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 BRIEF TO THE ANSWERING BRIEF OF RESPONDENT CALIFORNIA RECONVEYANCE COMPANY

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 11th day of July 2018.

By: *Nicholas A. Boylan*

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I. INTRODUCTION

Defendants' business model combines the business activities of a collection agent and the traditional role of a non-judicial foreclosure trustee ("trustee"). Defendants argue this Court should issue express judicial authorization in Nevada for businesses exercising any and all collection activities, without rules, limits, or administrative supervision, so long as they attach the "trustee" label to their lapel.

Defendants have not, and cannot, suggest to this Court any workable legal standard and judicial opinion that would set the boundaries of conduct, and misconduct, for their massive and diverse collection agency activities against Nevada residents, using the "trustee" logo as a protective mascot. But, in reality, if you are carrying on a business in Nevada that falls within the definition of NRS 649.020(1), you cannot be a trustee unless you are licensed under NRS 649. (*See, e.g.*, NRS 107.028(1)(i).)

Defendants seek an unqualified order of affirmance, so they can conduct any sort of collection activity against Nevada residents, without collection agency licenses, without compliance with the regulatory requirements applicable to huge businesses executing collection activities, and without any supervision by Nevada's Financial Institutions Division ("FID"). Defendants seek a "blank check" from this Court, and an order that would effectively prohibit the Nevada trial courts from providing restraints and remedies for the protection of Nevada

residents who are the victims of collection misconduct by those businesses conducting "default services", *i.e.*, combination-business entities which, like Defendants here, become substitute trustees only after the Nevada debtors have defaulted on their loans. Can the Court imagine the collection misconduct that would or could then occur if the Court's judgment effected no rules and no supervision for these massive collectors? The FID is designed and statutorily authorized to provide the oversight and regulation of businesses whose activities include debt collection in Nevada.

Boiled down to its essence, Defendants openly seek an order from this Court that would be irresponsible, harmful to Nevadans, and contrary to the important public policies implemented by the Legislature under NRS 649 and NRS 598.0923(1).

II. ALL OF THE FACTS IN THE RECORD AND THUS KNOWN TO THIS COURT AND THE TRIAL COURT MUST BE CONSIDERED TO DETERMINE WHETHER PLAINTIFFS CAN STATE A CLAIM UNDER NRCP 12(b)(5)

Below, the dismissal order drafted by CRC counsel, stated: "Plaintiffs' allegations in the [TAC] and otherwise are acts taken by Defendants within the scope of the non-judicial foreclosure process as permitted by the deed of trust and NRS Chapter 107." (AA005652, ¶14 [emphasis added].) Clearly, as both pleading

and transcript records reflect, the trial court considered the facts alleged and proven by Plaintiffs below, including the summary judgment evidence, not just the allegations within the four corners of the TAC. This was entirely proper, given the applicable legal standard under NRCP 12(b)(5) that an order of dismissal under NRCP 12(b)(5) "will be affirmed only where it appears beyond a doubt that the plaintiff could prove no set of facts . . . [that] would entitle him [or her] to relief." (*Zohar v. Zbiegien* (2014) 334 P.3d 402, 404-405, [internal quotation marks omitted; alterations in original; emphasis added]; *see also, e.g., Buzz Stew, LLC v. City of N. Las Vegas* (2008) 124 Nev. 224, 227-228, 181 P.3d 670, 672.)

Accordingly, the entire record of factual allegations and evidence is properly before this Court for consideration and review under NRCP 12(b)(5). (As discussed below, the evidence in the record is also relevant to whether leave to amend should be granted if the Court concludes further amendment of Plaintiffs' operative complaint is needed.)

