IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY BENKO, A NEVADA RESIDENT; ET Al., Appellants, v. QUALITY LOAN SERVICE CORPORATION, A CALIFORNIA CORPORATION; ET AL., Respondents	Supreme Court No. 73484 District Court Case No. A-11-649857

APPELLANTS' REPLY TO RESPONDENT MTC FINANCIAL INC. DBA TRUSTEE CORPS' ANSWERING BRIEF

Appeal from Eighth Judicial District Court
Clark County, Nevada

The Honorable William Kephart

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NRAP 26.1 DISCLOSURE

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

Jeffrey Benko, Camilo Martinez, Ana Martinez, Frank Scinta, Jacqueline Scinta, Susan Hjorth, Raymond Sansota, Francine Sansota, Sandra Kuhn, Jesus Gomez, Silvia Gomez, Donna Herrera, Jesse Hennigan, Susan Kallen, Robert Mandarich, James Nico, Patricia Tagliamonte, and Bijan Laghaei are individuals. They will be referred to herein as "Plaintiffs" or "Appellants."

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

Dated this 10th day of July 2018.

By: *Nicholas A. Boylan*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Regulations

I. INCORPORATION OF ARGUMENTS PRESENTED BY APPELLANTS' IN REPLY TO RESPONDENT CALIFORNIA RECONVEYANCE COMPANY'S ANSWERING BRIEF

Insofar as Respondent MTC Financial INC dba Trustee Corps ("MTC") joins in, expressly relies on, or briefly discusses the issues, facts, and arguments stated by Respondent California Reconveyance Company ("CRC")'s Answering Brief, Plaintiffs will address them in replying to CRC.

II. MTC IGNORES THE OVERWHELMING FACTS ALLEGED AND PROVEN; A MASSIVE RECORD ESTABLISHING APPELLANTS CAN STATE A CLAIM PURSUANT TO NRCP 12(b)(5)

MTC has been continuously conducting business in Nevada since at least as early as 2000. (AA003200.) MTC did not obtain a collection agency license from Nevada's Financial Institutions Division ("FID") until April 19, 2012. (AA003379.) Before and after receiving its collection agency license from the FID, the nature of MTC's Nevada business operations has not materially changed. (AA003095, AA003118-AA003120.)

MTC's practice, policy, and procedure generally has been to hold its employees to the standards the Fair Debt Collection Practices Act ("FDCPA") imposes on all debt collectors, including in all communications with Nevada debtors. (AA003353.) MTC estimates it received payments from clients of

$12,317,679 in fees and $34,772,022.71 in costs incurred on behalf of its clients for services in Nevada between 2007 through 2012. (AA003498-AA003499.) As a general rule, MTC's fees and costs for its services are added to the loan balances of defaulted debtors in Nevada whose files MTC handles, and become a part of their outstanding debt. (AA003124.) MTC currently has approximately 150 clients, each with its own particular written contract governing MTC's services. (AA003096-AA003097.) If its creditor-clients direct it to accept checks (*i.e.*, collect money) from Nevada debtors or third-parties as payment on defaulted debts, MTC processes the checks and forwards the funds directly to the creditor-clients and then invoices them for MTC's services. (AA003103.)

According to its own employees, MTC provides both full service default services and foreclosure services to its clients. (AA003134-AA003141.) The two categories are distinct: full service default services include collection services such as handling deed-in-lieu of foreclosure transactions, senior lien monitoring, negotiating loan forbearance agreements, post-foreclosure sale conveyances, and other services. (*Id.*) Since at least 2011, MTC solicits creditor-clients for the full range of default services and foreclosure services MTC provides on defaulted loans in Nevada. (AA003142, at 150:23-AA003143, at 151:16.) In collecting money from Nevada debtors to reinstate or pay-off defaulted debts, and passing the money received on to its creditor-clients, MTC acts as the "middle person" (*i.e.*, agent) in

the transaction. (AA003149.)

Since at least 2007, MTC has had an entire department dedicated to collecting money from Nevada borrowers and third-parties for pay-off and reinstatement of defaulted loans. (AA003101-AA003103.) MTC's reinstatement and pay-off process includes receiving (*i.e.*, collecting) money from Nevada debtors, depositing the funds in MTC's trust account, and then passing the money on to its creditor-clients. (AA003104.) As part of its pay-off and reinstatement activities, MTC regularly receives checks, and thus collects money, from Nevada borrowers and third-parties to pay-off or reinstate defaulted loans in Nevada. (AA003101-AA003103.) As part of these activities, MTC employees communicate—whether by phone or in writing or both—pay-off and reinstatement quotes to Nevada borrowers and third-parties. (*Id.*) In late 2016, MTC had approximately 40 employees located in Red Rock, Nevada, alone. (AA003097.) At that time, MTC had approximately 15 employees in Nevada to handle calls from Nevada debtors, and received approximately 40 such calls a month. (AA003098-AA003100.) In 2011, MTC had approximately triple the number of calls from Nevada debtors, for approximately 100 to 120 such calls per month. (*Id.*)

From 2007 to 2012, it was MTC's policy and practice when it received checks from Nevada borrowers and third-parties for payment on defaulted debts to confirm with its creditor-clients whether the checks should be accepted by MTC on

their behalf. (AA003103.)

