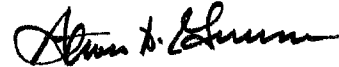


ATTACHMENT 4, EXHIBIT A



CLERK OF THE COURT

1 **SAO**
2 G. MARK ALBRIGHT, ESQ., #001394
3 D. CHRIS ALBRIGHT, ESQ., #004904
4 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**
5 801 South Rancho Drive, Suite D-4
6 Las Vegas, Nevada 89106
7 Tel: (702) 384-7111 / Fax: (702) 384-0605
8 gma@albrightstoddard.com
9 dca@albrightstoddard.com
10 *Attorneys for Plaintiff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 **BRANCH BANKING & TRUST COMPANY,**
14 a North Carolina corporation,

CASE NO. A-16-744561-C

15 Plaintiff,

DEPT NO. XXXI

16 vs.

17 **DOUGLAS D. GERRARD, ESQ.,** individually;
18 and GERRARD COX & LARSEN, a Nevada
19 professional corporation, JOHN DOES I-X; and
20 ROE BUSINESS ENTITIES XI-XX,

**STIPULATION AND ORDER TO
DISMISS THE SECOND CAUSE OF
ACTION FROM THE PLAINTIFF'S
COMPLAINT**

21 Defendants.

22 **COMES NOW**, Plaintiff, BRANCH BANKING & TRUST COMPANY (hereinafter
23 "Plaintiff" or "BB&T"), by and through its undersigned counsel of record, ALBRIGHT,
24 STODDARD, WARNICK & ALBRIGHT, and Defendants, DOUGLAS D. GERRARD, ESQ.
25 and GERRARD COX & LARSEN (hereinafter collectively "Defendants"), by and through their
26 undersigned counsel of record, GORDON & REES LLP, and hereby stipulate and agree to the
27 entry of an Order as follows:

28 WHEREAS, Plaintiff filed its Complaint initiating this litigation on October 5, 2016; and

WHEREAS, this suit involves claims for legal malpractice arising out of earlier litigation
(the "underlying suit") in which the Plaintiff alleges it was represented by the Defendants; and

WHEREAS, Defendants have not yet filed an Answer to the Complaint, but have filed a
Motion to Dismiss the Complaint, which, together with various related filed requests, oppositions,

LAW OFFICES
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A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
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LAS VEGAS, NEVADA 89106
LAS VEGAS, NEVADA 89106



1 alternative counter motions, replies, etc. (all jointly hereinafter the "Pending MTD Filings") are set
2 to be heard on February 7, 2017 at 10:00 a.m. (hereinafter the "Pending MTD Hearing"); and

3 WHEREAS, Plaintiff and Defendants are willing and desire to stipulate to the dismissal of
4 the Second Cause of Action set forth in Plaintiff's Complaint, and to dismiss and strike certain
5 other paragraphs of the Complaint which relate thereto;

6 NOW THEREFORE, the Parties hereto, by and through their undersigned counsel, hereby
7 stipulate and agree that an Order may enter herein as follows:

8 1. The Second Cause of Action in the Plaintiff's Complaint is hereby dismissed, with
9 prejudice, each party to bear its own costs and attorneys' fees.

10 2. Paragraphs 113, 114, 127, and 130 through 142 of the Complaint are hereby
11 stricken from the Complaint, and dismissed, with prejudice, each party to bear its own costs and
12 attorneys' fees.

13 3. Item B of the Prayers for Relief in the Plaintiff's Complaint, seeking punitive
14 damages, is hereby dismissed from said Complaint, each party to bear its own costs and attorneys'
15 fees.

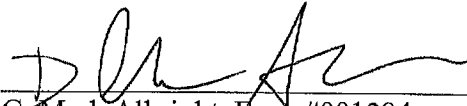
16 4. The above dismissed cause of action, allegations, and prayer for relief are all
17 hereinafter jointly referred to as the "Dismissed Claim."

18 5. The Pending MTD Hearing on the Pending MTD Filings shall remain scheduled
19 for February 7, 2017 at 10:00 a.m., with respect to the remaining claims at issue in the Complaint,
20 and the parties retain all claims and defenses and arguments with respect to said remaining claims
21 still alleged of record and still on file in the suit, including the First and the Third Cause of Action
22 in the Complaint; but no arguments shall be necessary at the MTD Hearing with respect to the
23 Dismissed Claim, and any references in the Pending MTD Filings, seeking to dismiss or preserve,
24 challenge or defend, the Dismissed Claim, are hereby deemed withdrawn as moot, and need not be
25 discussed at the Pending MTD Hearing or addressed in any Order of this Court following the
26 Pending MTD Hearing.

27 //


1 DATED this 31st day of January, 2017.

2 ALBRIGHT, STODDARD, WARNICK
3 & ALBRIGHT

4 By: 
5 G. Mark Albright, Esq. #001394
6 D. Chris Albright, Esq.
7 Nevada Bar No. 4904
8 801 S. Rancho Dr., Suite D-4
9 Las Vegas, Nevada 89106
10 dca@albrightstoddard.com
11 bstoddard@albrightstoddard.com
12 Attorneys for Defendant/Counterclaimant
13 *Eziagu Properties, LLC*

DATED this 27th day of January, 2017.

GORDON & REES LLP

By: 
Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101
Tel: 702.577.9310 Fax: 702.255.2858
cmariam@gordonrees.com
rlarsen@gordonrees.com
wwong@gordonrees.com
Attorney for Defendants

ORDER

IT IS HEREBY SO ORDERED; and, it is further HEREBY ORDERED THAT:

1. The Second Cause of Action in the Plaintiff's Complaint is hereby dismissed, with prejudice, each party to bear its own costs and attorneys' fees.
2. Paragraphs 113, 114, 127, and 130 through 142 of the Complaint are hereby stricken from the Complaint, and dismissed, with prejudice, each party to bear its own costs and attorneys' fees.
3. Item B of the Prayers for Relief in the Plaintiff's Complaint, seeking punitive damages, is hereby dismissed from said Complaint, each party to bear its own costs and attorneys' fees.
4. The above dismissed cause of action, allegations, and prayer for relief are all hereinafter jointly referred to as the "Dismissed Claim."
5. The Pending MTD Hearing on the Pending MTD Filings shall remain scheduled for February 7, 2017 at 10:00 a.m., with respect to the remaining claims at issue in the Complaint, and the parties retain all claims and defenses and arguments with respect to said remaining claims still alleged of record and still on file in the suit, including the First and the Third Cause of Action in the Complaint; but no arguments shall be necessary at the MTD Hearing with respect to the Dismissed Claim, and any references in the Pending MTD Filings, seeking to dismiss or preserve,

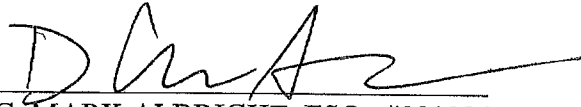
1 challenge or defend, the Dismissed Claim, are hereby deemed withdrawn as moot, and need not
2 be discussed at the Pending MTD Hearing or addressed in any Order of this Court following the
3 Pending MTD Hearing.

4 DATED this 1st day of February, 2017.

6 
7 JOANNA S. KISHNER
DISTRICT COURT JUDGE

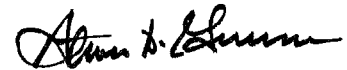
8 Respectfully submitted,

9 ALBRIGHT, STODDARD, WARNICK
10 & ALBRIGHT

11 
12 G. MARK ALBRIGHT, ESQ., #001394
13 D. CHRIS ALBRIGHT, ESQ., #004904
14 801 South Rancho Drive, Suite D-4
15 Las Vegas, Nevada 89106
16 Tel: (702) 384-7111
17 gma@albrightstoddard.com
18 dca@albrightstoddard.com
19 *Attorneys for Plaintiff*

LAW OFFICES
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LAS VEGAS, NEVADA 89106

ATTACHMENT 4, EXHIBIT B



CLERK OF THE COURT

NTSO

G. MARK ALBRIGHT, ESQ., #001394
D. CHRIS ALBRIGHT, ESQ., #004904
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dca@albrightstoddard.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a
North Carolina corporation,

CASE NO. A-16-744561-C

Plaintiff,

DEPT NO. XXXI

vs.

DOUGLAS D. GERRARD, ESQ., individually;
and GERRARD COX & LARSEN, a Nevada
professional corporation, JOHN DOES I-X; and
ROE BUSINESS ENTITIES XI-XX,


**NOTICE OF ENTRY OF STIPULATION
AND ORDER TO DISMISS THE
SECOND CAUSE OF ACTION FROM
THE PLAINTIFF'S COMPLAINT**

Defendants.

PLEASE TAKE NOTICE that a STIPULATION AND ORDER TO DISMISS THE
SECOND CAUSE OF ACTION FROM THE PLAINTIFF'S COMPLAINT was entered in the
above entitled action on the 6th day of February, 2017. A true and correct copy of the Stipulation
and Order is attached hereto.

DATED this 7th day of February, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT



G. MARK ALBRIGHT, ESQ., #001394
D. CHRIS ALBRIGHT, ESQ., #004904
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Tel: (702) 384-7111
Attorneys for Plaintiff

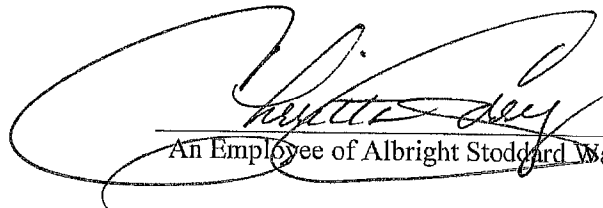
LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

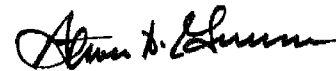
CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 7th day of February, 2017, service was made by the following mode/method a true and correct copy of the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER TO DISMISS THE SECOND CAUSE OF ACTION FROM THE PLAINTIFF'S COMPLAINT** to the following person(s):

Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
GORDON & REES LLP
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101
Tel: 702.577.9310 Fax: 702.255.2858
cmariam@gordonrees.com
rlarsen@gordonrees.com
wwong@gordonrees.com
Attorney for Defendants

☐ Certified Mail
☒ Electronic Filing/Service
☐ Email
☐ Facsimile
☐ Hand Delivery
☐ Regular Mail


An Employee of Albright Stoddard Warnick & Albright



CLERK OF THE COURT

1 **SAO**
2 G. MARK ALBRIGHT, ESQ., #001394
3 D. CHRIS ALBRIGHT, ESQ., #004904
4 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**
5 801 South Rancho Drive, Suite D-4
6 Las Vegas, Nevada 89106
7 Tel: (702) 384-7111 / Fax: (702) 384-0605
8 gma@albrightstoddard.com
9 dca@albrightstoddard.com
10 *Attorneys for Plaintiff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 **BRANCH BANKING & TRUST COMPANY,**
14 a North Carolina corporation,

15 Plaintiff,

16 vs.

17 **DOUGLAS D. GERRARD, ESQ.,** individually;
18 and GERRARD COX & LARSEN, a Nevada
19 professional corporation, JOHN DOES I-X; and
20 ROE BUSINESS ENTITIES XI-XX,

21 Defendants.

CASE NO. A-16-744561-C

DEPT NO. XXXI

22 **STIPULATION AND ORDER TO
DISMISS THE SECOND CAUSE OF
ACTION FROM THE PLAINTIFF'S
COMPLAINT**

23 **COMES NOW**, Plaintiff, BRANCH BANKING & TRUST COMPANY (hereinafter
24 "Plaintiff" or "BB&T"), by and through its undersigned counsel of record, ALBRIGHT,
25 STODDARD, WARNICK & ALBRIGHT, and Defendants, DOUGLAS D. GERRARD, ESQ.
26 and GERRARD COX & LARSEN (hereinafter collectively "Defendants"), by and through their
27 undersigned counsel of record, GORDON & REES LLP, and hereby stipulate and agree to the
28 entry of an Order as follows:

WHEREAS, Plaintiff filed its Complaint initiating this litigation on October 5, 2016; and

WHEREAS, this suit involves claims for legal malpractice arising out of earlier litigation
(the "underlying suit") in which the Plaintiff alleges it was represented by the Defendants; and

WHEREAS, Defendants have not yet filed an Answer to the Complaint, but have filed a
Motion to Dismiss the Complaint, which, together with various related filed requests, oppositions,



1 alternative counter motions, replies, etc. (all jointly hereinafter the "Pending MTD Filings") are set
2 to be heard on February 7, 2017 at 10:00 a.m. (hereinafter the "Pending MTD Hearing"); and

3 WHEREAS, Plaintiff and Defendants are willing and desire to stipulate to the dismissal of
4 the Second Cause of Action set forth in Plaintiff's Complaint, and to dismiss and strike certain
5 other paragraphs of the Complaint which relate thereto;

6 NOW THEREFORE, the Parties hereto, by and through their undersigned counsel, hereby
7 stipulate and agree that an Order may enter herein as follows:

8 1. The Second Cause of Action in the Plaintiff's Complaint is hereby dismissed, with
9 prejudice, each party to bear its own costs and attorneys' fees.

10 2. Paragraphs 113, 114, 127, and 130 through 142 of the Complaint are hereby
11 stricken from the Complaint, and dismissed, with prejudice, each party to bear its own costs and
12 attorneys' fees.

13 3. Item B of the Prayers for Relief in the Plaintiff's Complaint, seeking punitive
14 damages, is hereby dismissed from said Complaint, each party to bear its own costs and attorneys'
15 fees.

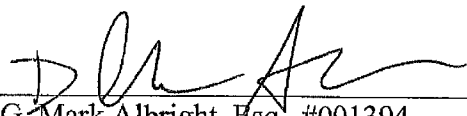
16 4. The above dismissed cause of action, allegations, and prayer for relief are all
17 hereinafter jointly referred to as the "Dismissed Claim."

18 5. The Pending MTD Hearing on the Pending MTD Filings shall remain scheduled
19 for February 7, 2017 at 10:00 a.m., with respect to the remaining claims at issue in the Complaint,
20 and the parties retain all claims and defenses and arguments with respect to said remaining claims
21 still alleged of record and still on file in the suit, including the First and the Third Cause of Action
22 in the Complaint; but no arguments shall be necessary at the MTD Hearing with respect to the
23 Dismissed Claim, and any references in the Pending MTD Filings, seeking to dismiss or preserve,
24 challenge or defend, the Dismissed Claim, are hereby deemed withdrawn as moot, and need not be
25 discussed at the Pending MTD Hearing or addressed in any Order of this Court following the
26 Pending MTD Hearing.

27 //

1 DATED this 31st day of January, 2017.

2 **ALBRIGHT, STODDARD, WARNICK**
3 **& ALBRIGHT**

4 By: 
5 G. Mark Albright, Esq. #001394
6 D. Chris Albright, Esq.
7 Nevada Bar No. 4904
8 801 S. Rancho Dr., Suite D-4
9 Las Vegas, Nevada 89106
10 dca@albrightstoddard.com
11 bstoddard@albrightstoddard.com
12 *Attorneys for Defendant/Counterclaimant*
13 *Eziagu Properties, LLC*

DATED this 27th day of January, 2017.

GORDON & REES LLP

By: 
Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101
Tel: 702.577.9310 Fax: 702.255.2858
cmariam@gordonrees.com
rlarsen@gordonrees.com
wwong@gordonrees.com
Attorney for Defendants

ORDER

IT IS HEREBY SO ORDERED; and, it is further **HEREBY ORDERED THAT:**

1. The Second Cause of Action in the Plaintiff's Complaint is hereby dismissed, with prejudice, each party to bear its own costs and attorneys' fees.
2. Paragraphs 113, 114, 127, and 130 through 142 of the Complaint are hereby stricken from the Complaint, and dismissed, with prejudice, each party to bear its own costs and attorneys' fees.
3. Item B of the Prayers for Relief in the Plaintiff's Complaint, seeking punitive damages, is hereby dismissed from said Complaint, each party to bear its own costs and attorneys' fees.
4. The above dismissed cause of action, allegations, and prayer for relief are all hereinafter jointly referred to as the "Dismissed Claim."
5. The Pending MTD Hearing on the Pending MTD Filings shall remain scheduled for February 7, 2017 at 10:00 a.m., with respect to the remaining claims at issue in the Complaint, and the parties retain all claims and defenses and arguments with respect to said remaining claims still alleged of record and still on file in the suit, including the First and the Third Cause of Action in the Complaint; but no arguments shall be necessary at the MTD Hearing with respect to the Dismissed Claim, and any references in the Pending MTD Filings, seeking to dismiss or preserve,

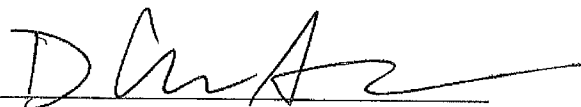
1 challenge or defend, the Dismissed Claim, are hereby deemed withdrawn as moot, and need not
2 be discussed at the Pending MTD Hearing or addressed in any Order of this Court following the
3 Pending MTD Hearing.

4 DATED this 1st day of February, 2017.

5
6 
7 JOANNA S. KISHNER
8 DISTRICT COURT JUDGE

8 Respectfully submitted,

9 **ALBRIGHT, STODDARD, WARNICK**
10 **& ALBRIGHT**

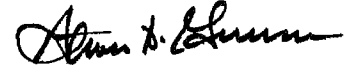
11 
12 G. MARK ALBRIGHT, ESQ., #001394
13 D. CHRIS ALBRIGHT, ESQ., #004904
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15 Las Vegas, Nevada 89106
16 Tel: (702) 384-7111
17 gma@albrightstoddard.com
18 dca@albrightstoddard.com
19 *Attorneys for Plaintiff*

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LAS VEGAS, NEVADA 89106

ATTACHMENT 4, EXHIBIT C

1 **SAO**
2 G. MARK ALBRIGHT, ESQ., #001394
3 D. CHRIS ALBRIGHT, ESQ., #004904
4 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**
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6 Las Vegas, Nevada 89106
7 Tel: (702) 384-7111 / Fax: (702) 384-0605
8 gma@albrightstoddard.com
9 dca@albrightstoddard.com
10 *Attorneys for Plaintiff*

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CLERK OF THE COURT

7
8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 **BRANCH BANKING & TRUST COMPANY,**
11 a North Carolina corporation,

12 Plaintiff,

13 vs.

14 **DOUGLAS D. GERRARD, ESQ.,** individually;
15 and GERRARD COX & LARSEN, a Nevada
16 professional corporation, JOHN DOES I-X; and
17 ROE BUSINESS ENTITIES XI-XX,

18 Defendants.

CASE NO. A-16-744561-C

DEPT NO. XXVII

19 **STIPULATION AND ORDER**
20 **TO WITHDRAW WITHOUT**
21 **PREJUDICE AND VACATE ANY**
22 **SCHEDULED HEARINGS ON**
23 **MOTION TO DISMISS AND**
24 **REQUESTS FOR JUDICIAL NOTICE**

25 **COMES NOW**, Plaintiff, BRANCH BANKING & TRUST COMPANY (hereinafter
26 "Plaintiff" or "BB&T"), by and through its undersigned counsel of record, ALBRIGHT,
27 STODDARD, WARNICK & ALBRIGHT, and Defendants, DOUGLAS D. GERRARD, ESQ.
28 and GERRARD COX & LARSEN (hereinafter collectively "Defendants"), by and through their
undersigned counsel of record, GORDON & REES LLP, and hereby stipulate and agree to the
entry of an Order as follows:

WHEREAS, the Plaintiff filed its initial Complaint initiating these proceedings on October
5, 2016; and

WHEREAS, the Defendants filed a Motion to Dismiss, and a Request for Judicial Notice
on November 21, 2016; and

1 WHEREAS, the Defendants also filed Requests for Judicial Notice on November 21, 2016
2 and on January 17, 2017, and the Plaintiff also filed a Request for Judicial Notice on December
3 28, 2016; and

4 WHEREAS, prior to the date set for hearing on said Motion and Requests, certain of the
5 claims set forth in the Complaint were dismissed by stipulation and order entered on February 6,
6 2017, leading certain of the arguments in the briefs to become moot; and

7 WHEREAS said Motion and Requests were to be heard on February 7, 2017 before
8 Department 31; and

9 WHEREAS, at said hearing, the district court judge provided and disclosed certain
10 information relating to the possible appearance of a possible conflict of interest, leading both law
11 firms to jointly ask the Judge presiding in Department 31 to recuse herself, thus leading to the
12 reassignment of this case to the instant department; and

13 WHEREAS, the Motion to Dismiss and related Requests are now to be rescheduled for
14 hearing before this Court on a new date; and

15 WHEREAS, based on the stipulation and order to dismiss having withdrawn one of the
16 causes of action which is still referenced in the existing briefs, and based on the parties having
17 opposed certain of each other's requests for judicial notice, but not other requests which might be
18 able to be stipulated, the parties believe that it would be in their own and this Court's best interest
19 to cleanup and clarify the record before any subsequent hearing;

20 NOW THEREFORE, the parties hereto, by and through their undersigned counsel of
21 record, hereby agree and stipulate to the entry of an Order as follows:

22 1. Defendants' Motion to Dismiss filed on November 21, 2016 is hereby
23 withdrawn, without prejudice, and any hearing currently scheduled thereon is hereby
24 vacated without prejudice.

25 2. All of the Defendants' and the Plaintiff's existing Requests for Judicial
26 Notice are hereby withdrawn, without prejudice, and any hearing(s) currently scheduled
27 thereon are hereby vacated without prejudice.

28 3. No responsive pleading, as defined by NRCP 7(a) having yet been filed in
response to the original Complaint of the Plaintiff, Plaintiff remains entitled to file an

Amended Complaint pursuant to NRCP 15(a) without prior leave of Court, and Plaintiff shall do so within three (3) days of the notice of entry of this Order, or prior thereto.

4. Defendants shall have fourteen (14) days from the filing of the Amended Complaint to re-file a new Motion to Dismiss relating to the Amended Complaint, or to file a responsive pleading to the Amended Complaint if they choose to do so in lieu of refileing a new Motion to Dismiss.

DATED this 13th day of February, 2017.

DATED this 13th day of February, 2017.

**ALBRIGHT, STODDARD, WARNICK
& ALBRIGHT**

GORDON & REES LLP

By: 

G. Mark Albright, Esq.
Nevada Bar No. 1394
D. Chris Albright, Esq.
Nevada Bar No. 4904
801 S. Rancho Dr., Suite D-4
Las Vegas, Nevada 89106
Tel: 702.384.7111
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bstoddard@albrightstoddard.com
*Attorneys for Defendant/Counterclaimant
Eziagu Properties, LLC*

By: 

Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
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cmariam@gordonrees.com
rlarsen@gordonrees.com
wwong@gordonrees.com
Attorney for Defendants

ORDER

IT IS HEREBY SO ORDERED; and, it is further **HEREBY ORDERED THAT:**

1. Defendants' Motion to Dismiss filed on November 21, 2016 is hereby withdrawn, without prejudice, and any hearing currently scheduled thereon is hereby vacated without prejudice.

2. All of the Defendants' and the Plaintiff's existing Requests for Judicial Notice are hereby withdrawn, without prejudice, and any hearing(s) currently scheduled thereon are hereby vacated without prejudice.

3. No responsive pleading, as defined by NRCP 7(a) having yet been filed in response to the original Complaint of the Plaintiff, Plaintiff remains entitled to file an Amended Complaint

1 pursuant to NRCP 15(a) without prior leave of Court, and Plaintiff shall do so within three (3)
2 days of the notice of entry of this Order, or prior thereto.

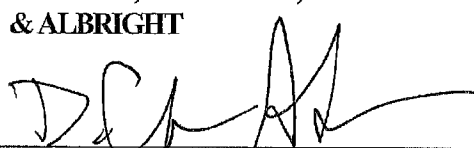
3 4. Defendants shall have fourteen (14) days from the filing of the Amended
4 Complaint to re-file a new Motion to Dismiss relating to the Amended Complaint, or to file a
5 responsive pleading to the Amended Complaint if they choose to do so in lieu of refileing a new
6 Motion to Dismiss.

7 DATED this 13 day of Feb, 2017.

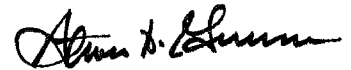
8
9
10 Nancy L. Albright
DISTRICT COURT JUDGE

11 Respectfully submitted,

12 **ALBRIGHT, STODDARD, WARNICK**
13 **& ALBRIGHT**

14 
15 G. MARK ALBRIGHT, ESQ., #001394
16 D. CHRIS ALBRIGHT, ESQ., #004904
17 801 South Rancho Drive, Suite D-4
18 Las Vegas, Nevada 89106
19 Tel: (702) 384-7111
20 gma@albrightstoddard.com
21 dca@albrightstoddard.com
22 *Attorneys for Plaintiff*
23
24
25
26
27
28

ATTACHMENT 4, EXHIBIT D



CLERK OF THE COURT

1 NTSO

2 G. MARK ALBRIGHT, ESQ., #001394

3 D. CHRIS ALBRIGHT, ESQ., #004904

4 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**

5 801 South Rancho Drive, Suite D-4

6 Las Vegas, Nevada 89106

7 Tel: (702) 384-7111 / Fax: (702) 384-0605

8 gma@albrightstoddard.com / dca@albrightstoddard.com

9 *Attorneys for Plaintiff*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 BRANCH BANKING & TRUST COMPANY, a
13 North Carolina corporation,

14 Plaintiff,

15 vs.