III. PLAINTIFFS' FACTS RELATED TO CRC

During discovery, CRC's former president admitted the purpose of CRC's foreclosure services was to obtain money or property to pay defaulted debts in full or in part. (AA004838-AA004841; *see also* NRS 649.020(1).) CRC's business was to perform "default services" for lender-clients. (AA004857.) For defaulted debts, lenders hired CRC to perform services, including giving specific payment

instructions to borrowers in default, and CRC gave such payment instructions to them. (AA004870-AA004871.) CRC provided borrowers in default the breakdown of fees and costs necessary to pay defaulted loans, including the costs and fees for CRC's work, which CRC added to the pay-off or reinstatement amount for defaulted loans. (AA004872-AA004874.)

While operating in Nevada, CRC knew of Nevada's collection agency license requirement because CRC and Chase lawyers discussed CRC obtaining that license. (AA004842-AA004843.)

The majority of CRC's communications with borrowers in default was by telephone. (AA004856.) CRC's various operational units received training regarding telephone communications with borrowers in default. (AA004844-AA004846.) Chase's lawyers required CRC, as a policy and practice, to inform borrowers in default CRC was a debt collector. (AA004862-AA004864.) CRC's practice, according to its former president, was to not make false statements to borrowers; she testified that such never happened during her tenure at CRC. (AA004860-AA004869.) She also admitted CRC stated in writing to borrowers in default CRC was a debt collector; she also indirectly admitted this was a true statement. (*Id.*) A former CRC operational supervisor testified she personally signed a document admitting in writing CRC was a debt collector; that this statement was on the document when she signed it; and that she believed the

admission to be true when she signed the document. (AA004965-AA004967.) She had been with CRC by then for approximately a year. (*Id.*)

For example, on or about November 1, 2011, CRC provided two former named Plaintiffs with a "pay-off statement", which included the following language: "WE ARE A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT. HOWEVER, IF YOU ARE IN BANKRUPTCY OR HAVE BEEN DISCHARGED IN BANKRUPTCY, THIS LETTER IS FOR INFORMATIONAL PURPOSES ONLY AND IS NOT INTENDED AS AN ATTEMPT TO COLLECT A DEBT OR AS AN ACT TO COLLECT, ASSESS, OR RECOVER ALL OR ANY PORTION OF THE DEBT FROM YOU PERSONALLY." (AA004731-AA004732.)

The pay-off statement also stated "the amount required to payoff your loan is $525,950.33. However, if you are not prepared to tender the full amount today, then the amount you owe may increase between the date of this letter and the date you pay-off the loan. The payoff amount may increase because of additional interest and late charges as well as legal fees and costs that are incurred as additional steps in the foreclosure proceed." (*Id.* [emphasis in original].)

From 2009 to 2013, CRC employees were required to have a recording as part of their voice mail message admitting CRC was a debt collector. (AA004969-AA004971.) CRC required its employees to state in their recordings the following:

their names, telephone number, department, and a clause about CRC being a debt collector. (*Id.*) Chase's lawyers provided CRC with instructions, including the requirements for these recorded admissions. (*Id.*)

CRC made collection phone calls to named Plaintiff Susan Kallen. (AA004797-AA004805.) Employees on one CRC referrals team had permission to speak by telephone with debtors. (AA004892.) If borrowers called, employees in CRC's office were able to take the call and get the information from borrowers they needed to have answered, including by responding and providing information to debtors (if CRC had responsive information) by telephone. (*Id.*)

Near the end, CRC had at least 4 people working in its pay-off and reinstatement unit, on defaulted loans; CRC would work with Chase and borrowers on reinstatement of defaulted loans. (AA004826-AA004828.) This was a service CRC conducted for its clients. (*Id.*) During discovery, CRC admitted it received no less than $3,501,103.22 in fees and costs in Nevada between October 1, 2007 and December 31, 2012, from its creditor-client (and owner) Chase. (AA004753-AA004760.)

