IN THE SUPREME COURT OF THE STATE OF NEVADA

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; JOHN DOE INDIVIDUALS I-X; and ROE BUSINESS ENTITIES XI-XX,

Respondents.

Supreme Court No. 73848

District Court Case No.:
A-16-744561-C

JOINT APPENDIX
VOLUME I

Appeal from the Eighth Judicial District Court, Clark County, Nevada
(Honorable Nancy L. Allf Presiding)

G. Mark Albright, Esq., #1394
D. Chris Albright, Esq., #4904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
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Attorney for Appellant

Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
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Attorney for Respondents

DOCUMENT INDEX

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
1	10/05/16	Summons	I	AA0001-0003
2	10/05/16	Summons	I	AA0004-0006
3	10/05/16	Complaint [subsequently amended]	I	AA0007-0035
4	10/18/16	Affidavit of Service on Defendant Douglas D. Gerrard	I	AA0036-0037
5	10/18/16	Affidavit of Service on Defendant Gerrard Cox Larsen	I	AA0038-0039
6	11/21/16	Defendant Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Notice of Motion and Motion to Dismiss Complaint; Memorandum of Points and Authorities [subsequently superceded and ultimately never ruled on]	I	AA0040-0070
7	12/02/16	Demand for Jury Trial	I	AA0071-0072
8	12/28/16	Plaintiff's Opposition to Motion to Dismiss; and Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA0073-0103
9	01/17/17	Reply In Support of Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen's Motion to Dismiss Complaint And Opposition to Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA0104-0124
10	01/27/17	Plaintiff's Reply in Support of Alternative Countermotion for Leave to Amend Complaint [subsequently superceded]	I	AA0125-0130
11	02/06/17	Stipulation and Order to Dismiss the Second Cause of Action from the Plaintiff's Complaint	I	AA0131-0134
12	02/07/17	Notice of Entry of Stipulation and Order to Dismiss the Second Cause of Action from the Plaintiff's Complaint	I	AA0135-0140
13	02/07/17	Minutes from February 7, 2017 Hearing entered by Court Clerk	I	AA0141

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
14	02/07/17 Hrg.	Transcript: February 7, 2017 scheduled hearing on Motion to Dismiss, leading to judicial recusal (File Date – 01/9/18)	I	AA0142-0153
15	02/08/17	Notice of Department Reassignment	I	AA0154
16	02/16/17	Stipulation and Order to Withdraw Without Prejudice and Vacate Any Scheduled Hearings on Motion to Dismiss and Requests for Judicial Notice	I	AA0155-0158
17	02/17/17	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	I	AA0159-0164
18	02/22/17	First Amended Complaint	I	AA0165-0196
19	03/08/17	Notice of Motion and Motion to Dismiss First Amended Complaint; Memorandum of Points and Authorities	I	AA0197-0217
20	03/08/17	Request for Judicial Notice in Support of Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint	II	AA0218-0278
21	03/21/17	Plaintiff's Opposition to Motion to Dismiss First Amended Complaint; and Alternative Countermotion for Leave to Amend	II	AA0279-0309
22	03/21/17	Plaintiff's Response and Partial Opposition to Defendants' March 8, 2017 Request for Judicial Notice and Counter-Request for Judicial Notice by Plaintiff	II & III	AA0310-0457 AA0458-0622
23	04/07/17	Reply in Support of Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint and Opposition to Alternative Countermotion for Leave to Amend	III	AA0623-0643
24	04/07/17	Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen's (1) Reply in Support of Defendants' Request for	III	AA0644-0694

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
		Judicial Notice; (2) Response and Partial Objection to Plaintiff's Counter-Request for Judicial Notice; and (3) Request for Judicial Notice on Reply		
25	04/12/17	Plaintiff's Reply in Support of its Counter-Requests for Judicial Notice and Response to Defendants New Requests	IV	AA0695-0717
26	04/12/17	Plaintiff's Reply in Support of Alternative Countermotion for Leave to Amend Complaint	IV	AA0718-0783
27	04/19/17	Minutes from April 19, 2017 hearing on Motion to Dismiss, and other pending filings entered by Court Clerk	IV	AA0784
28	04/19/17 Hrg.	Transcript: April 19, 2017 Hearing on Motion to Dismiss and other pending filings (File Date – 6/26/17)	IV	AA0785-0804
29	04/28/17	Supplemental Brief [filed by Plaintiff] on Statute of Limitations Issues in Opposition to Defendants' Motion to Dismiss First Amended Complaint	IV	AA0805-0830
30	04/28/17	Supplemental Briefing [filed by Defendants] of Points and Authorities on Statute of Limitation Issues in Support of Motion to Dismiss First Amended Complaint	IV	AA0831-0848
31	05/25/17	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	IV	AA0849-0853
32	05/26/17	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	IV	AA0854-0862

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
33	06/05/17	Defendants' Memorandum of Costs and Disbursements	IV	AA0863-0912
34	06/05/17	Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e)	IV	AA0913-0929
35	06/22/17	Defendants Douglas D. Gerrard and Gerrard Cox & Larsen's Opposition to Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e)	V	AA0930-0944
36	06/28/17	Reply Points and Authorities in Support of Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e)	V	AA0945-0960
37	07/19/17	Minutes from July 19, 2017 Hearing on Plaintiff's Motion to Alter or Amend, by Vacating, Order of Dismissal entered by Court Clerk	V	AA0961
38	07/19/17 Hrg.	Transcript: July 19, 2017 Hearing on Plaintiffs' Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e) (File Date – 12/27/17)	V	AA0962-0972
39	08/07/17	Order Denying Plaintiff Branch Banking & Trust Company's Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e)	V	AA0973-0974
40	08/08/17	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)	V	AA0975-0980
41	08/22/17	Notice of Appeal	V	AA0981-0983
42	08/22/17	Case Appeal Statement	V	AA0984-0988
43	08/29/17	Judgment	V	AA0989-0996
44	08/30/17	Notice of Entry of Judgment	V	AA0997-1008
45	08/30/17	Amended Notice of Appeal	V	AA1009-1011
46	08/30/17	Amended Case Appeal Statement	V	AA1012-1016

ALPHABETICAL INDEX

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4	10/18/16	Affidavit of Service on Defendant Douglas D. Gerrard	I	AA0036-0037
5	10/18/16	Affidavit of Service on Defendant Gerrard Cox Larsen	I	AA0038-0039
46	08/30/17	Amended Case Appeal Statement	V	AA1012-1016
45	08/30/17	Amended Notice of Appeal	V	AA1009-1011
42	08/22/17	Case Appeal Statement	V	AA0984-0988
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35	06/22/17	Defendants Douglas D. Gerrard and Gerrard Cox & Larsen's Opposition to Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e)	V	AA0930-0944
24	04/07/17	Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen's (1) Reply in Support of Defendants' Request for Judicial Notice; (2) Response and Partial Objection to Plaintiff's Counter-Request for Judicial Notice; and (3) Request for Judicial Notice on Reply	III	AA0644-0694
33	06/05/17	Defendants' Memorandum of Costs and Disbursements	IV	AA0863-0912
7	12/02/16	Demand for Jury Trial	I	AA0071-0072
18	02/22/17	First Amended Complaint	I	AA0065-0196

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43	08/29/17	Judgment	V	AA0989-0996
27	04/19/17	Minutes from April 19, 2017 hearing on Motion to Dismiss, and other pending filings entered by Court Clerk	IV	AA0784
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 14th day of March, 2018, the foregoing **JOINT APPENDIX, VOLUME I**, was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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 Respondents

____ Certified Mail
_X_ Electronic Filing/Service
____ Email
____ Facsimile
____ Hand Delivery
____ Regular Mail

An employee of Albright, Stoddard, Warnick & Albright

SUMM

G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 001394
D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 004904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
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Las Vegas, Nevada 89106
Tel: (702) 384-7111
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gma@albrightstoddard.com
dca@albrightstoddard.com
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 & LARSEN, a Nevada professional corporation, JOHN DOES I-X; and ROE BUSINESS ENTITIES XI-XX, Defendants.	CASE NO. A-16-744561-C DEPT NO. XXXI **SUMMONS**

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT(S) DOUGLAS D. GERRARD, ESQ., individually: A civil Complaint has been filed by the Plaintiff(s) against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within **20 days** after this Summons is served on you, exclusive of the day of service, you must do the following:

   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.

   b. Serve a copy of your response upon the attorney whose name is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff and this Court may enter judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislators, each have 45 days after service of this Summons within which to file an answer or other responsive pleading to the Complaint.

Submitted by:
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

G. MARK ALBRIGHT, ESQ. #1394
D. CHRIS ALBRIGHT, ESQ., #1394
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
(702) 384-7111
Attorneys for Plaintiff

STEVEN D. GRIERSON
CLERK OF THE COURT

OCT 05 2016

By: _____
Deputy Clerk Date
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
JANEL WASHINGTON

NOTE: When service is by publication, add a brief statement of the object of the action. See Rules of Civil Procedure 4 (b).

STATE OF _____)
) ss.
COUNTY OF _____)

AFFIDAVIT OF SERVICE

_____, being duly sworn, says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received _____ copy(ies) of the Summons and Complaint in the above captioned matter, on the _____ day of _____, 2016, and served the same on the _____ day of _____, 2016, by:

(Affiant must complete the appropriate paragraph)

1. Delivering and leaving a copy with the Defendant _____ at (state address) _____
_____.

2. Serving the Defendant _____, by personally delivering and leaving a copy with _____, a person of suitable age and discretion residing at the Defendant's usual place of abode located at: (state address) _____
_____.

(Use paragraph 3 for service upon agent, completing a or b)

3. Serving the Defendant _____ by personally delivering and leaving a copy at (state address) _____.

a. With _____ as _____, an agent lawfully designated by statute to accept service of process;

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

b. With _____, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.

4. Personally depositing a copy in a mail box of the United States Post Office, enclosed in a sealed envelope, postage prepaid (Check appropriate method):

_____ Ordinary mail
_____ Certified mail, return receipt requested
_____ Registered mail, return receipt requested

addressed to the Defendant _____ at Defendant's last known address which is (state address) _____ _____.

COMPLETE ONE OF THE FOLLOWING:

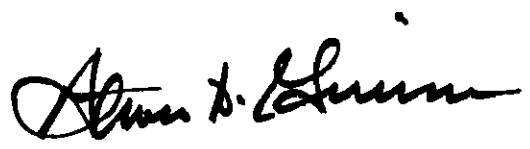
(a) If executed in this state, "I declare under penalty of perjury that the foregoing is true and correct."

_____
Signature of person making service

(b) If executed outside of this state, "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

_____
Signature of person making service

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



SUMM
G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 001394
D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 004904
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dca@albrightstoddard.com
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 & LARSEN, a Nevada professional corporation, JOHN DOES I-X; and ROE BUSINESS ENTITIES XI-XX, Defendants.	CASE NO. A-16-744561-C DEPT NO. XXXI **SUMMONS**

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT(S) GERRARD COX & LARSEN, a Nevada professional corporation: A civil Complaint has been filed by the Plaintiff(s) against you for the relief set forth in the Complaint.

1. If you intend to defend this lawsuit, within **20 days** after this Summons is served on you, exclusive of the day of service, you must do the following:

   a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.

   b. Serve a copy of your response upon the attorney whose name is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff and this Court may enter judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members, and legislators, each have 45 days after service of this Summons within which to file an answer or other responsive pleading to the Complaint.

Submitted by:
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

G. MARK ALBRIGHT, ESQ. #1394
D. CHRIS ALBRIGHT, ESQ., #1394
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
(702) 384-7111
Attorneys for Plaintiff

STEVEN D. GRIERSON
CLERK OF THE COURT

OCT 05 2016

By: _____
Deputy Clerk Date
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
JANEL WASHINGTON

NOTE: When service is by publication, add a brief statement of the object of the action. See Rules of Civil Procedure 4 (b).

STATE OF _____)
) ss.
COUNTY OF _____)

AFFIDAVIT OF SERVICE

_____, being duly sworn, says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received _____ copy(ies) of the Summons and Complaint in the above captioned matter, on the _____ day of _____, 2016, and served the same on the _____ day of _____, 2016, by:

(Affiant must complete the appropriate paragraph)

1. Delivering and leaving a copy with the Defendant _____ at (state address) _____.

2. Serving the Defendant _____, by personally delivering and leaving a copy with _____, a person of suitable age and discretion residing at the Defendant's usual place of abode located at: (state address) _____.

(Use paragraph 3 for service upon agent, completing a or b)

3. Serving the Defendant _____ by personally delivering and leaving a copy at (state address) _____.

a. With _____ as _____, an agent lawfully designated by statute to accept service of process;

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

b. With _____, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.

4. Personally depositing a copy in a mail box of the United States Post Office, enclosed in a sealed envelope, postage prepaid (Check appropriate method):

_____ Ordinary mail
_____ Certified mail, return receipt requested
_____ Registered mail, return receipt requested

addressed to the Defendant _____ at Defendant's last known address which is (state address) _____ _____.

COMPLETE ONE OF THE FOLLOWING:

(a) If executed in this state, "I declare under penalty of perjury that the foregoing is true and correct."

_____
Signature of person making service

(b) If executed outside of this state, "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

_____
Signature of person making service

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

A-16-744561-C
XXXI

DISTRICT COURT CIVIL COVER SHEET

_____ County, Nevada

Case No. _____
(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Branch Banking & Trust Company	Douglas D. Gerrard, Esq.
9555 Hillwood Drive, 2nd Floor	GERRARD COX & LARSEN
Las Vegas, Nevada 89134	2450 S. Rose Pkwy., Suite 200
Tel: 702-669-4619	Henderson, Nevada 89074
Attorney (name/address/phone):	Attorney (name/address/phone):
G. Mark Albright, Esq. / D. Chris Albright, Esq.	
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT	
801 S. Rancho Drive, Suite D-4, Las Vegas, NV 89106	
Tel: 702.384.7111	

II. Nature of Controversy *(please select the one most applicable filing type below)*

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☐ Auto	☐ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☐ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	■ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	☐ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
☐ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		☐ Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

October 5, 2016
Date

Signature of initiating party or representative

See other side for family-related case filings.

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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, Defendants.	CASE NO.: A-16-744561-C DEPT. NO.: XXXI **COMPLAINT**

COMES NOW, Plaintiff, BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, qualified and registered to do business in Nevada (hereinafter "Plaintiff" or "BB&T"), and, as and for its Complaint against Defendants, DOUGLAS D. GERRARD, ESQ., individually; GERRARD COX & LARSEN, a Nevada professional corporation, and JOHN DOES I-X and ROE BUSINESS ENTITIES XI-XX (hereinafter collectively the "Defendants"), hereby alleges and avers as follows.

THE PARTIES

1. Plaintiff BB&T, is a North Carolina corporation qualified and registered to do business in Nevada. BB&T purchased certain loans, notes, and deeds of trust, from, and became the successor in interest to the FDIC, in its capacity as Receiver of Colonial Bank, N.A., an Alabama corporation, as further described herein.

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 & LARSEN is a Nevada professional corporation (hereinafter "GC&L"), licensed to do business in Clark County, Nevada, and offering legal services, including in Clark County, Nevada.

4. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants John Doe Individuals I through X and Roe Business Entities I through X, 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 other Defendant(s) 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 Doe Defendants or Roe Business Entities 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 amend this Complaint and insert the true names and capacities of Doe Individuals I through X and Roe Corporations I through X when the same have been ascertained.

GENERAL ALLEGATIONS

5. Defendants represented Plaintiff BB&T in certain litigation known as Clark County Nevada District Court Case Number A-08-574852, consolidated with Case No. A-09-594512-C (hereinafter the "Subject Litigation").

6. This instant lawsuit is for professional malpractice and related claims against Defendants arising out of this professional representation.

7. The core dispute in the underlying Subject Litigation revolved around the respective priority of two deeds of trust encumbering approximately thirty-eight (38) acres of real property in Henderson, Clark County, Nevada (the "Property") located near 7 Hills and St. Rose Street, owned by R&S St. Rose, LLC ("St. Rose"), as said Property was described in the relevant deeds of trust, identified below.

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8. Plaintiff BB&T holds one of these deeds of trust pursuant to an assignment from the Federal Deposit Insurance Corporation ("FDIC") as receiver for Colonial Bank, N.A., an Alabama corporation ("Colonial"), the original beneficiary of that deed of trust. The beneficial interest under the other deed of trust is held by R&S St. Rose Lenders LLC ("R&S Lenders").

9. Property owner St. Rose and deed of trust holder R&S Lenders are each ultimately owned and controlled by the same two individuals: Saiid Forouzan Rad ("Rad") and R. Phillip Nourafchan ("Nourafchan"), including through other entities they own or control, such as RPN, LLC ("RPN") which is a managing member of St. Rose and a manager of R&S Lenders, and Forouzan, Inc., which is a managing member of St. Rose and a manager of R&S Lenders. RPN is, in turn, managed by Nourafchan, and Forouzan, Inc., is, upon information and belief, controlled or owned by Rad.

10. Rad and Nourafchan's/RPN's and Forouzan Inc.'s company, St. Rose, came to own the Property as part of a land-banking arrangement with Centex Homes ("Centex") through which Centex assigned its right to purchase the Property to St. Rose, subject to a reserved purchase option in favor of Centex.

11. In order to initially purchase the Property, subject to the Centex option, St. Rose and its owners Rad and Nourafchan, were required to raise approximately $45,131,414.00, which they expected to recoup and earn a profit on, when Centex exercised its option, to purchase the Property for an option price substantially more than the initial purchase price to be paid by St. Rose.

12. St. Rose used three primary sources of funds to purchase the Property.

13. First, St. Rose borrowed $29,305,250.00 from Colonial (the "First Colonial Loan"). The First Colonial Loan was secured by a first priority deed of trust against the Property recorded on August 26, 2005 (the "First Colonial Deed of Trust"), recorded with the Clark County Recorder as Book 20050826 and Instrument 0005282, which First Colonial Deed of Trust more fully describes the Property at issue herein.

14. Second, St. Rose applied the approximately $8,100,000.00 it received as a non-refundable deposit from Centex. Third, St. Rose borrowed an additional approximately $12,300,000.00 from R&S Lenders, which Rad and Nourafchan, through other entities they

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controlled, such as RPN and Forouzan, Inc., formed for the sole purpose of "loaning" funds to St. Rose.

15. On or about August 23, 2005, Rad and Nourafchan caused St. Rose to execute a promissory note in favor of R&S Lenders for $12,000,000.00, which was secured by a "Second Deed of Trust" recorded against the Property on September 16, 2005 (the "R&S Lenders Second Deed of Trust"), as Document No. 02881 in Book 20050916 in the Official Records of Clark County, Nevada.

16. The First Colonial Deed of Trust, having been first recorded, had first priority over the R&S Lenders Second Deed of Trust.

17. On or about June 6, 2007, R&S Lenders recorded a subordination agreement relative to the R&S Lenders Second Deed of Trust as Document No. 0003244 in Book 20070604 of the Official Records of Clark County, Nevada (the "R&S Lenders Subordination Agreement").

18. Rad and Nourafchan intended to hold the Property for roughly one year, after which time they expected Centex to exercise its purchase option. Centex unexpectedly did not exercise its purchase option, thereby forfeiting its prior deposits.

19. As a result, St. Rose needed to raise additional funds in order for it, instead of Centex, to retain and potentially develop the Property. These additional funds came almost exclusively from Colonial.

20. On July 27, 2007, Colonial and St. Rose entered into a loan for an amount not to exceed $43,980,000.00 (the "Construction Loan"). The Construction Loan was: (i) to pay off the First Colonial Loan, and (ii) to provide funding for the construction of certain infrastructure improvements on the Property.

21. The Construction Loan was secured by a Deed of Trust in favor of Colonial, which was recorded against the Property on July 31, 2007 (the "2007 Colonial Deed of Trust"). Colonial funded the Construction Loan with the understanding that the 2007 Colonial Deed of Trust would - like the First Colonial Deed of Trust- be secured in first priority position against the Property.

22. Funds from the Construction Loan were used to fully pay off and satisfy the approximately $29,797,628.72 then owing under the First Colonial Loan. Therefore, pursuant to legal principles of equitable subrogation recognized in Nevada, or the analogous theory of

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replacement and modification, this Construction Loan and the 2007 Colonial Deed of Trust securing the same were entitled to enjoy the same first priority position of the earlier First Colonial Loan and the First Colonial Deed of Trust, at least up to the amount refinanced, and thus enjoyed priority over any deed of trust recorded after the First Colonial Deed of Trust, including the R&S Lenders Second Deed of Trust from September 2005.

23. For example, "Equitable subrogation permits 'a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance.'" *Houston v. Bank of Am. Fed. Savings Bank,* 119 Nev. 485, 488, 78 P.3d 71, 73 (2003) (quoting *Mort v. U.S.,* 86 F.3d 890, 893 (9th Cir.1996)). Thus, the doctrine "enables 'a later-filed lienholder to leap-frog over an intervening lien [holder].'" *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.,* 126 Nev. 423, 429, 245 P.3d 535, 539 (2010) (quoting *Hicks v. Londre,* 125 P.3d 452, 456 (Colo. 2005)). "The practical effect of equitable subrogation is a revival of the discharged lien and underlying obligation" [*i.e.*, of the lien discharged and paid off by the loan secured by the later deed of trust] and equitable subrogation therefore effects an "assignment to the payor or subrogee, permitting [it] to enforce the seniority of the satisfied lien against junior lienors." *Am. Sterling,* 126 Nev. at 429, 245 P.3d at 539.

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

25. Gerrard's and GC&L's allegations on behalf of BB&T in the Subject Litigation, averred that, within one week prior to Colonial funding the Second Colonial Loan, the escrow officer at Nevada Title Company ("Nevada Title") that was handling the transaction, Brenda Burns, told Rad and/or Nourafchan that Colonial would not close and fund the Second Colonial Loan unless it was secured by a first priority lien against the Property, which required the release

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and reconveyance of the R&S Lenders Second Deed of Trust from September 2005.

26. Gerrard's and GC&L's allegations on behalf of BB&T in the underlying Subject Litigation, included allegations that Rad and/or Nourafchan, individually and in their capacity as the managing officers of Forouzan and RPN, respectively, the managing entities of St. Rose and R&S Lenders, told and assured Brenda Burns that they would cause the reconveyance of the R&S Lenders Second Deed of Trust in order to close escrow of the Second Colonial Loan.

27. Gerrard and GC&L alleged in the Subject Litigation, that Brenda Burns explained to Rad and/or Nourafchan that their company R&S Lenders would have to provide a reconveyance of the R&S Lenders Second Deed of Trust as the Second Colonial Loan was to be secured by a deed of trust with a first position lien on the Property. Gerrard and GC&L further alleged that Rad and/or Nourafchan knowingly and fraudulently assured Brenda Burns in their individual capacity and in their capacity as the managing officers of Forouzan and RPN, respectively, the controlling entities of St. Rose and R&S Lenders, that they would release and reconvey the R&S Lenders Second Deed of Trust.

28. Based on these allegations, and also, regardless of the accuracy of these allegations, but as a matter of law under principles of equitable subrogation, or replacement, Colonial was entitled to have its Construction Loan Deed of Trust enjoy a first priority position, as against the R&S Lenders 2005 Deed of Trust.

29. As such, when Colonial funded the Construction Loan it did not believe that there were any allegedly senior deeds of trust against the Property, with priority over its 2007 Deed of Trust securing the Construction Loan, and should R&S Lenders claim otherwise, Colonial had a variety of legal principles available to it to overcome any such assertion.

30. Colonial obtained additional assurances of its first priority position through the 2007 Deed of Trust. In pertinent part, the 2007 Deed of Trust provided that:

> 5.03: Beneficiary [Colonial] shall be subrogated for further security to the lien, although released of record, of any and all encumbrances paid out of the proceeds of the loan secured by the Deed of Trust.

31. Pursuant to the plain language of the 2007 Deed of Trust, and as a matter of law, Colonial had succeeded to the priority position of the First Colonial Deed of Trust against the Property.

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32. In July of 2008 Colonial first learned that the R&S Lenders Second Deed of Trust from September 16, 2003 was not actually reconveyed, such that R&S Lenders could attempt to argue that its 2005 Second Deed of Trust, had become the first position Deed of Trust against the Property, with apparent priority over Colonial's 2007 Deed of Trust securing the Construction Loan.

33. On November 3, 2008, Robert E. Murdock ("Murdock") and Eckley M. Keach ("Keach") in their capacity as investors and lenders of St. Rose and/or R&S Lenders, with an alleged interest in the R&S Lenders Second Deed of Trust, filed a Complaint against R&S Lenders instigating Case Number A-08-594512, the first of the two ultimately consolidated cases comprising the underlying Subject Litigation. This suit was filed pro se and said Plaintiffs subsequently filed both a First and Second Amended Complaint.

34. Colonial was first named as a party to the Subject Litigation in Murdock and Keach's Second Amended Complaint filed on April 3, 2009. Colonial answered and filed a Cross-Complaint against St. Rose for indemnity and contribution, and was initially represented by Jeffrey R. Sylvester, Esq. and James B. MacRobbie, Esq. of Sylvester & Polednak, Ltd., at the time of this filing.

35. St. Rose subsequently defaulted on the Construction Loan by failing to pay the amounts due under the loan. On April 3, 2009, Colonial demanded that St. Rose cure its default. When St. Rose failed to cure, Colonial recorded a Notice of Default and Election to Sell, initiating non-judicial foreclosure proceedings against St. Rose and the Property.

36. Colonial thereafter filed its own separate Complaint on July 1, 2009, initiating Case No. A-09-594512-C (the second of the two eventually consolidated cases comprising the underlying Subject Litigation) against R&S Lenders, Forouzan Inc., RPN, Rad and Nourafchan, all as defendants therein.

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

38. This Complaint sought to obtain a ruling that the Second (Construction Loan) Colonial Deed of Trust had priority over the R&S Lenders 2005 Deed of Trust, including based on equitable subrogation, and other related theories.

39. On July 15, 2009, R&S Lenders also recorded a Notice of Default and Election to

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Sell, initiating foreclosure proceedings against St. Rose and its Property.

40. The trial court eventually entered a TRO against both foreclosures, which was extended pending the outcome of the Subject Litigation.

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

42. On or about August 14, 2009, Colonial was closed by the Alabama State Banking Department, and the FDIC was named as its Receiver.

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

44. Based on the PAA's execution, but failing to recognize that said document arguably contained certain inadequacies or ambiguities, which they should have recognized, on or about October 1, 2009, 48 days after execution of the PAA, Defendants Gerrard and GC&L, without first moving for leave of court to substitute a new Plaintiff in lieu of Colonial, and thus without explaining the basis for their conduct, filed an Amended Complaint in the second consolidated case in the underlying Subject Litigation, substituting BB&T as the Plaintiff, in the place and stead of Colonial.

45. Based thereon, Defendants Gerrard and GC&L became counsel of record for BB&T, and established an attorney-client relationship with BB&T, having been retained by BB&T to represent it, pursuant to which Defendants owed duties of care and professionalism to BB&T.

46. The PAA was not as clear as it could have been, and, had it been carefully reviewed by BB&T's counsel, said counsel should have anticipated possible objections being raised regarding the same, or possible arguments that it did not clearly and adequately demonstrate that Colonial's claims and assets related to the Subject Colonial Deed of Trust and priority assertions in the Subject Litigation had been transferred to BB&T. For example:

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- At Section 3.1 of the PAA, the agreement states that Schedules are attached to the PAA listing certain of the assets being conveyed. However, no such schedules were actually prepared or attached.
- Section 3.5 of the PAA could potentially be construed to indicate that certain assets were excluded from the sale, including assets involving claims against third-parties, and assets which were the subject of any legal proceedings (excluding from this category of non-transferred assets claims for losses arising out of failures of such third-parties to pay debts, but not excluding from this category claims for losses arising out of other failures, such as, in this case, failures to reconvey another prior deed of trust).
- Section 3.6 of the PAA indicated that the parties could choose to exclude certain assets from the sale, such as assets similar to the Colonial claims in the Subject Litigation.
- Based upon the fact that legal proceedings were pending which included allegations of fraud at the time the PAA was entered into, the 2007 Colonial Bank Deed of Trust could be argued to fall into the category of assets which either party might exclude from the FDIC sale to BB&T as defined in Section 3.6 of the PAA.
- The PAA does not clearly indicate whether or not the 2007 Colonial Bank Deed of Trust, that was the subject of pending litigation involving allegations of fraud, was excluded by either party, under Section 3.6, but it could in any event be argued that this asset was excluded under Section 3.5.
- The PAA was ultimately found to be internally inconsistent and incomplete, and the district court ultimately ruled that this document prevented the court from making a finding as to whether an assignment of the loan at issue had occurred, especially as no witness testimony was ever proffered to explain or identify the transferred assets. These potential future rulings were predictable by any reasonable attorney conducting a competent review of the PAA.

47. Had Defendants filed a Motion to Amend or to Substitute a new Plaintiff in the

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stead of Colonial, and sought and received permission from the district court to amend, and replace BB&T in Colonial's stead, before filing the Amended Complaint which listed BB&T as the new Plaintiff, Defendants would, via that process, have either obtained a dispositive ruling that BB&T was a proper assignee of the Colonial claims (or a possible waiver of any contrary claim based on whether any opposition was filed); or, would have learned via that process of any potential concerns held by the court or any objections asserted by opposing counsel, with respect thereto, in time to remedy and address such concerns before trial. However, as no written Motion to Amend for purposes of substituting a new Plaintiff was ever filed, this did not occur.

48. On or about October 7, 2009, a Second Amended Complaint was filed in BB&T's name by Gerrard and GC&L.

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

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

51. The Second Amended Complaint filed by the Defendants on behalf of BB&T, included an allegation relating to BB&T's acquisition of Colonial's claims, with the right to therefore pursue the suit based thereon.

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

53. Notwithstanding these allegations, Defendants did not clearly explain or allege in

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this pleading how it was that BB&T had come to succeed to the claims of the FDIC, as Receiver for Colonial.

54. Thereafter, both St. Rose and R&S Lenders filed Answers to the BB&T Second Amended Complaint, in which both Defendants denied, for lack of sufficient knowledge, the first paragraph of Plaintiff's Second Amended Complaint, and in which both Defendants asserted BB&T's lack of standing as their Third Affirmative Defense.

55. NRS 111.235 requires that any transfer of a trust in lands is void, unless set forth in a writing.

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

57. Both St. Rose and R&S Lenders raised the statute of frauds as an affirmative defense in their Answers to BB&T's Second Amended Complaint.

58. Based on all of the foregoing, and based on other events during litigation as set forth hereafter, Defendants Gerrard and GC&L knew or should have known that BB&T would be required to prove at trial, by a preponderance of the evidence, that Colonial's position under the Deed of Trust had been assigned to BB&T, via a writing clearly setting forth this assignment, which would need to be presented as trial evidence, together with testimony regarding the same, in order for BB&T to demonstrate that it now owned and had succeeded to the right to pursue the claims previously owned by Colonial.

59. Based thereon, Defendants had a duty to ensure that any documents proving this assignment to BB&T were timely disclosed so as to be utilized at trial, to present all such documents during trial, and to have witnesses prepared to testify as to the correct understanding of the PAA and other available assignment documents during trial, and to present such witnesses during trial.

60. Alternatively, if no adequate documents existed, the Defendants had a duty to inform their client of this concern, and to advise their client BB&T of the need to prepare and obtain the FDIC's signature on adequate documentation, evidencing the assignment, to be disclosed prior to trial, and utilized during trial.

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61. Defendants failed to perform these duties.

62. Defendants Gerrard and GC&L never adequately examined the PAA to ensure that it adequately demonstrated the assignment to BB&T, never advised BB&T or the FDIC of the need to create schedules for the PAA to demonstrate the assignment, never inquired of BB&T or the FDIC before trial if any more adequate documents existed more clearly demonstrating the assignment (which did in fact come to exist before trial), never checked with the Clark County Nevada Recorder's Office or any local title company prior to trial, to determine whether other proof of the assignment, beyond the PAA, had come to exist and be recorded against the Property (which was in fact the case), never disclosed any such additional documentation in pre-trial disclosures, never assisted BB&T with drafting any more adequate assignment documentation prior to trial, to utilize at trial, and never, in the alternative, advised BB&T that it should do so, and never utilized or introduced existing and available evidence of the assignment as evidence during their presentation of BB&T's case-in-chief during trial, and never offered any testimony from BB&T's most 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 included amounts to purchase the subject Colonial claims at issue in the Subject Litigation, during presentation of their case-in-chief at trial.

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

64. This 2009 Bulk Assignment document overcame the potential ambiguities in the PAA and, taken together with the PAA, confirmed that the FDIC had transferred, among other items, all of Colonial's outstanding Nevada commercial loans and security instruments, to BB&T, which would include the Subject Colonial Construction Loan and the Colonial 2007 Deed of Trust. However, Gerrard and GC&L never timely inquired about the existence of any such document, never looked for or found this document via a search of the Clark County Recorder's office, and never attempted to disclose this document prior to trial or to present this evidence or

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any testimony regarding the same, during their case-in-chief at trial.

65. On November 19, 2009, the opposing parties in the Subject Litigation filed a Notice of Questions of Fact to be tried at the trial, which Notice identified, in Paragraph 24, the issue of "whether BB&T" was entitled to claim "an 'assignment' that comes with" Colonial's "equitable rights" as one of the questions to be tried.

66. On November 25, 2009, Gerrard and GC&L moved for a Preliminary Injunction on an Order Shortening Time, and also requested that the trial court issue an order consolidating an evidentiary hearing on that Motion with a trial on the merits. This consolidation request was ultimately honored.

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

68. The opposing parties in the underlying Subject Litigation did not, upon information and belief, object to the timelines of these supplemental disclosures, nor were they in a position to do so, given that, on or about December 4, 2009, R&S Lenders provided its own supplemental list of disclosed witnesses and exhibits. Murdock and Keach also provided disclosures on December 4, 2009, as to the first consolidated case.

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

70. However, Defendants Gerrard and GC&L failed to include the October 23, 2009 Bulk Assignment, recorded on November 3, 2009, as part of its Second Supplemental Disclosures, served on December 3, 2009, and thus prevented themselves from being able to utilize it at trial. Said Defendants also failed to list the PAA in this document or to introduce it as evidence during trial.

71. The district court allowed discovery to continue until shortly before trial. For example, R&S Lenders was allowed to depose BB&T's person most knowledgeable, for which deposition BB&T produced its employee Gary Fritz, on December 28, 2009, long after the October 2009 Bulk Assignment was recorded in early November 2009, and less than two weeks

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prior to trial commencing, such that the court was clearly amenable to discovery continuing after any previous 16.1 discovery deadlines had passed, up until the eve of trial, and would clearly have allowed the disclosure and use of the 2009 Bulk Assignment had Gerrard and GC&L timely sought to disclose the same, at some point prior to this deposition taking place.

72. The notice of this PMK deposition indicated that R&S Lenders sought to depose BB&T's person most knowledgeable on a variety of subjects, including regarding "all documents, memorandum, and correspondence concerning BB&T's acquisition of the [subject] loan."

73. During the December 28, 2009 deposition of Gary Fritz, Mr. Fritz was repeatedly challenged by Gerrard's opposing counsel with respect to whether or not the PAA adequately demonstrated the assignment of the subject loan and deed of trust at issue in the Subject Litigation to BB&T.

74. Based on the PMK notice, and based on this line of questioning at the deposition, Defendants Gerrard and GC&L knew or should have known that the FDIC's transfer and assignment of the disputed Colonial claims to BB&T would be challenged at the trial of the underlying Subject Litigation, and that said Defendants had a duty to have arguments, including pertinent case law as to similar PAAs, and evidence, including documents and testimony, ready to present during their case-in-chief, to establish the assignment to BB&T, as an initial prerequisite component of their *prima facie* case.

75. Defendants nevertheless failed in such duty, and did not disclose certain necessary evidence prior to trial or present any evidence during trial of their case-in-chief, for the purpose of demonstrating the assignment of the relevant Colonial rights and claims to BB&T, and failed to ensure that adequate evidence existed, or, if not, to direct BB&T that it needed to have such documents prepared and signed by the FDIC, for disclosure prior to trial, and use during trial.

76. The Defendants' pre-trial list of documents and witnesses to be utilized at trial did not identify the PAA, or the 2009 Bulk Assignment, as documents to be relied on at trial, nor did it identify Fritz as a trial witness.