16 DOUGLAS D. GERRARD, ESQ., individually;
17 and GERRARD COX & LARSEN, a Nevada
18 professional corporation, JOHN DOES I-X; and
19 ROE BUSINESS ENTITIES XI-XX,

20 Defendants.

CASE NO. A-16-744561-C


DEPT NO. XXVII

**NOTICE OF ENTRY OF STIPULATION
AND ORDER TO WITHDRAW
WITHOUT PREJUDICE AND VACATE
ANY SCHEDULED HEARINGS ON
MOTION TO DISMISS AND
REQUESTS FOR JUDICIAL NOTICE**

21 **PLEASE TAKE NOTICE** that a STIPULATION AND ORDER TO WITHDRAW
22 WITHOUT PREJUDICE AND VACATE ANY SCHEDULED HEARINGS ON MOTION TO
23 DISMISS AND REQUESTS FOR JUDICIAL NOTICE was entered in the above entitled action
24 on the 16th day of February, 2017. A true and correct copy of the Stipulation and Order is
25 attached hereto.

26 **DATED** this 16th day of February, 2017.

27 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**

28 
G. MARK ALBRIGHT, ESQ., #001394

D. CHRIS ALBRIGHT, ESQ., #004904

801 South Rancho Drive, Suite D-4

Las Vegas, Nevada 89106

Tel: (702) 384-7111

Attorneys for Plaintiff

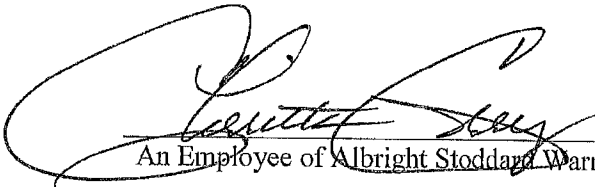
LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 17th day of February, 2017, service was made by the following mode/method a true and correct copy of the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER TO WITHDRAW WITHOUT PREJUDICE AND VACATE ANY SCHEDULED HEARINGS ON MOTION TO DISMISS AND REQUESTS FOR JUDICIAL NOTICE** to the following person(s):

Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
GORDON & REES LLP
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101
Tel: 702.577.9310 Fax: 702.255.2858
cmariam@gordonrees.com
rlarsen@gordonrees.com
wwong@gordonrees.com
Attorney for Defendants

☐ Certified Mail
☒ Electronic Filing/Service
☐ Email
☐ Facsimile
☐ Hand Delivery
☐ Regular Mail


An Employee of Albright Stoddard Warnick & Albright

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1 **SAO**

2 G. MARK ALBRIGHT, ESQ., #001394

3 D. CHRIS ALBRIGHT, ESQ., #004904

4 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**

5 801 South Rancho Drive, Suite D-4

6 Las Vegas, Nevada 89106

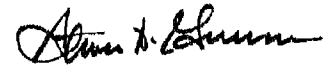
7 Tel: (702) 384-7111 / Fax: (702) 384-0605

8 gma@albrightstoddard.com

9 dca@albrightstoddard.com

10 *Attorneys for Plaintiff*

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CLERK OF THE COURT

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 **BRANCH BANKING & TRUST COMPANY,**
14 a North Carolina corporation,

15 **Plaintiff,**

16 **vs.**

17 **DOUGLAS D. GERRARD, ESQ., individually;**
18 **and GERRARD COX & LARSEN, a Nevada**
19 **professional corporation, JOHN DOES I-X; and**
20 **ROE BUSINESS ENTITIES XI-XX,**

21 **Defendants.**

CASE NO. A-16-744561-C

DEPT NO. XXVII

22 **STIPULATION AND ORDER**
23 **TO WITHDRAW WITHOUT**
24 **PREJUDICE AND VACATE ANY**
25 **SCHEDULED HEARINGS ON**
26 **MOTION TO DISMISS AND**
27 **REQUESTS FOR JUDICIAL NOTICE**

28 **COMES NOW**, Plaintiff, BRANCH BANKING & TRUST COMPANY (hereinafter
"Plaintiff" or "BB&T"), by and through its undersigned counsel of record, ALBRIGHT,
STODDARD, WARNICK & ALBRIGHT, and Defendants, DOUGLAS D. GERRARD, ESQ.
and GERRARD COX & LARSEN (hereinafter collectively "Defendants"), by and through their
undersigned counsel of record, GORDON & REES LLP, and hereby stipulate and agree to the
entry of an Order as follows:

WHEREAS, the Plaintiff filed its initial Complaint initiating these proceedings on October
5, 2016; and

WHEREAS, the Defendants filed a Motion to Dismiss, and a Request for Judicial Notice
on November 21, 2016; and

1 WHEREAS, the Defendants also filed Requests for Judicial Notice on November 21, 2016
2 and on January 17, 2017, and the Plaintiff also filed a Request for Judicial Notice on December
3 28, 2016; and

4 WHEREAS, prior to the date set for hearing on said Motion and Requests, certain of the
5 claims set forth in the Complaint were dismissed by stipulation and order entered on February 6,
6 2017, leading certain of the arguments in the briefs to become moot; and

7 WHEREAS said Motion and Requests were to be heard on February 7, 2017 before
8 Department 31; and

9 WHEREAS, at said hearing, the district court judge provided and disclosed certain
10 information relating to the possible appearance of a possible conflict of interest, leading both law
11 firms to jointly ask the Judge presiding in Department 31 to recuse herself, thus leading to the
12 reassignment of this case to the instant department; and

13 WHEREAS, the Motion to Dismiss and related Requests are now to be rescheduled for
14 hearing before this Court on a new date; and

15 WHEREAS, based on the stipulation and order to dismiss having withdrawn one of the
16 causes of action which is still referenced in the existing briefs, and based on the parties having
17 opposed certain of each other's requests for judicial notice, but not other requests which might be
18 able to be stipulated, the parties believe that it would be in their own and this Court's best interest
19 to cleanup and clarify the record before any subsequent hearing;

20 NOW THEREFORE, the parties hereto, by and through their undersigned counsel of
21 record, hereby agree and stipulate to the entry of an Order as follows:

22 1. Defendants' Motion to Dismiss filed on November 21, 2016 is hereby
23 withdrawn, without prejudice, and any hearing currently scheduled thereon is hereby
24 vacated without prejudice.

25 2. All of the Defendants' and the Plaintiff's existing Requests for Judicial
26 Notice are hereby withdrawn, without prejudice, and any hearing(s) currently scheduled
27 thereon are hereby vacated without prejudice.

28 3. No responsive pleading, as defined by NRCP 7(a) having yet been filed in
response to the original Complaint of the Plaintiff, Plaintiff remains entitled to file an

1 Amended Complaint pursuant to NRCP 15(a) without prior leave of Court, and Plaintiff
2 shall do so within three (3) days of the notice of entry of this Order, or prior thereto.

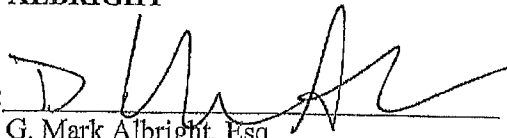
3 4. Defendants shall have fourteen (14) days from the filing of the Amended
4 Complaint to re-file a new Motion to Dismiss relating to the Amended Complaint, or to
5 file a responsive pleading to the Amended Complaint if they choose to do so in lieu of
6 refiling a new Motion to Dismiss.

7
8 DATED this 13th day of February, 2017.

DATED this 13th day of February, 2017.

9 ALBRIGHT, STODDARD, WARNICK
& ALBRIGHT

GORDON & REES LLP

10
11 By: 
12 G. Mark Albright, Esq.
13 Nevada Bar No. 1394
14 D. Chris Albright, Esq.
15 Nevada Bar No. 4904
16 801 S. Rancho Dr., Suite D-4
17 Las Vegas, Nevada 89106
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19 dca@albrightstoddard.com
20 bstoddard@albrightstoddard.com
21 Attorneys for Defendant/Counterclaimant
22 *Eziagu Properties, LLC*

By: 
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rlarsen@gordonrees.com
wwong@gordonrees.com
Attorney for Defendants

ORDER

IT IS HEREBY SO ORDERED; and, it is further HEREBY ORDERED THAT:

1. Defendants' Motion to Dismiss filed on November 21, 2016 is hereby withdrawn,
without prejudice, and any hearing currently scheduled thereon is hereby vacated without
prejudice.

2. All of the Defendants' and the Plaintiff's existing Requests for Judicial Notice are
hereby withdrawn, without prejudice, and any hearing(s) currently scheduled thereon are hereby
vacated without prejudice.

3. No responsive pleading, as defined by NRCP 7(a) having yet been filed in response
to the original Complaint of the Plaintiff, Plaintiff remains entitled to file an Amended Complaint

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pursuant to NRCP 15(a) without prior leave of Court, and Plaintiff shall do so within three (3) days of the notice of entry of this Order, or prior thereto.

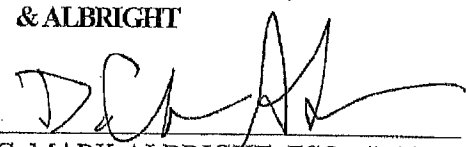
4. Defendants shall have fourteen (14) days from the filing of the Amended Complaint to re-file a new Motion to Dismiss relating to the Amended Complaint, or to file a responsive pleading to the Amended Complaint if they choose to do so in lieu of refileing a new Motion to Dismiss.

DATED this 13 day of Feb, 2017.

Nancy L. Alf
DISTRICT COURT JUDGE

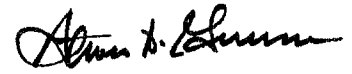
Respectfully submitted,

ALBRIGHT, STODDARD, WARNICK
& ALBRIGHT



G. MARK ALBRIGHT, ESQ., #001394
D. CHRIS ALBRIGHT, ESQ., #004904
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gma@albrightstoddard.com
dca@albrightstoddard.com
Attorneys for Plaintiff

ATTACHMENT 4, EXHIBIT E


CLERK OF THE COURT

1 **ACOM**
2 G. MARK ALBRIGHT, ESQ., #001394
3 D. CHRIS ALBRIGHT, ESQ., #004904
4 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**
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8 gma@albrightstoddard.com
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10 *Attorneys for Plaintiff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 BRANCH BANKING & TRUST COMPANY, a
14 North Carolina corporation,

CASE NO. A-16-744561-C

15 Plaintiff,

DEPT NO. 27

16 vs.

17 DOUGLAS D. GERRARD, ESQ., individually;
18 and GERRARD & COX, a Nevada professional
19 corporation, d/b/a GERRARD COX & LARSEN;
20 JOHN DOE INDIVIDUALS I-X; and ROE
21 BUSINESS ENTITIES XI-XX,

FIRST AMENDED COMPLAINT

22 Defendants.

23 **COMES NOW**, Plaintiff, BRANCH BANKING & TRUST COMPANY, a North
24 Carolina corporation, qualified and registered to do business in Nevada, by and through its
25 undersigned counsel of record, ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and, no
26 pleading as defined by NRCP 7(a) (such as an answer) having yet been filed in response to the
27 original Complaint, hereby files this Amended Complaint, as allowed pursuant to NRCP 15(a) and
28 15(c), against Defendants, DOUGLAS D. GERRARD, ESQ., individually; GERRARD & COX, a
Nevada professional corporation doing business as Gerrard Cox & Larsen, and JOHN DOES I-X
and ROE BUSINESS ENTITIES XI-XX (hereinafter collectively the "Defendants"), by alleging
and averring as follows:

THE PARTIES

1. Plaintiff Branch Banking & Trust Company, is a North Carolina corporation
qualified and registered to do business in Nevada (hereinafter "BB&T" or "Plaintiff").

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2. Defendant DOUGLAS D. GERRARD, ESQ. (hereinafter "Gerrard"), is an individual living in Clark County, Nevada, licensed to practice law in Nevada and offering legal services, including in Clark County, Nevada.

3. Defendant GERRARD & COX, is a Nevada professional corporation licensed to do business, and offering legal services, in Clark County, Nevada, under business and trade names such as "Gerrard Cox Larsen" "Gerrard, Cox & Larsen" and "Gerrard Cox & Larsen" (hereinafter "GC&L"). (Defendant Gerrard and Defendant GC&L are sometimes hereinafter jointly identified as "Defendants.")

4. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants John Doe Individuals I through X and Roe Business Entities XI through XX, including, without limitation, for example, any associates or partners of GC&L who were materially involved in these matters, or any business entity owned by any of the other Defendants are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes, and therefore alleges, that each of the Defendants designated as John Doe Individuals or Roe Business Entities XI-XX is responsible in some manner for the events and occurrences referred to in this Complaint, and/or owes money to Plaintiff and/or may be affiliated with one of the other Defendants. Plaintiff will ask leave of the Court to further amend this Amended Complaint and insert the true names and capacities of John Doe Individuals I through X and Roe Business Entities XI through XX when the same have been ascertained.

GENERAL ALLEGATIONS REGARDING THE TRANSACTIONAL FACTS

5. Defendants represented Plaintiff BB&T in certain litigation known as Clark County Nevada (a/k/a the Eighth Judicial District of Nevada) District Court Case Number A-08-574852, consolidated with Case No. A-09-594512 (said consolidated cases are sometimes hereinafter jointly or severally referred to as the "Subject Underlying Litigation").

6. This instant lawsuit is for professional malpractice and related claims against Defendants arising out of the Defendants' aforesated professional representation of the Plaintiff in the said Subject Underlying Litigation.

7. The core dispute in the Subject Underlying Litigation revolved around the respective priority of two deeds of trust encumbering approximately thirty-eight (38) acres of real

1 property in Henderson, Clark County, Nevada located near 7 Hills and St. Rose Street, owned by
2 an entity known as R&S St. Rose, LLC ("R&S St. Rose"), as said Property was described in the
3 relevant deeds of trust, identified below (the "Property").

4 8. During the relevant time period (of Defendants' representation of Plaintiff) at issue
5 herein, Plaintiff BB&T held the beneficial interest under one of these deeds of trust, pursuant to an
6 assignment from the Federal Deposit Insurance Corporation as receiver for Colonial Bank, N.A.,
7 an Alabama corporation ("Colonial"), the original beneficiary of that deed of trust.

8 9. The beneficial interest under the other deed of trust was held by an entity known as
9 R&S St. Rose Lenders LLC ("R&S Lenders").

10 10. Upon information and belief, Property owner R&S St. Rose and deed of trust
11 holder R&S Lenders were affiliated entities which were both created at the direction of and
12 principally influenced by the same two individuals, namely Said Forouzan Rad ("Rad") and R.
13 Phillip Nourafchan ("Nourafchan"), including through other entities they owned or controlled,
14 such as RPN, LLC ("RPN") which is or was a managing member of R&S St. Rose and a manager
15 of R&S Lenders, and such as Forouzan, Inc., which is or was a managing member of R&S St.
16 Rose and a manager of R&S Lenders, with RPN, in turn, managed by Nourafchan, and with
17 Forouzan, Inc., in turn, being presided over by Rad, as its President.

18 11. R&S St. Rose obtained its ownership interest in the Property, on or about August
19 26, 2005, which ownership interest was subject to a reserved purchase option in favor of Centex
20 Homes ("Centex").

21 12. In order to initially purchase the Property, subject to the Centex purchase option,
22 R&S St. Rose needed to raise or otherwise acquire purchase money funds which it expected to
23 recoup and earn a profit on, when Centex exercised its option, to purchase the Property for an
24 option price which was to be higher than the initial purchase price paid by R&S St. Rose.

25 13. R&S St. Rose borrowed \$29,305,250.00 from Colonial (the "First Colonial Loan")
26 towards the necessary purchase money funds to acquire the Property.

27 14. The First Colonial Loan was secured by a first priority Deed of Trust and Security
28 Agreement and Fixture Filing with Assignment of Rents, in favor of Colonial as beneficiary,
against the Property, recorded on August 26, 2005 with the Clark County Recorder as Book

20050826 and Instrument 0005282 (the "First Colonial Deed of Trust"), which First Colonial Deed of Trust more fully describes the Property referenced throughout this First Amended Complaint.

15. Upon information and belief, R&S St. Rose may have also utilized and applied approximately \$8,100,000.00 it had received as a non-refundable deposit from Centex, on the Centex option, towards the funds needed to acquire the Property.

16. R&S St. Rose also claimed to have borrowed approximately \$12,000,000.00 from R&S Lenders.

17. Upon information and belief, Rad and Nourafchan, or entities they influenced or controlled, caused R&S Lenders to be formed for the purpose of loaning or claiming to loan said funds to R&S St. Rose.

18. On or about August 23, 2005, R&S St. Rose executed a promissory note in favor of R&S Lenders for \$12,000,000.00, which was secured by a "Second Short Form Deed of Trust and Assignment of Rents" recorded against the Property, in favor of R&S Lenders as beneficiary, on September 16, 2005 as Document No. 0002881 in Book 20050916 in the Official Records of Clark County, Nevada (the "R&S Lenders Second Deed of Trust").

19. The First Colonial Deed of Trust securing the First Colonial Loan, having been first recorded in August of 2005, had priority over the R&S Lenders Second Deed of Trust, recorded in September of 2005.

20. Centex unexpectedly did not exercise its option to purchase the Property.

21. R&S St. Rose therefore determined to itself retain and potentially develop the Property.

22. Colonial and R&S St. Rose entered into a loan agreement for Colonial to loan R&S St. Rose an amount not to exceed \$43,980,000.00, and, on or about July 27, 2007, R&S St. Rose executed a Promissory Note in favor of Colonial in approximately said amount (these arrangements, including the Promissory Note, are hereinafter referred to as the "Colonial Construction Loan").

23. The Colonial Construction Loan was provided and funded in order: (i) to pay off the First Colonial Loan from 2005, and (ii) to provide funding for the construction of certain

1 infrastructure improvements on the Property.

2 24. R&S St. Rose's obligations under the Colonial Construction Loan were secured by
3 a July 27, 2007 Deed of Trust and Security Agreement and Fixture Filing with Assignment of
4 Rents in favor of Colonial, which was recorded against the Property on July 31, 2007 as Book and
5 Instrument Number 20070731-0004824, in the official records of Clark County, Nevada (the
6 "2007 Colonial Deed of Trust").

7 25. Colonial funded the Colonial Construction Loan with the belief, intent, and
8 understanding that the 2007 Colonial Deed of Trust securing said loan would be in a first priority
9 position against the Property, and would not be junior to any other Deed of Trust, including the
10 R&S Lenders Second Deed of Trust recorded in September of 2005.

11 26. Funds from the 2007 Colonial Construction Loan were used to fully pay off and
12 satisfy the approximately \$29,797,628.72 then owing under the First Colonial Loan, from 2005.

13 27. Therefore, pursuant to legal principles of equitable subrogation recognized in
14 Nevada, or the analogous theory of replacement and modification, the 2007 Colonial Deed of
15 Trust securing the Colonial Construction Loan was entitled to enjoy the same first priority position
16 as the earlier First Colonial Deed of Trust, from August 2005, at least up to the amount of the
17 earlier First Colonial Loan paid off and refinanced thereby (\$29,797,628.72), and thus should have
18 enjoyed priority over any deed of trust recorded after the August 2005 recordation of the First
19 Colonial Deed of Trust, including the R&S Lenders Second Deed of Trust recorded in September
20 2005.

21 28. For example, "Equitable subrogation permits 'a person who pays off an
22 encumbrance to assume the same priority position as the holder of the previous encumbrance.'"
23 *Houston v. Bank of Am. Fed. Savings Bank*, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003) (quoting
24 *Mort v. U.S.*, 86 F.3d 890, 893 (9th Cir. 1996)). Thus, the doctrine "enables 'a later-filed
25 lienholder to leap-frog over an intervening lien [holder].'" *Am. Sterling Bank v. Johnny Mgmt.*
26 *LV, Inc.*, 126 Nev. 423, 429, 245 P.3d 535, 539 (2010) (quoting *Hicks v. Londre*, 125 P.3d 452,
455 (Colo. 2005)).

27 29. "The practical effect of equitable subrogation is a revival of the discharged lien and
28 underlying obligation" [*i.e.*, of the lien discharged and paid off by the loan secured by the later

1 deed of trust] and equitable subrogation therefore effects an “assignment to the payor or subrogee,
2 permitting [it] to enforce the seniority of the satisfied lien against junior lienors.” *Am. Sterling*,
3 126 Nev. at 429, 245 P.3d at 539.

4 30. The doctrine of equitable subrogation has sometimes been held to be inapplicable
5 to loans from the same lender who issued the earlier loan, which is paid off and refinanced by the
6 same lender’s subsequent or later loan; nevertheless, an analogous theory, known as replacement,
7 or replacement and modification, recognized in the Restatement (Third) of Property, similarly
8 allows a new deed of trust, in favor of the same original earlier lender, to enjoy priority from the
9 date of the original earlier deed of trust, even where both deeds of trust were in favor of the same
10 lender, based on loans provided by that same lender. *See*, for example, the Restatement (Third) of
11 Property: Mortgages (1997) §7.6 at comment (E).

12 31. Thus, as a matter of law under principles of equitable subrogation, or replacement
13 (aka replacement and modification), Colonial was entitled to have its 2007 Colonial Deed of Trust
14 (securing the 2007 Colonial Construction Loan) enjoy a first priority position, as against the R&S
15 Lenders Second Deed of Trust from September of 2005, and to enjoy priority dating back to the
16 recordation of the First Colonial Deed of Trust recorded in August of 2005.

17 32. Demonstrating Colonial’s belief, intention, and understanding that the 2007
18 Colonial Deed of Trust would be in first priority position, in conjunction with funding the
19 Colonial Construction Loan, Colonial insisted that its title insurance policy on the 2007
20 transaction not include the September 2005 R&S Lenders Second Deed of Trust as an exception
21 from the title being insured, and also sought assurances that the R&S Lenders Second Deed of
22 Trust would be reconveyed as part of that transaction.

23 33. When Colonial funded the Colonial Construction Loan it did not believe and it did
24 not intend or understand that there were or would remain any allegedly senior deeds of trust
25 against the Property, with priority over its 2007 Colonial Deed of Trust securing the Construction
26 Loan.

27 34. Further evidencing Colonial’s intent, belief, and understanding on that point, the
28 2007 Colonial Deed of Trust provided that:

5.03: Beneficiary [Colonial] shall be subrogated for further security to the lien,

1 although released of record, of any and all encumbrances paid out of the proceeds
2 of the loan secured by the Deed of Trust.

3 35. Colonial eventually learned (including in or about mid 2008) that the R&S Lenders
4 Second Deed of Trust from September 16, 2005 was not actually reconveyed, such that R&S
5 Lenders could attempt to argue that said September 2005 Deed of Trust in its favor, had become
6 the first position Deed of Trust against the Property, with apparent priority over the 2007 Colonial
7 Deed of Trust securing R&S St. Rose's obligations under the 2007 Colonial Construction Loan,
8 and the Promissory Note related thereto.

9 36. Colonial, however, had the legal ability to contest, in court, any such assertion,
10 including based on the recognized legal theories of equitable subrogation or replacement and
11 modification as described above.

12 37. R&S St. Rose eventually defaulted on both the Colonial Construction Loan and on
13 the R&S Lenders Loan, by failing to pay the amounts due under these two loans, and both debtors
14 eventually recorded Notices of Default and Election to Sell documents, initiating competing non-
15 judicial foreclosure proceedings against R&S St. Rose and the Property, leading to a dispute
16 between the two lenders as to which deed of trust had priority, and would survive or be wiped out
17 by a foreclosure of the other deed of trust.

18 **GENERAL ALLEGATIONS REGARDING THE SUBJECT**
19 **UNDERLYING LITIGATION AND OTHER GENERAL ALLEGATIONS**

20 38. On November 3, 2008, Robert E. Murdock ("Murdock") and Eckley M. Keach
21 ("Keach") acting on their own pro se behalf, as Plaintiffs, and in their capacity as investors and
22 lenders of St. Rose and/or R&S Lenders, with an alleged interest in the R&S Lenders Second
23 Deed of Trust, filed a Complaint against R&S Lenders and other parties, instigating Case Number
24 A-08-574852, the first of the two ultimately consolidated cases comprising the Subject Underlying
25 Litigation.

26 39. This Complaint was subsequently amended, more than once, to name additional
27 parties, including Colonial or an affiliate of Colonial, which came to be represented by Defendants
28 herein.

40. Colonial subsequently filed its own separate Complaint on July 1, 2009, initiating
Case No. A-09-594512 (the second of the two eventually consolidated cases comprising the

1 Subject Underlying Litigation) against R&S Lenders, R&S St. Rose, Forouzan Inc., RPN, Rad and
2 Nourafchan, all as defendants therein.

3 41. Colonial was represented in said filing by Defendants herein Gerrard and GC&L.