Of the monies it received (*i.e.*, collected), CRC maintained over $4 million dollars in its trust account, for which CRC's president had responsibility. (AA004829-AA004832; AA004942-AA004945.) CRC's president was a signatory for the trust accounts. (*Id.*) CRC would forward to lenders all funds CRC received

(*i.e.*, collected) from borrowers. (AA004847-AA004850.) All checks CRC received from borrowers in default that were made payable to CRC would be endorsed by CRC and overnighted to lender–clients. (AA004851-AA004853.) CRC had a stamp to endorse checks for just that purpose. (*Id.*) For all of the monies CRC collected for reinstatement and/or pay-off of defaulted debts, CRC was bound, pursuant to its contract with Chase, by various obligations for collection services, one of which was to send Chase all money CRC collected within 24 hours, and CRC did so as a general practice. (AA004882-AA004883.)

During the relevant period in Nevada, Chase was CRC's primary client. (AA004833.) For defaulted loans, the reinstatement and pay-off business was a service CRC provided Chase. (AA004834.) For reinstatement and/or pay-off of defaulted loans, CRC also received requests for information from various parties other than borrowers, and pay-off quotes had to be requested from CRC in writing. (AA004836-AA004837.)

In its communications with borrowers, CRC invited borrowers specifically to contact CRC (not lenders) to discuss pay-off and reinstatement (*i.e.*, collection) of defaulted debts; CRC's express policy was to invite defaulted borrowers to contact it regarding collection of loans by reinstatement and/or pay-off of defaulted debts. (AA004874-AA004877.) CRC's policy also was to instruct borrowers to send it (not lenders) the money necessary to pay-off and/or reinstate defaulted

Nevada debts. (AA004878-AA004879.) As reflected in generic documents or templates CRC produced in discovery, CRC sent reinstatement or pay-off letters to Nevada debtors as part of its collection activities in Nevada during the relevant period. (AA004735-AA004736.) In these documents, CRC admitted it was a debt collector attempting to collect a debt, provided the amounts necessary to reinstate or pay-off defaulted debts, stated the amounts included fees and costs CRC incurred, suggested the Nevada debtor-recipients contact CRC to verify the amounts necessary to reinstate or pay-off defaulted debts, and provided detailed payment instructions, including that the payments be made by certified cashier's check or money order and be sent to CRC directly. (*Id.*)

CRC's pay-off and reinstatement team handled a whole range of activities involved in the reinstatement and pay-off of defaulted loans. (AA004973-AA004974.) These activities included finding relevant information, communicating with creditor-client banks to obtain current information, including amounts necessary to reinstate or pay-off defaulted loans. (*Id.*) CRC's team would then validate that information before providing it to debtors in default. (*Id.*) CRC's team communicated with borrowers to clarify or provide more information regarding reinstatement and pay-off of defaulted loans. (*Id.*) CRC's team gathered money, including checks, CRC received (*i.e.*, collected) to reinstate or pay-off defaulted loans. (*Id.*) Checks generally would go through a CRC clerk before being

transmitted to CRC's reinstatement and pay-off team. (*Id.*) Checks would be matched up to defaulted debts and borrowers' numbers. (*Id*.) If made payable to CRC, checks would be endorsed and sent to CRC's creditor-clients (*e.g.*, Chase). (*Id.*) If checks were made payable to creditor-clients directly, CRC would send them to the relevant creditor-client. (*Id.*) If other problems arose, CRC's team would engage in additional communications, including regarding additional monies. (*Id.*) On some occasions, checks and money received would be to reinstate defaulted loans; on other occasions, they would be to fully pay-off the loans. (*Id.*) When money received was less than the amount required to reinstate or pay-off defaulted debts, CRC's team would engage in further communication with defaulted borrowers to collect the correct amount from them to reinstate or pay-off the defaulted loans. (*Id.*)

CRC's contracts with its creditor-client, Chase, produced by CRC in discovery, show CRC contracted to receive reinstatement and pay-off amounts from debtors on defaulted debts and to forward the money collected by overnight mail to Chase. (AA004733-AA004734.) CRC agreed it would not take its fees for its services out of reinstatement or pay-off proceeds, but would remit the full amount to Chase, and send a subsequent bill for its services to Chase. (*Id.*) CRC contractually agreed it would confirm with Chase whether CRC could accept on Chase's behalf partial payments to reinstate or pay-off defaulted debts. (*Id.*)