All incoming calls to MTC are greeted by an automated recording containing a statement (*i.e.*, admission) that MTC is a debt collector and all information obtained may be used for that purpose. (AA003109-AA003109, AA003355.) It generally has been MTC's policy, procedure, and practice since at least 2011 to give Nevada debtors MTC's direct contact information in communications so they can communicate directly with MTC (rather than its creditor-clients) regarding pay-off or reinstatement of defaulted debts. (AA003116-AA003117.)

MTC was authorized by at least one creditor-client to enter into loan forbearance plans on the creditor-client's behalf with Nevada debtors relating to their defaulted debt from approximately 2007 through 2010. (AA003132-AA003133; *see also* AA003425.) One MTC former employee, Maria Diaz, said approximately 840 checks was a fair estimate of the number of checks she collected each day and wrote deposit slips for while she was employed in MTC's Reinstatements Department. (AA003162-AA003163.) Ms. Diaz had a basic understanding MTC was collecting money on behalf of a bank (or banks) with respect to unpaid loans. (AA003167.) As part of her reinstatement work, Ms. Diaz would prepare separate pay-off or reinstatement documentation every working day. (AA003178-AA003180.) Some of the checks she received from debtors were to

pay off defaulted debts entirely; some were simply to reinstate defaulted loans. (*Id.*) Ms. Diaz's reinstatement work involved processing checks from third-parties and preparing their deposits into MTC's account. (AA003180- AA003183.) Her understanding of "third-party deposits" is they were "checks from someone other than the homeowner who is in default on the loan." (*Id.*) She would collect these checks and fill out deposit slips to deposit the money into MTC's account. (*Id.*)

MTC's co-owner, Terry Johnsen, testified her best estimate of the amount of money MTC collected each year between 2007 and 2012 on behalf of its lender-clients and related to defaulted debtors was at least more than $7 million. (AA003217-AA003219.) MTC has a phone bank (*i.e.*, a location where MTC employees operate its phones) in each of its four offices, including one in Nevada. (AA003220-AA003221; AA003222.) Ms. Johnsen estimated MTC's Nevada office had more than 10 employees working its phone bank in July 2016. (*Id.*) She estimated MTC's employees handling its phones in Nevada made more than 100 phone calls on MTC's behalf per month. (*Id.*) She confirmed these calls include communications with debtors who are in default on their loans. (*Id.*) MTC would remit or send funds MTC collected to its lender-clients (whether the money was collected to reinstate or pay-off loans or through sale of properties at non-judicial foreclosure sales). (AA003224-AA003225; AA003325.)

MTC has continued to renew its collection agency license with the FID from 2012 to the present. (*See* AA002913-AA002928.)

By contract, MTC's creditor-clients generally require MTC to provide a debt-collector, "mini-Miranda warning," to debtors or otherwise inform borrowers that MTC is a debt collector. (*See* AA002643-AA002644, AA002647-AA002648, AA002660-AA002665.) MTC's practice and procedure is for all outgoing communications—including written and telephonic communications—from MTC to borrowers to contain a "verbal mini-Miranda warning," admitting MTC is a debt collector and seeking to collect on debt. (AA002889.) MTC's so-called "warning" generally consists of a statement disclosing MTC is a "debt collector" and the "purpose" of the communication—including calls—is to "collect a debt" and "any information . . . obtain[ed] will be used for that purpose."(*Id.* [italics omitted].) MTC received no less than $1889.41 from its creditor-client, Wells Fargo Bank, N.A. ("Wells Fargo"), as payment for MTC's services relating to Plaintiffs Raymond and Francine Sansota ("Sansotas"). (AA002932.)

MTC sold the Sansotas' Nevada property on or about March 9, 2011, to a third-party buyer at a trustee sale for $51,000.00; MTC collected and then remitted these funds to its creditor-client, Wells Fargo, on or about March 14, 2011, to apply them to the Sansotas' defaulted loan. (*See* AA002930-AA002931. *See also* AA002656-AA002659.)

