

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.

Electronically Filed
Mar 14 2018 11:38 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 73848

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

**JOINT APPENDIX
VOLUME II**

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
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
dca@albrightstoddard.com
Attorney for Appellant

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

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Cox & Larsen's Notice of Motion and Motion to Dismiss Complaint; Memorandum of Points and Authorities [subsequently superceded and ultimately never ruled on]	I	AA0040-0070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8	12/28/16	Plaintiff's Opposition to Motion to Dismiss; and Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA0073-0103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Cox & Larsen's Motion to Dismiss Complaint And Opposition to Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA0104-0124
10	01/27/17	Plaintiff's Reply in Support of Alternative Countermotion for Leave to Amend Complaint [subsequently superceded]	I	AA0125-0130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

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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 NRCPC 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
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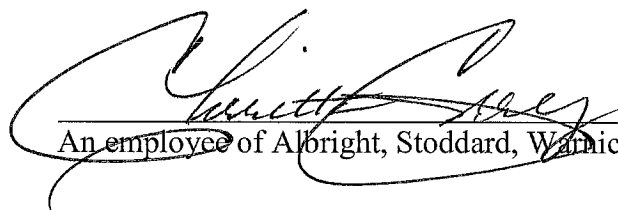
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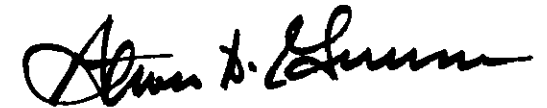
CERTIFICATE OF SERVICE

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 II**, 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

<input type="checkbox"/>	Certified Mail
<input checked="" type="checkbox"/>	Electronic Filing/Service
<input type="checkbox"/>	Email
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Regular Mail


An employee of Albright, Stoddard, Warnick & Albright



CLERK OF THE COURT

1 **RFJN**
2 CRAIG J. MARIAM, ESQ.,
3 Nevada Bar No. 10926
4 ROBERT S. LARSEN, ESQ.
5 Nevada Bar No. 7785
6 WING YAN WONG, ESQ.
7 Nevada Bar No. 13622
8 GORDON & REES LLP
9 300 South Fourth Street, Suite 1550
10 Las Vegas, Nevada 89101
11 Telephone: (702) 577-9300
12 Facsimile: (702) 255-2858
13 E-Mail: cmariam@gordonrees.com
14 rlarsen@gordonrees.com
15 wwong@gordonrees.com

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

18 EIGHTH JUDICIAL DISTRICT COURT

19 CLARK COUNTY, NEVADA

20 BRANCH BANKING & TRUST COMPANY, a
21 North Carolina corporation,

22 Plaintiff,

23 vs.

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

28 Defendant.

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

**REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF
DEFENDANTS DOUGLAS D.
GERRARD, ESQ., AND GERRARD
COX & LARSEN'S MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

[Concurrently filed with Notice of
Motion; Memorandum of Points and
Authorities]

Date:
Time:
Dept: XXVII
Judge: Honorable Nancy L. Allf

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REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

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

PLEASE TAKE NOTICE that on _____, 2017 at ____ p.m., or as soon thereafter as this matter may be before the Honorable Judge Nancy L. Alf in Department XXVII of the above captioned court located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155, Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen ("Firm") (collectively, "Defendants"), by and through its attorneys, Craig J. Mariam, Esq., Robert S. Larsen, Esq. and Wing Yan Wong, Esq., of the law firm of Gordon & Rees LLP, will, and hereby does, respectfully request, in considering Defendants' Motion to Dismiss First Amended Complaint, that this Court take judicial notice of the following facts through corresponding documents, pursuant to NRS 47.130:

1. The fact that Defendants, on behalf of Plaintiff Branch Banking & Trust Company ("Plaintiff"), filed the Second Amended Complaint ("Operative BB&T Complaint") in the case styled *Murdock et al. v. Rad, et al.*, Clark County Nevada District Court Case Number A-08-574852, consolidated with Case No. A-09-594512-C ("*Murdock* Litigation") on October 7, 2009 in Department XI of the District Court of Clark County, Nevada, a true and correct copy of which is attached hereto as **Exhibit A**.
2. The fact that the Operative BB&T Complaint attached hereto as Exhibit A 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 Operative BB&T Complaint at ¶¶ 34-85.
3. The fact that the Operative BB&T Complaint attached hereto as Exhibit A prayed for damages that included: general damages in excess of \$10,000.00; exemplary and punitive damages in excess of \$10,000.00; attorneys' fees and costs; and declaratory relief, specifically orders declaring Plaintiff had subrogated to all rights under the First Colonial

1 Loan and First DOT, that the Third DOT replaced the First Colonial DOT and that
2 Plaintiff is entitled to first priority position for the Property, that the Second DOT was
3 either expunged or junior priority, and that the named defendants therein were compelled
4 to disgorge benefits unjustly received in excess of \$10,000.00. Id. at Prayer for Relief, p.
5 16.

6 4. The fact that the Findings of Fact and Conclusions of Law (“FFCL”) made by the trial
7 court in the *Murdock* Litigation was filed on June 23, 2010 in the District Court of Clark
8 County, Nevada, Department XI, a true and correct copy of which is attached hereto as
9 **Exhibit B.**

10 5. The following facts contained within the findings of fact and conclusions of law in the
11 *Murdock* Litigation memorialized in the FFCL attached hereto as Exhibit C, including:

12 A. The fact that the trial court in the *Murdock* Litigation consolidated an evidentiary
13 hearing and a limited trial on those specific questions in a first phase of trial
14 which took place over 10 days between January 8, 2010 and April 14, 2010. Id. at
15 p.3.

16 B. The fact that the trial court in the *Murdock* Litigation found that representatives of
17 Colonial Bank, N.A., an Alabama corporation (“Colonial”), testified that Colonial
18 only entered into a July 27, 2007 loan (“Construction Loan”) with the plaintiff of
19 the *Murdock* Litigation, R&S St. Rose, LLC (“St. Rose”), under the condition that
20 a deed of trust in favor of Colonial against the subject property recorded on July
21 31, 2007 (“Third DOT”) would have first priority for the subject property. FFCL
22 at Findings of Fact, ¶ 40.

23 C. The fact that, to gain a first priority position, the trial court in the *Murdock*
24 Litigation found that Colonial had to form an agreement with St. Rose to
25 reconvey a deed of trust against the subject property, recorded on September 16,
26 2005 (“Second DOT”), which had a priority position above the Third DOT. Id. at
27 ¶¶ 40, 41.

- 1 D. The fact that, in order to acquire that agreement, the trial court in the *Murdock*
2 Litigation found Colonial drafted a loan commitment letter dated July 24, 2007
3 (“Loan Commitment Letter”) supposedly faxed to St. Rose. Id. at ¶¶ 40, 41.
- 4 E. The fact that, the trial court in the *Murdock* Litigation found that representatives
5 of St. Rose denied ever receiving the Loan Commitment Letter, and Colonial
6 representatives were unable to produce either a copy of the letter executed by St.
7 Rose or even a copy of the facsimile of same. Id. at ¶¶ 42, 43, 47, 49.
- 8 F. The fact that, regardless of the status of the Second DOT, the trial court in the
9 *Murdock* Litigation found Colonial worked with the Nevada Title Company to
10 close on the Construction Loan on July 31, 2007. Id. at ¶¶ 54, 65.
- 11 G. The fact that the trial court in the *Murdock* Litigation found that “Since St. Rose
12 Lenders, was not a party to either the 2007 Colonial Bank Deed of Trust or the
13 Construction Loan Agreement, it is not required to subrogate its Deed of Trust. Id.
14 at ¶ 121.
- 15 H. The fact that the trial court in the *Murdock* Litigation found that “An agreement
16 which prejudices lien holders or impairs their security requires their consent.” Id.
17 at ¶ 122.
- 18 I. The fact that the trial court in the *Murdock* Litigation found that “St. Rose
19 Lenders did not consent to subrogate its Deed of Trust.” Id. at ¶ 123.
- 20 J. The fact that the trial court in the *Murdock* Litigation found that Colonial “did not
21 have a reasonable expectation that it would receive a reconveyance of the [Second
22 DOT] following closing of the Construction loan transaction [,] only that it would
23 receive a policy of title insurance, which it did receive.” Id. at Conclusions of
24 Law, ¶¶ 22, 27.
- 25 K. The fact that as a condition of the Construction Loan, the trial court in the
26 *Murdock* Litigation found that Colonial did not require St. Rose to reconvey or
27 subordinate the Second DOT or convert it to equity. Id. at Findings of Fact, ¶ 51.
28

- 1 L. The fact that the trial court in the *Murdock* Litigation found that “Colonial Bank
2 never communicated to Rad, Nourafchan [principals of R&S St. Rose], R&S or
3 St. Rose Lenders that it required a first priority deed of trust for the Construction
4 Loan.” Id. at ¶ 71.
- 5 M. The fact that the trial court in the *Murdock* Litigation found that “Colonial Bank
6 did not condition its extension of the Construction Loan on its receipt of a first
7 deed of trust.” Id. at ¶ 86.
- 8 N. The fact that the trial court in the *Murdock* Litigation found that “Colonial Bank
9 did not convey any intent to receive a first deed of trust to either R&S, St. Rose
10 Lenders, Rad or Nourafchan.” Id. at ¶ 87.
- 11 O. The fact that the trial court in the *Murdock* Litigation found that “Colonial Bank
12 did not negotiate the requirement for a first deed of trust in the Construction Loan
13 Agreement, Deed of Trust or Promissory Note Secured by Deed of Trust.” Id. at ¶
14 89.
- 15 P. The fact that the trial court in the *Murdock* Litigation found that “Reconveyance
16 of the St. Rose Lenders Deed of Trust was not a condition for closing the
17 Construction Loan transaction.” Id. at ¶ 100.
- 18 Q. The fact that the trial court in the *Murdock* Litigation found that the “Purchase
19 and Assumption Agreement, Whole Bank All Deposits” (“PAA”) executed by the
20 Plaintiff on August 14, 2009 with the Federal Deposit and Insurance Corporation
21 (“FDIC”) was deficient “as inconsistent and incomplete” for, in part, failing to
22 attach the schedules referenced therein, and that the Second DOT was never
23 reconveyed or subordinated. Id. at Findings of Fact, ¶¶ 115; 138.
- 24 R. The fact that the trial court in the *Murdock* Litigation found that “The Purchase
25 and Assumption Agreement specifically excluded actions and claims against any
26 individual, corporation, partnership, joint venture, association, joint-stock
27 company, trust, unincorporated organization, or government or any agency or
28

political subdivision thereof, from the Colonial Bank assets purchased from the FDIC.” Id. at Conclusions of Law, ¶ 10.

S. The fact that the trial court in the *Murdock* Litigation stated in its Findings of Fact and Conclusions of law that “[a] Party must invoke equity to obtain relief from the established order dictated by a recording system.” Id. at ¶ 19.

T. The fact that the trial court in the *Murdock* Litigation ruled expressly that “The Court will grant the declaratory relief requested in St. Rose Lenders’ First Cause of Action.” Id. at ¶ 28.

U. The fact that the trial court in the *Murdock* Litigation ruled expressly that “St. Rose Lenders’ Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust.” Id. at ¶ 29.

6. The fact that the trial court in the *Murdock* Litigation issued a Final Judgment on July 23, 2010, attached hereto as **Exhibit C**.

7. The fact that the Final Judgment issue on July 23, 2010 by the trial court in the *Murdock* Litigation attached hereto as Exhibit D contained the following statements and rulings concerning a Findings of Fact and Conclusions of Law:

On June 23, 2010 the Court entered its Findings of Fact and Conclusions of Law based upon a non jury trial commencing on January 8, 2010, and concluding on April 8, 2010. On June 24, 2010, the Court entered an Order Granting, in part, and Denying in part: (1) BB&T’s Motion To Voluntarily Dismiss Its Remaining Claims To Certify Order As Final And Motion To Stay Foreclosure Pending Appeal On Order Shortening Time; and (2) Plaintiffs’ Motion To Voluntarily Dismiss The Remaining Claims Against All Defendants And Enter Judgment In Accordance With This Court’s Order Of April 21, 2010. On July 13, 2010, the Court filed its Judgment in favor of Plaintiffs against R & S St. Rose Lenders, LLC. Accordingly, the Court hereby enters Final Judgment on all claims as follows:

IT IS HEREBY ORDERED ADJUDGED AND DECREED that:

1. The Findings of Fact and Conclusions of Law are hereby incorporated herein;
[. . .]

8. The fact that Plaintiff never filed a motion for stay of remittitur in its Nevada Supreme Court case. See *R&S St. Rose Lenders v. Branch Banking and Trust Co.*, Case No. 56640

(Nev. filed Aug. 20, 2010), available at

<http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=24308> (last accessed on Feb. 28, 2017).

9. The fact that the Nevada Supreme Court closed Plaintiff's case on March 18, 2014. *Id.*

LEGAL BASIS FOR JUDICIAL NOTICE

The aforementioned facts are proper subject matter of judicial notice under NRS 47.130, which authorizes as follows:

1. The facts subject to judicial notice are facts in issue or facts from which they may be inferred.
2. A judicially noticed fact must be:
 - (a) Generally known within the territorial jurisdiction of the trial court; or
 - (b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.

The Court "shall take judicial notice if requested by a party and supplied with the necessary information." NRS 47.150. In addition, judicial notice may be taken at any stage of the proceeding prior to submission to the court or jury. NRS 47.170.

The Court is free to judicially notice matters of public record without converting a motion to dismiss into one of summary judgment. See *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) ("[T]he court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted."); see also *Gemtel Corp. v. Cmty. Redevelopment Agency*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994) ("On a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a [motion to dismiss] to one for summary judgment.") (citation omitted).

The aforementioned documents are matters of public record, preserved in the record of this very Court in the *Murdock* Litigation. Thus the date of filing, the filing party, and the general contents of each document are proper subject matter for judicial notice for consideration on Defendants' Motion to Dismiss without turning the Motion into one of summary judgment.

1 Likewise, “documents whose contents are alleged in a complaint and whose authenticity
2 no party questions, but which are not physically attached to the pleading, may be considered in
3 Ruling on a 12(b) motion to dismiss”. *Thunder Props. v. Gonsalez*, 2014 Nev. Dist. LEXIS 207,
4 *8-9 (Nev. Dist. Ct. 2014) (*quoting Bhardwaj v. Pathak*, 2013 WL 5958145, *1, n. 1 (N.D. Cal.
5 Nov. 7, 2013)).

6 Each of the aforementioned documents and facts are referenced, quoted, and relied upon
7 by the FAC. Specifically, the FAC refers to the aforementioned filings in the *Murdock*
8 Litigation as follows:

- 9 • The Operative BB&T Complaint, attached hereto as **Exhibit A**: FAC at ¶¶ 50; 51; 52; 59;
10 60; 61; 62; 63; 90;
- 11 • The FFCL, attached hereto as **Exhibit B**: Id. at ¶¶ 135-143;
- 12 • The July 23, 2010 Final Judgement, attached hereto as **Exhibit C**: Id. at ¶¶ 156; and
- 13 • The rulings and actions of the Nevada Supreme Court in case number 56640, the docket
14 of which is referenced in RFJN Nos. 8 and 9: Id. at ¶¶ 157-164.