CRC's contracts with Chase, effective May 1, 2011, show CRC's client was Chase; CRC agreed to promptly return all telephone calls it received and answer correspondence within one business day of receipt, whether the communications were from Chase, trustees, borrowers, or borrowers' counsel; CRC contracted to produce reinstatement quotes and pay-off quotes and to review them to ensure they complied with applicable law, and to promptly send Chase by overnight delivery all reinstatement and pay-off amounts CRC received; CRC agreed it would promptly send Chase all proceeds CRC obtained from non-judicial foreclosure sales; CRC would obtain prior written approval from Chase before postponing foreclosure sales; CRC agreed to consider all foreclosures, including sales, with Chase's best interests in mind; CRC agreed to indemnify Chase for any costs arising from reversals of non-judicial foreclosure sales due to CRC's errors or omissions; CRC agreed to deliver good and marketable title following non-judicial foreclosure sales, including by advancing payments necessary to pay-off outstanding property taxes or liens on properties; CRC agreed to assist Chase in post-foreclosure sale efforts to deal with tenants and occupants of foreclosed properties, and to take all steps necessary to preserve Chase's right to pursue deficiency judgments against deed of trust debtors; CRC agreed to assist Chase with deed-in-lieu transactions with Nevada debtors and to attempt to solicit loss mitigation workout options when initial foreclosure documents were sent to

borrowers if permitted by applicable law; and CRC agreed not to charge borrowers amounts that were not permitted by borrowers' loan documents or prohibited by applicable law. (*Id.*)

The amounts CRC listed on its pay-off or reinstatement letters—including anticipated foreclosure costs or attorney or trustee fees—would have to be paid by borrowers to reinstate or pay-off their defaulted loans. (AA004987-AA004989.) These amounts would include the trustee's fees CRC charged. (*Id.*) If borrowers paid more (*e.g.*, in fees or costs) than CRC actually incurred or charged, then CRC or its creditor-client would refund them that amount. (*Id.*) According to a former CRC operations manager, CRC passing money received from debtors to pay-off or reinstate defaulted loans to CRC's client, Chase, was "part of a service to our client to send that money to them for them to collect the debt." (AA004904.) CRC's fees and costs associated with foreclosure would generally be added to the obligations of borrowers in default. (AA004914-AA004915.)

IV. CRC MISINTERPRETS NRS 107.028

NRS 107.028 now identifies 10 categories which may serve as a trustee. (*See* NRS 107.028(1).) According to NRS 649.020(1), to the extent the persons or entities within those 10 categories are also engaged in the business of collection agency activities, they must obtain a collection agency license from the FID, and comply with all laws and regulations pursuant to NRS 649 (in addition to simply

holding the nominal status as "trustee"). Knowing the dangers and history of unscrupulous collection agency practices, under NRS 107.028(1)(i), the Legislature mandated that collection agencies cannot serve as trustees unless they are licensed pursuant to NRS 649. The Legislature also expressed caution even with respect to trustees who are simply holding property for particular real estate transactions; specifically, that type of entity may serve as trustee only "if he or she is not regularly engaged in the business of acting as a trustee for such trusts." (NRS 107.028(1)(h) [emphasis added].) Absolutely nothing contained in NRS 107.028 indicates any category of trustee may also be engaged in the business of collection agency activities, such as sending collection letters, making collection phone calls, collecting money from defaulted debtors, collecting money from the family members of defaulted debtors, collecting by means of negotiating deed-in-lieu transactions, collecting money and adjusting loan terms by negotiating loan modification agreements, collecting money and negotiating loan extensions or forbearance agreements, etc., without full compliance with NRS 649. Put simply, the list articulated in NRS 107.028 does not contemplate that any category identified therein may also be engaged in the business of collection agency activities, unless licensed to do so pursuant to NRS 649. (NRS 107.028(1)(i).)