4 42. This Colonial Complaint sought, among other relief, to obtain a ruling that the 2007
5 Colonial Deed of Trust, securing the 2007 Colonial Construction Loan, had priority over the R&S
6 Lenders Second Deed of Trust from September 2005, including based on theories of replacement
7 and modification, equitable subrogation, and other related legal theories.

8 43. On August 11, 2009, the trial court in the underlying suit consolidated Murdock
9 and Keach's action with that of Colonial, under the lead Case No. A574852, thereby consolidating
10 the two cases comprising the Subject Underlying Litigation.

11 44. On or about August 14, 2009, Colonial was closed by the Alabama State Banking
12 Department, and the Federal Deposit Insurance Corporation, an independent agency of the U.S.
13 government (the "FDIC") was named as its Receiver, pursuant to applicable Alabama state law,
14 and applicable federal law.

15 45. Subsequently, also on or about August 14, 2009, BB&T and the FDIC, in its
16 capacity as Receiver of Colonial, entered into a "Purchase and Assumption Agreement, Whole
17 Bank All Deposits" (the "PAA"), which was intended to transfer Colonial's financial assets,
18 including the Construction Loan, 2007 Deed of Trust, and all related Colonial rights, agreements,
19 and claims, concerning the Property, to BB&T.

20 46. Approximately 48 days after the PAA's execution, Defendants Gerrard and GC&L,
21 filed an Amended Complaint, on or about October 1, 2009, in the Subject Underlying Litigation,
22 substituting BB&T as the Plaintiff, in the place and stead of Colonial.

23 47. Based thereon, Defendants Gerrard and GC&L became counsel of record for
24 BB&T, and established an attorney-client relationship with BB&T, and were retained by BB&T to
25 represent it, pursuant to which the Defendants herein owed duties of care and professionalism to
26 BB&T.

27 48. The PAA was not as clear as it could have been, and, upon review by BB&T's
28 counsel, the Defendants herein, said counsel (did or) should have anticipated possible arguments
being raised in the Subject Underlying Litigation that the PAA did not clearly and adequately

1 demonstrate that Colonial's claims and assets and priority assertions at issue in the Subject
2 Underlying Litigation had been transferred and assigned to, and acquired by, BB&T.

3 49. For example, and without limitation, the PAA indicated that Schedules are attached
4 to the PAA listing the assets being conveyed, whereas no such schedules were actually prepared or
5 attached; Section 3.5 of the PAA could potentially be construed to indicate that certain assets were
6 excluded from the sale, including assets involving claims against third-parties, or which were the
7 subject of any legal proceedings (excluding from this category of non-transferred assets claims for
8 losses arising out of failures of such third-parties to pay debts, but not excluding from this
9 category claims for losses arising out of other failures); and other language in the PAA created
10 possible exclusions or ambiguities.

11 50. On or about October 7, 2009, a Second Amended Complaint was filed on behalf of
12 BB&T by Gerrard and GC&L (Defendants herein) in the Subject Underlying Litigation.

13 51. The Second Amended Complaint alleged a variety of legal theories for and on
14 behalf of BB&T, as successor-in-interest to the FDIC and Colonial, to obtain an order and
15 judgment declaring and recognizing that the 2007 Colonial Deed of Trust had a first priority
16 position over the R&S Lenders Second Deed of Trust from September of 2005, including based on
17 theories of: Contractual Subrogation; Replacement; Equitable Estoppel or Promissory Estoppel;
18 Unjust Enrichment; Fraudulent Misrepresentation; and Civil Conspiracy.

19 52. At least one (or more) of the claims for relief listed in this Second Amended
20 Complaint of BB&T set forth a good and valid theory (or theories) for the relief sought by BB&T,
21 and BB&T would have prevailed as to at least one (or more) of said causes of action, if BB&T
22 were able to demonstrate its own right, as Colonial's successor-in-interest, and as the new owner
23 of said claims, to pursue the same.

24 53. Both R&S St. Rose Lenders and BB&T sought injunctive relief to prevent the other
25 from moving forward with a foreclosure on the Property pending a determination of priority of the
26 respective deeds of trust.

27 54. The district court presiding over the Subject Underlying Litigation issued a mutual
28 Temporary Restraining Order preventing either party from moving forward with their respective
foreclosure proceedings, or with any foreclosure sale, until the issue of priority was resolved.

1 55. With the consent of the parties, the district court in the Subject Underlying
2 Litigation consolidated the Preliminary Injunction Hearing with a trial on the merits regarding
3 BB&T's claims, which the court characterized as including claims for contractual subrogation,
4 equitable subrogation, replacement, equitable/promissory estoppel, and unjust enrichment
5 (hereinafter the "Trial").

6 56. BB&T was entitled to prevail, on the merits, as to one or more of these claims and
7 causes of action.

8 57. The parties to the Subject Underlying Litigation also consented to an extension of
9 the Temporary Restraining Order until the conclusion of the Trial.

10 58. Defendants Gerrard and GC&L knew or should have known that BB&T would
11 need to demonstrate its ownership of Colonial's former claims at the Trial as part of BB&T's case
12 in chief, and as a prerequisite showing to demonstrate that BB&T had a right to pursue the claims
13 it was pursuing.

14 59. For example, the Second Amended Complaint filed by the Defendants on behalf of
15 BB&T, included an allegation relating to BB&T's acquisition of Colonial's claims, with the right
16 to therefore pursue the suit based thereon, which allegation was not admitted by the R&S entities
17 named as Defendants to that pleading, when said entities answered the Second Amended
18 Complaint.

19 60. More particularly, the Second Amended Complaint alleged in ¶1, as follows:
20 "BB&T is a North Carolina corporation, that is successor in interest to Federal Deposit Insurance
21 Corporation as receiver of Colonial Bank N.A., with sufficient minimum contacts with the State of
22 Nevada and entitled to an interest in certain real property at issue in this case which is located in
23 Clark County, Nevada."

24 61. Thereafter, both R&S St. Rose and R&S Lenders filed Answers to the BB&T
25 Second Amended Complaint, in which both Defendants denied, for lack of sufficient knowledge,
26 the above-quoted first paragraph of Plaintiff's Second Amended Complaint, thereby placing
27 Defendants herein on notice that this allegation would need to be proven with evidence at Trial.

28 62. As a further example of what Defendants Gerrard and GC&L knew or should have
known they would need to prove on behalf of BB&T at the Trial of the Subject Underlying

1 Litigation, both defendant R&S St. Rose and defendant R&S Lenders asserted BB&T's lack of
2 standing to pursue its claims, as their Third Affirmative Defense to BB&T's Second Amended
3 Complaint, in their Answers thereto.

4 63. Furthermore R&S St. Rose and R&S Lenders raised the statute of frauds as an
5 affirmative defense in their Answers to BB&T's Second Amended Complaint, such that BB&T's
6 lawyers in the underlying suit (Defendants herein) knew or should have known that the adequacy
7 of the PAA and whether BB&T had in fact acquired Colonial's claims, under an adequate written
8 assignment, would be an issue at Trial.

9 64. NRS 111.205 (the Nevada statute of frauds) provides that no estate or interest in
10 lands, other than for a lease less than one year in duration, shall be "assigned" except via a writing
11 "subscribed by the party . . . assigning . . . the same, or by the party's lawful agent."

12 65. Moreover, NRS 111.235 requires that any transfer of a trust in lands is void, unless
13 the transfer is set forth in a writing.

14 66. Based on all of the foregoing, and based on other filings in the underlying suit, and
15 based on events during the Subject Underlying Litigation, including without limitation, events
16 which are described and alleged hereafter, Defendants Gerrard and GC&L knew or should have
17 known that BB&T would be required to prove at Trial, by a preponderance of the evidence, that
18 Colonial's position under the Deed of Trust had been effectively assigned to BB&T, via a writing
19 clearly setting forth this assignment, which document would need to be presented as trial evidence,
20 together with witness testimony regarding the same, in order for BB&T to effectively demonstrate
21 that it now owned and had succeeded to the right to pursue the priority and related claims
22 previously owned and originally pursued by Colonial.

23 67. Based thereon, Defendants had a duty to ensure that the documentation pursuant to
24 which their client, BB&T, had obtained its interest in Colonial's claims was adequate to the task
25 of making the necessary showing at trial; and had a duty to ensure that any documents proving this
26 assignment to BB&T were timely disclosed to the other litigants prior to Trial, so as to be able to
27 be utilized at Trial; had a duty to present all such documents during Trial; and to have witnesses
28 prepared to testify as to the correct understanding of the PAA and other available assignment
documents during Trial, and to authenticate said documentary evidence, and to present such

1 witnesses and evidence before and during Trial, as were necessary to ensure that BB&T met its
2 evidentiary burden on the assignment issue.

3 68. Alternatively, if no adequate documents or evidence existed as to BB&T's
4 ownership of its stated claims through an adequate written assignment, then the Defendants had a
5 professional duty as counsel to BB&T to inform their client BB&T of this concern, and to advise
6 their client BB&T of the need to prepare and obtain the FDIC's signature on adequate
7 documentation, evidencing the assignment, to be timely disclosed prior to Trial, and to then be
8 utilized during Trial, a task which subsequent events demonstrated was capable of being quickly,
9 easily, and readily performed.

10 69. Defendants failed to adequately or timely perform any of these professional duties,
11 tasks and obligations owed to BB&T.

12 70. Defendants Gerrard and GC&L never: adequately examined and analyzed the PAA
13 to ensure that it adequately demonstrated the assignment to BB&T (or, alternatively, said
14 Defendants did know of defects in the PAA but did nothing to remedy the same); never advised
15 BB&T or the FDIC of the need to create schedules for the PAA to demonstrate the assignment, or
16 to otherwise clarify any ambiguities therein; never inquired of BB&T or the FDIC before Trial if
17 any more adequate documents existed more clearly demonstrating the assignment (which did in
18 fact exist before Trial); never checked with the Clark County Nevada Recorder's Office or any
19 local title company prior to Trial, to determine whether other proof of the assignment to BB&T, of
20 Colonial's rights, to be asserted at Trial, beyond the PAA, had ever come to exist and be recorded
21 against the Property (which was in fact the case); never timely disclosed any such additional
22 documentation in pre-trial disclosures; never timely assisted BB&T with drafting any more
23 adequate assignment documentation for the FDIC's execution prior to Trial, to timely disclose and
24 then utilize at Trial or advised BB&T that it should do so via separate counsel; and never utilized
25 or introduced existing and available evidence of the assignment or alternative evidence created
26 prior to Trial, during their presentation of BB&T's case in chief during Trial.

27 71. Defendants also never offered the most key testimony from BB&T's most
28 knowledgeable witnesses as to the assignment (by way of live witnesses or deposition transcripts)
regarding the PAA, or the assignment to BB&T, and whether the amounts bid and paid by BB&T

1 thereunder included amounts to purchase the subject Colonial claims at issue in the Subject
2 Litigation, during presentation of their case in chief at Trial.

3 72. Prior to commencement of the Trial of the underlying suit, a document came to
4 exist which more clearly demonstrated the assignment by the FDIC, of the FDIC's rights (as
5 Colonial's Receiver), to BB&T, than did the PAA, namely, a recorded "Assignment of Security
6 Instruments and Other Loan Documents" from the FDIC in its capacity as Receiver for Colonial,
7 to BB&T, dated October 23, 2009 and recorded on November 3, 2009 (sometimes herein the
8 "2009 Bulk Assignment").

9 73. Upon information and belief, Defendants either knew of this document in time to
10 disclose the same and then utilize it at Trial, and failed to do so, or could easily have come to learn
11 of its existence, on the basis of adequate inquiries, in time to disclose the same and then utilize it
12 at Trial, but failed to do so.

13 74. This 2009 Bulk Assignment document overcame the potential ambiguities in the
14 PAA and, taken together with the PAA, confirmed that the FDIC had transferred, among other
15 items, all of Colonial's outstanding Nevada commercial loans and security instruments, to BB&T,
16 which would include the Subject Colonial Construction Loan and the Colonial 2007 Deed of
17 Trust.

18 75. However, Gerrard and GC&L either knew about this document and never timely
19 disclosed this document; or had constructive notice of same but never timely inquired about or
20 researched the existence of any such document, and thus never timely discovered this document in
21 order to timely disclose the same to opposing counsel.

22 76. In either event, Defendants never timely disclosed this document prior to Trial and
23 never presented this document as evidence, or any testimony regarding the same, in a timely
24 manner, during Trial.

25 77. As further evidence of what Defendants knew or should have known would need to
26 be addressed at Trial, on November 19, 2009, Murdock and Keach filed a Notice of Questions of
27 Fact to be tried at the Trial, which Notice identified, in Paragraph 24, the question of: "Whether
28 BB&T paid proper consideration and thus is able to have an 'assignment' that comes with
equitable rights?" as one of the questions to be tried during the Trial.

1 78. The Trial court in the underlying suit ruled that certain of the questions set forth in
2 this filing would be part of the Trial, including this item number 24.

3 79. Defendants would later claim that their understanding of Item 24 of these
4 Questions of Fact differed from that of the district court.

5 80. Defendants were however, negligently wrong, in their understanding of the
6 meaning of this question; and/or negligently failed to clarify any ambiguity as to the meaning of
7 this question; and/or negligently failed to ensure that their understanding thereof and their
8 assumptions based thereon were correct.

9 81. Based thereon, Defendants negligently failed to properly obtain or locate, timely
10 disclose, and then present necessary information and evidence on the issue raised by this question
11 at Trial.

12 82. After the 2009 Bulk Assignment document came to exist, and after it was recorded,
13 Defendants supplemented their pre-trial disclosures, via BB&T's Second Supplemental Pre-Trial
14 Disclosures, served on or about December 3, 2009.

15 83. The opposing parties in the underlying Subject Litigation did not, upon information
16 and belief, object to the timelines of these supplemental disclosures, nor were they in a position to
17 do so, given that, on or about December 4, 2009, R&S Lenders provided its own supplemental list
18 of disclosed witnesses and exhibits.

19 84. Murdock and Keach also provided disclosures on December 4, 2009.

20 85. Upon information and belief, all of the parties were able to utilize the documents
21 and witnesses identified in these December 3 and December 4, 2009 disclosures, during Trial, to
22 the extent they deemed necessary.

23 86. However, Defendants Gerrard and GC&L failed to include the October 23, 2009
24 Bulk Assignment, recorded on November 3, 2009, as part of BB&T's Second Supplemental
25 Disclosures, served on December 3, 2009, which would have allowed BB&T to be able to utilize it
26 at Trial.

27 87. Said Defendants also failed to list the PAA in their December 3, 2009 document
28 disclosures or to initially introduce it as evidence during their case in chief at Trial, and failed,
during their case in chief at Trial to have any witness testify as to its meaning or the consideration

1 paid for the rights now owned by BB&T and being pursued at Trial by BB&T thereunder.

2 88. The district court allowed further discovery to continue until shortly before Trial.

3 89. For example, R&S Lenders was allowed to depose a BB&T person most
4 knowledgeable, for which deposition BB&T produced its employee Gary Fritz, on December 28,
5 2009, long after the October 2009 Bulk Assignment was recorded in early November 2009, and
6 less than two weeks prior to the Trial commencing, such that the court was clearly amenable to
7 discovery continuing after any previous NRCP 16.1 discovery deadlines had passed, up until the
8 eve of the Trial, and would clearly have allowed the disclosure and use of the 2009 Bulk
9 Assignment had Gerrard and GC&L sought to disclose the same at some point prior to this
10 deposition taking place.

11 90. The notice of this PMK deposition indicated that R&S Lenders sought to depose
12 BB&T's person most knowledgeable on a variety of subjects, including regarding "all documents,
13 memorandum, and correspondence concerning BB&T's acquisition of the [subject] loan," which
14 is further evidence that Defendants knew or should have known that whether BB&T had acquired
15 and owned the claims set forth in its Second Amended Complaint was an issue that needed to be
16 addressed at Trial.

17 91. During the December 28, 2009 deposition of Gary Fritz, Mr. Fritz was repeatedly
18 challenged by Gerrard's opposing counsel with respect to whether or not the PAA adequately
19 demonstrated the assignment of the subject loan and deed of trust at issue in the Subject Litigation
20 to BB&T, thereby putting Defendants on further notice that (i) BB&T's acquisition and ownership
21 of the claims (originally belonging to Colonial) that BB&T was now asserting would be
22 challenged during the Trial and would need to be demonstrated by BB&T at Trial; and that (ii)
23 more than just the PAA, standing alone, would be needed to meet this challenge.

24 92. Based on the PMK notice, and based on this line of questioning at the deposition,
25 Defendants Gerrard and GC&L knew or should have known that the FDIC's transfer and
26 assignment of the disputed Colonial claims to BB&T would be challenged at the Trial of the
27 underlying Subject Litigation, and, thus said Defendants had a duty to have arguments, including
28 pertinent case law as to similar PAAs, and evidence, including available documents and witness
testimony, ready to present during their case in chief, in order to adequately establish the

1 assignment from Colonial's receiver, the FDIC, to BB&T, as an initial prerequisite component of
2 BB&T's *prima facie* case.

3 93. Notwithstanding certain concessions as to problematic language in the PAA, made
4 by deponent Fritz in his deposition testimony, Fritz also offered other testimony which did
5 demonstrate that a conveyance to BB&T had taken place, which should have been introduced at
6 trial, by way of live testimony or reading from the deposition transcript.

7 94. Defendants nevertheless failed in their duty to present adequate evidence, and did
8 not disclose certain necessary evidence prior to Trial or timely present key evidence during Trial,
9 for the purpose of demonstrating the assignment of the relevant Colonial rights and claims to
10 BB&T, and failed to ensure that adequate evidence existed, or, if not, to direct BB&T that it
11 needed to have such documents prepared and signed by the FDIC, for disclosure prior to Trial, and
12 for use during Trial.

13 95. Upon information and belief, Defendants Gerrard and GC&L knew, or should have
14 known, that the PAA was deficient and the Defendants made a deliberate strategic decision not to
15 introduce or utilize the PAA at the Trial due to its deficiencies, but nevertheless failed to advise
16 BB&T of the need to obtain some alternative documentary evidence to demonstrate that an
17 assignment to BB&T had taken place.

18 96. The Defendants' pre-trial list of documents and witnesses to be utilized at Trial
19 failed to identify the PAA, or the 2009 Bulk Assignment, as documents to be relied on at Trial,
20 and failed to identify Fritz as a trial witness, and such failures by the Defendants were negligent
21 and fell below the standard of care for attorneys in their circumstance.

22 97. The Trial (*i.e.*, the evidentiary hearing consolidated with a trial on the merits) in the
23 Subject Underlying Litigation was held over approximately ten days spanning a three month
24 period from on or about January 8, 2010 until on or about April 8, 2010.

25 98. BB&T put on its case in chief (save for the trial testimony of a Centex
26 representative [who Defendants would have no basis for utilizing on the issue of BB&T's
27 acquisition of the Colonial claims] which had to be delayed until a subsequent trial date), between
28 January 8, 2010 and March 30, 2010 (which time period of the presentation of BB&T's case on
said dates of January 8, 2010 through March 30, 2010 --excluding any March 30, 2010 oral

1 motions by opposing counsel, and excluding the subsequent Centex testimony-- is sometimes
2 referred to herein as BB&T's "primary case in chief").

3 99. Defendants Gerrard and GC&L knew or should have known that their client
4 BB&T's right to bring the suit would be a fundamental and necessary preliminary showing at
5 Trial, and should have ensured, prior to Trial, that they were ready to address this issue at Trial
6 and that they were ready to establish at Trial that BB&T had become the successor-in-interest to
7 Colonial's claims, with admissible documentary evidence and relevant witness testimony and
8 appropriate legal authority, and should have in fact presented such evidence and testimony and
9 legal authority of the assignment during their primary case in chief at Trial.

10 100. However, they did not perform any of these tasks, and were not prepared to make
11 the key legal and evidentiary showings at Trial, as were necessary to establish BB&T's ownership
12 of its claims at Trial and did not adequately demonstrate this fact at Trial.

13 101. The actual facts and the law relating thereto are such that BB&T could have and
14 should have prevailed on the assignment and ownership issues at Trial but for the Defendants'
15 negligent failures to timely and competently prepare (if necessary), or locate and disclose relevant
16 evidence prior to Trial; and then present such necessary evidence on this point during Trial.

17 102. On January 8, 2010, at the first day of the Trial, Eckley M. Keach argued as
18 follows to the Court, on his own and Mr. Murdock's behalf as pro se Plaintiffs in the first of the
19 two consolidated cases:

20 **Our argument is BB&T is not an assignee in this case.** And while he [Gerrard]
21 wants to argue the law of assignment, BB&T didn't enter into an assignment
22 agreement with Colonial Bank. BB&T went to the FDIC and put in a bid, and they
23 bid against all these other people. And being the top bidder, they purchased assets.
24 It was an asset purchase. There was no assignment involved, and so anything he
25 wants to discuss regarding the law of assignment and assignee stepping in the
26 shoes, that's not, that's not the issue here. [Emphasis added.]

27 103. Based on this argument, the Defendants were again apprised of the critical need,
28 during Trial, to present evidence of BB&T's acquisition and ownership of the Colonial claims.

29 104. Also on the first day of the Trial, on January 8, 2010, the Trial court indicated as
30 follows: "I have two issues I have to determine" one of which issues was described by the Trial
31 court as follows: "I have to determine ... the nature of the relationship between the Colonial

1 Bank loan and the BB&T's entity's. And in making that determination I am going to listen to the
2 evidence before I apply the theories that you're [BB&T's counsel] saying because **I have to make**
3 **a determination as to whether there's an assignment that exists**, if it's a successor in interest
4 that exists, or if it's some other nature of an acquisition. Okay. Which is why I'm listening to the
5 evidence." Emphasis added.

6 105. The foregoing statements by the underlying Trial judge further demonstrate that
7 Plaintiff BB&T's then counsel, Defendants Gerrard and GC&L, knew, or should have known, at
8 the beginning of Trial, that they would need to adequately address the issue of BB&T's
9 acquisition and ownership of the Colonial rights on which BB&T was suing, at some point prior to
10 the conclusion of BB&T's primary case in chief, and "before" the court would even determine
11 whether to apply their various subrogation/replacement or other theories to establish the priority
12 issues.

13 106. This should have come as no surprise to Defendants, based on the foregoing facts
14 regarding the R&S Lenders' and R&S St. Rose's denials and defenses and the statements, and
15 identified questions, in the other parties' relevant pleadings and filings, and based on the above-
16 identified statutory requirements, and based on the above-noted PMK deposition notice and the
17 PMK deposition questions, etc.

18 107. To the extent that the foregoing opening arguments by opposing counsel, or the
19 foregoing statement by the underlying Trial court was ambiguous, or did come as a surprise to
20 Defendants, the Defendants had a duty to clarify the same, and to clarify and ensure the accuracy
21 of any assumptions they were then still making, at that time, at the beginning of Trial, rather than
22 continue to proceed under such assumptions.

23 108. Notwithstanding this knowledge, Gerrard and GC&L did not adequately or directly
24 address this issue while putting on their six day primary case in chief, over the course of the next
25 approximately three months, did not put witness Fritz on the stand, did not introduce any of his
26 deposition transcript during Trial, and did not even introduce the PAA, let alone the 2009 Bulk
27 Assignment, into evidence, and instead allowed themselves to be negligently caught unprepared
28 and unawares by an oral motion on this very issue raised after their primary case in chief was
completed, which motion they inaccurately averred had somehow unfairly surprised and

1 sandbagged them.

2 109. Additionally, Defendants failed to properly prepare their own witnesses to testify as
3 to the essential facts during Trial, including to demonstrate BB&T's acquisition and ownership of
4 the 2007 Construction Loan.

5 110. BB&T's lawyers, Defendants herein, negligently failed to introduce any of the key
6 evidence in their primary case in chief, necessary to establish that BB&T had received an
7 assignment or had any ownership rights in the 2007 Colonial Construction Loan, the Promissory
8 Note or in the 2007 Colonial Deed of Trust.

9 111. Defendants Gerrard and GC&L, negligently did not submit testimony from BB&T
10 or from the FDIC concerning the PAA, during their primary case in chief, nor did they seek to
11 submit the deposition transcript of Gary Fritz, BB&T's person most knowledgeable concerning
12 the PAA and the transfer of the relevant loan to BB&T, notwithstanding said deponent having
13 testified that BB&T's multi-billion dollar bid to the FDIC included a bid for all non-consumer
14 loans, and also testified that BB&T had acquired all of the commercial loans of Colonial, and also
15 testified that the summary general ledger relating to the transaction indicated that all of Colonial's
16 commercial loans had been transferred to BB&T, which would include the loan to St. Rose.

17 112. Furthermore, Defendants negligently had not listed the PAA as a document BB&T
18 intended to rely on at Trial in its pre-trial disclosures, did not ever disclose the October 2009 Bulk
19 Assignment recorded in early November of 2009, prior to Trial, and did not try to introduce either
20 of these documents during their presentation of BB&T's primary case in chief, nor did they
21 present sufficient evidence or testimony during Trial to establish the assignment of the Colonial
22 Construction Loan and 2007 Colonial Deed of Trust from the FDIC to BB&T.