MTC's own documents show MTC negotiated a forbearance agreement with Plaintiff Bijan Laghaei in 2009 on behalf of its creditor-client (in its own words, MTC "placed borrower [*i.e.*, Plaintiff Laghaei] in a forbearance agreement"), relating to his defaulted debt, and received (*i.e.*, collected) funds from him to reinstate his defaulted loan, which funds MTC sent to its creditor-client as payment on the loan. (AA002959-AA003003, especially AA002959 and AA002963.) MTC collected thousands of dollars from Plaintiff Laghaei on Wells Fargo's behalf. (*Id.*)

Ms. Diaz' reinstatement work while employed by MTC also involved accounting, as she was involved in collecting money from debtors. Ms. Diaz would receive checks from debtors and put them on a deposit slip; this work could take a full 8 hours on her busiest days, and at least around 5 hours on other days. (AA002694-AA002695.) Ms. Diaz estimated she may have prepared as many as around 80 reinstatement documents (or quotes) on average per day. (AA002707.) The reinstatement template she used in preparing these documents had a phone number on it for the recipient debtors to call MTC. (*Id.*) Those who called usually wanted to know what the amount was to reinstate their defaulted loans. (AA002707-AA002708.)

Ms. Diaz was involved while employed by MTC in sending to Wells Fargo the funds ($51,000.00) reflected in MTC's documents. (AA002718-AA002720.) According to Ms. Diaz, these documents show MTC collected money from a third

party, and the money collected on that loan was then wire transferred by her on MTC's behalf to the creditor (Wells Fargo). (*Id.*; *see also* AA002780, AA002930-AA003011.) At her deposition,[1] Ms. Johnsen testified she attended at least one meeting of MTC's management team in 2011 or before at which there was discussion of whether MTC should obtain a collection agency license from the FID. (AA002739-AA002741.) MTC counsel represented to the Discovery Commissioner that discussions within MTC regarding obtaining a collection agency license from the FID "may have happened as early as 2009, 2010."(AA002777.)

Ms. Johnsen also testified MTC's "management team" has authority over MTC employees who are involved in loan modifications or loan workouts. (AA002738.) In July 2016, Cathe Cole-Sherburn, MTC's operations manager, was the member of MTC's management team who was in charge of MTC employees involved in loan modifications or loan workouts. (*Id.*) Ms. Johnsen testified she as a co-owner of MTC is involved at least approximately once per working day in receiving or transferring funds on MTC's behalf, including funds received from

[1] After her deposition, Ms. Johnsen changed her testimony in significant ways. (*See* AA002765- AA002766.) For instance, her testimony at 25:14 was changed from "Just came up in a conversation, management" was changed to "No one" while her testimony at 25:16 was changed from "All of our management team" to "No one." (*Id.*) She also changed her testimony regarding a meeting she attended to the effect she was never at such a meeting. (*See id.* [changes to 25:14 through 27:12].)

defaulted debtors. (AA002745-AA002747;[2] *see also* AA002780.) Ms. Johnsen testified the cashier's check reflected in MTC's documents is the money MTC collected, put in its trust account in March 2011, and then transferred to its lender-client, Wells Fargo, on March 14, 2011, relating to the Sansotas.(AA002760; *see also* AA002861.) Ms. Cole-Sherburn testified at her deposition MTC may have applied for its collection agency license from the FID as early as 2009. (AA002627-AA002628.)

III. MTC WAS NOT "EXEMPT" FROM THE STATUTORY LICENSING REQUIREMENT. MTC'S ARGUMENT IS EXPRESSLY BARRED BY THE STATUTE

Revealing the lack of merit in MTC's contentions, MTC's principal argument is specious, because MTC's asserted defense is expressly disallowed by statute. By any logic, subsection (4)(b) of NRS 80.015 disposes of the argument. Otherwise, deceptive trade practices committed in Nevada by foreign, rogue companies collecting debts and enforcing mortgages and security interests in property, with or without a license, would be condoned and expressly authorized by the Nevada Legislature. That is an incomprehensible conclusion. Stated another way, it is inconceivable the Legislature would have expressly "exempted" and

[2] After her deposition, Ms. Johnsen changed "If I know, maybe twice" at 47:21 to "I don't know." (*See* AA002767.) She also changed "Depends on the day of the week" at 47:25 to "We don't sign checks or wires together." (*Id.*)

allowed fraud, deception, unlicensed activities, deceit, misappropriation and breach of duty by foreign entities in connection with acquiring notes, indebtedness, mortgages and security interest in real or personal property in Nevada, or in employing such deceptive practices in the conduct of securing or collection debts or enforcing mortgages and security interest in property securing the debts.