Defendants' misinterpretation must be rejected because it would lead to absurd and perverse results. For instance, attorneys licensed to practice law in

Nevada may act as trustees and conduct non-judicial foreclosure sales. (*See* NRS 107.028(1)(a) [permitting attorneys to be trustees].) In their capacity as attorneys, however, such persons still must comply with the regulations for attorneys established by this Court and Nevada's State Bar, including all licensing requirements. (*See, e.g.*, Nev. Sup. Ct. R. 210 [requiring attorneys to meet the annual minimum continuing legal education requirements]; *id.* 54 [requiring to pay certain fees to practice as an attorney and counselor at law].) By Defendants' logic, however, any such rules and regulations would be rendered void and/or inapplicable whenever attorneys purport to act as trustees and to perform trustees' duties. That is surely not what the Nevada Legislature intended by allowing licensed Nevada attorneys to serve as trustees.

If, as Defendants assert, NRS Chapter 107 exhaustively delineates trustees' rights and liabilities, those guilty of grave breaches of Nevada law would, perversely, be insulated from civil and criminal liability so long as they committed those breaches ostensibly in their capacity as trustees. For example, attorneys serving as trustees who willfully misappropriated or embezzled the proceeds of foreclosure sales they conducted would be clearly subject to the civil sanctions stated in NRS Chapter 107 (and criminal punishment). By Defendants' logic, however, such attorneys could not be subject to any additional sanctions—whether civil or criminal—by, for instance, appropriate law enforcement authorities or

Nevada's State Bar. To state the issue in this way is to realize the fundamental flaw of Defendants' position and the perverse consequences that would ensue were this Court to adopt it.

As presented in Plaintiffs' Opening Brief, other reply papers, and below, the role, powers, and duties of trustees under Nevada law are actually limited and narrow. As Nevada law and the deeds of trust themselves reflect, trustees' role is intended to be restricted to (1) upon default and beneficiaries' instructions, carrying out non-judicial foreclosure sales (including conveying title to successful purchasers after such sales), and (2) reconveying title to borrowers upon satisfaction of debts secured by deeds of trust. (*See, e.g.,* NRS 107.080; *Edelstein v. Bank of N.Y. Mellon* (2012) 128 Nev. 505, 286 P.3d 249, 254-255 ["[I]n a nonjudicial foreclosure, the trustee may sell the property to satisfy the obligation only after certain statutory requirements are met" and discussing statutory requirements]; AA000263-AA000274, AA000407-AA000422; *see also Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 819, 300 P.3d 518, 525 [noting trustee's "agency is a passive one, for the limited purpose of conducting a sale in the event of the trustor's default or reconveying the property upon satisfaction of the debt"][emphasis added; citation and internal quotation marks omitted]; *Madden v. Alaska Mortg. Group* (2002) 54 P.3d 265, 270 ["existing

authority strongly suggests that the duties of a trustee under a deed of trust are usually quite narrow: to conduct a fair sale in the event of the trustor's default"].)

As explained in Plaintiffs' Opening Brief and below, when, as Defendants did here, trustees go beyond their proper, limited role, they violate their duty of impartiality to both trustors and beneficiaries by becoming the agent of only one side, rather than the common agent of both. (*See, e.g.*, Opening Brief, at 45-60 [discussing, *inter alia*, NRS 107.028(6) and *Klem v. Washington Mutual Bank* (Wash. 2013) 176 Wn.2d 771, 295 P.3d 1179].)