77. The evidentiary hearing consolidated with a trial on the merits in the underlying Subject Litigation was held over approximately ten days spanning a three month period from on or about January 8, 2010 until on or about April 8, 2010.

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78. Defendants Gerrard and GC&L knew or should have known that their client BB&T's right to bring the suit would be a fundamental and necessary preliminary showing at trial, and should have ensured, prior to trial, that they were ready to address this issue at trial and show that BB&T had become the successor-in-interest to Colonial's claims, with admissible documentary evidence and relevant witness testimony and appropriate legal authority, and should have presented such evidence of the assignment during their case-in-chief at trial. However, they did not perform any of these tasks.

79. At the beginning and first day of the trial, on January 8, 2010, the trial court indicated as follows: "I have two issues I have to determine" one of which issue was described by the trial court as follows: "I have to determine . . . the nature of the relationship between the Colonial Bank loan and the BB&T's entity's. And in making that determination I am going to listen to the evidence before I apply the theories that you're [BB&T's counsel] saying because **I have to make a determination as to whether there's an assignment that exists**, if it's a successor in interest that exists, or if it's some other nature of an acquisition. Okay. Which is why I'm listening to the evidence." Emphasis added.

80. Based thereon, Plaintiff BB&T's counsel knew, at the beginning of trial, that they would need to adequately address this issue, at some point prior to the conclusion of their case-in-chief, and "before" the court would even determine whether to apply their legal theories to establish priority. This should have come as no surprise to Defendants, based on the foregoing facts regarding the R&S Lenders' and St. Rose's denials and defenses and their statements in the relevant pleadings and filings, and based on the above-identified statutory requirements, and based on the above-noted PMK deposition notice and the PMK deposition questions.

81. Notwithstanding this knowledge, Gerrard and GC&L did not adequately or directly address this issue while putting on their six day case-in-chief, over the course of the next approximately three months, did not put witness Fritz on the stand, did not introduce any of his deposition transcript during trial, and did not even introduce the PAA or the 2009 Bulk Assignment into evidence, and instead allowed themselves to be caught unprepared and unawares by an oral motion on this very issue raised after their case-in-chief was substantially completed, which motion they averred had somehow unfairly surprised and sandbagged them.

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82. Additionally, Defendants failed to properly prepare their own witnesses to testify as to the essential facts during trial to support ownership of the 2007 Construction Loan or to support the other elements of their claims for relief.

83. BB&T's lawyers, Defendants herein, failed to introduce any of the most relevant and available evidence in their case-in-chief, to establish that BB&T had received an assignment or had any ownership rights in the 2007 Colonial Construction Loan Note or in the Second Colonial Deed of Trust.

84. Defendants Gerrard and GC&L, did not submit testimony from BB&T or from the FDIC concerning the PAA, during their case-in-chief, nor did they seek to submit the deposition transcript of Gary Fritz, BB&T's person most knowledgeable concerning the PAA and the transfer of the relevant loan to BB&T, notwithstanding said deponent having testified that BB&T's $21.5 billion bid to the FDIC included a bid for all non-consumer loans, and also testified that BB&T had acquired all of the commercial loans of Colonial, and also testified that the summary general ledger relating to the transaction indicated that all of Colonial's commercial loans had been transferred to BB&T, which would include the loan to St. Rose. Furthermore, Defendants had not listed the PAA as a document BB&T intended to rely on at trial in its pre-trial disclosures, did not ever disclose the October 2009 Bulk Assignment recorded in early November of 2009, prior to trial, and did not try to introduce either of these documents during their presentation of BB&T's case-in-chief, nor did they call any witnesses during trial who were familiar with the assignment from the FDIC to BB&T.

85. At the close of their case-in-chief, the district court asked BB&T's counsel if he had any additional evidence to submit in its case-in-chief, beyond one witness whose schedule required the witness to appear later, and BB&T's counsel said "no."

86. After the close of BB&T's case-in-chief on or about March 30, 2010 (day six of the evidentiary hearing), almost three months after trial had begun, counsel for the opposing party, R&S Lenders, brought an oral motion pursuant to NRCP 52(c) for judgment on partial findings arguing that BB&T had not established a *prima facie* case that it had succeeded to and become the owner of Colonial's right to assert claims originally owned by Consolidated, related to the Construction Loan Deed of Trust.

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87. In response to this Motion, the trial court allowed Gerrard and GC&L, on behalf of BB&T, to now introduce, for the first time, the PAA, over objection, but ultimately determined that said document was not adequate to show that BB&T owned the claims it was pursuing at trial.

88. The district court noted as follows:

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

89. Following this oral ruling, the trial court nevertheless invited Defendants Gerrard and GC&L, on behalf of BB&T, to attempt to introduce other documentation indicating that BB&T had standing to bring its claims.

90. The following day, pursuant to the trial court's invitation, Gerrard and GC&L attempted, for the first time, to provide the trial court with the 2009 Bulk Assignment from the FDIC to BB&T, dated October 23, 2009 and recorded on November 3, 2009, confirming that the FDIC had transferred, among other things, the Construction Loan and the 2007 Deed of Trust to BB&T. The inquiries which suddenly allowed the Defendants to locate and produce this document, prior to the next day of trial, could and should have been made prior to the commencement of trial.

91. However, this evidence presented for BB&T had never been disclosed by Gerrard and GC&L to opposing counsel, in a timely manner prior to trial, despite the essential nature of this evidence, and despite certain prior district court directives compelling BB&T to produce all of the relevant documents when it allowed opposing counsel to depose BB&T's person most knowledgeable on this very issue.

92. The trial court refused to admit or consider this 2009 Assignment, because Defendants Gerrard & GC&L had not previously or timely provided this documentation on behalf of BB&T including at any time prior to trial, although it existed and was a publicly recorded document, prior to the January 2010 commencement of trial, and prior to the early December 2009

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supplemental disclosures exchange between the parties, and at the time of the late December 2009 deposition of Fritz. Indeed, the document had not been disclosed even at any time during presentation of BB&T's case-in-chief at trial, which was staggered and ultimately held between January 8 and March 30, 2010.

93. Following the trial court's rejection of the October 2009 Bulk Assignment, recorded in early November of 2009, Gerrard and GC&L, on behalf of BB&T, moved the district court to re-open BB&T's case-in-chief, which motion the district court granted. BB&T then attempted to introduce into evidence a new "assignment" that it had just recently created after the oral motion, which had also never previously been disclosed, namely, an assignment executed or effective on or about March 30, 2010 (the "2010 Assignment") for the explicit purpose of clarifying ownership of the Construction Loan.

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

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

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

97. Defendants Gerrard and GC&L then made an oral motion pursuant to NRCP 17, 21, and 25, to substitute in the FDIC- the only other conceivable owner of the Construction Loan - for BB&T as the real party in interest. The trial court denied this motion, stating in pertinent part that:

> Exhibit 183 [the PAA] is internally inconsistent and is incomplete. It prevents the Court from making a finding that an assignment has occurred of the loan that is at issue. The insufficient and conflicting evidence regarding this assignment is what led me to the position that we're currently in, the ruling that I began to make on

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> 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.

98. Ultimately, the trial court determined that the R&S Lenders Deed of Trust would be treated as having priority over the 2007 Deed of Trust, based on an evidentiary failure by the Plaintiff's counsel to establish the transfer of FDIC's/Colonial's rights to BB&T, at trial.

99. This trial court determination was based, first and foremost, on the finding that BB&T had not shown that it had ownership of the Colonial claims, or of Colonial's 2007 Note and Trust Deed to assert claims in Colonial's name which had originally arisen in favor of Colonial prior to the PAA.

100. For example, in its Findings of Fact and Conclusions of Law, entered on or about June 23, 2010, the trial court indicated that BB&T's claims were dismissed because "BB&T failed to establish the Colonial Bank Loan, Note and Deed of Trust at issue in the case were ever assigned to BB&T." The trial court's Findings of Fact further provide that:

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

101. In unnecessary dicta never reached on appeal, the Court nevertheless made certain factual findings and legal conclusions to suggest that, in any event, some of the Plaintiff's BB&T's causes of action, might have failed even if properly brought in the name of a valid successor to Colonial, such as those for fraudulent misrepresentation and civil conspiracy. These findings were factually incorrect, but were able to be made by the district court due to Defendants' failures to properly prepare BB&T's witnesses for trial.

102. Nevertheless, with respect to the Plaintiff BB&T's primary claims, including, without limitation, its claims for replacement (or its analogue equitable subrogation), the district court made clear that these claims were to be denied explicitly due to BB&T's failure to prove its

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status as a successor-in-interest to Colonial. For example, the district court's Conclusions of Law indicated in pertinent part as follows:

> 2. BB&T has failed to meet its burden of proof to establish that the Second Deed of Trust was transferred or assigned by the FDIC to BB&T.
>
> 3. BB&T is not entitled to relief on its claim for equitable subrogation **since it has not demonstrated it is a successor in interest**.
>
> 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**.
>
> . . . .
>
> 7. R&S St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust **since BB&T has not demonstrated it is a successor in interest with the ability to assert these claims**.
>
> . . . .
>
> 15. BB&T was required to establish with competent, admissible evidence that the purchase, transfer and assignment, if any, of the 2007 Colonial Bank Deed of Trust from the FDIC to BB&T was in writing and signed by the FDIC;
>
> 16. BB&T failed to meet its burden of proof and **presented no evidence, written, oral or otherwise, that the 2007 Colonial Bank Deed of Trust was assigned** by the FDIC **to BB&T** in the Purchase and Assumption Agreement;
>
> 17. The Purchase and Assumption Agreement, Exhibit 183, does not comply with the requirements of either NRS 111.205 or NRS 111.235 as to the 2007 Colonial Bank Deed of Trust.

[Emphasis added.]

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103. These rulings would not have been made, had the relevant actual facts been demonstrated to the court, as BB&T did in fact have the necessary legal and factual rights, as an assignee of Colonial, to pursue its claims.

104. Defendant Gerrard and Defendant GC&L negligently failed to prepare, disclose, or otherwise preserve for use at trial, or to present the relevant documentary and witness evidence during trial, to make a *prima facie* showing on this fact, to support a correct ruling by the trial court, despite ample indications prior to trial, and at the beginning of trial, that they would need to do so.

105. Other evidence, beyond the PAA, existed prior to trial, including the 2009 Bulk Assignment and potential live testimony from witnesses, which Defendants should have disclosed prior to trial, and should have utilized during the presentation of their case-in-chief at trial, or upon the reopening of trial, to demonstrate BB&T's ownership of the subject claims and standing to pursue the same.

106. Upon information and belief legal authority and case law also existed prior to trial which should have been presented to the Court during trial.

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

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

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

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

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BB&T was a permitted subject of discovery by the Court prior to the commencement of trial.

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

THIS COURT FINDS there was no irregularity in the trial proceedings, 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.

[Emphasis in original.]

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

111. On or about September 24, 2010, Defendants, on behalf of BB&T, appealed the district court's decision to the Nevada Supreme Court and the appeal was ultimately heard by a three judge panel of that Court. On May 31, 2013 the panel entered its "Order of Affirmance" which decision upheld the trial court's Judgment based on the following analysis:

> The PAA was an asset purchase and therefore the district court looked to its language in order to determine which assets and corresponding liabilities were transferred to BB&T. However, due to the omission of the schedules of assets, 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.**

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

[Emphasis added.]

112. On or about November 10, 2010, the district court entered its Final Judgment which included an award and Judgment against BB&T and in favor of R&S Lenders in the amount of $41,263.59, with interest to accrue thereon until paid in full. Notice of entry of this Judgment was served on or about November 15, 2010 and filed on December 1, 2010.

113. Plaintiff BB&T had the right, under certain loss share provisions of the PAA, including at Section 2.1(a) and (b)(i), to submit this Judgment for costs to the FDIC, for payment of 80% thereof, by the FDIC.

114. Defendants failed to inform BB&T of this award and Judgment, at the time it was entered, such that BB&T did not learn of the same until its 80% reimbursement rights had expired, such that it was required to pay the entire amount thereof, plus interest which would not have accrued had Plaintiff been timely informed of the need to pay the same.

115. BB&T sought *en banc* rehearing of the Nevada Supreme Court's three-judge decision by the entire Nevada Supreme Court. This request was denied by Order dated on or about February 21, 2014 in Supreme Court Case No. 56640.

116. BB&T sought to appeal this decision to the U.S. Supreme Court. 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)

117. 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.

118. An attorney-client relationship was created between Plaintiff and Defendants by the above conduct of the parties.

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119. Defendants had a duty, pursuant to that relationship, to represent Plaintiff with the reasonable care, skill, and diligence possessed and exercised by the ordinary attorney in similar conditions and circumstances.

120. Defendants failed to meet this duty.

121. Defendants' failure to properly disclose to opposing parties and counsel, prior to trial, all of the relevant documents relating to the assignment of the 2007 Construction Loan and Deed of Trust from the FDIC to Plaintiff, so that such documents could be utilized at trial, prevented Plaintiff from obtaining relief on the basis of its various claims asserted against the Defendants in the underlying trial.

122. To the degree that any pre-existing documentation did not adequately demonstrate that such an assignment had been made, Defendants' failure to inform its client of the need to timely prepare such additional documentation and negotiate its execution by the FDIC prevented Plaintiff from obtaining relief to which it otherwise would have been entitled, on the basis of its various claims asserted against the opposing parties in the underlying trial.

123. Defendants' failure to properly and adequately prepare their client's witnesses for depositions and trial also prevented Plaintiff from obtaining relief on the basis of its various claims asserted against the Defendants in the underlying trial.

124. Defendants breached their duties owed to Plaintiff by committing the negligent acts and omissions alleged herein, including but not limited to, failing to properly and timely prepare and produce and submit into evidence an acceptable assignment of the 2007 Note and Deed of trust from the FDIC to Plaintiff and in failing to properly prepare witnesses for depositions and trial.

125. Plaintiff's injuries include the loss of a judgment, settlement, or award, and the remuneration that Plaintiff would have recovered by foreclosing on the Subject Property in first priority position, but for Defendants' negligence, and includes the value of the loss of its 2007 Deed of Trust's first priority position, which has or will be wiped out upon foreclosure of the 2005 R&S Lender's Deed of Trust.

126. The damages sustained by Plaintiff were proximately caused by Defendants' various breaches of duty as set forth above.

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127. Defendants also failed to timely disclose to BB&T the terms of the Final Judgment entered on November 10, 2010, and concealed the fact that the Court had ordered BB&T to pay the St. Rose Lenders costs incurred during the underlying litigation in the amount of $41,263.00. Accordingly, to the extent that this concealment was negligent, Plaintiff is entitled to compensatory damages for the losses proximately caused by this legal malpractice on the part of Defendants, as said losses are described in greater detail hereinabove, and below.

128. As a result of Defendants' professional malpractice, Plaintiff has been damaged in an amount in excess of $10,000.00, plus interest and the costs and fees being incurred in this suit, and is entitled to Judgment against the Defendants, and each of them, jointly and severally, for these damages.

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

SECOND CAUSE OF ACTION

(Intentional Omission and Fraudulent Concealment)

130. 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.

131. On November 10, 2010, a Final Judgment was entered in the underlying action, holding among findings, that "the St. Rose Lenders Deed of Trust shall retain its priority over the 2007 Colonial Deed of Trust," and that "St. Rose Lenders shall take judgment against BB&T in the amount of St. Rose Lenders' Costs of Forty-One Thousand Two Hundred Sixty-Three Dollars and Fifty-Nine Cents ($41,263.59), which amount shall accrue interest until satisfied."

132. A Notice of Entry of Final Judgment was filed and served on the attorneys of record on December 1, 2010, by attorney David Merrill, counsel for St. Rose Lenders.

133. Defendants Gerrard and GC&L failed to disclose to BB&T, and intentionally omitted and concealed from BB&T the order awarding costs to the St. Rose Lenders.

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134. As Plaintiff's lawyers, Defendants were obligated to disclose the true status of the Final Judgment to their client, BB&T, and specifically the November 10, 2010 order awarding costs.

135. Gerrard and GC&L did not inform Plaintiff of the entry of this Judgment or the Costs and Fees awarded against BB&T therein, and concealed these material facts from Plaintiff for the purpose of inducing Plaintiff to continue employing them as its attorneys, or for other wrongful purposes.

136. The PAA between the FDIC and Plaintiff BB&T contained a loss-sharing provision intended to limit BB&T's exposure to damages and losses, such as the costs award, and allowing the BB&T to seek reimbursement of 80% of the Judgment from the FDIC.

137. Plaintiff was unaware of the foregoing true status of the Final Judgment, in time to invoke this provision.

138. But for Gerrard's and GC&L's concealment, Plaintiff would have been able to act promptly to mitigate its damages caused by Gerrard's errors and omissions, including because BB&T could have submitted a claim to the FDIC for 80% of the costs awarded to St. Rose Lenders and against BB&T in the Final Judgment, per the loss-sharing provision set forth in the PAA.

139. Plaintiff however lost its opportunity to submit this claim to the FDIC, because, by the time the facts concerning this Judgment were known to Plaintiff, its contractual rights to assert this claim to the FDIC for 80% reimbursement had expired.

140. As a proximate result of Defendants' intentional concealment, Plaintiff suffered damages as alleged herein, in excess of $10,000.00, and is entitled to a Judgment against the Defendants for these losses.

141. Plaintiff is entitled not only to compensatory, but to exemplary and punitive damages against Defendants, to the extent that their concealment was intentional, as such conduct was fraudulent, oppressive, and malicious.

142. By reason of Defendants' aforesaid errors and omissions, Plaintiff has been required to obtain the services of attorneys to represent it and has thereby incurred attorney fees and costs in prosecuting this action against Defendants, and is entitled to an award for its costs and

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attorneys' fees, pursuant to any rule, statute, or contractual provision allowing for the same, and also as special damages, incurred herein.

THIRD CAUSE OF ACTION

(Breach of Contract Against All Defendants)

143. 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.

144. Plaintiff entered into a written or oral agreement with Defendants for legal services.

145. This agreement required Defendants to keep Plaintiff regularly apprised of all significant developments and provide Plaintiff with copies of all correspondence, internal memoranda and court filings, and particularly and specifically the Final Judgment, and to represent Plaintiff with the reasonable care, skill and diligence exercised by a competent and ordinary attorney in similar circumstances.

146. Defendants breached their contract with Plaintiff by committing the legal malpractice and errors and omissions alleged above.

147. As a proximate result of the aforesaid breaches by Defendants of their contract with Plaintiff, Plaintiff suffered damages as alleged herein, and is entitled to a Judgment against Defendants, jointly and severally, in excess of $10,000.00.

148. By reason of Defendants' aforesaid errors and omissions, Plaintiff has been required to obtain the services of attorneys to represent it and have thereby incurred attorney fees and costs in prosecuting this action against Defendants, and Plaintiff is entitled to an award for its costs and attorneys' fees, pursuant to any rule, statute, or contractual provision allowing for the same, and also as special damages incurred herein.

WHEREFORE Plaintiff prays for the following relief against Defendants:

A. Judgment against Defendants Gerrard and GC&L, jointly and severally, for damages in excess of $10,000;

B. Judgment against Defendants for punitive or exemplary damages;

C. Pre-judgment interest at the highest rate allowed by law;

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D. An award and Judgment for Plaintiff's costs of suit and reasonable attorneys' fees, both pursuant to any statute, rule, or contractual provision allowing for the same, and also as special damages incurred herein;

E. Post-Judgment interest to be incurred and to accrue at the highest rate available to Plaintiff, until any Judgment is paid in full; and

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

DATED this 5th day of October, 2016.

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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,

Defendants.

CASE NO. A-16-744561-C

DEPT NO. XXXI

AFFIDAVIT OF SERVICE ON DEFENDANT DOUGLAS D. GERRARD, ESQ.

SEE ATTACHED AFFIDAVIT OF SERVICE ON DEFENDANT DOUGLAS D. GERRARD, ESQ.

AFFIDAVIT OF SERVICE

State of Nevada **County of Clark** **District Court**

Case Number: A-16-744561-C

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

vs.

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

Received by Bullet Legal Services on the 14th day of October, 2016 at 10:17 am to be served on **DOUGLAS D. GERRARD, ESQ., 2450 St. Rose Parkway, Suite 200, Henderson, NV 89074**.

I, Anthony Spada, being duly sworn, depose and say that on the **14th day of October, 2016** at **4:00 pm, I:**

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the ***SUMMONS and COMPLAINT*** to: **KANANI GONZALEZ** as Legal Assistant to Douglas Gerrard, Esq., authorized to accept, at the address of: **2450 St. Rose Parkway, Suite 200, Henderson, NV 89074.**

Description of Person Served: Age: 35, Sex: F, Race/Skin Color: PACIFIC ISLAND, Height: 5'2", Weight: 125, Hair: BROWN, Glasses: Y

I certify that at all times herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to or interested in the proceeding in which this affidavit is made.

State of Nevada
County of Clark

Subscribed and Sworn to before me on the 17th day of October, 2016 by the affiant who is personally known to me.

NOTARY PUBLIC

BERT LOTT
Notary Public, State of Nevada
Appointment No. 07-4864-1
My Appt. Expires Sept 14, 2019

Anthony Spada
R-045877

Bullet Legal Services
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Our Job Serial Number: BRT-2016003790

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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,

Defendants.

CASE NO. A-16-744561-C

DEPT NO. XXXI

AFFIDAVIT OF SERVICE ON DEFENDANT GERRARD COX & LARSEN

SEE ATTACHED AFFIDAVIT OF SERVICE ON DEFENDANT GERRARD COX & LARSEN

AFFIDAVIT OF SERVICE

State of Nevada **County of Clark** **District Court**

Case Number: A-16-744561-C

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

vs.

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

Received by Bullet Legal Services on the 14th day of October, 2016 at 10:17 am to be served on **GERRARD COX & LARSEN, 2450 St. Rose Parkway, Suite 200, Henderson, NV 89074**.

I, Anthony Spada, being duly sworn, depose and say that on the **14th day of October, 2016** at **4:00 pm, I:**

served the defendant by delivering a true copy of the ***SUMMONS and COMPLAINT***, to: **SUMMER MAGDALUYO**, **Office Assistant**, pursuant to NRS 14.020 as a person of suitable age and discretion at the address of: **2450 St. Rose Parkway, Suite 200, Henderson, NV 89074**, which address is the address of the registered agent as shown on the current certificate of designation filed with the Secretary of State.

Description of Person Served: Age: 30, Sex: F, Race/Skin Color: WHITE, Height: 5'6", Weight: 120, Hair: BLONDE, Glasses: N

I certify that at all times herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to or interested in the proceeding in which this affidavit is made.

State of Nevada
County of Clark

Subscribed and Sworn to before me on the 17th day of October, 2016 by the affiant who is personally known to me.

NOTARY PUBLIC

BERT LOTT
Notary Public, State of Nevada
Appointment No. 07-4864-1
My Appt. Expires Sept 14, 2019

Anthony Spada
R-045877

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Our Job Serial Number: BRT-2016003791

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CLERK OF THE COURT

MDSM
CRAIG J. MARIAM, ESQ.,
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ROBERT S. LARSEN, ESQ.
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Attorneys for Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen

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 **DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** [Concurrently filed with Request for Judicial Notice] Date: 01/03/17 Time: 9:30 AM Dept: XXXI Judge: Honorable Joanna S. Kishner

DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS COMPLAINT

Defendants Douglas D. Gerrard, Esq. ("Mr. Gerrard"), and Gerrard Cox & Larsen ("Firm") (collectively, "Defendants"), by and through their attorneys, Craig J. Mariam, Esq., Robert S. Larsen, Esq. and Wing Yan Wong, Esq., of the law firm of Gordon & Rees LLP, and pursuant to NRCP 12(b)(5), hereby submit their Motion to Dismiss.

This Motion is based on the pleadings and papers filed in this action, the attached Memorandum of Points and Authorities, the Request for Judicial Notice filed concurrently with

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this Motion, and any oral argument and evidence the Court may allow at the hearing on the Motion.

DATED this 21st day of November, 2016.

Respectfully submitted,

GORDON & REES, LLP

/s/ Craig J, Mariam
Craig J. Mariam, Esq.
Nevada Bar No. 10926
Robert S. Larsen, Esq.
Nevada Bar No. 7785
Wing Yan Wong, Esq.
Nevada Bar No. 13622
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101
Attorneys for Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD.

PLEASE TAKE NOTICE that Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen will bring the foregoing **DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS COMPLAINT** on for hearing before the Honorable Judge Joanna S. Kishner in Department XXXI of the above-entitled Court located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155 on the 03 day of January 2017, ~~2016~~, at the hour of 9:30 A .m., or as soon thereafter as counsel can be heard.

DATED: November 21, 2016.

Respectfully submitted,

GORDON & REES, LLP

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

At its heart, this case is about a client unhappy with the results from litigation, all caused by the failures and negligence of the client and its predecessor in interest. Plaintiff Branch Banking and Trust Company ("Plaintiff"), blames an unfavorable outcome on its attorneys, despite the attorneys' diligent actions to litigate the case and despite poor facts and documentation provided by the Plaintiff. Because the Complaint fails to allege that Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen (collectively, "Defendants") fell below the standard of reasonable and ordinary attorneys, each of Plaintiff's claims must be dismissed. Moreover, most of Plaintiff's claims are time-barred, further justifying dismissal of same.

Defendants are licensed Nevada attorneys retained to represent a separate company, Colonial Bank, N.A. ("Colonial"), in litigation over loans issued to owners of real property in Nevada. However, Colonial negligently handled these loans, mistakenly closing a second loan and releasing its first priority security interest believing a previous junior lien was reconveyed, without verifying that had happened. When Plaintiff, acting as Colonial's successor in interest, sought to assert claims for Colonial's assets, the trial court ruled against it.

In particular, the trial court in the litigation underlying this action, styled *Murdock et al. v. Rad, et al.*, Eighth Judicial District Court Case Number A-08-574852, consolidated with Case No. A-09-594512-C ("*Murdock* Litigation"), held that the specific instrument that transferred Colonial's assets to Plaintiff was defective. That document was not prepared by Defendants. Despite this, Plaintiff seeks to blame Defendants for Plaintiff's own poor drafting.

Each cause of action alleged by Plaintiff concerns how Defendants sought to reduce a loss caused by Colonial's and Plaintiff's negligence. However, Plaintiff's claims are beyond their applicable statute of limitations, as the events of this case occurred between 2007 and 2010.

In addition, Plaintiff fails to state a claim for each of its three causes of action. Plaintiff's first cause of action is for legal malpractice. As discussed below, Defendants' conduct is not legally actionable malpractice. Moreover, Plaintiff cannot show causation, as it would have faced the same result absent the alleged malpractice, as Plaintiff and its predecessor botched the loan transaction and the transfer of the loans to Plaintiff.

Likewise, Plaintiff's second cause of action for intentional omission and fraudulent concealment fails to state a claim. This cause of action rests on the erroneous proposition that Defendants failed to alert Plaintiff of the trial court's November 10, 2013 Final Judgment, as to trigger a supposed loss-sharing agreement Plaintiff shares with the Federal Deposit Insurance Corporation ("FDIC"). Defendants deny concealing anything from Plaintiff, but assuming, *arguendo*, such an omission occurred, Plaintiff's participation in this action betrays their claim.

To wit, Plaintiff admits to being involved in every relevant part of this litigation, and does not claim Defendants failed to inform of the actual judgment, the Motion for a New Trial submitted by Defendants on Plaintiff's behalf, the appeal Defendants filed on Plaintiff's behalf, or the Memorandum of Costs submitted by the opposing parties – or the relevant rulings by the trial court to all the above. Thus, Plaintiff admits to being substantively aware of every aspect of the Final Judgment, if not the form itself, and that Defendants have otherwise faithfully informed it of every piece of it. As a result, Plaintiff cannot show that an omission to receive the actual copy of the Final Judgment caused the damages it claims, and this cause of action fails.

Moreover, intentional omission and fraudulent concealment are forms of fraud, which require pleading with particularity pursuant to NRCP 9(b). The Complaint fails to allege the most critical aspects of Plaintiff's claim: when it learned of the Final Judgment and how. As Plaintiff claims that Defendants withheld this document, when and how Plaintiff first learned of it are fundamental to inform Defendants' response to this claim. The allegations in the Complaint come nowhere near the heightened pleading requirements of NRCP 9(b).

Finally, Plaintiff's third cause of action for breach of contract is wholly duplicative of its claim for malpractice, and equally defective. As a result, it must fail with the remaining claims and Plaintiff's entire action must be dismissed without leave to amend.

II. FACTUAL ALLEGATIONS

The *Murdock* Litigation concerned the priority of deeds of trust encumbering real property in Henderson, Clark County, Nevada ("Property"), owned at one time by R&S St. Rose, LLC ("St. Rose"). Complaint at ¶ 7.

A. The Loans Between R&S, Colonial, and R&S Lenders

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To initially purchase the Property, St. Rose borrowed from Colonial $29,305,250.00 ("First Colonial Loan"). Id. at ¶ 13. The First Colonial Loan was secured by a deed of trust against the Property, recorded on August 26, 2005 ("First DOT"). Id.

In addition, St. Rose borrowed $12,300,000.00 ("R&S Loan") from the independent entity R&S Lenders, LLC ("R&S Lenders"). Id. at ¶ 14. On or about August 23, 2005, executives of St. Rose executed a promissory note in favor of R&S Lenders for $12,000,000.00, secured by a deed of trust against the Property, recorded on September 16, 2005 ("Second DOT"). Id. at ¶ 15.

B. The Construction Loan and Non-Reconveyance of the Second DOT

To fully pay off the First Colonial Loan and to help develop the Property, St. Rose entered into a second loan with Colonial on July 27, 2007 for $43,980,000.00 ("Construction Loan"). Id. at ¶ 20. The Construction Loan was secured by a deed of trust in favor of Colonial against the Property, recorded on July 31, 2007 ("Third DOT"). Id. at ¶ 21.

However, in the *Murdock* Litigation, representatives of Colonial testified that Colonial only entered into the Construction Loan under the condition that the Third DOT, and thereby Colonial, would have a first priority lien against the Property. See trial court's Findings of Fact and Conclusions of Law at Findings of Fact ("FFCL") attached as Exhibit A to the Request for Judicial Notice concurrently filed ("RFJN"); see also RFJN at Nos. 1; 2(A). This financing arrangement required an agreement by R&S Lenders to reconvey the Second DOT so Colonial's new loan could be secured by a first priority lien. Thus, Colonial drafted a loan commitment letter dated July 24, 2007 ("Loan Commitment Letter"), supposedly faxed to St. Rose, which was intended to, among other things, obtain a commitment from St. Rose to obtain a reconveyance of the Second DOT as a condition of receiving the new loan. See RFJN at No. 2(B-C).

However, at trial, representatives of St. Rose denied ever receiving the Loan Commitment Letter, and Colonial representatives were unable to produce either a copy of the letter executed by St. Rose or even a copy of the facsimile of same. See RFJN at No. 2(D). Regardless, Colonial closed the Construction Loan on July 31, 2007. See RFJN at No. 2(E).

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As Colonial never received confirmation that St. Rose would require R&S Lenders to reconvey the Second DOT, the trial court eventually found that Colonial "did not have a reasonable expectation that it would receive a reconveyance of the [Second DOT] following closing of the Construction loan transaction[,] only that it would receive a policy of title insurance, which it did receive." See RFJN at No. 2(F). Thus, Colonial did not require St. Rose to reconvey or subordinate the Second DOT. See RFJN at No. 2(G).

Colonial's failure (i) to obtain a reconveyance of the Second DOT, as a condition precedent to funding the new loan and releasing the First DOT, and (ii) to state its intention in a Loan Commitment executed by St. Rose that it would only make the new loan if secured by a first priority deed of trust, are the reasons Plaintiff could not succeed in reducing the loss caused by Colonial's negligence through Plaintiff's equitable claims for equitable subrogation/ replacement being handled by Defendants. Colonial's actions created the loss in security for the new loan and prevented any possible recovery on the claims handled by Defendants.

C. The R&S Investors and the *Murdock* Litigation Commences

On November 3, 2008, two investors in R&S Lenders, Robert E. Murdock, Esq., and Eckley M. Keach, Esq. ("R&S Investors") commenced the *Murdock* Litigation against St. Rose and R&S Lenders as well as individual directors and executives concerning the loans discussed above. Complaint at ¶ 33. Colonial was added as a defendant on April 3, 2009. Id. at ¶ 34.

As a result of St. Rose's default on the Commercial Loan, Colonial initiated foreclosure proceedings against St. Rose and the Property and brought its own action on July 1, 2009, alleging that the Third DOT had priority over the Second DOT and the R&S Loan. Id. at ¶¶ 35; 36. Colonial's action was subsequently consolidated with the *Murdock* Litigation. Id. at ¶ 41. Defendants were retained to represent Colonial in that litigation. Id. at ¶ 5.

D. Colonial Placed Into Receivership of FDIC

On or about August 14, 2009, the Alabama State Banking Department closed Colonial, naming the FDIC as its receiver. Id. at ¶ 42. On August 14, 2009, Plaintiff executed with the FDIC a "Purchase and Assumption Agreement, Whole Bank All Deposits" ("PAA"), intending to transfer Colonial's financial assets to Plaintiff. Id. at ¶ 43. However, the PAA was defective. Among other defects, the PAA referred to schedules that were not attached to the document. Id.

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at ¶ 46. The defects in the PAA were critical to the trial court's findings of fact and conclusions of law adverse to Plaintiff. Plaintiff has not alleged that Defendants drafted the PAA or that Defendants' scope of representation included correcting deficiencies in the PAA.

Following the transfer of Colonial's assets, Plaintiff substituted into the *Murdock* Litigation in place of Colonial and filed a Second Amended Complaint. On Id. at ¶ 5; see also *Murdock* Litigation Second Amended Complaint of Plaintiff BB&T ("Operative BB&T Complaint") attached as Exhibit B to the RFJN; RFJN at No. 3.[1]

During a December 28, 2009 deposition of Plaintiff's person most knowledgeable, Gary Fritz, opposing counsel repeatedly inquired into the PAA and whether it adequately showed an assignment. Complaint at ¶¶ 73-74.

E. Phase One of Trial

On November 19, 2009, the R&S Investors filed a Notice of Questions of Fact with the trial court identifying all of the issues to be determined during the first, expedited phase of the trial in the *Murdock* Litigation. Complaint at ¶ 65; see also R&S Investors' Notice of Questions of Fact ("NQF") attached as Exhibit C to the RFJN; RFJN at No. 6. On November 23, 2009, the trial court consolidated the evidentiary hearing on the preliminary injunction with a limited trial on those specific issues as the first phase of trial. See RFJN Nos. 2(H); 10.

Out of the forty-eight (48) issues submitted, the court identified thirty-six (36) specific issues for determination in this expedited trial, reserving all other issues for a later trial. See Minutes from the November 23, 2009 hearing ("Minutes"), attached as Exhibit D to the RFJN; RFJN at No. 11. None of the designated issues of fact and law to be tried included a challenge to the assignment from the FDIC to Plaintiff. See RFJN at Nos. 8, 9, 11.

During the first day of the limited trial, Mr. Gerrard called as a witness Plaintiff's employee Richard Yach, who formerly worked at Colonial. See relevant transcripts from trial

[1] The Operative BB&T Complaint alleged six causes of action for declaratory relief for contractual subrogation, declaratory relief for quiet title and replacement, equitable and promissory estoppel, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. See RFJN at No. 4. The Operative BB&T Complaint specifically requested the court issue an order declaring Plaintiff had subrogated to all rights under the First Colonial Loan and First DOT, that the Third DOT replaced the First Colonial DOT, that Plaintiff was entitled to first priority position for the Property, that the Second DOT was either expunged or junior in priority, and that the named defendants therein were compelled to disgorge benefits unjustly received in excess of $10,000.00. See RFJN at No. 5.

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("Transcripts") attached as Exhibit F to the RFJN; RFJN at Nos. 15; 16. Mr. Yach testified as follows on cross-examination:

> Q: I believe you indicated that you joined BB&T – was it in August of 2009?
> A: Yes. I mean, that's when the FDIC took over the bank and assigned it or sold it or whatever it did to BB&T.
> Q: Okay. Sold assets to BB&T?
> A: It was a whole bank acquisition.
> Q: Are you saying BB&T acquired Colonial Bank?
> A: Acquired all the assets. I don't know if they acquired Colonial Bank.