Despite NRS 80.015(4)(b)'s express language, MTC asserts as a defense NRS 80.015(1)(h) excludes "securing or collecting debts or enforcing mortgages and security interests in property securing the debts" as transacting business in Nevada and therefore MTC is exempt from all consumer-protection laws of Nevada. Not so. According to this Court, NRS 80.015 applies only to NRS Chapter 80. (*See RTTC Communs., LLC v. The Saratoga Flier, Inc.* (2005) 121 Nev. 34, 40, 110 P.3d 24, 28 ["*RTTC*"].)

This Court, in considering whether a party was doing business in Nevada for purposes of Nevada's employment agency licensure statutes found in NRS 611.030, expressly noted Nevada's "foreign corporations statutes specifically disavow their applicability to 'any other provision of law'" (such as NRS 611.030). (*RTTC*, *supra*, 121 Nev. at 40, 110 P.3d at 28 [quoting NRS 80.015(4)(b)][emphasis added].) This Court went on to note "the two-prong test utilized" by this Court in evaluating "doing business" for purposes of NRS 80.015 "is instructive in determining whether Pinsker was 'doing business in this state' for

the employment agency statutes at issue." (*Id.* [referring to *Sierra Glass & Mirror v. Viking Industries* (1991) 107 Nev. 119, 80 P.2d 512][emphasis added].) If MTC's interpretation of NRS 80.015's application—in defiance of its express language—were correct, the test used for "doing business" under NRS 80.015 would be not merely instructive, but conclusive (which this Court expressly recognized it was not).

NRS Chapter 80 establishes the basic filing requirements for foreign corporations operating a business in Nevada. NRS 80.010 mandates the resident agent and corporate information requirements. Nevertheless, following MTC's logic, all foreign businesses "collecting debts and enforcing mortgages," which are excluded from the definition of transacting business under NRS 80.015(1)(h), must also be exempt from the entirety of NRS Chapter 649 related to collection agencies and thus NRS 649 is void as to rogue foreign entities, like MTC. It makes no sense. (*See RTTC, supra*, 121 Nev. at 40, 110 P.3d at 28.)

NRS 80.015(4)(b) states an exclusion from it "does not affect the applicability of any other provision of law with respect to the person and may not be offered as a defense or introduced in evidence in any civil action, criminal action, administrative proceeding or regulatory proceeding to prove that the person is not doing business in this State, including without limitation, any civil action . . . . involving an alleged violation of Chapter . . . . 598 or 598A of N.R.S." [emphasis

added]. MTC's assertion it is excluded from the requirements of Nevada law is refuted by the statute's express text.

NRS 80.015's express language limits this definition of "doing business" in Nevada to the application of NRS Chapter 80. NRS Chapter 80 deals only with foreign corporations which must register with the Nevada Secretary of State. NRS 80.010 requires a foreign corporation to file certain items before it commences doing any business in Nevada. Subsection (4)(b) expressly prohibits MTC from using NRS 80.015 as a defense in any civil action, including specifically a civil action for the violation of NRS Chapter 598, which is the cornerstone of this lawsuit.

Subsection (4)(b) of NRS 80.015 is devastating to MTC's contention here that enforcing mortgages and security interests in property based on defaulted debts owed to another (*i.e.*, the MTC non-judicial foreclosure process) without a license under NRS 649 does not constitute deceptive trade practice according to NRS 598. Subsection (4)(b)'s express language directly reflects the intent of the Legislature to apply the deceptive trade practices law (and all other laws outside Chapter 80) and remedies to unlicensed foreign collection agencies that are involved in conducting a business "collecting debts or enforcing mortgages and security interest in property securing the debts," in Nevada. [emphasis added]. No other intended purpose of subsection (4)(b) is rational. It is dead on point, and

applies directly to the business MTC conducts for its lender-clients.

MTC attempts to bolster its argument by relying on orders of trial courts in Nevada that have ruled NRS 80.015 exempts foreclosure trustees from obtaining licenses in Nevada. (*See, e.g.*, *Wensley v. First Nat'l Bank of Nev.* (D. Nev. 2012) 874 F.Supp.2d 957, 963; *Marley v. Greater Nevada Mortgage Services* (D. Nev. May 22, 2012) 2012 U.S. Dist. LEXIS 70887; *March v. Pinnacle Mortgage of Nevada, LLC* (D. Nev. 2011) 2011 U.S. Dist. LEXIS 117185; *James v. Countrywide Home Loans, Inc.* (D. Nev. Feb. 23, 2012) 2012 U.S. Dist. LEXIS 23617; *Marin v. Wells Fargo Bank* (D. Nev. 2012) 2012 U.S. Dist. LEXIS 15989; *Fitzgerald v. Clarion Mortg. Capital* (D. Nev. 2011) 2011 U.S. Dist. LEXIS 72169; *Quality Loan Service Corp. v. State of Nevada* (Nev. Dist. Ct. Jan. 3, 2013) 2013 WL 6911859["FID Litigation"].) Although MTC's string citations may appear impressive, a reading of these orders reveals they reflect the cursory analysis of NRS 598.0923(1) and NRS 80.015(1) found in *Wensley*. Moreover, of six orders from Nevada federal trial courts MTC cites, three are signed by the same judge (District Judge Reed), (*see Wensley*, *supra*; *Marin*, *supra*; *Marley*, *supra*) while another three are signed by District Judge Jones. (*See James*, *supra*; *March*, *supra*; *Fitzgerald*, *supra*.) Not one of these orders—including Judge Williams'—reflect <u>any</u> consideration of NRS 80.015(4)(b). Instead, the federal orders repeat—

