.com](http://www.qualityloans.com). On its website, Respondent states that it is engaged in the business of "non-judicial foreclosure processing."

5. Respondent is engaged in the business of a collection agency through filing foreclosure notices and conducting foreclosure sales on real property for mortgage companies and mortgage holders.

6. Respondent is not now and has never been licensed as a collection agency by the Division.

7. Respondent engaged in the business as a collection agency in the State of Nevada without first obtaining a license to do so.

8. The Division has received a complaint from a resident of the State of Nevada that Respondent had attempted to collect a claim against the resident.

9. On February 13, 2009, Respondent filed Notice of Breach and Default and Election to Cause Sale of Real Property under Deed of Trust on behalf of Horizon First Home Loan Corporation.

10. In the notification, Respondent claims they are "the agent for the trustee or beneficiary under a Deed of Trust" and that "the obligations secured thereby are presently held by the [Respondent]."

11. Respondent goes on to state that the borrower may have "the right to cure the default hereon and reinstate the one obligation secured by such Deed of Trust." The borrower is then directed to contact Respondent as follows:

To determine if reinstatement is possible and the amount, if any, to cure the default, contact:

MetLife Home Loans, a division of MetLife Bank NA  
c/o Quality Loan Service Corp.  
2141 Fifth Avenue,  
San Diego, CA 92101

12. The Nevada District Court, Second District, in case no. CV09-1845, *Barton, et al. v. First Horizon Home Loan Corporation, et al.*, determined that Respondent was a debt collector as a matter of law based upon the activities Respondent conducted in the State of Nevada.

13. Respondent's actions are a willful and intentional violation of the laws of the State of Nevada.

14. If any finding of fact is more properly characterized as a conclusion of law, it shall be considered as such.

#### CONCLUSIONS OF LAW

15. NRS 649.075(1) reads as follows:

Except as otherwise provided in this section, a person shall not conduct within this State a collection agency or engage within this State in the business of collecting claims for others, or of soliciting the right to collect or receive payment for another of any claim, or advertise, or solicit, either in print, by letter, in person or otherwise, the right to collect or receive payment for another of any claim, or seek to make collection or obtain payment of any claim on behalf of another without having first applied for and obtained a license from the Commissioner.

16. NRS 649.395 provides the Commissioner to take disciplinary action for any violation of NRS Chapter 649.

NRS 649.390 Investigation of verified complaint concerning unlicensed person; order to cease and desist; administrative fines; suit to recover fine; cumulative penalties.

1. The Commissioner shall conduct an investigation if he receives a verified complaint from any person that sets forth reason to believe that an unlicensed person is engaging in an activity for which a license is required pursuant to this chapter.

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1 2. If the Commissioner determines that an unlicensed person  
2 is engaging in an activity for which a license is required pursuant to  
3 this chapter, the Commissioner shall issue and serve on the  
4 person an order to cease and desist from engaging in the activity  
5 until such time as the person obtains a license from the  
6 Commissioner.

7 3. If a person upon whom an order to cease and desist is  
8 served does not comply with the order within 30 days after service,  
9 the Commissioner shall, after notice and opportunity for a hearing:

10 (a) Impose upon the person an administrative fine of \$10,000;  
11 or

12 (b) Enter into a written consent agreement with the person  
13 pursuant to which the person agrees to cease and desist from all  
14 unlicensed activity in this State relating to the collection of debts,  
15 and impose upon the person an administrative fine of not less than  
16 \$5,000 and not more than \$10,000.

17 -- The imposition of an administrative fine pursuant to this  
18 subsection is a final decision for the purposes of judicial review.

19 4. The Commissioner shall bring suit in the name and on  
20 behalf of the State of Nevada against a person upon whom an  
21 administrative fine is imposed pursuant to subsection 3 to recover  
22 the amount of the administrative fine:

23 (a) If no petition for judicial review is filed pursuant to NRS  
24 233B.130 and the fine remains unpaid for more than 90 days after  
25 notice of the imposition of the fine; or

26 (b) If a petition for judicial review is filed pursuant to NRS  
27 233B.130 and the fine remains unpaid for more than 90 days after  
28 exhaustion of any right of appeal in the courts of this State  
resulting in a final determination that upholds the imposition of the  
fine.

5. A person's liability for an administrative fine is in addition to  
any other penalty provided in this chapter.

17. Pursuant to NRS 649.440, the Commissioner can impose administrative fines  
of not more than \$10,000.00 for any violation of this chapter.

In addition to any other remedy or penalty, the Commissioner may  
impose an administrative fine of not more than \$10,000 upon a  
person who:

1. Without a license or certificate, conducts any business or  
activity for which a license or certificate is required pursuant to the  
provisions of this chapter; or

2. Violates any provision of this chapter or any regulation  
adopted pursuant thereto.

1 18. Respondent has violated NRS 649.075 by collecting payments on behalf of  
2 another and seeking "to make collection or obtain payment of any claim on behalf of another."

3 19. Respondents have violated NRS 649.075 by "soliciting the right to collect or  
4 receive payment for another of any claim."

5 20. Respondent has violated NRS 649.075 by engaging in the business of collecting  
6 payments for another in the State of Nevada.

7 21. Pursuant to NRS 649.395, the Commissioner hereby orders Respondent to  
8 cease and desist all activity covered under NRS Chapter 649 and will set a hearing to  
9 determine any administrative fine to be imposed.

10 22. Any conclusion of law which is more properly characterized as a finding of fact  
11 shall be considered as such.

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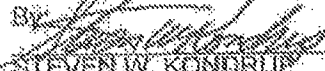
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ORDER

IT IS HEREBY ORDERED that Respondent QUALITY LOAN SERVICE CORPORATION shall CEASE AND DESIST from operating and/or engaging in the business of "collecting claims for others, or of soliciting the right to collect or receive payment for another of any claim, or advertise, or solicit, either in print, by letter, in person or otherwise, the right to collect or receive payment for another of any claim, or seek to make collection or obtain payment of any claim on behalf of another" within the State of Nevada unless and until such time Respondent becomes licensed by the Division pursuant to NRS Chapter 649.

DATED this 14<sup>th</sup> day of October 2010.

STATE OF NEVADA  
DEPARTMENT OF BUSINESS AND INDUSTRY  
FINANCIAL INSTITUTIONS DIVISION

By   
STEVEN W. KONDRUP  
Deputy Commissioner

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APPEAL RIGHTS

RESPONDENT HAS THE RIGHT TO REQUEST A HEARING IN THIS MATTER. If you wish to request a hearing you must file a request within thirty (30) days after this Order to Cease and Desist was served on the Respondent.

Your request for a hearing must be delivered to:

FINANCIAL INSTITUTIONS DIVISION  
STATE OF NEVADA, DEPARTMENT OF BUSINESS  
AND INDUSTRY  
2785 E. Desert Inn Road, Suite 180  
Las Vegas, Nevada 89121

Other important rights you have are listed in Nevada Revised Statutes Chapters 649 and 233B and the Nevada Administrative Code Chapter 649.

DATED this 14<sup>th</sup> day of October, 2010.

STATE OF NEVADA  
DEPARTMENT OF BUSINESS  
AND INDUSTRY  
FINANCIAL INSTITUTIONS DIVISION

By:

  
STEVEN W. KONDRUP  
Deputy Commissioner

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Certified Mail: 7000 2250 0001 8881 4670

By: Ruth Ceramtes

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1 LIONEL SAWYER & COLLINS  
2 PAUL E. LARSEN, Nevada Bar # 3756  
3 300 Fourth Street, #1700  
4 Las Vegas, NV 89101  
5 Phone (702) 383-2888  
6 Fax (702) 383-8843  
7 email: plarsen@lionelsawyer.com

8 Attorney for:  
9 Quality Loan Service Corporation

10 STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY  
11 FINANCIAL INSTITUTIONS DIVISION

12 IN RE:

13 QUALITY LOAN SERVICE  
14 CORPORATION,

15 REQUEST FOR EXPEDITED HEARING

16 NOTICE OF APPEAL OF ORDER TO  
17 CEASE AND DESIST UNLICENSED  
18 ACTIVITIES AND NOTICE OF RIGHT TO  
19 APPEAL.

20 COMES NOW QUALITY LOAN SERVICE CORPORATION and hereby APPEALS

21 the Cease and Desist Order issued on October 14, 2010 and requests an expedited hearing.

22 Said request for expedited hearing is based on the fact that Quality Loan Service only  
23 advances non judicial foreclosures pursuant to applicable Nevada Law and does not collect debts  
24 and is not subject to being a licensed collection agency. Quality Loan Service also respectfully  
25 requests an immediate ruling in this request for expedited treatment, in order to avoid undue  
26 interruption of pending proceedings.

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Quality Loan Service also respectfully requests the stay of any enforcement action pending an immediate hearing on this matter.

Dated: 10/21/2010

LIONEL SAWYER & COLLINS

By: 

PAUL E. LARSEN, Nevada Bar # 3736  
300 South Fourth Street, 17th Floor  
Las Vegas, Nevada 89101  
Attorneys for Quality Loan  
Service Corporation

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1 POINTS AND AUTHORITIES

2 STATEMENT OF FACTS

3 Quality Loan Service Corporation (hereinafter "Quality") is a California corporation.  
4 Quality has been incorporated in the State of California since 1988, has been registered as a  
5 foreign corporation in Nevada since 1988, and has been doing business solely as a non-judicial  
6 foreclosure trustee since that time.

7 Quality is not now, nor has it ever been in the business of collecting debts and does not  
8 now, nor has it ever held, or been required to hold a license as a debt collector in any state in  
9 which it does business.

10 Quality does not fall within the general definition of a "debt collector" under either  
11 Federal or State Law as Quality only advances non-judicial foreclosures in the State of Nevada  
12 pursuant to NRS 107.080 et seq.,<sup>1</sup> wherein Quality serves solely as either the agent of the  
13 beneficiary or the duly substituted trustee for the purpose of conducting only non-judicial  
14 foreclosures in the State of Nevada.

15 NRS 107.080 et seq., makes no reference to the Federal Fair Debt Collection  
16 Practices Act or "FDCPA" (or Chapter 649 of the NRS) nor does NRS 107.080 require that a  
17 beneficiary or trustee engaged in Nevada foreclosures follow the requirements of the FDCPA. In  
18 accordance with NRS 107.080, Quality records a Notice of Default in the official records of the  
19 County in which the property subject to the Deed of Trust is located. Thereafter, Quality mails  
20 to the interested parties a copy of the recorded notice of Default, along with the Election to  
21 Mediate and required forms relative to an election to mediate. Quality has the Notice of Default  
22 posted at the subject real property and ensures that the "Danger Notice" and copy of the  
23 promissory note are posted at the subject real property pursuant to NRS 107.085. None of these  
24 acts are debt collection.

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<sup>1</sup> See Exhibit 1 hereto, a true and correct copy of NRS 107.080 through NRS 107.110.



1 If the Borrower seeks contact information regarding loss mitigation, Quality makes  
2 available contact information for the beneficiary or servicer or state agency to permit the  
3 borrower to obtain loss mitigation assistance from said agency. This, too, is not debt collection.

4 If the Borrower requests reinstatement information Quality will obtain from the  
5 beneficiary and provide the total amount of the reinstatement. This is not debt collection.

6 If the Borrower elects to mediate Quality will request the financial information required  
7 pursuant to NRS 107.086 (and the Foreclosure Mediation Rules promulgated on July 21, 2010).  
8 Additionally, at that time, an attorney is retained by the lender/beneficiary to participate in the  
9 mediation process. Neither of these acts is debt collection.

10 Quality, as the duly appointed Trustee under the Deed of Trust, causes to be posted,  
11 published, recorded and mailed the Notice of Sale, pursuant to NRS 107.080. Quality also  
12 causes to be posted and mailed the Notice to Tenants pursuant to NRS 107.087. No debt  
13 collection.

14 As demonstrated above, Quality engages in none of the activities that are the hallmarks of  
15 debt collection: Quality does not call borrowers, demand payment, file suit, send dunning letters,  
16 etc. Most importantly and most telling, Quality has no interest in whether or not any funds are  
17 ever tendered or collected from a borrower by its activities and has no vested interest in the  
18 outcome of the process, whether it is the reinstatement of the loan or the completion of the  
19 foreclosure sale. Quality is paid by the holder of a note secured by a deed of trust to simply  
20 conduct a foreclosure sale pursuant to the laws of the State of Nevada.

21 **A. QUALITY LOAN SERVICE IS NOT A DEBT COLLECTOR**

22 Pursuant to Nevada law, enforcing a security interest in real property is specifically  
23 excluded from the definition of what constitutes doing business in Nevada.

24 NRS 80.015, provides, in pertinent part:

25 NRS 80.015 Activities not constituting doing business.

26  
27  
28 <sup>2</sup> See Exhibit 2 hereto, a true and correct copy of the current Foreclosure Mediation Rules and Trustee Forms.

1           1. For the purposes of this chapter, the following activities do not constitute  
2     transacting business in this State;

3           (a) Maintaining, defending or settling any proceeding;

4           ...  
5           (g) Creating or acquiring indebtedness, mortgages and security interests in  
6     real or personal property;

7           (h) Securing or collecting debts or *enforcing mortgages and security interests*  
8     *in property securing the debts;*

9           (i) Owning, without more, real or personal property;

10          ... (Emphasis added)

11          The Nevada legislature has specifically excluded the enforcement of mortgage interest in  
12     property from what constitutes doing business in Nevada. Indeed, in *Ernstberg v. Mortgage*  
13     *Investors Group* 2010 U.S. Dist. Lexis 4560 (D. Nev. 2009), the Court held that First American  
14     Title, a business directed at enforcing mortgage rights, was not even required to register with the  
15     Secretary of State as a foreign corporation.<sup>3</sup>

16          NRS 649.020 defines a "collection agency" as all persons engaging, directly or indirectly,  
17     and as a primary or a secondary object, business or pursuit, in the collection of or in soliciting or  
18     obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to  
19     another. As previously stated, Quality does not solicit the payment of a debt; Quality has no  
20     interest whatsoever in whether or not the debt is paid. The United States District Court for the  
21     District of Nevada, Judge Robert Clive Jones, recently held in *Long v. National Default*  
22     *Servicing Corporation* 2010 U.S. Dist. Lexis 92344 (D. Nev. 2010), that when a Defendant is in  
23     the business of enforcing security interests, not collecting debts, the Defendant did not fall within  
24     the general definition of a debt collector.

25  
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28     <sup>3</sup> See Exhibit 3 hereto, a true and correct copy of *Ernstberg v. Mortgage Investors Group*, 2010 U.S. Dist. Lexis  
   4560 (D. Nev. 2009).