15 Thus, each of the aforementioned documents and facts are incorporated by reference into
16 the FAC, and proper subject matter for judicial notice without converting the Motion to Dismiss
17 into one for summary judgment.

18 Furthermore, a court may judicially notice filings in another case where they share a
19 “close relationship” to the underlying case. *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d
20 568, 569 (1981) (in estate case, district court took judicial notice of filings in closely related
21 divorce proceeding). The instant case before the Court is a litigation-based legal malpractice
22 action that revolves around the *Murdock* Litigation. As a result, the claims alleged by the
23 Plaintiff inherently involve a close relationship to the events, filings, findings of fact, and
24 conclusions of law in the *Murdock* Litigation, necessitating judicial notice of same to make
25 further findings of fact and conclusions of law concerning the instant case.

26 The aforementioned documents and findings of fact and conclusions of law are all proper
27 subject matter for this Court when ruling on Defendants’ Motion to Dismiss the FAC. Each is
28 “capable of accurate and ready determination by resort to sources whose accuracy cannot

1 reasonably be questioned, so that the fact is not subject to reasonable dispute” pursuant to NRS
2 47.130. Thus, as each of the aforementioned documents and facts are matters of public record,
3 referenced and relied upon in the FAC, and concern prior litigation in a close relationship to the
4 case at bar, these documents and facts must be judicially noticed pursuant to NRS 47.150.

5 DATED this 8th day of March, 2017.

6 Respectfully submitted,

7 GORDON & REES, LLP

8 /s/ Craig J. Mariam

9 Craig J. Mariam, Esq.

10 Nevada Bar No. 10926

11 Robert S. Larsen, Esq.

12 Nevada Bar No. 7785

13 Wing Yan Wong, Esq.

14 Nevada Bar No. 13622

15 300 South Fourth Street, Suite 1550

16 Las Vegas, Nevada 89101

17 *Attorneys for Defendants Douglas D.*

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

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

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 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S MOTION TO DISMISS COMPLAINT 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:

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

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

EXHIBIT A

EXHIBIT A



CLERK OF THE COURT

1 **ACOM**
Douglas D. Gerrard, Esq.
2 Nevada Bar No. 4613
Sheldon A. Herbert, Esq.
3 Nevada Bar No. 5988
Aaron B. Shumway, Esq.
4 Nevada Bar No. 10759
GERRARD COX & LARSEN
5 2450 St. Rose Pkwy., Suite 200
Henderson, Nevada 89074
6 (702) 796-4000
Attorneys for BB&T Corporation
7 *as successor in interest to Federal*
Deposit Insurance Corporation,
8 *as receiver of Colonial Bank N.A.*

9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11 ROBERT E. MURDOCK and ECKLEY M.
12 KEACH,

13 Plaintiffs,

13 vs.

14 SAIID FOROUZAN RAD, an individual; R. PHILLIP
15 NOURAFCHAN, an individual; FOROUZAN, INC., a
16 Nevada corporation; RPN LLC, a Nevada limited
liability company; R & S ST. ROSE, LLC, a Nevada
17 limited liability company; R & S ST. ROSE
LENDERS, LLC, a Nevada limited liability company;
18 COLONIAL BANCGROUP, INC.; R & S
INVESTMENTS GROUP, LLC, a Nevada limited
liability company; and DOES I through X, inclusive,

19 Defendants.

Master Case No. **08-A574852**
(consolidated with 09-A594512)

Dept No.: XI

SECOND AMENDED COMPLAINT

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GERRARD, COX & LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000

1 BB&T, CORPORATION as successor in interest to
2 Federal Deposit Insurance Corporation, as receiver of
Colonial Bank N.A.

3 Cross-Complainant,

4 vs.

5 R & S ST. ROSE LENDERS, LLC, a Nevada limited
6 liability company, R & S ST. ROSE, LLC, a Nevada
7 limited liability company, FOROUZAN, INC., a Nevada
8 corporation, RPN, LLC, a Nevada limited liability
company, SAIID FOROUZAN RAD, an individual, R.
PHILLIP NOURAFCHAN, an individual, and DOES 1-
10, and ROE ENTITIES 1-10, inclusive,

9 Cross-Defendants,

10
11 R & S ST. ROSE LENDERS, LLC, a Nevada limited
liability company,

12 Cross-plaintiff,

13 vs.

14 COLONIAL BANCGROUP, INC.

15 Cross-defendant.
16

17 **SECOND AMENDED COMPLAINT**

18 COMES NOW Cross-Complainant BB&T CORPORATION, as successor in interest to
19 Federal Deposit Insurance Corporation, as receiver of Colonial Bank N.A. (“BB&T” or
20 “Plaintiff”), by and through its attorneys, GERRARD COX & LARSEN, and for its Second
21 Amended Complaint, alleges and avers as follows:

22 **GENERAL ALLEGATIONS**

23 1. BB&T is a North Carolina corporation, that is successor in interest to Federal
24 Deposit Insurance Corporation as receiver of Colonial Bank N.A., with sufficient minimum
25 contacts with the State of Nevada and entitled to an interest in certain real property at issue in this
26 case which is located in Clark County, Nevada.

27 2. Upon information and belief, Defendant R&S ST. ROSE LENDERS, LLC (“R&S
28 Lenders”) is organized in the State of Nevada with an interest in certain real property at issue in
this case which is located in Clark County, Nevada.

1 3. Upon information and belief, Defendant R&S ST. ROSE, LLC (“R&S”) is
2 organized in the State of Nevada with an interest in certain real property at issue in this case
3 which is located in Clark County, Nevada.

4 4. Upon information and belief, Defendant FOROUZAN, INC. (“Forouzan”) is
5 incorporated in the State of Nevada and doing business in Clark County, Nevada.

6 5. Upon information and belief, Defendant RPN, LLC (“RPN”) is organized in the
7 State of Nevada and doing business in Clark County, Nevada.

8 6. Upon information and belief, Defendant SAID FOROUZAN RAD (“Rad”) is a
9 resident of Clark County, Nevada.

10 7. Upon information and belief, Defendant R. PHILLIP NOURAFCHAN
11 (“Nourafchan”) is a resident of Clark County, Nevada.

12 8. The true names and capacities, whether individual, corporate, associate, or
13 otherwise of Defendant DOES 1-10, and ROE ENTITIES 1-10, inclusive, are not known to
14 Plaintiff at this time and are therefore named as fictitious Defendants. Plaintiff is informed and
15 believes, and upon such alleges, that each of the Defendants designated as a Doe, or a Roe Entity
16 is responsible in some manner for the events and happenings referred to in this Second Amended
17 Complaint. Plaintiff will ask leave of this Court to amend this Second Amended Complaint and
18 insert the true names and capacities of said DOES 1-10, and ROE ENTITIES 1-10, inclusive,
19 when the same have been ascertained by Plaintiff, together with the appropriate charging
20 allegations, and to join these Defendants in this action.

21 9. On or about August 26, 2005, R&S was the owner of certain real property located
22 in Clark County, Nevada (the “Property”), and more fully described as:

23 PARCEL I:

24 THAT PORTION OF THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26,
25 TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA,
26 DESCRIBED AS FOLLOWS:

27 LOT 4-3 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS,
28 PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY,
29 NEVADA.

30 ///

1 PARCEL II:

2 THAT PORTION OF THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26,
3 TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA,
DESCRIBED AS FOLLOWS:

4 LOT 4-4 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS,
5 PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY,
NEVADA.

6 PARCEL III:

7 THE WEST HALF (W1/2) OF THE SOUTHWEST QUARTER (SW1/4) OF THE
8 NORTHWEST QUARTER (NW 1/4) OF THE SOUTHWEST QUARTER (SW 1/4) OF
THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22 SOUTH,
9 RANGE 61 EAST, M.D.M.

10 EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY
BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY
11 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

12 FURTHER EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO
CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED
13 RECORDED JANUARY 27, 1998 IN BOOK 980127 AS INSTRUMENT NO. 01298 OF
OFFICIAL RECORDS.

14 TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK
COUNTY IN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK
15 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

16 PARCEL IV:

17 THE EAST HALF (E 1/2) OF THE SOUTHWEST QUARTER (SW 1/4) OF THE
18 NORTHWEST QUARTER (NW 1/4) OF THE SOUTHWEST QUARTER (SW 1/4) OF
THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22 SOUTH,
19 RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA.

20 EXCEPTING THEREFROM THAT PORTION CONVEYED TO CLARK COUNTY
BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY
21 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

22 TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK
COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK
23 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

24 PARCEL V:

25 SOUTHEAST QUARTER (SE 1/4) OF THE NORTHWEST QUARTER (NW 1/4) OF
THE SOUTHWEST QUARTER (SW 1/4) OF THE SOUTHEAST QUARTER (SE 1/4)
26 OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK
COUNTY, NEVADA.

27 EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY
BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY
28 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

1 TOGETHER WITH THAT PORTION OF BRUCE STREET AS VACATED BY
2 CLARK COUNTY IN AN ORDER OF VACATION RECORDED DECEMBER 24,
3 1977 IN BOOK 971224 AS INSTRUMENT NO. 00917 AND RE-RECORDED APRIL
4 9, 1998 IN BOOK 980409 AS INSTRUMENT NO. 01289 AND RE-RECORDED
OCTOBER 12, 1998 IN BOOK 981012 AS INSTRUMENT NO. 00903 AND RE-
RECORDED DECEMBER 8, 1998 IN BOOK 981208 AS INSTRUMENT NO. 00688
OF OFFICIAL RECORDS.

5 TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK
6 COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK
20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

7 PARCEL VI:

8 THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHWEST QUARTER
9 (SW ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST
10 QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST,
11 M.D.M., LYING NORTHEASTERLY OF THE NORTHEASTERLY RIGHT OF WAY
LINE OF SPENCER STREET AS LOCATED ON THAT CERTAIN GRANT,
BARGAIN, SALE DEED RECORDED JANUARY 30, 1998 IN BOOK 980130 AS
INSTRUMENT NO. 01806, OFFICIAL RECORDS.

12 PARCEL VII:

13 THAT PORTION OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST
14 QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST,
M.D.B. & M., CLARK COUNTY, NEVADA, DESCRIBED AS FOLLOWS:

15 BEGINNING AT THE NORTHEAST CORNER (NE COR.) OF THE SOUTH HALF
16 (S ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER
(SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 26;
17 THENCE SOUTH 00°21'02" WEST ALONG THE EAST LINE THEREOF, 98.88 FEET
TO A POINT ON THE NORTHWESTERLY EASEMENT LINE OF LAKE MEAD
18 DRIVE (ST. ROSE PARKWAY) (300.00 FEET WIDE); THENCE SOUTH 48°18'18"
WEST ALONG SAID NORTHWESTERLY EASEMENT LINE 423.23 FEET; THENCE
19 NORTH 41°42'17" WEST, 304.80 FEET; THENCE CURVING TO THE RIGHT
ALONG THE ARC OF A 1080.00 FOOT RADIUS CURVE CONCAVE
20 NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 02°37'57", AN ARC
LENGTH OF 49.62 FEET TO A POINT ON THE NORTH LINE OF THE SAID
21 SOUTH HALF (S ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE
SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF
22 SAID SECTION 26, A RADIAL LINE TO SAID POINT BEARS SOUTH 50°55'40"
WEST; THENCE SOUTH 89°21'22" EAST ALONG SAID NORTH LINE, 417.18 FEET
TO THE POINT OF BEGINNING.

23 EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY
24 BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 30,
1998 IN BOOK 980130 AS INSTRUMENT NO. 01321 OF OFFICIAL RECORDS.

26 NOTE: THE ABOVE METES AND BOUNDS DESCRIPTION APPEARED
27 PREVIOUSLY IN THAT CERTAIN DOCUMENT RECORDED MAY 5, 1998 IN
BOOK 980505 AS INSTRUMENT NO. 02057, OFFICIAL RECORDS.

28 ///

1 PARCEL VIII:

2 THAT PORTION OF THE SOUTH HALF (S ½) OF THE SOUTHEAST QUARTER
3 (SE ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST
4 QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST,
5 M.D.M., CLARK COUNTY, NEVADA, LYING NORTHWESTERLY OF THE
6 NORTHWESTERLY LINE OF LAKE MEAD DRIVE (NOW KNOWN AS ST. ROSE
7 PARKWAY) AS THE SAME NOW EXISTS.

8 10. On or about August 26, 2005, R&S obtained a loan from Plaintiff in the principal
9 amount of \$29,305,250.00 (the "First Colonial Loan").

10 11. On or about August 26, 2005, R&S executed a promissory note in favor of
11 Plaintiff in the principal amount of \$29,305,250.00 (the "First Colonial Note").

12 12. On or about August 26, 2005, R&S secured the First Colonial Loan and First
13 Colonial Note by recording a first position Deed of Trust against the Property in favor of Plaintiff
14 in the principal amount of \$29,305,250.00 as Document No. 05282 in Book 20050826 of the
15 Official Records of Clark County, Nevada (the "First Colonial DOT").

16 13. On or about September 16, 2005, R&S recorded a second position Deed of Trust
17 against the Property in favor of Defendant R&S Lenders in the principal amount of
18 \$12,000,000.00 as Document No. 02881 in Book 20050916 in the Official Records of Clark
19 County, Nevada (the "R&S Lenders DOT").

20 14. Plaintiff is without information as to whether R&S Lenders paid any consideration
21 to R&S for the R&S Lenders DOT.

22 15. Upon information and belief, Defendants R&S and R&S Lenders are related
23 entities, each of which at all times relevant to this case, is owned and/or controlled by,
24 Defendants Forouzan and RPN, who are also the members/managers of both R&S and R&S
25 Lenders.

26 16. Upon information and belief, Defendant Rad is the president of Forouzan and
27 Defendant Nourafchan is the manager of RPN.

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

1 18. Pursuant to the R&S Lenders Subordination Agreement, R&S Lenders recognized
2 that the First Colonial DOT and its related loan was going to be modified to extend the maturity
3 date of the First Colonial Note, and acknowledged that Plaintiff was to retain a first position lien
4 against the Property.

5 19. On or about July 27, 2007, Plaintiff agreed to make a development loan to R&S
6 in the amount of \$43,980,000.00 (the "Second Colonial Loan") to be secured by a first priority
7 lien against the Property.

8 20. The Second Colonial Loan was to be used to pay off the First Colonial Note and
9 provide funds for construction of improvements on the Property, and was to be secured by a first
10 priority deed of trust against the Property.

11 21. Within one week prior to Colonial funding the Second Colonial Loan, the escrow
12 officer at Nevada Title Company ("Nevada Title") that was handling the transaction, Brenda
13 Burns, told Defendants Rad and/or Nourafchan that Plaintiff would not close and fund the Second
14 Colonial Loan unless it was secured by a first priority lien against the Property, which required
15 the release and reconveyance of the R&S Lenders DOT.