23 113. At the close of BB&T's primary case in chief, the district court asked Defendant
24 Gerrard if he had any additional evidence to submit in BB&T's case in chief, beyond one witness
25 (from Centex, who would have no ability to testify regarding the acquisition by BB&T, as
26 Centex's involvement ended long before that event), whose schedule required the witness to
27 appear later, and Defendant Gerrard said "no."

28 114. After the close of BB&T's primary case in chief at Trial (other than the later
anticipated Centex testimony unrelated to the BB&T acquisition), upon Defendants otherwise

1 resting BB&T's case, on March 30, 2010 (day six of the evidentiary hearing) opposing party
2 Keach brought an oral motion, including pursuant to NRC 52, ultimately joined in by the other
3 parties including R&S Lenders, for judgment on partial findings arguing that BB&T had not
4 established a *prima facie* case that it had succeeded to and become the owner of Colonial's right to
5 assert claims originally owned by Colonial, related to the Colonial Construction Loan and the
6 2007 Colonial Deed of Trust.

7 115. In response to this motion, the Trial court allowed Gerrard and GC&L, on behalf of
8 BB&T, to now introduce, for the first time, the PAA, over objection.

9 116. Defendants, having procured the admission of the PAA, were not however prepared
10 to adequately address or argue any basis for treating the PAA as demonstrating an assignment to
11 BB&T had taken place, as Defendants had negligently failed to anticipate arguments which they
12 had had adequate reason to know were likely to be made.

13 117. The Trial court ultimately determined that the PAA was not adequate to show that
14 BB&T owned the claims it was pursuing at Trial, and the PAA was ultimately found to be
15 internally inconsistent and incomplete, and the district court ultimately ruled that this document
16 prevented the court from making a finding as to whether an assignment of the loan at issue had
17 occurred, especially as no witness testimony was ever proffered to explain or identify the
18 transferred assets.

19 118. The district court noted as follows:

20 I've admitted Exhibit 183 [the PAA], if it included some reference to the
21 particular asset or schedule that had excluded assets that didn't include this asset,
22 might comply with NRS 111.235, which would then put your [Gerrard's and
23 GC&L's] client [BB&T] in a position where it might have some remedy. Without
24 those kinds of things I think we have a potential standing issue ... or you know, I
25 guess that's the best way, or successor in a true successor in interest problem.

26 119. Following this oral ruling, the Trial court nevertheless invited Defendants Gerrard
27 and GC&L, on behalf of BB&T, to attempt to introduce other documentation indicating that
28 BB&T had acquired standing to bring what were originally Colonial's claims.

120. The following morning, on March 31, 2010, pursuant to the Trial court's invitation,
Gerrard and GC&L showed up at Trial with, and attempted, for the first time, to present and have
admitted, and provide the Trial court with the 2009 Bulk Assignment from the FDIC to BB&T,

1 dated October 23, 2009 and recorded on November 3, 2009, confirming that the FDIC had
2 transferred all of Colonial's Nevada loans and Nevada recorded deeds of trust (other than MERS
3 filings), to BB&T which had thus acquired, among other things, Colonial's rights under the
4 Construction Loan and the 2007 Deed of Trust.

5 121. Whatever inquiries suddenly allowed the Defendants to locate and produce this
6 document, literally overnight, between March 30th and March 31, 2010, could and should have
7 been made prior to the commencement of Trial, such that the events of March 31, 2010,
8 demonstrate that Defendants either were already aware of said document prior thereto, or should
9 have been aware of that document prior thereto.

10 122. However, because the 2009 Bulk Assignment evidence had never been disclosed
11 by Gerrard and GC&L to opposing counsel, in a timely manner prior to Trial, or even at some
12 point during BB&T's primary case in chief, the Trial court refused to admit or consider this 2009
13 Bulk Assignment, and declined, on March 31, 2010, to admit the same, because Defendants
14 Gerrard & GC&L had not previously provided this documentation on behalf of BB&T (including,
15 it might be noted, at any time prior to Trial, although it existed and was a publicly recorded
16 document, prior to the January 8, 2010 commencement of Trial, and prior to the early December
17 2009 supplemental disclosures exchange between the parties, and prior to the late December 2009
18 deposition of Fritz).

19 123. The Trial court judge indicated she would have expected the disclosure of the Bulk
20 Assignment "at least at some time prior to today," [March 31, 2010] in order to be willing to admit
21 the same.

22 124. Based thereon, had Defendants attempted to introduce the document at any time
23 prior to resting their primary case in chief, and prior to the oral motion for a directed judgment
24 under NRCP 52, it is likely that the 2009 Bulk Assignment would have been admissible, or a good
25 faith argument for its admissibility could at least have been preserved for appeal.

26 125. Instead, the October/November 2009 document had not been disclosed even at any
27 time during presentation of BB&T's primary case in chief at Trial, which was staggered and
28 ultimately held between January 8 and March 30, 2010.

126. Following the Trial court's refusal to admit or consider the October 2009 Bulk

1 Assignment, recorded in early November of 2009, Gerrard and GC&L, on behalf of BB&T,
2 moved the district court to re-open BB&T's case in chief, which motion the district court granted.

3 127. Defendants then attempted, on March 31, 2010, to introduce into evidence, on
4 behalf of BB&T, a new "Assignment" document that it had just created (the day before) after the
5 oral motion, which had also never previously been disclosed, namely, an Assignment executed or
6 effective on or about March 30, 2010 (the "2010 Assignment") for the explicit purpose of
7 clarifying ownership of the Colonial Construction Loan.

8 128. The Trial court also refused to consider this newly created assignment, as not
9 having been preserved for admission via pre-trial disclosures to opposing counsel.

10 129. Defendants should have informed BB&T of the need to prepare such a document
11 when they first learned of BB&T's apparent status as the successor to Colonial, and first had the
12 opportunity to review the PAA and to analyze the potential defects in the same, and such a
13 document should have been created and then disclosed at that earlier time, prior to Trial, and
14 utilized during Trial to demonstrate that this claim of BB&T to be the successor-in-interest to
15 Colonial was valid.

16 130. The ease with which Defendants were able to create this 2010 Assignment
17 document and obtain the FDIC's signature thereon, literally overnight, upon their finally realizing,
18 in a negligently belated fashion, the need for such a document, demonstrates that such a document
19 should, and could, have easily been procured in a timely fashion, prior to the disclosures deadlines
20 and prior to Trial, to be introduced during the presentation of BB&T's primary case in chief, had
21 Defendants simply bothered to do so, pursuant to their professional duty to be ready to deal with
22 this significant threshold issue, and present evidence thereon, at and during Trial.

23 131. Even after BB&T's case was reopened, Defendants Gerrard and GC&L still did not
24 introduce the deposition testimony of their designated person most knowledgeable about the
25 assignment, Mr. Fritz.

26 132. Defendants Gerrard and GC&L then made an oral motion pursuant to NRCP 17,
27 21, and 25, to substitute in the FDIC- the only other conceivable owner of the 2007 Colonial Deed
28 of Trust on the Colonial Construction Loan - for BB&T as the real party in interest. The Trial
court denied this motion, stating in pertinent part that:

1 Exhibit 183 [the PAA] is internally inconsistent and is incomplete. It prevents the
2 Court from making a finding that an assignment has occurred of the loan that is at
3 issue. The insufficient and conflicting evidence regarding this assignment is what
4 led me to the position that we're currently in, the ruling that I began to make on
the 41(b) [sic] motions at the time we had this motion presented. For that reason
and given the particular procedural posture of the case, I'm going to deny the
request for substitution of the real party in interest.

5 133. Ultimately, following the completion of the entire BB&T case in chief, including
6 the Centex testimony, the Trial court granted the earlier Rule 52 motion.

7 134. Based thereon, the Trial court determined that the September 2005 R&S Lenders
8 Deed of Trust would be treated as having priority over the 2007 Colonial Deed of Trust, arising
9 out of the Construction Loan based on an evidentiary failure by the Plaintiff's counsel to establish
10 the transfer of FDIC's/Colonial's rights to BB&T, at Trial.

11 135. The Trial court described the above and foregoing procedural events as follows, in
12 subsequently entered written "Findings of Fact and Conclusions of Law" (the "FF&CL"), entered
13 on or about June 23, 2010:

14 The trial commenced on January 8, 2010 with the initiation of BB&T's case
15 in chief. The trial continued over the ensuing four (4) months for a total of ten days
16 [Court's Footnote: On March 30, 2010, BB&T disclosed that its last witness Brad
17 Burns, formerly of Centex, was not available to testify until April 8, 2010. The
18 Court requested that Plaintiff rest with the exception of that testimony on March 30,
19 2010. As a result, the motions pursuant to Rule 52 were made at that time. BB&T's
last witness Brad Burns, formerly of Centex, testified on April 8, 2010 completing
BB&T's presentation of evidence.] until April 14, 2010 when the Court granted a
Rule 52 motion brought by Plaintiffs Murdock and Keach and Defendants Rad,
Nourafchan, Forouzan, RPN, St. Rose Lenders, and R&S Investment (sometimes
"moving parties").

20 The primary issue raised in the Rule 52 motion was whether BB&T had met
21 its evidentiary burden of proof to demonstrate it received an assignment of Colonial
22 Bank's interest in the 2007 Colonial Bank Deed of Trust. Over objection, the Court
23 admitted into evidence Exhibit 183, a Purchase and Assumption Agreement entered
24 into on August 14, 2009 between the FDIC and BB&T which purported to sell
25 assets of Colonial Bank to BB&T. The Court found that there was no competent,
admissible evidence offered by BB&T to establish whether the loan, note and deed
of trust at issue were excluded pursuant to Sections 3.5 and/or 3.6 or purchased by
BB&T pursuant to Section 3.1 of Exhibit 183.

26 As the finder of fact, the Court found that the Purchase and Assumption
27 Agreement did not clearly transfer the loan, note and deed of trust at issue and
called into question BB&T's ability to assert its claims of priority.

28 136. The Trial court therefore decided the case against BB&T based on an evidentiary

1 failure, namely that BB&T had not shown that it had ownership of the claims it was pursuing,
2 consisting of claims which had originally arisen in favor of Colonial prior to the PAA.

3 137. For example, in its FF&CL the Trial court indicated that BB&T's claims were
4 dismissed because "BB&T failed to establish the Colonial Bank Loan, Note and Deed of Trust at
5 issue in the case were ever assigned to BB&T."

6 138. The Trial court's Findings of Fact further provided that:

7 BB&T has not shown the claims or causes of action against defendants being
8 pursued by BB&T belong to BB&T and it is the successor in interest with the
9 ability to assert these claims against defendants . . . since BB&T has not proved
10 that it owns the actions or claims asserted herein, it does not have the ability to
11 assert the claims in the Second Amended Complaint.

12 139. Based on this ruling, which was premised on the evidentiary failure of BB&T to
13 demonstrate its ownership of the claims it was pursuing, the Plaintiff, BB&T, was not able to fully
14 adjudicate, including through an appeal, the merits of its claims.

15 140. Had BB&T been able to obtain an adjudication, on the merits, of its claims, BB&T
16 would have prevailed on its claims, on the merits, either before the district court, or on appeal.

17 141. Instead, there was no basis to reach the merits of BB&T's claims, or to argue the
18 merits of those claims on appeal.

19 142. The Trial court ruled that Plaintiff BB&T's claims, including, without limitation,
20 its claims for replacement (or its analogue equitable subrogation), were to be denied explicitly due
21 to BB&T's failure to prove its status as a successor-in-interest to Colonial.

22 143. For example, the district court's Conclusions of Law portion of the FF&CL,
23 indicated in pertinent part as follows:

24 2. BB&T has failed to meet its burden of proof to establish that the
25 Second Deed of Trust was transferred or assigned by the FDIC to BB&T.

26 3. BB&T is not entitled to relief on its claim for equitable
27 subrogation **since it has not demonstrated it is a successor in interest.**

28 4. BB&T is not entitled to relief on its claim for contractual or
conventional subrogation **since it has not demonstrated it is a successor in interest.**

5. BB&T is not entitled to relief on its claim for equitable
replacement **since it has not demonstrated it is a successor in interest.**

....

1 7. R&S St. Rose Lenders' Deed of Trust should retain its priority
2 over the 2007 Colonial Bank Deed of Trust **since BB&T has not demonstrated**
3 **it is a successor in interest with the ability to assert these claims.**

4

5 15. BB&T was required to establish with competent, admissible
6 evidence that the purchase, transfer and assignment, if any, of the 2007 Colonial
7 Bank Deed of Trust from the FDIC to BB&T was in writing and signed by the
8 FDIC;

9 16. BB&T failed to meet its burden of proof and **presented no**
10 **evidence, written, oral or otherwise, that the 2007 Colonial Bank Deed of**
11 **Trust was assigned by the FDIC to BB&T** in the Purchase and Assumption
12 Agreement;

13 17. The Purchase and Assumption Agreement, Exhibit 183, does not
14 comply with the requirements of either NRS 111.205 or NRS 111.235 as to the
15 2007 Colonial Bank Deed of Trust.

16 [Emphasis added.]

17 144. These rulings would not have been made, had the relevant actual facts been
18 demonstrated to the court by Defendants herein, during the Trial, as BB&T did in fact have the
19 necessary legal and factual rights, as an assignee of Colonial, to pursue its claims.

20 145. These rulings by the Trial court prevented BB&T from obtaining a full adjudication
21 on the merits of its claims.

22 146. To the extent that the Trial court's FF&CL went on to make any rulings as to any
23 component of the merits of BB&T's priority claims, any such rulings were mere dicta, and were
24 not based on a full adjudication of the merits of said claims, and were not able to be addressed on
25 the merits on appeal.

26 147. Had BB&T been allowed to obtain a full adjudication, on the merits, of its claims,
27 it would have ultimately prevailed thereon, either before the district court or on appeal, as it was in
28 fact entitled to the benefit of equitable subrogation or replacement pursuant to the facts at issue.

29 148. Defendant Gerrard and Defendant GC&L negligently failed to prepare, disclose, or
30 otherwise preserve for use at Trial, or to present the relevant documentary and witness evidence
31 during Trial, to make a *prima facie* showing that BB&T had acquired ownership of the claims it
32 was pursuing at Trial, to support a correct ruling by the Trial court, despite ample indications prior
33 to Trial, and at the beginning of Trial, that they would need to do so.

34 149. Other evidence, beyond the PAA, existed prior to Trial, including the 2009 Bulk

1 Assignment and potential live testimony from witnesses, (or even deposition testimony) which
2 Defendants should have disclosed prior to Trial, and/or should have utilized during the
3 presentation of their case in chief at Trial, or upon the reopening of Trial, to demonstrate BB&T's
4 ownership of the subject claims and standing to pursue the same.

5 150. Alternatively, Defendants knew or should have known of the need to advise BB&T
6 of the need to create a better assignment document and obtain the FDIC's signature thereon, prior
7 to Trial, which could have been easily accomplished, but Defendants negligently failed in their
8 duty to so advise BB&T.

9 151. Defendants herein were not prepared to persuasively argue against the oral Rule 52
10 motion against them, as they had failed to recognize the likelihood of confronting such a motion,
11 and had failed to prepare for the same, despite all of the events which should have led them to
12 recognize that this would occur.

13 152. Defendants' failures as described above, constituted legal malpractice, which
14 proximately caused losses to the Plaintiff.

15 153. On July 8, 2010, Defendants Gerrard and GC&L moved for a new trial, or, in the
16 alternative, to alter or amend the judgment, in which Motion Defendants Gerrard and GC&L
17 sought to excuse their failure to address or present evidence as to the assignment to BB&T during
18 presentation of their case.

19 154. On or about October 5, 2010, the Trial court issued an Order denying this post-trial
20 Motion, in which Order the underlying Trial court found as follows:

21 **THIS COURT FINDS** that the issue of whether the 2007 Colonial Bank
22 Loan, Promissory Note and Deed of Trust was assigned to BB&T was one which
23 had been raised by parties and the Court prior to the start of trial.

24 **THIS COURT FINDS** that the issue of whether the 2007 Colonial Bank
25 Loan, Promissory Note and Deed of Trust was acquired by and transferred to
26 BB&T was a permitted subject of discovery by the Court prior to the
27 commencement of trial.

28 **THIS COURT FINDS** that counsel for BB&T was aware of the issue of
whether the 2007 Colonial Bank Loan, Promissory Note and Deed of Trust was
assigned to BB&T prior to the start of trial.

THIS COURT FINDS therefore, that BB&T was on notice and had
opportunity to present evidence of its rights to the 2007 Colonial Bank Loan,

1 Promissory Note and Deed of Trust at the time of trial and was not precluded or
2 prevented from doing so before it rested its case in chief.

3 **THIS COURT FINDS** there was no irregularity in the trial proceedings,
4 BB&T was not unfairly surprised by the challenge to its evidence via the
N.R.C.P. 52 motion, no newly discovered evidence exists and no error of law
occurred which warrants a new trial.

5 [Emphasis in original.]

6 155. The Trial court's foregoing findings, in its Order denying the Motion for a New
7 Trial, have survived and been upheld on appeal, and are now dispositive herein.

8 156. The Trial court issued a "Final Judgment" on or about July 23, 2010 and again on
9 or about November 10, 2010, both of which judgments caused Plaintiff to lose its ability to assert
10 the priority of the 2007 Colonial Deed of Trust which Plaintiff had acquired.

11 157. On or about September 24, 2010, BB&T appealed the district court's decision to
12 the Nevada Supreme Court and the appeal was ultimately heard by a three judge panel of that
13 Court.

14 158. On May 31, 2013 the panel entered its "Order of Affirmance" which decision
15 upheld the Trial court's Judgment based on the following analysis:

16 The PAA was an asset purchase and therefore the district court looked to
17 its language in order to determine which assets and corresponding liabilities were
18 transferred to BB&T. However, due to the omission of the schedules of assets,
19 the district court found that the PAA did not transfer the Construction Loan to
BB&T. We agree, and therefore conclude **that the district court's decision to**
grant R&S Lenders' NRCP 52(c) motion after BB&T failed to carry its
evidentiary burden to prove its ownership of the Construction Loan was not
clearly erroneous.

20 Further, we conclude that the district court's **decision to exclude two**
21 **documents relating to BB&T's interest in the Construction Loan** was not an
22 abuse of discretion **because the documents were not properly produced** in
23 accordance with the disclosure requirements of NRCP 16.1(a)(1) or NRCP
26(3)(a).

24 [Emphasis added.]

25 159. Thus, the Nevada Supreme Court upheld the lower court's ruling that BB&T had
26 failed to prove its right to pursue its claims.

27 160. However, this could have been proven had evidence of the same been timely
28 produced and disclosed and then utilized at Trial by Defendants herein.

1 161. Based on the preclusive effect of this ruling, BB&T had no basis to argue, and the
2 Nevada Supreme Court panel had no basis to reach, the merits of BB&T's claims to priority,
3 including under theories of equitable subrogation or replacement, upon which BB&T would have
4 prevailed, had that been the question to be adjudicated before the Nevada Supreme Court at that
5 time.

6 162. However, due to Defendants' evidentiary failure at the trial level, to establish that
7 BB&T even owned the right to pursue those theories, a full adjudication of those theories through
8 and including adjudication on appeal, has never occurred.

9 163. BB&T then petitioned for *en banc* rehearing of the Nevada Supreme Court's three-
10 judge decision by the entire Nevada Supreme Court.

11 164. This request was denied by Order dated on or about February 21, 2014 in Supreme
12 Court Case No. 56640.

13 165. This ruling did not reach the merits of the Plaintiff BB&T's equitable subrogation
14 and replacement claims, but denied relief to BB&T on the basis that "BB&T failed to satisfy its
15 evidentiary burden to prove its ownership of the Construction Loan" such that no full adjudication
16 of the merits has ever been afforded to BB&T on appeal, based on the preclusive effect of the
17 evidentiary failure caused by the negligence of the Defendants herein.

18 166. Plaintiff BB&T did however actually own the Colonial Construction Loan, and the
19 failure to meet its evidentiary burden on this point was due to Defendants' herein negligent failure
20 to recognize that this ownership needed to be demonstrated at trial, and consequent failure to take
21 the necessary steps, in a timely manner, to make this evidentiary demonstration at Trial.

22 167. Due to Defendants' failure to make the necessary evidentiary showing at trial, on
23 behalf of BB&T, BB&T's rights to claim priority have never been fully adjudicated, on the merits,
24 including through appeal.

25 168. Had an adjudication on the merits actually occurred, and not been precluded by
26 Defendants' malpractice, and had BB&T been able to prove up its claims, BB&T would have
27 prevailed on said claims, either at the Trial or on appeal.

28 169. BB&T also sought to appeal the case to the U.S. Supreme Court, via a petition
seeking a writ of certiorari.

170. The United States Supreme Court denied BB&T's Petition for Writ of Certiorari on October 6, 2014.

FIRST CAUSE OF ACTION

(Professional Negligence/Legal Malpractice)

171. Plaintiff repeats and realleges and incorporates by reference all of the allegations previously made in the foregoing paragraphs hereof, as though fully set forth at length herein.

172. An attorney-client relationship was created between Plaintiff and Defendants by the above conduct of the parties, pursuant to which Defendants represented Plaintiff in the Underlying Subject Litigation.

173. Defendants had a duty, pursuant to that relationship, to use such skill, prudence and diligence in representing Plaintiff in the Underlying Subject Litigation, as lawyers with ordinary skill and capacity possess and exercise in similar conditions and circumstances.

174. Defendants failed to meet this duty.

175. Defendants' failures to meet this duty proximately caused losses and damages to Plaintiff.

176. Defendants' failures, as outlined in greater detail above, including their failures to properly and timely obtain and then disclose and utilize at Trial relevant documents and other evidence demonstrating the assignment of the Colonial Construction Loan and 2007 Colonial Deed of Trust from the FDIC to Plaintiff, prevented Plaintiff from obtaining relief on the basis of its various claims asserted against the defendants and other opposing parties named or appearing in the Subject Underlying Litigation.

177. But for Defendants' failures and breaches of duty and breaches of the standard of care, BB&T would otherwise have obtained relief, and prevailed on the merits of its claims, at Trial or on appeal, as it was entitled to prevail on one or more of its claims under the facts and existing Nevada law.

178. However, Defendants' failures outlined above prevented Plaintiff from obtaining relief on the basis of its various claims asserted against the other parties in the Original Underlying Litigation.

179. Defendants breached their duties owed to Plaintiff by committing the negligent acts

1 and omissions and failures of professional duty and legal malpractice alleged herein.

2 180. These breaches proximately caused losses to Plaintiff.

3 181. Plaintiff's injuries include the loss of a judgment, settlement, or award, and the
4 remuneration that Plaintiff would have recovered by foreclosing on the subject Property in first
5 priority position, but for Defendants' negligence, and includes the value of the loss of the 2007
6 Colonial Deed of Trust's first priority position, which security instrument has or will be wiped out
7 upon foreclosure of the 2005 R&S Lenders Second Deed of Trust.

8 182. The damages sustained by Plaintiff were proximately caused by Defendants'
9 various acts of malpractice, breaches of duty, and of the standard of care, failures, and omissions,
10 as set forth above.

11 183. As a proximate result of Defendants' professional legal malpractice, Plaintiff has
12 been damaged in an amount in excess of \$10,000.00, plus interest accrued and to accrue, at the
13 highest rate allowed by law, and the costs and fees being incurred in this suit, and is entitled to
14 Judgment against the Defendants, and each of them, jointly and severally, for these damages.

15 184. Plaintiff has been required to retain the services of an attorney in order to prosecute
16 this action, and is, therefore, entitled to its costs and reasonable attorneys' fees incurred herein,
17 both pursuant to any statute, rule, or contractual provision allowing for the same, and also as
18 special damages incurred herein.