1 Thus, the weight of authority in Nevada is that pursuing a non judicial foreclosure is not  
2 debt collection; as such Quality is not a debt collector and is not required to be licensed as such.<sup>4</sup>

3 Additionally, Courts outside of Nevada have held that the activity of non-judicial  
4 foreclosure is not "debt collection" under the FDCPA. *Hulse v. Owen Fed. Bank, FSB*, 195 F.  
5 Supp. 2d 1188 (D. Or. 2002).<sup>5</sup> The reason for this rule is that the object of foreclosure is not the  
6 collection of money: "Foreclosing on a trust deed is distinct from the collection of the obligation  
7 to pay money. The FDCPA is intended to curtail objectionable acts occurring in the process of  
8 collecting funds from a debtor. But, foreclosing on a trust deed is an entirely different path.  
9 Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its  
10 interest in the property." *Id.* at 1204. Because foreclosure is not debt collection under the  
11 FDCPA, "any actions taken . . . in pursuit of the actual foreclosure may not be challenged as  
12 FDCPA violations." *Id.*

13 The purpose of the notice of default (the first step of a non judicial foreclosure in  
14 Nevada) is to provide borrowers with notice of their default and the lender's election to sell the  
15 property in satisfaction of the debt. See NRS 107.080(2)(b); See generally *Ernestberg*, *supra*.  
16 (The notice of breach and election to sell is not an attempt to collect the debt from the borrower.)  
17 In *Maynard v. Cannon*, 650 F. Supp. 2d 1138, 1143-1144 (D. Utah 2006)<sup>6</sup> (citing *Shinek v.*  
18 *Weisman, Nowack, Curry & Wilco, P.C.*, 374 F.3d 1011 (11<sup>th</sup> Cir. 2004)), the Court stated that  
19 "the filing of a lien by a creditor is a necessary step for securing payment of a debt". It is an  
20 attempt to satisfy the borrower's obligation by resorting to property that secures the debt.  
21 Nevada statutes permit non-judicial foreclosure. See NRS 107.080. The State requires  
22 recordation of a notice of default to commence non-judicial foreclosure and the notice of default  
23 must describe the deficiency in performance or payment. NRS 107.080(2)(b); NRS 107.080(3).  
24 Accordingly, recordation and mailing of the notice of default cannot violate FDCPA. See

25  
26  
27 <sup>4</sup> See Exhibit 4 hereto, a true and correct copy of *Lang v. National Deposit Servicing Corporation*, 2010 U.E. Dist.  
Lexis 92344 (D. Nev. 2010).

<sup>5</sup> See Exhibit 5 hereto, a true and correct copy of *Hulse v. Owen Fed. Bank, FSB*, 195 F.Supp. 2d 1188.

28 <sup>6</sup> See Exhibit 6 hereto, a true and correct copy of *Maynard v. Cannon*, 650 F. Supp. 2d 1138, 1143-1144 (D. Utah  
2006).

1 *Maynard* at 1144. (FDCPA is not so broad as to prohibit recordation of a notice of default).  
2 "The intent behind the FDCPA was to prohibit abusive collection practices, not to outlaw  
3 foreclosure when there is an express security agreement and breach of an obligation." *Maynard*  
4 at 1143.

5 Further, citing *Maynard*, Courts in Nevada have already stated that recording a notice of  
6 default and election to sell is not an attempt to collect a debt because the borrowers' consent to  
7 make such a recordation upon default is given to the trustee where state law requires such  
8 recordation as part of the non-judicial foreclosure. *Charov v. Perry*, 2010 U.S. Dist. LEXIS  
9 65798 (D. Nev. 2010).<sup>7</sup>

10 As recently as September 15, 2010, Federal District Court Judge Hicks in *Maves v. First*  
11 *Horizon Home Loans* 2010 U.S. Dist. Lexis 97387 (D. Nev. 2010)<sup>8</sup> held:

12 QLS<sup>9</sup> acted as the foreclosure trustee in this matter. A  
13 foreclosure trustee does not have to be licensed to record  
14 a notice of default because a foreclosure trustee is not a  
15 debt collector. (Citations omitted.) Accordingly, QLS is  
16 entitled to judgment as a matter of law that it did not violate  
17 Nevada's Unfair and Deceptive Trade Practices Act and the  
18 court shall grant defendants' motion in this respect.<sup>10</sup>

19 The weight of authority in Nevada is that pursuing a non judicial foreclosure is not debt  
20 collection but the enforcement of a contractual right and property interest and as such Quality  
21 does not meet the definition of "Collection Agency" as set forth in NRS 649.020 and is not  
22 subject to the licensing requirements of NRS 649.<sup>11</sup> Further, the provisions of NRS

23 <sup>7</sup> See Exhibit 7 hereto, a true and correct copy of *Charov v. Perry*, 2010 U.S. Dist. LEXIS 65798 (D. Nev. 2010).

24 <sup>8</sup> See Exhibit 8 hereto, a true and correct copy of *Maves v. First Horizon Home Loans* 2010 U.S. Dist. Lexis 97387  
(D. Nev. 2010).

25 <sup>9</sup> QLS is the same company as Quality.

26 <sup>10</sup> Please note that while the Order uses the general description "license" the Complaint and opposition to motion for  
summary judgment specifically refer to Chapter 649 and there was no required "foreign collector's license".

27 <sup>11</sup> It need not be said, Exhibit 9 hereto, a true and correct copy of *Greene v. Trinity Mortg. Ass'n, Corp.*, 2009 U.S.  
Dist. Lexis 89808; Exhibit 10 hereto, a true and correct copy of *Munsour v. Cal-Western Reconveyance Corp.*, 2010  
F. Supp. 2d 1178 (D. AZ 2010); Exhibit 11 hereto, a true and correct copy of *Salazar v. Lehman Brothers Bank*,  
2010 U.S. Dist. Lexis 108737 (D. AZ 2010) holding, "it is well established that "foreclosing on a property pursuant  
28 to a deed of trust is not the collection of a debt within the meaning of the FDCPA." (Citations omitted.).

649.020(3)(a) are inapplicable as Quality is *not* a community manager and advances no foreclosure proceedings pursuant to NRS 116 et. seq. or NRS 116B et. seq.

**B. QUALITY REQUESTS AN EXPEDITED HEARING IN THIS MATTER AS THE ISSUANCE OF THE CEASE AND DESIST ORDER HAS A SUBSTANTIAL NEGATIVE IMPACT**

The Deputy Commissioner has issued its Cease and Desist Order in this matter without any notice to Quality or providing Quality any opportunity to discuss this issue. Quality was not given any prior opportunity to be heard, no notice, not even a phone call. The investigation was done without the Department even asking Quality to explain its activities.

Quality has been engaged in the business of non-judicial foreclosure in the State of Nevada since 1988. In that time Quality has been a party to a number of judicial proceedings wherein its practices and procedures relative to the completion of non-judicial foreclosures have been before the various Courts. At no time prior to the issuance of the Court's interim order on June 9, 2010, in the *Barton* case has a Court found Quality to be a debt collector.<sup>12</sup> Unfortunately, the Court in *Barton* makes a crucial and mistaken assumption, that Quality "acquired" the debt (*Barton* page 6, line 10) and that the loan was "assigned" to Quality (*Barton*, page 6, line 13). However, in actual fact Quality does not acquire the loan nor does Quality acquire the debt. Quality is merely the Trustee under the deed of trust. Quality only acquires the ability to enforce the security interest against the subject real property pursuant to NRS 107.080 et. seq.

Indeed, in the Third Judicial District Court for the County of Lyon, in the case of *Ford v. Weinstein*, the Court dealing with the same set of facts, circumstances, and business practices held the exact opposite to the Court in *Barton*.<sup>13</sup> The court held in relevant part:

3. Rhonda Ford and Daniel Weinstein's claim that MTGLQ Investor, L.P. or its foreclosure trustee was a debt collector under the Federal Debt Collection Practices Act (or NRS 649.671) are rejected;

<sup>12</sup> See Exhibit 12 hereto, a true and correct copy of the Court's order in the Second Judicial District of Nevada in *Barton v. First Horizon*. This *Barton* order was an interim order that is not appealable as it is not final. Further, the court said that this Department must decide if Quality is subject to being licensed, not that it had to be licensed.  
<sup>13</sup> See Exhibit 13 hereto, *Ford v. MTGLQ*, CI 20145 rejecting Plaintiff's claim that the foreclosure trustee was a debt collector under FDCPA or NRS 649.671

1 4.

Rhonda Ford and Daniel Weinstein's claim that MUGLO Investor, L.P. engaged in deceptive trade practices under NRS 41.600 is rejected;

2  
3 Similarly, the weight of the authority in the Ninth Circuit is that a non-judicial  
4 foreclosure is not debt collection. The weight of the relevant authority in Nevada is also that  
5 Quality is not a debt collector.<sup>14</sup>

6 In addition, it appears that during the 20+ years Quality has been doing in business in  
7 Nevada, the Financial Institutions Division has never received a complaint about Quality's  
8 business practices. In fact, the only Complaint before this agency has ever been made against  
9 Quality relies on no specific action of Quality.

10 Justifiably relying on the industry standard, the weight of general authority, and specific  
11 holdings within the courts of Nevada, interpreting Nevada State law regarding licensing, Quality  
12 has continued its proceedings following Nevada foreclosure law.

13 Expedited hearing in this matter is crucial as Quality has a substantial number of non-  
14 judicial foreclosures currently pending in the State of Nevada; this Agency's Order will  
15 significantly impact not only Quality but the many varied citizens of the State of Nevada  
16 involved in those foreclosures negatively:

- 17 a. Consumers who are awaiting the completion of foreclosure to start  
18 reestablishing their credit will be negatively impacted;
- 19 b. Consumers who are awaiting their opportunity to mediate will be  
20 negatively impacted;
- 21 c. Neighborhoods will continue to suffer blight and decline when  
22 foreclosures are not completed in a timely fashion;
- 23 d. The struggling Nevada economy will suffer setbacks as more properties  
24 are placed into limbo where *neither* can consumers pay the mortgage or

25  
26  
27 <sup>14</sup> Courts have consistently held that foreclosure is not an action intended to "collect a debt" under the FCRA, and  
28 therefore cannot be a basis for violations of the FCRA. See, e.g., *Quintero Family Trust v. Quintero Bank, P.A.*,  
2010 U.S. Dist. LEXIS 6618 (2010 WL 2618729, (S.D. Cal. 2010); *Ostner v. Mortgage Elec. Registration Sys.*,  
618 F. Supp. 2d 1184, 1188-89 (D. Ariz. 2009); *Isenberg v. RTS Servs., LLC*, 389 F. Supp. 2d 1193, 1199 (C.D. Cal.  
2008).

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1 the subject property nor can the beneficiary revitalize the property by  
2 placing it back into the chain of commerce; and

3 e. The owners of the notes secured by the deed of trust in which Quality is  
4 the duly appointed trustee will suffer a loss for each day Quality is  
5 prevented from proceeding with its contractual and statutory rights.

6 As unfortunate as it is, completion of foreclosure is a necessary step to economic  
7 recovery of this State and the Country as a whole.

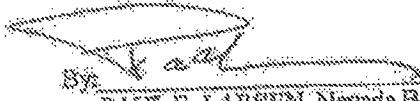
8 CONCLUSION

9 Quality respectfully requests that the Commissioner (1) withdraw the cease and desist  
10 order pending a hearing on this matter (2) set this matter for an expedited hearing and (3) make a  
11 determination that Quality is not a collection agency and subject to the licensing provisions of  
12 Chapter 649 of the Nevada Revised Code. Quality also respectfully requests an immediate  
13 ruling on its request for expedited hearing.

14 Respectfully submitted,

15  
16 Dated: 10/21/2010

17 LIONEL SAWYER & COLLINS

18  
19 By:   
20 PAUL E. LARSEN, Nevada Bar # 3756  
21 308 South Fourth Street, #11700  
22 Las Vegas, Nevada 89101  
23 Attorneys for Quality Loan  
24 Service Corporation  
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beneficiary of the Deed of Trust and utilizes a title company to sign and record the Notice of Default as Quality's agent.

- b) A copy of the Notice of Default with the recording date shown thereon is be sent by registered or certified mail within 10 calendar days of the actual recordation to the required parties last known address if different than the address specified in the Deed of Trust. *The Notice of Default and Election to Sell must describe the deficiency in performance or payment. See NRS § 107.080 (3)(a).*
- c) Effective July 1, 2009, along with the Notice of Default, Quality must mail to the grantor by registered or certified mail, return receipt requested, with postage prepaid, an Election to Mediate Form which includes the required information found in NRS § 107.086 2(3). The Form must be completed by the required person(s) within 30 days of the date that the Notice of Default was mailed to the grantor. [See NRS § 107.086(2)(a)(3) and NRS § 107.086 (2)(c)]
- d) Effective June 1, 2010, a Financial Statement and Housing Affordability Worksheet must also be included with the Notice of Default. [See Amended Foreclosure Mediation Rule 5.5]
- e) As of July 1, 2009, at least 60 days prior to the date of the Trustee's Sale, Quality must mail to the grantor a separate Danger Notice which includes a copy of the Original Promissory Note. [See NRS § 107.085]
- f) Beginning October 1, 2009 a copy of the Notice of Default is posted in a conspicuous place on the property not later than three (3) business days after the Notice of Default is recorded. [See NRS § 107.080]
- g) Beginning October 1, 2009, a separate Danger Notice is posted in a conspicuous place on the property and mailed, with a certificate of mailing issued by the United States Postal Service, to any tenant or subtenant, if any, other than the grantor or his successor in interest, in

1 actual occupation of the premises not later than 3 business days after the  
2 Notice of the Sale is given. [See NRS § 107.080 and NRS § 107.087]

3 h) After expiration of the 3-month period following the recording of the  
4 Notice of Default and only after having received a Certificate from the  
5 Nevada Foreclosure Mediation Program Administrator does Quality  
6 generate and record a Notice of Trustee's Sale [See NRS § 107.080]  
7 Quality executes the Notice of Trustee's Sale as the duly appointed  
8 Trustee. Quality must record a copy of the Certificate of Mediation in the  
9 County in which the property is located. [See NRS § 107.086(2)(c)]

10 i) At least 20 days before the date of the scheduled sale Quality mails a  
11 copy of the Notice of Trustee's Sale to all required parties, including the  
12 borrower, by way of certified mail, return receipt requested, and by way  
13 of regular US mail. [See NRS § 107.090(4)]

14 j) The Notice of Trustee's Sale is then posted in three public places of the  
15 township or city where the property is situated and where the property is  
16 to be sold for 20 days. Three days after the Notice of Trustee's Sale is  
17 recorded it is also posted on the property to be sold.

18 k) The Notice of Trustee's Sale is published on three separate occasions,  
19 once each week for three consecutive weeks, in a newspaper of general  
20 circulation in the county where the property is located.

21 l) Beginning October 1, 2009, a separate Notice to Tenant must be posted in  
22 a conspicuous place on the property and mailed, with a certificate of  
23 mailing issued by the United States Postal Service to any tenant or  
24 subtenant, if any, other than the grantor or his successor in interest, in  
25 actual occupation of the premises not later than 3 business days after the  
26 Notice of the Sale is recorded. [See NRS § 107.080, NRS § 107.087]

27 m) If a sale of property pursuant to NRS § 107.080 is postponed by oral  
28 proclamation the sale must be postponed to a later date at the same time

and location. If such a sale has been postponed by oral proclamation three (3) times, any new sale information must be provided by Notice as provided in NRS § 107.080. [See NRS § 107.082]

n) All sales of property pursuant to NRS § 107.080 must be made at auction to the highest bidder and must be made between the hours of 9 a.m. and 5 p.m. The agent holding the sale must not become a purchaser at the sale or be interested in any purchase at such a sale. [See NRS § 107.081]

o) After the Trustee's sale is completed Quality issues the Trustee's Deed Upon Sale such that it can be recorded in the county in which the property is located within 30 days of the completed Trustee's sale. [NRS § 107.080(3)]

5. During the foreclosure process Quality does NOT contact the Borrower by phone to seek collection of the outstanding debt and only sends the above referenced mailings that can include, depending on the desire of the beneficiary/loan servicer, information advising the borrower that help may be available through various loss mitigation programs that may be offered by the beneficiary/loan servicer.

6. Should the borrower contact Quality to address the available loss mitigation options Quality will act as a facilitator to assist both the borrower and the beneficiary/loan servicer to hopefully reach a resolution. During this process Quality makes no decision whatsoever relative to whether or not a specific program will be made available to the borrower or on what is ultimately agreed to relative to the payment of the debt; this decision sits solely with the borrower and the beneficiary/loan servicer.