See RFJN at No. 17.

F. R&S Investor's Motion for a Directed Verdict and Additional Evidence

On March 30, 2010, the R&S Investors brought an oral motion pursuant to NRCP 52(c) for judgment on partial findings, arguing, for the first time, that Plaintiff lacked standing to assert its claims and challenging the transfer of Colonial's assets to Plaintiff. Complaint at ¶ 86. In response, Defendants argued that the issue of Plaintiff's standing was never identified as an issue for this phase of trial:

> THE COURT: But you believe, I guess, that the proof of the assignment was not something that was ever going to be at issue in my determination of the priority?
> MR. GERRARD: That's correct, Your Honor. And you were very specific about what was at issue. And if you look at what was filed by the plaintiffs before that, they identified 48 different issues, every minor issue that could be raised.
> THE COURT: Yeah, I know.
> MR. GERRARD: And this was not one of them.

See RFJN at No. 18. Likewise, R&S Investors' trial briefs admitted that Plaintiff owned the loan subject to their dispute. See RFJN at No. 19.

In addition, Defendants introduced the PAA for the court's consideration as evidence of the transfer. Id. at ¶ 87. The trial court specifically noted that the PAA's deficiencies were not the result of Defendants' efforts, stating that "The document is at best poorly prepared. And I know you didn't prepare it," (see RFJN at No. 20) and "I thought there would have been something a little more [than the PAA] - - not from your perspective, but from the transaction lawyers." (see RFJN at No. 21).

Likewise, Defendants brought two additional assignments, a document titled "Assignment of Security Instruments and Other Loan Documents" dated October 23, 2009 and

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recorded on November 3, 2009 ("2009 Bulk Assignment") and an assignment dated March 30, 2010 ("March 2010 Assignment"). Complaint at ¶ 93. The trial court refused to consider these two additional documents based on an evidentiary technicality. Id. at ¶ 94.

G. Court's Findings of Fact and Conclusions of Law, Appeals, and Final Judgment

On June 23, 2010, the trial court entered its Findings of Fact and Conclusions of Law. Id. at ¶ 100; see also RFJN at No. 1. The Court considered the PAA was deficient "as inconsistent and incomplete" for, in part, failing to attach the schedules referenced therein. Complaint at ¶ 87; RFJN at No. 2(I). In addition, the trial court found it could not determine what Colonial assets were excluded from the asset sale to Plaintiff, stating:

> The Purchase and Assumption Agreement specifically excluded actions and claims against any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof, from the Colonial Bank assets purchased from the FDIC.

RFJN at No. 2(J). Thus, the trial court ruled against Plaintiff, and in favor of the R&S Investors declaring that the Second DOT had priority over the Third DOT and allowing the R&S Investors to proceed with its foreclosure sale of the Property. RFJN at 2(K).

Thereafter, on July 8, 2010, Defendants moved on Plaintiff's behalf for a new trial, which was denied on October 5, 2010. Complaint at ¶¶ 108-109.

On July 23, 2010, the trial court entered judgment against Plaintiff in favor of the R&S Investors. See Final Judgment, attached as Exhibit E to the RFJN; RFJN at Nos. 12; 13. On July 30, 2010, the R&S Investors submitted their Memorandum of Costs and Disbursements in accordance with NRS 18.020 and 18.110. RFJN at No. 14. The trial court issued its final judgment on November 10, 2010 ("Final Judgment"), awarding costs to the R&S Investors in the amount of $41,263.59. Complaint at ¶ 112. Notice of Entry of this Judgment was served on or about November 15, 2010 and filed on December 1, 2010. Id.

Defendants appealed the court's findings on September 24, 2010 to the Nevada Supreme Court, and a three judge panel affirmed the ruling on May 31, 2013. Complaint at ¶ 111. The Nevada Supreme Court closed the case on March 18, 2014. *See* RFJN at Nos. 22; 23. Plaintiff

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subsequently requested that the United States Supreme Court grant a writ for certiorari, which it denied. Id. at ¶ 116. On October 5, 2016, Plaintiff filed this action against Defendants.

III. LEGAL STANDARD

Dismissal under NRCP 12(b)(5) is proper "where the allegations in the [Complaint], taken at face value, and construed favorably in the [Plaintiff's] behalf, fail to state a cognizable claim for relief." *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 886 P.2d 454 (1994) (citations omitted).

Pleading of conclusions must be "sufficiently definite to give fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Taylor v. State of Nevada*, 73 Nev. 151, 152, 311 P.2d 733, 734 (1957). Likewise, this Court may properly grant a party's motion to dismiss based on the running of statutes of limitations. *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 130 P.3d 1280 (2006).

Notwithstanding all favorable inferences, Plaintiff cannot establish any set of facts that would entitle it to relief against Defendants. *Blackjack Bonding v. City of Las Vegas Municipal Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (affirming dismissal).

IV. LEGAL ARGUMENTS

A. Plaintiff's Cause of Action for Professional Negligence/Legal Malpractice Must Be Dismissed as Untimely and for Failure to State a Claim

1. Plaintiff's Professional Negligence/Legal Malpractice Cause of Action is Untimely.

The applicable statute of limitations for legal malpractice actions is four years from the damage or two years from when the plaintiff discovers or could discover the damage, whichever is earlier. NRS 11.207. Under Nevada law, malpractice causes of action do not accrue until after an adverse ruling on appeal. See *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988).

Plaintiff received an adverse appellate ruling when the Nevada Supreme Court affirmed the ruling of the trial court on May 31, 2013, making the deadline under the applicable statute of limitations two years later on May 31, 2015. See NRS 11.207. Plaintiff did not file this lawsuit until October 5, 2016 more than fifteen months after the statute of limitations expired. Thus, Plaintiff's cause of action for professional negligence/legal malpractice is untimely.

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Though Plaintiff petitioned for a writ of certiorari to the United States Supreme Court, such a petition is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. Unlike the appeal of the District Court's decision, which is an appeal of right and must be heard by the Nevada Supreme Court (see Nev. Const. Art. 6, § 4), there is no appeal of right from a decision by the Nevada Supreme Court. An "appeal by right" or "appeal of right" is defined as "An appeal for which permission need not be first obtained." *See* Black's Law Dictionary at 94 (7th Ed. 1999). A writ seeking certiorari is not an "appeal of right" as it requires the permission of the court from which the writ is sought. It has long been held that the Supreme Court will not grant writ of certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 US 175 (1938). As Plaintiff's appeal concerned an evidentiary question from an evidentiary hearing, Plaintiff misplaced its reliance on the United States Supreme Court granting a writ of certiorari, especially where such review is discretional.

That Plaintiff's statute of limitations begin to run from entry of the May 31, 2013 Order of Affirmance by the Nevada Supreme Court is further evidenced by Plaintiff's failure to obtain any stay of remittitur pending its writ for certiorari under NRAP 41(b). NRAP 41(a) states that the Nevada Supreme Court will issue its remittitur (which closes the case) 25 days after entry of the Supreme Court's final order. To avoid having the case closed, a party must file a motion to stay the remittitur pending application to the United States Supreme Court for a writ of certiorari. However, Plaintiff failed to file a motion for stay of the remittitur and accordingly, the remittitur was issued and the case was closed on March 18, 2014. *See* RFJN at Nos. 22; 23.

As a result, with no remaining appeals of right available to Plaintiff as of the entry of the Order of Affirmance on May 31, 2013, with the Nevada Supreme Court having issued its final, non-appealable Order Denying En Banc Reconsideration on February 21, 2014, and with the Nevada Supreme Court having issued its remittitur and closed the case by March 18, 2014, there is simply no possibility of any further tolling of the statute of limitations for Plaintiff's malpractice claim beyond March 18, 2014 at the very latest, which means the statute of limitations on this malpractice claim expired by no later than March 18, 2016.

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Moreover, allowing the litigation tolling rule under Nevada law to extend to the United States Supreme Court encourages plaintiffs to file frivolous writs of certiorari that take years for review, unnecessarily elongating their statute of limitations period for potential malpractice claims against their former counsel. As stated by the Nevada Supreme Court, "the state has a legitimate interest in the finality of judgments. When a case must be retried after a significant passage of time, both parties are hindered by the likelihood that key evidence and witnesses will no longer be available for presentation to the trier of fact." *Snow v. State*, 105 Nev. 521, 524, 779 P.2d 96, 98 (1989). Thus, allowing parties to suspend malpractice claims through writ practice allows for witnesses and evidence to waste away to the annals of time. As a result, it is equitable and just to find Plaintiff's case concluded with the affirmation of the Nevada Supreme Court on May 31, 2013, making this cause of action untimely.

2. Plaintiff Fails to State a Claim for Professional Negligence/Legal Malpractice

The required elements of a legal malpractice claim are: (1) an attorney-client relationship; (2) a duty owed to the client by the attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of that duty; (4) the breach being the proximate cause of the client's damages; and (5) actual loss or damage resulting from the negligence. *Day v. Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996) (*citing Sorenson v. Pavlikowski*, 94 Nev. 440, 443, 581 P.2d 851, 853 (1978)).

Plaintiff fails to support three essential elements of a legal malpractice claim, specifically, that (1) Defendants breached their duty to perform as lawyers of ordinary skill and capacity, (2) that any breach proximately caused its damages, and (3) actual loss resulting from negligence.

a. *Plaintiff Fails to Allege Defendants Breached Their Duty to Perform as Lawyers of Ordinary Skill and Capacity*

i. Plaintiff's Claim that Defendant Breached Their Duty by Failing to Timely Consider the Issue of Standing is Without Merit as the Issue Was Not Before the Court Prior to the Murdock Litigation Motion for a Directed Verdict

The duty relevant to a legal malpractice inquiry is "the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and

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exercise." *Gustafson v. Schwarz*, 2014 U.S. Dist. LEXIS 125894, *5 (D. Nev., September 9, 2014) (*quoting Sorenson v. Pavlikowski*, 94 Nev. 440, 581 P.2d 851, 853 (1978)).

Plaintiff's allegations, taken as true, do not amount to actionable legal malpractice. Its claims of legal malpractice hinge on the issue of whether Defendants timely addressed Plaintiff's standing to sue over Colonial's assets. However, this argument fails to consider the fact that the issue of standing was not properly brought before the trial court in the first place.

The procedural history of the *Murdock* Litigation demonstrates that no legal malpractice occurred. At Defendants' request, the trial court advanced the trial on some of the issues to be conducted together with an evidentiary hearing required on various preliminary injunction motions. Complaint at ¶ 66. The trial court requested that the parties submit issues for adjudication in the first phase of the trial, with all remaining issues to await trial in the ordinary course. See Minutes; RFJN at No. 10-11. The court identified only thirty-six specific issues of that would be the subject matter of this expedited trial, and none identified Plaintiff's standing to sue as a potential issue for trial. See RFJN at Nos. 6-11. Likewise, the R&S Investors submitted trial briefs that admitted Plaintiff owned the loan at issue. See RFJN No. 19.

As a result, prior to the commencement of this stage of trial, Defendants had no reason to anticipate the issue of the asset transfer from the FDIC to Plaintiff would be one subject to the court's consideration in the first phase of the trial. See RFJN at No. 18. The issue only came up following a late-stage motion at the conclusion of the first trial phase, and thereafter, the issue of the PAA was considered for the first time.

In sum, given that the issues for trial were divided, and none of them concerned Plaintiff's asset transfer or ownership of the Construction Loan, Defendants put on all available evidence relevant to the first phase of the trial. Even taking the Complaint as true, Plaintiff's standing to assert Colonial's legal claims was not an issue identified for this first phase of the trial, and thus evidence on those issues was properly not presented.

ii. Plaintiff's Claim that Defendants Breached Their Duty by Failing to Timely Disclose the PAA or the 2009 Bulk Assignment to the Court is Without Merit

Aside from the general strategy in Defendants' approach to the *Murdock* Litigation, Plaintiff makes various criticisms of Defendants' representation that it claims amount to

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malpractice. Specifically, Plaintiff claims Defendants failed to "properly disclose to opposing parties and counsel, prior to trial, all of the relevant documents relating to the assignment of the Construction Loan and the Third DOT from the FDIC to Plaintiff, so that such documents could be utilized at trial." Complaint at ¶ 121. Likewise, Plaintiff claims Defendants failed to investigate these documents, apprise plaintiff of the need of these documents, or prepare witnesses for trial on the issue of standing. Id. at ¶¶ 122-124.

The Complaint highlights three specific documents Plaintiff believes would demonstrate the assignment of the Construction Loan and the Third DOT: the PAA, the 2009 Bulk Assignment, and the March 2010 Assignment. However, the circumstances surrounding these documents show that Defendant either had no control over them, no notice of them, or that they did not exist at the time for use in the first phase of trial. Moreover, even had the trial court considered all of these documents, the trial court's findings demonstrate Plaintiff would not have prevailed given the *equitable* nature of its claims for equitable subrogation/replacement.

(A) Plaintiff Admits that the PAA Was Timely Considered By the Court, and Was Defective

First, Plaintiff admits that the PAA was considered by the Court, which held that the PAA was inadequate to establish Plaintiff owned the claims it was pursuing. Id. at ¶ 87. As Plaintiff admits, the PAA was defective for failing to attach proper schedules and exhibits. Id. at ¶ 46. Plaintiff does not allege – as it cannot – that Defendants prepared the PAA. The trial court spoke on this issue, specifically noting that the problems inherent in the PAA were not the fault of Defendants, but the transactional attorneys who drafted it. See RFJN Nos. 20; 21.

Furthermore, Plaintiff admits Defendants were hired exclusively for the purpose of defending Colonial (later Plaintiff) in the *Murdock* Litigation, not to affect the assignment of Colonial's assets from the FDIC. Id. at ¶ 37. An attorney's duty of care is limited to the scope of attorney's retained obligations as "the attorney must be employed in such a capacity as to impose a duty of care with regard to the particular transaction connected to the malpractice claim. Even with regard to a particular transaction or dispute, an attorney may be specifically employed in a limited capacity." *Warmbrodt v. Blanchard*, 100 Nev. 703, 707, 692 P.2d 1282, 1285-1286, (1984) (internal citations omitted). Thus, as Defendants were hired only to litigate

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the Colonial claims in the *Murdock* Litigation, and did not draft the PAA or play any part in negotiating its creation, any failure in that document is not the result of Defendants.

Further, Plaintiff alleges Defendants failed to inquire into the PAA (id. at ¶ 64) and failed to include it as part of the Second Supplemental Disclosures served on December 3, 2009 (id. at ¶ 70). However, the reasons underlying Defendant's strategic decision to keep the PAA out of the court's consideration are obvious given the deficiency in the document and the court's eventual ruling on same. Moreover, as previously discussed in Section IV(A)(2)(a)(i), *supra*, the issue of Plaintiff's standing was never before the court prior to the *Murdock* Litigation Motion for a Directed Verdict. Thus, Defendant's actions were not a failure or omission, but a critical part of their strategy to present the best possible case for Plaintiff at trial.

(B) Plaintiff Fails to Allege Defendants Had Timely Notice of the 2009 Bulk Assignment

Plaintiff cites the 2009 Bulk Assignment as an additional source for its ownership of the Construction Loan and the Third DOT. However, the Complaint fails to establish when Plaintiff made Defendants aware of this document or otherwise disclosed its existence to Defendants.

To wit, Plaintiff alleges the 2009 Bulk Assignment was executed in October of 2009 and recorded in November of 2009. Id. at ¶ 84. However, Plaintiff very carefully fails to state when Plaintiff presented it to Defendants to establish that Defendants purposefully withheld this document prior to the commencement of trial or before the close of Plaintiff's case-in-chief. Thus, Plaintiff has failed to allege that Defendants even had notice of this document for the purpose of using it at trial. Without alleging that Defendants even knew of this document prior to the commencement of trial, Plaintiff cannot establish that Defendants deliberately omitted it from the first phase of the trial. The trial record is clear in stating that Defendants did not even know the 2009 Bulk Assignment existed until after the trial evidence was closed.

(C) The March 2010 Assignment Did Not Exist During the First Phase of Trial

The final alleged evidence of Plaintiff's ownership of the Construction Loan and the Third DOT is the March 2010 Assignment. However, Plaintiff admits that it effected the March 2010 Assignment on March 30, 2010, after the evidence was closed and in direct response to the

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motion challenging Plaintiff's standing to enforce the Colonial note and deed of trust. Id. at ¶ 93. Moreover, Plaintiff admits it had "just recently created [the March 2010 Assignment]." Id. at ¶ 93. Thus, based on Plaintiff's own admission, this document *did not even exist* at the time of trial or beforehand. In sum, Plaintiff's own admissions demonstrate that no document existed that could show the assignment of Colonial's assets or which otherwise was made apparent to Defendants prior to the end of the first phase of trial.

iii. Plaintiff's Claim that Defendants Breached Their Duty by Failing to Timely Inform Plaintiff of the Need for Further Documents Is Without Merit

The second malpractice allegation concerns "[t]o the degree that any pre-existing documentation did not adequately demonstrate that such an assignment had been made" and whether defendants failed to "inform its client of the need to timely prepare such additional documentation and negotiate its execution by the FDIC." Complaint at ¶ 122. As discussed in Sections IV(A)(2)(a)(i), *supra*, Defendants proceeded before the trial court under the theory that the issue of standing was not one for consideration by the court at that time.

Moreover, when Defendants faced the Motion for Directed Verdict brought by the R&S Investors, Plaintiff admitted that Defendants sought and acquired further documentation, including the 2009 Bulk Assignment and the March 2010 Assignment. Complaint at ¶¶ 90, 93. Likewise, as much as Defendants have an obligation to inform, that duty is equally based on Plaintiff's contribution to its own defense. To the extent that Plaintiff blames Defendants for failing to provide documents to the trial court, Plaintiff is guilty of failing to provide the same to Defendants. As a result, failure to timely inform falls on Plaintiff, not Defendants, and as a result, Plaintiff cannot show malpractice based on the admissions in the Complaint.

iv. Plaintiff's Claim that Defendants Breached Their Duty by Failing to Prepare Witnesses Is Without Merit

The third of Plaintiff's claims of malpractice concerns whether Defendants failed to "properly and adequately prepare their client's witnesses for depositions and trial." Complaint at ¶ 123. Supposedly, this claim rests on Defendants' strategic decision to not bring Plaintiff's designated person most knowledgeable, Mr. Fritz, as a witness to testify as to Plaintiff's assignment of the Construction Loan and the Third DOT. However, as discussed in Sections

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IV(A)(2)(a)(i), *supra*, Defendants proceeded before the trial court under the theory that the issue of standing was not one for consideration by the court at that time.

Moreover, Plaintiff admits that Mr. Fritz's testimony concerned the PAA, a document the trial court considered and ruled was defective, and did little more than corroborate the deficiencies in the PAA. While the Complaint alleges that Mr. Fritz testified at his deposition concerning the PAA (Complaint at ¶ 73), the Complaint does not express the substance of his testimony on how the PAA was drafted, whether the PAA was adequately drafted, or whether there existed additional documents to substantiate Plaintiff's assignment of Colonial's assets and legal claims. Thus, the Complaint does not elaborate on the investigation Defendants performed prior to trial, including preparing Mr. Fritz for his December 2009 deposition and whether his testimony was even warranted at trial in the first place.

As the scope of Mr. Fritz's testimony was entirely based upon a poorly drafted document the trial court later ruled to be defective, and Defendants proceeded with the understanding that the issue of Plaintiff's ownership of the Construction Loan and the Third DOT was not yet before the trial court, Defendants made a strategic decision in keeping his testimony out of trial.

In addition, Defendants did put on witnesses who testified that Plaintiff "[a]cquired all the assets" that belonged to Colonial, including the loan at issue. RFJN at Nos. 16-18. Thus, witnesses called by Defendants *did* address the issue of what Colonial assets transferred to Plaintiff, evidence that was ignored in the trial court's decision. As a result, no witness testimony would have swayed the trial court on this issue over the defects present in the PAA, and Plaintiff's arguments to the contrary are simply an attempt to shift the loss of this defective loan and defective transfer to Defendants.

v. Plaintiff's Claim that Defendants Breached Their Duty by Failing to Disclose Terms of the Final Judgment Is Without Merit

Finally, Plaintiff claims Defendants committed malpractice when they allegedly "failed to timely disclose to BB&T the terms of the Final Judgment entered on November 10, 2010." Complaint at ¶ 127.

However, Plaintiff was aware of the court's June 23, 2010 Findings of Fact and Conclusions of Law that lead to the Final Judgment in the first place. Likewise, Plaintiff filed an

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Suite 1550
Las Vegas, NV 89101

appeal to the Nevada Supreme Court on September 10, 2010 regarding this issue.[2] Plaintiff admits to knowing the substance of the Final Judgment, if not the form, and was on notice that a final judgment was pending as to initiate its alleged shared-loss agreement with the FDIC.

In addition, the Complaint is more telling for what information Plaintiff withholds than what it discloses. The Complaint does not allege when Plaintiff first came to know of the trial court's Final Judgment, nor does the Complaint give any fact or circumstance surrounding how it came to know of the Final Judgment or whether that knowledge came from Defendants or some other source or means. Likewise, the Complaint does not allege that Defendants withheld the following matters from Plaintiff's attention:

- The Motion for New Trial submitted on behalf of Plaintiff on July 8, 2010;
- The trial court's July 23, 2010 judgment against Plaintiff in favor of the R&S Investors;
- The R&S Investors' July 30, 2010 submitted Memorandum of Costs & Disbursements;
- The September 24, 2010 appeal to the Nevada Supreme Court; or
- The trial court's October 5, 2010 ruling on the Motion for New Trial.

All of these documents would have provided notice to the Plaintiff that a final judgment was imminent. Plaintiff's allegation that it was somehow surprised it received a judgment against it is completely disingenuous and should be disregarded by the Court, as Plaintiff's own allegations demonstrate that Plaintiff was intimately aware for many months of the judgment and the costs requested by the R&S Investors.[3] As a result, Plaintiff cannot claim that the Final Judgment was a surprise that triggered its loss-sharing agreement with the FDIC. Thus, any failure to enforce that agreement falls entirely on Plaintiff, and not the Defendants.

b. *Plaintiff Fails to Allege Defendants Purported Breach Proximately Caused Their Damages*

[2] Plaintiff does not allege its appeal rights were lost or any other harm to its appeal because of the alleged failure of Defendants to disclose the Final Judgment.

[3] Nevada law automatically awards costs to the prevailing party to a lawsuit where the action is for the recovery of money or damages greater than $2,500. NRS 18.020 ("Costs *must* be allowed of course to the prevailing party against *any* adverse party against whom judgment is rendered. . . ." (emphasis added)). Plaintiff's causes of action in the *Murdock* Litigation included claims for Unjust Enrichment, Fraudulent Misrepresentation, and Civil Conspiracy, requesting an award of damages that invoked NRS 18.020. See Complaint at ¶ 49. Plaintiff is a sophisticated business which has actively litigated many cases in Nevada alone. It cannot credibly assert it was not aware that it would face a cost award following an adverse judgment.

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Suite 1550
Las Vegas, NV 89101

Causation is a required element for a legal malpractice claim. *See Day v. Zubel*, 112 Nev. 972, 922 P.2d 536, 538 (1996). Proximate cause means "that cause which, in natural and continuous sequence and unbroken by any efficient, intervening cause, produces the injury complained of and without which the result would not have occurred." *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 864 P.2d 796, 801 (1993). "Proximate cause, or legal cause, consists of two components: cause in fact and foreseeability." *Id.*; *Taylor v. Silva*, 96 Nev. 738, 615 P.2d 970, 971 (1980) ("A negligent defendant is responsible for all foreseeable consequences proximately caused by his or her negligent act.").

To establish causation in a legal malpractice action, a plaintiff must establish each and every element of the underlying case. *Chandler v. Black & Lobello*, 2014 Nev. Dist. LEXIS 1, *10-12 (D. Nev., Feb. 26, 2014) (collecting cases). "A legal malpractice case requires a 'case-within-the-case' showing, meaning Plaintiff must prove-up the underlying action, and show that but for the alleged malpractice, he would have received a better result . . . . The purpose of this methodology is to avoid damages based on pure speculation and conjecture." *Id.* at * 12, citing *Orrick, Herrington & Sutcliffe, LLP v. Superior Court*, 107 Cal. App. 4th 1052 (2003); see also *Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. Adv. Rep. 68, 333 P.3d 229, 235 (2014) ("The material facts for an attorney malpractice action include those facts that pertain to the presence and causation of damages on which the action is premised.")

The underlying causes of action involved in the *Murdock* Litigation concern Colonial's initial claims for equitable subrogation and replacement, as well as claims for fraudulent misrepresentation and civil conspiracy. Plaintiff makes the assumption that, but-for the alleged failure to timely present evidence such as the PAA, 2009 Bulk Assignment, or the March 2010 Assignment, the aforementioned documents would have automatically changed the court's opinion as to its claims for equitable subrogation and replacement. However, this assumption fails to consider how Nevada courts apply the doctrine of equitable subrogation and replacement and fails to account for the specific findings made by this court.

Equitable subrogation permits a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance. *Houston v. Bank of America Fed.*

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Sav. Bank, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003). Likewise, the equitable doctrine of replacement) is functionally identical to equitable subrogation. *See Freedom Mortg. Corp. v. Tovare Homeowners Ass'n*, 2012 U.S. Dist. LEXIS 169638 at * 9-11 (D. Nev. Nov. 28, 2012) rev'd on other grounds, 613 Fed. Appx. 668, 668 (9th Cir. 2015) ("Equitable Subrogation operates in the same manner as replacement, except Equitable Subrogation deals with the circumstance where one lender refinances the loan of another lender as opposed to the circumstance of replacement where a single lender refinances its own prior loan.")

Fundamentally, Colonial, then Plaintiff, sought equitable subrogation and/or replacement to step into the shoes of the First DOT for up to the amount paid to satisfy the original loan, , placing it ahead of the Second DOT favoring the R&S Investors. However, both causes of action are equitable remedies to "avoid a person's receiving an unearned windfall at the expense of another." *Houston*, *supra*, 119 Nev. at 490, 78 P.3d at 74. As an equitable concept, equitable subrogation is not a legal remedy, and even if a party successfully establishes all the elements of the claim, the court carries the discretion to decide whether equity permits the remedy to be applied. *American Sterling Bank v. Johnny Management*, 126 Nev. 423 (2010).

This legal concept was not lost on the trial court in the *Murdock* Litigation, which stated in its June 23, 2013 Conclusions of Law that "[a] Party must invoke equity to obtain relief from the established order dictated by a recording system." See RFJN at No. 2(L).

Likewise, the trial court analyzed Plaintiff's ability to show equitable subrogation and replacement. In its Findings of Fact and Rulings of Law, the trial court found that the Second DOT was never reconveyed or subordinated, and that Colonial had no reasonable expectation it would receive such a reconveyance. RFJN at Nos. 2(I); 2(F). As it found no proof of any executed agreement by R&S Lenders to reconvey, the trial court granted the R&S Investor's request for declaratory relief, ensuring the Second DOT would retain its priority over the Third DOT. RFJN at No. 2(K). As stated by the trial court, Colonial "did not have a reasonable expectation that it would receive a reconveyance of the [Second DOT] following closing of the Construction loan transaction [,] only that it would receive a policy of title insurance, which it did receive." RFJN at No. 2(F). After hearing extensive evidence during six days of trial from

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all Colonial employees involved in making the new construction loan and Colonial's attorney who documented the new construction loan, the District Court made the following express findings of fact which precluded equitable subrogation or replacement:

> 51. As a condition to the Construction Loan, Colonial Bank did not request that St. Rose Lenders reconvey or subordinate the St. Rose Lenders Deed of Trust or convert the same to equity.
>
> 71. Colonial Bank never communicated to Rad, Nourafchan [principals of R&S St. Rose], R&S or St. Rose Lenders that it required a first priority deed of trust for the Construction Loan.
>
> 86. Colonial Bank did not condition its extension of the Construction Loan on its receipt of a first deed of trust.
>
> 87. Colonial Bank did not convey any intent to receive a first deed of trust to either R&S, St. Rose Lenders, Rad or Nourafchan.
>
> 89. Colonial Bank did not negotiate the requirement for a first deed of trust in the Construction Loan Agreement, Deed of Trust or Promissory Note Secured by Deed of Trust.
>
> 100. Reconveyance of the St. Rose Lenders Deed of Trust was not a condition for closing the Construction Loan transaction.

RFJN at Exhibit A. These facts, found by the trial court, occurred when Colonial failed to properly obtain and record the reconveyance — long before the *Murdock* Litigation commenced, and long before Defendants were involved on the matter.

Based on the trial court's findings, Colonial and Nevada Title Company created Colonial's own harm, causing the loss in the *Murdock* Litigation by closing on the Construction Loan without first obtaining proof that the Second DOT was reconveyed and by never manifesting an intent to St. Rose that it would not fund the new loan without a reconveyance of the Second DOT. See Complaint at ¶ 26-32. Essentially, every step taken thereafter by Defendants in the *Murdock* Litigation was an attempt to reduce the loss caused by Colonial's own negligence. Because Colonial closed the second Construction Loan without properly ensuring the reconveyance of the Second DOT, the court in the *Murdock* Litigation was not willing to grant equitable subrogation. As such, based on the allegations in the Complaint and the trial court's findings, it would be impossible for Plaintiff to show causation for legal malpractice as to its claims for equitable subrogation and replacement as the Court heard extensive evidence and then made findings that precluded these claims.

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As to the remaining claims of Fraudulent Misrepresentation and Civil Conspiracy, the trial court in the *Murdock* Litigation noted these claims were even less likely to succeed:

> . . . . the Court nevertheless made certain factual findings and legal conclusions to suggest that, in any event, some of the Plaintiff's BB&T's causes of action, might have failed even if properly brought in the name of a valid successor to Colonial, such as those for fraudulent misrepresentation and civil conspiracy.

Complaint at ¶ 101. Thus, Plaintiff admits these causes of action were not guaranteed to succeed even if the court accepted the available evidence as to Plaintiff's standing.

Moreover, Nevada case law holds that tort causes of action, such as fraud claims, are not assignable. *See Hansen v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 143061, *17, (D. Nev. October 21, 2015); see also *Prosky v. Clark*, 32 Nev. 441, 445, 109 P. 793, 794 (Nev. 1910) ("Rights of action based on fraud . . . . are held by the courts to be not assignable, but are personal to the one defrauded.")

Likewise, an actionable civil conspiracy "consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts." *Hilton Hotels v. Butch Lewis Productions*, 109 Nev. 1043, 1048, 862 P.2d 1207, 1210 (1993). Thus, like its fraud claim, Colonial's tort claim for Civil Conspiracy is a claim personal to Colonial – and is not assignable for the same reasoning. As a result, Plaintiff cannot assert Colonials' tort claims.

Thus, Plaintiff's claims of causation are mere speculation, and it has failed to allege it would succeed on any of its causes of action in the *Murdock* Litigation, justifying dismissal of its claim for legal malpractice for failing to show causation.

c. *Plaintiff Fails to Plead Actual Damages Resulting From Defendants' Purported Negligence*

Essential to a legal practice claim is the burden placed on a plaintiff to demonstrate actual damage resulting from the attorney's alleged misconduct. *See Day v. Zubel*, 112 Nev. 972, 922 P.2d 536, 538 (1996). Courts agree that "[i]t is black-letter law that damages which are speculative, remote, imaginary, contingent or merely possible cannot serve as a legal basis for recovery." (*Mozzetti v. City of Brisbane*, 67 Cal. App. 3d 565, 577, 136 Cal. Rptr. 751 (1977).

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Las Vegas, NV 89101

For its legal malpractice claim, Plaintiff claims damages including "the loss of a judgment, settlement, or award, and the remuneration that Plaintiff would have recovered by foreclosing on the Subject Property in first priority position, but for Defendants' negligence, and includes the value of the loss of its [Third DOT] first priority position, which has or will be wiped out upon foreclosure of the [Second DOT]." Complaint at ¶ 125.

However, Plaintiff's claims for damages are based on the merely speculative and remote possibility it would succeed on its claims in the trial court on the issue for equitable subrogation. As discussed in Section IV(A)(2)(b), *supra*, the trial court would not allow Plaintiff to proceed on this theory even absent Defendants' alleged malpractice. Even assuming the trial court did allow such a theory, Plaintiff's damages are pure speculation based on its ability to receive a judgment and foreclose on the Property – speculative future events not guaranteed to occur. Thus, Plaintiff has not substantiated these damages with a claim of cognizable injury.

B. Plaintiff's Claim for Intentional Omission and Fraudulent Concealment Must Be Dismissed as Untimely, Because Plaintiff Fails to State the Claim, and Because Plaintiff Fails to Plead with Particularity

1. Plaintiff Failed to File Its Intentional Omission and Fraudulent Concealment Cause of Action Within 3 Years of When It Should Have Discovered the Concealment.

NRS 11.190(3)(d) provides for a three-year statute of limitations for fraud actions which accrues "upon the discovery by the aggrieved party of the facts constituting the fraud." See *Siragusa v. Brown*, 114 Nev. 1384, 1389, 971 P.2d 801, 805 (1998) (three year statute of limitations in NRS 11.190(3)(d) applied to cause of action for fraudulent concealment). Accrual of statute of limitations for fraudulent concealment is based on when a plaintiff "reasonably should have discovered the facts supporting his cause of action." *Rohn v. Skyjack, Inc.*, 2013 Nev. Dist. LEXIS 419, *4 (D. Nev. November 25, 2013); see also *Sierra Pac. Power Co. v. Nye*, 389 P.2d 387, 390, 80 Nev. 88, 94-95 (1964) ("mere ignorance of the existence of . . . the facts which constitute the cause will not postpone the operation of the statute of limitations . . . if the facts may be ascertained by inquiry or diligence").

As Plaintiff filed this action on October 5, 2016, its claim for fraudulent services had to accrue on or after October 5, 2013. Here, the Final Judgment in the *Murdock* Litigation was entered on November 10, 2010, with the Notice of Entry served on November 15, 2010 and filed

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on December 2, 2010. Plaintiff does not allege with particularity when it first became aware of the Final Judgment, only that it "was unaware of the foregoing true status of the Final Judgment, in time to invoke" a loss-sharing provision with the FDIC concerning its exposure to damages and losses. See Complaint at ¶137.

Defendants deny Plaintiff's allegations concerning an omission of notification of the Final Judgment. However, taking Plaintiff's allegations as true, the entry of the Final Judgment was mere formality, as the court substantively ruled on June 23, 2010, as admitted in the Complaint. Id. at ¶ 100. Thus, Plaintiff had ample notice of its "loss" as to invoke its purported loss-sharing provisions in its agreement with the FDIC even prior to the entry of Final Judgment.

Moreover, Plaintiff's continued involvement in the post-trial and appeal proceedings in the *Murdock* Litigation shows that it knew about the trial court's judgment. Plaintiff appealed the court's judgment on September 24, 2010, the court ruled on Plaintiff's Motion for a New Trial on October 5, 2010, and the Supreme Court of Nevada affirmed the court's judgment on May 31, 2013 – all of which demonstrate Plaintiff's knew about the trial court's rulings and judgment. Id. at ¶ 109. Thus, Plaintiff should have known that the trial court would issue a final judgment awarding costs to the R&S Investors at some point in 2010.

Likewise, to participate in the appeal, Plaintiff had to have known about the Final Judgment and certainly Plaintiff would have known about it prior to the decision from the Nevada Supreme Court on May 31, 2013. Yet, Plaintiff did not file this lawsuit until October 5, 2016, after the statute of limitation expired, making the fraudulent concealment claim untimely.

2. Plaintiff Fails to State a Claim for Intentional Omission and Fraudulent Concealment

a. *Plaintiff Has Not Alleged Defendants Suppressed a Material Fact*

A *prima facie* case of fraudulent concealment has five elements: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the

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concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages. *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1485, 970 P.2d. 98, 110 (1998), overruled in part *GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001)

The fact/document Plaintiff claims Defendants "concealed" does not amount to a "material fact." Plaintiff alleges Defendants withheld the November 10, 2010 Final Judgment in the *Murdock* Litigation, and claims this fact was material for the purpose of its purported loss-sharing agreement with the FDIC that "intended to limit BB&T's exposure to damages and losses, such as the costs award [of the Final Judgment], and allowing the BB&T to seek reimbursement of 80% of the Judgment from the FDIC." Complaint at ¶¶ 135, 136.