19 **WHEREFORE** Plaintiff prays for the following relief against Defendants:

- 20 A. Judgment against Defendants Gerrard and GC&L, jointly and severally, for
21 compensatory, consequential, direct and indirect damages and all other losses, in
22 excess of \$10,000;
- 23 B. An Award and Judgment of pre-judgment interest at the highest rate allowed by
24 law;
- 25 C. An Award and Judgment for Plaintiff's costs of suit, both pursuant to any statute,
26 rule, or contractual provision allowing for the same and also as special damages
27 incurred herein;
- 28 D. An Award and Judgment for Plaintiff's reasonable attorneys' fees, both pursuant to
any statute, rule, or contractual provision allowing for the same, and also as special

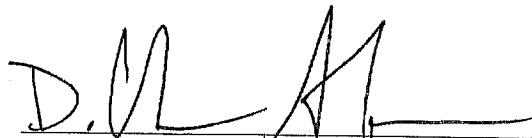
1 damages incurred herein;

2 E. An Award and Judgment allowing for the accrual of post-Judgment interest to be
3 incurred and to accrue at the highest rate available to Plaintiff, until any Judgment
4 is paid in full; and

5 F. For such other and further relief as the Court deems just and proper under the
6 circumstances.

7 DATED this 22nd day of February, 2017.

8 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

9
10 

11 G. MARK ALBRIGHT, ESQ.

12 Nevada Bar No. 001394

13 D. CHRIS ALBRIGHT, ESQ.

14 Nevada Bar No. 004904

15 801 South Rancho Drive, Suite D-4

16 Las Vegas, Nevada 89106

17 Tel: (702) 384-7111

18 gma@albrightstoddard.com

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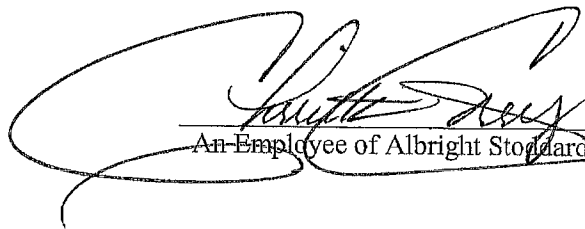
20 Attorneys for Plaintiff

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 22ND day of February, 2017, service was made by the following mode/method a true and correct copy of the foregoing **FIRST AMENDED COMPLAINT** to the following person(s):

Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
GORDON & REES LLP
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101
Tel: 702.577.9310
Fax: 702.255.2858
cmariam@gordonrees.com
rlarsen@gordonrees.com
wwong@gordonrees.com
Attorney for Defendants

☐ Certified Mail
☒ Electronic Filing/Service
☐ Email
☐ Facsimile
☐ Hand Delivery
☐ Regular Mail


An Employee of Albright Stoddard Warnick & Albright

ATTACHMENT 4, EXHIBIT F



DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST
COMPANY, a North Carolina
corporation,
Plaintiff(s)

vs

Case No.: A-16-744561-C

DOUGLAS D. GERRARD, ESQ.,
individually; and GERRARD & COX, a
Nevada professional corporation, d/b/a
GERRARD COX & LARSEN; JOHN
DOE INDIVIDUALS I-X; and ROE
BUSINESS ENTITIES XI-XX,
Defendants.

Department 27

**DECISION AND ORDER GRANTING DEFENDANTS DOUGLAS D. GERRARD, ESQ. AND
GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT
AND DENYING PLAINTIFF'S COUNTERMOTION FOR LEAVE TO AMEND**

This is a legal malpractice suit against attorney Douglas D. Gerrard ("Gerrard") and his law firm, Gerrard Cox & Larsen (individually "GCL") (collectively the "Defendants"). This case stems from the Defendants' representation of Plaintiff Branch Banking & Trust Company ("BBT") in an earlier underlying case tried before the Honorable Elizabeth Gonzalez in 2010. The underlying case involved the adjudication of the priority of two deeds of trust encumbering approximately thirty-eight acres of real property in Henderson, Clark County, Nevada. Colonial Bank, N.A. ("Colonial") originally held the beneficial interest under one of the deeds of trust, but its interest was acquired during the underlying litigation by BBT when Colonial was placed into receivership with the FDIC. It should be noted that

1 Defendants were originally retained to represent Colonial, but such representation transferred
2 to BBT as Colonial's successor in interest.

3 In its Findings of Fact and Conclusions of Law entered June 23, 2010, the District
4 Court in the underlying case ruled against BBT on the basis that BBT failed to establish, as a
5 necessary prerequisite to its claims, that it had been assigned and owned the former Colonial
6 Deed of Trust on which the claims it was pursuing were based. *See* Defendants' Request for
7 Judicial Notice in Support of Defendants Motion to Dismiss First Amended Complaint,
8 Exhibit B—Findings of Fact and Conclusions of Law, Case #08-A-574852. BBT asserts
9 that this ruling was based on the District Court's refusal to allow BBT's attorneys, the
10 Defendants, to present evidence at trial relative to the assignment of the Colonial Deed of
11 Trust to BBT due to the Defendants' alleged failure to timely disclose the pertinent
12 documents prior to trial.
13

14
15 BBT initiated this legal malpractice suit against Defendants on October 5, 2016.
16 BBT filed its First Amended Complaint on February 22, 2017, asserting a single cause of
17 action for Professional Negligence/Legal Malpractice.

18 Now before the Court is Defendants' Motion to Dismiss First Amended Complaint
19 ("Motion") filed on March 8, 2017 concurrently with Defendants' Request for Judicial
20 Notice, wherein Defendants asked this Court to take judicial notice of numerous documents
21 related to the underlying dispute. BBT filed its Opposition to Defendants' Motion to Dismiss
22 on March 21, 2017, along with a Counter-Request for Judicial Notice. The Court set
23 Defendants' Motion to Dismiss for a hearing on motions calendar on April 19, 2017 at 10:00
24 a.m., wherein this Court denied Defendants' Motion to Dismiss as to standing, but took the
25 issue as to whether the statute of limitations has expired under advisement. The Court
26
27
28

1 continued the matter to Chambers Calendar on May 16, 2017 for a decision as to the running
2 of the statute of limitations.

3
4 After having read the pleadings and papers on file, including the supplemental briefs
5 filed by both parties, and for good cause appearing therefore:
6

7 **THE COURT FINDS** after review, in Nevada, an action for legal malpractice does
8 not begin to accrue until the “plaintiff’s damages are certain and not contingent upon the
9 outcome of an appeal.” *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d
10 184, 186 (1988). “It is only after the underlying case has been affirmed on appeal that it is
11 appropriate to assert injury and maintain a legal malpractice cause of action for damages.” *Id.*
12 The statute of limitations for legal malpractice claims is four years from the damages or two
13 years from when the plaintiff discovers, or could discover, the damages, whichever is earlier.
14 N.R.S. 11.207.
15

16 **THE COURT FURTHER FINDS** after review that on March 31, 2013, the Nevada
17 Supreme Court affirmed the district court’s ruling in the underlying case, and issued its
18 remittitur. “The reversal and remittitur comprise the judgment by which the parties and the
19 district court are thereafter bound.” *In re Estate & Living Trust of Miller*, 125 Nev. 550, 553,
20 216 P.3d 239, 242 (2009). The remittitur “terminated the case below as to all issues settled
21 by the judgment” and formally informs the district court of appellate court’s final resolution
22 of the appeal. *Cerminara v. Eighth Jud. Distr. Ct.*, 104 Nev. 663, 665, 765 P.2d 182, 184
23 (1988); *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998).
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25
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28

1 **THE COURT FURTHER FINDS** after review, that Nevada Rules of Appellate
2 Procedure 41(a)(3)(A) provides that “[a] party may file a motion to stay the remittitur
3 pending application to the Supreme Court of the United States for a writ of certiorari.”
4

5 **THE COURT FURTHER FINDS** after review, that a writ of certiorari is separate
6 and distinct from an appeal. While an appeal to an appellate court is a matter of right, a writ
7 of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10.

8 **THE COURT FURTHER FINDS** after review that because BBT did not have a
9 right to a writ of certiorari to the United States Supreme Court, and because BBT failed to
10 file a motion to stay the remittitur under NRAP 41(a)(3)(A), the Nevada Supreme Court’s
11 May 31, 2013 decision to affirm the district court’s ruling and its remittitur to the district
12 court, constitutes an final adverse appellate ruling for BBT. Therefore, the statute of
13 limitations was not tolled when BBT filed a petition for a writ of certiorari to the United
14 States Supreme Court. Accordingly, the statute of limitations began to run on or about May
15 31, 2013, making BBT’s deadline under the statute of limitations for its legal malpractice
16 claim two years later on or about May 31, 2015.
17

18 **THE COURT FURTHER FINDS** after review BBT filed its Complaint in this case
19 on October 5, 2016, some 493 days past the expiration of the statute of limitations.
20

21 **THEREFORE, THE COURT ORDERS** for good cause appearing and for the
22 reasons stated above, Defendants Motion to Dismiss First Amended Complaint is
23 **GRANTED** as the statute of limitations ran on or about May 31, 2015.

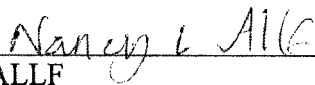
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1
2 **COURT FURTHER ORDERS** for good cause appearing and after review that
3 Plaintiff's Countermotion for Leave to Amend is likewise **DENIED. HEARING** set for
4 **CHAMBERS CALENDAR** on May 16, 2017, **VACATED.**

5
6 Dated: May ²⁵ 23, 2017 ^{MLA}

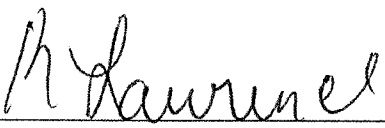
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9 NANCY ALLF
District Court Judge, Department 27

10
11 **Certificate of Service**

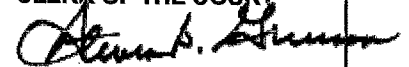
12 I hereby certify that on or about the date signed I caused the foregoing document to be
13 electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial
14 District Court's electronic filing system, with the date and time of the electronic service
substituted for the date and place of deposit to: *anb by email to.*

15 Albright, Stoddard, Warnick & Albright
16 G. Mark Albright, Esq. – gma@albrightstoddard.com
D. Chris Albright, Esq. – dca@albrightstoddard.com

17 Gordon & Rees LLP
18 Craig J. Mariam, Esq. – cmariam@gordonrees.com
Robert S. Larsen, Esq. – rlarsen@gordonrees.com
19 Wong Yan Wong, Esq. – wwong@gordonrees.com

20 
21
22 Karen Lawrence
Judicial Executive Assistant

ATTACHMENT 4, EXHIBIT G



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4 ROBERT S. LARSEN, ESQ.
5 Nevada Bar No. 7785
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17 *Attorneys for Defendants Douglas D.*
18 *Gerrard, Esq. and Gerrard Cox & Larsen*

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27
28
EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a
North Carolina corporation,
Plaintiff,

vs.

DOUGLAS D. GERRARD, ESQ., individually; and
GERRARD COX & LARSEN, a Nevada
professional corporation, JOHN DOES I-X; and
ROE BUSINESS ENTITIES XI-XX,
Defendant.

) Case No.: A-16-744561-C
) Dept. No.: ~~27~~ XXVII
)

) **NOTICE OF ENTRY OF**
) **DECISION AND ORDER**
) **GRANTING DEFENDANTS**
) **GERARD D. GERRARD, ESQ.**
) **AND GERRARD COX &**
) **LARSEN'S MOTION TO DISMISS**
) **FIRST AMENDED COMPLAINT**
) **AND DENYING PLAINTIFF'S**
) **COUNTERMOTION FOR LEAVE**
) **TO AMEND**

PLEASE TAKE NOTICE that, on May 25, 2017, the Court entered the DECISION
AND ORDER GRANTING DEFENDANTS GERARD D. GERRARD, ESQ. AND GERRARD
COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND
DENYING PLAINTIFF'S COUNTERMOTION FOR LEAVE TO AMEND in this matter.

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///

1 A copy of the Court's Decision and Order is attached hereto as Exhibit "1."

2 DATED this 26th day of May, 2017.

3 Respectfully submitted,

4 GORDON & REES, LLP

5 /s/ Robert S. Larsen

6 Craig J. Mariam, Esq.

7 Nevada Bar No. 10926

8 Robert S. Larsen, Esq.

9 Nevada Bar No. 7785

10 Wing Yan Wong, Esq.

11 Nevada Bar No. 13622

12 300 South Fourth Street, Suite 1550

13 Las Vegas, Nevada 89101

14 *Attorneys for Defendants Douglas D.*

15 *Gerrard, Esq. and Gerrard Cox & Larsen*

Gordon & Rees LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of GORDON & REES LLP, and that on the 26th day of May, 2017, the foregoing **NOTICE OF ENTRY OF DECISION AND ORDER GRANTING DEFENDANTS GERARD D. GERRARD, ESQ. AND GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND DENYING PLAINTIFF'S COUNTERMOTION FOR LEAVE TO AMEND** was served upon those persons designated by the parties in the E-Service Master List in the Eighth Judicial District court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-1 and the Nevada Electronic Filing and Conversion Rules, upon the following:

G. Mark Albright, Esq.
D. Chris Albright, Esq.
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106

/s/ Gayle Angulo
An Employee of GORDON & REES, LLP

EXHIBIT “1”



DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST
COMPANY, a North Carolina
corporation,

Plaintiff(s)

vs

Case No.: A-16-744561-C

DOUGLAS D. GERRARD, ESQ.,
individually; and GERRARD & COX, a
Nevada professional corporation, d/b/a
GERRARD COX & LARSEN; JOHN
DOE INDIVIDUALS I-X; and ROE
BUSINESS ENTITIES XI-XX,
Defendants.

Department 27

**DECISION AND ORDER GRANTING DEFENDANTS DOUGLAS D. GERRARD, ESQ. AND
GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT
AND DENYING PLAINTIFF'S COUNTERMOTION FOR LEAVE TO AMEND**

This is a legal malpractice suit against attorney Douglas D. Gerrard ("Gerrard") and his law firm, Gerrard Cox & Larsen (individually "GCL") (collectively the "Defendants"). This case stems from the Defendants' representation of Plaintiff Branch Banking & Trust Company ("BBT") in an earlier underlying case tried before the Honorable Elizabeth Gonzalez in 2010. The underlying case involved the adjudication of the priority of two deeds of trust encumbering approximately thirty-eight acres of real property in Henderson, Clark County, Nevada. Colonial Bank, N.A. ("Colonial") originally held the beneficial interest under one of the deeds of trust, but its interest was acquired during the underlying litigation by BBT when Colonial was placed into receivership with the FDIC. It should be noted that

1 Defendants were originally retained to represent Colonial, but such representation transferred
2 to BBT as Colonial's successor in interest.

3 In its Findings of Fact and Conclusions of Law entered June 23, 2010, the District
4 Court in the underlying case ruled against BBT on the basis that BBT failed to establish, as a
5 necessary prerequisite to its claims, that it had been assigned and owned the former Colonial
6 Deed of Trust on which the claims it was pursuing were based. *See* Defendants' Request for
7 Judicial Notice in Support of Defendants Motion to Dismiss First Amended Complaint,
8 Exhibit B—Findings of Fact and Conclusions of Law, Case #08-A-574852. BBT asserts
9 that this ruling was based on the District Court's refusal to allow BBT's attorneys, the
10 Defendants, to present evidence at trial relative to the assignment of the Colonial Deed of
11 Trust to BBT due to the Defendants' alleged failure to timely disclose the pertinent
12 documents prior to trial.
13

14
15 BBT initiated this legal malpractice suit against Defendants on October 5, 2016.
16 BBT filed its First Amended Complaint on February 22, 2017, asserting a single cause of
17 action for Professional Negligence/Legal Malpractice.

18 Now before the Court is Defendants' Motion to Dismiss First Amended Complaint
19 ("Motion") filed on March 8, 2017 concurrently with Defendants' Request for Judicial
20 Notice, wherein Defendants asked this Court to take judicial notice of numerous documents
21 related to the underlying dispute. BBT filed its Opposition to Defendants' Motion to Dismiss
22 on March 21, 2017, along with a Counter-Request for Judicial Notice. The Court set
23 Defendants' Motion to Dismiss for a hearing on motions calendar on April 19, 2017 at 10:00
24 a.m., wherein this Court denied Defendants' Motion to Dismiss as to standing, but took the
25 issue as to whether the statute of limitations has expired under advisement. The Court
26
27
28

1 continued the matter to Chambers Calendar on May 16, 2017 for a decision as to the running
2 of the statute of limitations.

3
4 After having read the pleadings and papers on file, including the supplemental briefs
5 filed by both parties, and for good cause appearing therefore:
6

7 **THE COURT FINDS** after review, in Nevada, an action for legal malpractice does
8 not begin to accrue until the “plaintiff’s damages are certain and not contingent upon the
9 outcome of an appeal.” *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d
10 184, 186 (1988). “It is only after the underlying case has been affirmed on appeal that it is
11 appropriate to assert injury and maintain a legal malpractice cause of action for damages.” *Id.*
12 The statute of limitations for legal malpractice claims is four years from the damages or two
13 years from when the plaintiff discovers, or could discover, the damages, whichever is earlier.
14 N.R.S. 11.207.
15

16 **THE COURT FURTHER FINDS** after review that on March 31, 2013, the Nevada
17 Supreme Court affirmed the district court’s ruling in the underlying case, and issued its
18 remittitur. “The reversal and remittitur comprise the judgment by which the parties and the
19 district court are thereafter bound.” *In re Estate & Living Trust of Miller*, 125 Nev. 550, 553,
20 216 P.3d 239, 242 (2009). The remittitur “terminated the case below as to all issues settled
21 by the judgment” and formally informs the district court of appellate court’s final resolution
22 of the appeal. *Cerminara v. Eighth Jud. Distr. Ct.*, 104 Nev. 663, 665, 765 P.2d 182, 184
23 (1988); *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998).
24
25
26
27
28

1 **THE COURT FURTHER FINDS** after review, that Nevada Rules of Appellate
2 Procedure 41(a)(3)(A) provides that “[a] party may file a motion to stay the remittitur
3 pending application to the Supreme Court of the United States for a writ of certiorari.”
4

5 **THE COURT FURTHER FINDS** after review, that a writ of certiorari is separate
6 and distinct from an appeal. While an appeal to an appellate court is a matter of right, a writ
7 of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10.

8 **THE COURT FURTHER FINDS** after review that because BBT did not have a
9 right to a writ of certiorari to the United States Supreme Court, and because BBT failed to
10 file a motion to stay the remittitur under NRAP 41(a)(3)(A), the Nevada Supreme Court’s
11 May 31, 2013 decision to affirm the district court’s ruling and its remittitur to the district
12 court, constitutes an final adverse appellate ruling for BBT. Therefore, the statute of
13 limitations was not tolled when BBT filed a petition for a writ of certiorari to the United
14 States Supreme Court. Accordingly, the statute of limitations began to run on or about May
15 31, 2013; making BBT’s deadline under the statute of limitations for its legal malpractice
16 claim two years later on or about May 31, 2015.
17

18 **THE COURT FURTHER FINDS** after review BBT filed its Complaint in this case
19 on October 5, 2016, some 493 days past the expiration of the statute of limitations.
20

21 **THEREFORE, THE COURT ORDERS** for good cause appearing and for the
22 reasons stated above, Defendants Motion to Dismiss First Amended Complaint is
23 **GRANTED** as the statute of limitations ran on or about May 31, 2015.

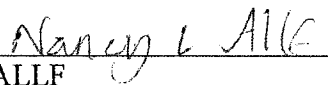
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1
2 **COURT FURTHER ORDERS** for good cause appearing and after review that
3 Plaintiff's Countermotion for Leave to Amend is likewise **DENIED. HEARING** set for
4 **CHAMBERS CALENDAR** on May 16, 2017, **VACATED.**

5
6 Dated: May ²⁵ 23, 2017 ^{MLA}

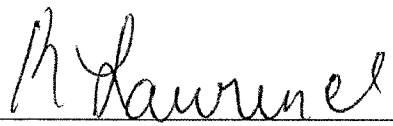
7
8 
9 NANCY ALLF
District Court Judge, Department 27

10
11 **Certificate of Service**

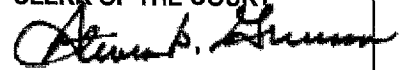
12 I hereby certify that on or about the date signed I caused the foregoing document to be
13 electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial
14 District Court's electronic filing system, with the date and time of the electronic service
substituted for the date and place of deposit to: *anb by email to.*

15 Albright, Stoddard, Warnick & Albright
16 G. Mark Albright, Esq. – gma@albrightstoddard.com
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17 Gordon & Rees LLP
18 Craig J. Mariam, Esq. – cmariam@gordonrees.com
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Wong Yan Wong, Esq. – wwong@gordonrees.com

20 
21
22 Karen Lawrence
Judicial Executive Assistant

ATTACHMENT 4, EXHIBIT H



MOT
G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 001394
D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 004904
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Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY,
a North Carolina corporation,

Plaintiff,

vs.

DOUGLAS D. GERRARD, ESQ., individually;
and GERRARD & COX, a Nevada professional
corporation, d/b/a GERRARD COX &
LARSEN; JOHN DOE INDIVIDUALS I-X;
and ROE BUSINESS ENTITIES XI-XX,

Defendants.

CASE NO.: A-16-744561-C
DEPT. NO.: XXVII

**MOTION TO ALTER OR AMEND, BY
VACATING, ORDER OF DISMISSAL,
PURSUANT TO NRCP 59(e)**

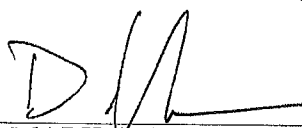
DATE OF HEARING:
TIME OF HEARING:

COMES NOW, Plaintiff, BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, qualified and registered to do business in Nevada (hereinafter "Plaintiff" or "BB&T"), by and through its attorneys of record, ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and hereby moves this Court, pursuant to NRCP 59(e), to vacate (*i.e.*, to alter or amend, by vacating) its "Decision and Order Granting Defendant Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint and Denying Plaintiff's Countermotion for Leave to Amend" entered on May 25, 2017.

1 This Motion is made and based upon the attached Memorandum of Points and Authorities, any
2 argument of counsel at the time of any hearing on this matter, and all of the papers and pleadings on
3 file herein.

4 DATED this 5th day of June, 2017.

5 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

6
7 
8 G. MARK ALBRIGHT, ESQ.
9 Nevada Bar No. 001394
10 D. CHRIS ALBRIGHT, ESQ.
11 Nevada Bar No. 004904
12 801 South Rancho Drive, Suite D-4
13 Las Vegas, Nevada 89106
14 (702) 384-7111
15 Attorneys for Plaintiff

16 NOTICE OF MOTION


17 TO: ALL INTERESTED PARTIES; and

18 TO: ALL COUNSEL OF RECORD

19 PLEASE TAKE NOTICE that the undersigned counsel will bring the above and foregoing
20 MOTION TO ALTER OR AMEND, BY VACATING, ORDER OF DISMISSAL PURSUANT TO
21 NRCP 59(e) on for hearing on the 19 day of JULY, 2017, at the hour of 9:00A
22 .m., in Department XXVII, of the above-entitled Court.

23 DATED this 5th day of June, 2017.

24 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

25
26 
27 G. MARK ALBRIGHT, ESQ.
28 Nevada Bar No. 001394
D. CHRIS ALBRIGHT, ESQ.
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801 South Rancho Drive, Suite D-4
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Attorneys for Plaintiff

POINTS AND AUTHORITIES

A. Introduction.

The Court is familiar with the factual basis of this lawsuit, which alleges legal malpractice against Defendants, stemming from their representation of Plaintiff in certain prior underlying litigation. The Defendants moved to dismiss Plaintiff's First Amended Complaint on a variety of grounds, only one of which seemed compelling to this Court, the statute of limitations. After a hearing and a request for further briefing on the statute of limitations defense raised in the Motion, this Court entered its Order granting the Motion to Dismiss Plaintiff's First Amended Complaint, on May 25, 2017. Said Order relied on the fact that a remittitur of all State court appeals in the underlying litigation had issued without stay on March 18, 2014. This Court ruled that the statute of limitations for a legal malpractice action was therefore not tolled by (and pending the outcome of) a subsequent petition for writ of certiorari which was timely filed with the U.S. Supreme Court. Based thereon, this Court ruled that the Statute of Limitations began to run on May 13, 2013.¹ This Motion seeks to have this Court reconsider and alter and amend (by vacating) its Order.

B. A Motion to Vacate an Order of Dismissal May Properly Be Brought Under NRCP 59(e).

An order of dismissal, without leave to amend, is, effectively, a final judgment. *See, e.g., Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 400 P.2d 621 (1965). NRCP 59(e) allows a motion to alter or amend a judgment to be filed within ten (10) days of notice of entry thereof.

Given its general language, Rule 59(e) "covers a broad range of motions" including any motions which make any request for a substantive alteration of an order or judgment. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 581, 245 P.3d 1190, 1192-1193 (2010), quoting 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, §2810.1, at 119 (2d ed. 1995). Based thereon, Rule 59(e) "has been interpreted as permitting a motion to vacate a judgment rather than merely amend it." *Id.*

¹This Court's Order thus indicated that the statute of limitations had begun to run as of May 13, 2013, the date on which a three Judge Panel of the Nevada Supreme Court initially rejected the appeal, as the date on which the statute of limitations began to run, notwithstanding two subsequent petitions for rehearing and for en banc rehearing which were timely filed after that date, delaying the remittitur until February of 2014. It is therefore unclear what date the Court would have indicated the statute of limitations began to expire had the remittitur been stayed. Nevertheless, the lack of such a stay seems to be the crucial point in this Court's Order, which will primarily be addressed herein.

Thus, for example, in *TRP Int'l Inc. v. Proimtu MMI, LLC*, 391 P.3d 763, 764 (Nev. April 6, 2017) Nevada's high court described with approval the following procedures which had taken place in the district court therein:

Proimtu MMI LLC filed an amended complaint alleging several causes of action related to the construction of a solar electricity plant in Tonopah. On February 16, 2016, the district court entered an order granting appellant TRP International, Inc.'s motion to dismiss the claims asserted by Proimtu against it and certified the judgment as final under NRCP 54(b). **Proimtu timely filed a tolling motion pursuant to NRCP 59(e), see NRAP 4(a)(4)(C), asking that the district court amend or reconsider the order dismissing the complaint and allow the action to proceed.** The district court granted the motion, vacated the February 16, 2016, order granting the motion to dismiss, and denied the [previously granted] motion to dismiss.