16 22. Defendants Rad and/or Nourafchan, individually and in their capacity as the
17 managing officers of Forouzan and RPN, respectively, the managing entities of R&S and R&S
18 Lenders, responded by telling and assuring Brenda Burns that they would cause the reconveyance
19 of the R&S Lenders DOT in order to close escrow of the Second Colonial Loan.

20 23. On or about July 27, 2007, R&S executed a promissory note in favor of Plaintiff
21 in the principal amount of \$43,980,000.00 (the "Second Colonial Note").

22 24. Defendants Rad and Nourafchan guaranteed the repayment of the Second Colonial
23 Note.

24 25. On or about July 31, 2007, R&S recorded what was intended by Plaintiff to be a
25 new first position Deed of Trust against the Property in favor of Plaintiff in the principal amount
26 of \$43,980,000.00 as Document No. 0004824 in Book 20070731 of the Official Records of Clark
27 County, Nevada (the "Second Colonial DOT").

28 ///

1 26. The conversation described in ¶¶ 21 & 22 above occurred within a few days prior
2 to the recording of the Second Colonial DOT on or about July 31, 2007. Brenda Burns clearly
3 explained to Defendants Rad and/or Nourafchan that they would have to provide a reconveyance
4 of the R&S Lenders DOT as the Second Colonial Loan was to be a first position lien on the
5 Property. Defendants Rad and/or Nourafchan knowingly and fraudulently assured Brenda Burns
6 in their individual capacity and in their capacity as the managing officers of Forouzan and RPN,
7 respectively, the controlling entities of R&S and R&S Lenders, that they would release and
8 reconvey the R&S Lenders DOT.

9 27. In reliance upon the misrepresentations and promises that Defendants Rad and/or
10 Nourafchan made in their individual capacity and in their capacity as the managing members of
11 Forouzan and RPN, respectively, the controlling entities of R&S and R&S Lenders, the Second
12 Colonial Loan and escrow closed when Plaintiff funded the Second Colonial Loan and released
13 and reconveyed the First Colonial DOT.

14 28. On July 9, 2008, Brenda Burns followed up on the R&S Lenders DOT
15 reconveyance that Defendants Rad and Nourafchan were to have provided to Nevada Title in
16 connection with the Second Colonial Loan, requesting that R&S Lenders execute a Substitution
17 of Trustee and Deed of Reconveyance. Within a few days of July 9, 2008, Defendants Rad and/or
18 Nourafchan responded to Brenda Burns' email requesting a reconveyance by way of a telephone
19 call during which Rad again confirmed that R&S Lenders would be reconveying the R&S
20 Lenders DOT.

21 29. Between July 9, 2008 and September 5, 2008, Defendants Rad and/or Nourafchan,
22 in their individual capacity and in their capacity as the managing officers of Forouzan and RPN,
23 respectively, the controlling entities of R&S and R&S Lenders, indicated to Brenda Burns that
24 they were in the process of preparing new loan documents and a deed of trust which they intended
25 to record directly after they reconveyed the R&S Lenders DOT. To assist in preparing the
26 necessary documents, Rad and/or Nourafchan requested copies of any deeds of trust encumbering
27 the Property.

28 ///

1 30. On or about September 5, 2008, in response to Defendants Rad and Nourafchan's
2 request to provide any deeds encumbering the Property, Brenda Burns sent copies of the Second
3 Colonial DOT as well as the R&S Lenders DOT to Defendants Rad and Nourafchan, confirming
4 the need for the R&S Lenders DOT reconveyance.

5 31. On or about September 17, 2008, Teresa Cargill, an agent/employee of an entity
6 controlled by Defendants Rad and Nourafchan, requested additional information in the form of
7 a title report from Brenda Burns to purportedly assist their attorney in preparing new loan
8 documents and a deed of trust in connection with reconveying the R&S Lenders DOT.

9 32. On or about September 25, 2008, Brenda Burns provided the amended preliminary
10 title report to Defendants Rad and Nourafchan, which clearly showed that the R&S Lenders DOT
11 needed to be reconveyed since it was still in a senior lien position as to the Second Colonial Loan.

12 33. The Plaintiff has been required to hire an attorney to obtain the relief set forth
13 herein and as a result, is entitled to its attorneys fees and costs incurred.

14 **FIRST CAUSE OF ACTION**

15 **(Declaratory Relief - Contractual Subrogation)**

16 34. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1 through
17 33 of its Second Amended Complaint and incorporates the same by this reference as if more fully
18 set forth herein.

19 35. Plaintiff has fully complied with each and every obligation under the Second
20 Colonial Loan, Second Colonial Note, and Second Colonial DOT, including paying off the entire
21 amount owed under the First Colonial Loan and releasing and reconveying the First Colonial
22 DOT.

23 36. The Second Colonial DOT contractually entitles Plaintiff to be subrogated to any
24 and all encumbrances, including the First Colonial DOT, that were satisfied by the proceeds of
25 the Second Colonial Loan.

26 37. Defendants Rad, Nourafchan, Forouzan, RPN, R&S, and R&S Lenders dispute
27 Plaintiff's right to be subrogated to the priority of the First Colonial DOT to the extent of the
28 terms of the First Colonial Loan.

1 38. An actual justiciable case or controversy exists between the parties and their
2 interests are adverse. Plaintiff has a legally protectable interest in the Property, and the issue is
3 ripe for judicial determination.

4 39. Plaintiff's legal fees and costs in prosecuting this action are covered and secured
5 by its subrogated lien position in the same manner as if Plaintiff was defending its lien rights
6 under the First Colonial DOT.

7 40. Plaintiff is entitled to a declaration that it is subrogated (contractually) to all rights
8 of the First Colonial Loan, First Colonial Note, and First Colonial DOT, up to the full amount
9 paid to satisfy the First Colonial Loan, plus interest, costs and attorneys fees accrued and/or
10 incurred thereafter.

11 **SECOND CAUSE OF ACTION**

12 **(Declaratory Relief/Quiet Title - Replacement)**

13 41. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1 through
14 40 of its Second Amended Complaint and incorporates the same by this reference as if more fully
15 set forth herein.

16 42. At the time that the escrow closed relative to the Second Colonial Loan, Plaintiff
17 paid the entirety of the amounts owed on the First Colonial Loan.

18 43. The First Colonial DOT was released of record as part of the transaction and
19 replaced with the Second Colonial DOT, which was intended to be a first position lien against
20 the Property.

21 44. At the time that the escrow closed relative to the Second Colonial Loan,
22 Defendants Rad and Nourafchan on behalf of R&S Lenders already had a purported lien interest
23 in the Property and did not acquire any new or additional interest in the Property during the time
24 that Plaintiff's lien interests were not of record, if any.

25 45. The Second Colonial DOT is entitled to the same priority as the First Colonial
26 DOT to the extent of the terms of the First Colonial Loan.

27 ///

28 ///

1 46. Plaintiff's legal fees and costs in prosecuting this action are covered and secured
2 by its subrogated lien position in the same manner as if Plaintiff was defending its lien rights
3 under the First Colonial DOT.

4 **THIRD CAUSE OF ACTION**

5 **(Equitable/Promissory Estoppel)**

6 47. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1 through
7 46 of its Second Amended Complaint and incorporates the same by this reference as if more fully
8 set forth herein.

9 48. Defendants Rad and Nourafchan (acting individually and in their representative
10 capacities), Forouzan, and RPN agreed to the terms and signed the Second Colonial DOT.

11 49. Section 5.03 of the Second Colonial DOT states:

12 Beneficiary **shall be subrogated** for further security to the lien,
13 although released of record, of any and all encumbrances paid out
14 of the proceeds of the loan secured by this Deed of Trust.
 (emphasis added)

15 50. Pursuant to the terms of the Second Colonial DOT, Defendants Rad and
16 Nourafchan (individually and in their representative capacities), Forouzan, and RPN, all agreed
17 and knew that Plaintiff was entitled to be subrogated to the same first position lien priority it held
18 pursuant to the First Colonial DOT.

19 51. By agreeing to the terms and signing the Second Colonial DOT Defendants Rad
20 and Nourafchan (individually and in their representative capacities), Forouzan, and RPN, all
21 intended for and induced Plaintiff to fund the Second Colonial Loan and release and reconvey
22 the First Colonial DOT.

23 52. At the time of the closing of the Second Colonial Loan, Plaintiff was ignorant of
24 the fact that Defendants Rad and Nourafchan (individually and in their representative capacities),
25 Forouzan, and RPN, had no intention of reconveying the R&S Lenders DOT and were taking the
26 position that Plaintiff could not be subrogated to the lien position of the First Colonial DOT.

27 53. Plaintiff relied to its detriment on the representations and contractual agreements
28 executed by Defendants Rad and Nourafchan (individually and in their representative capacities),

1 Forouzan, and RPN, which were set forth in the Second Colonial DOT, and Plaintiff funded the
2 Second Colonial Loan and released and reconveyed the First Colonial DOT in reliance upon such
3 representations and contractual warranties.

4 54. As Defendants Rad and Nourafchan (individually and in their representative
5 capacities), Forouzan, and RPN knew that Plaintiff was to be subrogated to the First Colonial
6 DOT, Defendants Rad, Nourafchan, Forouzan, RPN, R&S and R&S Lenders are estopped from
7 arguing that Plaintiff is not entitled to be subrogated to the first priority lien position of the First
8 Colonial DOT on the Property.

9 55. Plaintiff has been required to retain the services of an attorney in order to
10 prosecute this matter, and Plaintiff is entitled to reasonable attorneys' fees and costs thereof.

11 **FOURTH CAUSE OF ACTION**

12 **(Unjust Enrichment)**

13 56. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1 through
14 55 of its Second Amended Complaint and incorporates the same by this reference as if more fully
15 set forth herein.

16 57. Defendants R&S, R&S Lenders, Forouzan, RPN, Rad and Nourafchan received
17 the benefit of the release of the First Colonial DOT and the funding of the Second Colonial Loan.

18 58. Plaintiff was not acting as a volunteer, gratuitously, or officiously when it paid off
19 the First Colonial Note secured by the First Colonial DOT.

20 59. It would be unjust and inequitable for Defendants R&S, R&S Lenders, Forouzan,
21 RPN, Rad and Nourafchan to retain the benefit of the Second Colonial Loan and the payoff of
22 the First Colonial DOT.

23 60. Defendants should be compelled to disgorge the benefits they received from
24 Plaintiff.

25 61. Plaintiff has been required to retain the services of an attorney in order to
26 prosecute this matter, and Plaintiff is entitled to reasonable attorneys' fees and costs thereof.

27 ///

28 ///

FIFTH CAUSE OF ACTION

(Fraudulent Misrepresentation)

62. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1 through 61 of its Second Amended Complaint and incorporates the same by this reference as if more fully set forth herein.

63. Prior to Colonial funding the Second Colonial Loan on or about July 27, 2007, Brenda Burns informed Defendants Rad and/or Nourafchan that Plaintiff was to obtain a first position lien against the Property to secure repayment of the Second Colonial Loan, and that the R&S Lenders DOT would have to be released and reconveyed in connection with the transaction.

64. Defendants Rad and/or Nourafchan, individually and in their capacity as the managing officers of Forouzan and RPN, respectively, the controlling entities of R&S and R&S Lenders, knowingly and fraudulently misrepresented to the escrow agent handling the transaction that they would reconvey the R&S Lenders DOT in order to close escrow of the Second Colonial Loan on July 31, 2007.

65. In reliance upon the fraudulent misrepresentations that Defendants Rad and/or Nourafchan made to the escrow officer, Brenda Burns, Plaintiff funded the Second Colonial Loan. Escrow closed and the First Colonial DOT was released and reconveyed.

66. On July 9, 2008, Brenda Burns followed up by email on the R&S Lenders DOT reconveyance that Defendants Rad and Nourafchan, individually and in their representative capacities, agreed to provide in connection with the Second Colonial Loan.

67. In a conversation with Brenda Burns occurring a few days following her July 9, 2008 email to Defendants Rad and/or Nourafchan, Defendants Rad and/or Nourafchan again stated that they would reconvey the R&S Lenders DOT.

68. Between July 9, 2008 and September 5, 2008, Defendants Rad and/or Nourafchan, in their individual capacity and in their capacity as the managing officers of Forouzan and RPN, respectively, the controlling entities of R&S and R&S Lenders, knowingly misrepresented to Brenda Burns that they were in the process of preparing new loan documents and a deed of trust

///

1 in connection with reconveying the R&S Lenders DOT, and they requested copies of any deeds
2 of trust encumbering the Property.

3 69. On or about September 5, 2008, in response to Defendants Rad and/or
4 Nourafchan's request to provide any deeds encumbering the Property, Brenda Burns sent copies
5 of the Second Colonial DOT as well as the R&S Lenders DOT to Defendants Rad and/or
6 Nourafchan, confirming the need for the R&S Lenders DOT to be reconveyed as it was still in
7 a first priority position.

8 70. On or about September 17, 2008, Teresa Cargill, an agent/employee of an entity
9 controlled by Defendants Rad and Nourafchan, requested additional information in the form of
10 a title report from Brenda Burns, purportedly in order to prepare new loan documents and a deed
11 of trust in connection with reconveying the R&S Lenders DOT.

12 71. On or about September 25, 2008, Brenda Burns provided the amended preliminary
13 title report to Defendants Rad and Nourafchan, individually and in their capacity as the managing
14 officers of Forouzan and RPN, the controlling entities of R&S and R&S Lenders, which clearly
15 showed that the R&S Lenders DOT needed to be reconveyed since it was still in a senior lien
16 position as to the Second Colonial Loan.

17 72. Plaintiff was unaware that Defendants Rad and/or Nourafchan's
18 misrepresentations that they would release the R&S Lenders DOT were false. Defendants Rad
19 and/or Nourafchan made these misrepresentations in their individual capacity and in the their
20 capacity as the managing officers of Forouzan and RPN, respectively, the controlling entities of
21 R&S and R&S Lenders.

22 73. In reliance upon these fraudulent misrepresentations that Defendants Rad and/or
23 Nourafchan knew were false, Plaintiff funded the Second Colonial Loan. Escrow closed on the
24 Second Colonial Loan and the First Colonial DOT was released and reconveyed.

25 74. As a direct and proximate result of the fraudulent misrepresentations made by
26 Defendants Rad and Nourafchan, Plaintiff has been damaged in an amount in excess of
27 \$10,000.00.

28 ///

7 SIXTH CAUSE OF ACTION

9 77. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1 through
10 76 of its Second Amended Complaint and incorporates the same by this reference as if more fully
11 set forth herein.

78. Prior to the close of escrow for the Second Colonial Loan, Defendants Rad, Nourafchan, Forouzan, RPN, R&S, and R&S Lenders, conspired, agreed, and combined to knowingly misrepresent to escrow officer Brenda Burns, the escrow agent for the Plaintiff, that they would release and reconvey the R&S Lenders DOT in order to close escrow and have the First Colonial DOT released and reconveyed.