However, as argued in Section IV(A)(2)(a)(iv), *supra*, Plaintiff was involved and aware of every stage of the case including the June 23, 2010 Findings of Fact and Conclusions of Law that lead to the Final Judgment in the first place, as well as subsequent motions and appeals. In sum, even if Defendants failed to alert Plaintiff to the Final Judgment – which Defendants deny – Plaintiff had every reason to know it would soon face a ruling that initiated its shared-costs agreement with the FDIC, and Plaintiff has failed to allege concealment of a material fact.

b. *Plaintiff Has Not Alleged Defendants Acted with an Intent to Defraud For the Purpose of Causing Plaintiff to Act Differently But-For the Alleged Concealment*

The Complaint makes no allegation that Defendants acted with intent to defraud it "for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact." *Dow Chem. Co*, *supra*, 114 Nev. at 1485, 970 P.2d. at 110. Instead, Plaintiff merely alleges that Defendants "intentionally omitted and concealed from BB&T the order awarding costs to the St. Rose Lenders." Complaint at ¶ 133. The theory Plaintiff claims informed Defendant's conduct is that Defendants "concealed these material facts from Plaintiff for the purpose of inducing Plaintiff to continue employing them as attorneys . . . ." Id. at ¶ 135.

Plaintiff's reasoning is unintelligible and implausible. Theoretically, Plaintiff posits that, but-for Defendants alleged concealment of the Final Judgment, Plaintiff would have terminated Defendants representation and employment. However, Plaintiff admits to knowing the trial court's June 23, 2010 Findings of Fact and Conclusions of Law, Plaintiff's appeal of same on September 23, 2010, and the trial court's October 5, 2010 ruling on Defendant's Motion for a

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New Trial. Thus, for months prior to the November 10, 2010 Final Judgment, Plaintiff admits it was aware of the trial court's rulings, if not the exact amount of the award.

Further, Plaintiff does not (and cannot) explain how learning the amount of the award would, alone, frighten Defendants so harshly that they would fear losing their representative employment with Plaintiff, especially with an appeal pending to the Nevada Supreme Court. Thus, Plaintiff's theory of "intent to defraud" is nonsensical and fails to justify its claim.

c. *Plaintiff Cannot Prove that the Claimed Concealment Caused Its Damages*

Plaintiff's entire theory of damages based on the alleged concealed Final Judgment is similarly nonsensical and implausible. As shown above, Plaintiff was aware for months prior to the Final Judgment of the court's ruling on same, fully aware that the trial court held against it and would award damages in favor of the R&S Investors in the *Murdock* Litigation.

Plaintiff has not shown that the alleged concealment of the Final Judgment caused its damages, aside from its own failure to speak to the FDIC about the judgment of the trial court.

3. Plaintiff Fails to Plead Fraudulent Concealment with Particularity

Under Nevada law, "fraudulent concealment must be alleged with particularity." *Golden Nugget v. Ham*, 98 Nev. 311, 314-315, 646 P.2d 1221, 1224, (1982). Under NRCP 9(b), "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." To satisfy this requirement, Plaintiff has the burden to allege "averments to the time, the place, the identity of the parties involved, and the nature of the fraud or mistake." *Brown v. Kellar*, 97 Nev. 582, 583-84, 636 P.2d 874, 874 (1981) (complaint sufficiently alleged identity of individual purporting to act on behalf of corporation). When a plaintiff does not plead fraud with particularity, its complaint is subject to dismissal. *Morris v. Bank of America Nevada*, 110 Nev. 1274, 886 P.2d 454, fn. 1 (1994) (allegation that defendant had "fraudulently refused to honor" a transaction is insufficient). Many courts require that "to establish fraudulent concealment, the complaint must show: (1) when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry." *Raifman v.*

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Wachovia Secs, 649 Fed. Appx. 611, 613, 2016 U.S. App. LEXIS 8740, *5 (9th Cir. 2016) (quoting *Baker v. Beech Aircraft Corp.*, 114 Cal. Rptr. 171, 175 (Cal. Ct. App. 1974)).

Plaintiff has failed to establish the circumstances of its discovery of the purported "fraud" it claims. Firstly, Plaintiff makes no allegation as to when it discovered the purported fraud, how it was discovered, or why Plaintiff is innocent for failing to discover it. At no point in the Complaint does Plaintiff allege the date or circumstances of when it became aware of the Final Judgment, a fact Plaintiff carefully avoids. This type of information is required by NRCP 9(b) and is essential for Defendants to know the circumstances behind Plaintiff's claim, especially in reference to statute of limitations. Plaintiff's claim lacks the required particularity and must fail.

C. Plaintiff's Cause of Action for Breach of Contract Must Be Dismissed as Untimely, Because Plaintiff Fails to State the Claim, and Because the Cause of Action Is Merely Duplicative of Plaintiff's Malpractice Claim

1. Plaintiff's Cause of Action for Breach of Contract Fails as Untimely Under the Applicable Malpractice or Contract Based Statutes of Limitations

a. *Plaintiff's Breach of Contract Cause of Action Depends on Malpractice, and Plaintiff Failed to File Its Breach of Contract Cause of Action Within 2 Years of the Alleged Malpractice.*

In Nevada, where a breach of contract action is predicated on a claim of legal malpractice, the statute of limitations for legal malpractice under NRS 11.207 applies. *See Stalk v. Mushkin*, 125 Nev. 21, 29, 199 P.3d 838, 843 (2009) ("A cause of action for legal malpractice encompasses breaches of contractual as well as fiduciary duties").

Regarding plaintiff's breach of contract cause of action, the Complaint identifies the only instance of breach as follows: "Defendants breached their contract with Plaintiff by committing the legal malpractice and errors and omissions alleged above." Complaint at ¶ 146. Thus, Plaintiff's legal malpractice cause of action "encompasses" its breach of contract cause of action. *See Stalk v. Mushkin*, 125 Nev. 21, 29, 199 P.3d 838, 843 (2009).

As discussed in section IV(A)(1), *supra*, the statute of limitations for Plaintiff's cause of action for legal malpractice expired on May 31, 2015. This case was not filed until October 5, 2016. Plaintiff's cause of action for breach of contract is equally untimely.

b. *Plaintiff Failed to File Its Breach of Contract Cause of Action Within 6 Years of the Alleged Breach for a Written Contract or Within Four Years of the Alleged Breach for an Oral Contract.*

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Even under the statute of limitations for breach of contract, Plaintiff's claim is untimely. Nevada law provides a six year limitation period for breach of contract actions based on a written instrument, and a four year limitation for an "action upon a contract, obligation or liability not founded upon an instrument in writing." NRS 11.190 (1)(b), (2)(c). Nevada courts hold "that an action for breach of contract accrues as soon as the plaintiff knows or should know of facts constituting a breach." *Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995) (citing *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437 (1998)).

First, Plaintiff does not plead whether the contract at issue is specifically written or oral, stating that "Plaintiff entered into a written or oral agreement with Defendants for legal services." Complaint at ¶144. Thus, whether the six or four year statute of limitations periods provided under NRS 11.190 applies depends on the specific contract sued under by the Plaintiff. However, even under the longer period provided for written contracts under NRS 11.190(1)(b), Plaintiff's limitations period has run based on the date Plaintiff discovered its alleged "breach."

To wit, Plaintiff's cause of action for breach of contract proceeds on the allegation that "Defendants breached their contract with Plaintiff by committing the legal malpractice and errors and omissions alleged . . . ." The heart of Plaintiff's legal malpractice claims is the presentation of evidence at trial, specifically, its allegation that Defendants failed to submit evidence of its ownership interest in Colonial's assets. This allegation – which is denied – is based on facts that would have been apparent to Plaintiff throughout the trial, as Plaintiff admits that Defendants attempted to enter into evidence the 2009 Bulk Assignment and the March 2010 Assignment on March 31, 2010, the day after the close of plaintiff's case in chief. See Complaint at ¶¶ 86-90.

However, Plaintiff would be affirmatively aware of the alleged errors and omissions at the latest as of entry of the court's June 23, 2010 Findings of Fact and Conclusions of Law, wherein, the court ruled Plaintiff failed to prove its ownership interest in Colonial's assets. See Complaint at ¶ 100. At that time, the court placed Plaintiff on notice that "BB&T has not shown the claims or causes of action against defendants being pursued by BB&T belong to BB&T and it is the successor in interest with the ability to assert these claims against defendant." Id.

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Thus, Plaintiff was on notice of the purported "malpractice" as early as June 23, 2010. Six years from this date was June 23, 2016. Plaintiff did not file its Complaint until nearly four months later on October 5, 2016. Thus, the statute of limitations has run.

2. Plaintiff Fails to State a Claim for Breach of Contract.

Breach of contract requires a plaintiff to allege an existing valid agreement with the defendant, the defendant's material breach, and damages resulting from that breach. See *Saini v. International Game Technology*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006). "A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement." *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (quoting *Malone v. University of Kansas Medical Center*, 552 P.2d 885, 888 (Kan. 1976)).

The Complaint fails to allege Plaintiff entered into any specific contract, only that "Plaintiff entered into a written or oral agreement with Defendants for legal services." No contract language is quoted verbatim and no contract is attached to the pleading. Thus, Defendants are left guessing as to what contract Plaintiff alleges is breached, including its terms, effective date, and whether it is written or oral.

However, whatever form the contract at issue may take, Plaintiff predicates its claim of breach on the same allegations of malpractice alleged in Plaintiff's other claims. Specifically, Plaintiff claims that "Defendants breached their contract with Plaintiff by committing the legal malpractice and errors and omissions alleged above." Complaint at ¶ 146.

As discussed in Section IV(A), *supra*, Plaintiff failed to allege actionable legal malpractice. First, Plaintiff does not allege Defendants' conduct is below that of an ordinary attorney, as Defendants did not draft the PAA and Plaintiff does not allege that Defendants had any reason to believe other documents confirming the Colonial assignment existed. Further, Plaintiff cannot establish causation as a matter of law, as Plaintiff would face the same result in the trial court absent any malpractice, based on Colonial's negligent handling of the subject loans. See *Clark Cty. Sch. Dist. v. Richardson Constr.*, 123 Nev. 382, 396, 168 P.3d 87, 96 (2007) (stating that causation is an essential element of a claim for breach of contract). Thus, Plaintiff's contract claims fail in lockstep with its claim for malpractice.

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3. Plaintiff's Breach of Contract Claim is Duplicative of Its Legal Malpractice Claim

Plaintiff's claim for Breach of Contract is merely duplicative of its claim for legal malpractice, and should be dismissed. A claim for breach of contract envelopes a malpractice claim where both arise out of the attorney-client relationship, justifying dismissal of the contract claim. See *Chandler v. Black & Lobello*, 2014 Nev. Dist. LEXIS 1, *8-10 (D. Nev. February 26, 2014); see also *Stalk v. Mushkin*, 125 Nev. 21, 29, 199 P.3d 838, 843 (2009).

The Complaint identifies the only instance of a breach of contract as follows: "Defendants breached their contract with Plaintiff by committing the legal malpractice and errors and omissions alleged above." Complaint at ¶ 146. Thus, Plaintiff's entire Breach of Contract claim is dependent, and thus duplicative, of its cause of action for Legal Malpractice, and must be dismissed regardless of the merits of the alleged malpractice claims.

V. CONCLUSION

In summary, all of Plaintiff's causes of action violate the applicable statute of limitations. This alone requires dismissal of the claims. However, as discussed above, all three fail to state a valid claim. The Complaint is without merit and must be dismissed.

DATED this 21st day of November, 2016.

Respectfully submitted,

GORDON & REES, LLP

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CERTIFICATE OF MAILING

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 21st day of November, 2016, the foregoing **DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT** 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:

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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, Defendants.	CASE NO. A-16-744561-C DEPT NO. XXXI **DEMAND FOR JURY TRIAL**

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, pursuant to NRCP 38(b), demands a trial by jury of any issue triable of right by a jury in these proceedings

DATED this 2nd day of December, 2016.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

G. MARK ALBRIGHT, ESQ., #001394
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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 2ND day of December, 2016, service was made by the following mode/method a true and correct copy of the foregoing **DEMAND FOR JURY TRIAL** to the following person(s):

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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, Defendants.	CASE NO. A-16-744561-C DEPT NO. XXXI **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS; AND ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND** Date of Hearing: January 24, 2017 Time of Hearing: 9:30 a.m.

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 undersigned counsel of record, ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and hereby opposes the Motion to Dismiss filed by Defendants Douglas D. Gerrard (hereinafter "Gerrard") and Gerrard Cox & Larsen (hereinafter "GC&L"), and also hereby countermoves, alternatively, for leave to amend.

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

I. PRELIMINARY STATEMENT AS TO SOURCES OF FACTUAL AVERMENTS

A Motion to Dismiss is to be reviewed primarily on the basis of the allegations of the Complaint being challenged. Documents outside of the pleading may also be reviewed without necessarily altering the nature of the Motion to a Motion for Summary Judgment, where the Complaint refers to the document, and it is central to the Plaintiff's claims, and when no party questions the authenticity of the document. *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 930 (2015)(quoting *United States v. Corinthian Colleges,* 655 F.3d 984, 999 (9th Cir.

2011)). Thus, the following Opposition relies primarily on the allegations set forth in the Complaint, but also verifies some of said allegations via certain publicly filed or recorded documents, including some of the lettered exhibits referenced in Defendants' Request for Judicial Notice (hereinafter, the lettered "Notice Doc(s)"), and also as attached to a similar Request for Judicial Notice filed concurrently herewith by Plaintiff (hereinafter the numbered "Notice Doc(s)"). Those Exhibits to the parties' Requests for Judicial Notice which are cited herein, are incorporated by reference as Exhibits hereto, and may be treated (to the extent this Court believes doing so is appropriate and consistent with the *Baxter* decision) as Exhibits hereto, should this Court determine to so treat the documents, and whether or not this Court determines to formally take judicial notice thereof. This will not, however alter the nature of Defendants' Motion to Dismiss, nor the legal standard applicable thereto.

II. STATEMENT OF FACTS

A. Overview.

This is a legal malpractice suit, stemming from the Defendants' representation of Plaintiff in an earlier Clark County, Nevada case. Plaintiff herein alleges that said case was lost due to the Defendants' failure to recognize that one of the key issues in play was the Plaintiff's ownership of the claims, brought by Plaintiff therein, as the assignee of an earlier bank, and resultant failure to adequately address said assignment issue at trial. After Defendants herein had closed their case in chief on behalf of Plaintiff at trial, the opposing parties immediately orally moved that Plaintiff's case be denied for failure to establish ownership of its claims. Defendants, as counsel for Plaintiff, returned to court the next day and attempted to introduce documents into evidence demonstrating the assignment to Plaintiff, but the court would not admit said documents, which had not been previously disclosed in time.

B. The Alleged Underlying Transactional Facts.

Plaintiff BB&T, a North Carolina corporation qualified and registered to do business in Nevada (Notice Doc 1), purchased certain assets, such as loans, notes, and deeds of trust, from, and became the successor in interest to, the FDIC, in its capacity as Receiver of Colonial Bank, N.A., an Alabama corporation (hereinafter "Colonial"), when Colonial was placed into FDIC receivership. (Notice Doc 11 at Exhibit A thereto.) The Defendants represented Plaintiff BB&T in

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Clark County, Nevada, District Court Case Number A-08-574852, consolidated with Case No. A-09-594512-C (hereinafter the "underlying suit" or "Subject Litigation"). *See*, the Complaint initiating the instant action (hereinafter "Comp.") at ¶¶ 1-5. The underlying suit sought the adjudication of the respective priority of two deeds of trust encumbering approximately thirty-eight (38) acres of real property in Henderson, Clark County, Nevada (the "Property") owned by R&S St. Rose LLC (hereinafter "R&S St. Rose"). *Id.* at ¶¶ 6-9; Notice Doc 2.

R&S St. Rose acquired the Property for a substantial purchase price, having previously borrowed $29,305,250.00 from Colonial to pay part of that price (the "First Colonial Loan"), which loan was secured by a first priority deed of trust against the Property recorded with the Clark County Recorder on August 26, 2005 (the "First Colonial Deed of Trust"). Notice Doc 3. To fund the remainder of the purchase, R&S St. Rose applied $8,100,000.00 it received from Centex Homes in exchange for a purchase option acquired by Centex Homes, and the principals of R&S St. Rose, Saiid Fourouzan Rad ("Rad") and R. Phillip Nourafchan ("Nourafchan") also loaned R&S St. Rose an additional sum, through an affiliated entity, formed for that purpose, R&S Lenders, which loan was secured by a "Second Short Form Deed of Trust and Assignment of Rents" recorded against the Property on September 16, 2005 in favor of this owner-affiliated lender entity (the "R&S Lenders Second Deed of Trust"). Notice Doc 4; Comp. at ¶¶ 10-17.

Centex Homes did not exercise its purchase option, and R&S St. Rose therefore borrowed additional funds from Colonial to itself retain and potentially develop the Property. On or about July 27, 2007, Colonial agreed to loan St. Rose an amount not to exceed $43,980,000.00 (the "Construction Loan"), in order to (i) pay off the First Colonial Loan, and (ii) provide funding for constructing certain Property improvements. The Construction Loan was secured by a Deed of Trust in favor of Colonial, which was recorded on July 31, 2007 (the "2007 Colonial Deed of Trust" Notice Doc 5) (Comp. at ¶¶ 18-20) and which Colonial understood would be in a first priority position, with the R&S Lenders Second Deed of Trust from September 2005 to be released and reconveyed, in conjunction with the funding of the Construction Loan. Comp. ¶¶ 25-29. (In keeping with this understanding, after funding, Colonial reconveyed its own earlier 2005 First Colonial Deed of Trust which had been paid off by this later Construction Loan. Notice Doc 6.)

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In July of 2008 Colonial first learned that, notwithstanding having been removed from the exceptions to its title insurance, the R&S Lenders Second Deed of Trust from September 16, 2005 was not actually released and reconveyed of record. Comp. at ¶¶ 31-32. Nevertheless, pursuant to legal principles of equitable subrogation recognized in Nevada, or the analogous theory of replacement and modification, this Construction Loan and the 2007 Colonial Deed of Trust securing the same were, it is alleged in this suit, entitled to enjoy the same first priority position of the earlier First Colonial Deed of Trust, at least up to the amount of the earlier First Colonial Loan refinanced thereby. *See*, Comp. at ¶¶ 21-24.

C. <u>The Alleged Underlying Litigation Facts</u>.

Based on these priority and other related disputes, on November 3, 2008, Robert E. Murdock ("Murdock") and Eckley M. Keach ("Keach") in their capacity as alleged investors and lenders of R&S St. Rose and/or R&S Lenders, with an alleged interest in the R&S Lenders Second Deed of Trust, filed a Clark County District Court complaint against R&S Lenders initiating Case Number A-08-574852.[2] *See* Comp. at ¶ 5; 33-36; and Notice Doc 7. Colonial thereafter filed its own separate Complaint on July 1, 2009, initiating Case No. A-09-594512-C against defendants R&S Lenders, Forouzan Inc., RPN, Rad and Nourafchan. Colonial was represented in said filing by Defendants herein Gerrard and GC&L. This complaint sought to obtain a ruling that the 2007 (Construction Loan) Deed of Trust had priority over the R&S Lenders 2005 Deed of Trust, including based on equitable subrogation, and other related theories.

These two cases were eventually consolidated and comprise the underlying suit which is the Subject Litigation at issue herein. Comp. at ¶¶ 37-39; Notice Docs 10A and 10B. R&S St. Rose eventually defaulted on both the Construction Loan and on the loan from R&S Lenders, and both entities recorded Notices of Default and Elections to Sell, initiating non-judicial foreclosure proceedings against St. Rose and the Property (Notice Docs 8A and 8B), which both came to be stayed by an extended TRO entered during the Subject Litigation. Notice Doc 17 at p. 3.

On or about August 14, 2009, Colonial was closed by the Alabama State Banking Department, the FDIC was named as its Receiver (Notice Doc 11, at Exhibit A thereto); and the

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[2] A clerical error in paragraph 33 of the Complaint initiating the instant action indicated the incorrect case number for this first consolidated suit; however, the correct case numbers for both suits are provided at Comp. ¶5.

FDIC, in its capacity as Receiver of Colonial, entered into a "Purchase and Assumption Agreement, Whole Bank All Deposits" (the "PAA"), in order to transfer Colonial's financial assets, including the Construction Loan, 2007 Deed of Trust, and all related Colonial agreements and claims concerning the Property, to BB&T. Comp. at ¶¶ 42-44. Based thereon, Defendants Gerrard and GC&L filed an Amended Complaint in the underlying suit substituting BB&T as the plaintiff therein, in lieu of Colonial, and thereby became counsel of record for BB&T. Comp. at ¶ 45; Notice Doc 12.

The PAA was not as clear as it could have been, and, had it been carefully reviewed by BB&T's counsel, said counsel should have anticipated possible objections being raised regarding the same, or possible arguments that it did not clearly and adequately demonstrate that Colonial's claims and assets related to the subject 2007 Colonial Deed of Trust and priority assertions in the Subject Litigation had been transferred and assigned to BB&T. Comp. at ¶ 46.

On or about October 7, 2009, a Second Amended Complaint was filed in BB&T's name by Gerrard and GC&L (Notice Doc 13) which alleged a variety of theories for and on behalf of BB&T, as successor-in-interest to Colonial, to obtain an order and judgment declaring and recognizing that the 2007 Colonial Deed of Trust had a first priority position over the 2005 R&S Lenders Deed of Trust, or to aver damages, including based on theories of: Contractual Subrogation; Replacement; Equitable Estoppel or Promissory Estoppel; Unjust Enrichment; Fraudulent Misrepresentation; and Civil Conspiracy. Notice Doc 13. It is Plaintiff's contention in this instant suit, that, at least one (or more) of these claims for relief set forth a valid claim on which BB&T would have prevailed on the merits, if BB&T were able to demonstrate its own right, as Colonial's successor-in-interest, to pursue the same. Comp. at ¶¶ 48-50.

A number of events in the underlying suit should have apprised Defendants herein that BB&T's right to bring the Colonial claims, as an owner and assignee thereof, would be an important factual question in the case. For example, the Second Amended Complaint in the underlying suit alleged in ¶1 that BB&T was a successor in interest to the FDIC, as the receiver of Colonial and was entitled to an interest in the real property at issue in the underlying suit. Both St. Rose and R&S Lenders filed Answers to the BB&T Second Amended Complaint, in which both Defendants denied, for lack of sufficient knowledge, this first paragraph of Plaintiff's pleading,

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and in which both Defendants asserted BB&T's lack of standing, as well as the statute of frauds, as Affirmative Defenses. Comp. at ¶¶ 51-57; Notice Docs 14 and 15.

The district court set the underlying suit for an evidentiary hearing as to pending motions for preliminary injunction, to be consolidated with trial on the merits as to certain claims, including the equitable relief claims, and, on or about November 19, 2016, Murdock and Keach filed a Notice of Questions of Fact (the "NFQ") to be reviewed at this trial. *See*, Notice Doc C. Item no. 24 in this list indicated that one question to be tried was "whether BB&T paid proper consideration and thus is able to have an assignment that comes with equitable rights." Comp. at ¶¶ 65-66.

Based on the foregoing, and based on other events during the litigation of the underlying suit (such as the questions asked during the deposition of BB&T's PMK Gary Fritz, who was specifically challenged in his deposition as to whether the PAA adequately demonstrated that an assignment to BB&T had occurred), Defendants Gerrard and GC&L knew or should have known, prior to trial, that BB&T would be required to prove at trial, by a preponderance of the evidence, that Colonial's position and claims under the Deed of Trust had been assigned to BB&T, via a writing clearly setting forth this specific assignment, in order for BB&T to demonstrate that it now owned and had succeeded to the right to pursue the claims previously owned by Colonial. *See*, Comp. at ¶¶ 51-62; 65; 72-74; 78-80. The Defendants herein however failed in their duty to ensure that any documents proving this particular assignment to BB&T were timely disclosed so as to be able to be utilized at trial, and failed to present all such documents during trial; and failed to present such witnesses and evidence during trial, as would effectively address this key factual showing. Comp. 61-64; 67-71; 75-76; 81-94.

Alternatively, if no adequate assignment documents existed, then the Defendants had a duty to inform their client of this fact, and to advise their client BB&T of the need to immediately prepare and obtain the FDIC's signature on adequate new documentation, evidencing the assignment to BB&T, to be disclosed prior to trial, and utilized during trial. However, the Defendants also failed to perform these duties. Comp. at ¶¶ 52; 58-62. Instead, Gerrard and GC&L never adequately examined the PAA to determine whether it adequately demonstrated this particular assignment to BB&T; never advised BB&T or the FDIC of the need to create schedules

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for the PAA to demonstrate the assignment; never inquired of BB&T or the FDIC before trial if any more adequate documents existed more clearly demonstrating the assignment (which did in fact exist before trial); never checked with the Clark County Nevada Recorder's Office or any local title company prior to trial, to determine whether other proof of the assignment, beyond the PAA, had come to exist and be recorded as to the Property (which was in fact the case); never disclosed any such additional documentation in pre-trial disclosures, never timely assisted BB&T with drafting adequate assignment documentation prior to trial, to utilize at trial; never, in the alternative, advised BB&T that it should do so; and never sufficiently utilized or introduced existing and available documentary evidence and witness testimony of the assignment during their presentation of BB&T's case-in-chief during trial. Comp. at 60-62.

Prior to trial, a document came to exist which more clearly demonstrated the assignment to BB&T, than did the PAA, namely, a recorded "Assignment of Security Instruments and Other Loan Documents" from the FDIC in its capacity as Receiver for Colonial, to BB&T, dated October 23, 2009 and recorded on November 3, 2009, effective on the same date as the PAA (sometimes herein the "2009 Bulk Assignment"). Notice Doc 11. Comp. 63-65. This 2009 Bulk Assignment document overcame the potential ambiguities in the PAA and, taken together with the PAA, confirmed that the FDIC had transferred, among other items, Colonial's position under all of its outstanding Nevada commercial loans and Nevada recorded security instruments (other than MERS recorded documents), to BB&T, for an acknowledged consideration, which would include the Subject Colonial Construction Loan and the Colonial 2007 Deed of Trust. Comp. 63-64. Notice Doc. 11.

However, Gerrard and GC&L never timely inquired about the existence of any such document, never looked for or found this document via a search of the Clark County Recorder's office, and never attempted to timely disclose this document prior to trial or to timely present this evidence or any testimony regarding the same, during their case-in-chief at trial. Comp. at ¶¶ 63-64. The Complaint in the instant action further avers that after the 2009 Bulk Assignment document came to exist of record, all of the parties to this suit were still able to supplement their disclosures, prior to trial, in early December 2009, and that the district court allowed discovery to continue until the eve of trial, including through December 28, 2009, but that Defendants herein

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failed during this time period to disclose the Bulk Assignment. Comp. at ¶¶ 67-70.

The evidentiary hearing / trial was held over approximately ten days, spanning a three month period, from on or about January 8, 2010 until on or about April 8, 2010. On the very first day of trial, after hearing Gerrard's argument that the assignment to BB&T allowed BB&T to enjoy the same claims as Colonial, pro se party / attorney Keach expressly argued that a more fundamental question was at issue, namely, whether any assignment had taken place at all, as Keach asserted that "BB&T is not an assignee in this case," because BB&T's "asset purchase" involved no assignment. Notice Doc 16. On that same day, the district court indicated as follows: "I have two issues I have to determine . . . [including] the nature of the relationship between the Colonial Bank loan and the BB&T's entity's. And in making that determination I am going to listen to the evidence before I apply the theories that you're [BB&T's counsel] saying because **I have to make a determination as to whether there's an assignment that exists**, if it's a successor in interest that exists, or if it's some other nature of an acquisition. Okay. Which is why I'm listening to the evidence." Comp. at ¶ 79. Notice Doc 16 [emphasis added].

Notwithstanding their knowledge, prior to trial, that BB&T's ownership of Colonial's former claims would be at issue, as reiterated at the beginning of trial, the Defendants failed, prior to trial, to disclose documents necessary to make this showing, and also failed, while putting on their six day case-in-chief, over the course of the next three months, to directly or adequately address this factual question; did not put witness Fritz on the stand, did not introduce any of Fritz's deposition transcript during trial (wherein he testified that BB&T had paid and bid $21.5 Billion for *all* non-consumer loans of Colonial, which included the Subject Construction Loan and 2007 Deed of Trust, which thereafter appeared on BB&T's General Ledger); did not introduce the PAA into evidence, and did not introduce the 2009 Bulk Assignment (which it had never disclosed) into evidence. Comp., including at ¶¶ 74-84.

After the close of BB&T's case-in-chief on or about March 30, 2010 (day six of the trial), almost three months after trial had begun, opposing party Keach brought an oral motion (ultimately joined by the other opposing parties in the suit) for judgment on partial findings arguing that BB&T had not established a *prima facie* case that it had succeeded to and become the owner of Colonial's right to assert the claims originally owned by Colonial, which were being

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pursued in the suit. In response to this Motion, the trial court allowed Gerrard and GC&L, on behalf of BB&T, to now introduce, for the first time, the PAA, over objection, but ultimately determined that said document was not adequate to show that BB&T owned the claims it was pursuing at trial, noting as follows:

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

See, Comp. at ¶¶ 85-89; Notice Doc 17 at p. 4; Notice Doc. 18.

The court indicated that it would allow Defendants to attempt to introduce additional evidence, and, the following day, Gerrard and GC&L attempted, for the first time, to provide the trial court with the 2009 Bulk Assignment to BB&T, confirming that the FDIC had transferred, among other things, the Construction Loan and the 2007 Deed of Trust to BB&T. Comp. 90-92; Notice Doc 19 and Notice Doc 17 at pp. 3-6. Whatever inquiries suddenly allowed the Defendants to locate and produce this document, literally overnight and prior to the next day of trial, could and should have been made prior to the commencement of trial, as the document had been of record since November 3, 2009. The trial court refused to admit or consider this 2009 Assignment, because Gerrard & GC&L had not timely disclosed it at any time prior to that date (Notice Doc 17 at pp. 3-6; Notice Doc. 19). Comp. at ¶¶ 90-92, although it existed and was a publicly recorded document, prior to the January 2010 commencement of trial, and prior to the early December 2009 supplemental disclosures exchange between the parties, and at the time of the late December 2009 deposition of BB&T's PMK, Mr. Fritz.

Following the trial court's refusal to admit the 2009 Bulk Assignment, Gerrard and GC&L, on behalf of BB&T, orally moved the district court to re-open BB&T's case-in-chief, which motion the district court granted. Comp. at ¶¶ 92-95. BB&T then attempted to introduce into evidence a new March 30, 2010 "assignment" (the "2010 Assignment") that it had just obtained the FDIC's signature on. *Id.* Defendants' ability to immediately procure the creation and FDIC execution of this document after finishing their case in chief, literally overnight, demonstrates that

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they would and should have been able to just as easily do so before trial. The trial court however also refused to consider this newly created specific assignment, as also not having been timely disclosed. *Id*. *See also*, Notice Docs 17 (at pp. 3-6) and 19. Comp. at ¶ 94.

Defendants Gerrard and GC&L then made an oral motion to substitute in the FDIC for BB&T as the real party in interest, but the trial court also ultimately denied this motion, stating:

> Exhibit 183 [the PAA] is internally inconsistent and is incomplete. It prevents the Court from making a finding that an assignment has occurred of the loan that is at issue. The insufficient and conflicting evidence regarding this assignment is what led me to the position that we're currently in, the ruling that I began to make . . . 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.

Comp. at ¶ 96-97. Notice Doc 17 at p. 5.

Ultimately, the trial court determined that, based on an evidentiary failure, no transfer or assignment of FDIC's/Colonial's rights to BB&T had been shown, to demonstrate that BB&T had ownership of the claims which had originally arisen in favor of Colonial prior to the PAA, with respect to the Construction Loan and the Property. Comp. at ¶¶ 98-104; Notice Doc. 17.

In its Findings of Fact and Conclusions of Law ("FF&CL"), entered on or about June 23, 2010 (Notice Doc 17), the trial court indicated that BB&T's claims were dismissed due to an "evidentiary" failure, namely, because "BB&T failed to meet its burden of proof to establish the Colonial Bank loan, note and deed of trust at issue in this case were ever assigned to BB&T." Notice Doc 17 at p. 6, lines 23-27. This evidentiary failure was due to BB&T's counsel's failure, to adequately prepare and present its case; the district court indicating that it had "given BB&T ample opportunity to submit proper admissible evidence that the Colonial [loan documents] at issue in this case were . . . acquired by BB&T" but, because they had relied solely on the inadequate PAA, the burden of proof had not been met. *Id.*, at page 6-7. The trial court's FF&CL further provided, at Findings 143 and 144 that:

> 143. BB&T has not shown the claims or causes of action against defendants being pursued by BB&T belong to BB&T and it is the successor in interest with the ability to assert these claims against defendants.
>
> 144. Since BB&T has not proved that it owns the actions or claims asserted herein, it does not have the ability to assert the claims in the Second Amended Complaint.

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Comp. at ¶ 100, Notice Doc 17 at page 24.

The district court's Conclusions of Law, as set forth in the FF&CL, further indicated in pertinent part as follows:

> 2. BB&T has failed to meet its burden of proof to establish that the Second Deed of Trust was transferred or assigned by the FDIC to BB&T.
>
> 3. BB&T is not entitled to relief on its claim for equitable subrogation ***since*** **it has not demonstrated it is a successor in interest**.
>
> 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**.
>
> . . . .
>
> 7. R&S St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust ***since*** **BB&T has not demonstrated it is a successor in interest with the ability to assert these claims**.
>
> . . . .
>
> 15. BB&T was required to establish with competent, admissible evidence that the purchase, transfer and assignment, if any, of the 2007 Colonial Bank Deed of Trust from the FDIC to BB&T was in writing and signed by the FDIC;
>
> 16. BB&T failed to meet its burden of proof and **presented no evidence, written, oral or otherwise, that the 2007 Colonial Bank Deed of Trust was assigned** by the FDIC **to BB&T** in the Purchase and Assumption Agreement;

Comp. at ¶ 102, Notice Doc 17 at pp. 25-26. [Emphasis added.]

Plaintiff has averred herein, at ¶ 103 of its Complaint, that these rulings would not have been made, had the relevant actual facts and assignments been timely disclosed prior to trial and demonstrated during trial, as BB&T did in fact have the necessary legal and factual rights, as an assignee of Colonial, to pursue its legal and equitable claims. Plaintiff's Complaint argues and avers that Defendants Gerrard and GC&L negligently failed to prepare, disclose, or otherwise preserve for use at trial, or, to present during trial, the relevant documentary and witness evidence, necessarily to make a *prima facie* showing on this fact, to support a correct ruling by the trial court, despite ample indications prior to trial, and at the beginning of trial, that they would need to do so. *See*, *e.g.*, Comp. 103-107. Notice Doc 17, at page 6, line 23 through page 7, line 7.

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On July 8, 2010, Defendants Gerrard and GC&L moved for a new trial, or, in the alternative, to alter or amend the Judgment (Comp. ¶108), in which Motion Defendants Gerrard and GC&L sought to excuse their failure to address or present evidence of a specific assignment to BB&T during presentation of their case-in-chief, by averring that they had been unfairly surprised by this issue being raised late in the day against them. Notice Doc 20 at p. 8. On or about October 5, 2010, the trial court issued an Order denying this post-trial Motion, stating as follows:

> **THIS COURT FINDS** that the **issue of whether the 2007 Colonial Bank** Loan, Promissory Note and Deed of Trust **was assigned to BB&T** was one which **had been raised** by parties and the Court **prior to the start of trial**.
>
> **THIS COURT FINDS** that the issue of whether the 2007 Colonial Bank Loan, Promissory Note and Deed of Trust was acquired by and transferred to BB&T **was a permitted subject of discovery by the Court prior to the commencement of trial**.
>
> **THIS COURT FINDS** that **counsel for BB&T was aware of [this] issue . . . 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, Promissory Note and Deed of Trust . . . before it rested its case-in-chief.
>
> **THIS COURT FINDS . . . BB&T was not unfairly surprised by the challenge to its evidence** via the N.R.C.P. 52 motion . . . .