[Emphasis added.] The district court was therefore held to retain jurisdiction of the case, as the vacated order of dismissal meant there was no longer a final appealable judgment in place for either side to appeal. *Id.*

This is the same procedure now followed by Movant herein: this motion to vacate the Order of Dismissal is, similarly, brought under NRCP 59(e); similarly seeks to have this Court reconsider and vacate its Order of Dismissal, and, is, similarly, a tolling Motion, delaying the due date of any Notice of Appeal, under NRAP 4(a)(4)(C). Moreover, if granted, then this Motion will result in this Court retaining jurisdiction over this case, as it moves forward at this time.

C. Standard For Reviewing A Motion to Alter or Amend Under NRCP 59(e).

"Among the 'basic grounds' for a Rule 59(e) Motion are 'correcting manifest errors of law or fact,'" as well as asserting any "compelling legal basis" to avoid a "manifest injustice." *AA Primo* 125 Nev. at 582, 245 P.3d at 1193.

"A district court may reconsider a previously decided issue if ... the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.d 486, 489 (1997). Further, whether to grant reconsideration is "within the sound discretion of the district court." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). Indeed, the district court does not abuse its discretion to reconsider a motion, "[a]lthough the facts and the law [are] unchanged [if] the judge [is] more familiar with the case by the time the second motion [is] heard, and [she is] persuaded by the rationale of the" motion seeking reconsideration, including any newly cited authority. *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 218, 606

1 P.2d 1095, 1097 (1980).

2 An order reconsidering and altering and amending, by vacating, this Court's Order of Dismissal
3 is appropriate in this case because this Court's May 25, 2017 Decision and Order is erroneous in its
4 reliance on the issuance of a remittitur in the underlying litigation, as a controlling event for purposes
5 of the statute of limitations, as such issuance simply has no bearing on the ultimate questions of
6 whether the United States Supreme Court will consider or grant a petition for writ of certiorari, and
7 whether or not the Nevada judiciary will be required to honor the U.S. Supreme Court's decision.

8 **D. The Decision and Order Relied on an Analysis which Omitted the Key Question.**

9 (i) *The Decision and Order of Dismissal.*

10 In its Decision and Order entered herein on May 25, 2017, this Court stated:

11 **THE COURT FURTHER FINDS** after review, that Nevada Rules of
12 Appellate procedure 41(a)(3)(A) provides that "[a] party may file a motion to stay the
13 remittitur pending application to the Supreme Court of the United States for a writ of
14 certiorari."

15 **THE COURT FURTHER FINDS** after review, that a writ of certiorari is
16 separate and distinct from an appeal. While an appeal to an appellate court is a matter
17 of right, a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct.
18 R. 10.

19 **THE COURT FURTHER FINDS** after review that because BBT did not have
20 a right to a writ of certiorari to the United States Supreme Court, and because BBT
21 failed to file a motion to stay the remittitur under NRAP 41(a)(3)(A),² the Nevada
22 Supreme Court's May 31, 2013 decision to affirm the district court's ruling and its
23 remittitur to the district court, constitutes an final adverse ruling for BBT. Therefore,
24 the statute of limitations was not tolled when BBT filed a petition for a writ of
25 certiorari to the United States Supreme Court. Accordingly, the statute of limitations
began to run on or about May 31, 2013, making BBT's deadline under the statute of
limitations for its legal malpractice claim two years later on or about May 31, 2015.

26 **THE COURT FURTHER FINDS** after review BBT filed its Complaint in this
27 case on October 5, 2016, some 493 days past the expiration of the statute of limitations.

28 **THEREFORE, THE COURT ORDERS** for good cause appearing and for
the reasons stated above, Defendants Motion to Dismiss First Amended Complaint is
GRANTED as the statute of limitations ran on or about May 31, 2015.

²The reason why BB&T did not seek to stay the remittitur might be noted: by that point in time, the borrower on the \$12 million deed of trust which was treated in the underlying litigation as having priority over the BB&T deed of trust, namely R&S St. Rose, had filed bankruptcy (*see*, first 3 pages of April 14, 2011 Bankruptcy Petition attached as Exhibit "A" hereto) thereby staying any foreclosure sale of the Property in any event, or staying any distribution of the proceeds from any such sale, subject to any Bankruptcy Court orders (on various motions and adversarial proceedings which came to be filed in the Bankruptcy case). Thus, staying remittitur in order to avoid the lower court allowing BB&T's adversary, and competing lender, to go forward with the foreclosure sale, simply was not needed, as BB&T was already being protected against such action in another forum.

This Court's above ruling essentially accepted Defendants' reasoning, as set forth in their Motion to Dismiss, that the issuance of remittitur is deeply significant and thus acts as some sort of barrier, beyond which Nevada's litigation malpractice appeal-tolling rules can no longer apply. However, this assertion ignores the relevant question, which requires an examination of what would have happened if the U.S. Supreme Court *had* granted the Petition for Writ of Certiorari. Would the Nevada Supreme Court have ignored such a writ because remittitur had already issued? And if the U.S. Supreme Court had then reversed the Nevada Supreme Court's ruling, could the Nevada Supreme Court also choose to ignore that decision on the grounds that remittitur had already issued and so no further action could be taken in Nevada on the basis of a U.S. Supreme Court decision reversing the Nevada Supreme Court? The answer to both of these inquiries is, of course, emphatically no. Whether or not a stay has been entered to prevent the remittitur of the case to the trial court, is, rather, completely irrelevant to the issues now before this Court, the only question being whether the Petition to the U.S. Supreme Court was timely filed, which no one disputes was the case.

(ii) *The Issuance of a Mandate or Remittitur Has No Bearing on the Validity of any Petition for Writ of Certiorari.*

The United States Supreme Court has itself issued guidelines for petitioning for a writ of certiorari, which make it clear that issuance of a remittitur (called a mandate in federal appeals -- FRAP 41) has no bearing whatsoever on the efficacy of a cert. petition, providing as follows:

You must file your petition for a writ of certiorari within 90 days from the date of the entry of the final judgment in the United States court of appeals or highest state appellate court **or 90 days from the denial of a timely filed petition for rehearing. The issuance of a mandate or remittitur after judgment has been entered has no bearing on the computation of time** and does not extend the time for filing. See Rules 13.1 and 13.3. (Emphasis added.)

Guide for Prospective Indigent Petitioners for Writs of Certiorari (Office of the Clerk, Supreme Court of the United States) (available at <https://www.supremecourt.gov/casehand/guideforifpcases.pdf>).

U.S. Supreme Court Rule 13.1 expressly provides as follows:

Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) **is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.** A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last

1 resort is timely when it is **filed with the Clerk within 90 days after entry of the**
2 **order denying discretionary review.** (Emphasis added).

3 Supreme Court Rule 13.2 provides:

4 The time to file a petition for a writ of certiorari runs from the date of entry of
5 the judgment or order sought to be reviewed, **and not from the issuance date of the**
6 **mandate (or its equivalent [remittitur] under local practice).** But **if a petition for**
7 **rehearing is timely filed in the lower court by any party,** or if the lower court
8 appropriately entertains an untimely petition for rehearing or sua sponte considers
9 rehearing, **the time to file the petition for a writ of certiorari for all parties** (whether
10 or not they requested rehearing or joined in the petition for rehearing) **runs from the**
11 **date of the denial of rehearing** or, if rehearing is granted, the subsequent entry of
12 judgment. [Emphasis added.]

13 In the present case, as noted in Plaintiff's previously filed Opposition and Supplemental brief,
14 this is exactly what happened, and the Petition for Writ was timely filed within the deadline arising
15 once the underlying Plaintiff's final allowed request for rehearing before the Nevada Supreme Court
16 had been denied, on February 21, 2014.

17 In *United States of America v. Thomas*, 203 F.3d 350, 352 (5th Cir. 2000), the court explained
18 that a criminal conviction:

19 becomes final: (1) when the ninety day period for filing a petition for writ of certiorari
20 expires if the defendant does not seek a writ of certiorari from the Supreme Court, *see*,
21 Sup.Ct. R. 13, (2) **when the Supreme Court denies the petition for writ of**
22 **certiorari if such a petition is filed and denied,** or (3) when the Supreme court issues
23 a decision on the merits, if the petition for writ of certiorari is granted and the case
24 proceeds to decision. *See, e.g., Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999),
25 cert *denied*, 528 U.S. 1084, 120 S.Ct. 80, 145 L.Ed.2d 681 (2000); *Kapral v. United*
26 *States*, 166 F.3d 565, 577 (3^d Cir. 1998); *United States v. Williamson*, No. 99-3120,
27 1999 WL 1083750, at 1 n. 1 (10th Cir. 1999) (unpublished); *see also United States v.*
28 *Miller*, 197 F.3d 644, 652 (n. 9 (3^d Cir. 1999 (applying rule announced in *Kapral*);
United States v. Lacey, 98-3030, 1998 WL 777067, at 1 (10th Cir. 1998) (unpublished)
(quoting *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 712 n. 6, 93 L.Ed.2d 649
(1987), for the proposition that **a federal conviction becomes final when 'the**
availability of appeal has been exhausted, and the time for filing a petition for
certiorari elapsed or a petition for certiorari [has been] finally denied'); *United*
States v. Simmonds, 111 F.3d 737, 744 (10th Cir. 1997) (stating that a federal conviction
becomes final when the Supreme Court denies certiorari in the context of an analysis
of the retroactivity of § 2255).

29 *Id.* [Emphasis added.]

30 Nor does the issuance and filing of the remittitur by a state Supreme Court and its remand and
31 transmission of the record to the trial court hinder or impair, in any way, the appellant's ability to
32 present a petition to the Supreme Court of the United States for a writ of certiorari. *See, e.g., Miller*

1 v. *Southern Pac. Co.*, 24 P.2d 380, 382 (Ut. 1933), citing *Merrill v. Nat'l Bank of Jacksonville*, 173
2 U.S. 131, 19 S.Ct. 360, 43 L.Ed. 640 (1899), also citing 8 Hughes' Federal Practice, § 6261: "A stay
3 is not essential to the issuance of certiorari, for the writ may issue even though the mandate [or
4 remittitur] of the court below has gone down." *Id.* Similarly, in *Nika v State*, 124 Nev. 1272, 1284,
5 198 P.3d 839, 848 (2008) at fn. 52, the Nevada Supreme Court stated:

6 A conviction becomes final when the judgment of conviction has been entered, the
7 availability of appeal has been exhausted, **and a petition for certiorari to the United**
8 **States Supreme Court has been denied** or the time for such a petition has expired.
9 *Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002) (citing *Griffith v.*
10 *Kentucky*, 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 931 L.Ed.2d 649 (1987)).

11 *Id.* [Emphasis added.]

12 (iii) *No Authority Exists to Indicate that an Unstayed Remittitur Somehow*
13 *Prevents the Nevada Supreme Court from Recognizing a Writ of Certiorari*
14 *Issued by the U.S. Supreme Court.*

15 Even after remittitur issues a motion to recall the remittitur may be filed with the Nevada
16 Supreme Court, for the record to be sent back to the State Supreme Court. Most courts of appeal have
17 rooted the authority to recall a remittitur (or, in the Federal system, to recall a mandate) in the "inherent
18 power" of a court. *American Iron and Steel Institute v. E.P.A.*, 560 F.2d 589, 592-594 (3d Cir. 1977).³

19 Nevada has long recognized its own inherent power to recall a remittitur, so long as this is done
20 on the basis of good cause shown. *Wood v. State*, 60 Nev. 139, 141, 104 P.2d 187, 188 (1940). The
21 issuance of a timely writ of certiorari by the U.S. Supreme Court would surely easily meet this
22 standard.

23 For example, in *Bass-Davis v. Davis*, 133 P.3d 251 (2005), the Nevada Supreme Court recalled
24 a remittitur simply because it had ordered *en banc* reconsideration, after the remittitur issued. *See also,*
25 *Walters v. State*, 108 Nev. 186, 825 P.2d 1237 (1992) (remittitur had been recalled to accommodate
26 a new hearing by Nevada Supreme Court). Because an order recalling a remittitur is typically not
27 published, as it is not dispositional, other examples of Nevada Supreme Court orders, prior to 2016,

28 ³For example, the power to recall the remittitur is now firmly established in the federal system. *See, Calderon v. Thompson*,
523 U.S. 538, 549-550, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). Indeed the authority of an appellate court to recall the
remittitur, or mandate as it is called in the federal system, is an accepted feature of modern appellate practice. *See C.*
Wright, A. Miller & E. H. Cooper, Wright & Miller's Federal Practice & Procedure-Jurisdiction & Related Matters (2d
ed.), § 3938.

1 recalling a remittitur on other grounds can not be cited, but do exist.

2 There is no reason to suppose that, in the present case, there would have been any difficulty
3 in obtaining an order recalling the remittitur if BB&T's petition for a writ of certiorari had been
4 granted. More importantly, no legal authority exists for the preposterous assertion that a State
5 Supreme Court could simply ignore the U.S. Supreme Court's issuance of a writ of certiorari, or
6 subsequent request for the trial record, or any U.S. Supreme Court reversal of the State Supreme Court
7 simply because a remittitur had issued.

8 Instead, the Nevada Supreme Court, clearly having the power to recall the remittitur, as shown
9 above, would clearly do so upon issuance of a writ of certiorari by the U.S. Supreme Court, including
10 in order to re-obtain any records needed to be transmitted to the U.S. Supreme Court. There is no
11 authority whatsoever for the proposition that, upon the U.S. Supreme Court issuing such a writ, the
12 Nevada Supreme Court would or appropriately could, ignore this development, or any subsequent
13 reversal of its prior decision, on the grounds that a remittitur had already been issued.

14 Rather, when the United States Supreme Court grants certiorari and then remands the case for
15 further proceedings, the appropriate course of action is for the state Supreme Court to promptly recall
16 its remittitur for the purpose of acting on the remand order. *See, City of Long Beach v. Bozek*, 661
17 P.2d 1072, 1073 (Cal. 1983) ("On January 10, 1983, the Supreme Court of the United States granted
18 a petition for writ of certiorari in this case and ordered that 'The judgment is vacated and the case is
19 remanded to the Supreme Court of California to consider whether its judgment is based upon federal
20 or state constitutional grounds, or both.' (459 U.S. 1095, 103 S.Ct. 712, 74 L.Ed.2d 943.) **Pursuant**
21 **to this mandate, the remittitur is recalled.** We have reexamined our decision in this case . . . and
22 certify that our judgment is [supported by] . . . an independent ground to support the decision.")
23 [Emphasis added.] As another example, similar to *Long Beach*, in one federal case, the circuit court
24 affirmed the convictions of several codefendants. Some of the defendants petitioned for certiorari and
25 issuance of a mandate (*i.e.*, a federal remittitur) was stayed as to them. Others did not seek further
26 review, the mandate issued, and they were taken into custody. Thereafter the U.S. Supreme Court
27
28

1 remanded for further proceedings as to the defendants who had sought certiorari. The Court of
2 Appeals recalled its own mandate to allow consideration as to the *nonpetitioning defendants as well*,
3 exercising its own inherent power to “recall its mandate to prevent injustice.” *Gradsky v. U.S.*, 376
4 F.2d 993, 995 (5th Cir. 1967).

5 As an alternative to a State Supreme Court recalling a remittitur, the lower court to which the
6 case was remanded may respond to the U.S. Supreme Court writ, if it has the record now required by
7 the U.S. Supreme Court clerk. The Utah Supreme Court in *Miller v. Southern Pac. Co.*, 24 P.2d 380
8 (Ut. 1933), explained that “when the record is not in the highest state court which decided the question
9 but has been remitted to the lower court, the transcript should be obtained therein, the filing therein
10 of the allowance of the appeal being the specific command.” *Id.* at 382. The court in *Miller* noted as
11 follows:

12 The rule of practice has been long established that in such case, **in order to bring up**
13 **the record which is essential to a review of the judgment of the appellate court,**
14 **the writ of error is properly directed to the lower court in which the record is then**
15 **found.** (Emphasis added.)

16 *Id.*

17 U.S. Supreme Court Rule 16 expressly provides that, upon granting the writ, “the clerk *will*
18 *request the clerk of the court having possession of the record* to certify and transmit it.” (Emphasis
19 added.) It is entirely irrelevant whether or not a remand has issued, and which court therefore has the
20 record at the time the U.S. Supreme Court makes its request. This precise scenario was addressed by
21 the U.S. Supreme Court in *Dept. of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 267 63 S.Ct.
22 233, 87 L.Ed. 254 (1942), where the remittitur had occurred in New York before the Petition for Writ
23 of Certiorari. The Court noted “for the guidance of the bar” that it does not matter “where the record
24 is physically lodged” explaining that it “is . . . *immaterial whether the record is physically lodged in*
25 *the one court or the other*, since we have ample power to obtain it from either.”

26 The point for present purposes is clear: Whether or not a remittitur has issued is entirely
27 irrelevant to the U.S. Supreme Court’s ability to grant a writ of certiorari, and then decide whether or
28 not to reverse the highest court of a state, in reviewing the case on the merits. Under these legal

1 principles, it is irrelevant to the accrual of the malpractice claim whether or not the remittitur was
2 stayed per NRAP 41, or whether the record had been transmitted back to the trial court via remittitur.
3 Once any writ had been issued by the U.S. Supreme Court, the record would have been transmitted
4 to the U.S. Supreme Court, either via a recall of the remittitur, or from the court then holding the
5 record. In *either* event, upon any subsequent reversal by the U.S. Supreme Court, Nevada's high court
6 would have been required to abide by the U.S. Supreme Court's ruling.

7 This Court's decision to base the date of running of the statute of limitations on whether a stay
8 of remittitur was or was not issued, unduly emphasizes a rather benign, irrelevant, potentially
9 meaningless and readily recallable event, treating that event as creating an insuperable barrier, which
10 is belied by actual jurisprudence and actual procedural processes.

11 CONCLUSION

12 Based on the foregoing, the issuance or non-issuance of a remittitur has no bearing on the
13 statute of limitations tolling and claim accrual arguments which were asserted before this Court, and
14 those arguments should be reviewed and assessed without regard to the remittitur issue.

15 There is no policy or other basis to treat the Petition for a Writ of Certiorari to the U.S.
16 Supreme Court as anything other than an appeal, tolling the Nevada statute of limitations, given that
17 any other ruling would: (a) force litigants to waste judicial resources on a claim that may be cured on
18 appeal; (b) require litigation which may be wasteful to judicial resources before damages are
19 calculable; and (c) place parties in the untenable position of alleging malpractice while concurrently
20 arguing a conflicting position on appeal. Given that these public policy considerations, which support
21 and form the basis for the subject rule, are equally applicable to any U.S. Supreme Court writ
22 proceedings, there is no basis for rejecting the applicability of those same considerations in this case.

23 Moreover, what Defendants' arguments and this Court's decision fails to recognize is that the
24 post-appeal-accrual rule is but one illustration and example of the broader and more fundamental claim
25 accrual rule's application. Two elements must coalesce before a cause of action can exist: (a) a breach
26 of some legally recognized duty owed by the defendant to the plaintiff; (b) which causes the plaintiff
27
28

1 some legally cognizable damage.” *Woodruff v. Tomlin*, 511 F.2d 1019, 1021 (6th Cir. 1975). Thus,
2 as explained in the treatise *Legal Malpractice*, the date of injury “coincides with *the last possible date*
3 when the attorney’s negligence becomes *irreversible*.” R. Mallen and V. Levit *Legal Malpractice*
4 §390, at 457 (1981), quoted with approval by *Neylan v. Moser*, 400 N.W.2d 538, 542 (Iowa 1987)
5 [emphasis added]. As with civil judgments and criminal convictions, that “irreversible” date is when
6 the petition for writ of certiorari is denied, and the issuance or non-issuance of a remittitur simply has
7 no bearing on that date.

8 Based on the foregoing, Plaintiff respectfully requests, pursuant to NRCP 59(e), that this Court
9 reconsider and vacate its Decision and Order dated May 25, 2017 in this matter. Plaintiff was
10 completely within its rights to timely petition the United States Supreme Court for a writ of certiorari
11 without first moving for a stay of the remittitur. No case law supports punishing a party for not
12 obtaining a stay of remittitur. To the contrary, as Plaintiff’s prior briefing has shown, both federal and
13 state cases exist which recognize that the statute of limitation on a litigation malpractice claim does
14 not begin to run until after a ruling issues on any petition for writ of certiorari.

15 DATED this 5th day of June, 2017.

16 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

17 

18 G. MARK ALBRIGHT, ESQ.

19 Nevada Bar No. 001394

20 D. CHRIS ALBRIGHT, ESQ.

21 Nevada Bar No. 004904

22 801 South Rancho Drive, Suite D-4

23 Las Vegas, Nevada 89106

24 (702) 384-7111

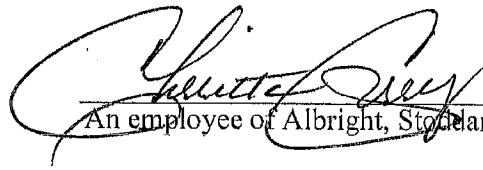
25 Attorneys for Plaintiff
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 5th day of June, 2017, service was made by the following mode/method a true and correct copy of the foregoing **MOTION TO ALTER OR AMEND, BY VACATING, ORDER OF DISMISSAL, PURSUANT TO NRCP 59(e)** to the following person(s):

Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
GORDON & REES LLP
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101
Tel: 702.577.9310
Fax: 702.255.2858
cmariam@gordonrees.com
rlarsen@gordonrees.com
wwong@gordonrees.com
Attorney for Defendants

☐ Certified Mail
☒ Electronic Filing/Service
☐ Email
☐ Facsimile
☐ Hand Delivery
☐ Regular U.S. Mail



An employee of Albright, Stoddard, Warnick & Albright

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

EXHIBIT “A”

B1 (Official Form 1)(4/10)

United States Bankruptcy Court District of Nevada		Voluntary Petition
Name of Debtor (if individual, enter Last, First, Middle): R & S ST. ROSE, LLC		Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):		All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all) 75-3196203		Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all)
Street Address of Debtor (No. and Street, City, and State): 3110 S. DURANGO DRIVE #203 LAS VEGAS, NV		Street Address of Joint Debtor (No. and Street, City, and State):
ZIP Code 89117		ZIP Code
County of Residence or of the Principal Place of Business: CLARK		County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):		Mailing Address of Joint Debtor (if different from street address):
ZIP Code		ZIP Code
Location of Principal Assets of Business Debtor (if different from street address above): 38+ ACRES OF RAW LAND LOCATED IN HENDERSON, NV (APN 177-26-814-001, 177-26-701-019, 177-26-801-011, AND 177-26-801-016) HENDERSON, NV		
Type of Debtor (Form of Organization) (Check one box) <input type="checkbox"/> Individual (includes Joint Debtors) <i>See Exhibit D on page 2 of this form.</i> <input checked="" type="checkbox"/> Corporation (includes LLC and LLP) <input type="checkbox"/> Partnership <input type="checkbox"/> Other (If debtor is not one of the above entities, check this box and state type of entity below.)	Nature of Business (Check one box) <input type="checkbox"/> Health Care Business <input type="checkbox"/> Single Asset Real Estate as defined in 11 U.S.C. § 101 (51B) <input type="checkbox"/> Railroad <input type="checkbox"/> Stockbroker <input type="checkbox"/> Commodity Broker <input type="checkbox"/> Clearing Bank <input checked="" type="checkbox"/> Other Tax-Exempt Entity (Check box, if applicable) <input type="checkbox"/> Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).	Chapter of Bankruptcy Code Under Which the Petition is Filed (Check one box) <input type="checkbox"/> Chapter 7 <input type="checkbox"/> Chapter 9 <input checked="" type="checkbox"/> Chapter 11 <input type="checkbox"/> Chapter 12 <input type="checkbox"/> Chapter 13 <input type="checkbox"/> Chapter 15 Petition for Recognition of a Foreign Main Proceeding <input type="checkbox"/> Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding
Filing Fee (Check one box) <input checked="" type="checkbox"/> Full Filing Fee attached <input type="checkbox"/> Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A. <input type="checkbox"/> Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.		Nature of Debts (Check one box) <input type="checkbox"/> Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." <input checked="" type="checkbox"/> Debts are primarily business debts.
Chapter 11 Debtors Check one box: <input type="checkbox"/> Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). <input checked="" type="checkbox"/> Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D). Check if: <input type="checkbox"/> Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$2,343,300 (amount subject to adjustment on 4/01/13 and every three years thereafter). Check all applicable boxes: <input type="checkbox"/> A plan is being filed with this petition. <input type="checkbox"/> Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).		THIS SPACE IS FOR COURT USE ONLY
Statistical/Administrative Information <input checked="" type="checkbox"/> Debtor estimates that funds will be available for distribution to unsecured creditors. <input type="checkbox"/> Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.		THIS SPACE IS FOR COURT USE ONLY
Estimated Number of Creditors <input checked="" type="checkbox"/> 1-49 <input type="checkbox"/> 50-99 <input type="checkbox"/> 100-199 <input type="checkbox"/> 200-999 <input type="checkbox"/> 1,000-5,000 <input type="checkbox"/> 5,001-10,000 <input type="checkbox"/> 10,001-25,000 <input type="checkbox"/> 25,001-50,000 <input type="checkbox"/> 50,001-100,000 <input type="checkbox"/> OVER 100,000		
Estimated Assets <input type="checkbox"/> \$0 to \$50,000 <input type="checkbox"/> \$50,001 to \$100,000 <input type="checkbox"/> \$100,001 to \$500,000 <input type="checkbox"/> \$500,001 to \$1 million <input type="checkbox"/> \$1,000,001 to \$10 million <input checked="" type="checkbox"/> \$10,000,001 to \$50 million <input type="checkbox"/> \$50,000,001 to \$100 million <input type="checkbox"/> \$100,000,001 to \$500 million <input type="checkbox"/> \$500,000,001 to \$1 billion <input type="checkbox"/> More than \$1 billion		
Estimated Liabilities <input type="checkbox"/> \$0 to \$50,000 <input type="checkbox"/> \$50,001 to \$100,000 <input type="checkbox"/> \$100,001 to \$500,000 <input type="checkbox"/> \$500,001 to \$1 million <input type="checkbox"/> \$1,000,001 to \$10 million <input checked="" type="checkbox"/> \$10,000,001 to \$50 million <input type="checkbox"/> \$50,000,001 to \$100 million <input type="checkbox"/> \$100,000,001 to \$500 million <input type="checkbox"/> \$500,000,001 to \$1 billion <input type="checkbox"/> More than \$1 billion		

B1 (Official Form 1)(4/10)

Page 2

Voluntary Petition <i>(This page must be completed and filed in every case)</i>		Name of Debtor(s): R & S ST. ROSE, LLC	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet)			
Location Where Filed: - None -	Case Number:	Date Filed:	
Location Where Filed:	Case Number:	Date Filed:	
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet)			
Name of Debtor: R & S ST. ROSE LENDERS, LLC	Case Number: PENDING	Date Filed:	
District: DISTRICT OF NEVADA	Relationship: SISTER LLC	Judge:	
Exhibit A (To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.) <input type="checkbox"/> Exhibit A is attached and made a part of this petition.	Exhibit B (To be completed if debtor is an individual whose debts are primarily consumer debts.) I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I delivered to the debtor the notice required by 11 U.S.C. §342(b). X _____ Signature of Attorney for Debtor(s) (Date)		
Exhibit C			
Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety? <input type="checkbox"/> Yes, and Exhibit C is attached and made a part of this petition. <input checked="" type="checkbox"/> No.			
Exhibit D			
(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.) <input type="checkbox"/> Exhibit D completed and signed by the debtor is attached and made a part of this petition. If this is a joint petition: <input type="checkbox"/> Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.			
Information Regarding the Debtor - Venue			
(Check any applicable box)			
<input checked="" type="checkbox"/> Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. <input type="checkbox"/> There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District. <input type="checkbox"/> Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.			
Certification by a Debtor Who Resides as a Tenant of Residential Property			
(Check all applicable boxes)			
<input type="checkbox"/> Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.) _____ (Name of landlord that obtained judgment) _____ (Address of landlord)			
<input type="checkbox"/> Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and <input type="checkbox"/> Debtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition. <input type="checkbox"/> Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).			