nearly verbatim—the conclusory statements and cursory analysis found in *Wensley*.

Judge Williams' order in the FID Litigation is not precedent and should not be followed by this Court, for reasons previously explained in opposing Defendants' NRCP 12(b)(5) motion to dismiss. (AA000665-AA000670.) Judge Scann concluded as much when she rejected Defendants' earlier efforts to have the order control this case. (AA000815-AA000816.) Judge Williams' conclusion was founded on a number of errors. Judge Williams did not consider the application of NRS 80.015(4)(b) and its conclusive demolition of MTC's NRS 80.015(1) defense. (*See* AA000626-AA000627, at *2.) Two of the cases Judge Williams relied on had nothing to do with whether trustees were deemed to be doing business in Nevada or NRS 80.015 (but, instead, concerned application of the "one-action rule"). (*See id.*; *McMillan v. United Mortgage Co.* (1966) 82 Nev. 117, 412 P.2d 604; *Bonicamp v. Vazquez* (2004) 120 Nev. 377, 91 P.3d 584.

A. This Court Holds the DTPA Applies to Real Estate Activities/Transactions

This Court holds Nevada's Deceptive Trade Practices Act applies to real estate activities/transactions; clearly, MTC violated the statute by executing unlicensed collection agency service activities in Nevada that targeted Plaintiffs. (*See D.R. Horton v. Betsinger* (2010) 126 Nev. 162.)

B. MTC Failed to Obtain a Certificate of "Exemption" from the FID, as Required by Law

By MTC's admissions, it is undisputed MTC considered obtaining its Nevada collection agency license around 2009 or 2010, but failed to do so then, and continued to conduct its business without a license until 2012. (AA002734, AA002913-AA002928, AA002627-AA002629, AA002652-AA002654, AA002724-AA002734, AA002738-AA002743, AA002776-AA002777.) MTC's owner and Chief Executive, Rande Johnsen, admitted he began studying for the Nevada test to be MTC's collection agency manager for Nevada in about 2009, and actually took the test in about 2009 to 2010. (AA003764- AA003765; *see also* NAC 649.210 and 649.151.) Despite its ongoing, multi-million dollar collection activities in Nevada throughout that period, MTC did not obtain its collection agency license until 2012, after this lawsuit was filed. (AA002734, AA002913-AA002928.)

Under the applicable Nevada Administrative Code, 649.105, MTC was required to obtain from the FID a certification confirming MTC was "exempt" and not required to obtain a collection agency license, and that certification was a mandatory requirement before MTC could engage in its subject business activities in Nevada. By rule of law, MTC cannot be deemed "exempt" from NRS 649.075.

C. The Specific Statutes Involved Contain No "Exemption" for

Foreclosure Actions/Trustees

Beyond any doubt, the Nevada Legislature knows how to exempt specific entities from statutory mandates, controls and prohibitions. Notably, MTC does not and cannot credibly argue a "trustee" is expressly exempted under the statutory dictates of NRS 649 or NRS 107.

IV. MTC "KNOWINGLY" CONDUCTED ITS BUSINESS ACTIVITIES IN NEVADA FOR AT LEAST 10 YEARS BEFORE OBTAINING ITS LICENSE IN 2012

MTC, as it has in the past, mistakenly attempts to mischaracterize Plaintiffs' burden by arguing Plaintiffs must show MTC conducted business knowing its conduct amounted to a specific violation of Nevada law. This is not what NRS 598.0923 states. Plaintiffs must only show MTC knowingly conducted the business itself. MTC surely cannot expect this Court to assume MTC conducted its business in Nevada "inadvertently" or "accidentally" for more than a decade, and "unknowingly" received about $50,000,000 in fees and costs from 2007 to 2012! (AA003498-AA003499, AA003200, AA003379, AA003095, AA003118-AA003120, AA002734, AA002913-AA002928, AA002627-AA002629, AA002652-AA002654, AA002724-AA002734, AA002738-AA002743, AA002776-AA002777.)