[Some emphasis added.] Comp. ¶109; Notice Doc 21. These foregoing findings, having survived and been upheld on appeal, are now dispositive herein. Comp. ¶110.

On or about September 24, 2010, Defendants, on behalf of BB&T, appealed the district court's decision, and on May 31, 2013 a three-judge panel of the Nevada Supreme Court entered its "Order of Affirmance" which decision upheld the trial court's Judgment, based on the following analysis:

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

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See, Comp. ¶111; Notice Doc 22, at p. 6. [Emphasis added.]

On or about November 10, 2010, the district court entered a Judgment which included an award against BB&T and in favor of R&S Lenders in the amount of $41,263.59, with interest to accrue thereon until paid in full. *See*, Comp. ¶112; Notice Doc E at ¶5. Notice of entry of this Judgment was served on November 15, 2010. Plaintiff BB&T had the right, under certain loss share provisions of the PAA, including at Section 2.1(a) and (b)(i), to submit this Judgment to the FDIC, for its payment of 80% thereof. Comp. ¶113. Defendants failed to timely inform BB&T of the monetary Judgment against it, such that BB&T alleges it did not learn of the same until its 80% reimbursement rights under the PAA had expired. Comp. at ¶¶ 112-114.

BB&T sought *en banc* rehearing of the Nevada Supreme Court's three-judge decision by the entire Nevada Supreme Court, which was denied on February 21, 2014. Comp. ¶115; Notice Doc 23. BB&T sought to appeal this decision to the U.S. Supreme Court. The United States Supreme Court denied BB&T's Petition for Writ of Certiorari on October 6, 2014. Comp. at ¶116; Notice Docs 24 and 25. Plaintiff filed this lawsuit within less than two years after the U.S. Supreme Court's denial of the Petition for Writ of Certiorari, on October 5, 2016. This suit includes three causes of action: for professional negligence/legal malpractice; intentional omission and fraudulent concealment; and for breach of contract, and seeks a monetary judgment.

III. LEGAL STANDARD APPLICABLE TO MOTION

The motion to dismiss should not be granted unless it appears beyond all doubt that Plaintiff BB&T could prove no set of facts which would entitle it to relief. *See, Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). As the Nevada Supreme Court has explained:

> The standard of review for a dismissal under NRCP 12(b)(5) is rigorous as this court must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party]. All factual allegations of the complaint must be accepted as true.

Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481, 874 P.2d 744, 746 (1994) [citations and quotations omitted].

In reviewing a motion to dismiss, the court's "task is to determine whether or not the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief."

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Edgar v. Wagner, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). "The test" for determining this question, "is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 858 P.2d 1258, 1260 (1993). *See also*, *Western States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220, 1223 (1992). The herein Complaint easily meets these standards, and should not be dismissed.

IV. LEGAL ANALYSIS

A. Plaintiff's Legal Malpractice Claims Are Not Barred by the Statute of Limitations.

Movants first contend that the present suit is barred by the two-year statute of limitations governing legal malpractice claims, at NRS 11.207. Mot. at pp. 10-12. However, Plaintiff has clearly brought this suit within the applicable two year limitations period.

In Nevada, a legal malpractice claim either does not accrue, or the statute of limitations is tolled, pending the outcome of litigation which could mitigate the client's damages or exonerate the attorney, *including through and until the end of any appeals therein*. As explained in *Semenza v. Nevada Medical Liability Ins. Co.*, 765 P.2d 184, 186, 104 Nev. 666, 668 (1989):

> *a legal malpractice action does not accrue until the plaintiff's damages are certain* ***and not contingent upon the outcome of an appeal***. . . . [w]here there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence. . . . Apparent damage may vanish with successful prosecution of an appeal and ultimate vindication of an attorney's conduct by an appellate court. . . . If an appeal is taken in the underlying case, it is simply premature to proceed . . . on a legal malpractice claim until the appeal of the original judgment . . . has finally been resolved.

Id. [Emphasis added and citations and quotation marks omitted.]

Other Nevada cases reach this same result, sometimes relying on a tolling, rather than a claim accrual, analysis, but in either event with the same outcome, which rulings continued even after legislative revisions to the language of the statute of limitations. *See, e.g., K.J.B. Inc. v. Drakulich*, 811 P.2d 1305, 1306, 107 Nev. 367, 369-70 (1991) (articulating an express tolling rule, in addition to the *Semenza* claim accrual rule: "we now hold that the statute of limitations . . . does not commence to run against a cause of action for attorney malpractice until the conclusion of the underlying litigation wherein the malpractice allegedly occurred."); *Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002) ("[W]hen the malpractice is alleged to have caused an

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adverse ruling in an underlying action, the malpractice action does not accrue while an appeal from the adverse ruling is pending."); *Brady Vorwerck v. New Albertson's*, 130 Nev. Adv. Op. 68, 333 P.3d 229, 335 (2014) (recognizing ongoing validity of prior case law, after 1997 revisions to language of attorney malpractice statute of limitations, based on applicable common law discovery tolling rules, as damages cannot be discovered until any appeals have run their course).

Thus, the statute of limitations as to the claims in the present case did not begin to expire until after the U.S. Supreme Court denied cert. on October 6, 2014. This suit was filed on October 5, 2014, within two years of that date. Movants contend that the denied petition for writ of certiorari to the U.S. Supreme Court, somehow, *does not count* as an appeal, tolling or preventing the accrual of the legal malpractice and related causes of action pending in this suit. Motion at pp. 11-12. Movants however provide no legal authority supporting this contention, which is instead based on their own strained argument, premised on various assertions relating to the nature of a petition for a writ of certiorari. Those courts which have actually addressed this issue have, however, and contrary to Defendants' assertions, determined that a petition for a writ of certiorari to the U.S. Supreme Court should be treated as an appeal for purpose of their similar malpractice tolling rules.

For example, Texas, like Nevada, also recognizes that when an attorney commits litigation malpractice, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals in the underlying suit are exhausted. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991) (legal malpractice claims did not begin to expire, but was tolled until after loss of an appeal, and after denial of a request for rehearing from that rejected appeal).

The Texas Court of Appeals, in *Golden v. McNeal*, 78 S.W.3d 488 (Tex. Ct. App. 2002), extended this *Hughes'* tolling rule to specifically *include petitions seeking a writ of certiorari* filed with the U.S. Supreme Court, as well as requests for rehearing of such a denied writ. In *Golden*, the Court explained that since the Supreme Court of the United States denied a petition for writ of cert. on April 14, 1997, and then denied a motion for rehearing on June 27, 1997, the statute of limitations for a malpractice claim was therefore "tolled" until the later of these dates, "June 27, 1997, and the filing of" a malpractice petition "on September 8, 1997 was not barred by the statute." In *Haase v. Abraham Watkins*, 404 S.W.3d 75 (Tex. Ct. App. 2013), the Court expressed

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two policy reasons for this Texas rule: First, that a contrary rule would force a client into the untenable position of having to adopt inherently inconsistent litigation postures in the underlying case and in the malpractice case; and Second, that limitations should be tolled for the malpractice claim because the viability of that claim depends on the outcome of the underlying litigation.

Other states have also reached this same conclusion. *See, e.g., Barker v. Miller*, 918 S.W.2d 749, 752 (Ky. Ct. App. 1996) ("Had Barker sought a writ of certiorari within the ninety-day period, the statute of limitations would have been tolled pending the ruling of the United States Supreme Court on his petition."); *MacKenzie v. Leonard, Collins and Gillespie, P.C.*, 2009 WL 2383013 at 3 (D. Ariz. 2009)("Thus, the appellate process was not 'completed or ... waived by a failure to appeal' until Plaintiff's opportunity to file a writ of certiorari with the Supreme Court expired on July 23, 2008.").

As explained in *Brady Vorwerck*, 333 P.3d at 230, Nevada's tolling of the legal malpractice statute of limitations pending appeal, is also supported by public policy considerations, in that "the rule . . . permits the final resolution of the damages incurred during the litigation . . . thereby preventing judicial resources from being spent on a claim for damages that may be reduced or cured during litigation." There is no policy or other basis to treat the petition for a writ of certiorari to the U.S. Supreme Court as anything other than an appeal, tolling the Nevada statute of limitations, given that any other ruling would: (a) force litigants to waste judicial resources on a claim that may be cured on appeal, (b) require litigation which may be wasteful to judicial resources before damages are calculable; and (c) place parties in the untenable position of alleging malpractice while concurrently arguing a conflicting position on appeal.

Defendants' request for dismissal by virtue of the statute of limitations should be rejected.

B. <u>Plaintiff's Professional Negligence/Legal Malpractice Claims Are Adequately Stated.</u>

Movants next contend that the Plaintiff's legal malpractice claims fail to adequately state a claim for relief. Mot. at pp. 12-23. This is inaccurate. Nevada is a notice pleading state. As explained in *Hay v. Hay*, 678 P.2d 672, 674, 100 Nev. 196, 198 (1984):

> Because Nevada is a notice-pleading jurisdiction, our courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party. NRCP 8(a); [further citation omitted]. A complaint must set forth sufficient facts to establish all necessary elements of a claim for relief [citation omitted], so that the adverse party has adequate notice of the nature of the claim

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and relief sought. [Citation omitted.]

Because the legal malpractice pleadings standard is based in negligence or contract, Nevada's general notice pleading standard applies, and the heightened standard requiring pleading with particularity, such as under Rule 9(b), is not applicable to the Plaintiff's first and third causes of action. No reasonable contention can be asserted that the Plaintiff's 28 page, 148 paragraph Complaint, which specifically details the underlying facts and the litigation failures upon which this suit is based, failed to provide the Defendants with adequate notice of the nature of the claims, and the relief sought, or omitted any key factual allegation. Indeed, the very arguments raised within the Motion to Dismiss, verify that the Defendants know exactly why they are being sued, and are clearly on notice of the basis for and nature of the claims asserted against them.

The required elements of a legal malpractice claim are (1) An attorney-client relationship; (2) a duty owed by the attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of that duty; (4) which is the proximate cause of the client's (5) actual loss or damage resulting from the negligence. *See*, *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308, 324 (2004); *Day v. Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996); *Warmbrodt v. Blanchard*, 100 Nev. 703, 706-07, 692 P.2d 1282 (1984). Defendants do not contest the attorney-client relationship, but aver that no adequate allegations have been made by Plaintiff of a breach of the duty of competence; or of proximately caused actual loss and damages. These arguments must fail.

(i) Plaintiff's Complaint adequately alleges the second and third elements of a malpractice claim, a breach of the Defendants' duty of skill and competence.

Movants' contention that Plaintiff has failed to sufficiently allege that they breached their duty to perform at the expected level of competence and skill (Mot. at pp. 12-18), must be rejected. Plaintiff's Complaint specifically alleges, at ¶ 119, that Defendants had a duty "to represent Plaintiff with the reasonable care, skill, and diligence" required from an ordinary attorney in similar circumstances, and, in ¶ 120, that they breached this duty. Moreover, these allegations are supported by specific alleged facts demonstrating this failure, including at paragraphs 46-47; 60; and 95 of the Complaint (failure to recognize that the PAA was inadequate and would need to be fixed via new amendments or schedules thereto or new specific assignment documents prior to trial, and failure to warn BB&T of this concern or to help BB&T address the

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same); paragraphs 51-59; 65; 72-74; and 78-80 (failure to recognize that they would need to establish an assignment to BB&T had occurred as a prerequisite initial showing at trial, as this disputed issue had clearly been demonstrated to be in play for trial based on the pleadings, filings, court statements, and discovery contentions articulated before trial and at the beginning of trial) paragraphs 58-62; 61-64; 67-71; 75-76; 81-94 (failure to prepare, before trial, an adequate document which could clarify the PAA, to be used at trial or to learn of the existence of and to obtain and disclose the 2009 Bulk Assignment in time to utilize the same at trial, even though both of these tasks were able to be performed, literally overnight, once the Defendants finally recognized, too late, their importance; and failure to adequately address these factual issues during the presentation of their case in chief during trial).

Nevertheless, Defendants contend (in a portion of their brief which is much more akin to a motion for summary judgment than a motion to dismiss, and should be rejected on that basis alone), that, somehow, none of these failures rise to the level of a breach of their legal duties.

First, Defendants claim their failure to address the issue of BB&T's ownership of its claims at trial, was not a breach, as they "had no reason to anticipate" that this issue would arise as it was not before the court. Mot. at pp. 12-13. This argument ignores the many allegations set forth throughout the complaint, including at paragraphs 51-59; 65; 72-74; and 78-80, which, if taken as true, as they must be for present purposes, demonstrate that, based upon the pleadings, filings, court statements, and discovery contentions articulated before trial and at the beginning of trial, Gerrard and GC&L had every reason to recognize that this issue was in play, and that they would need to establish an assignment of the Construction Loan and its Deed of Trust to BB&T had occurred as a prerequisite initial showing at trial.

Moreover, this argument ignores the fact that Gerrard and GC&L have *already made these same arguments, and already had them rejected,* in the original court's Order denying a motion they filed for a new trial or to alter or amend the underlying court's decision. The Complaint (including at ¶¶ 108-110) quotes from the underlying Order issued on this topic, wherein the district court found "that the issue of whether the 2007 Colonial Bank Loan, Promissory Note and Deed of Trust was assigned to BB&T was one which had been raised by parties and the Court prior to the start of trial" and "that counsel for BB&T was aware of the issue . . . prior to the start

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of trial" and were "on notice and had opportunity to present evidence" thereon during trial and were "not unfairly surprised" by this issue arising at trial. Notice Doc 21.

Movants' Second and Third Breach of Competence arguments contend (at Mot. pp. 13-16, subheadings (ii) A, B, and C, and (iii)) that it is not Movants' fault that the Plaintiff, BB&T, had not received an adequate assignment of the claims in the PAA, which Movants did not draft on their behalf, such that they may not be held responsible for its inadequacies (which were outside the scope of their retention); and that no allegation exists that they knew of the 2009 Bulk Assignment in time to disclose it (although it is unclear what they are contending about when they knew of it); and that the new 2010 Assignment document which they created after closing their case in chief, could not have been disclosed prior to trial, as it did not exist prior to its attempted introduction after trial.

The inefficacy of these arguments is, first of all, demonstrated by Movants' own concession that they made a "strategic decision to keep the PAA out of the court's consideration" because of "the deficiency in the document" (Motion at p. 15, ll. 5-7) which deficiency they must therefore have recognized, to make a conscious strategic decision based thereon. In other words, Defendants have now verified a major premise of the Complaint, that the Defendants knew or should have known that the PAA was inadequate, and should have done something about it. Based on this concession, Defendants cannot now seriously contend that they had no duty (i) to ask BB&T or otherwise determine by reviewing Clark County public records, filings, prior to trial, whether any other documents existed which could be utilized at trial in lieu of the deficient PAA; or (ii) to advise BB&T of the need to draft a more adequate assignment document and have it signed by the FDIC. *See*, *e.g.*, Comp. at ¶¶ 46-47; 51-59; 60; 65; 72-74; 78-80; 95. The ease with which either of these tasks could have been performed long prior to trial is demonstrated by how quickly Defendants were able to perform both of them, literally overnight, between March 30 and March 31, 2010, Notice Doc 19. The Motion to Dismiss reveals that Defendants' decision to only take those crucial steps after it was too late for them to be efficacious, was based on having previously decided to simply ignore the PAA at trial, even though they knew it was inadequate! (Mot. at p. 15 ll. 5-7.) Movants try to justify this alleged strategic decision based on their belief and assumption, before and during trial, that they would not need to address whether BB&T had

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obtained an assignment (Mot. at p. 15, ll. 7-9; p.16, ll.12-14). However, as already shown above, they were also negligent in maintaining that wrongful belief and assumption, as confirmed by the underlying district court and on appeal to the Nevada Supreme Court.

Although the Complaint does not allege when the 2009 Bulk Assignment was first discovered by the Defendants, it does allege that it was a publicly recorded document, which came to exist and be of record before pre-trial discovery exchanges had been finalized, thereby indicating that constructive notice of the document was available, and it also alleges, including at ¶ 64, that Gerrard and GC&L never timely inquired about the existence of this document, and never looked for or found this document via a search of the Clark County Recorder's office, in order to timely disclose or utilize the same. This is something which they demonstrably would and could have done, had they chosen to address the deficiencies they knew of in the PAA, rather than ignore them.

Likewise, Defendants' contention (Mot. at p. 1411. 18-28; p. 1611. 8-22) that they had no duty, under the scope of their retention, to ensure a proper assignment could be produced since they were only litigation counsel, not transaction counsel, makes no sense given their now conceded awareness of the deficiencies in the PAA, and given the district court's ruling that they knew or should have known about the need to address the assignment issue at trial. Just because a lawyer is not retained to effect a particular transaction, but to represent a client in litigation involving the same, does not mean that said lawyer has no duty to advise his client of any deficiencies in the transactional documentation which may need to be cured before trial, where such a cure is possible, as it clearly was here.

For example, in *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013), *as corrected* (Apr. 10, 2013), *aff'd*, 515 B.R. 599 (B.A.P. 9th Cir. 2014), a Nevada Bankruptcy Judge sanctioned an attorney for incompetent handling of his bankruptcy client's bankruptcy case, which incompetence included a failure to properly analyze the debt documentation provided by the client to the lawyer, and to advise the client that certain of the debts set forth therein were based on a judgment for fraud, were non-dischargeable, and were likely to lead to an adversarial proceeding; together with other failures by the attorney arising out of this initial failure. The attorney argued, to no avail, that, due to scope limitations set forth within his retainer agreement, he was not obligated to

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perform such an analysis; and that his clients "had the burden to inform him that the Judgment was based on [his client] Seare's fraud, and that they failed to meet this burden. In other words, [the attorney] contends that he did not have an independent duty to investigate the nature of the Judgment." *In re Seare*, 493 B.R. at 176. This is similar to Defendants' contention that, due to the scope of their retention, they had no independent duty to ensure that the PAA adequately demonstrated an assignment of Colonial's relevant rights to BB&T, or to advise BB&T of any deficiencies therein, and of the need to cure the same, or to inquire or otherwise ascertain, whether a better assignment document already existed, before trial, as they were not retained to effect that transfer.

The *Seare* Judge however, disagreed, noting that, under Nevada's Rules of Professional Conduct, and other relevant authorities, the "[c]ompetent handling of a legal matter includes inquiry into and analysis of the factual and legal elements of the problem . . . ." *Id.* at 188 [citations and quotations omitted]. An assessment of whether the lawyer has breached or fulfilled the duty of competence "depends on the client's objectives" as it is the "lawyer's duty . . . to competently attain the client's goals of representation. In the absence of a valid limitation on services, a lawyer must provide **the bundle of services that are reasonably necessary** to achieve the client's reasonably anticipated result." *Id.* at 188-89 [citations and quotations omitted; emphasis added]. Thus, in the present case, Defendants had a duty, in order to satisfy all of BB&T's necessary showings at trial, to at least advise BB&T of any possible problems with its ownership of the claims, and of the need to remedy the same, and to timely inquire of any documentation which did remedy this issue. The "baseline obligation to inquire into the facts and circumstances of a case and analyze the possible legal issues is not changed when the scope of services is limited." Rather, "a lawyer must properly communicate with the client to understand the client's expectations, learn about the client's particular legal and financial situation, **and independently investigate any 'red flag' areas**." *Id.* Citations and quotations omitted; emphasis added.

Movants' Fourth Breach of Competence argument contends that allegations regarding the Defendants' failure to properly prepare trial witnesses should be dismissed (Mot. pp. 16-17). As is the case with so many other arguments in the motion, this assertion ignores the standard of

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analysis applicable to a NRCP 12(b)(5) motion, pursuant to which the allegations in the Plaintiff's Complaint regarding failure to properly prepare witnesses, must be taken as true. This allegation is therefore not appropriate for resolution on a motion to dismiss basis at this early juncture, as it clearly raises questions of fact, and should be allowed to stand pending the filing of an Answer and future post-discovery motions. Now is not the time for a Motion for Summary Judgment.

Movants' Fifth Breach of Competence argument, seeking dismissal of malpractice claims relating to their failure to timely communicate the terms of a cost award entered against BB&T, should also fail. Defendants clearly have a duty to communicate with their clients under Nevada Rule of Professional Conduct 1.4, and failure to do so is alleged in the Complaint to have proximately caused damages, based on Plaintiff's inability to therefore timely seek assistance in paying the costs from the FDIC, under the terms of the PAA, before that right expired. Comp. at 112-14; 127. Taking these allegations as true, as required for present purposes, there are no grounds to dismiss these allegations.

(ii) The Plaintiff's Complaint Adequately Alleges the Fourth and Fifth Elements of a Legal Malpractice Claim: Proximately Caused, Actual Damages and Losses.

Defendants next contend (at subsections (b) and (c), pages 18 through 23 of their Motion) that Plaintiff cannot demonstrate the final two elements of a malpractice claim: that Defendants' professional negligence proximately caused actual losses to the Plaintiff, because BB&T's case would have failed on the merits in any event, even if it had been properly presented to the district court. In other words, Defendants argue that the Plaintiff, BB&T, cannot make what is sometimes called the "case within the case" showing of a legal malpractice suit, that, but for the defendant attorneys' professional negligence, the original case would have been successful.

This argument is based on three assertions in the Motion to Dismiss: (1) first, that the district court made factual findings and legal conclusions in its FF&CL (Notice Doc 17) which render it "impossible for Plaintiff to show causation for legal malpractice as to its claims" including those for equitable subrogation and replacement, "as the [underlying court] heard extensive evidence and then made findings that precluded these claims." Mot. at pp. 20-22. (2) Secondly, Defendants argue that certain of the claims were not assignable to BB&T in any event and thus could not be pursued by BB&T (Mot. at p. 22, ll. 8-18). (3) Finally, Defendants aver

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that, therefore, only speculative damages have been pled, lacking sufficient allegations of actual loss. (Mot. pp 22-23). These arguments must fail.

(1) With respect to the contention that the underlying district court made findings which reached the merits of the Plaintiff's claims, and preclude any ability to litigate those merits herein, it must first of all be understood that any such findings were unnecessary dicta. The district court ruled in its FF&CL that BB&T had not demonstrated that it owned the claims it sought to pursue, including because the only document which might satisfy the statute of frauds, and which was admitted into evidence during trial on this question, the PAA, was inadequate (FF&CL, Notice Doc. 17, at Conclusions of Law 2; 11-17), and further ruled that BB&T was not entitled to relief on its claims for equitable subrogation or replacement because of ("since") BB&T had failed to establish the assignment to it of Colonial's rights (FF&CL at Conclusions 2-9).

Based on these rulings, it was completely unnecessary to speculate as to what the merits of any of the claims might have been, had they been reached. Because BB&T was in any event precluded from pursuing such claims due to Defendants' failure to establish the truth, that BB&T owned the same, no further rulings were necessary, to rule against BB&T in granting the Rule 52 Motion, or in granting the R&S Lenders' Motion for Declaratory Relief as to its ability to now a foreclose on its earlier recorded deed of trust. Indeed, the district court's FF&CL acknowledges as much, noting for example Gerrard's concession (made after the 2009 Bulk Assignment and the 2010 Assignment had been rejected as evidence) that, if no assignment to BB&T had taken place under the only relevant admitted evidence, the PAA, there was no basis to reach *any* of the BB&T claims in the litigation (*see*, Notice Doc 17 at pp. 5-6). The district court's Finding 144, also confirms this: "Since BB&T has not proved that it owns the actions or claims asserted herein, it does not have the ability to assert the claims set forth in its Second Amended Complaint." Based on this ruling, the district court specifically determined that the Plaintiff's equitable subrogation / replacement claims were being rejected, *not on the merits*, but because ("since") BB&T had not demonstrated its ownership of the same, and had no right to pursue any of its claims. Any further findings relating directly to the merits of any of those claims were unnecessary dicta, and, as such, are not controlling in this subsequent legal malpractice case, and may not be relied on for any alleged preclusive effect herein.

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For example, in *Pollicino v. Roemer and Featherstonhaugh P.C.*, 277 A.D.2d 666, 668 (N.Y. Ct. App. 2000) the appellate court reversed a lower court's grant of summary judgment dismissal of a malpractice suit, in a case where the underlying suit against the city transit authority had been dismissed for procedural failures, and explained that: "Language that is not necessary to resolve an issue . . . constitutes dicta and should not be accorded preclusive effect . . . . Here, the law firm's failure to serve a proper notice of claim was an error requiring dismissal, and [the court] dismissed the complaint on that ground. Its comment concerning the merits of plaintiff's claim [indicating that it would have been dismissed in any event for failure to show that the authority had notice of a dangerous condition], however, clearly was dicta and, as such, is not entitled to preclusive effect." *See also, Nelson v. Quarles and Brady, LLP*, 997 N.E.2d 872, 894 (Ill. Ct. App. 2013)("A malpractice plaintiff is not required to demonstrate what award the original judge or jury would have made if no malpractice had occurred. Once a malpractice Plaintiff has demonstrated that his attorney fell below a reasonable standard of professional conduct, the fact finder must determine what a reasonable judge or jury would have concluded and compare that conclusion to the actual resolution of the underlying action to determine damages."); *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal.Rptr2d 780, 793 (Ct. App. 1997)("The trial-within-a-trial . . . does not recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done . . . . [This] standard remains an objective one. The trier of facts determines what should have been, not what the result would have been . . . before a particular judge or jury."); *Collins v. Miller & Miller, Ltd.*, 943 P.2d 747, 756 (Ariz. Ct. App. 1996)(in establishing causation in a legal malpractice action, the plaintiff must convince the trier of fact that, but for the attorney's negligence, a reasonable judge or jury would have decided in his or her favor in the underlying action); Restatement (Third) of Law Governing Lawyers section 53, comment b, at 390 (2000)("The judges or jurors who heard or would have heard the original trial or appeal may not be called as witnesses to testify as to how they would have ruled . . . the issue [being] how a reasonable judge or jury would have ruled.").

Moreover, even if the underlying court's unnecessary dicta could be used for preclusive affect, the use to which Defendants wish to put the court's dicta in this case is untenable. "Equitable subrogation permits 'a person who pays off an encumbrance to assume the same

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priority position as the holder of the previous encumbrance.'" *Houston v. Bank of Am. Fed. Savings Bank,* 119 Nev. 485, 488, 78 P.3d 71, 73 (2003)(quoting *Mort v. U.S.,* 86 F.3d 890, 893 (9th Cir.1996)). Thus, the doctrine "enables 'a later-filed lienholder to leap-frog over an intervening lien [holder].'" *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.,* 126 Nev. 423, 429, 245 P.3d 535, 539 (2010) (quoting *Hicks v. Londre,* 125 P.3d 452, 456 (Colo. 2005)). "The practical effect of equitable subrogation is a revival of the discharged lien and underlying obligation" [*i.e.*, of the lien discharged and paid off by the loan secured by the later deed of trust] and equitable subrogation therefore effects an "assignment to the payor or subrogee, permitting [it] to enforce the seniority of the satisfied lien against junior lienors." *Id.,* 126 Nev. at 429, 245 P.3d at 539.

The doctrine of equitable subrogation has sometimes been held inapplicable to loans from the same lender who issued the earlier loan, paid off by the same lender's subsequent loan. However, in this situation, an analogous theory, known as replacement, or replacement and modification, still allows the new deed of trust, in favor of the same original lender, to enjoy priority from the date of the original earlier deed of trust. *See*, for example, the Restatement (Third) of Property: Mortgages (1997) §7.6 at comment (E). Defendants' Motion to Dismiss acknowledges this point, at p. 20, ll. 1-7, citing *Freedom Mortg. Corp. v. Tovare Homeowners Ass'n*, 2012 U.S. Dist. LEXIS 169638 at 9-11 (D. Nev. 2012).

Different states have adopted different rules as to when equitable subrogation (or its analogue, replacement) should apply. The Nevada Supreme Court in *Houston*, adopted the Restatement (Third) of Property approach, and allowed subrogation as long as the lender seeking such subrogation "reasonably expected to get security with a priority equal to the mortgage being paid." *Houston,* 119 Nev. at 491, 78 P.3d at 74. Movants contend that this possibility has been foreclosed by the dicta in the district court's FF&CL, which questioned whether Colonial took sufficient steps to ever have a reasonable expectation that the R&S Lenders Second Deed of Trust was to be released or subrogated. Mot. at pp. 20-21. This analysis, however, omits a key clarifying passage in the *Houston* decision, which notes that, when determining whether the payor reasonably expected to obtain security with a priority equal to the mortgage being paid "**a refinancing mortgagee should be found to lack such an expectation only where there is *affirmative proof* that the mortgagee [*i.e.*, in this case, Colonial] intended to subordinate its**

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mortgage to the intervening interest [*i.e.*, in this case, that of R&S Lenders]." *Houston*, 119 Nev. 485, 490-91, 78 P.3d 71, 74-75 (2003) [emphasis added.]

The district court findings and conclusions on which Movants rely are all based on BB&T's alleged failure, at trial, to establish that R&S Lenders were notified of Colonial's intent that the Construction Loan Deed of Trust was to have first priority, and Colonial's failure to adequately arrange for this subordination to take place (Mot. at pp. 20-21; FF&CL at pp. 14-15; 27). Such inadequate action by Colonial, is, however, *insufficient* to base a ruling that Colonial lacked the requisite reasonable expectation. The district court needed instead to cite some *affirmative proof* that Colonial *intended* that its Construction Loan Deed of Trust would *not* enjoy priority, but would be junior in priority to the R&S Lenders Second Deed of Trust, even though Colonial's new loan was paying off the First Colonial Deed of Trust.

No such affirmative proof of any such Colonial intent was ever shown at trial. Indeed, just the opposite evidence existed, that "Colonial did not make land loans unless secured by a first priority deed of trust" as confirmed by three different witnesses (Notice Doc 17 at p. 8), and that, because Colonial intended to remain secured in first position, it would not close if the title insurer listed the R&S Second Deed of Trust as an exception to title *Id.* at pp. 14-15. However, given that the entire BB&T suit was rejected on the grounds that BB&T had failed to show it owned the Colonial rights, the merits of these arguments were never truly reached, including on appeal, which affirmed the district court's determination to exclude evidence that BB&T owned the Colonial rights, and affirmed the district court on that basis, without reaching beyond the BB&T ownership question to fully adjudicate these merit questions. It is therefore inappropriate for Defendants to rely on dicta and speculation to imagine that the district court or the Supreme Court, would have ruled against the merits of BB&T's claims, had those merits been reached. That is not even the relevant question.

(2) With respect to the contention that certain of Colonial's claims could not have been assigned, relevant authority demonstrates that, had the assignment to BB&T, as clearly demonstrated by the 2009 Bulk Assignment, been established at trial, BB&T would have had full rights to pursue all of Colonial's claims, including but not limited to its equitable subrogation / replacement claims. Indeed, in *Mort v. United* States, 86 F.3d 890, 894 (Ninth Cir. 1996), an

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appeal from a Nevada U.S. District Court ruling, which was later cited with approval by the Nevada Supreme Court in *Houston*, the Circuit rejected an argument that the assignee of a deed of trust could not have the same rights to equitable subrogation as the original lender, and ruled that "the general rule in most states is that where a valid assignment of a mortgage has been consummated with proper consideration, the assignee is vested with all the powers and rights of the assignor . . . . Thus, the [assignees] have the same rights to equitable subrogation as the [the assignor/original refinancing lender]."

(3) Plaintiff's Complaint also adequately alleges that Defendants' failures, as outlined therein, proximately caused the Plaintiff's damages (Comp. at Para. 126), which damages include "the loss of a judgment, settlement or award, and the remuneration that Plaintiff would have recovered by foreclosing on the Subject Property in first priority position" Comp. at Para. 125. These are actual damages, demonstrated by the district court's ruling allowing R&S Lenders, instead of BB&T to foreclose on the Property. Not only does the Complaint adequately assert these final elements of a malpractice claim, but it does so with and by reference to the district court's own (relevant and applicable and non-dicta) findings and conclusions of law, which indicate that the Plaintiff's subrogation and replacement claims were to be rejected "since BB&T has not demonstrated it is a successor in interest" to Colonial Bank and therefore failed to show it had "the ability to assert these claims." Comp. at ¶¶ 98-103; 107-108. It is difficult to imagine how a more clear allegation of proximately caused loss could be made in a legal malpractice suit, than an allegation that the loss occurred "since" (*i.e.*, because of) the lawyer's failure to address a key necessary evidentiary showing, which allegation quotes the original court's own controlling, non-dicta, rulings, upheld on appeal. Plaintiff is entitled, as demonstrated above, to an opportunity to prove that, but for the Defendants' failure, a reasonable court would have ruled on the merits in favor of BB&T.

C. Plaintiff's Second Cause of Action, for Intentional Omission/Fraudulent Concealment Should Not Be Dismissed.

Defendants next argue (Mot. at pp. 23-27), that Plaintiff's Second Cause of Action, for fraud and concealment, relating to Defendants' failure to timely advise plaintiff of a costs award against it, should be dismissed, under a variety of theories.

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First, Defendants aver the statute of limitations applicable to fraud actions requires dismissal of this claim. However, Plaintiff's damages with respect to the fraud claim were not certain, and the claim had thus not fully accrued, until the Judgment in question, containing the subject costs award, was upheld on appeal. Thus, the statute of limitations on the fraud claim did not begin to run until the U.S. Supreme Court's cert. denial, less than two years before this suit was filed, for the reasons already explained above, such that this claim was timely.

Defendants also contend that the Second Cause of Action inadequately asserted that the costs award was a material fact, or was intentionally concealed. However, the Complaint specifically explains the materiality of this fact based on the terms of the PAA, which would have allowed BB&T to avoid paying up to 80% of this award had it been timely made known to BB&T. Comp. at ¶¶ 112-114; 136-139. Its concealment is also specifically alleged. Comp. ¶¶ 114; 135.

Finally, Defendants contend that this claim has not been alleged with sufficient particularity under Rule 9(b). Plaintiff disagrees, given the specific information provided in the Complaint as to the date of the award being entered and served, and the specific provisions of the PAA cited in the Complaint, which would have allowed the Plaintiff to avoid losses had it timely learned of the award. Nevertheless, if this Court agrees with Defendants, then it would be more appropriate to allow Plaintiff leave to amend and provide a more definite statement, than to dismiss this claim with prejudice at this early juncture.

D. <u>The Plaintiff's Breach of Contract Claims and Cause of Action Should Remain in Place.</u>

Defendants next aver that Plaintiff's breach of contract claim should be dismissed. Mot. at pp. 27-30. First, Defendants contend this claim is subject to the two year statute of limitations for legal malpractice, where the gravamen of the contractual breach claim is predicated upon legal malpractice. This is true. *See, e.g., Stalk v. Mushkin*, 125 Nev. 21, 29, 199 P.3d 838, 843-44 (2009)(statute of limitations for legal malpractice held applicable to breach of fiduciary duty claims against an attorney, as a "cause of action for legal malpractice encompasses breaches of contractual as well as fiduciary duties because both concern the representation of a client and involve the fundamental aspects of an attorney-client relationship."). *See also,* NRS 11.207(1) which expressly provides that "[a]n action against an attorney to recover damages for malpractice,

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whether based on a breach of duty or contract, must be commenced within" the statutory limitations period. [Emphasis added.] Based thereon, the same limitations analysis already set forth earlier in this brief, demonstrates that this suit was brought within this two year statute of limitations, which was tolled until the denial of certiorari. Defendants' alternate argument, that the four year or six year statute of limitations would apply (Mot. at pp. 27-28), is therefore moot.

Defendants also contend that Plaintiff has failed to state a claim for breach of contract (Mot. at p.29) for the same reasons previously argued in their brief as applicable to the Plaintiff's malpractice claims (questioning any showing of a breach of duty, or damages). Based thereon, Defendants aver the dismissal of the Breach of Contract claims should be analyzed "in lockstep with" the dismissal of the malpractice claims. Thus, similarly, Movants' arguments on this point should be denied for the same grounds already set forth, in lockstep, above, as to the sufficiently alleged malpractice claims.