7. If during the foreclosure process the Borrower contacts Quality to ascertain what is owed Quality will obtain the required information from the beneficiary/loan servicer and forward the pay-off and/or reinstatement quotes to the borrower if requested by the beneficiary/loan servicer. Pursuant to Nevada law the

beneficiary is required to provide the borrower, as well as any other party who holds an interest in the subject real property, with these figures. ~~Quality does not contact the borrower to offer pay-off and/or reinstatement quotes.~~

8. During the foreclosure process Quality will address any and all issues raised by the borrower, no matter how small by referring the borrower to the appropriate source as Quality has no independent ability to negotiate payment or modify the foreclosure process except as authorized by statute. Quality truly appreciates the impact of the foreclosure on the borrower and therefore has implemented policy and procedures that are designed to assist the borrower whenever possible in hopes that the negative impact of the pending foreclosure can be reduced as much as possible.

9. If the Borrower elects to mediate Quality will request the financial information required pursuant to NRS 107.086 (and the Foreclosure Mediation Rules promulgated on July 21, 2010).

10. Expedited hearing in this matter is crucial as Quality has a substantial number (in the thousands) of non-judicial foreclosures currently pending in the State of Nevada and the Cease and Desist Order that has been issued negatively impacts the borrowers, the beneficiaries, and the citizens of the state of Nevada:

- a. Consumers who are awaiting the completion of foreclosure to start reestablishing their credit will be negatively impacted by the delay;
- b. Consumers who are awaiting their opportunity to mediate will be negatively impacted by the delay;
- c. Neighborhoods will continue to suffer blight and decline when foreclosures do not complete in a timely fashion; (in order for the homes to be acquired by new owners)
- d. ~~The struggling Nevada economy will suffer setbacks as more properties are~~ placed into a limbo where neither can consumers pay the mortgage on the subject


property nor can the beneficiary revitalize the property by placing it back into the chain of commerce.

e. The owners of the notes secured by the deed of trust in which Quality is the duly appointed trustee will suffer a loss for each day Quality is prevented from proceeding with its contractual and statutory rights.

11. To the best of my knowledge, Quality has never been contacted by the Department of Business and Industry for the State of Nevada for any reason prior to receiving the subject Order to Cease and Desist.

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

Dated: 10/20/2010

  
David Owen  
Chief Operations Officer for  
Quality Loan Service Corporation

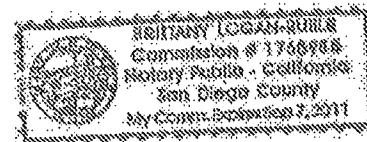
State of California  
County of San Diego

On 10/20/2010 before me, Bernard Logan-Rule,  
personally appeared David Owen, who proved to me on the basis  
of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within  
instrument and acknowledged to me that he/she/they executed the same in his/her/their  
authorized capacity(ies), and that by his/her/their signature(s) on  
the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the  
instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Bernard Logan-Rule (Seal)



RECEIPT OF COPY

I hereby certify that on the \_\_\_\_\_ day of October, 2010, I received a true and correct copy of the foregoing Request for Hearing in Response to Order to Cease and Desist Unlicensed Activities and Notice of Right to Appeal.

State of Nevada Department of Business and Industry  
Financial Institutions Division  
2785 East Desert Inn Road, Suite 160  
Las Vegas, NV 89121

# EXHIBIT 3

STATE OF NEVADA



DEPARTMENT OF BUSINESS AND INDUSTRY  
FINANCIAL INSTITUTIONS DIVISION

In Re:

Quality Loan Service Corporation,  
Respondent.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND FINAL DECISION

The above-captioned matter was presented to the undersigned, George E. Burns, Commissioner, Financial Institutions Division, State of Nevada (hereinafter "Commissioner") for hearing. The hearing convened at approximately 10:00 a.m. on December 13, 2010.

The Financial Institutions Division, State of Nevada (hereinafter "Division") was represented by Daniel D. Ebihara, Deputy Attorney General. On behalf of the Division, Mr. Ebihara submitted a prehearing statement, a Supplemental Prehearing Statement and Exhibits A – O. Exhibits A – O were all entered into evidence. Sandra Mincer, Acting Deputy Commissioner of the Division, Randolph Barton and Geoffrey Lynn Giles, Esq. appeared and testified on behalf of the Division. Quality Loan Service Corporation (hereinafter "Respondent") was represented by Paul E. Larsen, Esq. of Lionel, Sawyer & Collins and Kristen Schuler-Hintz, Esq., Thomas J. Holthus, Esq. and Kevin McCarthy, Esq. all of McCarthy & Holthus, LLP. David Owen appeared and testified on behalf of Respondent. Respondent submitted a Request for Expedited Hearing, a Prehearing Statement and Exhibits 1 – 19 (including Rule 16.1 Disclosures from Second Judicial District Court Case #CV-09-1845). Exhibit 14 was omitted because it was duplicative. Exhibits 8 - 9 and 12 - 19 were



1 entered into evidence<sup>1</sup>. Though Exhibits 1 -- 7 and 10 - 11 are court decisions and not  
2 evidence, the parties agreed that they would be marked as exhibits with the understanding  
3 that they are courtesy copies for the Hearing Officer. Finally, Donna M. Osborn, Esq., of  
4 Wright, Finlay & Zak, LLP, representing the United Trustee Association, observed the hearing.

#### 5 6 JURISDICTION

7 1. The business of collecting claims for others or of soliciting the right to collect or  
8 receive payment for another of any claim in the State of Nevada is governed by Chapter 649  
9 of the Nevada Revised Statutes (hereinafter "NRS") and Chapter 649 of the Nevada  
10 Administrative Code (hereinafter "NAC"). The Division has primary jurisdiction for the  
11 licensing and regulation of persons operating and/or engaging in collection services. NRS  
12 649.026.

13 2. Pursuant to Chapter 649 of the NRS and Chapter 233B of the NRS, this matter  
14 is properly before the Commissioner.

15 3. Pursuant to the authority vested by Chapter 649 of the NRS, the Commissioner  
16 hereby makes the following Findings of Fact, Conclusions of Law, and Decision.

#### 17 18 FINDINGS OF FACT

19 1. Respondent uses the following business address: Quality Loan Service Corp., 2141  
20 5<sup>th</sup> Avenue, San Diego, CA 92101. *Exhibit F; Exhibit G; Exhibit J.*

21 2. On or about June 18, 2010, a complaint was submitted to the Division regarding  
22 Respondent.

23 3. Respondent is not licensed by the Division as a collection agency.  
24  
25

26  
27 <sup>1</sup> Exhibit 15 was also provided in a redacted version and the redacted version will be retained by the Division as  
28 the official record. Should this matter become a District Court case, the redacted version of Exhibit 15 will be the  
Exhibit 15 in the record filed by the Division.

1 4. Respondent claims it is not required to be licensed by the Division as a collection  
2 agency.

3 5. Respondent is not acting as a "community manager." See NRS 116.023 (defining  
4 "community manager" as "a person who provides for or otherwise engages in the  
5 management of a common-interest community or the management of an association of a  
6 condominium hotel").

7 6. Respondent is the replacement trustee regarding a deed of trust or is an agent of the  
8 trustee or beneficiary. *Exhibit F*, p. 31 (stating that Respondent is "either the original trustee,  
9 the duly appointed substituted trustee, or acting as agent for the trustee or beneficiary under a  
10 Deed of Trust).

11 7. In this case, Respondent was acting on behalf of a lender.

12 8. According to *Exhibit F*, upon default, the lender, i.e. beneficiary, declares all sums  
13 secured by the deed of trust due and payable and elects to have the trust property sold to  
14 satisfy the defaulted loan.

15 9. The lender also declares that the loan is in default in the referrals that they send to  
16 Respondent. Tr. 12/13/10, p. 124, ln. 25 to p. 125, ln. 1.

17 10. The borrowers know that, unless they can remit the payoff amount, the property will  
18 be sold to satisfy the debt. *Exhibit F*.

19 11. Respondent initially solicits and obtains the opportunity to act as trustee or agent of  
20 the beneficiary or trustee with regard to the deed of trust and does so with regard to properties  
21 located in the State of Nevada and owned by Nevada residents. *Exhibit F*.

22 12. The facts also show that Respondent solicits and obtains the right to solicit and  
23 obtain payments/payoff amounts on behalf of lenders. See *Exhibits L, M & N*.

24 13. A notice issued by Respondent, dated September 1, 2009, states, "THIS IS AN  
25 ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED  
26 FOR THAT PURPOSE." *Exhibit L*.

1 14. The notice also provides a payoff amount and states, "Please submit your  
2 cashier's check, payable to Quality Loan Service Corp., *directly to this office*. Attn: Accounting  
3 / Disbursement Dept.[.] Quality Loan Service Corp.[.] 2141 5<sup>th</sup> Ave., San Diego, CA 92101."  
4 *Exhibit L.*

5 15. The Debt Validation Notice issued by Respondent states, "WE ARE ATTEMPTING  
6 TO COLLECT A DEBT, AND ANY INFORMATION WE OBTAIN WILL BE USED FOR THAT  
7 PURPOSE." *Exhibit M.*

8 16. Respondent issued Wire Instructions containing instructions for defaulting  
9 borrowers with regard to making payment to Respondent via wire funds transfer. *Exhibit N.*

10 17. When being questioned about what Respondent does with money received from  
11 borrowers who are being foreclosed upon, Mr. David Owen stated, "We send the entire  
12 amount received, if received by our office, to the lender." Tr. 12/13/10, p. 119, ln. 6-7.

13 18. Testimony also established that when a property is sold at auction, the successful  
14 bidder pays the full amount of the sale price at the time of the sale and the money goes to  
15 Respondent and from Respondent to the lender. Tr. 12/13/10, p. 129, ln. 4 – 13.

16 19. NRS 107.030(7) states, in pertinent part:

17 That the trustee, upon such sale, shall make (without warranty),  
18 execute and, ~~after due payment made,~~ deliver to purchaser or  
19 purchasers, his, her or their heirs or assigns, a deed or deeds of  
20 the premises so sold which shall convey to the purchaser all the  
21 title of the grantor in the trust premises, ~~and shall apply the~~  
22 ~~proceeds of the sale thereof in payment,~~ firstly, of the expenses of  
23 such sale . . . ~~and in payment, secondly, of the obligation or debts~~  
24 ~~secured,~~ and interest thereon then remaining unpaid, and the  
25 amount of all other moneys with interest thereon herein agreed or  
26 provided to be paid by grantor; and the balance or surplus of such  
27 proceeds of sale it shall pay to grantor, his or her heirs, executors,  
28 administrators or assigns.

25 20. The defaulted loan is an obligation for the payment of money or its equivalent that  
26 is past due. NRS 649.010; *see also Memmott v. Onewest Bank, FSB*, Slip Copy, 2011 WL

1 1560985, p. 11 (D. Or.) (concluding that the loans remained debts even after the lender  
2 elected to pursue non-judicial foreclosure).

3 21. Respondent solicits the right to solicit and obtain payments on behalf of others and  
4 solicits and obtains payments. *Exhibits F, G, L, M & N; Tr. 12/13/10, p. 119* ("We send the  
5 entire amount received, if received by our office, to the lender.").

6 22. The documentary evidence showing that payments are to be sent to Respondent  
7 and Mr. Owen's testimony that Respondent receives payments support that Respondent was  
8 soliciting and obtaining payments on behalf of others and outweighs any evidence offered to  
9 show the contrary. *Exhibits F, G, L, M & N; Tr. 12/13/10, p. 119* ("We send the entire amount  
10 received, if received by our office, to the lender.").

11 23. Whether the payment is received by Respondent before or after a foreclosure sale,  
12 Respondent is collecting, soliciting or obtaining the payment of a claim owed or due or  
13 asserted to be owed or due to another, i.e. collecting debts. See *Mammott v. Onewest Bank,*  
14 *FSB*, Slip Copy, 2011 WL 1560985, p. 11 (D. Or.) (concluding that the loans remained debts  
15 even after the lender elected to pursue non-judicial foreclosure).

16 24. Because the substantial evidence in this case establishes that Respondent is  
17 collecting claims for others, the debt collection notices referenced in paragraphs 12 and 14  
18 were of less consideration.

19 25. Any Finding of Fact hereinafter construed to constitute a Conclusion of Law is  
20 hereby adopted as such to the same extent as if originally so denominated.

## 21 22 CONCLUSIONS OF LAW

23  
24 1. Pursuant to NRS 649.020(1), "[c]ollection agency" is defined as "all persons  
25 engaging, directly or indirectly, and as a primary or a secondary object, business or pursuit, in  
26 the collection of or in soliciting or obtaining in any manner the payment of a claim owed or due  
27 or asserted to be owed or due to another."

1           2. Pursuant to NRS 649.010, "[c]laim" is defined as "any obligation for the payment of  
2 money or its equivalent that is past due."

3           3. Upon issuance of the Notice of Breach and Default and of the Election to Cause Sale  
4 of Real Property, the lender declares that there are amounts past due, declares the loan in  
5 default and declares all amounts secured by the real property due and payable. *Exhibit F.*  
6 The lenders also declare the loans to be in default in the referrals that they send to  
7 Respondent. Tr. 12/13/10, p. 124, ln. 25 to p. 125, ln. 1. Consequently, all amounts secured  
8 by the real property constitute a claim. NRS 649.010.

9           4. Pursuant to NRS 107.020, transfers in trust are made "to secure the performance of  
10 an obligation or the payment of any debt."

11           5. Pursuant to NRS 107.025, "foreclosure may be had by the exercise of a power of  
12 sale in accordance with the provisions of this chapter."

13           6. "Trustee" is defined as "[o]ne who holds legal title to property 'in trust' for the benefit  
14 of another person (beneficiary) and who must carry out specific duties with regard to the  
15 property. The trustee owes a fiduciary duty to the beneficiary." Black's Law Dictionary, 1514  
16 (6<sup>th</sup> Ed. 1990) (citation omitted).

17           7. "Deed of Trust" is defined as "[a]n instrument in use in some states, taking the place  
18 and serving the uses of a mortgage, by which the legal title to real property is placed in one or  
19 more trustees, to secure the repayment of a sum of money or the performance of other  
20 conditions. Though differing in form from a mortgage, it is essentially a security." Black's Law  
21 Dictionary, 414 (6<sup>th</sup> Ed. 1990) (citation omitted).

22           8. The term "security" is "usually applied to an obligation, pledge, mortgage, deposit,  
23 lien, etc., given by a debtor in order to assure the payment or performance of his debt, by  
24 furnishing the creditor with a resource to be used in case of failure in the principal obligation.  
25 Collateral given by a debtor to secure a loan." Black's Law Dictionary, 1355 (6<sup>th</sup> Ed. 1990).

1       9. The term "loan" includes, "the creation of debt by the lender's payment of or  
2 agreement to pay money to the debtor or to a third party for the account of the debtor . . ."  
3 Black's Law Dictionary, 936 (6<sup>th</sup> Ed. 1990).

4       10. "Payment" means "[a] discharge in money or its equivalent of an obligation or debt  
5 owing by one person to another, and is made by debtor's delivery to creditor of money or  
6 some other valuable thing, and creditor's receipt thereof, for purpose of extinguishing a debt."  
7 Black's Law Dictionary, 1129 (6<sup>th</sup> Ed. 1990) (citation omitted). In this case, the borrowers' real  
8 property is pledged as payment of the amounts owed to the lenders in the event of default. *Id.*  
9 Though the borrowers are not delivering the property to the lenders directly, because non-  
10 judicial foreclosure is required to terminate the right of redemption and facilitate the sale,  
11 pursuant to the deed of trust and NRS 107.080(1) the lender has the right to receive payment  
12 for the debt via a foreclosure sale, i.e. the borrower has agreed that the debt can be paid  
13 through such means. *Id.*; see NRS 107.080 (allowing payment to be made up to five days  
14 before the sale); see NRS 107.030(7) (indicating that the trustee will apply the proceeds in  
15 payment of secured debts). When Respondent obtains payments, in any manner, from  
16 borrowers for debts owed to others it is acting as a collection agency. NRS 649.020(1).