Beginning at least in 2009, MTC expressly considered obtaining its Nevada license on multiple occasions and in multiple high-level management meetings, but decided not to do so until 2012, after this lawsuit was filed in 2011. (*Id.*) This is "knowing" conduct, as a matter of law. MTC's owner, Rande Johnsen, took the Nevada Collection Agency Manager test in 2009. (AA003764-AA003765.)

MTC's "knowingly" argument is also fatally weak for multiple other reasons. First, MTC "knew" it was conducting business as a collection agency, as it had service contracts with its lender-clients specifically for that purpose. (AA002630-AA002631, AA002643-AA002644, AA002647-AA002648, AA002660-AA002665, AA002668-AA002683.) If MTC claims such items were not done knowingly, then it must be it unknowingly sent an untold number of collection letters and notices of default to Nevadans, and accidentally collected tens of millions of dollars and foreclosed on thousands of Nevada homeowners, including the Sansotas. (AA003498-AA003499, AA003200, AA003379, AA003095, AA003118-AA003120, AA002734, AA002913-AA002928, AA002627-AA002629, AA002652-AA002654, AA002724-AA002734, AA002738-AA002743, AA002776-AA002777.)

Although bordering on frivolous, MTC apparently claims entitlement to a dismissal because it was purportedly ignorant of the specific Nevada law which required it hold a license, or that the law applied to MTC. The classic rule is true

and applies as a matter of law: ignorance of the law is not a defense. (*See* NRS 281A.115, *and* NRS 624.024.) Undisputed evidence shows MTC knowingly made a conscious decision not to obtain the Nevada license, until 2012. (*See, e.g.*, AA002734, AA002913-AA002928, AA002627-AA002629, AA002652-AA002654, AA002724-AA002734, AA002738-AA002743, AA002776-AA002777.)

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

Plaintiffs have presented powerful proof—from MTC's own officers and directors and internal files—showing MTC knew it was a debt collector during the relevant period, and therefore required a collection agency license from the FID. Beginning at least in 2009, MTC expressly considered obtaining its Nevada license on multiple occasions and in multiple high-level management meetings, but decided not to do so until 2012, after this lawsuit was filed in 2011. (AA003498-

AA003499, AA003200, AA003379, AA003095, AA003118-AA003120, AA002734, AA002913-AA002928, AA002627-AA002629, AA002652-AA002654, AA002724-AA002734, AA002738-AA002743, AA002776-AA002777.) Ms. Johnsen, MTC's co-owner, and Ms. Cole-Sherburn, a vice-president of MTC, testified at their depositions that, years before the filing of this lawsuit, MTC expressly considered whether to obtain a collection agency license from the FID, and, ultimately, did obtain such a license in 2012. (AA002734, AA002913-AA002928, AA002627-AA002629, AA002652-AA002654, AA002724-AA002734, AA002738-AA002743, AA002776-AA002777.) To date, MTC continues to maintain that license. (*See* AA002913-AA002928.) About 2009, MTC's other co-owner, Rande Johnsen, took the Nevada test to become a collection agency manager on MTC's behalf, demonstrating his full knowledge years before MTC acted to obtain the license in 2012. (AA003764-AA003765.) MTC's own documents show MTC regularly held itself out to others—including the Nevada debtors targeted by its collection agency activities—during the relevant period as a debt collector, and specifically warned the recipients of its communications it was attempting to collect a debt. (AA002643-AA002644, AA002647-AA002648, AA002660-AA002665.) MTC's practice and procedure is that "[a]ll <u>incoming</u> calls to MTC are greeted by an automated recording containing a statement (i.e., admission) to the effect that MTC is a debt collector

and all information obtained may be used for that purpose." (AA003109-AA003109; AA003355) It is similarly "MTC's practice and procedure that all outgoing communications—including written communications and communications by phone—from MTC to borrowers and their representatives contain a 'verbal mini-Miranda warning,' admitting that MTC is a debt collector and seeking to collect on debt." (AA002889 [emphasis added].) MTC's "so-called 'warning' generally consists of a statement disclosing that MTC is a 'debt collector' and that the 'purpose' of the communication—including calls—is to 'collect a debt' and that 'any information . . . obtain[ed] will be used for that purpose.'" (AA002889.) This is knowing conduct, as a matter of law.

V. MTC'S "DAMAGES" CONTENTIONS ARE ERRONEOUS

As admitted by MTC's Senior Vice President of Operations, the fees and costs MTC charged for its illicit claim collection are added to the obligation/debt of the homeowner victim, such as the Sansotas. (AA002658, AA003124.) Although he attempted evasion and qualification, Rande Johnsen admitted essentially the same in his testimony. (AA003766.) Accordingly, consistent with MTC's perceived authorization under the deed of trust, the illicit money MTC put into its pocket for its illegal activity in Nevada was also added to its bank client's claim against the Sansotas and their property. The amount was just under $2,000.00. (AA002862.)