Finally, Defendants contend, under *Stalk*, and also under *Chandler v. Black & Lobello*, Nev. Dist. Lexis 1, 8-10 (also located at 2014 WL 1246381)(D. Nev. 2014), that the Plaintiff's breach of contract claim should be dismissed, as duplicative of the legal malpractice claim. This might be true if this court were inclined to dismiss the legal malpractice claim, just as, in *Chandler*, upon granting summary judgment dismissal of the legal malpractice claim, the U.S. District Court for Nevada also dismissed ancillary claims that were based on the same underlying legal malpractice allegations. However, nothing in either the *Stalk* or the *Chandler* decision requires this court to dismiss a cause of action merely because it arises out of the same essential allegations as another claim *where the other claim is not being dismissed*. It is fairly common practice in Nevada for more than one cause of action to be asserted upon a common nucleus of operative facts, and there is no election of remedies principle which requires the Plaintiff to choose one theory over the other at this early juncture.

V. ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND

Under NRCP Rule 15(a), as no responsive pleading (*i.e.*, Answer) has yet been filed by Defendants herein, the Plaintiff could still amend its Complaint at this time, pending a ruling on the Motion to Dismiss. Nevertheless, it does not appear from that Motion that any such amendment is necessary, as all of the arguments set forth therein are overcome by the initial

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Complaint already on file, as shown by this Opposition. Nevertheless, if this Court determines that the Plaintiff's pleading is inadequate in any measure, or is inclined to dismiss any of the claims for relief set forth therein, then the Plaintiff hereby requests that any such dismissal be without prejudice, and with leave to amend within ten (10) days of notice of the entry of any order by this Court, dismissing as inadequate any of the Plaintiff's causes of action or any of the elements thereof. Under NRCP 15(a), leave to amend "shall be freely given when justice so requires." Such leave should be granted absent a specific justification for denial. *See Adamson v. Bowker*, 85 Nev. 115, 121, 450 P.2d 796, 800 (1969)(quoting *Foman v. Davis*, 371 U.S. 178, 182, S.Ct. 227, 230 (1962)) (refusal to grant leave to amend absent a showing of a justifying reason is an abuse of discretion). In the present case, if the Court disagrees with any of the foregoing arguments of this brief, then, in lieu of dismissal of the action, it is requested that Plaintiff first be granted leave to amend, or that this Court (as this department has done in other cases) render any such dismissal without prejudice, unless an amended complaint is not filed within a certain number of days after notice of entry of the order.

CONCLUSION

For the reasons stated above, the Defendants' Motion to Dismiss should be denied, and the Defendants should be compelled to file their Answer, in full, to the Complaint, at this time.

DATED this 28th day of December, 2016.

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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 28th day of December, 2016, service was made by the following mode/method a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS; AND ALTERNATIVE COUNTER-MOTION FOR LEAVE TO AMEND** to the following person(s):

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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.: XXXI **REPLY IN SUPPORT OF DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS COMPLAINT AND OPPOSITION TO ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND** [Concurrently filed with Request for Judicial Notice in Support of Reply; Reply in Support of Judicial Notice; Response and Partial Objection to Plaintiff's Request for Judicial Notice] Date: February 7, 2017 Time: 10:00 a.m. Dept: XXXI Judge: Honorable Joanna S. Kishner

REPLY IN SUPPORT OF DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS COMPLAINT AND OPPOSITION TO ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND

TO THIS HONORABLE COURT, TO ALL PARTIES AND TO THEIR RESPECTIVE COUNSEL OF RECORD:

COMES NOW Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen ("Firm") (collectively, "Defendants"), by and through their attorneys, Craig J. Mariam, Esq., Robert S. Larsen, Esq., and Wing Yan Wong, Esq, of the law firm of Gordon & Rees LLP, submit the instant Reply In Support Of Defendants Douglas D. Gerrard, Esq., And Gerrard Cox & Larsen's Motion To Dismiss Complaint And Opposition To Alternative Countermotion For Leave To Amend ("Reply") as follows:

I. INTRODUCTION

The documents filed by Plaintiff Branch Banking and Trust Company ("Plaintiff") actually *support* Defendants' own arguments. As an example, the Order Denying *En Banc* Reconsideration issued by the Nevada Supreme Court that is attached as Exhibit 23 to Plaintiff's Requests for Judicial Notice ("Opposition RFJN") show that Defendants' evidentiary strategy was in fact supported by a portion of the Nevada Supreme Court ("Thus, it is not surprising that BB&T did not focus its evidence on the FDIC's acquisition and transfer of Colonial's assets to BB&T"). Malpractice defendants are held only to a standard of ordinary skill and capacity. *Day v. Zubel*, 112 Nev. 972, 922 P.2d 536, 538 (1996).

Plaintiff also fails to rebut the undisputed allegation that Defendants had nothing to do with drafting the "Purchase and Assumption Agreement, Whole Bank All Deposits" ("PAA") – the document at the heart of Plaintiff's claims. And, in any event, Plaintiff fails to demonstrate that, but for the alleged malpractice, it would have succeeded at trial. This is fatal to the allegations. Regarding same, Plaintiff selectively and misleadingly adopts Findings of Fact and Conclusions of Law ("FFCL") made by the trial court in the litigation underlying this action, styled *Murdock et al. v. Rad, et al.*, Eighth Judicial District Court Case Number A-08-574852, consolidated with Case No. A-09-594512-C ("*Murdock* Litigation"); for example, ignoring the

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trial court's conclusions that the "The Court will grant the declaratory relief requested in St. Rose Lenders' First Cause of Action" and that in so ruling "St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust." Conclusions of Law, ¶28 – 29 of FFCL.

The fact of the matter is that the entirety of the FFCL was adopted by the trial court in its July 23, 2010 Final Judgment. *See* Request for Judicial Notice in Support of Reply in Support of Motion to Dismiss ("Reply RFJN") at Nos. 24 and 25. Therein, the trial court ruled on the merits of Plaintiff's claims notwithstanding the issue of standing, holding that, even had Plaintiff established standing, it failed to justify the court's equitable power in granting equitable subrogation or replacement for the September 16, 2005 deed of trust ("Second DOT"). Thus, no additional facts will show Defendants caused Plaintiff's damages.

Likewise, Plaintiff wrongly seeks to change black letter law concerning the applicable statute of limitations for litigation-based malpractice claims. As such, Plaintiff fails to rebut how each of its claims are untimely.

II. LEGAL ANALYSIS

A. Plaintiff Fails to Rebut the Fact That the Complaint Fails to Allege Actionable Legal Malpractice for Its First Cause of Action

1. Plaintiff Continues To Fail In Alleging Legally Actionable Malpractice, By Failing To Allege That Defendants' Conduct Breached A Duty Of Skill And Competence

a. *Plaintiff Fails To Rebut The Fact That Neither Defendants – Nor They – Had Any Reason To Expect The Issue Of Standing Would Be Litigated At The Limited Trial*

Plaintiff places false emphasis on whether Defendants have sufficient notice of Plaintiff's claims under Nevada's notice-pleading standard. Opp'n at p. 16:23-25. Though Nevada is a notice-pleading state, a complaint still requires "sufficient facts to establish all necessary elements of a claim for relief." See *Hay v. Hay,* 678 P.2d 672, 674, 100 Nev. 196, 198 (1984). This Court may still dismiss an action where it concludes that the plaintiff can "prove no set of facts that would entitle it to relief" on its claims in light of the facts alleged. See *Blackjack Bonding v. City of Las Vegas Mun. Crt.*, 116 Nev. 1213, 1222, 14 P.3d 1275, 1281 (Nev. 2000).

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The conduct that Plaintiff continues to repeat is not legally actionable malpractice, and no set of facts will change this outcome based on Plaintiff's tacit admissions. Plaintiff admits that NQF No. 24 is the controlling issue most on point, which stated expressly the question "Whether BB&T paid proper consideration and thus is able to have an 'assignment' that comes with equitable rights?" Opp'n at p.6:3-9; RFJN No. 8, Exhibit C thereto. This question concerned the issue of consideration paid, not the nature of the assignment itself.

Even if the Defendants' reliance on this NQF was a misunderstanding – a position that is denied – "[a] lawyer is not expected to be perfect in giving advice to her clients." *Myers v. Maxey*, 1995 OK CIV APP 148, P11, 915 P.2d 940, 945 (Okla. Ct. App. 1995). Courts across the country do not hold lawyers liable for disagreeing with a controversial or particularly discretional point of law later found to be erroneous. See, e.g., *Halvorsen v. Ferguson*, 735 P.2d 675, 681, 46 Wn. App. 708, 717 (Wash. Ct. App. 1986) ("In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice."); *Sun Valley Potatoes v. Rosholt*, 981 P.2d 236, 239-240, 133 Idaho 1, 4-5 (Idaho 1999) ("courts have then held as a matter of law that an attorney cannot be held liable for failing to correctly anticipate the ultimate resolution of an unsettled legal principal"); *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685, 689 (Cal. 1961) (an attorney "is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers.").

In the order denying *en banc* rehearing of the appeal filed by Plaintiff in the Nevada Supreme Court, Justices Kristina Pickering and James Hardesty submitted a dissent that "the district court and panel decisions in this case place Nevada at odds with uniform law established by state and federal courts across the country" and that "in their procedural aspect, the decisions conflict with settled Nevada law." See Exhibit 23 filed in support of Plaintiff's Request for Judicial Notice at p. 19. The Justices state further:

> This appeal grew out of an expedited evidentiary hearing the district court ordered to decide the relative priority of the notes and deeds of trust held by BB&T and R&S St. Rose Lenders on a piece of commercial property. The order setting the hearing adopted a list of issue to be tried that several parties submitted. That list did not challenge BB&T's status as successor-in-interest to Colonial via the P&A Agreement. Thus, it is not surprising that BB&T did not focus its evidence on the FDIC's acquisition and transfer of Colonial's assets to BB&T. When, as the

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> hearing neared completion, the district court rejected the P&A Agreement as insufficient to establish BB&T's standing to enforce the Colonial note and deed of trust – a seemingly singular position under caselaw elsewhere – BB&T sought leave to admit documents specifically assigning the note and deed of trust in issue. The district court excluded these documents on the grounds they were not disclosed before discovery closed. But of course they were not-they did not exist before discovery concluded; indeed one was created overnight, specifically to allay the district court's stated concern that BB&T lacked standing.

Id. (emphasis added).

Thus, Exhibit 23 to the Plaintiff's Request for Judicial Notice shows that two out of the seven justices who decided the Motion for *En Banc* Reconsideration differed in opinion on the issue of Defendants' reliance on the NQF. Such a difference of opinion shows that this issue is not clear-cut or widely recognized by the legal profession – a dispute that is the very definition of an "unsettled legal principal" that no lawyer is held to perfection in applying. *See Sun Valley Potatoes v. Rosholt*, 981 P.2d 236, 239-240, 133 Idaho 1, 4-5 (Idaho 1999). "An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect." *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989). The decision at issue in this malpractice action – whether to submit evidence of the assignment specifics in light of the NQF directions – is thus reasonable in light of the circumstances. Thus, under Plaintiff's theory of the case, no set of facts will show malpractice occurred.

b. *Plaintiff Admits Defendants Did Not Draft the PAA, a Document that Was Irrelevant and Unnecessary to Use at the Limited Trial Based on Defendants' Understanding of the NQF*

Plaintiff cannot maintain an action over the sufficiency of the PAA – as Plaintiff does not rebut or dispute the fact that Defendants did not draft this document. Plaintiff contends that Defendants somehow failed to "ask BB&T or otherwise determine by reviewing Clark County public records, filings, prior to trial, whether any other documents existed which could be used at trial in lieu of the deficient PAA." Opp'n at p. 19:17-19.

Again, this presupposes that the issue of the asset transfer was an issue subject to the limited trial. This puts the cart before the horse, as previously stated, and articulated by Justices Pickering and Hardesty, "it is not surprising that BB&T did not focus its evidence on the FDIC's acquisition and transfer of Colonial's assets to BB&T." See Exhibit 23 to Opposition RFJN.

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Thus, as argued above, the primary reason Defendants did not submit the PAA earlier was because it was not an issue in the limited trial.

When it later became an issue at the end of the limited trial, the Defendants submitted – and the court accepted – the PAA into evidence. See RFJN 19. Whatever deficiencies existed in the PAA is not the fault of Defendants, as Plaintiff admits Defendants did not draft it.

c. *Plaintiff Fails to Allege When Defendants Had Notice of the 2009 Bulk Assignment, a Document that Was Irrelevant and Unnecessary to Use at the Limited Trial Based on Defendants' Understanding of the NQF*

Plaintiff admits that that "the Complaint does not allege when the 2009 Bulk Assignment was first discovered by the Defendants[.]" Opp'n at 20:4-5. Thus, Plaintiff argues, obviously without basis, that Defendants should have submitted the 2009 Bulk Assignment to the trial court before learning of its very existence. Of course, Defendants could not produce documents they did not know exist (such as the 2009 Bulk Assignment) or did not exist at all (such as the March 2010 Assignment).

Thus, Plaintiff's argument proceeds on the theory that Defendants should have "looked for or found [the 2009 Bulk Assignment] via a search of the Clark County Recorder's office [. . .] something which they demonstrably would and should have done [.]" Plaintiff seemingly would have Defendants sweep the Clark County records office for any record concerning the subject property, the *Murdock* litigants, the FDIC, BB&T, or Colonial even if Defendants did not believe this was necessary for the case at the time.

Plaintiff cites the case *In Re Seare*, 493 B.R. 158 (Bankr. D. Nev., 2013) to stand for the proposition that "Defendants had a duty, in order to satisfy all of BB&T's necessary showings at trial, to at least advise BB&T of any possible problems with its ownership of the claims, and of the need to remedy the same, and to timely inquire of any documentation which did remedy the issue." Opp'n at p. 21:17-20. This case concerned a bankruptcy lawyer sanctioned for incompetently handling a bankruptcy client's case. *In Re Seare*, *supra*, 493 B.R. at 171-173. The lawyer there failed to adequately explain to his "layperson" client the details of when certain acts of fraud are dischargeable under the bankruptcy code. *Id*. at 190.

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In Re Seare differs from the instant case. Plaintiff does not claim that Defendants failed to explain an issue as complex as personal bankruptcy. See *id*. at 195 (noting that "that bankruptcy, and adversary proceedings in particular, are highly complex", which weighed against the lawyer.) Moreover, Plaintiff is not an unsophisticated "layperson" involved in bankruptcy, but a national bank, presumably familiar both with the acquisition of assets and litigating property disputes around the country. The lawyer in *In Re Seare* also failed to investigate a garnishment connected to a prior judgment, an issue the lawyer affirmatively knew existed and knew would affect his client's bankruptcy. *Id*. at 190-191.

The issue in this instant case is the presentation of evidence at a limited trial, and as previously discussed, the Defendants provided the trial court with the evidence necessary to the issues identified in the NQF. Unlike *In Re Seare*, Defendants were not affirmatively aware this issue would be material to the Plaintiff's case at the time of the limited trial to raise a "red flag," unlike a bankruptcy lawyer who fails to investigate a prior judgment that directly affects his client's bankruptcy. See *id*. at 189 (describing a bankruptcy lawyer's unique role in ascertaining "to what extent any nondischargeable debts are the driving force behind the potential client's decision to seek counsel.").

Finally, the lawyer in *In Re Seare* refused to defend his own client during an adversarial proceeding, claiming this was outside the scope of his services. See *id*. at 173-174. Here, Plaintiff does not claim that Defendants abandoned them to litigate their case alone.

d. *Plaintiff Fails to Rebut the Fact It Was Aware of Those Aspects of the Case Critical to Its Alleged Agreement with the FDIC*

In the face of documentary evidence to the contrary, Plaintiff claims that Defendants' "failure to timely communicate the terms of the cost award" in the *Murdock* Litigation robbed it a chance to enforce its cost-sharing agreement with the FDIC. Opposition at p. 22:7-8.

Plaintiff continues to omit critical facts from its claim: when or how it learned of the Final Judgment. Plaintiff is required to plead the "circumstances under which [the alleged concealed information] was discovered." *Raifman v. Wachovia Secs*, 649 Fed. Appx. 611, 613

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Las Vegas, NV 89101

(9th Cir. 2016) (quoting *Baker v. Beech Aircraft Corp.*, 114 Cal. Rptr. 171, 175 (Cal. Ct. App. 1974)).

Likewise, Plaintiff fails to rebut the fact that it was substantively aware of every aspect of the fallout from the limited trial, including, but not limited to:

- The Motion for New Trial submitted on July 8, 2010;
- The trial court's July 23, 2010 judgment against Plaintiff in favor of the R&S Investors;
- The R&S Investors' July 30, 2010 submitted Memorandum of Costs & Disbursements;
- The September 24, 2010 appeal to the Nevada Supreme Court; and
- The trial court's October 5, 2010 ruling on the Motion for New Trial.

Thus, Plaintiff's claim that it was blindsided by the cost award and that Defendants failed to communicate same are not supported by the facts Plaintiff fails to deny.

2. Plaintiff Fails to Rebut the Fact that It Cannot Prove Proximate Causation as well as Actual Damages and Losses Because Plaintiff Would Not Have Succeeded in the Murdock Litigation Regardless

a. *The Entire Findings of Fact and Conclusions of Law Issued by the Trial Court Were "Adopted" by the Trial Court, and Show that the Trial Court Reached the Merits of Plaintiff's Claims on the Issue of Loan Priority*

Plaintiff next fails to establish that Plaintiff suffered any damages proximately caused by Defendants' alleged malpractice. Legal malpractice requires a "cases-within-the case" analysis where the plaintiff must show "that but for the alleged malpractice, he would have received a better result [.]" *Chandler v. Black & Lobello*, 2014 Nev. Dist. LEXIS 1, *12 (D. Nev., Feb. 26, 2014).

Plaintiff is thus required prove that, but-for Defendants' alleged failure to submit evidence of its asset acquisition, it would have won the day in the *Murdock* Litigation concerning, at least, the issues of equitable subrogation and replacement. However, the issue of standing would have made no difference, since the lower court found against Plaintiff substantively and on the merits regarding the subrogation and replacement claims, as shown in the Findings of Fact and Conclusions of Law ("29. St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust").

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Las Vegas, NV 89101

Plaintiff does not oppose the fact that causation is a required element for a legal malpractice claim. See *Day v. Zubel*, 112 Nev. 972, 922 P.2d 536, 538 (1996). Instead, Plaintiff claims that it is "completely unnecessary to speculate as to what the merits of any of the claims might have been, had they been reached." Opp'n at p. 23:12-13. Plaintiff cites numerous non-Nevada cases for its position that pleading the "trial-within-a-trial" but-for causation element does not require recreating "what a reasonable judge or fact finder would have done" absent the alleged malpractice. Opp'n at 24:14-16 (quoting *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal.Rptr2d 780, 793 (Ct. App. 1997)).

The trial court *did* determine the merits of Plaintiff's claims in the *Murdock* Litigation, specifically, the issues of equitable subrogation and replacement. Nearly the entirety of the limited trial concerned these issues, and evidence was presented to the trial court about whether equitable subrogation and replacement occurred. It was only on the final day of the limited trial that the trial court surprised Defendants with its position on the issue of what Colonial assets Plaintiff owned – an issue not identified in the NQF – and an issue that does not matter here.

The trial court was clear on the claims before it at trial: not only was the trial court adjudicating on Plaintiff's claims regarding priority, "St. Rose Lenders filed a Counterclaim on October 27, 2009 seeking a declaration that the 2005 St. Rose Lenders Deed of Trust has priority over the 2007 Colonial Bank Deed of Trust." FFCL at 2:11-13 (emphasis added). In the same FFCL, the trial court expressly ruled,

> 28. The Court will grant the declaratory relief requested in St. Rose Lenders' First Cause of Action.
>
> 29. St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust.

Conclusions of Law, ¶28 – 29 of FFCL (emphasis added).

Because St. Rose Lenders sought a declaration that its deed of trust had priority over Colonial's deed of trust, the trial court made extensive findings and conclusions on the merits of the equitable subrogation and replacement arguments. *E.g.,* Conclusions of Law, ¶ 22-27 of FFCL. The trial court found Colonial's deed of trust was junior to the St. Rose Lenders' deed of trust. Therefore, even if Plaintiff had successfully proven it owned the deed of trust, Plaintiff

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would have sustained the same damages it is now claiming. Since Colonial's deed of trust was junior to the St. Rose Lenders' deed, Plaintiff's interest was also junior to the St. Rose Lenders' deed. Whether Plaintiff had ownership of Colonial's deed of trust became, and was, irrelevant. Plaintiff could not have gotten a better result. The damages, namely the loss of priority, were not caused by any action by Defendants.

The FFCL was formally adopted in in its entirety by the trial court, which issued two separate Final Judgments in the *Murdock* Litigation: one on July 23, 2010 and one on November 10, 2010. The Final Judgment entered on July 23, 2010 referenced the June 23, 2010 FFCL and ordered specifically that "The Findings of Fact and Conclusions of Law are hereby incorporated herein[.]" See Reply RFJN at Nos 24 and 25.

b. *Plaintiff Cannot – as a Matter of Law – Establish Equitable Subrogation or Replacement*

Plaintiff attempts to re-argue the merits of its claims to equitable subrogation and replacement in the *Murdock* Litigation. In quoting liberally from the case *Houston v. Bank of America Fed. Sav. Bank*, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003), Plaintiff claims that a court must find for equitable subrogation unless "there is affirmative proof that the mortgagee [i.e., in this case, Colonial] intended to subordinate its mortgage to the intervening interest [i.e., in this case, that of R&S Lenders]." Opp'n at 25:28-26:1. Plaintiff claims that the district court failed to "cite some *affirmative proof* that Colonial *intended* that its Construction Loan Deed of Trust would *not* enjoy priority[.]" Id. at p. 26:6-8 (emphasis in original).

Plaintiff misapply *Houston*, as the court there found that the bank in that case "paid off the entire former mortgage 'with the intention and belief it would acquire [the intervening mortgagee]'s first-position deed of trust lien on the Property." *Houston*, 119 Nev. at 491, 78 P.3d at 75. The opposite finding was made by the trial court in the *Murdock* Litigation, which found that Colonial "did not have a reasonable expectation that it would receive a reconveyance of the [Second DOT]" to put it in first priority position. See RFJN at 2F.

Moreover, the *Houston* court not did not involve the issue of reconveyance between loans. Other courts holding in favor of equitable subrogation in circumstances similar to the

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Murdock Litigation held so because the subrogating party "obtained a reconveyance" from the intervening lien holder. See *Meier v. Tms Mortg.*, 2000 Nev. Dist. LEXIS 204, *5 (Nev. Dist. Ct. Feb. 16, 2000). Equitable subrogation is only proper "unless the superior or equal equities of others would be prejudiced thereby[.]" *Id.* (quoting *Katsivalis v. Serrano Reconveyance Co.*, 138 Cal. Rptr. 620, 625, 70 Cal. App. 3d 200, 210 (Cal. App. 1st Dist. 1977).

Thus the rights and equities pertaining to the R&S Lenders are important elements of the analysis, and cannot be thrown away as Plaintiff would prefer. See *Houston*, 119 Nev. at 491, 78 P.3d at 75 ("Subrogation will not be granted if it would result in injustice or prejudice to an intervening lienor."). A trial court does not abuse its discretion in weighing the prejudice served to an intervening lien holder and refusing to grant equity on the issue of equitable subrogation. See *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 433, 245 P.3d 535, 542 (Nev. 2010) (refusing equity where "subrogation, under the circumstances, would be detrimental to a junior lienholder").

The trial court heard substantial evidence and testimony concerning the reconveyance issue as it affected the rights and equities of the R&S Lenders, finding that the R&S Lenders had not consented to a reconveyance of their loan. See FFCL, Findings of Fact numbers 79, 80, 83, 85, 105, attached as Exhibit A to the RFJN. This led to the following express findings:

> 121. Since St. Rose Lenders, was not a party to either the 2007 Colonial Bank Deed of Trust or the Construction Loan Agreement, it is not required to subrogate its Deed of Trust.
>
> 122. An agreement which prejudices lien holders or impairs their security requires their consent.
>
> 123. St. Rose Lenders did not consent to subrogate its Deed of Trust.

See *id.* Thus, the trial court made express findings on the issue of prejudice and equity to the R&S Lenders. Likewise, the trial court made express conclusions of law on the issue of reconveyance and equitable subrogation. RFJN at Nos. 2K, 2G. Thus, counter to Plaintiff's position, the trial court did rule on the merits of their case, and found it lacking.

c. *Plaintiff's Remaining Claims in the Murdock Litigation Were Not Assignable in Any Respect*

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Las Vegas, NV 89101

Plaintiff alleges it would have a right to pursue its remaining fraud and civil conspiracy claims as a result of its rights under equitable subrogation. Opp'n at p.26:24-27:7. However, the case cited by Plaintiff does not address the assignment of fraud or civil conspiracy claims, but merely the assignment of a party's "right to equitable subrogation of their interest" in a deed of trust. *Mort v. United States*, 86 F.3d 890, 895 (9th Cir. Nev. 1996).

First, as discussed immediately above, the trial court ruled on the merits of the issue of equitable subrogation/replacement, and ruled against it. Thus, Plaintiff's argument is untenable.

Second, it is ancient Nevada law that fraud and tort-based claims – as opposed to equitable subrogation rights – are not assignable, a position Plaintiff fails to rebut. *See Prosky v. Clark*, 32 Nev. 441, 445, 109 P. 793, 794 (Nev.1910) ("Rights of action based on fraud . . . . are held by the courts to be not assignable, but are personal to the one defrauded.").

As a result, Plaintiff has not established any possible theory of causation, and has thus failed to establish it suffered any damages caused by the Defendants. See *Day v. Zubel*, 112 Nev. 972, 922 P.2d 536, 538 (1996). Thus, the Complaint fails to establish the required elements of a legal malpractice cause of action, justifying dismissal of same.

B. Plaintiff Fails to Rebut the Fact That Its Second Cause of Fails to State a Claim

1. Plaintiff Fails to Rebut How Its Claim for Fraudulent Concealment Does Not Allege Concealment of a Material Fact with Particularity

A required element for the *prima facie* case of fraudulent concealment is that a defendant "concealed or suppressed a material fact." *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1485, 970 P.2d. 98, 110 (1998), overruled in part *GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001).

Plaintiff claims that "the terms of the PAA, which would have allowed BB&T to avoid paying up to 80% of this award had been timely made known to BB&T." Opposition at 28:8-11. However, Plaintiff does not rebut the fact that it was aware of the FFCL issued on June 23, 2010 or the subsequent motions and appeals that directly followed. Thus, Plaintiff tacitly admits it was fully aware that the trial court ruled against it to trigger its alleged shared-costs agreement with the FDIC.

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Las Vegas, NV 89101

2. Plaintiff Makes No Attempt to Rebut Its Failure to Allege Defendants Acted With Intent to Defraud or the Fact Plaintiff Cannot Prove that the Claimed Concealment Caused its Damages

Plaintiff makes no attempt to rebut the Motion to Dismiss concerning two aspects of its cause of action for fraudulent concealment, namely, (1) that Defendants acted with intent to defraud or (2) that Plaintiff can prove the alleged concealment caused its damages. The elements of "intent to defraud" and causation are required in the *prima facie* for a claim of fraudulent concealment *Dow Chem. Co.*, *supra*, 114 Nev. at 1485.

A failure to challenge an issue or argument is seen as "a clear concession" of the merits of same. See *Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955). Thus, Plaintiff concedes its Complaint fails to establish these elements, justifying dismissal of the fraudulent concealment cause of action.

3. Plaintiff Concedes It Failed to Plead with Particularity

Finally, Plaintiff essentially concedes it failed to plead its fraudulent concealment claim with particularity, as is required by NRCP9(b). See *Golden Nugget v. Ham*, 98 Nev. 311, 314-315, 646 P.2d 1221, 1224 (1982). Specifically, Plaintiff failed to allege the facts surrounding when and how it first discovered the alleged concealment – the November 10, 2010 Final Judgment. Plaintiff fails to supply this factual background, justifying dismissal of the fraudulent concealment cause of action.

C. Plaintiff Fails to Rebut the Fact That Its Third Cause of Action Fails To State A Claim

Plaintiff fails to rebut how its cause of action for breach of contract fails to state a legally actionable claim. Plaintiff contends that its analysis of its legal malpractice cause of action is applicable to its breach of contract claim. Opp'n at 29:6-12. Similarly, as argued in Section II(A), its claims for breach of contract must fail in lockstep with its allegations of legal malpractice.

However, Plaintiff admits that its breach of contract cause of action is duplicative of its legal malpractice cause of action "if the court was inclined to dismiss the legal malpractice action." Opp'n at p. 29:15. Furthermore, Plaintiff attempts to couch this admission claiming –

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without citing any authority – that "[i]t is fairly common practice in Nevada for more than one cause of action to be asserted upon a common nucleus of operative facts, and there is no election of remedies principle which requires the Plaintiff to choose one theory over the other at this early juncture." *Id.* at p. 29:20-23.

However, Plaintiff fails to explain any substantive or procedural difference between its legal malpractice and breach of contract causes of action. Both hinge on the same allegations, both are treated substantively the same, and both have the same statute of limitations. *Stalk v. Mushkin*, 199 P.3d 838, 843, 125 Nev. 21, 28 (Nev. 2009). Thus, any remedy collected for its breach of contract claim, if successful, would be duplicative of its remedy under a successful legal malpractice action. The same result applies if one is dismissed – so goes the other. As both causes of action are merely redundant and waste the time of the Court and of defense counsel in needless arguments and paperwork, such as potential jury instructions, the Court should dismiss the breach of contract cause of action as merely superfluous.

D. Plaintiff's Claims are Untimely

1. Plaintiff Fails to Rebut How the Statute of Limitations Has Run On Its Legal Malpractice Cause of Action

a. *Plaintiff Cites No Controlling Authority To Stand For The Proposition That The Litigation Tolling Rule Extends To Filing Writs Of Certiorari*

Plaintiff essentially concedes that – absent the denial of its writ of certiorari to the United States Supreme Court – its legal malpractice action is untimely. However, in opposing the Motion to Dismiss, Plaintiff cites no Nevada authority that stands for the proposition that the litigation tolling rule allows for the Nevada legal malpractice statute of limitations to be tolled until after such a writ is denied.

Nevada law holds that "it is only after the underlying case has been affirmed on appeal that it is appropriate to assert injury and maintain a legal malpractice cause of action for damages." *Semenza v. Nevada Medical Liab. Ins. Co.*, 765 P.2d 184, 186, 104 Nev. 666, 668 (Nev. 1988) (ruling that a legal malpractice action was premature until resolution of the initial appeal, but where a writ of certiorari to the United States Supreme Court was not involved); see also *K.J.B., Inc. v. Drakulich*, 811 P.2d 1305, 1306, 107 Nev. 367, 370 (Nev. 1991) (plaintiff's

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Las Vegas, NV 89101

legal malpractice action was premature when filed before trial court rendered judgment in an unlawful detainer action).

The *Murdock* Litigation was affirmed on appeal by the Nevada Supreme Court on May 31, 2013 – a fact that Plaintiff does not and cannot refute. As described in the instant Motion, a writ of certiorari is not an appeal guaranteed by right to civil cases filed in state court. Thus, this action is untimely in that it was filed on October 5, 2016 – 493 days after the statute of limitations had run.

It is true that Nevada tolls the statute of limitations until the underlying case has been affirmed on appeal. *Semenza v. Nevada Medical Liab. Ins. Co.*, 765 P.2d at 186. But none of the controlling cases cited by Plaintiff extend this "litigation tolling rule" to writs of certiorari filed in civil state cases to the United State Supreme Court.

The malpractice action *Hewitt v. Allen*, 118 Nev. 216, 219, 43 P.3d 345 (Nev. 2002), cited by Plaintiff, was based on a criminal case were the plaintiff had voluntarily dismissed an appeal after determining it was futile. In the resulting malpractice suit, the Nevada Supreme Court held only "that a party does not abandon his right to pursue a claim of legal malpractice by voluntarily dismissing his appeal from an adverse judgment where the judgment is not likely to be reversed due to a finding of judicial error." *Id.* The effect of a writ of certiorari to the United States Supreme Court was not involved – or discussed – in that case. *Id.* The case has no application to the instant facts and should be disregarded.

Also cited by Plaintiff is the case *Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. Adv. Op. 68, 333 P.3d 229, 335 (Nev. 2014), where the court held that the statute of limitations for a legal malpractice action was tolled until resolution of an appeal to the Nevada Supreme Court. Again, a writ of certiorari to the United States Supreme Court is a different animal, and is *not* an appeal by right. Thus, the argument is off-point.

b. *Plaintiff's Out of State Authority is Off-Point*

Nevada law has never held that the statute of limitations for legal malpractice actions is tolled until the United States Supreme Court rules on a writ of certiorari. And the out-of-state cases cited by Plaintiff do not further its argument. Similar to the Nevada cases cited by

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Plaintiff, the Texas case *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 155 (Tex. 1991) did not involve or discuss the effect of a writ of certiorari. It, too, has no application here.

Plaintiff also cites the Texas case *Golden v. McNeal*, 78 S.W.3d 488, 493 (Tex. Ct. App. 2002) to stand for the proposition that a legal malpractice action is tolled until a party exhausts "all" avenues of appeal. However, the court in that case incorrectly held that a writ of certiorari is a "matter of right." *Id.* It is not; the United States Supreme Court carries discretion "granted only for compelling reasons" to entertain them. *See* Sup. Ct. R. 10; see also 28 U.S. Code §§ 1254, 1257.

The remaining non-Nevada cases cited by Plaintiff merely hypothesize the effect of a writ of certiorari in *dicta*, as the plaintiffs therein never filed writs of certiorari. See *Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto and Friend, LLP*, 404 S.W.3d 75, 78 (Tex. Ct. App. 2013) (plaintiff never filed writ of certiorari in federal case over a patent issue; malpractice action ultimately ruled untimely); *Barker v. Miller*, 918 S.W.2d 749, 750 (Ky. Ct. App. 1996) (plaintiff never filed a writ of certiorari); *Mackenzie v. Leonard*, 2009 U.S. Dist. LEXIS 66617, *6, 2009 WL 2383013 (D. Ariz. 2009) (plaintiff never filed a writ of certiorari). Thus, no case cited by Plaintiff stands for the proposition that statute of limitations period stretches to decisions on writs to the United States Supreme Court.

c. *The Intent Of The Legislature And Public Policy Favors Accrual Of Statute Of Limitations After Affirming The First Appeal*

The Court "must give the statute the interpretation that 'reason and public policy would indicate the legislature intended.'" *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 580, 97 P.3d 1132, 1135 (Nev. 2004) (quoting *State, Dep't Mtr. Vehicles v. Vezeris*, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986)).

The Nevada Supreme Court has remarked that the "public-policy considerations that form the basis for any statute of limitations" are "a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security." See *Winn v. Sunrise Hosp. & Med. Ctr.*, 277 P.3d 458, 465 (Nev. 2012). In malpractice actions, public policy weighs the interests of the represented client with the interests of counsel, allowing clients to

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"file claims against their attorneys when they become aware that they have suffered harm, yet relieves attorneys from the prospect of unlimited and unending liability." *See Silvers v. Brodeur*, 682 N.E.2d 811, 818 (Ind. Ct. App. 1997).

Allowing the litigation tolling rule to extend to the resolution of writs of certiorari to the United States Supreme Court wrongly prolongs the statute of limitations period. Under Nevada law, malpractice suits already toll through the duration of the state appeals process, delaying the malpractice action for years from the time the potential attorney malpractice occurred. *Semenza v. Nevada Medical Liab. Ins. Co. supra*, 765 P.2d at 186. A writ of certiorari to the United States Supreme Court elongates this process further, taking months or years to complete – as evidenced by the very litigation subject to this malpractice action. This was *not* the intent of the Nevada legislature.

To wit, Plaintiff's malpractice grievances stem from a ten-day limited trial that ended on April 14, 2010, resulting in an initial ruling issued by the trial court on July 23, 2010 and affirmed by the Nevada Supreme Court on May 31, 2013. Thereafter, Plaintiff dropped Defendants as counsel, and waited to file its writ of certiorari with the United States Supreme Court – submitted by different counsel – on May 22, 2014. *See* Exhibit 24 to the Opposition RFJN. The writ of certiorari was ultimately denied on October 6, 2014 before this action was filed two years later. Thus, **over six and a half years** passed since the substance of Plaintiff's action occurred during the limited trial that ended on April 14, 2010.