V. CRC MISSTATES THE SCOPE AND FUNCTION OF NRS 107

CRC's Reply Brief (pages 21-27) broadly mischaracterizes the intent, function, and scope of various provision of NRS 107. NRS 107.030 does not allow trustees to sue debtors in default for collection, but applies to lawsuits by trustees to clear a cloud on title, or to stop a process of waste, or other issues involving third parties, affecting the value of the property. (*See* NRS 107.030(3); *see also Osuna v. Albertson* (1982) 134 Cal.App.3d 71; *Restatement (Third) of Property: Mortgages*, § 4.6 (1997).) Intended for income properties, NRS 107.100(1) allows trustees to file an action for a receiver, but does not provide that trustees can sue debtors in default for collection, and thus take sides adverse to debtors. (*See also* NRS 107.100(2); *Bank of Am., N.A. v. MPLDP, LLC* (D. Nev. April 25, 2013) 2013 U.S. Dist. LEXIS 60026.) NRS 107.083(2) does not allow trustees to sue

debtors in default for collection; it merely allows trustees to sue the high bidder at a foreclosure sale who then fails to pay, in order to recover from that third party, but not to sue debtors in default for collection, or to pursue any other tactics of pressure, coercion, and collection of payments against defaulted debtors.

VI. CRC'S PREEMPTION ARGUMENT IS WRONG

In their Opening Brief and below, Plaintiffs explain why the Nevada Legislature did not intend NRS Chapter 107 to occupy the entire field of regulation, and CRC's preemption arguments are wrong. (*See, e.g.*, Opening Brief, at 59-63; AA004297-AA004301; AA004642-AA004653.) In the interest of economy, Plaintiffs refer this Court to their previous briefing, and hereby incorporate it by reference. (*See id.*)

VII. CAUSATION IS SHOWN AS A MATTER OF LAW

To evaluate causation for Plaintiffs' first cause of action, this Court must first identify the remedies, including any injunctive relief and damages pled, available under the law. (*See* NRS 41.600.) In replying to MTC, Plaintiffs present argument and authorities regarding damages, and other relief available to them under NRS 41.600, and Plaintiffs' claims for unjust enrichment, and the reasons why Defendants' related arguments are without merit. The same arguments and authorities apply to the other Defendants, and Plaintiffs hereby incorporate by reference their discussion in replying to MTC. As shown therein, damages are <u>not</u>

the only relief available to Plaintiff under NRS 41.600. As also demonstrated therein, Plaintiffs satisfied any causation requirement by adequately alleging Defendants' misconduct caused them harm (*i.e.*, damages), including insofar as Defendants added their illicit fees and costs to Plaintiffs' debts.

As also explained therein, dismissal is prohibited in any event, because the first cause of action survives even if Plaintiffs had not adequately pled damages. Once Plaintiffs prove Defendants operated their collection businesses illegally—*i.e.*, without required licenses—injunctions against them must be granted, requiring Defendants to obtain and maintain such licenses from the FID. Thus, true 'causation' is unnecessary for injunctive relief: once the illegal collection activities are proven, injunctive relief should issue. (*See, e.g.*, *Alaska Trustee, LLC v. Ambridge* (Alas. 2016) 372 P.3d 207 [summary judgement for plaintiff, and injunction issued].)

Finally, to the extent CRC continues to contend unjust enrichment is inappropriate because, according to CRC, deeds of trust are contracts, CRC is mistaken. Plaintiffs' unjust enrichment claims against CRC are valid *even assuming* deeds of trusts are contracts, because they would only be contracts between the borrower-trustor and creditor-beneficiary under the deed of trust, and not a contract between Plaintiffs and Defendants as trustees. (*See, e.g.*, *Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1111 ["The deed of trust constitutes a

contract between the trustor and the beneficiary, with the trustee acting as agent for both and acting pursuant to the terms of the instrument and their instructions" and noting a trustee, as nonsignatory of the deed of trust, is not a party to it].) As Plaintiffs explain in replying to MTC (and below), in such circumstances, an unjust enrichment claim between Plaintiffs and Defendants are valid. (*See, e.g.*, MTC Reply, at 26-29.)