17       11. "Solicit" means, "to try to obtain." Black's Law Dictionary, 1392 (6<sup>th</sup> Ed. 1990).

18       12. "Obtain" means, "to acquire, in any way." Black's Law Dictionary, 1078 (6<sup>th</sup> Ed.  
19 1990).

20       13. Pursuant to the plain language of NRS 649.020(1), Respondent, through its  
21 business practices, constitutes a collection agency because it engages "in the collection of or  
22 in soliciting or obtaining in any manner the payment of a claim owed or due or asserted to be  
23 owed or due to another" by soliciting the right to obtain or receive payments owed to lenders  
24 and attempting to obtain such payments from borrowers and obtaining payments which are  
25 later forwarded to the lenders. *Exhibits F, G, L, M & N; see White v. Warden, Nevada State*  
26 *Prison*, 96 Nev. 634, 636, 614 P.2d 536 (1980) ("Of course, we recognize that the intent of the  
27 legislature is the controlling factor and that, if the statutes under consideration are clear on  
28

1 their face, we cannot go beyond them in determining legislative intent."); see *Brown v. Davis*,  
2 1 Nev. 409, 1 (1865) ("The rule is cardinal and universal that if the law is plain and  
3 unambiguous, there is no room for construction or interpretation"); see 1964 Nev. Op. Att'y.  
4 Gen. No. 189, p. 1 (concluding, "[i]t is the opinion of this office that a company which indirectly  
5 solicits the payment of debts by requesting the debtor to forward payment to the creditor, and  
6 uses cards which threaten loss of credit, at the same time collecting a fee from the creditor, is  
7 a collection agency within the definition of Nevada Statutes and should therefore be bonded  
8 and pay a license fee."); see 1999 Nev. Op. Att'y. Gen. No. 38, p. 2-4 (comparing the  
9 procedures of lien foreclosures to those of non-judicial foreclosures of deeds of trust and  
10 stating, "[s]ince the purpose of the lien foreclosures is to enforce a creditor's rights with  
11 respect to a financial obligation that is 'past due,' we believe one exclusively engaged in the  
12 processing of such foreclosures is attempting to collect a debt as its 'primary or a secondary  
13 object, business or pursuit.' NRS 649.020(1). The opinion concludes, "[s]ince such a  
14 company is not exempted from the definition of a collection agency, it must obtain a collection  
15 agency license prior to engaging in that activity.").

16 14. NRS 649.075(1) reads as follows:

17 1. Except as otherwise provided in this section, a person shall not  
18 conduct within this State a collection agency or engage within this  
19 State in the business of collecting claims for others, or of soliciting  
20 the right to collect or receive payment for another of any claim, or  
21 advertise, or solicit, either in print, by letter, in person or otherwise,  
22 the right to collect or receive payment for another of any claim, or  
23 seek to make collection or obtain payment of any claim on behalf  
24 of another without having first applied for and obtained a license  
25 from the Commissioner.

26 2. A person is not required to obtain a license if the person holds a  
27 certificate of registration as a foreign collection agency issued by  
28 the Commissioner pursuant to NRS 649.171.

15. Respondent violated NRS 649.075 because through its business activities  
Respondent solicited the right to collect or receive payment of claims for others and sought to  
obtain payment of claims on behalf of others and obtained payments without having first

1 applied for and obtained a license, or a certificate of registration as a foreign collection  
2 agency, from the Commissioner. NRS 649.075.

3 16. Respondent is conducting a "collection agency," as that term is defined in NRS  
4 649.020(1), within the State of Nevada and it is not licensed as a collection agency in the  
5 State of Nevada.

6 17. NRS 649.390 states:

7 1. The Commissioner shall conduct an investigation if he or she  
8 receives a verified complaint from any person that sets forth  
9 reason to believe that an unlicensed person is engaging in an  
10 activity for which a license is required pursuant to this chapter.

11 2. If the Commissioner determines that an unlicensed person is  
12 engaging in an activity for which a license is required pursuant to  
13 this chapter, the Commissioner shall issue and serve on the  
14 person an order to cease and desist from engaging in the activity  
15 until such time as the person obtains a license from the  
16 Commissioner.

17 3. If a person upon whom an order to cease and desist is served  
18 does not comply with the order within 30 days after service, the  
19 Commissioner shall, after notice and opportunity for a hearing:

20 (a) Impose upon the person an administrative fine of \$10,000;  
21 or

22 (b) Enter into a written consent agreement with the person  
23 pursuant to which the person agrees to cease and desist from all  
24 unlicensed activity in this State relating to the collection of debts,  
25 and impose upon the person an administrative fine of not less than  
26 \$5,000 and not more than \$10,000.

27 The imposition of an administrative fine pursuant to this subsection  
28 is a final decision for the purposes of judicial review.

5. A person's liability for an administrative fine is in addition to any  
other penalty provided in this chapter.

22 By stipulation dated January 14, 2011, the parties agreed to stay the Cease and Desist Order  
23 until 30 days after the issuance of this decision. Therefore, a fine cannot be imposed pursuant  
24 to NRS 649.390.

25 18. Pursuant to NRS 649.440, the Commissioner can impose administrative fines of not  
26 more than \$10,000.00 for any violation of this chapter.



1 In addition to any other remedy or penalty, the Commissioner may  
2 impose an administrative fine of not more than \$10,000 upon a  
3 person who:

4 1. Without a license or certificate, conducts any business or  
5 activity for which a license or certificate is required pursuant to the  
6 provisions of this chapter; or

7 2. Violates any provision of this chapter or any regulation  
8 adopted pursuant thereto.

9 19. A finding that Respondent willfully violated the provisions of Chapter 649 of the  
10 NRS is not necessary.

11 20. Respondent's argument that the Division should treat it similar to another business  
12 if there is another business conducting similar activities and the Division did not require that  
13 other business to obtain a license is without merit. In Nevada, administrative decisions are  
14 not *stare decisis* and do not constitute binding precedent. See Gray Line Tours of Southern  
15 Nevada v. Public Service Commission of Nevada, 97 Nev. 200, 203 (1981) (providing,  
16 "administrative agencies are not bound by the doctrine of *stare decisis*"). Consequently, the  
17 Division applies the law to the facts of each circumstance on a case-by-case basis.

18 21. Respondent also argues that the Deed of Trust documents constitute a three party  
19 agreement and that Respondent simply agrees to perform activities that are required by Ch.  
20 107 of the NRS. To the extent, Respondent is attempting to argue that the statutes contained  
21 in Ch. 107 of the NRS are the specific statutes at issue and that they should control with  
22 regard to whether Respondent needs a collection license, Ch. 107 does not address whether  
23 a collection agency license is needed. In addition, NRS 107.050 states, "[n]othing in NRS  
24 107.030 and 107.040 shall prevent the parties to any transfer in trust from entering into other,  
25 different or additional covenants or agreements than those set out in NRS 107.030." In this  
26 case, the parties apparently entered into additional agreements regarding the attempting to  
27 obtain and obtaining of payments by Respondent. Moreover, with regard to what business  
28 activities require a collection agency license, NRS 649.020 is the specific statute and it does  
not contain an exemption for Respondents.

1       22. Respondent also argues that NRS 80.015 exhibits the Nevada Legislature's  
2 recognition that foreclosing pursuant to a deed of trust is a different activity than debt  
3 collection. Respondent points out that the statute excludes the enforcement of mortgages and  
4 security interests from the definition of doing business in Nevada. Notably, NRS 80.015(4)(b)  
5 states that such an exclusion "does not affect the applicability of any other provision of law  
6 with respect to the person and may not be offered as a defense or introduced in evidence in  
7 any civil action, criminal action, administrative proceeding or regulatory proceeding to prove  
8 that the person is not doing business in this State." Consequently, NRS 80.015 does not  
9 prohibit the enforcement of NRS 649.020 nor does it exempt Respondent from the  
10 requirement to be licensed as a collection agency.

11       23. Respondent cited to and provided several cases which state that non-judicial  
12 foreclosure does not constitute debt collection pursuant to the Fair Debt Collection Practices  
13 Act (hereinafter "FDCPA"). The FDCPA defines "debt collector" as, "any person who uses any  
14 instrumentality of interstate commerce or the mails in any business the principal purpose of  
15 which is the collection of any debts, or who regularly collects or attempts to collect, directly or  
16 indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692(a)(6).  
17 Whereas, NRS 649.020(1) states, "all persons engaging, directly or indirectly, and as a  
18 primary or a secondary object, business or pursuit, in the collection of or in soliciting or  
19 obtaining in any manner the payment of a claim owed or due or asserted to be owed or due to  
20 another." The statutes are considerably different. The FDCPA looks for the collection of  
21 debts to be the primary purpose of a business with the collection of debts, or attempted  
22 collection, being conducted regularly. NRS 649.020(1) is not limited to the collection of debts  
23 being a primary purpose and also includes the soliciting of payments and obtaining in any  
24 manner the payment of a claim. Thus, as set forth above, the plain language of NRS  
25 649.020(1) imposes upon Respondent the requirement to become licensed as a collection  
26 agency.

1       24. The FDCPA states, "[t]his title does not annul, alter, or affect, or exempt any person  
2 subject to the provisions of this title from complying with the laws of any State . . . ." 15 U.S.C.  
3 1692n. Contrary to Respondent's assertions, the FDCPA does not prohibit Nevada from  
4 requiring Respondent to be licensed as a collection agency. *Id.*

5       25. The Legislature is presumed to have knowledge of existing statutes. *International*  
6 *Game Technology, Inc. v. The Second Judicial District Court of the State of Nevada*, 122 Nev.  
7 132, 154 (2006). Thus, it is presumed that the legislature had knowledge of NRS 649.020 and  
8 that the statute excludes certain business activities from the requirement of obtaining a license  
9 as a collection agency. *Id.*; see NRS 649.020. In fact, NRS 649.020(2) enumerates seven (7)  
10 exceptions to the licensing requirement. The Legislature did not amend NRS 649.020 to  
11 include an exemption for the activities conducted by Respondent in connection with its non-  
12 judicial foreclosure services. Consequently, even if it could be argued that NRS 649.020 is  
13 ambiguous, construing the statute according to principles of statutory construction we come to  
14 the same conclusion that the business activities of Respondent are not exempt from the  
15 licensing requirement. *State ex. rel. Nev. Tax Comm'n v. Boerlin*, 38 Nev. 39, 45, 144 P.738  
16 (1914) ("In the construction of a statute in which certain things are enumerated, other things  
17 are to be excluded."); *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9<sup>th</sup> Cir. 2005)  
18 ("The doctrine of *expressio unius est exclusio alterius* 'as applied to statutory interpretation  
19 creates a presumption that when a statute designates certain persons, things, or manners of  
20 operation, all omissions should be understood as exclusions").

21       26. Moreover, according to legislative history, conducting foreclosures constitutes debt  
22 collection. See *Minutes of the Subcommittee of the Senate Committee on Commerce and*  
23 *Labor*, 73<sup>rd</sup> Session, April 12, 2005, p. 3 (stating, "if you have a full-service management  
24 company, and some of the large ones are full-service, and you are offering to file liens, record  
25 notices of default and go through the foreclosure process, . . . you have to meet the same  
26 licensing and the same qualifications as the actual foreclosure services that are out there");  
27 see *Minutes of the Subcommittee of the Senate Committee on Commerce and Labor*, 73<sup>rd</sup>

1 Session, April 12, 2005, p. 4 (discussing the proposed 649.020(3), "if you are a management  
2 company or . . . community manager who is going to be collecting . . . , then you are going to  
3 be governed under NRS 649, which governs other foreclosure services . . .").

4 27. Any Conclusion of Law hereinafter construed to constitute a Finding of Fact is  
5 hereby adopted as such to the same extent as if originally so denominated.

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DATED this 14<sup>th</sup> day of February, 2012.

By: George E. Burns  
 GEORGE E. BURNS  
 COMMISSIONER  
 (HEARING OFFICER)

# EXHIBIT 4

## CIVIL COVER SHEET

Clark County, Nevada A-12-657580-J

Case No.

(Assigned by Clerk's Office) XVI

## I. Party Information

Plaintiff(s) (name/address/phone): QUALITY LOAN SERVICE CORPORATION

Defendant(s) (name/address/phone): STATE OF NEVADA, DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION

Attorney (name/address/phone):

Attorney (name/address/phone):

Paul E. Larsen, Lionel Sawyer & Collins, 300 South 4<sup>th</sup> Street, Suite 1700, Las Vegas, Nevada 89101/702-383-8888

## II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ Arbitration Requested

## Civil Cases

Real Property	Negligence	Torts
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> Negligence - Auto <input type="checkbox"/> Negligence - Medical/Dental <input type="checkbox"/> Negligence - Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence - Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
Estimated Estate Value: _____ <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Agmt/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input checked="" type="checkbox"/> Civil Petition for Judicial Review <input type="checkbox"/> Foreclosure Mediation <input type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal <input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment - Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters	

## III. Business Court Requested (Please check applicable category for Clark or Washoe Counties only.)

☐ NRS Chapters 78-88  
☐ Commodities (NRS 90)  
☐ Securities (NRS 90)

☐ Investments (NRS 104 Art. 8)  
☐ Deceptive Trade Practices (NRS 598)  
☐ Trademarks (NRS 600A)

☐ Enhanced Case Mgmt/Business  
☐ Other Business Court Matters

March 5, 2012

Date

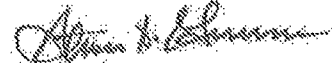
/s/ Paul E. Larsen

Signature of initiating party or representative

1 PET  
2 PAUL E. LARSEN  
3 Nevada Bar No. 3756  
4 LIONEL SAWYER & COLLINS  
5 1700 Bank of America Plaza  
6 300 South Fourth Street  
7 Las Vegas, Nevada 89101  
8 (702) 383-8819 (Telephone)  
9 (702) 383-8845 (Fax)

10 Attorneys for:  
11 Quality Loan Service Corporation

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CLERK OF THE COURT

12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

14 QUALITY LOAN SERVICE  
15 CORPORATION,  
16 Plaintiff

17 v.

18 STATE OF NEVADA, DEPARTMENT OF  
19 BUSINESS AND INDUSTRY, FINANCIAL  
20 INSTITUTIONS DIVISION

21 Defendants

Case No.: A-12-657580-J

Department No.: XVI

PETITION FOR JUDICIAL REVIEW  
PER NRS 233B.130

22 Quality Loan Services Corporation, by and through the undersigned Counsel, hereby  
23 Petitions for Judicial Review pursuant to NRS 233B.130 of a final administrative decision issued  
24 by the Commissioner of the Financial Institutions Division of the State of Nevada Department of  
25 Business and Industry, and alleges in support of this Petition the following facts:

- 26 1. Quality Loan Services Corporation ("QLS") is a California Corporation qualified  
27 to an doing business in Nevada, including but not limited to Clark County, as an  
28 agent for trustees pursuing non-judicial foreclosure of real property subject to  
Decds of Trust.