79. Defendants' conspiracy to fraudulently misrepresent to escrow officer, Brenda Burns, that the R&S Lenders DOT would be reconveyed was agreed to in order to obtain the Second Colonial Loan and avoid losing the Property to foreclosure and/or to elevate the priority of the R&S Lenders DOT from a second position lien to a first position lien.

21 80. Defendants engaged in the forgoing conspiracy to induce Plaintiff into acting as
22 it did.

81. By making fraudulent misrepresentations about their intention to release the R&S
Lenders DOT, Defendants took steps in furtherance of their conspiracy and with the intent to
defraud Plaintiff.

82. Defendants have accepted and received the benefits of their illegal conspiracy because the R&S Lenders DOT now appears in the public records of Clark County, Nevada, as a first position lien against the Property and they were able to avoid a foreclosure of the First

1 Colonial Loan and First Colonial DOT which would have extinguished the interest of the
2 Defendants in and to the Property.

3 83. As a direct and proximate cause of Defendants' conspiracy, Plaintiff has been
4 damaged in an amount in excess of Ten Thousand Dollars (\$10,000.00), in an amount to be
5 determined at trial.

6 84. As a direct and proximate cause of Defendants' conspiracy, Plaintiff has incurred
7 special damages in the form of attorneys fees and costs in an amount in excess of Ten Thousand
8 Dollars (\$10,000.00), in an amount to be determined at trial.

9 85. Defendants have acted intentionally, fraudulently, maliciously, and oppressively
10 and they should be assessed with exemplary and punitive damages for their misconduct.

11 WHEREFORE, Plaintiff prays for relief against Defendants as follows:

- 12 1. For an Order declaring it is subrogated (contractually) to all rights of the First
13 Colonial Loan, First Colonial Note, and First Colonial DOT, up to the full amount
14 paid to satisfy the First Colonial Loan, plus interest, costs and attorneys fees
15 accrued and/or incurred thereafter;
- 16 2. For an Order declaring that the Second Colonial DOT replaces the First Colonial
17 DOT, and is entitled to the same first position priority against title to the Property
18 and the right to non-judicially foreclose its interests in the First Colonial DOT;
- 19 3. For an Order declaring that the R&S Lenders DOT is either expunged from title
20 to the Property, or junior in lien priority with respect to title to the Property;
- 21 4. For an Order compelling Defendants to disgorge the benefits they unjustly
22 received in excess of \$10,000.00;
- 23 5. For general damages in an amount in excess of \$10,000.00;
- 24 6. For exemplary and punitive damages in an amount in excess of \$10,000.00;
- 25 7. For attorneys fees and costs incurred in prosecuting this matter; and
- 26 8. For such other and further relief as the Court deems appropriate in the premises.

27 ///

28 ///

Dated this 7th day of October, 2009.

GERRARD COX & LARSEN

/s/ Douglas D. Gerrard
Douglas D. Gerrard, Esq.
Nevada Bar No. 4613
Sheldon A. Herbert, Esq.
Nevada Bar No. 5988
Aaron B. Shumway, Esq.
Nevada Bar No. 10759
2450 Saint Rose Pkwy., Suite 200
Henderson, NV 89074
*Attorneys for BB&T Corporation
as successor in interest to Federal
Deposit Insurance Corporation,
as receiver of Colonial Bank N.A.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **SECOND**
AMENDED COMPLAINT was sent this ____ day of October, 2009, by United States Mail,
first class, postage fully prepaid, and addressed as follows:

Julie L. Sanpai, Esq.
BAILUS COOK & KELESIS, LTD.
400 South 4th Street, Suite 300
Las Vegas, NV 89101
Attorney for R & S St. Rose, LLC

David J. Merrill, Esq.
DAVID J. MERRILL, P.C.
2850 West Horizon Ridge Parkway, Suite 200
Las Vegas, NV 89052
Attorney for R & S St. Rose Lenders, LLC

Richard F. Holley, Esq.
SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY
& THOMPSON
400 South 4th Street, 3rd Floor
Las Vegas, NV 89101
*Attorneys for Saiid Forouzan Rad, R. Phillip
Nourafchan, Forouzan, Inc., RPN LLC and
R & S Investment Group, LLC*

Eckley M. Keach, Esq.
ECKLEY M. KEACH, CHTD.
520 South Fourth Street
Las Vegas, NV 89101
Plaintiff

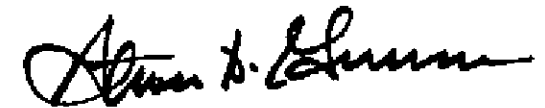
Robert E. Murdock, Esq.
MURDOCK & ASSOCIATES, CHTD.
520 South Fourth Street
Las Vegas, NV 89101
Plaintiff

/s/ Jennifer Hanks
Jennifer Hanks, An employee of
GERRARD, COX & LARSEN

EXHIBIT B

EXHIBIT B

FFCL



CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT E. MURDOCK and ECKLEY M.
KEACH,

Plaintiffs,

v.

Case No.: A574852

Dept. No.: XI

(Consolidated with 09-A-594512-C)

SAIID FOROUZAN RAD, an individual; R.
PHILLIP NOURAFCHAN, an individual;
FOROUZAN, INC., a Nevada corporation; RPN
LLC, a Nevada limited liability company; R & S
ST. ROSE LLC, a Nevada limited liability
company; R & S ST. ROSE LENDERS, LLC a
Nevada limited liability company; COLONIAL
BANGROUP INC.; R & S INVESTMENT
GROUP LLC, a Nevada limited liability
company; and DOES I through X, inclusive,

Defendants.

AND ALL RELATED CLAIMS AND
ACTIONS

**Hearing Dates: January 8, 11, 12 & 15, 2010
March 29-April 2, 2010 and
April 8, 2010**

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez
on January 8, 2010, and continuing day to day, based upon the availability of the Court,
witnesses, and Counsel, until its completion on April 8, 2010² in these consolidated proceedings;

¹ The Court has delayed issuing this Order due to BB&T's filing of a Petition for Involuntary bankruptcy against R & S St. Rose, LLC on May 13, 2010 in case number Case 10-1 8827 pending a motion for stay before this Court by BB&T. Although the Court on May 27, 2010, requested BB&T file a motion to stay if they intended to take the position that this Court should stay these proceedings, no motion for stay has been received. The Nevada Supreme Court has ruled that the bankruptcy automatic stay does not apply to nondebtor defendants. Edwards v. Ghandour, 123 Nev. 105, 159 P.3d 1086 (2007). Accordingly the Court enters this Order. It is not the intention of this Court to violate the automatic stay and any application of this Order will not be effective against the Debtor in Bankruptcy until the stay is lifted or the Petition dismissed.

² It should be noted that counsel originally indicated the hearing would be a one week trial. This estimate was not accurate and contributed to the non-sequential days required for

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CLERK OF THE COURT

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1 pertaining to priority and all related issues intertwined with the priority of liens found upon the
2 real property at issue; Cross-Complainant Branch Banking and Trust Company, as successor in
3 interest to Federal Deposit Insurance Corporation, as receiver of Colonial Bank N.A. ("BB&T"
4 or "Colonial"), having been represented by and through its attorneys of record, GERRARD,
5 COX & LARSEN; Defendant R & S ST. ROSE LENDERS, LLC ("R&S Lenders"), having been
6 represented by and through its attorneys of record, DAVID J. MERRILL, P.C.; Defendant R & S
7 ST. ROSE, LLC ("R&S"), having been represented by and through its attorneys of record,
8 BAILUS, COOK & KELESIS, LTD.; Defendants SAID FOROUZAN RAD ("Rad"), R.
9 PHILLIP NOURAFCHAN ("Nourafchan"), FOROUZAN, INC. ("Forouzan"), RPN, LLC
10 ("RPN"), and R & S INVESTMENT GROUP, LLC ("R&S Investment"), having been
11 represented by and through their attorneys of record, SANTORO, DRIGGS, WALCH,
12 KEARNEY, HOLLEY & THOMPSON; Plaintiffs ROBERT E. MURDOCK, ESQ.
13 ("Murdock") and ECKLEY M. KEACH, ESQ. ("Keach") having represented themselves in
14 proper person; the Court having read and considered all pleadings and papers on file in the
15 above-captioned case, including all other claims; having reviewed the documents admitted into
16 evidence during the trial and briefs and points and authorities filed by the parties; and having
17 heard and carefully considered the testimony of the witnesses called to testify; the Court with the
18 intention of resolving evidentiary issues pertaining to priority of liens found upon the real
19 property at issue hereby enters the following facts and states the following conclusions of law:
20
21
22

23 INTRODUCTION

24 This action was initiated on November 3, 2008 when Plaintiffs Murdock and Keach filed
25 a Complaint against Defendants, Rad, Nourafchan, Forouzan, RPN, R&S, and R&S Lenders. On
26 April 3, 2009, Plaintiffs filed a Second Amended Complaint adding claims against Colonial
27 Bancgroup, LLC, and R&S Investment.

28 _____ (continued)
completion.

1 Thereafter, on July 1, 2009, Colonial Bank, N.A. ("Colonial Bank") filed Case No. 09-A-
2 594512-C in which Colonial Bank alleged that its July 31, 2007 Deed of Trust relating to the
3 \$43,980,000 construction loan (sometimes "Construction Loan" or "2007 Colonial Bank Deed of
4 Trust") had priority over the September 16, 2005 St. Rose Lenders Deed of Trust relating to its
5 \$12,000,000 loan. An Amended Complaint was filed by Branch Banking and Trust ("BB&T")
6 in place of Colonial Bank in which BB&T alleged it was successor in interest to the FDIC as
7 receiver for Colonial Bank. BB&T asserted theories of contractual subrogation, equitable
8 subrogation, replacement, equitable/promissory estoppel, unjust enrichment, misrepresentation
9 and civil conspiracy to seek priority of the 2007 Colonial Bank Deed of Trust over the 2005 St.
10 Rose Lenders Deed of Trust. St. Rose Lenders filed a Counterclaim on October 27, 2009
11 seeking a declaration that the 2005 St. Rose Lenders Deed of Trust has priority over the 2007
12 Colonial Bank Deed of Trust. All actions were consolidated on October 22, 2009.
13
14

15 Both St. Rose Lenders and BB&T sought injunctive relief to prevent the other from
16 moving forward with a foreclosure on the property pending a determination of priority of the

17 deeds of trust. The Court granted a mutual Temporary Restraining Order preventing either party
18 from moving forward with foreclosure until the issue of priority was resolved. With the consent
19 of the parties, the Court consolidated the Preliminary Injunction Hearing with a trial on the
20 merits regarding BB&T's claims for relief for contractual subrogation, equitable subrogation,
21 replacement, equitable/promissory estoppel, and unjust enrichment. The parties also consented
22 to an extension of the Temporary Restraining Order until the conclusion of the trial and
23 evidentiary hearing.
24

25 The trial commenced on January 8, 2010 with the initiation of BB&T's case in chief.
26 The trial continued over the ensuing four (4) months for a total of ten days³ until April 14, 2010
27

28 ³ 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

1 when the Court granted a Rule 52 motion brought by Plaintiffs Murdock and Keach and
2 Defendants Rad, Nourafchan, Forouzan, RPN, St. Rose Lenders, and R&S Investment
3 (sometimes "moving parties").

4 The primary issue raised in the Rule 52 motion was whether BB&T had met its
5 evidentiary burden of proof to demonstrate it received an assignment of Colonial Bank's interest
6 in the 2007 Colonial Bank Deed of Trust. Over objection, the Court admitted into evidence
7 Exhibit 183, a Purchase and Assumption Agreement entered into on August 14, 2009 between
8 the FDIC and BB&T which purported to sell assets of Colonial Bank to BB&T. The Court
9 found that there was no competent, admissible evidence offered by BB&T to establish whether
10 the loan, note and deed of trust at issue were excluded pursuant to Sections 3.5 and/or 3.6 or
11 purchased by BB&T pursuant to Section 3.1 of Exhibit 183.
12

13 As the finder of fact, the Court found that the Purchase and Assumption Agreement did
14 not clearly transfer the loan, note and deed of trust at issue and called into question BB&T's
15 ability to assert its claims of priority. Specifically, the Court stated:
16

17 I've admitted Exhibit 183. I think Exhibit 183, if it included some
18 reference to this particular asset or a schedule that had excluded assets that didn't
19 include this asset, might comply with NRS 111.235, which would then put your
20 client in a position where it might have some remedy. Without those kinds of
21 things I think we have a potential standing issue, as Mr. Keach has framed it, or
22 you know, I guess that's the best way, or successor in – a true successor in interest
23 problem.

24 (Transcript of hearing Day 6, March 30, 2010, page 56-57, lines 24-7.) The Court then
25 asked BB&T to return the following day with documentary evidence in addition to Exhibit 183
26 to alleviate the Court's concern as to BB&T's ability to assert its claims of contractual
27 subrogation and replacement.

28 Upon returning to Court the following day, BB&T argued that standing was not one of
_____ (continued)
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.

1 the issues that the Court identified in its November 23, 2009 minute order to be advanced as part
2 of the expedited hearing on the priority issues. Nevertheless, BB&T reported to the Court that
3 after speaking with the FDIC it found a bulk assignment of security instruments and loan
4 documents recorded on November 3, 2009 in Clark County, which was read into the record
5 pursuant to NRS 111.155 and offered as an exhibit. BB&T also offered into evidence an
6 executed although unrecorded assignment, counsel had prepared with respect to the loan at issue.
7 The Court denied admission of both the bulk assignment as well as the unrecorded assignment
8 into evidence on the basis that neither had been previously disclosed.

9 After the Court denied admission of the above assignments, BB&T moved the Court to
10 reopen evidence. The Court denied BB&T's request. BB&T then moved the Court to substitute
11 in the real party in interest, Colonial Bank and/or the FDIC as receiver of Colonial Bank under
12 Rule 25(c), Rule (21), or Rule 17(a). After briefing on substitution/joinder of the real party in
13 interest, the Court denied BB&T's motion, stating:

14 Exhibit 183 is internally inconsistent and is incomplete. It prevents the
15 Court from making a finding that an assignment has occurred of the loan that is at
16 issue. The insufficient and conflicting evidence regarding this assignment is what
17 led me to the position that we're currently in, the ruling that I began to make on
18 the 41(b) motions at the time we had this motion presented.

19 For that reason and given the particular procedural posture of this case,
20 I'm going to deny the request for substitution of the real party in interest.

21 (Transcript of hearing Day 9, April 13, 2010, page 25, lines 16-25.)

22 Counsel for BB&T conceded that if Exhibit 183, the Purchase and Assumption
23 Agreement, was not sufficient evidence, on its face, to establish that BB&T was entitled to
24 priority on the note and deed of trust, then all of its claims must fail:

25 So, again, if it's the position of the Court that Exhibit 183 does not effect
26 an assignment of that loan, and that's what you said yesterday, then I don't know
27 why we're even having these discussions about any of the other issues in the case.
28 Because if we don't own the loan, we have no rights to make any of these
arguments, equitable subrogation, we don't have the right –

THE COURT: So while you don't agree that I'm right, but you recognize
that if that is my ruling and I'm going to be consistent, that I have to do the same
thing with contractual subrogation.