Given that (1) Plaintiff was aware of all conduct that occurred in the limited trial ending on April 14, 2010 (and does not claim otherwise), (2) Plaintiff filed various motions and appeals on the issues complained of in the underlying malpractice action, and (3) Plaintiff eventually hired new counsel to file its writ of certiorari with the United States Supreme Court – it is paradoxical for Plaintiff to claim it was unaware of "all facts relevant to the foregoing elements and damage has been sustained" to commence its malpractice action until the Supreme Court denied its writ of certiorari over six years after all the substantive facts found in the instant litigation occurred. *See Semenza v. Nevada Medical Liab. Ins. Co. supra*, 765 P.2d at 186 (citing *Jewett v. Patt*, 95 Nev. 246, 247, 591 P.2d 1151, 1152 (1979)).

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2. Plaintiff Fails to Rebut How the Statute of Limitations Has Run On Its Fraudulent Concealment Claim

Plaintiff sweeps aside applicable law concerning accrual of the statute of limitations for fraudulent concealment on the basis that its damages were not "certain" until the United States Supreme Court denied its writ, citing no case law or applicable statute. The applicable statute of limitation is not based on when full damages are ascertainable, as Plaintiff alleges, but "upon discovery by the aggrieved party of the facts constituting the fraud." *Siragusa v. Brown*, 114 Nev. 1384, 1389, 971 P.2d 801, 805 (1998).

Plaintiff's fraudulent concealment claim centers around its untenable allegation that Defendants concealed the November 10, 2010 Final Judgment issued by the trial court in the *Murdock* Litigation. Plaintiff does not rebut how it was aware of every fact underlying its alleged fraudulent concealment as far back as 2010, including an appeal on its judgment filed on September 24, 2010, which was ruled on by the Nevada Supreme Court on May 31, 2013.

Likewise, even if the statute of limitations was based on when Plaintiff ascertained its damages, the latest Plaintiff could possibly ascertain its perceived "damages" was the ruling by the Nevada Supreme Court on May 31, 2013 on its appeal, its last appeal of right for those reasons discussed immediately above. As this case was filed on October 5, 2016, the three year statute of limitations afforded by NRS 11.190(3)(d) long ran, a position Plaintiff fails to rebut under any theory of accrual.

3. Plaintiff Fails to Rebut How the Statute of Limitations Has Run On Its Breach of Contract Cause of Action

Plaintiff admits that the two-year statute of limitations for legal malpractice claims applies to its breach of contract cause of action under NRS 11.2017(1). Opp'n at p. 28:20-23. Thus, the analysis as to the statute of limitations for Plaintiff's legal malpractice cause of action, argued in Section II(D)(1), applies to its breach of contract cause of action.

III. OPPOSITION TO ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND

Plaintiff moves, in the alternative, for leave to amend its Complaint if dismissal is granted. However, leave to amend is properly denied where further amendment to the Complaint

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is "futile." See *Allum v. Valley Bank*, 109 Nev. 280, 287, 849 P.2d 297, 302 (Nev. 1993) (quoting *Reddy v. Litton Indus.*, 912 F.2d 291, 296 (9th Cir. Cal. 1990)).

As argued above, it is not possible for Plaintiff to establish a factual basis for its claims, as its entire theory of this case is legally defective. First, Plaintiff cannot establish legal malpractice due to Defendants' justifiable reliance on the issues identified for trial in the NQF, shown in Section II(A)(1)(a). Moreover, Defendants made a reasonable attempt to support Plaintiff's ownership of the claims at issue in the *Murdock* Litigation, proven unsuccessful by Plaintiff's own poor drafting PAA and Plaintiff's own poor handling of the asset transfer in general, shown in Sections II(A)(1)(b-c).

Finally, Plaintiff fails to articulate any theory of causation, as even assuming, *arguendo*, that Defendants breached a professional duty, Plaintiff lost the entirety of its claims on their merits when the trial court ruled that it failed to afford the power of equity to justify equitable subrogation or replacement, shown in Section II(A)(2). As described in Sections II(B) and (C), *supra*, Plaintiff's remaining claims fail in lockstep for essentially the same reasons. Thus, any amendment is futile to cure these defects as they amount to legally impossible claims.

IV. CONCLUSION

Plaintiff fails to articulate any reason to salvage its case. In sum, the record shows – and Plaintiff fundamentally admits – that Defendants attempted every possible legal strategy to ensure Plaintiff succeeded at its limited trial in the *Murdock* Litigation. However, Plaintiff's case was doomed, given its prior failure to perfect a valid asset transfer and Colonial's failure to ensure the Second DOT was reconveyed. Neither the Complaint nor the Opposition rebut the fact that Defendants played no role in the transactional work that caused these two separate events. As litigation counsel, the record from the trial court shows that Defendants did

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everything in their power to litigate this case, to no avail. As Plaintiff's legal malpractice cause of action fails, so fails their entire action, which must be dismissed without leave to amend given that such amendment would be futile.

DATED this 17th day of January, 2017.

Respectfully submitted,

GORDON & REES, LLP

/s/ Craig J, Mariam

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

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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 LLP, and that on the 17th day of January, 2017, the foregoing **REPLY IN SUPPORT OF DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS COMPLAINT AND OPPOSITION TO ALTERNATIVE 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:

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D. Chris Albright, Esq.
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/s/ Gayle Angulo
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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,

Defendants.

CASE NO. A-16-744561-C

DEPT NO. XXXI

PLAINTIFF'S REPLY IN SUPPORT OF ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND COMPLAINT

Date of Hearing: February 7, 2017
Time of Hearing: 10:00 a.m.

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 files the herein Reply Points and Authorities in Support of its Alternative Countermotion to Amend, which it filed with its Opposition to the Motion to Dismiss filed by Defendants, DOUGLAS D. GERRARD, ESQ. (hereinafter "Gerrard") and GERRARD COX & LARSEN (hereinafter "GC&L") (collectively hereinafter the "Defendants").

Said Alternative Countermotion is opposed at pages 18-19 of the Defendant's Reply Points and Authorities in Support of their Motion to Dismiss.

I. The Countermotion Is in the Alternative and Need Only Be Addressed if Required By this Court's Ultimate Order on any Portion of the Motion to Dismiss.

It should first be noted that Plaintiff does not believe an order allowing it to amend is necessary. That is to say, Plaintiff's Complaint adequately states the causes of action set forth therein and Defendants have failed in their Motion to demonstrate otherwise.[1] Indeed, Defendants' own arguments even tend to support this, in that they do not really focus on or claim missing factual averments, so much as they argue (incorrectly) that no allegations could overcome their legal defenses. Nevertheless, in the event this Court believes any of the allegations of the Complaint are inadequate, Plaintiff should be allowed to amend as justice would so require.

II. Response to Arguments Regarding the NQF.

Defendants first argue, in their Opposition to the Alternative Countermotion to Amend that it would be impossible for the Plaintiff to amend its complaint in a manner which would preserve any claims because the Plaintiff's entire theory of the case is legally defective. Defendants base this argument on what they describe as their justifiable reliance on the issues identified for the underlying trial in the NQF filed in the underlying litigation. This argument, however, ignores (i) the language of that NQF which does in fact question BB&T's ownership of the claims at issue in the underlying suit; (ii) the district court's statements at the first day of trial in the underlying suit that whether or not BB&T had received an assignment of Colonial's claims was an issue to be tried; (iii) the Answers to BB&T's Second Amended Complaint, which did not admit the allegations regarding BB&T's status as Colonial's successor, and which set forth affirmative defenses as to BB&T's standing; (iv) the contentions regarding the inadequacy of the PAA made during the deposition of BB&T's person most knowledgeable; (v) the Defendants having already made these same assertions, in the underlying suit, with respect to their reliance on their construction of the NQF now made before this Court, and having already had that contention rejected in the underlying litigation; and (vi) the numerous other allegations set forth in the

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[1] The Defendants' statute of limitations arguments will for example not prevail. There is no authority to support Defendants' position that a petition for writ is not an appeal. The tolling rule was eloquently summarized in the legal treatise *Legal Malpractice*, to be that the date of injury "coincides with the last possible date when the attorney's negligence becomes irreversible." R. Mallen and V. Levit *Legal Malpractice* §390, at 457 (1981), quoted with approval by *Neylan v. Moser*, 400 N.W.2d 538, 542 (Iowa 1987). This definition easily encompasses both appeals and petitions for a writ of certiorari.

Complaint and raised in the Opposition to Defendants' Motion to Dismiss in this instant litigation challenging the Defendants on this point.

It is absurd for the Defendants to contend that the Plaintiff could prove no set of facts upon which the Plaintiff would potentially be entitled to relief, by averring that the Defendants' reliance on their own inaccurate construction of the NQF must be upheld as a matter of law, on an initial motion to dismiss at the *early* stages of this litigation, when that same argument was alrcady rejected at the *final* stages of the earlier litigation, such that it has already been demonstrated that Plaintiff's instant theory not only could be proven herein, but could be treated as already adjudicated in favor of Plaintiff herein and against Defendants herein.

Nevertheless, to the degree that this Court determines that any factual assertions necessary to this claim have been inadequately stated, leave to amend should be granted.

III. <u>Causation Arguments</u>.

Defendants also contend in their Opposition to the alternative Countermotion that the Complaint could not, under any set of allegations, properly show causation, because the Plaintiff will not be able, in any event, to prove the case within the case portion of its instant legal malpractice suit. Defendants claim that the underlying trial court allegedly ruled against equitable arguments in favor of BB&T's underlying equitable subrogation or replacement claims. Thus, Defendants argue that, even assuming, arguendo, they breached their professional duty, Plaintiff would have lost on its underlying claims on the merits in any event.

Such arguments, which rely on extraneous information are better suited to a Motion for Summary Judgment than a Motion to Dismiss. Moreover, this argument relies on dicta from the underlying Court's rulings, the meaning of which would be disputed by Plaintiff, if it were relevant. Indeed, these defense assertions were already demonstrated to be inaccurate in the Opposition to the Motion to Dismiss. When the herein Defendants, themselves moved, on behalf of BB&T, for a new trial or other post-trial relief from the underlying court's Findings of Fact and Conclusions of Law (*see*, Exhibit 20 to Plaintiff's Request for Judicial Notice, consisting of the subject July 8, 2010 "Motion for New Trial, or in the Alternative, Motion to Alter or Amend Judgment"), they primarily and extensively argued that they had been unfairly surprised by the necessity to demonstrate an assignment from Colonial to BB&T had occurred, and sought on that

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basis to be excused from the evidentiary failures which led to the court's original ruling. There can be no question that the Court's other findings were mere dicta, not controlling herein, which did not need to be reached, based on and due to BB&T's failure to prove ownership of its asserted claims. Defendants themselves recognized this fact, indicating, in their aforestated Motion for New Trial or to Alter or Amend as follows:

> To the extent that this Court was unable to find that an assignment of the loan at issue had been made from the FDIC to BB&T, the Court's Findings of Fact and Conclusions of Law should be limited to BB&T's alleged failure to meet its evidentiary burden to prove ownership of the loan at issue. Due to the Court's inability to find that BB&T was the real party or successor in interest regarding the loan at issue, any and all findings and conclusions as to BB&T's interest therein would be premature.

Motion for New Trial, or to Alter or Amend, at Plaintiff's Request for Judicial Notice Exh. 20, p. 17.

Defendants herein further admitted in this Motion that "to the extent [certain] conclusions [in the FF&CL] do not pertain to BB&T's alleged evidentiary failure to demonstrate that it is successor in interest to Colonial Bank regarding the loan at issue, **they are irrelevant** and should be deleted." *Id.*, at p.32, ll. 7-10. Emphasis added.

Nevertheless, to the extent, if any, that this Court determines that the Motion to Dismiss should be granted on the grounds of some failure in the Complaint to allege some of the necessary facts, including any facts discussed in the Opposition to the Motion to Dismiss, the Court should allow a motion to amend with respect to any such fact (if any) not properly alleged, as justice would so require, in order to ultimately allow for an adjudication on the merits in this case.

CONCLUSION

For the reasons set forth above and in the original Opposition to the Motion to Dismiss and in the original Alternative Countermotion for Leave to Amend included within the Opposition, the Court should not dismiss the Plaintiff's Complaint at this time, but, if the Court is inclined to do

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so, the Court should first allow an amendment as to any factual claims or allegations which the Court determines are wanting, if any.

DATED this 27th day of January, 2017.

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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 27th day of January, 2017, service was made by the following mode/method a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND COMPLAINT** to the following person(s):

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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, Defendants.	CASE NO. A-16-744561-C DEPT NO. XXXI **STIPULATION AND ORDER TO DISMISS THE SECOND CAUSE OF ACTION FROM THE PLAINTIFF'S COMPLAINT**

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, 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,

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

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

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

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

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DATED this 31st day of January, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

By: _____

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DATED this 27th day of January, 2017.

GORDON & REES LLP

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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,

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

DATED this 1st day of February, 2017.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

Respectfully submitted,

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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 & LARSEN, a Nevada professional corporation, JOHN DOES I-X; and ROE BUSINESS ENTITIES XI-XX, Defendants.	CASE NO. A-16-744561-C DEPT NO. XXXI **NOTICE OF ENTRY OF STIPULATION AND ORDER TO DISMISS THE SECOND CAUSE OF ACTION FROM THE PLAINTIFF'S COMPLAINT**

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
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
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 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
_X_ Electronic Filing/Service
____ Email
____ Facsimile
____ Hand Delivery
____ Regular 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
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SAO
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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, Defendants.	CASE NO. A-16-744561-C DEPT NO. XXXI **STIPULATION AND ORDER TO DISMISS THE SECOND CAUSE OF ACTION FROM THE PLAINTIFF'S COMPLAINT**

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, 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,

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

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

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

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

//

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

LAS VEGAS, NEVADA 89106

DATED this 31st day of January, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

By: _____

G. Mark Albright, Esq. #001394
D. Chris Albright, Esq.
Nevada Bar No. 4904
801 S. Rancho Dr., Suite D-4
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bstoddard@albrightstoddard.com
Attorneys for Defendant/Counterclaimant Eziagu Properties, LLC

DATED this 27th day of January, 2017.

GORDON & REES LLP

By: _____

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LAS VEGAS, NEVADA 89106
LAS VEGAS, NEVADA 89106

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,

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

DATED this 1st day of February, 2017.

JOANNA S. KISHNER
DISTRICT COURT JUDGE

Respectfully submitted,

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

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Attorneys for Plaintiff

Register of Actions
Case No. A-16-744561-C

Branch Banking & T rust Company , Plaintiff(s) vs. Douglas Gerrard, ESQ, Defendant(s)

Case Type: Legal Malpractice
Date Filed: 10/05/2016
Location: Department 27
Cross-Reference Case Number: A744561
Supreme Court No.: 73848

Party Information

		Lead Attorneys
Defendant	Gerrard, Douglas D., ESQ	~~Craig J. Mariam Retained 7025779300(W)~~
Plaintiff	Branch Banking & T rust Company	George Mark Albright Retained 7023847111(W)

Events & Orders of the Court

02/07/2017 All Pending Motions (10:00 AM) (Judicial Officer Kishner, Joanna S.)

Minutes
02/07/2017 10:00 AM
- DEFENDANT DOUGLAS D. GERRARD, ESQ. AND GERRARD COX & LARSEN'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM POINTS AND AUTHORITIES... PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS; AND ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND... REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS COMPLAINT... Although the Court could and would rule fairly and without bias, recusal is appropriate in the present case in accordance with Canon 2.11(A)(3) of the Nevada Code of Judicial Conduct in order to avoid the appearance of impartiality or implied bias as the Court disclosed IN OPEN COURT. Thus, the Court recuses itself from the matter and requests that it be randomly reassigned in accordance with appropriate procedures.

Parties Present
Return to Register of Actions

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, Plaintiff, vs. DOUGLAS GERRARD, ESQ., Defendant.	CASE#: A-16-744561-C DEPT. XXXI

BEFORE THE HONORABLE JOANNA S. KISHNER, DISTRICT COURT JUDGE

TUESDAY, FEBRUARY 7, 2017

RECORDER'S TRANSCRIPT OF HEARING
ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff:	G. MARK ALBRIGHT, ESQ. D. CHRIS ALBRIGHT, ESQ.
For the Defendants:	ROBERT S. LARSEN, ESQ. CRAIG J. MARIAM, ESQ. WING YAN WONG, ESQ.

RECORDED BY: RACHELLE HAMILTON, COURT RECORDER

Las Vegas, Nevada, Tuesday, February 7, 2017

[Case called at 11:22 a.m.]

THE COURT: Branch Banking & Trust versus Douglas Gerrard.

[Colloquy between The Court and counsel in the Gallery regarding a different matter]

THE COURT: So if you don't mind, can I get appearances on Branch Banking versus Douglas Gerrard 744561?

MR. CHRIS ALBRIGHT: Certainly, Your Honor. Good Morning. Chris Albright and Mark Albright, both here on behalf of plaintiff, Branch Banking & Trust.

MR. MARIAM: And good morning, Your Honor.

THE COURT: Good morning -- ish.

MR. MARIAM: Craig Mariam and Rob Larsen. Actually, I'd like to invite to the party our other colleague as well since she's here, Ms. Wong. She is on the caption and she's participating in the case.

THE COURT: Okay. First off, the Court needs to make a disclosure, okay? With regards to this matter and I didn't really realize that I've made this disclosure in the past but -- this Court's family has utilized the firm of Gerrard Cox & Larsen for estate purposes, and so that's my disclosure. So this case doesn't in any way impact -- not this particular individual. Do you need a further disclosure, counsel?

MR. CHRIS ALBRIGHT: I'm sorry -- your --

THE COURT: My family has utilized the law firm of Gerrard Cox & Larsen for estate purposes.

MR. CHRIS ALBRIGHT: And you say your family -- you yourself and your spouse, not your parents or -- okay.

THE COURT: Yes.

MR. MARIAM: For the defense --

THE COURT: The way I understand -- just to let you know -- the way I understanding is the law firm keeps things and I asked a specific -- although I still make the disclosure -- is that I don't even think the law firm, other than the estate partner even knows we exist and I'm sure they would never look in our files. But at the same time, since this was an issue back -- let's put it this way -- initially it was 2000, so it had been extended period of time. We just updated some of our estate planning recently. So that's why the Court deems it really appropriate to make sure that I do a disclosure. It's one thing it was 2000, it's another thing since it was more recently and just doing some minor updates. And so since this involves the firm directly, I do think it's appropriate to make the disclosure and the Court's fine. I'd like to hear from all parties for your viewpoint.

MR. CHRIS ALBRIGHT: Sure, Your Honor. I think it's -- although I don't personally doubt your ability to rule on the merits in the case, I do think it's a sufficiently concerning issue that we would at least want to talk to our client --

THE COURT: No worries.

MR.CHRIS ALBRIGHT: -- before we move forward.

THE COURT: No worries. And just so we're clear, as you know, it doesn't go within the mandatory disclosure, because it's not

anything that -- this decision doesn't in anyway impact anything. And it -- the way I understand the firm is they keep their trusts in a -- in fact -- and I specifically asked -- does it impact and that I understand the litigation files are in one office and the trusts and estates handled in a completely different office. But since this involves one of the partners that's --

MR. CHRIS ALBRIGHT: But since they are a party and not just counsel --

THE COURT: Yes, and I fully appreciate that. The Court takes no concern one way or another. If you want to check with counsel, I have no problem continuing this. I would have liked to have told you earlier but once again, depending on the questions you wanted to ask, I wanted to make sure that you had a full opportunity to ask them.

Go ahead, counsel for defense.

MR. MARIAM: I'm disappointed because I wanted to have this hearing today, so I have disappointment. I don't necessarily have an issue with what you said. I'm sure the Court has no bias one way or the other, so I don't have an issue. It's just been a long time coming for today, so it is what it is and there's nothing I can do about it. So, I mean, for the record, the defense does -- and in fact, sometimes that kind of thing actually hurts the defense in certain cases. But the defense does not have an issue proceeding today.

THE COURT: Let me be clear. The Court can and will fairly and impartially rule on any matters before it. The reason why you have your timing is because you all stipped to continue the hearing date. And when the Court sees somebody stipping to continue a hearing date -- to

call you on the phone to make a disclosure when it may be a moot issue because you may resolve an issue, really isn't anything that we normally would do. Because I want to also give parties the fair opportunity that -- look, you're in Court, and ask questions that you may wish to do. Although, Court can fairly and impartially rule. This doesn't fall specifically within any of the sub provisions, but at the same time, this Court errs on the side of making sure I give more disclosures. Please, I just disclosed who my kids use to play soccer with back in the day when they were a lot younger, so.

MR. CHRIS ALBRIGHT: Sure. Your Honor, can I --

THE COURT: You want to reference -- to check with your client -- sure.

MR CHRIS ALBRIGHT: Could we just ask you a couple of questions then?

THE COURT: Yes, sure.

MR. CHRIS ALBRIGHT: You mentioned that the Gerrard Cox & Larsen firm did your family's estate planning back in 2000. And then did you say they had recently updated some of it?

THE COURT: Yes, we recently updated. That's why -- I mean, it was 2000 -- is one -- you know what I mean.

MR. CHRIS ALBRIGHT: And what year was the update?

THE COURT: Last year.

MR. CHRIS ALBRIGHT: Okay. And then do they have a different set of -- you mentioned that there is some separation --

THE COURT: What --

MR. CHRIS ALBRIGHT: -- at that firm as far as who works on trusts?

THE COURT: What we were told by the firm is that their litigation is out of a different office, rather than the office that we went to, where they just kind of do an occasional suite. And so that, therefore, the files are -- and we were told that the files were kept specifically separately.

And I am not in any way waiving any attorney client privilege. But that was something that this Court wanted to do, anticipating that I may get some cases that potentially would involve that firm. And so I wanted to be able to answer in anticipation of any questions that may happen.

MR. CHRIS ALBRIGHT: So you're saying that they have a different set of lawyers that do estate planning versus their litigation lawyers?

THE COURT: That's what I -- without waiving any attorney client privilege -- that limited answer -- we did ask that question and that's what it was.

MR. MARIAM: May I have three minutes to talk off the record with counsel outside on this --

THE COURT: Yes, of course.

MR. MARIAM: -- and then come right back?

THE COURT: No worries. Of course, please go ahead.

MR MARIAM: Is that okay?

MR. CHRIS ALBRIGHT: Yeah.

MR. MARIAM: Okay, we'll be right back. Thank you, Your Honor.

[Matter trailed at 11:28 a.m.]

[Matter recalled at 11:30 a.m.]

MR MARIAM: Thank you, Your Honor.

THE COURT: Thank you so very much. Okay, we just need to go back on the record. Give me one second for the Court Recorder to go back on the record. Madam Court Recorder, we're back of the record? Thank you so much.

Okay, so we're back on the record in Branch Banking & Trust versus Douglas Gerrard, et al. 744561, counsel.

MR. MARIAM: Thank you. So after discussing with counsel, all counsel here jointly, we think jointly that regardless of what a particular client thinks of this issue now, it still would have -- on an already very convoluted case, it would have the potential for -- to raise further issues later on appeal or during the case. And in a case like this, I think it's better to avoid that. You don't have to do this obviously, it's in your discretion, but the parties would jointly request that it just be reassigned and we can go from there.

MR. CHRIS ALBRIGHT: And we agree with that, Your Honor.

THE COURT: Sure. The Court finds -- okay -- so you're going to have my minute order that's going to be a little bit more detailed with citing, obviously, the applicable rule and the applicable case law. But the Court does understand, and the Court understands that even though the Court's disclosure does not fall within the specific provisions on

something where a Court needs to mandatorily recuse itself. The Court is appreciative of the appearance because of the recent aspect of -- I'm just going to say -- some generalized family estate planning matters that in this case, the Court will voluntarily recuse itself. Although the Court finds that it could and would've ruled fairly on the matter since this is a matter that you all have a lot of different issues and needs expeditious resolution, the Court would find that it would be appropriate to recuse itself and ask that it be randomly reassigned to a new department, okay?

What we can do for you is we can do one of two things, whatever meets your needs. I can either return the binder to the parties in open court where it can -- you can resubmit it to the department that it gets reassigned to or two, when we see the reassignment which will come up probably within the next 48 hours, I can just ask my Law Clerk to walk it to the new Judge. What would you all like? Depends on if you want your binder back or you ask my Law Clerk to --

MR. LARSEN: I think, Your Honor, if you transfer it over, we can just give a call to the new department to make sure they got it. That seems to be the most efficient, rather than taking it back and then having it submitted right back over.

THE COURT: That's fine, no worries. It's just some -- you know, to the extent if you all wanted it back and wanted to resubmit it, we're perfectly fine. If you want us to save you a few moments of time and effort, we're glad to accommodate. So is it a joint request? You just wish us to provide the materials --

MR. CHRIS ALBRIGHT: Have you -- I mean -- has Your

Honor made any notations in the binder that you're talking about or --

THE COURT: I have made all my notations on my bench memo.

MR. MARIAM: I would -- I -- it --

THE COURT: So that's why I've referenced binder.

MR. CHRIS ALBRIGHT: So not in the binder.

THE COURT: No, not in the -- in light of that I knew I was going to make a disclosure, I made sure I did not put anything in the actual documents that have been presented to the --

MR. CHRIS ALBRIGHT: So the other thing we could do is we could just resubmit to the new department.

THE COURT: I'm saying it's clean. All my notes are in this typed documents, which is the bench memo. So it's up to you -- whatever you want.

MR. MARIAM: I think the easier -- again this is just my opinion, but I think the easiest thing to do is to shred that and we will refile in the new department when we have a reassignment. We'll just start over.

MR. CHRIS ALBRIGHT: At least if we do a renotice, I don't think that you have to refile the motion. If we renotice the hearing we can --

THE COURT: Okay, just to let you know, it's common practice that when something gets reassigned, that we just walk it to --

MR. CHRIS ALBRIGHT: In that case, I'm fine with that, Your Honor.

THE COURT: -- the new department just because it saves you time and effort.

MR. CHRIS ALBRIGHT: Sure.

THE COURT: More than glad to, if for any reason you want it back.

MR. CHRIS ALBRIGHT: I'm fine with that and we can stipulate to a new hearing date or notice the hearing.

THE COURT: Just to let you know, what ends up happening when it gets reassigned is that, in general, it gets reassigned to the next available date on the new department's docket. And then if you had any questions about the availability of that particular new date, you would contact the new department in which it gets reassigned to. Because I don't -- A, I don't know who it'll be reassigned to; B, I don't know what their docket is on the person that I don't even know who will get it. So that's the ordinary course of what happens.

Like I said, if I had issued a minute order from chambers, rather than talking with you all, what would happen is the binder would go to the new department and then whatever that new department is --

MR. CHRIS ALBRIGHT: I'm fine with that procedure. If they have an objection, I'll let them state it.

MR. MARIAM: I'm fine with that. Let me tell you my hidden agenda though on why I just said what I said. I'd like to de-convolute this motion. It is too much for the Court. I'd like to refile and de-convolute the issues frankly. If that's not allowed, that's fine, but that would be my hidden agenda in refiling this.

THE COURT: Okay, since I've just recused, I can't take an opinion on that one way or another. I'm sure you can appreciate it. So in ordinary course, this would move on. And if you all wish to vacate, or whatever in accordance with that new department's procedures, you would need to do that. If you'd asked me before you asked me for the recusal, I could have said something. But since, you know, I've already recused myself, I can't take a position one way or another. And you can --

MR. CHRIS ALBRIGHT: No, we can discuss that and --

THE COURT: Yes, you can appreciate -- I mean, you can always stipulate to vacate hearings, you know what I mean, or to move hearing dates and things like that. I can't speak for another department what their procedure and practice is. But in our department that -- you know, generally fine if people want to vacate it and just refile it. As long as you don't have a immediate trial date coming on, which you don't in this case, at least what we saw. So --

MR. MARIAM: Okay.

THE COURT: -- that may impact dates. Okay, so I'm not sure -- I've heard a couple of things. Do you want my Law Clerk to walk the binder to the new department or do you want it back?

MR. CHRIS ALBRIGHT: I'm fine in having you walking it to the new department.

MR. MARIAM: I'm also fine with that.

THE COURT: Okay and then if you change the procedure, you'll just let the new department know?

MR. CHRIS ALBRIGHT: Yes.

MR. MARIAM: Yes.

THE COURT: Okay.

MR. CHRIS ALBRIGHT: Thank you.

THE COURT: Great, I appreciate it. Thank you and sorry for your wait, but I wanted to make sure I had a full opportunity in case you all wanted to ask any questions.

MR. CHRIS ALBRIGHT: Well, we appreciate the disclosure, Your Honor.

THE COURT: Thank you so very much -- appreciate it.

[Hearing concluded at 11:36 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Sandra Harrell

Sandra Harrell
Court Recorder/Transcriber

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * *

BRANCH BANKING & TRUST COMPANY, PLAINTIFF(S) VS. DOUGLAS GERRARD, ESQ, DEFENDANT(S)	Case No.: A-16-744561-C DEPARTMENT 27

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge Nancy Allf.

☒ This reassignment is due to the recusal of Judge Joanna S Kishner. See minutes in file.

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT. PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By:/s/ Patricia Azucena
Patricia Azucena-Preza,
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 8th day of February, 2017

☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-16-744561-C.

/s/ Patricia Azucena
Patricia Azucena-Preza
Deputy Clerk of the Court

SAO
G. MARK ALBRIGHT, ESQ., #001394
D. CHRIS ALBRIGHT, ESQ., #004904
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Attorneys for Plaintiff

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CLERK OF THE COURT

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,

Defendants.

CASE NO. A-16-744561-C

DEPT NO. XXVII

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

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

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

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

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

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

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

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

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

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

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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 refiling a new Motion to Dismiss.

DATED this 13th day of February, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

By: _____

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Nevada Bar No. 1394
D. Chris Albright, Esq.
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Tel: 702.384.7111
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bstoddard@albrightstoddard.com
Attorneys for Defendant/Counterclaimant Eziagu Properties, LLC

DATED this 13th day of February, 2017.

GORDON & REES LLP

By: _____

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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

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 refiling a new Motion to Dismiss.

DATED this 13 day of Feb, 2017.

Nancy L Allf
DISTRICT COURT JUDGE

Respectfully submitted,

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NTSO
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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 & LARSEN, a Nevada professional corporation, JOHN DOES I-X; and ROE BUSINESS ENTITIES XI-XX, 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**

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

DATED this 16th day of February, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

G. MARK ALBRIGHT, ESQ., #001394
D. CHRIS ALBRIGHT, ESQ., #004904
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Las Vegas, Nevada 89106
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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 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
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Attorney for Defendants

____ Certified Mail
_X_ Electronic Filing/Service
____ Email
____ Facsimile
____ Hand Delivery
____ Regular Mail

An Employee of Albright Stoddard Warnick & Albright

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CLERK OF THE COURT

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,

Defendants.

CASE NO. A-16-744561-C

DEPT NO. XXVII

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

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

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

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

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

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

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

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

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

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

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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 refiling a new Motion to Dismiss.

DATED this 13th day of February, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

By: _____
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Attorneys for Defendant/Counterclaimant Eziagu Properties, LLC

DATED this 13th day of February, 2017.

GORDON & REES LLP

By: _____
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Robert S. Larsen, Esq., #7785
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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

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 refiling a new Motion to Dismiss.

DATED this 13 day of Feb, 2017.

Nancy L Allf
DISTRICT COURT JUDGE

Respectfully submitted,

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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. 27 **FIRST AMENDED COMPLAINT**

COMES NOW, Plaintiff, BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, qualified and registered to do business in Nevada, by and through its undersigned counsel of record, ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and, no pleading as defined by NRCP 7(a) (such as an answer) having yet been filed in response to the original Complaint, hereby files this Amended Complaint, as allowed pursuant to NRCP 15(a) and 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").

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' aforestated 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

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

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

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

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

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

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

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

14. The First Colonial Loan was secured by a first priority Deed of Trust and Security 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

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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

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infrastructure improvements on the Property.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GENERAL ALLEGATIONS REGARDING THE SUBJECT UNDERLYING LITIGATION AND OTHER GENERAL ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

48. The PAA was not as clear as it could have been, and, upon review by BB&T's 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

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

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

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

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

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

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

54. The district court presiding over the Subject Underlying Litigation issued a mutual 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

67. Based thereon, Defendants had a duty to ensure that the documentation pursuant to which their client, BB&T, had obtained its interest in Colonial's claims was adequate to the task of making the necessary showing at trial; and had a duty to ensure that any documents proving this assignment to BB&T were timely disclosed to the other litigants prior to Trial, so as to be able to be utilized at Trial; had a duty to present all such documents during Trial; and to have witnesses 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

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

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

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

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

71. Defendants also never offered the most key testimony from BB&T's most 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

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

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

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

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

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

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

77. As further evidence of what Defendants knew or should have known would need to be addressed at Trial, on November 19, 2009, Murdock and Keach filed a Notice of Questions of Fact to be tried at the Trial, which Notice identified, in Paragraph 24, the question of: "Whether 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.

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

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

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

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

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

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

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

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

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

87. Said Defendants also failed to list the PAA in their December 3, 2009 document 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

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

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

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

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

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

92. Based on the PMK notice, and based on this line of questioning at the deposition, Defendants Gerrard and GC&L knew or should have known that the FDIC's transfer and assignment of the disputed Colonial claims to BB&T would be challenged at the Trial of the underlying Subject Litigation, and, thus said Defendants had a duty to have arguments, including 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

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

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

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

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

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

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

98. BB&T put on its case in chief (save for the trial testimony of a Centex representative [who Defendants would have no basis for utilizing on the issue of BB&T's acquisition of the Colonial claims] which had to be delayed until a subsequent trial date), between 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

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

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

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

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

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

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

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

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

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

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

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

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

108. Notwithstanding this knowledge, Gerrard and GC&L did not adequately or directly address this issue while putting on their six day primary case in chief, over the course of the next approximately three months, did not put witness Fritz on the stand, did not introduce any of his deposition transcript during Trial, and did not even introduce the PAA, let alone the 2009 Bulk Assignment, into evidence, and instead allowed themselves to be negligently caught unprepared 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

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sandbagged them.

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

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

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

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

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

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

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

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

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

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

118. The district court noted as follows:

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

119. Following this oral ruling, the Trial court nevertheless invited Defendants Gerrard and GC&L, on behalf of BB&T, to attempt to introduce other documentation indicating that 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,

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

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

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

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

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

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

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

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

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

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

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

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

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

132. Defendants Gerrard and GC&L then made an oral motion pursuant to NRCP 17, 21, and 25, to substitute in the FDIC- the only other conceivable owner of the 2007 Colonial Deed 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:

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> Exhibit 183 [the PAA] is internally inconsistent and is incomplete. It prevents the Court from making a finding that an assignment has occurred of the loan that is at issue. The insufficient and conflicting evidence regarding this assignment is what 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.

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

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

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

> The trial commenced on January 8, 2010 with the initiation of BB&T's case in chief. The trial continued over the ensuing four (4) months for a total of ten days [Court's Footnote: On March 30, 2010, BB&T disclosed that its last witness Brad Burns, formerly of Centex, was not available to testify until April 8, 2010. The Court requested that Plaintiff rest with the exception of that testimony on March 30, 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").
>
> The primary issue raised in the Rule 52 motion was whether BB&T had met its evidentiary burden of proof to demonstrate it received an assignment of Colonial Bank's interest in the 2007 Colonial Bank Deed of Trust. Over objection, the Court admitted into evidence Exhibit 183, a Purchase and Assumption Agreement entered into on August 14, 2009 between the FDIC and BB&T which purported to sell 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.
>
> As the finder of fact, the Court found that the Purchase and Assumption 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.

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

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

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

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

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

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

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

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

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

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

> 2. BB&T has failed to meet its burden of proof to establish that the Second Deed of Trust was transferred or assigned by the FDIC to BB&T.
>
> 3. BB&T is not entitled to relief on its claim for equitable subrogation **since it has not demonstrated it is a successor in interest.**
>
> 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.**
>
> . . . .

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

. . . .