- 1 2. At all relevant times QLS has been licensed to do business as an agent for  
2 trustees of real property subject to Deeds of Trust, and pursued only those activities  
3 for which it was licensed; specifically QLS drafted notices of foreclosure ("NOF"),  
4 and served and recorded such NOF's pursuant to strict statutory guidelines.  
5  
6 3. The Financial Institutions Divisions is a division of the Department of Business and  
7 Industry, an administrative agency of the State of Nevada, and is subject to the  
8 provision of the Nevada Administrative Procedure Act, NRS Chapter 233B.  
9  
10 4. The Financial Institutions Division ("Division") is in charge, inter alia, of  
11 regulating debt collection agencies in the State of Nevada, including licensing  
12 and enforcement of relevant regulatory statutes and regulations, including NRS  
13 Chapter 649 and Nevada Administration Code Chapter 649.  
14  
15 5. On or about June 16, 2010, the Division received a complaint alleging that QLS  
16 was acting as a collection agency. At that time, QLS was not licensed as a  
17 collection agency. The Division accepted the complaint as fact, and issued a  
18 Cease and Desist Order to QLS.  
19  
20 6. QLS was thereafter notified of the complaint, in the form of the Division's  
21 Cease and Desist Order, and requested a hearing before the Division to challenge/  
22 review the Cease and Desist Order and present evidence to the Division's hearing  
23 Officer that it was not acting as a collection agency, but rather that it was acting  
24 wholly within its existing licensure.  
25  
26  
27  
28

1 7. A hearing was held on December 13, 2010, before Division Commissioner George

2 E. Burns, acting as hearing officer. At the hearing, QLS presented evidence, inter

3 alia:

4  
5 (a) that QLS was not acting as a "community manager" or "collection agency" as  
6 defined by NRS Chapter 649 and NAC Chapter 649;

7  
8 (b) that QLS was the agent of the trustee or beneficiary of Deeds of Trust  
9 for real property securing promissory notes or, alternatively, that QLS was  
10 the replacement trustee or agent of the replacement trustee of Deeds of Trust for  
11 real property securing promissory notes;

12  
13 (c) that non-judicial foreclosure of real property held in trust (via Deeds of Trust)  
14 as security for promissory notes is governed by strict statutory guidelines as well  
15 as rules promulgated and administered by the Nevada Supreme Court;

16  
17 (d) that the Nevada Supreme Court has held as a matter of law that non-judicial  
18 foreclosure of real property held in trust by a Deed of Trust is not "collection of a  
19 debt" and has cited with approval authority stating that proposition: e.g. Hulse v.

20  
21 Owen Federal Bank, FSB, 195 F.Supp.2d 1188(D.Or.2002) ("Foreclosing on a  
22 trust deed is distinct from the collection of the obligation to pay money. The

23 [Fair Debt Collection Practices Act] is intended to curtail objectionable acts

24 occurring in the process of collecting funds from a debtor"); See also Diessner v.

25  
26 Mortgage Electronic Registration, 618 F. Supp. 2d 1184, 1188-89 (D. Ariz. 2009)

1 (concluding that Mortgage Foreclosure proceedings do not fall within the [Fair

2 Debt Collection Practices Act's] scope);

3 (e) that all NOFs prepared, served and recorded by QLS

4 strictly complied with applicable statutory and regulatory requirements;

5 (f) that any additional language on the NOFs were for the benefit of the trustor,

6 the trustee, and/or the beneficiary note holder, and that QLS in no way collected

7 or sought to collect any amounts owed on any note, but rather that QLS functioned

8 as a conduit of information for trustors, trustees and beneficiaries;

9 (g) that the NOFs do contain payoff amounts for notes (as required by applicable

10 law) and that if the payout sum is mistakenly paid directly to QLS rather than the

11 trustee or beneficiary note holder on a Deed of Trust, that QLS would "send the

12 entire amount received" to the trustee or beneficiary note holder.

13 8. The Division officer in charge of collection agency regulation also testified at

14 the December 13, 2010 hearing, and stated in relevant part that:

15 (a) she had no knowledge or understanding as to what a Deed of Trust was,

16 how it was used to hold title to real property securing promissory notes, and how

17 non-judicial foreclosure of real property subject to a Deed of Trust was regulated in

18 the State of Nevada;

19 (b) that the Division had no regulations governing non-judicial foreclosures per

20 Deeds of Trust, and that to her knowledge the Division had never attempted to

21 regulate such foreclosures;

1 (c) that the Division's decision to issue a Cease and Desist Order was entirely  
2 based upon the extra wording in the NOF and the allegations in the complaint,  
3 and that she had conducted no further legal analysis of QLS' actions in preparing,  
4 analysis of QLS actions in preparing, serving or recording the NOFs;  
5

6 (d) that she was unaware of any legal authority, such as that provided by QLS,  
7 finding that foreclosure pursuant to a Deed of Trust was not the collecting of a debt  
8 pursuant to the Fair Debt Collection Practices Act.  
9

10 9. Despite the absence of supporting evidence or legal authority, the Division issued  
11 its "Finding of Fact, Conclusions of Law and Final Decision" hereafter Final  
12 Decision) on February 14, 2012, affirming the Division's Cease and Desist Order  
13 and finding that QLS' preparing, serving and recording NOFs was the collection of  
14 a debt requiring QLS to be licensed as a collection agency.  
15

16 10. This Petition is timely filed pursuant to NRS 233B.130(2)(c) in that it has been  
17 filed within 30 days of after service of the final decision by the Division.  
18

19 11. The final decision of the Division should be set aside, pursuant to NRS 233.B135(3)  
20 as it has prejudiced the rights of QLS in that the final decision is:  
21

22 (a) in violation of constitutional or statutory provisions;  
23

24 (b) in excess of the statutory authority of the Division;  
25

26 (c) made upon unlawful procedure;  
27

28 (d) affected by other error of law;

1 (e) clearly erroneous in view of the reliable, probative and substantial

2 evidence of the whole record; or

3 (f) arbitrary or capricious or characterized by abuse of discretion.

4  
5 12. QLS, as a party aggrieved by the Division's final decision, has standing to seek  
6 judicial review in the Eighth Judicial District Court of Clark County pursuant to  
7 NRS 233B.130(1) and (2), as well as NRS 233B.130(2)(b) (judicial review may be  
8 sought "in and for the county where the agency proceedings occurred").  
9

10  
11  
12 NOW THEREFORE, based upon the foregoing, QLS respectfully prays for  
13 relief pursuant to NRS 233B.135(3), and requests that this Honorable Court set  
14 aside the Division's Decision in its entirety.  
15

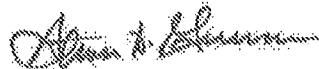
16 Respectfully Submitted,

17  
18 LIONEL SAWYER & COLLINS

19  
20  
21 By: 

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# EXHIBIT 5



CLERK OF THE COURT

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11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

13 QUALITY LOAN SERVICE CORPORATION,

14 Petitioner,

15 v.

16 STATE OF NEVADA, DEPARTMENT OF  
17 BUSINESS AND INDUSTRY, FINANCIAL  
18 INSTITUTIONS DIVISION,

19 Respondent.

Case No.: A-12-657580-J  
Dept. No.: XVI

PETITIONER'S OPENING BRIEF

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19 Respondent.

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Dept. No.: XVI

PETITIONER'S OPENING BRIEF

20 I. INTRODUCTION

21 This case involved a novel interpretation of Nevada law by the Financial Institutions  
22 Division (FID) of the Nevada Department of Business and Industry. This case does not involve  
23 a novel question of law, as every Nevada state or federal Court to address the case issue herein  
24 has ruled consistently and the FID decision departs from these court precedents.

25 This legal issue at the heart of this case is whether the processing of a real estate  
26 foreclosure by a Trustee under NRS Chapter 107 constitutes the "collection" of a debt, which is  
27 ostensibly regulated by the FID under authority granted by NRS Chapter 649.

28 While the courts have consistently ruled that the processing of a foreclosure under the  
state's foreclosure laws is not the "collection" of a debt (or even constitutes "doing business" in  
the state), the FID has taken the position in this case, for the very first time in its multi-decade  
history, that the processing of a real estate foreclosure is the collection of a debt, requiring the

1 foreclosure trustee to be licensed by the FID as a collection agency.

2 This novel FID position is complicated by the fact that the legislature has not specifically  
3 delegated enforcement powers over the NRS Chapter 107 foreclosure process to the FID, that the  
4 FID has never promulgated regulations governing foreclosure or Deeds of Trust, and by the  
5 testimony in this very case in which the FID enforcement officials reveal complete and total  
6 ignorance over what a Deed of Trust is, how it is used to secure a promissory note for the  
7 purchase of real estate, or even any application of NRS Chapter 107 to the foreclosure process.

8 By this Petition of Judicial Review, the Petitioner is respectfully requesting that this  
9 honorable court overturn the FID decision under review, and rule that under applicable Nevada  
10 law the processing of a real estate foreclosure by a Trustee under NRS Chapter 107 does not  
11 constitute "collection of a debt" requiring licensure and regulation by the FID.

12 **II. SUMMARY OF THE PROCEEDINGS**

13 The facts leading up to the proceeding before the FID requires some lengthy explanation,  
14 so the Petitioner respectfully requests the court's indulgence in the Petitioner's summing up the  
15 factual background of this case.

16 In October of 2005, Randolph Barton and Lori Ahmadi (collectively "Barton" for ease of  
17 reference) purchased real estate in the State of Nevada by executing a promissory note secured  
18 by a Deed of Trust. This Deed of Trust had a specific provision specifying the course of action a  
19 trustee would take in the event Barton defaulted on the promissory note.<sup>1</sup> The Deed of Trust  
20 specified, inter alia, that Barton agreed to the following process in the event of an acceleration of  
21 a payment default: (1) written execution of the Notice of Default and Election to Sell; (2)  
22 recordation of the Notice and Election; (3) mailing of the Notice and Election per applicable law;  
23 (4) public notice of the sale as prescribed by applicable law; (5) sale of the real property subject  
24 to the Deed of Trust at public auction, without demand to Barton. The Deed of Trust also  
25 specified the specific order and distribution of any funds received upon the conclusion of the  
26 foreclosure sale. Of course, Barton signed the Deed of Trust. AR at 000293-00314.

27  
28 <sup>1</sup> See Administrative Record ("AR"), filed herein on April 5, 2012, at pages 000293-314.

1           Thereafter, Barton defaulted on the promissory note. Accordingly, the authorized parties  
2 and the trustee under the Deed of Trust (Petitioner herein) commenced and conducted a non-  
3 judicial foreclosure as contemplated by the Deed of Trust and the applicable foreclosure statutes,  
4 NRS Chapter 107. AR at 000501-000544.

5           After the Petitioner completed the foreclosure sale according to the process dictated by  
6 the Deed of Trust's terms and NRS Chapter 107, Barton commenced litigation to challenge the  
7 foreclosure. Among other claims, Barton claimed that the trustee under a Deed of Trust was a  
8 collection agency under NRS Chapter 649, requiring a license by the FID. This litigation  
9 resulted in the Nevada Second Judicial District Court's Order stating that it would not make a  
10 determination as to whether a trustee foreclosing a Deed of Trust was a "collection agency"  
11 requiring a license by the FID. See AR at 000252-000264. The court stated instead that such a  
12 determination was for the FID. AR at 000144-000151.

13           Accordingly, Barton filed a complaint with the FID, asserting that the Petitioner was  
14 "collecting debts" by conducting non-judicial foreclosures under NRS Chapter 107 procedures,  
15 and asked the FID to act. The FID promptly issued a Cease and Desist Order (without any  
16 investigation<sup>2</sup> or inquiry of or to the Petitioner) directing Petitioner to cease all foreclosure  
17 processing until and unless it obtained a collection agency license from the FID. AR at 000001-  
18 000008.

19           Petitioner timely requested a hearing on the FID order, the hearing was held and the FID  
20 then issued the Decision under review herein<sup>3</sup>. AR at 000012-000021. Petitioner has now  
21 timely appealed this decision pursuant to NRS 233B.130.

22           In all relevant parts, the Decision properly disregards collateral factual issues<sup>4</sup> and  
23 focuses on the core legal issue: whether a trustee conducting a non-judicial foreclosure under  
24 NRS Chapter 107 is the performing "collection of a debt" requiring a license from (and  
25

26           <sup>2</sup> Indeed the FID acted solely on the allegations of the complaint, without additional  
27 factual investigation or even legal research as to whether the FID had expertise in this  
jurisdiction over non-judicial foreclosures. See AR at 000545-000578.

28           <sup>3</sup> The Decision is found in the Administrative Record at pages 000634-000654.

<sup>4</sup> See e.g. Finding of Fact No. 24; AR at 000643.

1 regulation by) the FID. In relevant part, the order simply states:

2 [T]he plain language of NRS 649.020(1) imposes upon [Petitioner  
3 Quality Loan Services Corporation] the requirement to become  
4 licensed as a collection agency.

5 Findings of Fact, Conclusions of Law and Final Decision, AR at 00649, paragraph 23, lines 24-  
6 26.

7 The court may wonder why a Trustee would appeal this decision, rather than simply  
8 obtain a license? The answer in the original litigation instituted by Barton in the Second Judicial  
9 District. Barton claims therein that a trustee's conducting of a foreclosure without a debt  
10 collector's license is a deceptive trade practice. In essence, by ignoring decades of its own  
11 interpretation of the law and consistent interpretations by courts that a foreclosure trustee is not a  
12 debt collector, the FID's erroneous decision herein has essentially exposed every trustee who has  
13 conducted a foreclosure sale under NRS 107 to potential civil liability.<sup>5</sup> Ironically, the FID has  
14 made this determination with no history of involvement in regulation of foreclosures, no  
15 familiarity with the foreclosure processes under NRS Chapter 107, and no investigation beyond  
16 accepting Barton's allegations (and dubious interpretation of applicable law) as fact.<sup>6</sup> Please note  
17 that Petitioner Quality Loan Services has in fact obtained a collection agency license from the  
18 FID, but does not concede that one is required to process non-judicial foreclosures as a trustee  
19 under a Deed of Trust pursuant to NRS Chapter 107.

20 As discussed below, it is the Petitioner's position that the FID decision is a flawed  
21 interpretation of the law<sup>7</sup>, which is entirely at odds with its own precedent and court decisions.  
22 In addition, Petitioner asserts that the Decision is essentially articulating a new standard of  
23

24  
25  
26 <sup>5</sup> See e.g., NRS 598.0923, under which it is considered a deceptive trade practice to  
27 conduct business without all required state, county or municipal licenses. However, Nevada  
28 Courts have previously rejected the arguments that Trustees must be licensed. See AR at 154.

<sup>6</sup> See discussion at Section V, *infra*.

<sup>7</sup> Pursuant to NRS 233B.135(3)(d), this Court may review the legal issues herein de novo.

1 general applicability<sup>8</sup>, in which every similarity situated Trustee is required to obtain a collection  
2 agency license. In essence, the decision contains one or more a novel "regulations". Because all  
3 new regulations must be adopted pursuant to specific statutory procedures, Petitioner asserts that  
4 the decision herein is an invalid ad hoc regulation that must be set aside by this court.

5  
6 **III. THE LAW PRIOR TO THE FID DECISION HELD THAT A FORECLOSURE**  
7 **TRUSTEE WAS NEITHER DOING BUSINESS IN THE STATE NOR**  
8 **COLLECTING A DEBT**

9 The Nevada Legislature has specifically recognized that a Trustee's pursuit of security  
10 under a Deed of Trust is not doing business in the state. Specifically, NRS 80.015 specifically  
11 excludes enforcing mortgages and pursuing security interests from the definition of "doing  
12 business" in Nevada. The courts have concurred. See e.g. Briar v. Homefield Financial Inc.,  
2011 WL 4479736 (D. Nev. 2011).

13 The legislature further distinguished the enforcement of a security interest from  
14 collection of a debt by enacting NRS 40.430 et. seq., which requires the exhaustion of a security  
15 interest prior to the institution of an action to collect on a debt. The legislature has further  
16 distinguished "debt collection" from the pursuing a security interest by recent statutory changes  
17 precluding deficiency judgments against borrowers after a foreclosure sale.