1 MR. GERRARD: And replacement and equitable subrogation; right?

2 THE COURT: I'm just -- if you want to skip ahead -- I'm just giving you
3 the opportunity to make --

4 MR. GERRARD: I don't know how it can come out any other way. If
5 my--

6 THE COURT: -- any other position to me known so I have the
7 opportunity to consider anything else that you think might cause those particular
8 claims to be treated differently given my ruling regarding the effect, the
9 evidentiary effect of Exhibit 183.

10 MR. GERRARD: Well, again, Your Honor -- you know, we went over
11 this the other day, but let's be clear about this. If Exhibit 183 does not effect an
12 assignment, if you can't find that that effects an assignment of the loan at issue in
13 this case to BB&T, then there's not one more thing for us to talk about.

14 THE COURT: Okay.

15 MR. GERRARD: Because the minute that you rule that this -- that you
16 cannot find that this document effected an assignment to my client, then we don't
17 have the right, we have no standing to make the equitable subrogation claim, to
18 make the --

19 THE COURT: It's not a standing issue, Mr. Gerrard.

20 (Transcript of hearing Day 10, April 14, 2010, page 25, lines 9-25, page 26, lines 1-18.)

21 Counsel for BB&T continued:

22 "And I told Your Honor yesterday and I told you on the 30th and I told
23 you on the 31st that this is the only document that exists pursuant to which any
24 rights to this loan were transferred. If this agreement doesn't transfer it, then
25 nothing else has any legal effect, because this is the -- this is the operative
26 document."

27 (Transcript of hearing Day 10, April 14, 2010, page 27, lines 7-12.)

28 Although BB&T repeatedly attempted to couch the issue as one of standing, it is
not a standing issue. Rather, the defect which prompts the dismissal of BB&T's claims is
evidentiary. BB&T failed to meet its burden of proof to establish that the Colonial Bank loan,
note and deed of trust at issue in this case were ever assigned to BB&T. The Court has given
BB&T ample opportunity to submit proper admissible evidence that the Colonial Bank loan, note

1 and deed of trust at issue in this case were one of the assets acquired by BB&T when it
2 purchased some of the Colonial Bank assets. BB&T instead relied upon the language of the
3 Purchase and Assumption Agreement, and no other admissible evidence, documentary or
4 testimonial. The Court hereby finds that Exhibit 183, the Purchase and Assumption Agreement,
5 was not sufficient evidence, on its face, to establish that BB&T was assigned the 2007 Colonial
6 Bank Deed of Trust.
7

8 Based upon the testimony and documentary evidence presented during the hearing and
9 for good cause appearing, pursuant to Rules 50 and 52, the Court finds, concludes, orders,
10 adjudges and decrees as follows:

11 FINDINGS OF FACT

12 1. R&S was formed in August 2005 to land-bank thirty-eight acres of real property
13 located at St. Rose Parkway and Spencer Road in Henderson, Nevada (the "Property") for
14 Centex Homes ("Centex").
15

16 2. St. Rose Lenders was formed for the purpose of borrowing funds from individual
17 lenders and then loaning those same funds to R&S and securing the loans with a deed of trust on
18 the Property.

19 3. On August 26, 2005, R&S purchased the Property for \$45,131,414.11 with the
20 intention of flipping it to Centex Homes a year later.

21 4. Centex Homes acquired an option to purchase the Property for \$54,102,000.00
22 from R&S by making a series of non-refundable deposits to R&S that totaled approximately
23 \$8,110,700.00.
24

25 5. To purchase the Property, R&S obtained funds from three different sources: (1)
26 Colonial Bank; (2) Centex non-refundable deposits; and (3) St. Rose Lenders, who obtained the
27 funds from private lenders, including the plaintiffs, Murdock and Keach.

28 6. R&S applied \$8,100,000 from the non-refundable earnest money deposits from

1 Centex towards the purchase price for the Property.

2 7. R&S also borrowed \$12,300,000 from St. Rose Lenders.

3 8. R&S obtained funds from Colonial Bank to finance the purchase of the Property:
4 first, R&S obtained a \$29,350,250.00 loan from Colonial (the "First Colonial Loan");

5 9. R&S and R&S Lenders are each comprised of the same two members and the
6 same two managers, those being Forouzan and RPN. The owner and/or president of Forouzan is
7 Rad. The owner and/or manager of RPN is Nourafchan.

8 10. Rad and Nourafchan (individually and in their representative capacities) were/are
9 the decision-makers and at all times herein they owned and/or controlled Forouzan, RPN, R&S,
10 and R&S Lenders, respectively.

11 11. In connection with the First Colonial Loan, Rad and Nourafchan (individually,
12 and in their representative capacities) signed a promissory note in favor of Colonial for
13 \$29,305,250 (the "First Colonial Note") as well as a first position deed of trust in that amount
14 that recorded on August 26, 2005 as Document No. 05282 in Book 20050826 of the Official
15 Records, Clark County, Nevada (the "First Colonial DOT") all of which are dated August 16,
16 2005.

17 12. The loan was for a period of twelve months with an option to extend the loan for
18 an additional six months.

19 13. Prior to the First Colonial Loan, Rad and Nourafchan, through various entities
20 they owned and controlled, had taken out eleven (11) different land loans from Colonial between
21 2001 and 2005. Each and every one of the eleven previous land loans, as well as the First
22 Colonial Loan, had been secured by a first position deed of trust as collateral. Colonial did not
23 make land loans unless secured by a first priority deed of trust. This was confirmed with
24 testimony of Richard Yach ("Yach"), Marty Singer ("Singer") and Stephen Novacek
25 ("Novacek").
26
27
28

1 14. In these prior transactions, Colonial informed Rad and Nourafchan⁴ that Colonial
2 required a first priority deed of trust as collateral on all loans secured by land. In addition to
3 Colonial's first deed of trust requirement, Rad and Nourafchan had also been told by Colonial,
4 and understood, that Colonial used a loan to value ratio to determine the amount Colonial was
5 willing to lend on a land loan. Rad and Nourafchan understood that the loan to value ratio was
6 determined by comparing all debt, including the proposed loan, against the appraised fair market
7 value of the land being financed ("loan to value ratio")⁵, and that using this loan to value ratio
8 Colonial would lend a maximum of 65% for unimproved land and 75% for land to be improved
9 using the loan proceeds.
10

11 15. In each of the eleven loans obtained by Rad and Nourafchan from Colonial Bank
12 between 2001 and 2005, Colonial Bank (i) required a first priority deed of trust, and (ii) would
13 only allow total debt against the property of 65% of the fair market value of the property being
14 financed.
15

16 16. In these prior transactions, Colonial Bank was aware that Rad and Nourafchan
17 would bring in other private investors to participate in the transactions.

18 17. Nearly one month later and without the knowledge of Colonial, Rad and
19 Nourafchan (individually, and in their representative capacities) signed a promissory note in
20 favor of R&S Lenders for \$12,000,000.00 (the "R&S Lenders Note") as well as a second
21

22 ⁴ Rad testified that Colonial Bank had told him the bank required a first deed of trust on all
23 land loans. See Transcript of Proceedings, Day 4 (Testimony of Rad) at pages 15:2-4 (Q. "They
24 told you that that was a requirement on land loans, that they have a first deed of trust, didn't
25 they?" A. "Yes, sir."); 28:18-21 (Q. "And at the time that loan was made you understood that
the bank had a requirement that it would only loan money if it's secured by a first deed of trust;
correct?" A. "Yes, sir. They mentioned it.")

26 ⁵ See Transcript of Proceedings, Day 4 (Testimony of Rad) at pages 72:22 – 73:1(Q.
27 "Well, you've already testified four separate times in your testimony that the way that you arrive
28 at the loan-to-value ratio was to add up all the debt against the property and compare it to the
value of the property, haven't you?" A. "That's correct"....Q. "That's what I said. You have
to add up all the debt against the property and compare it against the appraised value of the
property to arrive at your loan-to-value ratio; correct?" A. "Yes, sir.")

1 position deed of trust in that amount that recorded on September 16, 2006 as Document No.
2 02881 in Book 20050916 of the Official Records, Clark County, Nevada (the "R&S Lenders
3 DOT").

4 18. At that time, the First Colonial DOT was in a first position on the Property and
5 the R&S Lenders DOT was in a second position lien on the Property.

6 19. Rad, Nourafchan, and/or their agents raised the \$12,000,000 that R&S Lenders
7 loaned R&S to purchase the Property by soliciting private investors that included, among others,
8 family members, friends, acquaintances, including Murdock and Keach (collectively referred to
9 as "investors"). Each of the investors were told that they were investing in a second priority
10 loan, subject to the First Colonial Loan.⁶

11 20. In late August 2005 Murdock loaned Rad and Nourafchan \$100,000.00 towards
12 the purchase of the Property for which he received a note titled "Promissory Note Secured by
13 Deed of Trust" dated September 1, 2005 executed by R&S Lenders.

14 21. In late August 2005 Keach loaned Rad and Nourafchan \$500,000.00 toward the
15 purchase of the Property for which he received a Promissory Note Secured by Deed of Trust
16 dated September 1, 2005 executed by R&S Lenders.

17 22. The Promissory Notes Secured by Deed of Trust were executed by R&S Lenders
18 by its managers, Defendants Forouzan and RPN, by their managers, Defendants Rad and
19 Nourafchan.

20 23. Neither Murdock nor Keach ever received evidence that their Promissory Notes
21 were secured by a Deed of Trust.

22 24. According to Rad, Murdock and Keach's Notes for a total of \$600,000 are within

23
24
25
26 ⁶ While each investor apparently received a promissory note in the amount that R&S
27 Lenders borrowed, each investor did not receive an individual deed of trust securing their interest
28 against the Property. The R&S Lenders DOT only names R&S Lenders as the secured party.
Rad and/or Nourafchan believe that the R&S Lenders DOT is a "collective" deed of trust that
secures all of the investors that contributed funds for a second trust deed.

1 that \$12,300,000 Deed of Trust.

2 25. St. Rose Lenders recorded the St. Rose Lenders Deed of Trust on September 16,
3 2005.

4 26. In August of 2006, Centex Homes unexpectedly walked away from its option to
5 purchase the Property and forfeited its \$8.1 million in non-refundable deposits to R&S.

6
7 27. On March 19, 2007, R&S St. Rose and Colonial Bank entered into a Modification
8 to Deed of Trust and Security Agreement and Fixture Filing with Assignment of Rents (the
9 "Modification") and an Amendment to Promissory Note Secured by Deed of Trust (the
10 "Amendment"), in which R&S and Colonial Bank agreed to extend the maturity date of the Note
11 for a few months, until August 25, 2007.

12 28. R&S was able to avoid foreclosure of the First Colonial DOT by extending the
13 maturity date of the First Colonial Note until August of 2007.⁷

14
15 29. Nevada Title handled the Modification closing transaction and required both
16 R&S, as the owner, and St. Rose Lenders, as the beneficiary, to execute an agreement
17 subordinating the St. Rose Lenders Deed of Trust.

18 30. On May 17, 2007, R&S and St. Rose Lenders executed a Subordination
19 Agreement.

20 31. Nevada Title recorded both the Modification and the Subordination Agreement on
21 June 4, 2007.

22
23 ⁷ Rad and Nourafchan extended the maturity date by exercising a one-time six (6) month
24 extension as set forth in the First Colonial Note. Colonial agreed to a second extension through
25 a Modification executed by Rad and Nourafchan in March of 2007. It is important to note that
26 while the Modification was executed in March of 2007, the Subordination Agreement Colonial
27 required in connection with the Modification was not executed by Rad and Nourafchan until
28 almost two months later in May of 2007. Rad and Nourafchan's execution of the Subordination
Agreement post-closing of the Modification is consistent with Brenda Burns' testimony that in
her past dealings with Rad and Nourafchan they would execute documents post-closing as
needed. Specifically, their execution of the Subordination Agreement post-closing supports Ms.
Burns' testimony that Rad and/or Nourafchan agreed to release the R&S Lenders DOT in
connection with obtaining the construction loan.

1 32. Prior to expiration of the extended maturity date for the Modification, Colonial
2 Bank and R&S agreed to the terms of a new construction loan for the development of the
3 Property ("Construction Loan").

4 33. By the Spring of 2007, it was apparent to Rad and Nourafchan that they would be
5 unable to close a sale or refinance the Property prior to the August, 2007 maturity date of the
6 First Colonial Loan.

7 34. In late May or early June of 2007, Rad and Nourafchan approached Colonial with
8 a request for a new loan to be used to repay the First Colonial Loan and for additional
9 development funding to improve the Property. Rad and Nourafchan believed that by selling
10 improved lots rather than raw land, R&S could more easily sell the Property, repay the loans and
11 make a return on their investment.

12 35. At the time, Yach, testified he knew Rad and Nourafchan were land investors and
13 land speculators, not developers.

14 36. Yach also testified that if the 2005 loan had gone into default and the
15 Construction Loan Agreement had not been entered into, it would likely have affected Colonial
16 Bank's reserve requirements and its ability to extend further loans.

17 37. After considering Rad and Nourafchan's proposed plan to develop the Property,
18 Yach, informed Rad and Nourafchan that Colonial's loan to value ratio for a construction land
19 loan on the Property would be 75% by comparing all debt to the value of the Property. Rad
20 testified that he understood the total of all debt against the property could not exceed 75% of the
21 Property's appraised value in order to obtain the new loan he was seeking from Colonial.⁸ Since
22 the R&S Lenders DOT was recorded debt against the Property, Rad and Nourafchan would not
23 possess the 25% equity to qualify for the new construction loan unless the R&S Lenders DOT
24

25
26
27
28 ⁸ See Transcript of Proceedings, Day 4 (Testimony of Rad) at pages 61:15-19, 73:20-24;
78:19-22.

1 was released.⁹

2 38. On June 20, 2007, Singer sent the Loan Approval Request and a preliminary title
3 report (which discloses the R&S Lenders DOT as exception 37) to Novacek, an outside attorney
4 used by Colonial to draft loan documents. As the Loan Approval Request indicated that Colonial
5 required a first position deed of trust on the Property as collateral for the new loan, Novacek
6 prepared loan documents intended to create and secure a first position deed of trust on the
7 Property.
8

9 39. At Colonial's request, an appraisal of the Property was performed on or about
10 June 25, 2007. At that time, the Property had an "as is" market value of \$45,530,000 and a
11 "upon completion of site improvements" bulk value of \$58,640,000. Taking into consideration
12 the appraised bulk value of \$58,640,000 and based upon Colonial's 75% loan to value maximum
13 and Colonial's understanding that the R&S Lenders DOT was to be released, the amount of the
14 new loan was reduced from \$47,740,000 to \$43,980,000.
15

16 40. Cheryl Fricker, the Portfolio Manager of the Commercial Real Estate Department
17 and assistant to Yach, prepared a Loan Commitment letter dated July 24, 2007, which indicated
18 that the security for the loan is a "First deed of trust on the subject property generally located at
19 Seven Hills and St. Rose Parkway."
20

21 41. Singer testified she sent the Loan Commitment letter to Rad and Nourafchan by
22 facsimile transmission.