B1 (Official Form 1)(4/10)

Page 3

Voluntary Petition*(This page must be completed and filed in every case)*

Name of Debtor(s):

R & S ST. ROSE, LLC**Signatures****Signature(s) of Debtor(s) (Individual/Joint)**

I declare under penalty of perjury that the information provided in this petition is true and correct.
 [If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
 [If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. §342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
 Signature of Debtor

X _____
 Signature of Joint Debtor

 Telephone Number (If not represented by attorney)

 Date

Signature of Attorney*

X /s/ Zachariah Larson
 Signature of Attorney for Debtor(s)

Zachariah Larson 7787
 Printed Name of Attorney for Debtor(s)

LARSON & STEPHENS, LLC
 Firm Name
810 S. CASINO CENTER BLVD.
SUITE 104
LAS VEGAS, NV 89101

 Address

(702) 382-1170 Fax: (702) 382-1169
 Telephone Number

April 4, 2011
 Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X /s/ SAID FOROUZAN RAD
 Signature of Authorized Individual

SAID FOROUZAN RAD
 Printed Name of Authorized Individual

PRESIDENT OF FOROUZAN, INC.
 Title of Authorized Individual

April 4, 2011
 Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only one box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. §1515 are attached.

☐ Pursuant to 11 U.S.C. §1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
 Signature of Foreign Representative

 Printed Name of Foreign Representative

 Date

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

 Printed Name and title, if any, of Bankruptcy Petition Preparer

 Social-Security number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

 Address

X _____

 Date

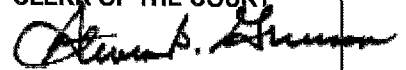
Signature of Bankruptcy Petition Preparer or officer, principal, responsible person, or partner whose Social Security number is provided above.

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.

ATTACHMENT 4, EXHIBIT I



1 CRAIG J. MARIAM, ESQ.
Nevada Bar No. 10926
2 ROBERT S. LARSEN, ESQ.
Nevada Bar No. 7785
3 WING YAN WONG, ESQ.
Nevada Bar No. 13622
4 GORDON REES SCULLY MANSUKHANI, LLP
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6 Facsimile: (702) 255-2858
E-Mail: cmariam@gordonrees.com
7 rlarsen@gordonrees.com
wwong@gordonrees.com

8 *Attorneys for Defendants Douglas D.*
9 *Gerrard, Esq. and Gerrard Cox Larsen*

10 EIGHTH JUDICIAL DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 BRANCH BANKING & TRUST COMPANY, a
13 North Carolina corporation,

14 Plaintiff,

15 vs.

16 DOUGLAS D. GERRARD, ESQ., individually; and
17 GERRARD COX & LARSEN, a Nevada
professional corporation, JOHN DOES I-X; and
18 ROE BUSINESS ENTITIES XI-XX,

19 Defendant.

Case No.: A-16-744561-C
Dept. No.: 27

**ORDER DENYING PLAINTIFF
BRANCH BANKING & TRUST
COMPANY'S MOTION TO
ALTER OR AMEND, BY
VACATING, ORDER OF
DISMISSAL, PURSUANT TO
NRCP 59(e)**

20 This matter came before the Honorable Nancy L. Alf on July 19, 2017 on Plaintiff
21 Branch Banking & Trust Company's Motion to Alter or Amend, by Vacating, Order of
22 Dismissal, Pursuant to NRCP 59(e) ("Motion"), filed on June 5, 2017. Defendants Douglas D.
23 Gerrard, Esq. and Gerrard Cox Larsen filed an Opposition on June 22, 2017, to which Plaintiff
24 filed a Reply on June 28, 2017. D. Chris Albright, Esq. of Albright, Stoddard, Warnick &
25 Albright appeared on behalf of Plaintiff; Robert S. Larsen, Esq. of Gordon Rees Scully
26 Mansukhani, LLP appeared on behalf of Defendants.

1 Having reviewed the Motion, Opposition, and Reply, and good cause appearing
2 therefore, the **COURT HEREBY FINDS** as follows:

3 A NRCP 59(e) motion to alter or amend the judgment may be granted under limited
4 circumstances. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193
5 (2010). The motion may be granted to "correct[] manifest errors of law or fact," to account for
6 "newly discovered or previously unavailable evidence," "to prevent manifest injustice," or based
7 on a "change in controlling law." *Id.*

8 After reviewing Plaintiff's Motion, the Court determines that the Court had previously
9 considered all the issues presented in Plaintiff's Motion. The Court finds that there has been no
10 new evidence and no change in the law. The Court further finds that this Court's Decision and
11 Order, entered on May 25, 2017, was not a manifest error of law and did not result in manifest
12 injustice.

13 **THE COURT HEREBY ORDERS** that Plaintiff's Motion is **DENIED**.

14 Date: This 4 day of August, 2017.

15
16 
17 **DISTRICT COURT JUDGE** *DC*

18 Dated: August 1, 2017.

19 Dated: July 31, 2017.

20 Respectfully Submitted by:

20 Approved as to form and content by:

21 GORDON REES SCULLY MANSUKHANI,
22 LLP

21 ALBRIGHT, STODDARD, WARNICK &
22 ALBRIGHT

23 
24 CRAIG J. MARIAM, ESQ.

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24 G. MARK ALBRIGHT, ESQ.

25 Nevada Bar No. 10926

25 Nevada Bar No. 1394

26 ROBERT S. LARSEN, ESQ.

26 D. CHRIS ALBRIGHT, ESQ.

27 Nevada Bar No. 7785

27 Nevada Bar No. 4904

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28 801 S. Rancho Dr., Ste. D-4

300 S. Fourth Street, Suite 1550

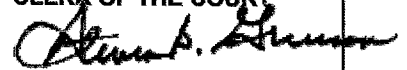
Las Vegas, Nevada 89106

Las Vegas, Nevada 89101

Attorneys for Plaintiff

Attorneys for Defendants

ATTACHMENT 4, EXHIBIT J



1 CRAIG J. MARIAM, ESQ.
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8

*Attorneys for Defendants Douglas D.
9 Gerrard, Esq. and Gerrard Cox & Larsen*

10 EIGHTH JUDICIAL DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 BRANCH BANKING & TRUST COMPANY, a
13 North Carolina corporation,

14 Plaintiff,

15 vs.

16 DOUGLAS D. GERRARD, ESQ., individually; and
17 GERRARD COX & LARSEN, a Nevada
professional corporation, JOHN DOES I-X; and
18 ROE BUSINESS ENTITIES XI-XX,

19 Defendant.

Case No.: A-16-744561-C

Dept. No.: 27 XXVII

20 **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF BRANCH BANKING &**
21 **TRUST COMPANY'S MOTION TO ALTER OR AMEND, BY VACATING, ORDER OF**
22 **DISMISSAL, PURSUANT TO NRCP 59(e)**

23 PLEASE TAKE NOTICE that, on August, 7th 2017, the Court entered the **ORDER**
24 **DENYING PLAINTIFF BRANCH BANKING & TRUST COMPANY'S MOTION TO**
25 **ALTER OR AMEND, BY VACATING, ORDER OF DISMISSAL, PURSUANT TO NRCP**
26 **59(e) in this matter.**

27 ///

28 ///

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

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A copy of the Court's Order is attached hereto as Exhibit "1."

DATED this 8th day of August, 2017.

Respectfully submitted,

GORDON REES SCULLY
MANSUKHANI, LLP

/s/ Robert S. Larsen
Craig J. Mariam, Esq.
Nevada Bar No. 10926
Robert S. Larsen, Esq.
Nevada Bar No. 7785
Wing Yan Wong, Esq.
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*Attorneys for Defendants Douglas D.
Gerrard, Esq. and Gerrard Cox & Larsen*

Gordon Rees Scully Mansukhani, LLP
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CERTIFICATE OF SERVICE

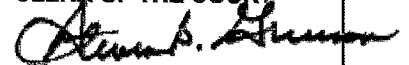
Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of GORDON REES SCULLY MANSUKHANI, LLP, and that on the 8th day of August, 2017, the foregoing **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF BRANCH BANKING & TRUST COMPANY'S MOTION TO ALTER OR AMEND, BY VACATING, ORDER OF DISMISSAL, PURSUANT TO NRCP 59(e)** was served upon those persons designated by the parties in the E-Service Master List in the Eighth Judicial District court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-1 and the Nevada Electronic Filing and Conversion

Rules, upon the following:

G. Mark Albright, Esq.
D. Chris Albright, Esq.
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106

/s/ Gayle Angulo
An Employee of GORDON & REES, LLP

EXHIBIT “1”



1 CRAIG J. MARIAM, ESQ.
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2 ROBERT S. LARSEN, ESQ.
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7 rlarsen@gordonrees.com
wwong@gordonrees.com

8 *Attorneys for Defendants Douglas D.*
9 *Gerrard, Esq. and Gerrard Cox Larsen*

10 EIGHTH JUDICIAL DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 BRANCH BANKING & TRUST COMPANY, a
13 North Carolina corporation,

14 Plaintiff,

15 vs.

16 DOUGLAS D. GERRARD, ESQ., individually; and
17 GERRARD COX & LARSEN, a Nevada
professional corporation, JOHN DOES I-X; and
18 ROE BUSINESS ENTITIES XI-XX,

19 Defendant.

Case No.: A-16-744561-C
Dept. No.: 27

**ORDER DENYING PLAINTIFF
BRANCH BANKING & TRUST
COMPANY'S MOTION TO
ALTER OR AMEND, BY
VACATING, ORDER OF
DISMISSAL, PURSUANT TO
NRCP 59(e)**

20 This matter came before the Honorable Nancy L. Allf on July 19, 2017 on Plaintiff
21 Branch Banking & Trust Company's Motion to Alter or Amend, by Vacating, Order of
22 Dismissal, Pursuant to NRCP 59(e) ("Motion"), filed on June 5, 2017. Defendants Douglas D.
23 Gerrard, Esq. and Gerrard Cox Larsen filed an Opposition on June 22, 2017, to which Plaintiff
24 filed a Reply on June 28, 2017. D. Chris Albright, Esq. of Albright, Stoddard, Warnick &
25 Albright appeared on behalf of Plaintiff; Robert S. Larsen, Esq. of Gordon Rees Scully
26 Mansukhani, LLP appeared on behalf of Defendants.

1 Having reviewed the Motion, Opposition, and Reply, and good cause appearing
2 therefore, the **COURT HEREBY FINDS** as follows:

3 A NRCP 59(e) motion to alter or amend the judgment may be granted under limited
4 circumstances. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193
5 (2010). The motion may be granted to "correct[] manifest errors of law or fact," to account for
6 "newly discovered or previously unavailable evidence," "to prevent manifest injustice," or based
7 on a "change in controlling law." *Id.*

8 After reviewing Plaintiff's Motion, the Court determines that the Court had previously
9 considered all the issues presented in Plaintiff's Motion. The Court finds that there has been no
10 new evidence and no change in the law. The Court further finds that this Court's Decision and
11 Order, entered on May 25, 2017, was not a manifest error of law and did not result in manifest
12 injustice.

13 **THE COURT HEREBY ORDERS** that Plaintiff's Motion is **DENIED**.

14 Date: This 4 day of August, 2017.

15
16 Abundant ALP
17 **DISTRICT COURT JUDGE** DC

18 Dated: August
19 1, 2017.

20 Respectfully Submitted by:

21 GORDON REES SCULLY MANSUKHANI,
22 LLP

23 [Signature]
24 CRAIG J. MARIAM, ESQ.
25 Nevada Bar No. 10926
26 ROBERT S. LARSEN, ESQ.
27 Nevada Bar No. 7785
28 WING YAN WONG, ESQ.
Nevada Bar No. 13622
300 S. Fourth Street, Suite 1550
Las Vegas, Nevada 89101

Attorneys for Defendants

Dated: July 31, 2017.

Approved as to form and content by:

ALBRIGHT, STODDARD, WARNICK &
ALBRIGHT

[Signature]
G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 1394
D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 4904
801 S. Rancho Dr., Ste. D-4
Las Vegas, Nevada 89106

Attorneys for Plaintiff

ATTACHMENT 4, EXHIBIT K

Steven D. Grierson

1 CRAIG J. MARIAM, ESQ.
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wwong@grsm.com

8 *Attorneys for Defendants Douglas D.*
9 *Gerrard, Esq. and Gerrard Cox Larsen*

10 EIGHTH JUDICIAL DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 BRANCH BANKING & TRUST COMPANY, a
13 North Carolina corporation,

14 Plaintiff,

15 vs.

16 DOUGLAS D. GERRARD, ESQ., individually; and
17 GERRARD COX & LARSEN, a Nevada
professional corporation, JOHN DOES I-X; and
18 ROE BUSINESS ENTITIES XI-XX,

19 Defendant.

Case No.: A-16-744561-C
Dept. No.: 27

JUDGMENT

20
21 This action came on for hearing before the Court, the Honorable Nancy L. Allf presiding,
22 and the issues having been duly heard. On May 25, 2017, the Court entered its Decision and
23 Order Granting Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to
24 Dismiss First Amended Complaint and Denying Plaintiff's Countermotion for Leave to Amend.
25 On June 5, 2017, Defendants filed their Memorandum of Costs for costs in the amount of
26 \$8,769.28. Plaintiff has not filed any objections or oppositions. On August 7, 2017, the Court
27 entered its Order Denying Plaintiff Branch Banking & Trust Company's Motion to Alter or
28 Amend, by Vacating Order of Dismissal, Pursuant to NRCP 59(e).

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

<input type="checkbox"/> Voluntary Dismissal	<input type="checkbox"/> Stipulated Dismissal
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Dismissal by Court
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Dismissal by Court
<input checked="" type="checkbox"/> Motion to Dismiss by Def(s)	<input type="checkbox"/> Dismissal by Court

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

1 The Decision and Order entered on May 25, 2017, attached hereto as Exhibit A, is hereby
2 expressly incorporated herein in full by this reference. In accordance with the Decision and
3 Order entered on May 25, 2017 and the Defendants' Memorandum of Costs filed on June 5,
4 2017, the Court enters the following Judgment.

5 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT** Plaintiff takes
6 nothing by way of its operative complaint in this matter, that the action be dismissed with
7 prejudice, and that Defendants recover of the Plaintiff Branch Banking & Trust Company their
8 costs in the amount of \$8,769.28.

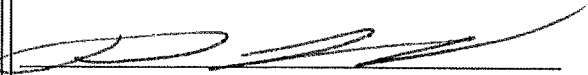
9 IT IS SO ORDERED, ADJUDGED AND DECREED.

10
11
12 DATED: Aug 29/17

13
14
15
16 
17 DISTRICT COURT JUDGE 
18

19 Respectfully Submitted By:

20 GORDON REES SCULLY MANSUKHANI, LLP

21
22 
23 CRAIG J. MARIAM, ESQ.
24 Nevada Bar No. 10926
25 ROBERT S. LARSEN, ESQ.
26 Nevada Bar No. 7785
27 Wing Yan Wong, Esq.
28 Nevada Bar No. 13622
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Las Vegas, Nevada 89101

*Attorneys for Defendants Douglas D.
Gerrard, Esq. and Gerrard Cox Larsen*

EXHIBIT A

EXHIBIT A



DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST
COMPANY, a North Carolina
corporation,

Plaintiff(s)

vs

Case No.: A-16-744561-C

DOUGLAS D. GERRARD, ESQ.,
individually; and GERRARD & COX, a
Nevada professional corporation, d/b/a
GERRARD COX & LARSEN; JOHN
DOE INDIVIDUALS I-X; and ROE
BUSINESS ENTITIES XI-XX,
Defendants.

Department 27

**DECISION AND ORDER GRANTING DEFENDANTS DOUGLAS D. GERRARD, ESQ. AND
GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT
AND DENYING PLAINTIFF'S COUNTERMOTION FOR LEAVE TO AMEND**

This is a legal malpractice suit against attorney Douglas D. Gerrard ("Gerrard") and his law firm, Gerrard Cox & Larsen (individually "GCL") (collectively the "Defendants"). This case stems from the Defendants' representation of Plaintiff Branch Banking & Trust Company ("BBT") in an earlier underlying case tried before the Honorable Elizabeth Gonzalez in 2010. The underlying case involved the adjudication of the priority of two deeds of trust encumbering approximately thirty-eight acres of real property in Henderson, Clark County, Nevada. Colonial Bank, N.A. ("Colonial") originally held the beneficial interest under one of the deeds of trust, but its interest was acquired during the underlying litigation by BBT when Colonial was placed into receivership with the FDIC. It should be noted that

1 Defendants were originally retained to represent Colonial, but such representation transferred
2 to BBT as Colonial's successor in interest.

3 In its Findings of Fact and Conclusions of Law entered June 23, 2010, the District
4 Court in the underlying case ruled against BBT on the basis that BBT failed to establish, as a
5 necessary prerequisite to its claims, that it had been assigned and owned the former Colonial
6 Deed of Trust on which the claims it was pursuing were based. *See* Defendants' Request for
7 Judicial Notice in Support of Defendants Motion to Dismiss First Amended Complaint,
8 Exhibit B—Findings of Fact and Conclusions of Law, Case #08-A-574852. BBT asserts
9 that this ruling was based on the District Court's refusal to allow BBT's attorneys, the
10 Defendants, to present evidence at trial relative to the assignment of the Colonial Deed of
11 Trust to BBT due to the Defendants' alleged failure to timely disclose the pertinent
12 documents prior to trial.
13
14

15 BBT initiated this legal malpractice suit against Defendants on October 5, 2016.
16 BBT filed its First Amended Complaint on February 22, 2017, asserting a single cause of
17 action for Professional Negligence/Legal Malpractice.

18 Now before the Court is Defendants' Motion to Dismiss First Amended Complaint
19 ("Motion") filed on March 8, 2017 concurrently with Defendants' Request for Judicial
20 Notice, wherein Defendants asked this Court to take judicial notice of numerous documents
21 related to the underlying dispute. BBT filed its Opposition to Defendants' Motion to Dismiss
22 on March 21, 2017, along with a Counter-Request for Judicial Notice. The Court set
23 Defendants' Motion to Dismiss for a hearing on motions calendar on April 19, 2017 at 10:00
24 a.m., wherein this Court denied Defendants' Motion to Dismiss as to standing, but took the
25 issue as to whether the statute of limitations has expired under advisement. The Court
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1 continued the matter to Chambers Calendar on May 16, 2017 for a decision as to the running
2 of the statute of limitations.

3
4 After having read the pleadings and papers on file, including the supplemental briefs
5 filed by both parties, and for good cause appearing therefore:
6

7 **THE COURT FINDS** after review, in Nevada, an action for legal malpractice does
8 not begin to accrue until the "plaintiff's damages are certain and not contingent upon the
9 outcome of an appeal." *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d
10 184, 186 (1988). "It is only after the underlying case has been affirmed on appeal that it is
11 appropriate to assert injury and maintain a legal malpractice cause of action for damages." *Id.*
12 The statute of limitations for legal malpractice claims is four years from the damages or two
13 years from when the plaintiff discovers, or could discover, the damages, whichever is earlier.
14 N.R.S. 11.207.
15

16 **THE COURT FURTHER FINDS** after review that on March 31, 2013, the Nevada
17 Supreme Court affirmed the district court's ruling in the underlying case, and issued its
18 remittitur. "The reversal and remittitur comprise the judgment by which the parties and the
19 district court are thereafter bound." *In re Estate & Living Trust of Miller*, 125 Nev. 550, 553,
20 216 P.3d 239, 242 (2009). The remittitur "terminated the case below as to all issues settled
21 by the judgment" and formally informs the district court of appellate court's final resolution
22 of the appeal. *Cerminara v. Eighth Jud. Distr. Ct.*, 104 Nev. 663, 665, 765 P.2d 182, 184
23 (1988); *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998).
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1 **THE COURT FURTHER FINDS** after review, that Nevada Rules of Appellate
2 Procedure 41(a)(3)(A) provides that “[a] party may file a motion to stay the remittitur
3 pending application to the Supreme Court of the United States for a writ of certiorari.”
4

5 **THE COURT FURTHER FINDS** after review, that a writ of certiorari is separate
6 and distinct from an appeal. While an appeal to an appellate court is a matter of right, a writ
7 of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10.

8 **THE COURT FURTHER FINDS** after review that because BBT did not have a
9 right to a writ of certiorari to the United States Supreme Court, and because BBT failed to
10 file a motion to stay the remittitur under NRAP 41(a)(3)(A), the Nevada Supreme Court’s
11 May 31, 2013 decision to affirm the district court’s ruling and its remittitur to the district
12 court, constitutes an final adverse appellate ruling for BBT. Therefore, the statute of
13 limitations was not tolled when BBT filed a petition for a writ of certiorari to the United
14 States Supreme Court. Accordingly, the statute of limitations began to run on or about May
15 31, 2013, making BBT’s deadline under the statute of limitations for its legal malpractice
16 claim two years later on or about May 31, 2015.
17

18 **THE COURT FURTHER FINDS** after review BBT filed its Complaint in this case
19 on October 5, 2016, some 493 days past the expiration of the statute of limitations.
20

21 **THEREFORE, THE COURT ORDERS** for good cause appearing and for the
22 reasons stated above, Defendants Motion to Dismiss First Amended Complaint is
23 **GRANTED** as the statute of limitations ran on or about May 31, 2015.

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3 COURT FURTHER ORDERS for good cause appearing and after review that
4 Plaintiff's Countermotion for Leave to Amend is likewise DENIED. HEARING set for
5 CHAMBERS CALENDAR on May 16, 2017, VACATED.