18 Furthermore, the legislature has specifically articulated the process for pursuing and  
19 exhausting a security interest in real estate--i.e., non-judicial foreclosure--by specifically  
20 dictating the process in NRS Chapter 107. That statute specifically empowers the judiciary--not  
21 the FID--with supervisory and enforcement powers. Nowhere in Chapter 107 is the FID given  
22 enforcement or supervisory authority over the foreclosure process. Nowhere in NRS Chapter  
23 107 is the FID given authority to adopt regulations concerning foreclosure. Accordingly, in its  
24 almost 20 year history, the FID has not regulated foreclosure, and has not required trustees to be

25  
26 See e.g. State Dept. of Taxation v. McKesson Corp., 111 Nev. 810, 896 P.2d 1145 (1995).

27 <sup>8</sup> Under NRS 233B.038 any standard "of general applicability" is a "regulation" requiring  
28 adoption pursuant to the procedures set forth in the Administrative Procedures Act. Regulations  
of major concern and impact must be adopted properly; ad hoc regulations are voidable by the  
Court. See Congy v. Whittlesea-Bell Luxury Limousine, 102 Nev. 302, 721 P.2d 375 (1986).

1 licensed as a collection agency.<sup>9</sup>

2 Accordingly, Nevada State and Federal Courts have uniformly held that a trustee's  
3 foreclosure of a security interest is not doing business in Nevada or collecting a debt in Nevada.  
4 See e.g., Bontcamp v. Vasquez, 107 Nev. 377 (2004); McMillan v. United Mtg. Co., 82 Nev. 117  
5 (1966). See also Bruce v. Homefield Financial, Inc., 2011 WL 4479736 (D. Nev. 2011) (citing  
6 NRS 80.015, the Court stated "[defendant's] actions, which were directed at enforcing mortgages  
7 and protecting security interests in real property fall within the exemption of the Nevada  
8 statute"). See also AR at 000154 and 000235-236.

9 As recently as May 4 of this calendar year, the federal courts have specifically held that  
10 "defendant...did not need to be licensed to conduct business in the State of Nevada because  
11 foreclosing on real property is not an attempt to collect a debt requiring a separate license."  
12 Elwing v. United Home Mortgage Capital Corp., 2012 WL 1602783 (D. Nev. May 4, 2012)  
13 (citing Hulse v. Owen Fed. Bank, 195 F.Supp.2d 1188 (D.Or. 2002)); See also Charry v. Perry,  
14 2010 U.S. Dist. Lexis 65798 (D. Nev. 2010) (holding that recording a Notice of Default is not an  
15 attempt to collect a debt because the borrower had already consented to allow the foreclosure  
16 Trustee to record the Notice of Default).<sup>10</sup> Similarly, courts have held that a trustee's initiating a  
17 foreclosure without adhering to the procedures for collection of a debt do not violate the Fair  
18 Debt Collection Practices Act (FDCPA). See Ewing, *supra*; see also Hulse, *supra*. This is  
19 significant, for while the FID does not have specific authority to enforce NRS Chapter 107, it  
20 does have authority to enforce the FDCPA. See NRS 640.370. In other words, because  
21 foreclosure under Chapter 107 does not violate the FDCPA, the FID has no jurisdiction over  
22 foreclosures.

23 IV. THE FID DECISION CONSTITUTES A NEW INTERPRETATION OF THE  
24 LAW IN THE STATE OF NEVADA AND ENACTS A NEW "STANDARD OF

25 <sup>9</sup> See testimony of FID Deputy Commissioner Sandi Mineer, AR at 000576-577, where  
26 the Deputy Commissioner admits she is unfamiliar with NRS Chapter 107, unfamiliar with  
27 Deeds of Trust and Security Interests, and unfamiliar with judicial decisions holding that  
foreclosure of a security interest is not "debt collection".

28 <sup>10</sup> A variety of these precedents are contained in the Administrative Record at AR at  
pages 000058 through 000143.



1        GENERAL APPLICABILITY" WITHOUT THE PROPER RULEMAKING  
2        PROCEDURES

3        The FID decision essentially concedes the precedents discussed above,<sup>11</sup> but argues that  
4        NRS 649.020(1) defines a debt collector or collection agency more broadly than the FDCPA.  
5        The FID decision specifically states that:

6                NRS 649.020(1) is not limited to the collection of debts being a  
7                primary purpose and also includes the solicitation of payment and  
8                obtaining in any manner the payment of a claim. Thus, as set forth  
9                above, the plain language of NRS 649.020(1) imposes upon  
10              respondent the requirement to become licensed as a collection  
11              agency.

12        Conclusion of Law No. 23, AR at page 00649 (emphasis in original). As stated above, this  
13        interpretation of NRS 649.020(1) is novel one for the FID and contradicts Nevada court  
14        decisions.

15        In order to construe NRS 649.020(1) in this novel manner, the FID needed to construct  
16        novel definitions of terms found in NRS 649.020(1). The decision looked beyond the statute to  
17        define the following highlighted portions of NRS 640.020(1):

18              1. "Collection Agency" means all persons engaging, directly or  
19              indirectly, and as a primary purpose or a secondary object,  
20              business or pursuit, in the collection of or in soliciting or obtaining  
21              payment of a claim or due or asserted to be owed or due to another.

22        See Decision at Conclusions of Law No. 5, 11 and 12 (ROA at 00645). In so defining the terms,  
23        the FID has ignored the specific requirements of NRS Chapter 107.

24        For example, the required notices under NRS 107.080 includes a requirement that a  
25        Notice of Default and Election to Sell include a description of the "deficiency in performance or  
26        payment" and a notice that the borrower may avoid foreclosure sale by making good the  
27        deficiency in performance or payment. See NRS 107.080(2)(3). See also NRS 107.085.  
28        Trustees are required to give guarantors or sureties a similar notice. See also NRS 107.095.  
Only the District Courts have power to review these notices for compliance with the statutory  
requirements. See also NRS 107.080(5) (court may declare default sale void); NRS 107.080(6)

1 ("person who did not receive proper notice" may commence an action pursuant to" NRS  
2 107.080(5)); NRS 107.080(9) (a Trustee who fails to record Trustee's deed can be liable in a civil  
3 action to purchaser). In essence, Chapter 107 requires notice, dictates what the Trustee is  
4 required to state in the notice, and dictates the judicial remedy in event of violation.<sup>12</sup>

5 The FID's decision, however, turns this statute upside down, by finding that a Trustee  
6 making the notices required by NRS 107 is "soliciting" or "obtaining" payment of a debt. See  
7 Decision at Conclusions 21 through 23. The FID decision thus construes the statutory notices  
8 under NRS 107 to be "soliciting" and "obtaining" payment of a debt, despite the lack of  
9 definitions of the terms in NRS Chapter 649, and despite the lack of any definitions of those  
10 terms in the Administrative Code Provisions adopted by the FID. See NAC Chapter 649  
11 (nowhere containing definitions of the terms "solicit" or "obtain"). Rather, the FID has now  
12 adopted a novel interpretation of these terms, ignoring prior judicial precedent holding that a  
13 Trustee's recording of a Notice of Default and Election to Sell was not soliciting or obtaining  
14 collection of a debt, but merely enforcement of a security interest. See cases cited above.

15 While NRS 649.053 specifically authorizes the FID commissioner to adopt such  
16 regulations "as may be necessary to carry out the provisions of this chapter" the Nevada  
17 Administrative Procedure Act also spells out the specific process for adopting such regulations.  
18 See NRS 233B. 040 through NRS 233B.120. A "regulation" is broadly defined as a standard of  
19 general applicability. See NRS 233B.038(1). If the FID had wanted to adopt novel definitions  
20 of the terms "solicit" and "obtain," especially ones that dramatically differ from FID's past  
21 construction of the law and judicial precedent holding a contrary interpretation, Nevada law  
22 requires the FID commissioner to adopt regulations in formal rulemaking proceedings. The FID  
23 is precluded from adopting standards of general applicability in a contested case; to do so

24  
25 <sup>11</sup> See Conclusions of Law Nos. 22 and 23, AR at page 000649.

26 <sup>12</sup> Note that the Fair Debt Collection Practices Act (FDCPA) also states specific  
27 requirements for notices given to persons who owe a debt. See 15 U.S.C. § 1682 et seq. This  
28 places a Trustee, if the Trustee is regulated as debt collector, in the position of possibly violating  
the requirements of the FDCPA simply by providing notice in the manner required by Chapter  
107's specific terms.

1 constitutes prohibited ad hoc rulemaking. See e.g. Coury v. Whittleson-Bell Luxury Limousine,  
2 supra. The ad hoc nature of the FID rulemaking in this case is evident, in that the FID adopted  
3 novel definitions of the terms (and several others), despite the terms having not been vetted in a  
4 public rulemaking proceeding and not reviewed by the Legislative Counsel Bureau for legal  
5 validity, as required for all new regulations. See NRS 233B.040 through NRS 233B.0681.

6 Please note that the FID decision also adopted definitions of other terms specifically used  
7 in NRS Chapter 107 (including the terms "Trustee," "Deed of Trust," "Security" and "Loan")  
8 despite having no authority to adopt regulations under NRS Chapter 107.<sup>13</sup> See Decision at  
9 Conclusions of Law Nos. 6, 7, 8, 9, 10, 11 and 12; AR at page 000644-645. Indeed, only the  
10 Nevada Supreme Court has been delegated authority to adopt regulations under NRS Chapter  
11 107. See NRS 107.086(8). In the absence of formal rulemaking for such terms, there is a strong  
12 possibility the FID could adopt definitions of Chapter 107 terms at odds with the legislative  
13 intent, judicial precedent, or the Supreme Court's regulations. Indeed, that is exactly what has  
14 happened in this case.

15  
16 V. THE NOVEL STANDARD OF GENERAL APPLICABILITY WAS ADOPTED  
17 WITHOUT KNOWLEDGE OF OR EXPERTISE IN THE FORECLOSURE  
18 PROCESS

19 The only testimony from the FID in this case highlights that the FID possessed no  
20 knowledge of Deeds of Trust or the foreclosure process:

21 Q: You indicated before that you are not familiar with how  
22 Deed of Trust operate, correct?

23 A: No. I have never been in that field of work.

24 AR at p. 00576, lines 19-22 (emphasis added).

25 Q: My question is very specific: It is the division's position  
26 that a notice required by NRS Chapter 107 for Notice of  
27 Breach and Default [sic] constitutes the collection of a  
28 debt?

<sup>13</sup> This was also done in the absence of any division familiarity with terms or the statutes.  
See testimony of Sandi Mincer, AR at 000557-558, 000576-577.

1 A: I am not familiar with 107. But in this scenario, it is a  
2 collection of a debt.

3 AR at p. 000557, lines 16-21 (emphasis added).

4 Q: No, my point is: you asserted you've had jurisdiction since  
5 1969; correct?

6 A: Yes.

7 Q: Would you agree with me that the division has not  
8 promulgated any regulations during that time regarding  
9 trustees on Deeds of Trust?

10 A: Not to my knowledge.

11 AR at p. 000559, lines 5-11 (emphasis added).

12 Q: Are you familiar with any court decisions indicating that  
13 trustees for Deeds of Trusts do not need a license from the  
14 state?

15 A: No, I am not familiar with any court decisions.

16 AR at p. 000577, lines 20-23 (emphasis added).

17 In the absence of any factual background or familiarity with applicable statutes or judicial  
18 interpretation of them, the FID Deputy Director maintained her position that the mere sending of  
19 a Notice of Default and Election to Sell, with all notices required by NRS Chapter 107,  
20 constituted the "soliciting" or "obtaining" of payment of a debt. The FID decision merely adopts  
21 that ill-informed ad hoc position as a new "standard of general applicability" entirely at odds  
22 with the courts.

23 This Court should note that the definition of "collection agency" is virtually unchanged  
24 since 1959, when the Nevada Attorney General, Roger D. Foley, formally opined that  
25 repossessing an automobile security interest by an agent for the secured party did not make that  
26 agent a collection agency. See Nevada Attorney General Opinion 1959-115 (1959). The Nevada  
27 legislature has agreed, specifically providing that pursuing a security interest is not doing  
28 business in Nevada. See NRS 80.015. The legislature's policy of not considering enforcement

1 of a security interest as collection of a debt is further demonstrated by the enforcement disparity  
2 of NRS Chapter 107 (enforced by the judiciary) and NRS Chapter 649 (enforced by the FID).

3 ///

4 VI. IN 2011 THE LEGISLATURE CONSIDERED THE REQUIREMENT THAT  
5 FORECLOSURE TRUSTEE'S BE REQUIRED TO BE LICENSED AS DEBT  
6 COLLECTORS AND REJECTED THAT REQUIREMENT.

7 In Assembly Bill 284 filed on March 15, 2011, the legislature considered an amendment  
8 to NRS 107, which would establish specific licensing requirements of foreclosure trustees in the  
9 State of Nevada. The original draft of the bill proposed that only individuals licensed as  
10 attorney's, title insurers or title agents, or a corporation engaged in the business of acting as  
11 trustee under deed of trust in the state could act as Trustees. AB284 was ultimately passed and  
12 limited foreclosure trustee's to Attorney's, Title Insurer's, Title Agents, or Title Agency's or  
13 licensed fiduciaries. AB284 was later amended by AB273, which broaden the entities which  
14 could act as foreclosure trustee's. The legislature recognized the difference between foreclosure  
15 trustee activities and collection agency activities by providing that if a person is engaged in the  
16 business of a collection agency pursuant to NRS 649, they could also act as a Trustee. The State  
17 having been afforded the opportunity to require debt collection licensing, recognized that being a  
18 Trustee and being a Debt Collector were two different activities.

19 The legislature appears to have recognized that the requirements of the FDCPA, NRS  
20 649, and NRS 107.080 et. seq., are incompatible. For example, under the FDCPA, if a consumer  
21 notifies the collector to cease communication the debt collector must cease communication  
22 except to the extent to advise the consumer tha communication will stop and/or to advise of what  
23 other remedies the collector may pursue. Regardless of any notification by the consumer a  
24 foreclosure trustee must record, mail, post and publish all statutorily required notices. The  
25 FDCPA limits with whom a collector can communication, while a foreclosure trustee is required  
26  
27

1 to publish the Notice of Sale in a local paper, and to post both the Notice of Default and Notice  
2 of Sale on the property, thereby communicating the default to unlimited third parties. NRS 649  
3 provides that entities hold a foreign debt collectors license can only communicate via phone,  
4 mail and facsimile, but as stated above NRS 107.080 required the posting and publication of all  
5 required notices.

6  
7 VII. THE ACTIVITIES OF FORECLOSURE TRUSTEES ARE REGULATED BY  
8 THE JUDICIARY AND THE ADMINISTRATIVE OFFICES OF THE COURT,  
9 AND DO NOT REQUIRE DUPLICATIVE REGULATION OR ENFORCEMENT  
10 BY THE FID

11 Unlike debt collection activities, non-judicial foreclosure is a statutory construct with  
12 specific requirements and procedures carefully delineated in the applicable statutes. NRS  
13 107.080 *et. seq.* While debt collectors and repossessioners have wide latitude in the methods they  
14 can use to recover property, foreclosure trustees are required to proceed solely as delineated by  
15 Chapter 107 in order to complete a non-judicial foreclosure. In recognition of that specific  
16 mandated statutory process, the legislature has consistently placed the oversight of the non-  
17 judicial foreclosure process and the activities of foreclosure Trustees with the Judiciary. For  
18 example, NRS 107.080(5) provides:

19 "...A sale made pursuant to this section may be declared void by any *Court* . . ."

20 NRS 107.080(6) states:

21 "... may commence an action" which would be filed in court. . . .