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

> **THIS COURT FINDS** that the issue of whether the 2007 Colonial Bank Loan, Promissory Note and Deed of Trust was assigned to BB&T was one which had been raised by parties and the Court prior to the start of trial.
>
> **THIS COURT FINDS** that the issue of whether the 2007 Colonial Bank Loan, Promissory Note and Deed of Trust was acquired by and transferred to BB&T was a permitted subject of discovery by the Court prior to the commencement of trial.
>
> **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,

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> Promissory Note and Deed of Trust at the time of trial and was not precluded or prevented from doing so before it rested its case in chief.
>
> **THIS COURT FINDS** there was no irregularity in the trial proceedings, 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.

[Emphasis in original.]

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

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

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

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

> The PAA was an asset purchase and therefore the district court looked to its language in order to determine which assets and corresponding liabilities were transferred to BB&T. However, due to the omission of the schedules of assets, 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**.
>
> Further, we conclude that the district court's **decision to exclude two documents relating to BB&T's interest in the Construction Loan** was not an abuse of discretion **because the documents were not properly produced** in accordance with the disclosure requirements of NRCP 16.1(a)(1) or NRCP 26(3)(a).

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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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

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

180. These breaches proximately caused losses to Plaintiff.

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

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

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

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

WHEREFORE Plaintiff prays for the following relief against Defendants:

A. Judgment against Defendants Gerrard and GC&L, jointly and severally, for compensatory, consequential, direct and indirect damages and all other losses, in excess of $10,000;

B. An Award and Judgment of pre-judgment interest at the highest rate allowed by law;

C. An Award and Judgment for Plaintiff's costs of suit, both pursuant to any statute, rule, or contractual provision allowing for the same and also as special damages incurred herein;

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

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damages incurred herein;

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

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

DATED this 22nd day of February, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

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

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 **NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** [Concurrently filed with Request for Judicial Notice] Date: Time: Dept: XXVII Judge: Honorable Nancy L. Allf

DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants Douglas D. Gerrard, Esq. ("Mr. Gerrard"), and Gerrard Cox & Larsen ("Firm") (collectively, "Defendants"), by and through their attorneys, Craig J. Mariam, Esq., Robert S. Larsen, Esq. and Wing Yan Wong, Esq., of the law firm of Gordon & Rees LLP, and pursuant to NRCP 12(b)(5), hereby submit their Motion to Dismiss the First Amended Complaint ("FAC").

This Motion is based on the pleadings and papers filed in this action, the attached Memorandum of Points and Authorities, the Request for Judicial Notice filed concurrently with this Motion, and any oral argument and evidence the Court may allow at the hearing on the Motion.

DATED this 8th day of March, 2017.

Respectfully submitted,

GORDON & REES, LLP

/s/ Craig J, Mariam

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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD.

PLEASE TAKE NOTICE that Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen will bring the foregoing **DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** on for hearing before the Honorable Judge Nancy L. Allf in Department XXVII of the above-entitled Court located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155 on the 19 day of April, 2017, at the hour of 10:00 a.m., or as soon thereafter as counsel can be heard.

DATED: March 8, 2017.

Respectfully submitted,

GORDON & REES, LLP

/s/ Craig J, Mariam

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

At its heart, this case is about a client unhappy with the results from litigation, all caused by the failures and negligence of the client itself and its predecessor in interest. Plaintiff Branch Banking and Trust Company blames an unfavorable outcome on its attorneys. But Plaintiff does not have standing to pursue this litigation. Even if it did, the trial court's findings at trial, which are matter of public record and cannot be disputed as fact, clearly evidence that the claims raised in this case fail at the outset, as at least two trial judges have already declared.

Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen are licensed Nevada attorneys or law firms originally retained to represent Colonial Bank, N.A. ("Colonial") in litigation over loans issued to certain owners of real property in Nevada, a case styled *Murdock et al. v. Rad, et al*., Eighth Judicial District Court Case Number A-08-574852, consolidated with Case No. A-09-594512-C ("*Murdock* Litigation"). However, Colonial, its transactional attorneys, and/or the title company negligently handled the documentation underlying such loans, mistakenly closing a second loan and releasing its first priority security interest believing a previous junior lien had been reconveyed, without verifying that it was, in fact, reconveyed. When Plaintiff, acting as Colonial's successor in interest, after having allegedly first purchased certain assets from the Federal Deposit Insurance Corporation ("FDIC"), sought to assert claims arising out of Colonial's assets, the trial court ruled against it, finding that Plaintiff never owned such assets and, even if it did, its claims for equitable subrogation would have failed anyway. The trial court further held that equitable subrogation is a discretionary doctrine that did not apply in the circumstance at issue, anyway.

Plaintiff's First Amended Complaint ("FAC") is without merit for a number of reasons. First, Plaintiff cannot show causation, as the indisputable public record demonstrates that it would have obtained the same result absent the alleged but non-existent malpractice. Plaintiff's predecessor and/or its agents at the time botched the loan transaction and the transfer of the loans to Plaintiff without securing, first, a release of the primary security interest. The facts found by the Court meant that Plaintiff's claims in the *Murdock* Litigation were never going to succeed.

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Second, Plaintiff lacks standing; its claims depend on its ownership of Colonial's assets (and the loan which was the subject of the underlying case) – an issue that the trial court in the *Murdock* litigation already decided and found against Plaintiff. Two courts have ruled on this issue and reached the same result, including, at the motion to dismiss stage a prior case against a title company.

Third, Plaintiffs' cause of action is beyond the statute of limitations, as the events of this case occurred between 2007 and 2010.

II. FACTUAL ALLEGATIONS

The *Murdock* Litigation concerned the priority of deeds of trust encumbering real property in Henderson, Clark County, Nevada ("Property"), owned at one time by R&S St. Rose, LLC ("St. Rose"). FAC at ¶ 7. Acting as the purported successor in interest to Colonial, Plaintiff sought through an equitable subrogation theory, among other causes of action, for a judgment that Colonial's Deed of Trust was first in priority over other encumbrances secured against the Property. Equitable subrogation is discretionary. The trial court had wide discretion to consider whether, under the principles of equity, to grant Plaintiff the declaration of priority it requested. After a lengthy trial of witnesses' testimony and presentation of documents, the trial court found that Plaintiff did not own Colonial's deed of trust. But, more importantly, the trial court found equitable subrogation was not applicable in that case. The trial court determined that Colonial's evidence was insufficient for the application of equitable subrogation and specifically ruled that Colonial's interest did not have first priority over the other deed of trust.

A. The Loans between R&S, Colonial, and R&S Lenders

To initially purchase the Property, St. Rose borrowed from Colonial $29,305,250.00 ("First Colonial Loan"). Id. at ¶ 13. The First Colonial Loan was secured by a deed of trust against the Property, recorded on August 26, 2005 ("First DOT"). Id.

In addition, St. Rose borrowed $12,000,000.00 ("R&S Loan") from the independent entity R&S Lenders, LLC ("R&S Lenders"). Id. at ¶ 16. On or about August 23, 2005, executives of St. Rose executed a promissory note in favor of R&S Lenders for $12,000,000.00,

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secured by a deed of trust against the Property, recorded on September 16, 2005 ("Second DOT"). Id. at ¶ 18.

B. The Construction Loan and Non-Reconveyance of the Second DOT

To fully pay off the First Colonial Loan and to help develop the Property, St. Rose entered into a second loan with Colonial on July 27, 2007 for $43,980,000.00 ("Construction Loan"). Id. at ¶ 22. The Construction Loan was secured by a deed of trust in favor of Colonial against the Property, recorded on July 27, 2007 ("Third DOT"). Id. at ¶ 24.

In the *Murdock* Litigation, representatives of Colonial testified that Colonial only entered into the Construction Loan under the condition that the Third DOT, and thereby Colonial, would have a first priority lien against the Property. Id. at ¶ 25; see also trial court's Findings of Fact and Conclusions of Law at Findings of Fact ("FFCL") attached as Exhibit B to the Request for Judicial Notice concurrently filed ("RFJN"); RFJN at Nos. 4; 5(B). This financing arrangement required an agreement by R&S Lenders to reconvey the Second DOT so Colonial's new loan could be secured by a first priority lien. Thus, Colonial drafted a loan commitment letter dated July 24, 2007 ("Loan Commitment Letter"), supposedly faxed to St. Rose, which was intended to, among other things, obtain a commitment from St. Rose to obtain a reconveyance of the Second DOT as a condition of receiving the new loan. See RFJN at No. 5(C-D).

However, at trial, representatives of St. Rose denied ever receiving the Loan Commitment Letter, and Colonial representatives were unable to produce either a copy of the letter executed by St. Rose or even a copy of the facsimile of same. See RFJN at No. 5(E). Regardless, Colonial closed the Construction Loan on July 31, 2007. See RFJN at No. 5(F).

As Colonial never received confirmation that St. Rose would require R&S Lenders to reconvey the Second DOT, the trial court eventually found that Colonial "did not have a reasonable expectation that it would receive a reconveyance of the [Second DOT] following closing of the Construction loan transaction[,] only that it would receive a policy of title insurance, which it did receive." See RFJN at No. 5(J). Thus, Colonial did not require St. Rose to reconvey or subordinate the Second DOT. See RFJN at No. 5(K).

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C. The R&S Investors and the *Murdock* Litigation Commences

On November 3, 2008, two investors in R&S Lenders, Robert E. Murdock, Esq., and Eckley M. Keach, Esq. ("R&S Investors") commenced the *Murdock* Litigation against St. Rose and R&S Lenders as well as individual directors and executives concerning the loans discussed above. FAC at ¶ 38. Colonial was added as a defendant on April 3, 2009. Id. at ¶ 39.

As a result of St. Rose's default on the Commercial Loan, Colonial initiated foreclosure proceedings against St. Rose and the Property and brought its own action on July 1, 2009, alleging that the Third DOT had priority over the Second DOT and the R&S Loan. Id. at ¶¶ 37; 40. Colonial's action was subsequently consolidated with the *Murdock* Litigation. Id. at ¶ 43. Defendants were retained to represent Colonial in that litigation. Id. at ¶ 41.

D. Colonial Placed Into Receivership of FDIC

On or about August 14, 2009, the Alabama State Banking Department closed Colonial, naming the FDIC as its receiver. Id. at ¶ 44. On August 14, 2009, Plaintiff executed with the FDIC a "Purchase and Assumption Agreement, Whole Bank All Deposits" ("PAA"), intending to transfer Colonial's financial assets to Plaintiff. Id. at ¶ 45. However, the PAA – which was prepared by separate counsel – was defective. Among other defects, the PAA referred to schedules that were not attached to the document. Id. at ¶ 48. The defects in the PAA were critical to the trial court's findings of fact and conclusions of law adverse to Plaintiff.

Following the transfer of Colonial's assets, Plaintiff substituted into the *Murdock* Litigation in place of Colonial and filed a Second Amended Complaint. Id. at ¶ 50; see also *Murdock* Litigation Second Amended Complaint of Plaintiff BB&T ("Operative BB&T Complaint") attached as Exhibit A to the RFJN; RFJN at No. 1.[1]

/ / /

[1] The Operative BB&T Complaint in the *Murdock* Litigation alleged six causes of action for declaratory relief for contractual subrogation, declaratory relief for quiet title and replacement, equitable and promissory estoppel, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. See RFJN at No. 2. The Operative BB&T Complaint specifically requested the court issue an order declaring Plaintiff had subrogated to all rights under the First Colonial Loan and First DOT, that the Third DOT replaced the First Colonial DOT, that Plaintiff was entitled to first priority position for the Property, that the Second DOT was either expunged or junior in priority, and that the named defendants therein were compelled to disgorge benefits unjustly received in excess of $10,000.00. See RFJN at No. 3.

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E. Court's Findings of Fact and Conclusions of Law, Appeals, and Final Judgment

On June 23, 2010, the trial court entered its Findings of Fact and Conclusions of Law. Id. at ¶ 135; see also RFJN at No. 4. The Court considered the PAA deficient "as inconsistent and incomplete" for, in part, failing to attach the schedules referenced therein. FAC at ¶ 132; RFJN at No. 5(Q). More importantly, the trial court made specific findings in support of its ruling that Colonial's Third DOT did not have first position priority over the Second DOT. RFJN at No. 5(U).

Thus, the trial court ruled against Plaintiff, and in favor of the R&S Investors' claim for declaratory relief, declaring that the Second DOT had priority over the Third DOT and allowing the R&S Investors to proceed with its foreclosure sale of the Property. RFJN at 5(T-U). The trial court's findings regarding Plaintiff's lack of ownership of the Second DOT were independent from and had absolutely no bearing on the trial court's finding regarding priority. Plaintiff's own actions and its own defective documents caused the adverse judgment. Defendants did not cause those facts.

The trial court entered two Final Judgments against Plaintiff in favor of the R&S Investors: on July 23, 2010 – incorporating the June 23, 2010 Findings of Fact & Conclusions of Law in its entirety – and again on November 10, 2010. FAC at ¶ 156; RFJN No. 6-7, Exhibit C.

Defendants appealed the court's findings on September 24, 2010 to the Nevada Supreme Court, and a three judge panel affirmed the ruling on May 31, 2013. FAC at ¶ 157. Defendants sought an *en banc* rehearing of the appeal in the Nevada Supreme Court, which was denied on or about February 21, 2014. FAC at ¶¶ 163-164.

The Nevada Supreme Court closed the case on March 18, 2014. *See* RFJN at Nos. 8; 9. Plaintiff subsequently requested that the United States Supreme Court grant a writ for certiorari, which it denied. FAC at ¶¶ 169-170. On October 5, 2016, Plaintiff filed this action against Defendants.

III. LEGAL STANDARD

Dismissal under NRCP 12(b)(5) is proper "where the allegations in the [Complaint], taken at face value, and construed favorably in the [Plaintiff's] behalf, fail to state a cognizable

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claim for relief." *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 886 P.2d 454 (1994) (citations omitted).

Pleading of conclusions must be "sufficiently definite to give fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *Taylor v. State of Nevada*, 73 Nev. 151, 152, 311 P.2d 733, 734 (1957). Likewise, this Court may properly grant a party's motion to dismiss based on the running of statutes of limitations. *Edwards v. Emperor's Garden Restaurant*, 122 Nev. 317, 130 P.3d 1280 (2006).

Notwithstanding all favorable inferences, Plaintiff cannot establish any set of facts that would entitle it to relief against Defendants. *Blackjack Bonding v. City of Las Vegas Municipal Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (affirming dismissal).

IV. LEGAL ARGUMENTS

A. Plaintiff Fails to State a Claim Because Defendants Did Not Cause Plaintiff's Alleged Injury as the Trial Court Ruled that Colonial's Deed of Trust Did Not Have First Priority.

The required elements of a legal malpractice claim are: (1) an attorney-client relationship; (2) a duty owed to the client by the attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of that duty; (4) the breach being the proximate cause of the client's damages; and (5) actual loss or damage resulting from the negligence. *Day v. Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996) (*citing Sorenson v. Pavlikowski*, 94 Nev. 440, 443, 581 P.2d 851, 853 (1978)).

Plaintiff cannot under any theory support the essential elements of a legal malpractice claim, specifically, that any breach proximately caused its damages. Causation is a required element for a legal malpractice claim. *See Day v. Zubel*, 112 Nev. 972, 922 P.2d 536, 538 (1996). Proximate cause means "that cause which, in natural and continuous sequence and unbroken by any efficient, intervening cause, produces the injury complained of and without which the result would not have occurred." *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 864 P.2d 796, 801 (1993). "Proximate cause, or legal cause, consists of two components: cause in fact and foreseeability." *Id.*; *Taylor v. Silva*, 96 Nev. 738, 615 P.2d 970, 971 (1980) ("A

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negligent defendant is responsible for all foreseeable consequences proximately caused by his or her negligent act.").

To establish causation in a legal malpractice action, a plaintiff must establish each and every element of the underlying case. *Chandler v. Black & Lobello*, 2014 Nev. Dist. LEXIS 1, *10-12 (D. Nev., Feb. 26, 2014) (collecting cases). "A legal malpractice case requires a 'case-within-the-case' showing, meaning Plaintiff must prove-up the underlying action, and show that but for the alleged malpractice, he would have received a better result . . . . The purpose of this methodology is to avoid damages based on pure speculation and conjecture." *Id*. at * 12, citing *Orrick, Herrington & Sutcliffe, LLP v. Superior Court*, 107 Cal. App. 4th 1052 (2003); *see also Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc*., 130 Nev. Adv. Rep. 68, 333 P.3d 229, 235 (2014) ("The material facts for an attorney malpractice action include those facts that pertain to the presence and causation of damages on which the action is premised.").

1. The Trial Court's Rulings Show that Plaintiff Could Not – As a Matter of Law – Establish Its Claims of Equitable Subrogation and Replacement Because Colonial Had No Reasonable Expectation It Would Receive a Reconveyance

The underlying causes of action involved in the *Murdock* Litigation concern Colonial's initial claims for equitable subrogation and replacement, as well as claims for fraudulent misrepresentation and civil conspiracy. Plaintiff makes the assumption that, but-for the alleged failure to timely present evidence such as the PAA, 2009 Bulk Assignment, or the March 2010 Assignment, the aforementioned documents would have automatically changed the court's opinion as to its claims for equitable subrogation and replacement. However, this assumption fails to consider how Nevada courts apply the doctrine of equitable subrogation and replacement and fails to account for the specific findings made by the trial court.

Equitable subrogation permits a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance. *Houston v. Bank of America Fed. Sav. Bank*, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003). Likewise, the equitable doctrine of replacement is functionally identical to equitable subrogation. *See Freedom Mortg. Corp. v. Tovare Homeowners Ass'n*, 2012 U.S. Dist. LEXIS 169638 at * 9-11 (D. Nev. Nov. 28, 2012) rev'd on other grounds, 613 Fed. Appx. 668, 668 (9th Cir. 2015) ("Equitable Subrogation

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operates in the same manner as replacement, except Equitable Subrogation deals with the circumstance where one lender refinances the loan of another lender as opposed to the circumstance of replacement where a single lender refinances its own prior loan.").

Fundamentally, Colonial, then Plaintiff, sought equitable subrogation and/or replacement to step into the shoes of the First DOT for up to the amount paid to satisfy the original loan, placing it ahead of the Second DOT favoring the R&S Investors. However, both causes of action are equitable remedies to "avoid a person's receiving an unearned windfall at the expense of another." *Houston*, *supra*, 119 Nev. at 490, 78 P.3d at 74. As an equitable concept, equitable subrogation is not a legal remedy, and even if a party successfully establishes all the elements of the claim, the court carries the discretion to decide whether equity permits the remedy to be applied. *Am. Sterling Bank v. Johnny Mgmt.*, 126 Nev. 423, 433, 245 P.3d 535, 542 (2010).

The Nevada Supreme Court's holding in favor of equitable subrogation in circumstances similar to the *Murdock* Litigation held so because the subrogating party "obtained a reconveyance" from the intervening lien holder. See *Meier v. Tms Mortg.*, 2000 Nev. Dist. LEXIS 204, *5 (Nev. Dist. Ct. Feb. 16, 2000). Here, the trial court found that Colonial had no reasonable expectation it would receive such a reconveyance. RFJN at Nos. 5(J). As stated by the trial court, Colonial "did not have a reasonable expectation that it would receive a reconveyance of the [Second DOT] following closing of the Construction loan transaction[,] only that it would receive a policy of title insurance, which it did receive." Id. After hearing extensive evidence during six days of trial from all Colonial employees involved in making the new construction loan and Colonial's attorney who documented the new construction loan, the District Court made the following express findings of fact which precluded equitable subrogation or replacement:

> 51. As a condition to the Construction Loan, Colonial Bank did not request that St. Rose Lenders reconvey or subordinate the St. Rose Lenders Deed of Trust or convert the same to equity.
>
> 71. Colonial Bank never communicated to Rad, Nourafchan [principals of R&S St. Rose], R&S or St. Rose Lenders that it required a first priority deed of trust for the Construction Loan.

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> 86. Colonial Bank did not condition its extension of the Construction Loan on its receipt of a first deed of trust.
>
> 87. Colonial Bank did not convey any intent to receive a first deed of trust to either R&S, St. Rose Lenders, Rad or Nourafchan.
>
> 89. Colonial Bank did not negotiate the requirement for a first deed of trust in the Construction Loan Agreement, Deed of Trust or Promissory Note Secured by Deed of Trust.
>
> 100. Reconveyance of the St. Rose Lenders Deed of Trust was not a condition for closing the Construction Loan transaction.

RFJN at Nos. 5(K-P); Exhibit B. These facts, found by the trial court, occurred when Colonial failed to properly obtain and record the reconveyance — long before the *Murdock* Litigation commenced, and long before Defendants were involved on the matter. As a result of these findings, the trial court expressly ruled that:

> 28. The Court will grant the declaratory relief requested in St. Rose Lenders' First Cause of Action.
>
> 29. St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust.

RFJN at Nos. 5(T-U) (emphasis added).

The trial court determined that Colonial and Nevada Title Company created Colonial's own harm, causing the loss in the *Murdock* Litigation by closing on the Construction Loan without first obtaining proof that the Second DOT was reconveyed and by never manifesting an intent to St. Rose that it would not fund the new loan without a reconveyance of the Second DOT. *See* FAC at ¶¶ 32-33. Because Colonial closed the second Construction Loan without properly ensuring the reconveyance of the Second DOT, the trial court in the *Murdock* Litigation was not willing to grant equitable subrogation. Even if the trial court had found Plaintiff owned Colonial's interest, Plaintiff nonetheless could not have won on the merits because the trial court ruled Colonial's interest was subordinate. That decision was independent from the ownership issue. Therefore, Defendants' alleged conduct did not and could not have caused Plaintiff's injury—the loss of the Third DOT's first priority position. The trial court's rulings make this point clear.

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Further, Nevada law recognizes the doctrine of issue preclusion that "essentially bar[s] recovery on or prevent relitigation of previously resolved issues." *Berkson v. Lepome*, 126 Nev. 492, 497, 245 P.3d 560, 564 (2010) (citing *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713 (2008)). Here, the trial court ruled on the issue of priority independent of Plaintiff's ownership, and ruled against Plaintiff. Plaintiff cannot seek to relitigate that ruling by placing blame on Defendants. Plaintiff cannot establish the fundamental element of causation. As a result, its malpractice claim fails as a matter of law.

2. <u>The Trial Court's Rulings Show that Plaintiff Could Not – as A Matter of Law – Establish Its Claims of Equitable Subrogation and Replacement Given the Prejudice to the Intervening Lien Holders</u>

The rights and equities pertaining to the R&S Lenders are important elements of equitable subrogation analysis, and cannot be thrown away as Plaintiff would prefer. See *Houston*, *supra*, 119 Nev. at 491, 78 P.3d at 75 ("Subrogation will not be granted if it would result in injustice or prejudice to an intervening lienor."). A trial court does not abuse its discretion in weighing the prejudice served to an intervening lien holder and refusing to grant equity on the issue of equitable subrogation. See *Am. Sterling Bank*, *supra*, 126 Nev. at 433, 245 P.3d at 542 (refusing equity where "subrogation, under the circumstances, would be detrimental to a junior lienholder"). Equitable subrogation is proper "unless the superior or equal equities of others would be prejudiced thereby[.]" See *Meier*, *supra*, 2000 Nev. Dist. LEXIS 204 at *5 (quoting *Katsivalis v. Serrano Reconveyance Co.*, 138 Cal. Rptr. 620, 625, 70 Cal. App. 3d 200, 210 (Cal. App. 1st Dist. 1977).

The trial court heard substantial evidence and testimony concerning the reconveyance issue as it affected the rights and equities of the R&S Lenders, finding that the R&S Lenders had not consented to a reconveyance of their loan. See FFCL, Findings of Fact numbers 79, 80, 83, 85, 105, Exhibit B to the RFJN. This led to the following express findings:

> 121. Since St. Rose Lenders, was not a party to either the 2007 Colonial Bank Deed of Trust or the Construction Loan Agreement, it is not required to subrogate its Deed of Trust.
>
> 122. An agreement which prejudices lien holders or impairs their security requires their consent.

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123. St. Rose Lenders did not consent to subrogate its Deed of Trust.

See id. at RFJN No. 5(G); 5(H); 5(I). The trial court made express findings on the issue of prejudice and equity to the R&S Lenders. Likewise, the trial court made express conclusions of law on the issue of reconveyance and equitable subrogation. RFJN at Nos. 5(P), 5(I). Thus, the trial court ruled on the merits of Plaintiff's case, and found it lacking due to the prejudice suffered by the intervening lien holders. Again, this was a situation created by Colonial. Defendants were not in control of those highly adverse facts. Whether Plaintiff owned the loan or not has no bearing on those adverse findings which resulted in an adverse decision without regard to who actually owned the loan.

3. The Trial Court's Rulings Show that Plaintiff Could Not – as A Matter of Law – Establish Its Tort Claims in the Underlying Claims, As Such Claims Are Not Assignable as a Matter of Law.

As to Colonial's remaining claims of Fraudulent Misrepresentation and Civil Conspiracy, Nevada case law holds that tort causes of action, such as fraud claims, are not assignable. *See Hansen v. State Farm Mut. Auto. Ins. Co.*, 2015 U.S. Dist. LEXIS 143061, *17, (D. Nev. October 21, 2015); see also *Prosky v. Clark*, 32 Nev. 441, 445, 109 P. 793, 794 (Nev. 1910) ("Rights of action based on fraud . . . . are held by the courts to be not assignable, but are personal to the one defrauded.").

Likewise, an actionable civil conspiracy "consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts." *Hilton Hotels v. Butch Lewis Productions*, 109 Nev. 1043, 1048, 862 P.2d 1207, 1210 (1993). Thus, like its fraud claim, Colonial's tort claim for Civil Conspiracy is a claim personal to Colonial – and is not assignable for the same reasoning. As a result, Plaintiff cannot assert Colonials' tort claims.

In sum, there is no dispute that Plaintiff could not have obtained a better result at trial. Plaintiff blames Defendants for the trial court's finding that Plaintiff did not own the Third DOT and thereby causing it to lose first priority. But, Defendants' alleged conduct did not cause Plaintiff to lose priority over the Second DOT. Although the trial court ruled on the ownership issue, it proceeded to address the merits of the priority of the competing deeds of trust. The trial

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court was clear: the Third DOT did not have priority over the Second DOT. The facts and law were simply not in Plaintiffs' favor. Plaintiff was never going to succeed (and actually didn't succeed) on its claims at trial. The trial court's ruling is dispositive on this issue. Therefore, Plaintiff's FAC must be dismissed.

B. Plaintiff Has No Standing to Claim Professional Negligence/Legal Malpractice Because It Is Not a "Real Party In Interest" to the Assets at Issue in the *Murdock* Litigation.

Under Nevada law, "[e]very action shall be prosecuted in the name of the real party in interest." NRCP 17(a). A real party in interest "is one who possesses the right to enforce the claim and has a significant interest in the litigation." *Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983). "The inquiry into whether a party is a real party in interest overlaps with the question of standing." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). Further, a party who is not an owner of a property interest is nonetheless the real party in interest only "if that person's interests in the property are injured or damaged." See *Vaughn v. Dame Construction Co.*, 223 Cal. App. 3d 144, 148, 272 Cal. Rptr. 261, 263 (Cal. App. 4th Dist. 1990).

Plaintiff seeks to relitigate the issue of its ownership of the Construction Loan and interests thereto, an issue already determined by the trial court and barred through the doctrine of issue preclusion. *Berkson*, *supra*, 126 Nev. at 497, 245 P.3d at 564. The four requirements for issue preclusion are as follows: "'(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation'; and (4) the issue was actually and necessarily litigated." *Five Star Capital Corp*, *supra*, 124 Nev. at 1055, 194 P.3d at 713 (quoting *University of Nevada v. Tarkanian*, 110 Nev. 581, 598-599, 879 P.2d 1180, 1191 (1994)).

As discussed above, the trial court determined that Plaintiff had failed to meet its evidentiary burden to show that it had acquired Colonial's interest in the Construction Loan. Exhibit B, at Conclusions of Law, ¶ 2. The trial court based this decision on its review of the PAA that – as Plaintiff freely admits – the document failed to include schedules that

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demonstrated what, if anything, Plaintiff acquired from the FDIC. Id. at Findings of Fact, ¶¶ 129-130; FAC ¶ 49. Moreover, the trial court also pointed to a clause in the Agreement stating that assets subject to a claim or legal proceeding would be excluded from Plaintiff's purchase. Exhibit B, at Findings of Fact ¶¶ 133-134. That determination became "final" pursuant to the trial court's Final Judgment that incorporated the FFCL, and was determined against Plaintiff BB&T. See RFJN Nos. 6; 7. Finally, this issue was litigated throughout the limited trial where the trial court heard witness testimony and issued pointed conclusions of fact and law on the subject. See RFJN, Exhibit B, at Pg. 1, Findings of Fact ¶ 129-136, Conclusions of Law ¶ 10.

Thus, the elements of issue preclusion are met, as the trial court in the *Murdock* Litigation previously decided the issue of Plaintiff's ownership of assets transferred from Colonial to the FDIC, including the claims of equitable subrogation that underlie this legal malpractice action. "[O]nce a court has decided an issue of fact or law necessary to its judgement, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *In re Marshall*, 600 F.3d 1037, 1037 (9th Cir. 2010). As a result, the issue of whether Plaintiff owns Colonial's assets to assert claims in the underlying *Murdock* Litigation was decided, precluding Plaintiff from relitigating its ownership interests in the same here.

In sum, Plaintiff has not shown – in any proceeding, including this one – that it has any ownership interest in assets transferred from Colonial to the FDIC. If Plaintiff did not own Colonial's assets, there is nothing Defendants could have done to change the outcome of trial, and thus, Plaintiff sustained no injury or damage to make it a "real party in interest." Thus, without an ownership interest in Colonial's assets and sustaining no damage as a result, Plaintiff has no standing to allege malpractice against Defendants.

C. Plaintiff's Cause of Action for Professional Negligence/Legal Malpractice Cause of Action is Untimely as the Appeal to the Nevada Supreme Court Ended More Than Two Years Ago.

The applicable statute of limitations for legal malpractice actions is four years from the damage or two years from when the plaintiff discovers or could discover the damage, whichever is earlier. NRS 11.207. Under Nevada law, malpractice causes of action do not accrue until

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after an adverse ruling on appeal. See *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988).

Plaintiff received an adverse appellate ruling when the Nevada Supreme Court affirmed the ruling of the trial court on May 31, 2013, making the deadline under the applicable statute of limitations two years later on May 31, 2015. See NRS 11.207. Plaintiff did not file this lawsuit until October 5, 2016 more than fifteen months after the statute of limitations expired. Thus, **over six and a half years** passed since the substance of Plaintiff's action occurred during the limited trial that ended on April 14, 2010. As such, Plaintiff's cause of action for professional negligence/legal malpractice is untimely.

Though Plaintiff petitioned for a writ of certiorari to the United States Supreme Court, such a petition is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. Unlike the appeal of the District Court's decision, which is an appeal of right and must be heard by the Nevada Supreme Court (see Nev. Const. Art. 6, § 4), there is no appeal of right from a decision by the Nevada Supreme Court. An "appeal by right" or "appeal of right" is defined as "An appeal for which permission need not be first obtained." *See* Black's Law Dictionary at 94 (7th Ed. 1999). A writ seeking certiorari is not an "appeal of right" as it requires the permission of the court from which the writ is sought. *See, e.g.*, *Kendrick v. City of Eureka*, 82 Cal. App. 4th 364, 371, 98 Cal. Rptr. 2d 153, 157 (Cal. App. 1st Dist. 2000) ("appeals to the United States Supreme Court are not afforded as a matter of right, but are completely discretionary with that body"). Courts across the country do not allow statutes of limitations to toll while a plaintiff pursues a discretionary and uncertain writ of certiorari with the highest Court. *See, e.g., id.* (state law claims not tolled until United States Supreme Court's decision on writ of certiorari, stating that "[i]ndeed, a denial of a petition [for certiorari] has no significance with respect to the judgment, nor does it constitute an adjudication of anything."); *Clark v. Velsicol Chem. Corp.*, 110 N.C. App. 803, 808, 431 S.E.2d 227, 229-230 (N.C. Ct. App. 1993) ("Therefore, for the purpose of tolling the statute of limitations [for negligence action], we do not consider the action alive while a decision to grant or deny the petition [for certiorari] was pending.").

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Likewise, it has long been held that the Supreme Court will not grant writ of certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co*., 304 US 175 (1938). As Plaintiff's appeal concerned an evidentiary question from an evidentiary hearing, Plaintiff cannot reply on the United States Supreme Court granting a writ of certiorari, especially where such review is discretional.

That Plaintiff's statute of limitations begin to run from entry of the May 31, 2013 Order of Affirmance by the Nevada Supreme Court is further evidenced by Plaintiff's failure to obtain any stay of remittitur pending its writ for certiorari under NRAP 41(b). NRAP 41(a) states that the Nevada Supreme Court will issue its remittitur (which closes the case) 25 days after entry of the Supreme Court's final order. To avoid having the case closed, a party must file a motion to stay the remittitur pending application to the United States Supreme Court for a writ of certiorari. However, Plaintiff failed to file a motion for stay of the remittitur and accordingly, the remittitur was issued and the case was closed on March 18, 2014. *See* RFJN at Nos. 8; 9.

As a result, with no remaining appeals of right available to Plaintiff as of the entry of the Order of Affirmance on May 31, 2013, with the Nevada Supreme Court having issued its final, non-appealable Order Denying *En Banc* Reconsideration on February 21, 2014, and with the Nevada Supreme Court having issued its remittitur and closed the case by March 18, 2014, there is simply no possibility of any further tolling of the statute of limitations for Plaintiff's malpractice claim beyond March 18, 2014 at the very latest. This means the statute of limitations on this malpractice claim expired by no later than March 18, 2016. This lawsuit was not filed until October 5, 2016—well after the statute of limitations expired.

Moreover, allowing the litigation tolling rule under Nevada law to extend to the United States Supreme Court encourages plaintiffs to file frivolous writs of certiorari that take years for review, unnecessarily elongating their statute of limitations period for potential malpractice claims against their former counsel. As stated by one court, a plaintiffs' ability to toll the statute of limitations balances two competing interests: "avoiding stale claims and providing meaningful remedies for plaintiffs. If the statute of limitations were tolled pending an appeal of the underlying claim this balance would be disturbed [as] 'an attorney is kept in a state of breathless

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apprehension while a former client pursues appeals from the trial court, to the Court of Appeal, to the Supreme Court and then, if the client has the money and energy, to the United States Supreme Court, during which time memories fade, witnesses disappear or die, and evidence is lost.'" *Robbins & Seventko Orthopedic Surgs. v. Geisenberger,* 449 Pa. Super. 367, 376, 674 A.2d 244, 248 (Pa. Super. Ct. 1996) (quoting *Laird v. Blacker*, 235 Cal. App. 3d 1795, 279 Cal. Rptr. 2d 700 (1991)).

Likewise, as stated by the Nevada Supreme Court, "the state has a legitimate interest in the finality of judgments. When a case must be retried after a significant passage of time, both parties are hindered by the likelihood that key evidence and witnesses will no longer be available for presentation to the trier of fact." *Snow v. State*, 105 Nev. 521, 524, 779 P.2d 96, 98 (1989). Thus, allowing parties to suspend malpractice claims through writ practice allows for witnesses and evidence to waste away to the annals of time. As a result, it is equitable and just to find Plaintiff's case concluded with the affirmation of the Nevada Supreme Court on May 31, 2013, making this cause of action untimely.

V. CONCLUSION

As a matter of law, Plaintiff cannot allege or prove that it suffered any damages as a result of Defendants' action. This alone requires dismissal of the FAC. However, as discussed above, Plaintiff also fail to state a claim upon which relief can be granted because it has no standing to sue over claims and interests that a Nevada court ruled it *does not own*. Defendants cannot be expected, as trial lawyers, to grant Plaintiff rights that it does not have. Finally,

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Plaintiff's cause of action for legal malpractice violates the statute of limitations. Thus, the FAC is without merit and must be dismissed in its entirety.

DATED this 8th day of March 2017.

Respectfully submitted,

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CERTIFICATE OF MAILING

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 8th day of March, 2017, the foregoing **DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** 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:

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