23 42. Rad and Nourafchan denied receiving the Loan Commitment letter.

24 43. Singer testified she did not keep a copy of the fax confirmation.

25 44. Both Yach and Singer testified they remembered seeing a copy of the Loan
26 Commitment letter signed by Rad and Nourafchan; however, Colonial could not locate the
27

28
⁹ See Transcript of Proceedings, Day 4 (Testimony of Rad) at pages 77:24 – 78:22.

1 signed copy.¹⁰

2 45. Rad and Nourafchan denied signing the Loan Commitment letter.

3 46. At trial, although BB&T presented an unsigned Loan Commitment Letter dated
4 July 24, 2007 which purports to indicate Rad and Nourafchan understood Colonial Bank wanted
5 to have a First Deed of Trust on the property, there is no credible evidence to indicate the Loan
6 Commitment Letter was seen or executed by Rad or Nourafchan.
7

8 47. Neither BB&T nor Colonial Bank produced a Loan Commitment Letter executed
9 by Rad and/or Nourafchan.

10 48. While Singer testified that she saw a signed Loan Commitment Letter (a faxed
11 copy) executed by Rad and Nourafchan, the Court finds the testimony to not be credible.

12 49. No credible evidence exists that the document was sent to Rad and/or
13 Nourafchan.
14

15 50. Yach and Singer testified that the Construction Loan documents governed the
16 understanding of the parties involved in the transaction and therefore the Loan Commitment
17 Letter was superseded by the Construction Loan Documents.

18 51. As a condition to the Construction Loan, Colonial Bank did not request that St.
19 Rose Lenders reconvey or subordinate the St. Rose Lenders Deed of Trust or convert the same to
20 equity.
21

22 52. The Construction Loan was for eighteen months with an option to extend the term
23 for an additional six months.

24 53. The terms of the Construction Loan were evidenced by a Construction Loan

25
26 ¹⁰ Colonial's loan file is missing the signed copy of the Loan Commitment letter as well as
27 a signed copy of the lender's escrow instructions signed by Nevada Title. Nevada Title's escrow
28 file contains the latter and Brenda Burns acknowledges her receipt of the same. Not surprisingly,
Rad and Nourafchan deny ever receiving the Loan Commitment letter that indicates Colonial
required a first position deed of trust on the Property as collateral for the new \$43,980,000
construction loan.

1 Agreement, Promissory Note Secured by Deed of Trust, and the Colonial Bank Deed of Trust
2 (collectively "Construction Loan Documents"), all of which are dated July 27, 2007.

3 54. Novacek prepared July 27, 2007 escrow instructions to Nevada Title that stated
4 that Nevada Title could close the transaction when it could issue a title policy to the bank
5 showing only certain exceptions and St. Rose Lenders' \$12,300,000 Deed of Trust was not one
6 of the permitted exceptions.
7

8 55. Colonial Bank's counsel testified he intended the escrow instructions to mean that
9 the title company could not record and close the transaction if it could not issue a title policy
10 subject to allowed exceptions only.

11 56. Novacek further testified that in order for Nevada Title to comply with his escrow
12 instructions, it had to issue a title policy without showing the St. Rose Lenders Deed of Trust as
13 an exception.
14

15 57. Although Colonial Bank instructed Nevada Title Company that the title policy
16 could only be subject to certain exceptions, how that was accomplished was left to the discretion
17 of the title company.

18 58. Colonial Bank relied on the title company to issue the title policy as instructed by
19 Novacek.
20

21 59. As long as Colonial Bank was provided with a title policy that did not include the
22 St. Rose Lenders Deed of Trust as an exception, Yach testified he did not care how it was
23 accomplished.

24 60. Brenda Burns also agreed Colonial Bank did not specify how Nevada Title was
25 supposed to accomplish or satisfy the requirements.

26 61. The witnesses confirmed that Nevada Title satisfied the title policy parameters
27 required by Colonial Bank.
28

62. Nevada Title insured the deed of trust as instructed, without St. Rose Lenders'

1 Deed of Trust as an exception.

2 63. Colonial Bank's attorney testified that the bank wanted a title insurance policy
3 insuring the 2007 Colonial Bank Deed of Trust without showing the St. Rose Lenders Deed of
4 Trust as an exception, and that is what it received.

5 64. On July 27, 2007, Colonial Bank and R&S entered into the Construction Loan.

6
7 65. On or about July 31, 2007, Colonial Bank closed the transaction in the
8 approximate amount of \$43,000,000 with the security of its Second Deed of Trust.

9 66. At the closing on July 31, 2007, the Construction Loan proceeds paid for the
10 following: (1) a \$439,800.00 loan fee to Colonial Bank; (2) the payoff of Colonial Bank's 2005
11 loan in the amount of \$29,779,628.72; (3) a reconveyance fee of \$45.00; (4) \$3,000.00 for the
12 appraisal; (5) \$500.00 for an appraisal review fee; (6) \$900.00 for an underwriting fee; and (7)
13 \$2,808,000.00 as an interest reserve.

14
15 67. The total encumbrance added to the Property at the time of closing was
16 \$33,031,873.72, nearly \$4 million more in additional debt than agreed to by R&S and Colonial
17 Bank in 2005.

18 68. By reason of its collection of additional funds in the nature of the loan fee, payoff
19 of the 2005 loan, reconveyance fee, appraisal fee, underwriting fee and interest reserve sums,
20 Colonial Bank was the recipient of and beneficiary of the majority of the additional debt.

21 69. St. Rose Lenders was not a party to the Construction Loan Documents.
22 Moreover, St. Rose Lenders was not a guarantor.

23
24 70. The Construction Loan was personally guaranteed by both Rad and Nourafchan.

25 71. Colonial Bank never communicated to Rad, Nourafchan, R&S or St. Rose
26 Lenders that it required a first priority deed of trust for the Construction Loan.

27 72. The Closing Instructions were never transmitted or communicated to Rad,
28 Nourafchan, R&S or St. Rose Lenders.

1 73. Brenda Burns, the Nevada Title escrow officer who closed the loan transaction,
2 never transmitted, communicated or discussed the Closing Instructions with Rad, Nourafchan,
3 R&S or St. Rose Lenders.

4 74. At no time prior to the closing of the Construction Loan did Brenda Burns discuss
5 with Rad, Nourafchan, R&S or St. Rose Lenders that reconveyance of the St. Rose Lenders Deed
6 of Trust was a condition to closing of the loan transaction.

7 75. At no time prior to the closing of the Construction Loan did Colonial Bank
8 discuss with Rad, Nourafchan, R&S or St. Rose Lenders that reconveyance of the St. Rose
9 Lenders Deed of Trust was a condition to closing of the loan transaction.

10 76. Yach testified he did not recall telling Rad or Nourafchan that Colonial Bank
11 required a First Deed of Trust as a condition to providing the Construction Loan.

12 77. Yach also testified Rad never told him the St. Rose Lenders Deed of Trust would
13 be converted to equity and neither Rad nor Nourafchan said that the St. Rose Lenders Deed of
14 Trust would be released.

15 78. Brenda Burns testified she could not specifically remember what words either she
16 or Rad used to allegedly discuss what was going to happen with the St. Rose Lenders Deed of
17 Trust prior to closing the Construction Loan Agreement.

18 79. Rad testified that he was never told by anyone on behalf of Colonial Bank or
19 Nevada Title that the St. Rose Lenders Deed of Trust would have to be reconveyed,
20 subordinated or converted to equity.

21 80. There is no evidence that Colonial Bank or BB&T informed Nourafchan that the
22 St. Rose Lenders Deed of Trust would have to be reconveyed, subordinated or converted to
23 equity.

24 81. The Escrow Instructions were not given or shown to Rad, Nourafchan, R&S or St.
25 Rose Lenders.
26
27
28

1 82. At the time of closing the Construction Loan, Nevada Title was an agent for Old
2 Republic Title Insurance Company.

3 83. Neither Rad, Nourafchan, R&S, nor St. Rose Lenders ever represented or agreed
4 to a reconveyance of the St. Rose Lenders' Deed of Trust.

5 84. The evidence demonstrates no agreement was reached for R&S or St. Rose
6 Lenders to reconvey the St. Rose Lenders deed of trust.

7 85. Principals from St. Rose Lenders and R&S St. Rose testified that the entities did
8 not agree, and could not have agreed, to a reconveyance of the St. Rose Lenders Deed of Trust
9 and there is no signed document indicating otherwise.
10

11 86. Colonial Bank did not condition its extension of the *Construction Loan on its*
12 receipt of a first deed of trust.

13 87. Colonial Bank did not convey any intent to receive a first deed of trust to either
14 R&S, St. Rose, Lenders, Rad, or Nourafchan.
15

16 88. Although loan documents for the 2005 loan and the modification stated Colonial
17 Bank would have a first lien, the Construction Loan Agreement did not.

18 89. Colonial Bank did not negotiate the requirement for a first deed of trust in the
19 Construction Loan Agreement, Deed of Trust or Promissory Note Secured by Deed of Trust.
20

21 90. Colonial Bank relied on the issuance of an ALTA lender's policy of title
22 insurance in the amount of \$43,980,000.00 insuring the Deed of Trust as a lien on the property,
23 which did not show as an exception the \$12,300,000.00 St. Rose Lenders Deed of Trust.

24 91. Colonial Bank received such a policy from Commonwealth Land Title Insurance
25 Company on July 31, 2007 as Policy No. 562-Z093126.

26 92. The ALTA lender's policy of title insurance was purchased by R&S for the
27 benefit of Colonial Bank.

28 93. R&S paid \$35,184.00 for the policy of title insurance for the benefit of Colonial

1 Bank.

2 94. Following closing, Colonial Bank did not request confirmation that a
3 reconveyance had been obtained; it checked only to verify the title insurance policy did not
4 include the St. Rose Lenders Deed of Trust as an exception.

5 95. Singer relied upon the title policy to insure the St. Rose Lenders Deed of Trust
6 was not identified as an exception. Singer did nothing to determine whether Colonial Bank had a
7 first position Deed of Trust.

8 96. Counsel for Colonial Bank did nothing to determine that Colonial Bank had a first
9 Deed of Trust other than review the title insurance policy. He did not ask for copies of any
10 reconveyance after closing because he relied on the title insurance policy.

11 97. When money was released to R&S for construction, the only thing Singer did to
12 determine whether Colonial Bank was in a first position was read the title policy.

13 98. When funds were disbursed, Colonial Bank did not get an endorsement from the
14 title company insuring the lien was still in position.

15 99. Yach testified he relied on the title policy to determine whether Colonial Bank
16 was in first position.

17 100. Reconveyance of the St. Rose Lenders Deed of Trust was not a condition for
18 closing the Construction Loan transaction.

19 101. If reconveyance of the St. Rose Lenders Deed of Trust had been a condition of the
20 Construction Loan, it would have been stated as such in the loan documents.

21 102. If reconveyance had been a material term, Colonial Bank should have obtained a
22 separate agreement from St. Rose Lenders prior to closing.

23 103. There is no proof of any executed agreement or consent by St. Rose Lenders to
24 reconvey.

25 104. Nevada Title closed its Construction Loan file without a reconveyance from St.

1 Rose Lenders.

2 105. Nevada Title never had anything from St. Rose Lenders in writing stating it would
3 provide a reconveyance or release.

4 106. A July 9, 2008 email was the first written communication from Nevada Title with
5 Rad regarding reconveyance of the St. Rose Lenders Deed of Trust when Nevada Title learned
6 the St. Rose Lenders Deed of Trust was still a first Deed of Trust,
7

8 107. On July 9, 2008, Brenda Burns contacted Rad and asked Rad to reconvey the St.
9 Rose Lenders Deed of Trust.

10 108. Rad refused to reconvey the St. Rose Lenders Deed of Trust.

11 109. Prior to that time, Brenda Burns testified she thought St. Rose Lenders would
12 prepare a reconveyance of the St. Rose Lenders Deed of Trust because it was the beneficiary.
13

14 110. In July 2008, Nevada Title prepared a reconveyance even though it was not the
15 beneficiary of the Deed of Trust.

16 111. Subordination was brought up for the first time in June or July 2009 when it was
17 proposed by Nevada Title.

18 112. Subordination of St. Rose Lenders' Deed of Trust would have been inconsistent
19 with Novacek's escrow instructions.

20 113. Novacek testified that Nevada Title assumed the risk by closing without a
21 reconveyance.
22

23 114. Nevada Title assumed the risk of closing the Construction Loan transaction
24 without a reconveyance from St. Rose Lenders.

25 115. The St. Rose Lenders Deed of Trust was never reconveyed or subordinated.

26 116. The St. Rose Lenders Deed of Trust, which was recorded on September 2005, has
27 priority over Colonial Bank's 2007 Deed of Trust, which was recorded nearly two (2) years later
28 in July 2007.

1 117. On September 5, 2008, Nevada Title confirmed that St. Rose Lenders Deed of
2 Trust had priority over Colonial Bank's 2007 Deed of Trust.

3 118. There was no showing by BB&T that because the managing officers of Forouzan
4 and RPN, and the managing members of R&S and St. Rose Lenders were the same, that they can
5 be treated as the same entity.

6 119. A uniformity of owners or interest alone is insufficient to demonstrate that entities
7 are anything other than valid, separate or independent corporate entities.

8 120. Colonial Bank and Nevada Title previously recognized that R&S and St. Rose
9 Lenders were distinct and separate entities in dealing with modification of the first Colonial
10 Bank loan when St. Rose Lenders was required to agree to and execute the Subordination
11 Agreement.
12

13
14 121. Since St. Rose Lenders, was not a party to either the 2007 Colonial Bank Deed of
15 Trust or the Construction Loan Agreement, it is not required to subrogate its Deed of Trust.

16 122. An agreement which prejudices lien holders or impairs their security requires
17 their consent.

18 123. St. Rose Lenders did not consent to subrogate its Deed of Trust.

19 124. On September 22, 2008, Colonial Bank obtained a new appraisal of the Property.
20 The "as is" value of the Property at that time was \$37,860,000.00.

21 125. R&S was unable to complete the development of the Property and on April 28,
22 2009, Colonial Bank recorded a Notice of Default and Election to Sell.

23 126. Colonial Bank's Notice of Default and Election to Sell only indicated failure to
24 pay under the terms of the promissory note as the reason for default.

25 127. In or about August 2009, the FDIC took over Colonial Bank as receiver.

26 128. An October 20, 2009 appraisal of the Property listed its value at \$23,555,000.00
27 resulting in an over-leveraged amount of roughly \$22,000,000.
28

1 129. The FDIC provided a Purchase and Assumption Agreement to BB&T on August
2 14, 2009.

3 130. BB&T's rights to assert claims against the Defendants would have to arise from
4 the August 14, 2009 Purchase and Assumption Agreement.