22 NRS 107.080(9) provides:

23 "If the successful bidder fails to record ...the successful bidder (a) is liable in a *civil*  
24 *action*... (b) Is liable in a *civil action* . . ." (emphasis added)

25 NRS 107.083(3) states in relevant part:

26 "The *Court* shall proceed in a summary manner in the hearing and disposition of such  
27 motion and give judgment and issue execution . . ." (emphasis added)

28 NRS 107.110(4) further states:

"If a person . . . requests a hearing . . . the applicable government entity shall apply for a

1 hearing before a *court* of competent jurisdiction." (emphasis added).

2 In 2009 when the Nevada legislature moved to address the issue of foreclosure in the  
3 State of Nevada, it made two substantive changes in the law. First, it expanded NRS Chapter  
4 645F to require licensing of foreclosure/loan modification ~~consultants~~ and gave supervision over  
5 such activities to the Department of Business and Industry, the Division of Mortgage Lending.  
6 Second, the legislature enacted NRS 107.086, providing for pre-foreclosure mediation with  
7 regulation over the process assigned to the Nevada Supreme Court. In contrast, the legislature  
8 made no changes requiring licensing of foreclosure Trustees by the FID.

9 NRS 107.086(8) provides, inter alia:

10 8. The Supreme Court shall adopt rules necessary to carry out the  
11 provisions of this section. The rules must, without limitation, include provisions:

12 (a) Designating an entity to serve as the Mediation Administrator  
13 pursuant to this section. The entities that may be so designated include, without  
14 limitation, the Administrative Office of the Courts, the District Court of the  
15 county in which the property is situated or any other judicial entity. [emphasis  
16 added].

17 Under the statute, only the Nevada Supreme Court promulgates the rules and provides the  
18 forms that must be utilized by trustee as part of the non-judicial foreclosure process. Since the  
19 implementation of the foreclosure mediation program on July 1, 2009, the foreclosure mediation  
20 rules have been amended by the Court several times. The Financial Institutions Division has  
21 never adopted any foreclosure regulations because, by negative implication, it lacks any  
22 authority over these entities or processes.

23 If foreclosures are to be jointly regulated by the FID and the Courts, then all foreclosure  
24 decisions of the FID will also have to be judicially reviewable by the courts. See NRS 233B.130  
25 and NRS 233B.135. So, at the end of the day, the courts will still have the final say on  
26 foreclosures, and will do so by applying the standards set by NRS Chapter 107 and regulations  
27 adopted by the Nevada Supreme Court. All that would be added by inserting the FID into the  
28 equation would be the added time and legal expense to the lender, the borrower and the state by  
adding an additional layer of regulation by an agency that--according to the testimony of the

1 deputy director--does not know what a Deed of Trust or Trustee is, does not know how  
2 foreclosures work, has no knowledge of the relevant statutes (NRS ch. 107), and which, before  
3 the instant case, has never even bothered to assert jurisdiction over Trustees' foreclosure.

4 ///

5 ///

6  
7 **VII. CONCLUSION**

8 For the reasons set forth above, the Decision of the FID must be set aside under the  
9 authority granted to this court by NRS 233B.135, in that the Decision is based upon error of law  
10 and/or constitutes improper ad hoc rulemaking.

11 DATED this 4 day of June, 2012.

12 Respectfully Submitted,

13 **LIONEL SAWYER & COLLINS**

14  
15 By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 4 day of June, 2012, I sent via U.S. Postal Service, first class mail, postage prepaid, a true and correct copy of the foregoing documents described as PETITIONER'S OPENING BRIEF to the following:

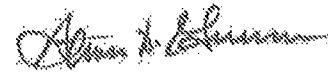
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CLARK COUNTY, NEVADA

10 QUALITY LOAN SERVICE CORPORATION,  
11  
12 Petitioner,

Case No.: A-12-657580-J  
Dept. No.: XVI

12 v.

PETITIONER'S REPLY BRIEF

13 STATE OF NEVADA, DEPARTMENT OF  
14 BUSINESS AND INDUSTRY, FINANCIAL  
15 INSTITUTIONS DIVISION,

16 Respondent.

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1 In its Answering Brief, the Respondent Nevada Department of Business and Industry,  
2 Financial Institutions Division (FID) summarizes its entire position in one sentence: "Here, the  
3 [FID] Commissioner has determined that demand for payment of past due *mortgages* and the  
4 *foreclosure* sale of homes to collect money for past due *mortgages* constitutes the act of a  
5 collection agency." Answering Brief at page 9, lines 10-12. (emphasis added).

6  
7 However, this case does *not* concern "mortgages" (regulated by NRS Chapter 106), nor  
8 does it concern "foreclosure" as that term is used in NRS Chapter 40. Rather, this case involves  
9 the Trustee holding a deed of trust exercising the "power of sale" under NRS Chapter 107.  
10 While the terms "foreclosure sale" or "non-judicial foreclosure" have been used by the parties to  
11 describe this process, the imprecise use of such terms (by all parties) has apparently lead to  
12 confusion by the FID. Indeed, the FID's brief essentially uses the terms "deed of trust" and  
13 "mortgage" and "promissory note" almost interchangeably; therefore, some clarification of terms  
14 and more precise use of statutory language is required herein.<sup>1</sup>

15  
16 A "mortgage" is a promissory agreement secured by real property (or chattel), where the  
17 borrower retains the title to the property, and where the security interest of the lender is  
18 essentially a lien recorded upon the borrowers property. See NRS Chapter 106, generally. In  
19 order for the lender to obtain the property securing the loan, the lender must undertake a  
20 "foreclosure" in court pursuant to the provisions of NRS Chapter 40.

21 Conversely, a "deed of trust" is used to actually transfer title to real property to a third  
22 party Trustee, in order to secure a promissory agreement between a borrower/buyer and a lender.  
23 Unlike a mortgage, wherein the buyer retains title to the security, the Trustee--not the borrower--  
24 actually holds title to the security. See NRS 107.020. The borrower is identified as the holder of  
25

26  
27 <sup>1</sup> As previously indicated to the Court, the FID witness at hearing professed *complete*  
28 *ignorance* to the nature and use of deeds of trust, as well as the laws governing deeds of trust.  
See Administrative Record (AR) at pages 000557-000559, 000576-000577.

1 a "title of record" but actual seizin of title resides with the Trustee.<sup>2</sup> In the event of a default by  
2 the borrower, the trustee literally has power to sell the security; this is referred to as exercising  
3 the "power of sale." See NRS 107.080(1) ("a *power of sale* is hereby conferred upon the trustee  
4 to be exercised after a breach of the obligation for which the transfer [of real property] is  
5 security." Emphasis added). Because no court action is required to exercise the Trustee's "power  
6 of sale", it is sometimes imprecisely referred to as a "non-judicial foreclosure." In this brief we  
7 shall avoid the term, and instead use the language of the statute.

8  
9 As the court knows, there are specific notices required before the Trustee can exercise the  
10 "power of sale." See e.g. NRS 107.080(2). However, these notices are there to prevent or stop the  
11 Trustee's exercising of the power of sale, such as *if* the borrower cures the default or pays off the  
12 promissory note. See e.g. NRS 107.080(3)(a) (Trustee cannot exercise power of sale if the  
13 borrower cures the default).

14 Thus, the statutory scheme gives the Trustee holding a deed of trust a "power of sale," but  
15 requires certain information be given to the borrower, and provides certain provisions by which a  
16 borrower can prevent or delay the Trustee's exercise of the "power of sale". See e.g. NRS  
17 107.085, titled "Restrictions on Trustee's *Power of Sale*..." (emphasis added). Similarly, the  
18 borrower may seek to prevent the Trustee's exercise of the "power of sale" by seeking judicial  
19 mediation between the borrower and the lender (termed the "beneficiary" of the deed of trust) or  
20 the lender's assignee. See NRS 107.086. The Trustee's "power of sale" is essentially suspended  
21 during such mediation, but it is not revoked.<sup>3</sup>

22  
23 Further provisions of the statute permit the borrower (or anyone who may be liable for  
24 the underlying promissory note, such as a guarantor) to demand from the lender/beneficiary (not

25  
26 <sup>2</sup> See authorities cited in the Amicus Brief of United Trustees Association, on file herein,  
at page 10, footnote 15.

27 <sup>3</sup> This mediation process is administered and regulated by the Nevada Courts. See NRS  
28 107.086(8). This is the only regulatory oversight of Trustees, deeds of trust or the "power of  
sale" mentioned in NRS Chapter 107. See discussion, *infra*.

1 the Trustee) information to pay off the underlying promissory note See NRS 107.200, 107.210  
2 and 107.220. Again, if the underlying promissory note is paid pursuant to this information, the  
3 Trustee may not exercise the "power of sale." See, again, NRS 107.080(2)(a).

4  
5 Thus, when one understands the process involved in the use of deeds of trust, one realizes  
6 the Trustee has only two real functions: (1) hold the real property in trust as security for the  
7 promissory note between the borrower and the lender/beneficiary; and (2) exercise the "power of  
8 sale" in the event of a default of the underlying note.

9 Nevada law is very clear that a Trustee exercising of the "power of sale" is *not* doing  
10 business in the state. See e.g. NRS 80.015 (a corporation is not "doing business" in the state if it  
11 enforces a security interest); NRS 86.5483(1)(6) (a limited liability company is not "doing  
12 business" in the state if it enforces a security interest); NRS 87A.615 (a limited partnership is not  
13 "doing business" in the state if it enforces a security interest). The courts have agreed. See, e.g.  
14 Brace v. Homefield Financial, Inc., 2011 WL 4479736 (D. Nev. 2011). Courts have further  
15 found that the "power of sale" is not debt collection.<sup>4</sup>

16 While the legislature and the courts have been clear that enforcing a security interest is  
17 not "doing business," the FID disagrees. Rather, the FID asserts that a Trustee issuing a notice of  
18 sale (and engaging in statutorily required functions) is doing business, and that the disclosures  
19 mandated by NRS 107.080 et. seq. are not really disclosures but are solicitations or "demand for  
20 payment of past due *mortgages*." See Answering Brief at page 9 (emphasis added). Similarly, the  
21 FID believes a Trustee exercising the "power of sale" is the collection of "money for past due  
22 *mortgages* [and] constitutes the act of a collection agency." Id. (emphasis added). Despite the  
23 admonitions of NRS 80.015, NRS 86.5483(1)(b), NRS 87.615 and dozens of court cases holding  
24 that exercise of the "power of sale" is not "collection" of a debt, the FID has found that the  
25

26  
27 <sup>4</sup> See, e.g. authorities cited in Petitioner's Opening Brief at page 10, lines 2-8. See also  
28 authorities continued in the Administrative Record at pages 000058 through 000143. See, too,  
authorities cited in the Amicus Brief of United Trustees Association at page 6, lines 1-10, and  
footnote 5. As the court can see, these authorities are too numerous to be easily cited here.

1 Trustee's exercise of the "power of sale" *is* debt collection and that the FID has regulatory  
2 jurisdiction over the process.

3 While the FID maintains that it can regulate the "power of sale" in this case, the *Nevada*  
4 *Attorney General* has been quite eloquent, in other litigation, in explaining that the use of a deed  
5 of trust and a Trustee's exercising of the "power of sale" is unregulated conduct--except by the  
6 courts:

7 By enacting NRS 107.086, the Nevada Legislature simply  
8 created a limited-judicial foreclosure as a replacement for non-  
9 judicial foreclosure. In Nevada, one can foreclose through  
10 governmental intervention in the form of an order from the Court.  
11 NRS 40.030. Prior to the passage of AB 149, one could also  
12 foreclose without any governmental intervention. ...[B]ut the  
13 legislature, by its prerogative, now requires both forms of  
14 enforcing the equity of foreclosure to be overseen by the  
15 government. *And in both instances the branch of government*  
16 *with authority to oversee this remedy is the judicial branch.*

17 NRS 107.086 also creates a process whereby a justiciable  
18 controversy is created since it requires the debtor to file a notice of  
19 mediation with the Court. Traditionally, cases where there is a  
20 justiciable controversy are matters for the courts, not the executive  
21 or legislative branches. All that has occurred is the elimination of a  
22 foreclosing party's ability to bypass the Judiciary. Wells Fargo fails  
23 to articulate a rationale that justifies transforming the traditional  
24 judicial powers into executive or legislative.

25 Brief of the Nevada Attorney General in Wells Fargo v. Renslow, Nevada Supreme Court  
26 Case No. 58283, at page 7, lines 13-25 (emphasis added).<sup>5</sup>

27 Bear the Nevada Attorney General's statement in mind when reviewing the FID position  
28 as succinctly stated in its Answering Brief: "the [FID] Commissioner has determined that  
demand for payment of past due mortgages and the foreclosure sale of homes to collect money  
for past due mortgages constitutes the act of a collection agency." Answering Brief at page 9,

<sup>5</sup> Please note that this brief was the official position of the state of Nevada in that  
litigation. Petitioner would be happy to provide the court with a courtesy copy of this brief at the  
court's discretion.



1 lines 10-12. (emphasis added). The Commissioner's determination that there was "demand for  
2 payment" ignores the fact that a Trustee's required notice of that Trustee's intent to exercise the  
3 "power of sale" requires certain payoff information be disclosed to the borrower and other  
4 persons. See NRS 107.086. The testimony and documentary evidence indicate that only  
5 statutorily required disclosures were made; disclosure of this required information is not a  
6 "demand for payment."  
7

8  
9 The FID's second determination that the "foreclosure sale of homes to collect money for  
10 past due mortgages constitutes the act of a collection agency" also ignores the law. Clearly, if a  
11 lender sought *judicial foreclosure* under NRS Chapter 40, that act would *not* require a license  
12 from the FID. See NRS 80.015; NRS 86.5483(1)(b) and NRS 87A.615. Rather, the entire process  
13 would be overseen by the courts--not the executive or legislative branches--as the Attorney  
14 General so eloquently stated in the brief quoted above. No further regulation of judicial  
15 foreclosure is or was contemplated by the legislature. Similarly, as the Nevada Attorney General  
16 also stated in the brief quoted above, the government oversight contemplated by the legislature  
17 for NRS 107.086's "limited-judicial foreclosure" (a.k.a. the exercise of the "power of sale") is  
18 also *only* the courts.  
19

20  
21 Thus, there is no "demand for payment," there is only the disclosures required by NRS  
22 Chapter 107 (such as NRS 107.086). There is "no collection of a debt"; there is only the  
23 enforcement of a security interest. In the past, the Nevada Attorney General has formally opined  
24 that enforcement of a security interest (even by the lender's agent) is *not* debt collection requiring  
25 a debt collector's license. See Nevada Attorney General Opinion 1959-115 (1959). Similarly,  
26  
27  
28

1 the legislature has exempted the "power of sale" from its own definition of "doing business."<sup>6</sup>

2 In order to ignore this logical reading of these Nevada laws, the FID argues that a  
3 Trustee's exercise of the "power of sale" is the "solicitation" for payment or the actual collection  
4 of a "claim". See Answering Brief at pages 5, 7, 8 and 9.  
5

6 As noted by the above authorities, a "claim" is distinct from a security interest. Indeed, a  
7 security interest is separate and distinct from a promissory note. See e.g. NRS 107.020 (deed of  
8 trust can be used "to secure the performance of an obligation or the payment of any debt.").  
9 Assuming (for the sake of argument) that we may interchange the terms "obligation" and "debt"  
10 with the word "claim," we see that under the specific text of NRS 107.020 the security interest  
11 created by a deed of trust is distinct and separate from the "claim" thereby secured by the deed  
12 of trust. Courts have found such distinctions quite important. See e.g. Haynes v. EMC  
13 Mortgage Corporation, --Cal. Rptr.3d--, Cal. App. 1Dist. (April 9, 2012)  
14 (<http://www.courts.ca.gov/opinions/documents/A131023.PDF>) (noting distinction between a  
15 mortgage and a deed of trust).  
16  
17

18 However, in this case the FID decision appears to construe "claim" to include *both* the  
19 promissory note *and* the security interest. (It is well settled that the promissory note and deed of  
20 trust are legally distinct. Upon the completion of the exercise of the power of sale, the holder of  
21 the note retains a right to sue under the promissory note for a deficiency judgment an action not  
22 implicating the Trustee; after a bankruptcy discharge the personal liability evidence by the  
23 promissory note is discharged but the Trustee retains the ability to exercise the power of sale;  
24 and the holder of the promissory note may elect to disregard the power of sale and sue under the  
25 promissory note alone.) This novel construction of the term "claim" goes far beyond the  
26  
27

28  
\_\_\_\_\_  
<sup>6</sup> For example, NRS 80.015, NRS 86.5483(1)(b), NRS 87A.615, and NRS 107.086.