VIII. DEFENDANTS FAIL TO SHOW THEIR FEES ARE NOT ILLICIT

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

Defendants' cases only address whether the unlicensed persons therein could recover compensation from clients for services rendered while lacking required licenses. (*See Nevada Equities, Inc.*, *supra*, 84 Nev. 300, 440 P.2d 122; *Robken*, *supra*, 84 Nev. 433, 442 P.2d 913; *Manzie*, *supra*, 389 F. Supp. 848.) These cases did not address whether such compensation would be illicit with respect to third

parties—such as Plaintiffs—who were damaged by having compensation for illicit services charged to their accounts (*i.e.*, added to their debts).

"Nevada follows the general rule that 'contracts made in contravention of the law do not create a right of action.'" (*Loomis v. Lange Fin. Corp.* (1993) 109 Nev. 1121, 1128, 865 P.2d 1161, 1165 [quoting *Vincent v. Santa Cruz* (1982) 98 Nev. 338, 241, 647 P.2d 379, 381].) Discussing *Nevada Equities, Inc.*, this Court noted it "recognized a narrow exception" to this general rule, when an unlicensed person was not guilty of "serious moral turpitude" or had "substantially complied" with licensing schemes (by, for instance, obtaining general licenses while lacking more specific licenses for specialized services), as in *Nevada Equities, Inc.* (*Id.* [discussing *Nevada Equities, Inc.*, *supra*, 84 Nev. 300, 440 P.2d 122, and *Magill v. Lewis* (1958) 74 Nev. 381, 386, 333 P.2d 717, 720].)

In *Loomis*, an "experienced and sophisticated corporate broker" contracted to sell real estate while lacking the license required by Nevada law.[1] (*Id.* at 1129, 1165.) This Court declined to allow recovery of compensation for the broker's

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

unlicensed services, because its "actions in contravention of Nevada real estate law were blatant, substantial, and repeated."[2] (*Id.*) This Court noted the Nevada Legislature, as with collection agencies, "enacted a comprehensive regulatory scheme" for real estate brokers "for the purpose of protecting the public in their dealings with persons in the real estate profession." (*Id.* at 1127, 1164.) This Court did not rely, as in *Nevada Equities, Inc.*, *Manzie*, or *Robken*, on whether the statutory scheme addressed whether recovery was barred by express statutory provisions. (*Id.* at 1127-1129, 1164-1165.) Instead, this Court concluded the unlicensed broker was barred from recovering fees for its unlawful services. (*Id.*) This Court should reach the same decision: whether Defendants could recover payment from their creditor-clients for services they unlawfully rendered is irrelevant, because, as to third parties such as Plaintiffs, those fees are illicit.

It must be remembered this case does not involve contracts between Plaintiffs and Defendants for unlicensed services. Plaintiffs did not expressly consent to receive services from Defendants which would convey a benefit or

[2] Defendants' suggestion there is no "equitable justification for the draconian remedy of forfeiture" of illicit fees is wrong for reasons reflected in both *Nevada Equities, Inc.* and *Loomis*. In the former, this Court allowed a narrow exception for recovery because, unlike here, the unlicensed party had substantially complied with the regulatory licensing scheme. In contrast, in *Loomis*, this Court noted "blatant, substantial, and repeated" violations of regulatory licensing schemes did not qualify as substantial compliance. (*See Loomis*, *supra*, at 1129.) Defendants' blatant, substantial, and repeated violations of Nevada's collection agency licensing laws are precisely the kind of misconduct justifying forfeiture of illicit fees obtained through their violations, and improperly added to Plaintiffs' debts.

substantial value to Plaintiffs or their homes. Quite the opposite occurred: because of Defendants' unlicensed services, Plaintiffs suffered serious harm, including, in many instances, the loss—and perhaps premature loss—of the use of their homes. There is no unfairness in requiring Defendants to disgorge money they unlawfully received as payment for their illicit fees and costs.