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

The controlling statute is NRS 41.600. Its pertinent portion is as follows:

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

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

Restitution, also known as unjust enrichment, can be awarded in law or in equity. (*See Restatement (Third) of Restitution and Unjust Enrichment*

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

The disgorgement remedy rests upon one of the most critical foundations underlying the entirety of the law of restitution, which is a "person is not permitted

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

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

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

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

> unjust . . . the defendant may be under a duty to give to the plaintiff the amount by which [the defendant] has been enriched.
>
> Moreover, [i]t is not essential that money be paid directly to the recipient by the party seeking restitution . . . . The emphasis is on the wrongdoer's enrichment, not the victim's loss. In particular, a person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing the same unlawful actions again. Disgorgement may include a restitutionary element, but it may compel a defendant to surrender all money obtained through an unfair business practice . . . regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice. Without this result, there would be an insufficient deterrent to improper conduct that is more profitable than lawful conduct.
> (225 Cal.App.4th at 1482 [internal quotation marks and citations omitted; alterations in original].)

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

B. Evidence Shows Damage Suffered Here

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

As confirmed by sworn testimony from MTC's Senior Vice-President and operations manager, Ms. Sherburn-Cole, the illicit fees and costs MTC charged and received for its illegal work, including with respect to the Sansotas, were added to Nevada debtors' obligations and thus the claim against the debtors by MTC's principals, including Wells Fargo and other creditor-clients. (AA002658, AA003124.) That claim, in total, was effectively recovered to the maximum extent possible by MTC, on behalf of its client, through the acquisition and sale of the Sansotas' home and the collection of the cash money paid therefor, which MTC collected into its own account and then passed on to its client, Wells Fargo (AA002701, AA002718-AA002720, AA002859-AA002860, AA002862, AA003246, AA003396-AA003477.)

2. Plaintiff Laghaei Has Damages

MTC goes to such pains to try to minimize or disregard the proof Plaintiffs have presented related to the full nature and scope of MTC's activities in Nevada, both as to the putative class of Nevada debtors who were subject to MTC's unlawful collection activities and Plaintiff Laghaei more specifically. The undisputed material facts in the record, however, demonstrate Plaintiff Laghaei has suffered thousands of dollars in damages due to MTC's misconduct.

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

2009 on behalf of its creditor-client. (AA002959-AA003003, especially AA002959 and AA002963.) In its own words—taken from these internal documents—MTC "placed borrower [*i.e.*, Plaintiff Laghaei] in a forbearance agreement")—*i.e.*, negotiated and documented a forbearance agreement with him—on its client's behalf relating to Plaintiff Laghaei's defaulted debt. (*Id.*) Pursuant to this forbearance agreement, MTC received (*i.e.*, collected) funds from Plaintiff Laghaei to reinstate his defaulted loan, which funds MTC sent to its creditor-client as payment on the loan. (*Id.*) MTC collected thousands of dollars from Plaintiff Laghaei on behalf of its creditor-client. (*Id.*) MTC also charged him a fee of no less than $150.00 for its services negotiating a forbearance agreement with him relating to his defaulted debt on behalf of its creditor-client in 2009. (AA003425-AA003469.) Insofar as MTC was not licensed by the FID at the time it directed these collection activities at Plaintiff Laghaei, MTC was not entitled to collect this money from him, or to charge him for its services in doing so. Plaintiff Laghaei's damages from MTC's statutory consumer fraud and deceptive trade practice would necessarily include at a minimum these amounts. Once the question of Plaintiffs' damages—rather than MTC's liability—is before the trial court, the full amount of Plaintiff Laghaei's damages is likely to be even higher.

VI. UNJUST ENRICHMENT IS APPLICABLE HERE

A. Plaintiffs Did Not Enter Into A Contract With MTC

As a matter of fact, Plaintiff Sansotas never entered into a contract with MTC. (AA003595.) The analogous Nevada authority is this Court's decision in *Leasepartners Corp. v. The Robert L. Brooks Trust* (1997) 113 Nev. 747, 942 P.2d 182 ("*Leasepartners*"). In Nevada, unjust enrichment occurs whenever "a person has and retains a benefit which is equity and good conscience belongs to another." (*Id.* at 756, 187-188.) In *Leasepartners*, many related contracts existed between and among the entities involved in the transactions at issue, but no contract existed between Leasepartners and the Brooks Trust. (*Id.*) Summary Judgment was therefore reversed. (*Id.*)

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

v. Freeman (1939) 150 Kan. 864; *Fairbanks v. Snow* (1887) 145 Mass. 153; *Bumgardner v. Corey* (1942) 124 W.Va. 373]; *see also generally id.* § 51.