5 131. The Purchase and Assumption Agreement provides the following with respect to
6 the purchase of Colonial Bank assets by BB&T:
7

8 3.1 Assets Purchased by Assuming Bank. With the exception of certain assets
9 expressly excluded in Sections 3.5 and 3.6, the Assuming Bank hereby purchases from
10 the Receiver, and the Receiver hereby sells, assigns, transfers, conveys, and delivers to
11 the Assuming Bank, all right, title, and interest of the Receiver in and to all of the assets
12 (real, personal and mixed, wherever located and however acquired) including all
13 subsidiaries, joint ventures, partnerships, and any and all other business combinations or
14 arrangements, whether active, inactive, dissolved or terminated, of the Failed Bank
15 whether or not reflected on the books of the Failed Bank as of Bank Closing. Schedules
16 3.1 and 3.1a attached hereto and incorporated herein sets forth certain categories of
17 Assets purchased hereunder. Such schedule is based upon the best information available
18 to the Receiver and may be adjusted as provided in Article VIII. Assets are purchased
19 hereunder by the Assuming Bank subject to all liabilities for indebtedness collateralized
20 by Liens affecting such Assets to the extent provided in Section 2.1....

21 132. Although the Purchase and Assumption Agreement states that there are schedules
22 attached showing the assets purchased, BB&T indicated at the time of trial that no schedules had
23 been prepared or existed.

24 133. The purchased Assets were sold in an "as is" condition:

25 3.3 Manner of Conveyance; Limited Warranty; Nonrecourse; Etc. THE
26 CONVEYANCE OF ALL ASSETS, INCLUDING REAL AND PERSONAL
27 PROPERTY INTERESTS, PURCHASED BY THE ASSUMING BANK UNDER THIS
28 AGREEMENT SHALL BE MADE, AS NECESSARY, BY RECEIVER'S DEED OR
RECEIVER'S BILL OF SALE, "AS IS", "WHERE IS", WITHOUT RECOURSE AND,
EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED IN THIS AGREEMENT,
WITHOUT ANY WARRANTIES WHATSOEVER WITH RESPECT TO SUCH
ASSETS, EXPRESS OR IMPLIED, WITH RESPECT TO TITLE, ENFORCEABILITY,
COLLECTIBILITY, DOCUMENTATION OR FREEDOM FROM LIENS OR
ENCUMBRANCES (IN WHOLE OR IN PART), OR ANY OTHER MATTERS.

1 134. The Purchase and Assumption Agreement states that certain types of assets were
2 excluded from the sale of assets to BB&T and the types of excluded assets are identified in

1 Sections 3.5 and 3.6:

2 3.5 Assets Not Purchased by Assuming Bank. This Assuming Bank does not
3 purchase, acquire or assume, or (except as otherwise expressly provided in this
4 Agreement) obtain an option to purchase, acquire or assume under this Agreement:

5 (b) any interest, right, action, claim, or judgment against ... (iv) any other
6 Person whose action or inaction may be related any loss (exclusive of any loss resulting
7 from such Person's failure to pay on a Loan made by the Failed Bank) incurred by the
8 Failed Bank; provided, that for the purposes hereof, the acts, omissions or other events
9 giving rise to any such claim shall have occurred on or before Bank Closing, regardless
10 of when any such claim is discovered and regardless of whether any such claim is made
11 with respect to a financial institution bond, banker's blanket bond, or any other insurance
12 policy of the Failed Bank in force as of Bank Closing.

13 3.6 Retention or Repurchase of Assets Essential to Receiver.

14 (a) The Receiver may refuse to sell to the Assuming Bank, or the Assuming Bank
15 agrees, at the request of the receiver set forth in a written notice to the Assuming Bank, to
16 assign, transfer, convey, and deliver to the Receiver all of the Assuming Bank's right,
17 title and interest in and to, any Asset or by the Receiver in its discretion (together with all
18 Credit Documents evidencing or pertaining thereto), which may include any Asset or
19 asset that the Receiver determines to be:

20 (ii) the subject of any investigation relating to any claim with respect to any item
21 described in Section 3.5(a) or (b), or the subject of, or potentially the subject of any legal
22 proceedings;

23 135. The Purchase and Assumption Agreement does not indicate whether the 2007
24 Colonial Bank Deed of Trust, that was the subject of pending litigation involving allegations of
25 fraud, was included as an excluded asset.

26 136. Based upon the fact that legal proceedings were pending which included
27 allegations of fraud at the time the Purchase and Assumption Agreement was entered into, the
28 2007 Colonial Bank Deed of Trust may fall into the category of assets which may be
excluded from the FDIC sale to BB&T as defined in Sections 3.5 and 3.6.

137. BB&T presented no witness who could competently testify about the Purchase
and Assumption Agreement.

138. The Purchase and Assumption Agreement is internally inconsistent and
incomplete, and prevents the Court from making a finding as to whether an assignment of the

1 loan at issue has occurred.

2 139. At the time that BB&T entered into the Purchase and Assumption Agreement,
3 substantial actual and constructive notice information regarding the disputed priority
4 status of the

5 2007 Colonial Bank Deed of Trust existed: (1) the actions by both Colonial Bank and
6 Murdock and Keach were pending, for which public information exists was already available;
7 and (2) a check of the recorded records for the property would have indicated the first position
8 R&S St. Rose Lenders' Deed of Trust.
9

10 140. "Person" is defined in the Assumption Agreement as any individual, corporation,
11 partnership, joint venture, association, joint-stock company, trust, unincorporated organization,
12 or government or any agency or political subdivision thereof, excluding the Corporation.
13

14 141. At the time of the execution of the Purchase and Assumption Agreement, there
15 were legal proceedings and claims pending in the Eighth Judicial District Court by both Colonial
16 Bank and Murdock and Keach regarding the

17 142. The specific rights to "actions or claims" which were mentioned in Section 3.5(b)
18 are absent from the listing of purchased assets.

19 143. BB&T has not shown that the claims or causes of action against the Defendants
20 being pursued by BB&T belong to BB&T and it is the successor in interest with the ability to
21 assert these claims against the Defendants.
22

23 144. Since BB&T has not proved that it owns the actions or claims asserted herein, it
24 does not have the ability to assert the claims set forth in its Second Amended Complaint.

25 145. Any of the foregoing Findings of Fact which constitute Conclusions of Law shall
26 be deemed as Conclusions of Law.
27

28 **CONCLUSIONS OF LAW**

The Court concludes as follows:

- 1 1. The Court has jurisdiction over the parties and venue is proper in this Court.
- 2 2. BB&T has failed to meet its burden of proof to establish that the Second Deed of
- 3 Trust was transferred or assigned by the FDIC to BB&T.
- 4 3. BB&T is not entitled to relief on its claim for equitable subrogation since it has
- 5 not demonstrated it is a successor in interest.
- 6 4. BB&T is not entitled to relief on its claim for contractual or conventional
- 7 subrogation since it has not demonstrated it is a successor in interest.
- 8 5. BB&T is not entitled to relief on its claim for equitable replacement since it has
- 9 not demonstrated it is a successor in interest.
- 10 6. NRS 111.320 recognizes the preference given to documents recorded earlier in
- 11 time which possess superior rights over those that follow.
- 12 7. R & S St. Rose Lenders' Deed of Trust should retain its priority over the 2007
- 13 Colonial Bank Deed of Trust since BB&T has not demonstrated it is a successor in interest with
- 14 the ability to assert these claims.
- 15 8. BB&T has not demonstrated that it has been assigned the interest in the 2007
- 16 Colonial Bank Deed of Trust at issue and therefore has not shown it has the ability to assert the
- 17 claims presented in the Second Amended Complaint filed by Colonial Bank on October 7, 2009.
- 18 9. BB&T's ability to assert claims against the Defendants would have to arise from
- 19 the rights it acquired as an asset purchaser pursuant to the August 14, 2009 Purchase and
- 20 Assumption Agreement.
- 21
- 22
- 23

- 24 10. The Purchase and Assumption Agreement specifically excluded actions and
- 25 claims against any individual, corporation, partnership, joint venture, association, joint-stock
- 26 company, trust, unincorporated organization, or government or any agency or political
- 27 subdivision thereof, from the Colonial Bank assets purchased from the FDIC.
- 28

1 11. BB&T has not demonstrated that the claims or causes of action against the
2 Defendants being pursued by BB&T herein belong to BB&T and it is the real party in interest
3 with the ability to assert equitable claims against the Defendants.

4 12. NRS 111.205 states, "No estate or interest in lands, other than for leases for a
5 term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner
6 relating thereto, shall be created, granted, assigned, surrendered or declared after December 2,
7 1861, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the
8 party creating, granting, assigning, surrendering or declaring the same, or by the party's lawful
9 agent thereunto authorized in writing."

11 13. NRS 111.235 states, "Every grant or assignment of any existing trust in lands,
12 goods or things in action, unless the same shall be in writing, subscribed by the person making
13 the same, or by his or her agent lawfully authorized, shall be void."

15 14. NRS 111.205 and/or NRS 111.235 apply to the purchase, transfer and assignment,
16 if any, of the 2007 Colonial Bank Deed of Trust from the FDIC to BB&T.

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

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

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

27 18. NRS 111.320 recognizes the preference given to documents recorded earlier in
28 time which possess superior rights over those that follow.

1 19. A party must invoke equity to obtain relief from the established order dictated by
2 a recording system.

3 20. Recording statutes provide 'constructive notice' of the existence of an outstanding
4 interest in land, thereby putting a prospective purchaser on notice that he may not be getting all
5 he expected.

6 21. Constructive notice is that which is imparted to a person upon strictly legal
7 inference of matters which he necessarily ought to know, or which, by the exercise of ordinary
8 diligence, he might know.

10 22. Colonial Bank did not have a reasonable expectation that it would receive a
11 reconveyance of the St. Rose Lenders Deed of Trust following the closing of the Construction
12 Loan transaction only that it would receive a policy of title insurance, which it did receive.

13 23. Nevada Title insured the 2007 Colonial Bank Deed of Trust as instructed, without
14 St. Rose Lenders' Deed of Trust as an exception.

15 24. Reconveyance of the St. Rose Lenders Deed of Trust was not a condition for
16 closing the Construction Loan transaction.

17 25. If reconveyance of the St. Rose Lenders Deed of Trust had been a condition of the
18 Construction Loan, it would have been stated as such in the loan documents.

19 26. If reconveyance had been a material term, Colonial Bank would have obtained a
20 separate agreement from St. Rose Lenders prior to closing.

21 27. There is no proof of any executed agreement or consent by St. Rose Lenders to
22 reconvey.

23 28. The Court will grant the declaratory relief requested in St. Rose Lenders' First
24 Cause of Action.

25 29. St. Rose Lenders' Deed of Trust should retain its priority over the 2007
26 Colonial Bank Deed of Trust.

1 30. The Mutual Temporary Restraining Orders issued on November 23, 2009
2 shall be dissolved and St. Rose Lenders may proceed with its foreclosure sale of the Property.

3 31. If any conclusions of law are properly findings of fact, they shall be treated as
4 if appropriately identified and designated.

5 DATED this 18 day of June, 2010.

7
8 
DISTRICT COURT JUDGE

9 **Certificate of Service**

10 I hereby certify that on or about the date filed, this document was copied through e-mail,
11 or a copy of this Order was placed in the attorney's folder in the Clerk's Office or mailed to the
proper party as follows:

12 Julie L Sanpei, Esq. (Bailus Cook & Kelesis)

13 Eckley M Keach, Esq. (Eckley M. Keach, Chtd.)

14 Douglas D Gerrard, Esq. (Gerrard Cox & Larsen)
dgerrard@gerrard-cox.com

15 David J. Merrill, Esq. (David J Merrill, PC)
david@djmerillpc.com

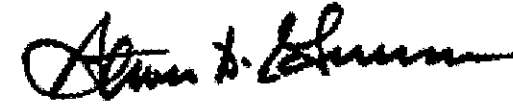
17 Robert B. Murdock, Esq. (Murdock & Assocs)
lasvegasjustice@aol.com

18 Richard F. Holley, Esq. (Santoro, Driggs, et al)
rholley@nevadafirm.com

20
21 
Jonathan Burdette

EXHIBIT C

EXHIBIT C



CLERK OF THE COURT

1 Robert E. Murdock, Esq.
2 Nevada Bar No. 4013
3 MURDOCK & ASSOCIATES, CHTD.
4 520 South Fourth Street
5 Las Vegas, NV 89101
6 (702) 384-5563
7 Plaintiff

8 Eckley M. Keach, Esq.
9 Nevada Bar No. 1154
10 ECKLEY M. KEACH, CHTD.
11 520 South Fourth Street
12 Las Vegas, NV 89101
13 (702) 384-5563
14 Plaintiff

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DISTRICT COURT
CLARK COUNTY, NEVADA

ROBERT E. MURDOCK and
ECKLEY M. KEACH,

Plaintiffs,

vs.

SAIID FOROUZAN RAD, an individual;
R. PHILLIP NOURAFCHAN, an individual;
FOROUZAN, INC., a Nevada corporation;
RPN LLC, a Nevada limited liability
Company; R & S ST. ROSE LLC, a Nevada
limited liability company; R & S ST. ROSE
LENDERS, LLC, a Nevada limited liability
company; COLONIAL BANCGROUP INC.;
R & S INVESTMENT GROUP LLC, a Nevada
limited liability company; and DOES I
through X, inclusive,

Defendants.

BB&T CORPORATION as successor in
Interest to Federal Deposit Insurance
Corporation, as receiver of Colonial Bank N.A.

Plaintiff,

vs.

CASE NO. 08-A-574852

DEPT. NO. XI

CONSOLIDATED WITH:

CASE NO. 09-A-594512

FINAL JUDGMENT

1 R & S ST. ROSE LENDERS, LLC, a Nevada)
 2 limited liability company, R & S ST. ROSE,)
 3 LLC, a Nevada limited liability company,)
 4 FOROUZAN, INC., a Nevada corporation,)
 5 RPN, LLC, a Nevada limited liability)
 6 company, SAID FOROUZAN RAD, an)
 7 individual, R. PHILLIP NOURAFCHAN,)
 8 an individual, and DOES 1-10, and ROE)
 9 ENTITIES 1-10, inclusive,)
 10 Defendants.)