IX. IN THE UNLIKELY EVENT AMENDMENT OF THE COMPLAINT IS DEEMED NECESSARY, AMENDMENT IS APPROPRIATE HERE

Strong public policy is reflected in this Court's mandate that amendment of complaints is to be liberally allowed, in order to achieve adjudication on the merits, as a matter of fundamental fairness and due process. Nevada's rules make clear "leave [to amend] shall be freely given when justice so requires," and this mandate should be heeded. (NRCP 15(a); *State v. Sutton* (2004) 120 Nev. 972, 987-988, 103 P.3d 8, 18-19; *see also Foman v. Davis* (1962) 371 U.S. 178, 182; *Owens v. Kaiser Found. Health Plan, Inc.* (9th Cir. 2001) 244 F. 3d 708, 712 [policy "to be applied with extreme liberality."][emphasis added].) No published opinion of this Court exists that would guide the process of pleading in this matter; it is a case of first impression. In the court below, Plaintiffs did suggest a fourth amendment could occur, and/or that Plaintiffs could add facts and/or theories related to estoppel and Defendants' misconduct (*see, e.g.*, AA004280-AA004281; AA005616-

AA005617), but the issue of amendment seemed remote given the trial court's declaration that in the course of their collection business, so long as they held the "trustee" label, Defendants could engage in any collection business activities short of the commission of crimes. (*See id.*; *see also* AA004338-AA004339).

CRC complains of prior amendments, but there has been no adverse consequence or prejudice to Defendants. Amendment in federal court was necessary to demonstrate to the Ninth Circuit federal jurisdiction did not exist here, based on the statutory exception to the Class Action Fairness Act. (*See* AA000038-AA000063.) This was successful, but had no relevance to Plaintiffs' Nevada law claims.

Moreover, it is ironic Defendants contests the possibility of amendment, given their massive discovery obstruction, requiring Plaintiffs to file sixteen motions to compel in the space of one year, and the Discovery Commissioner's erroneous and highly restrictive "phasing" of discovery. (*See, e.g.*, AA000885-AA000894.) For example, the Discovery Commissioner erroneously determined Defendants were not required to disclose to Plaintiffs how much money they collected from Nevada debtors who were in default. (*See id.*; *see also* AA000915-AA001031, AA002378-AA002508) The Discovery Commissioner ruled erroneously Defendants were not required to give Plaintiffs' counsel the names and contact information for the most critical witnesses in the case, specifically the other

Nevadans who were subject to Defendants' collection activities and who would likely have given testimony about a variety of collection actions, including phone calls, demands for money, collection of money, etc. (*See id.*, including specifically AA000930.) Similarly, the Discovery Commissioner ruled Defendants were not required to give Plaintiffs all of Defendants' written correspondence with all of the Nevada debtors (except the named Plaintiffs), which would have shown Defendants' (massive) business in Nevada of debt collection, and contained revelations comparable to the letters attached as exhibits to the Third Amended Complaint. (*Id.*)

Contrary to law, justice, and fairness, Defendants' proposed theory and tactic is to completely obstruct and hide the ball, and thus prohibit effective gathering of all pertinent facts for purposes of amendment, and then have the court foreclose amendment. This Court should decline to endorse the tactic. Moreover, the massive evidence assembled below in opposition to summary judgment, as well as the prospect of further penetrating discovery on remand, demonstrates Plaintiffs will be able to satisfy any potential pleading requirements imposed by this Court's decision in this matter.

X. CONCLUSION

For these reasons, and the reasons stated in Plaintiffs' Opening Brief and other Reply Briefs, this Court should reverse the judgment, and remand the matter

for further proceedings, including proper discovery, and class certification, consistent with this Court's opinion.

Dated this 11th 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I hereby certify 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 5,277 words.

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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 11, 2018, I e-served a true and correct copy of the foregoing on those listed below:

- **APPELLANTS' REPLY BRIEF TO THE ANSWERING BRIEF OF RESPONDENT CALIFORNIA RECONVEYANCE COMPANY**

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

Executed on July 11, 2018.

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