1 definition of that term in NRS 649.075, and beyond any previous judicial or administrative  
2 construction of that term. Moreover, this construction of the word "claim" is used as a novel  
3 standard of general applicability, which would apply to all similarly situated Trustees. By  
4 adopting a novel standard for construing the term "claim" to include security interests created by  
5 deeds of trust, the FID has engaged in "rulemaking," as that term is defined in the state's  
6 administrative procedure act, NRS Chapter 233B. The FID cannot engage in such important  
7 rulemaking on an ad hoc basis. Thus, even if the FID construction of the term (and the other  
8 terms previously discussed in this Appellant's Opening Brief) *were* somehow compatible with  
9 the statutory scheme of NRS Chapter 107, the FID would still have to go through a formal  
10 rulemaking process in order to vet the issue and give fair warning to all Trustees (and  
11 borrowers) that the FID is about to change the law contrary to existing judicial precedent and  
12 rulings.  
13  
14

15 The ability to exercise the power of sale to foreclose upon a deed of trust has existed in  
16 Nevada for about 85 years, NRS Chapter 649 has been around for approximately 40 years and  
17 the FID has been in existence for about 27 years; however prior to October 2010 (i.e. the  
18 issuance of the cease and desist order in this case), the FID expressed no desire or ability to  
19 govern the activity of a Trustee engaging in its statutory and contractual right to enforce the  
20 power of sale. Indeed, not until the 2011 legislative session was the question of *who* could act as  
21 a foreclosure trustee to exercise the power of sale even considered by any governing body. When  
22 the question was put to the Nevada state legislature, that body considered it and determined that  
23 holding a debt collectors license was just one of the many ways an entity could qualify to act as a  
24 Trustee exercising the power of sale under a deed of trust. In fact it appears that prior to  
25 Petitioner obtaining a license, no entity acting *solely* as a Trustee exercising the power of sale  
26  
27

1 was ever required by the FID to be licensed as a debt collector in the State of Nevada.

2  
3 So, not only has the FID become confused about the terms, the facts concerning the  
4 "power of sale," and the applicable law, but the FID has also decided to adopt a standard not  
5 previously approved by *either* the Nevada legislature or the courts. This can only be done  
6 through formal adoption of regulations under the Administrative Procedure Act.

7  
8 The decision of the FID Commissioner is therefor contrary to existing law, not supported  
9 by valid evidence in the record, and made according to improper procedure. This Court should  
10 overrule and reverse the FID decision by the authority granted this Court by NRS 233B.135.

11  
12  
13 DATED this 16 day of August, 2012.

14 Respectfully Submitted,

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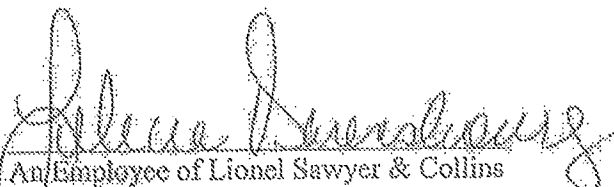
I HEREBY CERTIFY that on 16 day of August, 2012, I sent via U.S. Postal Service, first class mail, postage prepaid, a true and correct copy of the foregoing documents described as PETITIONER'S REPLY BRIEF to the following:

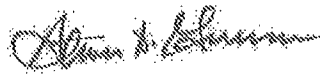
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9 QUALITY LOAN SERVICE CORPORATION,  
10

11 Petitioner,

12 v.

13 STATE OF NEVADA, DEPARTMENT OF  
14 BUSINESS AND INDUSTRY, FINANCIAL  
INSTITUTIONS DIVISION,

15 Respondent.

Case No.: A-12-657580-J

Dept. No.: XVI

DECISION AND ORDER  
GRANTING PETITION FOR  
JUDICIAL REVIEW PER NRS  
233B.130

16 Quality Loan Service Corporation's "Petition for Judicial Review per NRS 233B.130"  
17 (dated March 5, 2012) seeking review of the Decision of the Department of Business and  
18 Industry, Financial Institutions Division (dated February 12, 2012) came on for hearing on  
19 September 24, 2012, and the Court, having considered the Administrative Record, the briefs of  
20 the parties and Amicus Curae, and the arguments of counsel, does hereby issue its Decision and  
21 Order, and does hereby make the following Findings and Conclusions:

22 FINDINGS OF FACT

- 23 1. In a typical real estate transaction involving a Deed of Trust, a lender loans money to a  
24 borrower to purchase real property, and the parties contractually agree that the real  
25 property shall be held in trust by a Trustee, pursuant to a Deed of Trust, as security for  
26 the loan.  
27 2. The Deed of Trust typically contains a clause in which the borrower agrees that the  
28 Trustee may exercise the power of sale in the event of the borrower's default on the loan,

1 or other obligations, and typically also imposes other obligations upon the borrower  
2 such as maintaining liability and casualty insurance, keeping the property in good repair,  
3 and preventing waste of the property.

4 3. A Borrower's obligations under a Deed of Trust also typically include additional  
5 responsibilities, such as payment of taxes on the real property held in trust.

6 4. Petitioner Quality Loan Service Corporation ("Petitioner") is a Trustee (by original  
7 appointment or successive appointment) of Deeds of Trust, and has historically  
8 engaged in the exercise of the power of sale granted to Trustees by such Deeds of Trust  
9 and under NRS Chapter 107.

10 5. In the instance under review herein, Petitioners were Trustees on a Deed of Trust which  
11 held real property in trust to secure a loan for the purchase of such real property  
12 signed by Randolph Barton and Lori Ahnadi (collectively "Barton"); said Deed of  
13 Trust contained an explicit clause granting the Trustee the ability to exercise the power  
14 of sale in the event of the borrower's default.

15 6. Barton defaulted on the loan. After Barton defaulted on the loan, Petitioners noticed and  
16 conducted a sale of the real property held in trust for the Barton loan pursuant to  
17 procedures dictated by NRS chapter 107.

18 7. After Petitioner's sale of the real property held in trust as security for the defaulted  
19 Barton loan, the Respondent Department of Business and Industry,  
20 Financial Institutions Division ("FID"), received a written complaint from Barton that  
21 Petitioner's actions constituted the "collection of a debt" requiring a license from the FID  
22 as a "collection agency." At that time, Petitioner had no such license. The FID issued  
23 a Cease and Desist Order, without further investigation, which ordered Petitioner to  
24 cease all activities as a trustee under NRS chapter 107, inter alia, until and unless  
25 Petitioner became licensed by the FID as a "collection agency".

26 8. The Cease and Desist Order was timely appealed by Petitioner, and an appeal hearing  
27 before the Commissioner of the FID was held on December 13, 2010.

28 9. After hearing evidence, arguments of counsel and briefs on the Issues, the FID

1 Commissioner one year later (on February 14, 2012,) issued his decision concluding,  
2 inter alia, that a Trustee's exercise of the power of sale pursuant to the procedure set forth  
3 under NRS Chapter 107 constitutes the collection of, or solicitation of payment of, a  
4 claim and the Commissioner therefore ruled that the Petitioner was required to be  
5 licensed as a collection agency by the FID in order to exercise the power of sale under a  
6 Deed of Trust or NRS Chapter 107.

- 7 10. Petitioner has timely appealed the FID's decision, and the Court has received the record  
8 of the Administrative Proceedings, the briefs of the parties and Amicus Curae, and heard  
9 the arguments of counsel at hearing on September 24, 2012, and having considered the  
10 matter, now issues its decision on the Petitioner's Petition for Judicial Review.

11 CONCLUSIONS OF LAW

- 12 1. Under NRS Chapter 107, a Trustee has the ability to exercise the power of sale for real  
13 property held as security for a note upon the default of the borrower for that note.  
14 2. Pursuant to state policy articulated in NRS 80.015, 86.5483(1)(6) and 87A.615, until the  
15 passage and implementation of AB 284 in 2011, Trustees exercising the power of sale  
16 under a Deed of Trust did not be licensed to do business in the state of Nevada.  
17 3. Pursuant to applicable precedent, the exercise of the power of sale by a Trustee under  
18 NRS Chapter 107 is not "doing business" in Nevada. See e.g. Bonicamp v. Vasquez, 107  
19 Nev. 377 (2004); McMillan v. United Mtg. Co., 82 Nev. 117 (1966); Bruce v. Homefield  
20 Financial Inc., 2011 WL 4479736 (U.S. District Court, D. Nev. 2011)  
21 4. Pursuant to applicable precedent, the exercise of the power of sale under a Deed of Trust  
22 is not the collection or solicitation of payment of a claim See e.g. Bruce v. Homefield,  
23 supra.  
24 5. As a matter of applicable law, the exercise of the power of sale by a Trustee under NRS  
25 Chapter 107, including giving the required notices and conducting sale of the real  
26 property held as security, is not the collection of debt or claim or the solicitation of  
27 payment of a debt or claim under NRS Chapter 649.  
28 6. Based upon the foregoing, a Trustee exercising the power of sale pursuant to the



1 procedures set forth in NRS chapter 107 is not required to obtain a license as a  
2 "collection agency" from the FID prior to exercising the power of sale under a Deed of  
3 Trust.

4 7. Because Petitioner, as a Trustee, was merely exercising the power of sale specifically  
5 granted under the Barton's Deed of Trust, as well as NRS Chapter 107, Petitioner was not  
6 collecting a debt or claim or soliciting the payment of a debt as defined in NRS Chapter  
7 649, and therefore was not required to be licensed by the FID as a collection agency.

8 8. Based upon the foregoing, the Cease and Desist Order issued by the FID against the  
9 Petitioner in 2010 was legally flawed, in that it required Petitioner to cease and desist  
10 exercising the Power of Sale under NRS Chapter 107 unless it were licensed as a  
11 collection agency under NRS Chapter 649.

12 9. Based upon the foregoing, the Decision of the FID was also legally flawed, in that:

13 (A) The notices required by NRS Chapter 107 in the event of  
14 default by the borrower are not the solicitation of  
15 payment of a debt or claim;

16 (B) The exercise of the power of sale by a Trustee pursuant to  
17 the procedures set forth in NRS Chapter 107 is not the  
18 collection of a debt or claim;

19 (C) The FID has no authority to regulate or oversee a Trustee's  
20 exercise of the power of sale under, or issuance of the  
21 notices required by, NRS Chapter 107;

22 (D) Only the Judiciary, pursuant to a duly filed claim in District  
23 Court, has authority to review or oversee a  
24 Trustee's exercise of the power of sale, and its  
25 requisite notices, under NRS Chapter 107; and

26 (E) NRS chapter 649 gives the FID authority to regulate debt  
27 collection and collection agencies, but gives the FID  
28 no authority to regulate, license or oversee a Trustee's  
exercise of the power of sale under NRS Chapter 107.

10. Pursuant to NRS 233B.135, this Court has authority to reverse or affirm the Decision of  
the FID upon judicial review.

11. Because of the unique nature of real property, the use of a Deed of Trust to hold such  
real property as security for a real estate loan (which includes the Trustee's power of sale

1 by the contractual consent of the borrower), a Deed of Trust is not a "claim" or "debt"  
2 as defined by NRS Chapter 649.

3 12. NRS chapter 649 does not apply to the exercise of the power of sale under a Deed of  
4 Trust. Rather, only NRS Chapter 107 regulates the exercise of the power of sale  
5 pursuant to a Deed of Trust.

6 13. NRS Chapter 107 grants no regulatory authority or oversight of the power of sale by  
7 Trustees to any state executive agency. Rather, all regulatory authority for the exercise of  
8 the power of sale under NRS Chapter 107 is exclusively granted to the Judiciary, by  
9 actions filed in District Court (pursuant to NRS Chapter 107) challenging validity of  
10 the Trustee's exercise of the power of sale.

11 14. The FID has no regulatory, licensing or enforcement authority over a Trustee's exercise  
12 of the power of sale pursuant to NRS chapter 107.

13 15. If any Finding or Conclusion herein shall be more appropriately designated the other,  
14 they are hereby so designated.

15 NOW, THEREFORE based upon the foregoing Findings and Conclusions, the Court  
16 hereby ORDERS that the Petitioner's Petition for Judicial Review per NRS 233B.130 is granted,  
17 and pursuant to the Court's authority under NRS 233B.135, the Court hereby:

18 1. Reverses the Decision of the FID on the grounds that a Trustee's exercise of the power of  
19 sale under NRS Chapter 107 is not the collection of a debt or claim under NRS Chapter  
20 649, and therefore a Trustee who is only exercising the power of sale under NRS chapter  
21 107 is not required to obtain a license from the FID as a collection agency; and

22 2. Orders that the Cease and Desist Order issued herein by the FID in 2010 and the Decision

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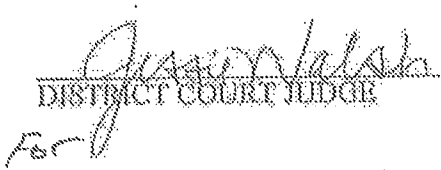
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1 of the FID issued herein in 2012 are void ab initio due to legal error by the FID.

2  
3 IT IS SO ORDERED this 2<sup>nd</sup> day of January, 2012.

4  
5  
6   
DISTRICT COURT JUDGE

7  
8 For  
TIMOTHY C. WILLIAMS

9 PREPARED AND SUBMITTED:

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11  
12 By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on \_\_\_\_ day of \_\_\_\_\_, 2012, I sent by Email and U.S. Postal Service, first class mail, postage prepaid, a true and correct copy of the foregoing documents described as DECISION AND ORDER GRANTING PETITION FOR JUDICIAL REVIEW PER NRS 233B.130 to the following:

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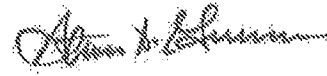
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# EXHIBIT 6

  
CLERK OF THE COURT

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12 EIGHTH JUDICIAL DISTRICT COURT

13 CLARK COUNTY, NEVADA

14 QUALITY LOAN SERVICE CORPORATION,

15 Plaintiff/Petitioner,

16 vs.

17 STATE OF NEVADA, DEPARTMENT OF  
18 BUSINESS AND INDUSTRY, FINANCIAL  
19 INSTITUTIONS DIVISION;

20 Defendant/Respondent.

Case No. A-12-657580-J

Dept. No. XVI

21 RESPONDENT'S ANSWERING BRIEF

22 Respondent Financial Institutions Division, State of Nevada, Department of  
23 Business and Industry, by and through its attorney Catherine Cortez Masto, Attorney  
24 General, and Daniel Ebihara, Deputy Attorney General, hereby submits its Answering  
25 Brief.

26 DATED, this 13th day of July, 2012.

27 CATHERINE CORTEZ MASTO  
28 Attorney General

By: 

Daniel D. Ebihara  
Deputy Attorney General  
Attorneys for State of Nevada  
Financial Institutions Division

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