MTC's brief does not reference one of the cornerstones of the law of restitution, as reflected in Section 3 of the Restatement of Restitution, Third, which prohibits "Wrongful Gain." The first comment to Section 3 states: "The present section marks one of the cornerstones of the law of restitution and unjust enrichment. The general principle it identifies is the one underlying the 'disgorgement' remedies in restitution, whereby a claimant potentially recovers more than a provable loss so that the defendant may be stripped of a wrongful gain." (Restatement of Restitution, Third, § 3, and cmt. a [emphasis added].) In other words, under restitution, a knowing wrongdoer like MTC cannot escape full liability and the disgorgement of illicit profit simply because the cash was not taken directly out of the hand of the plaintiff victim (although here, the Sansotas' home was taken and sold and the resulting cash delivered to MTC, which forwarded the cash to Wells Fargo and was paid fees therefor). (*See Kossian v. American Nat. Ins. Co.* (1967) 254 Cal.2d 647; *Guy Tel & Tel. Co., supra,* 329 F.3d 1241 .) Comment (c) to Section 3 of the Restatement of Restitution, Third, states as follows in pertinent part:

> (c) *Recovery Exceeding the Claimant's Loss*
> When the defendant has acted in conscious disregard of the claimant's rights, the whole of the resulting gain is treated as unjust enrichment, even though the defendant's gain may exceed both (i) the measurable injury to the

> claimant, and (ii) the reasonable value of a license authorizing the defendant's conduct. Restitution from a conscious wrongdoer may therefore yield a recovery that is profitable to the claimant plaintiff—a result that is generally not permitted when the restitution claim is against an innocent recipient.
> (Restatement of Restitution, Third, § 3, and cmt. c.)

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

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

MTC's reliance on the deed of trust is also misplaced. MTC was unjustly enriched by its receipt of money—almost $50 million from 2007-2012 (AA003498-AA003499, AA002751-AA002753, AA003751-AA003755)—for

conducting unlicensed collection agency activities, which are illegal under Nevada law. Neither the deed of trust, nor any contract between private parties, can authorize or otherwise justify the commission of illegal acts, and the receipt of illicit compensation therefor. The issue is not simply the non-judicial foreclosure process that may be referenced in a deed of trust. MTC needed a license as a collection agency from the FID. And, the governing issue here concerns unlicensed claim collection agency activities described in the evidence, which are illegal acts under applicable Nevada law, as explained in Plaintiffs' Opening Brief and herein (and below). MTC's argument some provision in the deed of trust allowed it to conduct unlicensed claim collection agency activities in contravention of Nevada law cannot stand; any such provision in the deed of trust is void as a matter of public policy. (*See Magill v. Lewis* (1958) 74 Nev. 381, 333 P.2d 717.)

According to law, where the subject contract is unenforceable, the cause of action for unjust enrichment is valid. (*Id.*) Under this Court's governing authority, the deed of trust cannot authorize defendants to commit illegal acts, and any such contract stipulation is unenforceable such that Plaintiffs' unjust enrichment claims must be sustained. (*See Magill, supra*, 74 Nev. 381, 333 P.2d 717; *Loomis v. Lange Fin. Corp.* (1993) 109 Nev. 1121, 865 P.2d 1161.) As a matter of strong Nevada public policy, Defendants collectively cannot be allowed to enrich themselves with perhaps as much as $80 million dollars in fees for conducting illegal acts, *i.e.*,

unlicensed claim collection agency activities, against Plaintiffs. (*See Loomis, supra*, 109 Nev. 1121, 865 P.2d 1161; *see also Webb v. Clark County School Dist.* (2009) 125 Nev. 611, 218 P.3d 1239; *Vincent v. Santa Cruz* (1982) 98 Nev. 338, 647 P.2d 379.)

VII. CONCLUSION

This Court should reverse the judgment.

Dated this 10th day of July 2018.

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CERTIFICATE OF COMPLIANCE

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

I hereby certify that this brief complies with the requirements of NRAP 32, including NRAP 32(a)(4)-(6). This brief has been prepared in a proportionally-spaced typeface (Times New Roman) of 14 points, using Microsoft Word 2010, and is double-spaced. Excluding the parts of the brief exempted by NRAP 32(a)(7)(c), the brief contains 6,892 words.

Dated this 10th day of July 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of the Law Office of Nicholas A. Boylan, APC, and not a party to this action, and that on July 10, 2018, I e-served a true and correct copy of the foregoing on those listed below:

- **APPELLANTS' REPLY TO RESPONDENT MTC FINANCIAL INC. DBA TRUSTEE CORPS' ANSWERING BRIEF**

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

Executed on July 10, 2018.

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