6 Dated: May 25, 2017 ^{MLA}

7
8 Nancy L. Allf
9 NANCY ALLF
10 District Court Judge, Department 27

11 Certificate of Service

12 I hereby certify that on or about the date signed I caused the foregoing document to be
13 electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial
14 District Court's electronic filing system, with the date and time of the electronic service
substituted for the date and place of deposit to: *anb by email to:*

15 Albright, Stoddard, Warnick & Albright
16 G. Mark Albright, Esq. - gma@albrightstoddard.com
D. Chris Albright, Esq. - dca@albrightstoddard.com

17 Gordon & Rees LLP
18 Craig J. Mariam, Esq. - cmariam@gordonrees.com
19 Robert S. Larsen, Esq. - rlarsen@gordonrees.com
Wong Yan Wong, Esq. - wwong@gordonrees.com

20 Karen Lawrence
21 Karen Lawrence
22 Judicial Executive Assistant
23
24
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26
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28

ATTACHMENT 4, EXHIBIT L

*Attorneys for Defendants Douglas D.
Gerrard, Esq. and Gerrard Cox & Larsen*

BRANCH BANKING & TRUST COMPANY, a)	Case No.: A-16-744561-C
North Carolina corporation,)	Dept. No.: 26 XXVII
)	
Plaintiff,)	
)	
vs.)	NOTICE OF ENTRY OF
)	JUDGMENT
)	
DOUGLAS D. GERRARD, ESQ., individually; and)	
GERRARD COX & LARSEN, a Nevada)	
professional corporation, JOHN DOES I-X; and)	
ROE BUSINESS ENTITIES XI-XX,)	
)	
Defendant.)	

///

1 A copy of the Court's filed Judgment is attached hereto as Exhibit "1."

2 DATED this 30th day of August, 2017.

3 Respectfully submitted,

4 GORDON REES SCULLY
5 MANSUKHANI, LLP

6 /s/ Wing Yan Wong
7 Craig J. Mariam, Esq.
8 Nevada Bar No. 10926
9 Robert S. Larsen, Esq.
10 Nevada Bar No. 7785
11 Wing Yan Wong, Esq.
12 Nevada Bar No. 13622
13 300 South Fourth Street, Suite 1550
14 Las Vegas, Nevada 89101

15 *Attorneys for Defendants Douglas D.*
16 *Gerrard, Esq. and Gerrard Cox & Larsen*
17
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Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of GORDON & REES LLP, and that on the 30th day of August, 2017, the foregoing **NOTICE OF ENTRY OF JUDGMENT** was served upon those persons designated by the parties in the E-Service Master List in the Eighth Judicial District court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-1 and the Nevada Electronic Filing and Conversion Rules, upon the following:

G. Mark Albright, Esq.
D. Chris Albright, Esq.
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106

/s/ Gayle Angulo
An Employee of GORDON REES SCULLY
MANSUKHANI, LLP

EXHIBIT “1”

Steven D. Grierson

1 CRAIG J. MARIAM, ESQ.
Nevada Bar No. 10926
2 ROBERT S. LARSEN, ESQ.
Nevada Bar No. 7785
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E-Mail: cmariam@grsm.com
7 rlarsen@grsm.com
wwong@grsm.com
8

9 *Attorneys for Defendants Douglas D.
Gerrard, Esq. and Gerrard Cox Larsen*

10 EIGHTH JUDICIAL DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 BRANCH BANKING & TRUST COMPANY, a
13 North Carolina corporation,

14 Plaintiff,

15 vs.

16 DOUGLAS D. GERRARD, ESQ., individually; and
17 GERRARD COX & LARSEN, a Nevada
professional corporation, JOHN DOES I-X; and
18 ROE BUSINESS ENTITIES XI-XX,

19 Defendant.

Case No.: A-16-744561-C

Dept. No.: 27

JUDGMENT

20
21 This action came on for hearing before the Court, the Honorable Nancy L. Allf presiding,
22 and the issues having been duly heard. On May 25, 2017, the Court entered its Decision and
23 Order Granting Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to
24 Dismiss First Amended Complaint and Denying Plaintiff's Countermotion for Leave to Amend.
25 On June 5, 2017, Defendants filed their Memorandum of Costs for costs in the amount of
26 \$8,769.28. Plaintiff has not filed any objections or oppositions. On August 7, 2017, the Court
27 entered its Order Denying Plaintiff Branch Banking & Trust Company's Motion to Alter or
28 Amend, by Vacating Order of Dismissal, Pursuant to NRCP 59(e).

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

<input type="checkbox"/> Voluntary Dismissal	<input type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Summary Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Summary Judgment
<input checked="" type="checkbox"/> Motion to Dismiss by Def(s)	<input type="checkbox"/> Judgment on Pleadings

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

The Decision and Order entered on May 25, 2017, attached hereto as Exhibit A, is hereby expressly incorporated herein in full by this reference. In accordance with the Decision and Order entered on May 25, 2017 and the Defendants' Memorandum of Costs filed on June 5, 2017, the Court enters the following Judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT Plaintiff takes nothing by way of its operative complaint in this matter, that the action be dismissed with prejudice, and that Defendants recover of the Plaintiff Branch Banking & Trust Company their costs in the amount of \$8,769.28.

IT IS SO ORDERED, ADJUDGED AND DECREED.

DATED: Aug 29/17


DISTRICT COURT JUDGE *RF*

Respectfully Submitted By:

GORDON REES SCULLY MANSUKHANI, LLP


CRAIG J. MARIAM, ESQ.

Nevada Bar No. 10926

ROBERT S. LARSEN, ESQ.

Nevada Bar No. 7785

Wing Yan Wong, Esq.

Nevada Bar No. 13622

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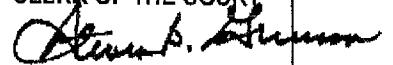
Las Vegas, Nevada 89101

Attorneys for Defendants Douglas D.

Gerrard, Esq. and Gerrard Cox Larsen

EXHIBIT A

EXHIBIT A



DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST
COMPANY, a North Carolina
corporation,

Plaintiff(s)

vs

Case No.: A-16-744561-C

DOUGLAS D. GERRARD, ESQ.,
individually; and GERRARD & COX, a
Nevada professional corporation, d/b/a
GERRARD COX & LARSEN; JOHN
DOE INDIVIDUALS I-X; and ROE
BUSINESS ENTITIES XI-XX,
Defendants.

Department 27

**DECISION AND ORDER GRANTING DEFENDANTS DOUGLAS D. GERRARD, ESQ. AND
GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT
AND DENYING PLAINTIFF'S COUNTERMOTION FOR LEAVE TO AMEND**

This is a legal malpractice suit against attorney Douglas D. Gerrard ("Gerrard") and his law firm, Gerrard Cox & Larsen (individually "GCL") (collectively the "Defendants"). This case stems from the Defendants' representation of Plaintiff Branch Banking & Trust Company ("BBT") in an earlier underlying case tried before the Honorable Elizabeth Gonzalez in 2010. The underlying case involved the adjudication of the priority of two deeds of trust encumbering approximately thirty-eight acres of real property in Henderson, Clark County, Nevada. Colonial Bank, N.A. ("Colonial") originally held the beneficial interest under one of the deeds of trust, but its interest was acquired during the underlying litigation by BBT when Colonial was placed into receivership with the FDIC. It should be noted that

1 Defendants were originally retained to represent Colonial, but such representation transferred
2 to BBT as Colonial's successor in interest.

3 In its Findings of Fact and Conclusions of Law entered June 23, 2010, the District
4 Court in the underlying case ruled against BBT on the basis that BBT failed to establish, as a
5 necessary prerequisite to its claims, that it had been assigned and owned the former Colonial
6 Deed of Trust on which the claims it was pursuing were based. *See* Defendants' Request for
7 Judicial Notice in Support of Defendants Motion to Dismiss First Amended Complaint,
8 Exhibit B—Findings of Fact and Conclusions of Law, Case #08-A-574852. BBT asserts
9 that this ruling was based on the District Court's refusal to allow BBT's attorneys, the
10 Defendants, to present evidence at trial relative to the assignment of the Colonial Deed of
11 Trust to BBT due to the Defendants' alleged failure to timely disclose the pertinent
12 documents prior to trial.
13

14
15 BBT initiated this legal malpractice suit against Defendants on October 5, 2016.
16 BBT filed its First Amended Complaint on February 22, 2017, asserting a single cause of
17 action for Professional Negligence/Legal Malpractice.

18 Now before the Court is Defendants' Motion to Dismiss First Amended Complaint
19 ("Motion") filed on March 8, 2017 concurrently with Defendants' Request for Judicial
20 Notice, wherein Defendants asked this Court to take judicial notice of numerous documents
21 related to the underlying dispute. BBT filed its Opposition to Defendants' Motion to Dismiss
22 on March 21, 2017, along with a Counter-Request for Judicial Notice. The Court set
23 Defendants' Motion to Dismiss for a hearing on motions calendar on April 19, 2017 at 10:00
24 a.m., wherein this Court denied Defendants' Motion to Dismiss as to standing, but took the
25 issue as to whether the statute of limitations has expired under advisement. The Court
26
27
28

1 continued the matter to Chambers Calendar on May 16, 2017 for a decision as to the running
2 of the statute of limitations.

3
4
5 After having read the pleadings and papers on file, including the supplemental briefs
6 filed by both parties, and for good cause appearing therefore:

7 **THE COURT FINDS** after review, in Nevada, an action for legal malpractice does
8 not begin to accrue until the "plaintiff's damages are certain and not contingent upon the
9 outcome of an appeal." *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d
10 184, 186 (1988). "It is only after the underlying case has been affirmed on appeal that it is
11 appropriate to assert injury and maintain a legal malpractice cause of action for damages." *Id.*
12 The statute of limitations for legal malpractice claims is four years from the damages or two
13 years from when the plaintiff discovers, or could discover, the damages, whichever is earlier.
14 N.R.S. 11.207.

15
16 **THE COURT FURTHER FINDS** after review that on March 31, 2013, the Nevada
17 Supreme Court affirmed the district court's ruling in the underlying case, and issued its
18 remittitur. "The reversal and remittitur comprise the judgment by which the parties and the
19 district court are thereafter bound." *In re Estate & Living Trust of Miller*, 125 Nev. 550, 553,
20 216 P.3d 239, 242 (2009). The remittitur "terminated the case below as to all issues settled
21 by the judgment" and formally informs the district court of appellate court's final resolution
22 of the appeal. *Cerminara v. Eighth Jud. Distr. Ct.*, 104 Nev. 663, 665, 765 P.2d 182, 184
23 (1988); *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998).
24
25
26
27
28

1 **THE COURT FURTHER FINDS** after review, that Nevada Rules of Appellate
2 Procedure 41(a)(3)(A) provides that “[a] party may file a motion to stay the remittitur
3 pending application to the Supreme Court of the United States for a writ of certiorari.”
4

5 **THE COURT FURTHER FINDS** after review, that a writ of certiorari is separate
6 and distinct from an appeal. While an appeal to an appellate court is a matter of right, a writ
7 of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10.

8 **THE COURT FURTHER FINDS** after review that because BBT did not have a
9 right to a writ of certiorari to the United States Supreme Court, and because BBT failed to
10 file a motion to stay the remittitur under NRAP 41(a)(3)(A), the Nevada Supreme Court’s
11 May 31, 2013 decision to affirm the district court’s ruling and its remittitur to the district
12 court, constitutes an final adverse appellate ruling for BBT. Therefore, the statute of
13 limitations was not tolled when BBT filed a petition for a writ of certiorari to the United
14 States Supreme Court. Accordingly, the statute of limitations began to run on or about May
15 31, 2013, making BBT’s deadline under the statute of limitations for its legal malpractice
16 claim two years later on or about May 31, 2015.
17

18 **THE COURT FURTHER FINDS** after review BBT filed its Complaint in this case
19 on October 5, 2016, some 493 days past the expiration of the statute of limitations.
20

21 **THEREFORE, THE COURT ORDERS** for good cause appearing and for the
22 reasons stated above, Defendants Motion to Dismiss First Amended Complaint is
23 **GRANTED** as the statute of limitations ran on or about May 31, 2015.

24 ///

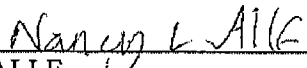
25 ///

26 ///

27
28

1
2 **COURT FURTHER ORDERS** for good cause appearing and after review that
3 Plaintiff's Countermotion for Leave to Amend is likewise **DENIED**. **HEARING** set for
4 **CHAMBERS CALENDAR** on May 16, 2017, **VACATED**.

5
6 Dated: May ²⁵~~23~~, 2017 ^{MLA}

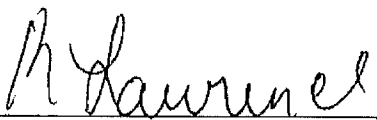
7
8 
9 NANCY ALLF
District Court Judge, Department 27

10
11 **Certificate of Service**

12 I hereby certify that on or about the date signed I caused the foregoing document to be
13 electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial
14 District Court's electronic filing system, with the date and time of the electronic service
substituted for the date and place of deposit to: *anb by email to:*

15 Albright, Stoddard, Warnick & Albright
16 G. Mark Albright, Esq. - gma@albrightstoddard.com
D. Chris Albright, Esq. - dca@albrightstoddard.com

17 Gordon & Rees LLP
18 Craig J. Mariam, Esq. - cmariam@gordonrees.com
19 Robert S. Larsen, Esq. - rlarsen@gordonrees.com
Wong Yan Wong, Esq. - wwong@gordonrees.com

20 
21 Karen Lawrence
22 Judicial Executive Assistant
23
24
25
26
27
28

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

BRANCH BANKING & TRUST COMPANY, a
North Carolina corporation
Appellant,
vs.

DOUGLAS D. GERRARD, ESQ., individually;
and GERRARD & COX, a Nevada professional
corporation, d/b/a GERRARD COX &
LARSEN,
Respondents.

No. 73848

Electronically Filed
Sep 19 2017 09:56 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department 27
County Clark Judge Nancy Allf
District Ct. Case No. A-16-744561-C

2. Attorney filing this docketing statement:

Attorney D. Chris Albright, Esq. (4904) Telephone (702) 384-7111
Firm Albright, Stoddard, Warnick & Albright
Address 801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106

Client(s) Branch Banking & Trust Company, a North Carolina corporation, Appellant

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Craig J. Mariam, Esq. (10962) Telephone (702) 577-9310
Firm GORDON & REES LLP
Address 300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101

Client(s) Douglas D. Gerrard, Esq. & Gerrard & Cox, d/b/a Gerrard Cox & Larsen, Resp'ts.

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|---|--|
| <input type="checkbox"/> Judgment after bench trial | <input checked="" type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input checked="" type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input checked="" type="checkbox"/> Other (specify): <u>Statute of Limitations</u> |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following? No.

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

R&S St. Rose Lenders, LLC, a Nevada limited liability company (Appellant/Cross-Respondent) v. Branch Banking & Trust Company, (Respondent/Cross-Appellant) et al.
Nevada Supreme Court Case No. 56640

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Branch Banking & Trust Company as Successor-in-Interest to the Federal Deposit Insurance Corporation as Receiver of Colonial Bank, N.A. v. R&S St. Rose Lenders, LLC, a Nevada limited liability company; et al.
U.S. Supreme Court Case No. 13-1413 (Petition for Writ of Certiorari)

8. Nature of the action. Briefly describe the nature of the action and the result below:

This is a legal malpractice suit brought by Branch Banking & Trust Company ("BB&T") against attorney Douglas D. Gerrard ("Gerrard") and his law firm Gerrard & Cox, d/b/a Gerrard Cox & Larsen ("GC&L"), stemming from the lawyer Defendants' representation of Plaintiff BB&T in an earlier Clark County, Nevada case, known as Case Number A-08-574852, consolidated with Case No. A-09-594512 (sometimes hereinafter the "Underlying Subject Litigation" or simply the "underlying suit") which was tried before the Honorable Elizabeth Gonzalez ("Judge Gonzalez" or "the underlying court") in 2010.

Defendants filed a Motion to Dismiss on various grounds, including the statute of limitations, which was granted solely on the basis of the statute of limitations for this suit having expired. This is an appeal from that Order of Dismissal.

9. Issues on appeal. State specifically all issues in this appeal (attach separate sheets as necessary):

1. Whether the district court erred in granting the Defendants' Motion to Dismiss this litigation malpractice case, by determining that it was barred by the statute of limitations found at NRS 11.207.

(See Attachment 1 for continuation.)

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Unknown.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: See Attachment 2.

13. Trial. If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? N/A

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No. N/A

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from 05/25/17; 08/29/17

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. Date written notice of entry of judgment or order was served 05/26/17; 08/30/17

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☒ NRCP 59 Date of filing June 5, 2017

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion August 7, 2017

(c) Date written notice of entry of order resolving tolling motion was served 08/08/17

Was service by:

☐ Delivery

☒ Mail / Electronic / Fax [EDCR Electronic Service System]

18. Date notice of appeal filed 8/22/2017 (original); 8/30/2017 (amended)*

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:
*EXPLANATION: On August 22, 2017, within 30 days after an earlier tolling motion had been denied, Appellant filed its Notice of Appeal from the district court's May 25, 2017 "Decision and Order" of dismissal. A "Judgment" was then entered by the district court on August 29, 2017, incorporating that earlier Order and awarding costs, leading to the Amended Notice of Appeal, also referencing that Judgment.

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)(1) and NRAP 4(a)(4)(C)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|--|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input checked="" type="checkbox"/> Other (specify) <u>NRAP 3A(b)(8)</u> | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The district court's May 25, 2016 "Decision and Order Granting Defendants ... Motion to Dismiss First Amended Complaint and Denying Plaintiff's Countermotion to Amend" was effectively a final "Judgment" as that term is defined under NRCP 54(a), in that it resolved all of the Plaintiff's claims against the Defendants, with no issues, no claims, and no parties still pending before, or requiring adjudication by, the district court after its entry. Thus, this Order did not require any formal certification of finality, under NRCP 54(b), to be final, and appealable under NRAP 3A(b)(1), and it was timely appealed once a subsequent tolling motion thereon was denied.

The district court's subsequent August 29, 2017 Judgment, entering a costs award, was also separately appealable as a special order, pursuant to NRAP 3A(b)(8). See, *Garcia v. Johnson*, 130 Nev. Adv. Op. No. 64, 331 P.3d 890, 891 (2014).

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiff: Branch Banking and Trust Company, a North Carolina corporation

Defendants: Douglas D. Gerrard, Esq. individually; Gerrard & Cox, a Nevada professional corporation, d/b/a Gerrard Cox & Larsen

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Plaintiff initially sued for Professional Negligence/Legal Malpractice; Intentional Omission and Fraudulent Conduct; and Breach of Contract.

(See Attachment 3 for continuation of this description.)

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

24. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

N/A

(b) Specify the parties remaining below:

N/A

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

The district court's May 25, 2017 "Decision and Order" dismissing the suit was a Judgment, as defined by NRCP 54(a), and was independently appealable under NRAP 3A(b)(1), in that it was a final adjudication of the sole Plaintiff's only cause of action, as listed in its dismissed First Amended Complaint, against all Defendants, such that NRCP 54(b) certification was not necessary or required to render that Judgment final. This is also true of the district court's later August 29, 2017 costs Judgment.

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

See Attachment 4, for Cover Index, and for copies of these documents attached as lettered Exhibits A-L to Attachment 4.

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Branch Banking & Trust Company

Name of appellant

September 18, 2017

Date

D. Chris Albright, Esq.

Name of counsel of record

D. C. Albright

Signature of counsel of record

Clark County, Nevada

State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 19th day of September, 2017, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
GORDON & REES LLP
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101
Tel: 702.577.9310 / Fax: 702.255.2858
cmariam@gordonrees.com / rlarsen@gordonrees.com / wwong@gordonrees.com

Dated this 19th day of September, 2017

[Signature]
Signature

ATTACHMENT 1 TO DOCKETING STATEMENT (CASE NO. 73848)

9. **Issues on appeal.** State specifically all issues in this appeal (continued).

2. Whether the district court erred in ruling that this litigation malpractice action accrued, subject to no further tolling, and the statute of limitations thus began to run, upon the date the Nevada Supreme Court affirmed the underlying court's decision in the underlying case where the malpractice occurred, rather than on the later date on which the U.S. Supreme Court rejected a timely Petition for Writ of Certiorari, seeking further appellate review.

3. Whether the district court erred in ruling that Nevada's delayed accrual/tolling pending-appeal rules, for litigation malpractice suits, did not apply during the pendency of a timely filed Petition for Writ of Certiorari to the U.S. Supreme Court, by ruling that said Writ Petition was not "an appeal" for purposes of those delayed-accrual/tolling rules.

4. Whether the district court erred in ruling that Nevada's delayed accrual/tolling pending-appeal rules, for litigation malpractice suits, did not apply during the pendency of a timely filed Petition for Writ of Certiorari to the U.S. Supreme Court, including because the State Supreme Court remittitur issued, and was not stayed, during the pendency of the Writ Petition.

5. Whether the district court erred in ruling that the statute of limitations in this litigation malpractice action had begun to expire, before damages were rendered certain, and continued to expire while damages were still contingent on the outcome of additional appellate or other proceedings (namely a timely filed Petition for Writ of Certiorari to the U.S. Supreme Court); in that this ruling appears to violate the principles enunciated by this Court in its prior case-law decisions, including without limitation *Semenza v. Nevada Med. Liability Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988) ("a legal malpractice action does not accrue" for purposes of the statute of limitations beginning to run, "until the Plaintiff's damages are certain and not contingent upon the outcome of an appeal") and *Kopicko v. Young*, 114 Nev. 1333, 971 P.2d 789 (1998) (statute of limitations on legal malpractice case arising from a first lawsuit did not accrue until attempts to mitigate the loss via a second lawsuit had failed).

ATTACHMENT 2 TO DOCKETING STATEMENT (CASE NO. 73848)

12. Other issues. Does this appeal involve any of the following issues?

- ☒ A substantial issue of first impression
- ☒ An issue of public policy
- ☒ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

If so explain: This Court has previously ruled that the statute of limitations on a litigation malpractice claim does not accrue pending any appeal in the underlying suit where the malpractice allegedly occurred. *Semenza v. Nevada Med. Liability Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988) (“a legal malpractice action does not accrue” for purposes of the statute of limitations beginning to run, “until the Plaintiff’s damages are certain and not contingent upon the outcome of an appeal.”) A similar result has also been reached under a tolling, rather than a delayed-accrual, analysis. *See, e.g., K.J.B. Inc. v. Drakulich*, 811 P.2d 1305, 1306, 107 Nev. 367, 369-70 (1991). The question of first impression raised herein, on which this Court has never previously ruled, is whether this delayed accrual/appeal tolling rule applies during the pendency of a timely filed Petition for Writ of Certiorari to the U.S. Supreme Court, or only applies during the pendency of the State-Court appeal. In other words, what is “an appeal” for purposes of the *Semenza* ruling, which delays accrual pending “an appeal.”

ATTACHMENT 3 TO DOCKETING STATEMENT (CASE NO. 73848)

- 22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

(continued) The second of these two claims was dismissed by Stipulation and Order entered on February 6, 2017. *See*, Attachment 4, **Exhibit A** hereto. The third of these claims was omitted in a subsequently filed First Amended Complaint, filed on February 22, 2017 (Attachment 4, **Exhibit E** hereto), which was allowed by NRCP 15(a), as recognized by a Stipulation and Order entered on February 16, 2017 (Attachment 4, **Exhibit C** hereto, at ¶3).

Plaintiff's First Amended Complaint sued for but one cause of action, entitled: "Professional Negligence/Legal Malpractice." This claim was adjudicated on May 25, 2017 via a Decision and Order Granting a Motion to Dismiss on the basis of the statute of limitations.

ATTACHMENT 4 TO DOCKETING STATEMENT – EXHIBITS A-L

ITEM 26: INDEX OF FILE-STAMPED DOCUMENTS ATTACHED AS EXHIBITS TO DOCKETING STATEMENT (CASE NO. 73848)

EXH. DOCUMENT

- A Stipulation and Order Dismissing Second Cause of Action from the Plaintiff's Complaint, entered February 6, 2017
- B Notice of Entry of Stipulation and Order Dismissing Second Cause of Action from the Plaintiff's Complaint, served February 7, 2017
- C Stipulation and Order to Withdraw Without Prejudice and Vacate Any Scheduled Hearings on Motion to Dismiss and Requests for Judicial Notice, entered February 16, 2017
- D Notice of Entry of Stipulation and Order to Withdraw Without Prejudice and Vacate Any Scheduled Hearings on Motion to Dismiss and Requests for Judicial Notice, served February 17, 2017
- E First Amended Complaint, entered February 22, 2017
- F Decision and Order Granting Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint and Denying Plaintiff's Countermotion for Leave to Amend, entered May 25, 2017
- G Notice of Entry of Decision and Order Granting Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint and Denying Plaintiff's Countermotion for Leave to Amend, served May 26, 2017
- H Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e), entered June 5, 2017
- I Order Denying Plaintiff Branch Banking & Trust Company's Motion to Alter or Amend, by Vacating, order of Dismissal, Pursuant to NRCP 59(e), entered August 7, 2017
- J Notice of Entry of Order Denying Plaintiff Branch Banking & Trust Company's Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e), served August 8, 2017
- K Judgment, entered August 29, 2017
- L Notice of Entry of Judgment, served August 30, 2017