11 On June 23, 2010 the Court entered its Findings of Fact and Conclusions of Law based
 12 upon a non-jury trial commencing on January 8, 2010, and concluding on April 8, 2010. On
 13 June 24, 2010, the Court entered an Order Granting, in part, and Denying in part: (1) BB&T's
 14 Motion To Voluntarily Dismiss Its Remaining Claims To Certify Order As Final And Motion
 15 To Stay Foreclosure Pending Appeal On Order Shortening Time; and (2) Plaintiffs' Motion To
 16 Voluntarily Dismiss The Remaining Claims Against All Defendants And Enter Judgment In
 17 Accordance With This Court's Order Of April 21, 2010. On July 13, 2010, the Court filed its
 18 Judgment in favor of Plaintiffs against R & S St. Rose Lenders, LLC. Accordingly, the Court
 19 hereby enters Final Judgment on all claims as follows:

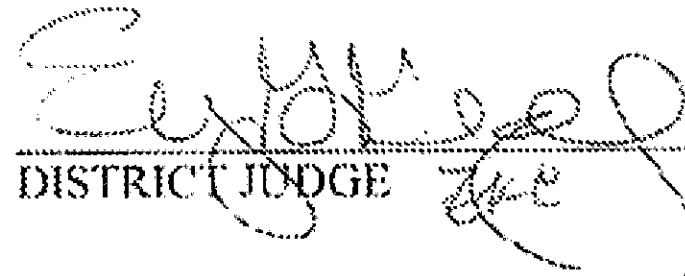
20 **IT IS HEREBY ORDERED ADJUDGED AND DECREED that:**

- 21 1. The Findings of Fact and Conclusions of Law are hereby incorporated herein;
- 22 2. All of Plaintiffs' remaining claims against all parties shall be and hereby are
23 dismissed;
- 24 3. In accordance with the Findings of Fact and Conclusions of Law, BB&T
25 Corporation's claims for declaratory relief-Contractual subrogation, Declaratory relief/Quiet
26 Title-Replacement, equitable/promissory estoppel, and unjust enrichment shall be and hereby
27 are dismissed;
- 28 4. All of BB&T Corporation's remaining claims shall be and hereby are dismissed;
5. In accordance with the Findings of Fact and Conclusions of Law, R & S St. Rose
Lenders, LLC shall take judgment against BB&T Corporation on its Counterclaim for

1 Declaratory Relief. The Court declares that St. Rose Lenders' Deed of Trust shall retain its
2 priority over the 2007 Colonial Bank Deed of Trust;


3 ~~6. To the extent any claims by any parties remain, they shall be and hereby are~~
4 ~~dismissed without prejudice as it is the intention of the Court that this judgment be the Final~~
5 ~~Judgment.~~

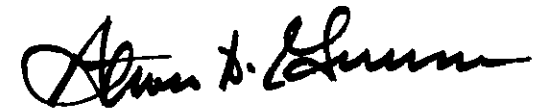
6 DATED and DONE at Clark County, Nevada, this 23 day of July,
7 2010.

8 
9
10 DISTRICT JUDGE *me*

11 Submitted by:

12
13 MURDOCK & ASSOCIATES, CHTD.
14 ECKLEY M. KEACH, CHTD.

15 
16 Robert E. Murdock Bar No. 4013
17 Eckley M. Keach Bar No. 1154
18 520 South Fourth Street
19 Las Vegas, NV 89101
20 Plaintiffs
21
22
23
24
25
26
27
28



CLERK OF THE COURT

OPPS

G. MARK ALBRIGHT, ESQ. (Nv Bar No. 001394)

D. CHRIS ALBRIGHT, ESQ. (Nv Bar No. 004904)

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

801 South Rancho Drive, Suite D-4

Las Vegas, Nevada 89106

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

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

Defendants.

CASE NO. A-16-744561-C

DEPT NO. XXVII

**PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS FIRST
AMENDED COMPLAINT; AND
ALTERNATIVE COUNTERMOTION
FOR LEAVE TO AMEND**

Date of Hearing: April 19, 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 ("BB&T"), by and through its undersigned counsel of record, and hereby opposes the Defendants' March 8, 2017 Motion to Dismiss Plaintiff's February 22, 2017 First Amended Complaint, based on the below Points and Authorities and the pleadings and papers on file herein. (The initial Complaint was filed herein on October 5, 2016, and, no Answer thereto having yet been filed, was amended following entry of a Stipulation and Order allowing for this amendment and vacating an earlier motion to dismiss without prejudice.)

OPPOSITION POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT AS TO SOURCES OF FACTUAL AVERMENTS

A motion to dismiss is to be reviewed on the basis of the allegations of the challenged pleading, taken as true. Documents outside of that pleading may be reviewed without altering the

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

1 nature of the motion to one for summary judgment, only where the pleading refers to the
2 documents, they are central to the Plaintiff's claims, and no party questions the authenticity
3 thereof. *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 930 (2015).

4 Thus, the factual statements herein rely primarily on, and cite to, the allegations set forth in
5 the First Amended Complaint (the "FAC"), which are not required, at this stage, to be verified, but
6 also find support by reference to certain publicly filed or recorded documents, marked as Exhibits
7 A through C to Defendants' March 8, 2017 Request for Judicial Notice, filed concurrently with
8 their Motion, together with such documents (Exhibits D through X) as are attached to a Response
9 and Counter-Request for Judicial Notice filed concurrently herewith by Plaintiff (both sets of
10 which documents are hereinafter referred to as the "Notice Doc(s)"). Said Notice Doc(s) which are
11 cited herein, are hereby incorporated by reference as though Exhibits hereto, and may be treated
12 (to the extent this Court believes to be appropriate under *Baxter*) as Exhibits hereto, should this
13 Court determine to review those documents, and whether or not this Court formally takes judicial
14 notice thereof. This will not, however alter the nature of Defendants' Motion (as a Motion to
15 Dismiss, not for Summary Judgment), nor the legal standard applicable thereto.

16 II. INTRODUCTION AND OVERVIEW

17 This is a legal malpractice suit against attorney Douglas D. Gerrard ("Gerrard") and his
18 law firm Gerrard Cox & Larsen ("GC&L"), stemming from the lawyer Defendants' representation
19 of Plaintiff BB&T in an earlier Clark County, Nevada case, known as Case Number A-08-574852,
20 consolidated with Case No. A-09-594512 (sometimes hereinafter the "Underlying Subject
21 Litigation" or simply the "underlying suit") which was tried before the Honorable Elizabeth
22 Gonzalez ("Judge Gonzalez" or "the underlying court") in 2010. FAC at ¶¶ 1-5.

23 The Underlying Subject Litigation involved the adjudication of the respective priority of
24 two deeds of trust encumbering approximately thirty-eight (38) acres of real property in
25 Henderson, Clark County, Nevada as described in those deeds of trust (the "Property"), which
26 Property was owned by R&S St. Rose LLC (hereinafter "R&S St. Rose"). *Id.* at ¶¶ 5-9. The
27 beneficial interest under one of those Deeds of Trust had originally been held by Colonial Bank,
28 N.A., an Alabama corporation (hereinafter "Colonial"), but was acquired, during litigation of the
underlying suit, by Plaintiff BB&T, when Colonial was placed into receivership with the FDIC,

1 which then sold Colonial's assets to BB&T. The other deed of trust had been recorded prior to
2 Colonial's deed of trust, but BB&T correctly claimed in the underlying suit that the Colonial deed
3 of trust was nevertheless entitled to priority under principles of equitable subrogation and
4 replacement, as it paid off an even earlier Colonial loan and deed of trust. FAC at ¶¶ 10-36.

5 BB&T lost the underlying suit not on the merits, but when the court ruled that BB&T had
6 failed to establish, as a necessary prerequisite to its claims, that it had been assigned and owned
7 the former Colonial Deed of Trust on which the claims it was pursuing were based. FAC at
8 ¶¶ 134-145. This ruling, in turn, was based on the underlying court declining to allow BB&T's
9 attorneys, Defendants herein, to present evidence at trial as to the assignment to BB&T, which
10 evidence had not been timely disclosed by those attorneys prior to trial. FAC at ¶¶ 119-130.

11 BB&T alleges in this instant case that: (i) its lawyers in the underlying suit, the Defendants
12 herein, knew or should have known that they would need to establish BB&T's acquisition and
13 ownership of its claims at trial, as a necessary component of BB&T's case in chief, which was
14 contested by the other parties to the underlying suit (FAC at ¶¶ 58-93); (ii) that Defendants
15 therefore had a duty to ensure they were able to meet this challenge, by procuring and timely
16 disclosing the necessary evidence on this point and then presenting that evidence at trial (*id.*); (iii)
17 that the Defendants failed to comply with these duties (*id.*); and (iv) that, had Defendants properly
18 and timely fulfilled these duties, the Plaintiff would have prevailed in the underlying suit, (a) both
19 in establishing its ownership and right to pursue the deed of trust priority claims at issue (FAC
20 ¶¶ 140; 144), and also (b) in prevailing on those priority claims themselves on the merits (FAC at
21 ¶¶ 26-31, 36; 159-162; 165-168; 171-174). If there is any set of facts on which BB&T could
22 prevail with respect to said contentions, Defendants' Motion must be denied.

23 Defendants' Motion argues that Plaintiff would not have prevailed on the merits in the
24 underlying case in any event, based on certain rulings of the underlying court, which they argue
25 are now binding in this case. However, the rulings which Defendants now wish to treat as binding
26 on this Court, in addition to being of ambiguous effect, and/or having been caused by the
27 Defendants' own negligence, were unnecessary *dicta*, which are *not* binding in this action, and
28 have no preclusive effect herein, all as set forth below. Defendants also contend that the instant
suit is barred by the applicable statute of limitations, which argument is also refuted below.

III. STATEMENT OF FACTS

A. The Underlying Transactional Facts Alleged in the First Amended Complaint.

The Property at issue in this matter was acquired by R&S St. Rose LLC ("R&S St. Rose"), for a substantial purchase price, for which it borrowed \$29,305,250.00 from Colonial (the "First Colonial Loan"). This loan was secured by a first priority deed of trust against the Property recorded on August 26, 2005 (the "First Colonial Deed of Trust"). Notice Doc D. 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 in favor of Centex; and the principals of R&S St. Rose, R. Phillip Nourafchan and Saiid Fourouzan Rad (*i.e.*, "R&S") also arranged for another loan to be made to R&S St. Rose, in the sum of \$12,000,000.00, through an affiliated entity, formed for that purpose, known as R&S St. Rose Lenders, LLC (hereinafter "R&S Lenders"). This \$12 million 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 R&S Lenders (the "R&S Lenders Second Deed of Trust"). Notice Doc E; FAC at ¶¶ 10-19.

When Centex Homes unexpectedly, did not exercise its purchase option, R&S St. Rose borrowed additional funds from Colonial to itself retain and potentially develop the Property. On or about July 27, 2007, Colonial agreed to loan R&S St. Rose an amount not to exceed \$43,980,000.00 (the "Construction Loan"), in order to pay off the First Colonial Loan, and provide funding for constructing certain Property improvements. The Construction Loan was secured by a Deed of Trust in favor of Colonial, recorded on July 31, 2007 (the "2007 Colonial Deed of Trust"). Notice Doc F; FAC at ¶¶ 18-20. Colonial intended that the 2007 Colonial Deed of Trust would be in a first priority position, with the R&S Lenders Second Deed of Trust to be reconveyed, in conjunction with the funding of the Construction Loan. FAC ¶¶ 20-26. Demonstrating this intent and understanding, Colonial insisted that the R&S Lenders Second Deed of Trust not be shown as an exception to its title insurance, and, after funding, Colonial reconveyed its own earlier 2005 First Colonial Deed of Trust which was paid off by this Construction Loan. Notice Doc G; FAC at ¶¶ 32-34.

In 2008 Colonial learned that, notwithstanding its intent, the R&S Lenders Second Deed of Trust from September 16, 2005 was not ever reconveyed. FAC at ¶ 35. Nevertheless, pursuant to legal principles of equitable subrogation recognized in Nevada, or the analogous theory of

1 equitable replacement, the 2007 Colonial Deed of Trust securing the Construction Loan was
2 entitled to enjoy the same first priority position of the earlier, August 2005, First Colonial Deed of
3 Trust, at least up to the amount thereof paid off and refinanced by Colonial's 2007 Construction
4 Loan. *See*, FAC at ¶¶ 26-31, 36, and legal citations set forth therein.

5 R&S St. Rose eventually defaulted on both the Colonial Construction Loan and on the
6 R&S Lenders loan, and both lender entities recorded Notices of Default and Elections to Sell,
7 initiating non-judicial foreclosure proceedings against the R&S St. Rose Property (FAC at ¶ 37),
8 leading to disputes with respect to which foreclosure would wipe out the other deed of trust.

9 **B. Initiation of the Underlying Subject Litigation.**

10 On November 3, 2008, Robert E. Murdock ("Murdock") and Eckley M. Keach ("Keach"),
11 who were investors in the R&S entities with an interest in the R&S Lenders Second Deed of Trust,
12 filed a Clark County Nevada Complaint against R&S Lenders initiating Case No. A-08-574852,
13 which was eventually amended to name a Colonial affiliate. FAC at ¶ 5; 38; and Notice Doc H.
14 Colonial thereafter filed its own separate Complaint on July 1, 2009, initiating Case No. A-09-
15 594512 against various defendants including R&S Lenders, Rad and Nourafchan. Colonial was
16 represented in said filing by Defendants herein Gerrard and GC&L. FAC at ¶ 40. This Complaint
17 sought to obtain a ruling that Colonial's 2007 (Construction Loan) Deed of Trust, which paid off
18 the August 2005 First Colonial Deed of Trust had priority over the September 2005 R&S Lenders
19 Second Deed of Trust, based on equitable subrogation/replacement and other related theories.
20 FAC at ¶ 42. The two cases were eventually consolidated and comprise the "Subject Underlying
21 Litigation" at issue herein. FAC at ¶¶ 5, 38-43; Notice Docs J and K. Both foreclosures came to be
22 stayed by a TRO, extended at the parties consent through trial, entered in the underlying suit.
23 Notice Doc B at p. 3, FAC at ¶¶ 53-57.

24 **C. BB&T's Acquisition of Colonial's Claims, and Substitution of BB&T as a Party in the**
25 **Subject Underlying Litigation.**

26 On August 14, 2009, Colonial was closed by the Alabama State Banking Department, with
27 the FDIC named as its Receiver (Notice Doc L, at pages 5-7 thereto). The FDIC, acting as
28 Colonial's Receiver, then entered into a "Purchase and Assumption Agreement, Whole Bank All
Deposits" (the "PAA"), pursuant to which it transferred Colonial's financial assets, including the
lender's rights under the Construction Loan and the 2007 Deed of Trust, to BB&T. FAC at ¶¶ 43-

1 45. Based thereon, Defendants Gerrard and GC&L filed an Amended Complaint in the underlying
2 suit substituting BB&T as the plaintiff therein, in lieu of Colonial, and thereby became counsel of
3 record for BB&T. FAC at ¶ 46; Notice Doc M. The PAA was not as clear as it could have been,
4 and, had it been carefully reviewed by Defendants herein, as BB&T's counsel, they should have
5 anticipated possible arguments being raised that it did not clearly and adequately demonstrate that
6 the subject Colonial Assets at issue in the suit had been transferred and assigned to BB&T. FAC at
7 ¶¶ 48-49.

8 On or about October 7, 2009, a Second Amended Complaint was filed in BB&T's name by
9 Gerrard and GC&L (Notice Doc A) alleging a variety of theories on behalf of BB&T, as successor
10 to Colonial, to obtain a judgment declaring and recognizing that the 2007 Colonial Deed of Trust
11 had a first priority position over the 2005 R&S Lenders Deed of Trust, or to aver damages,
12 including based on theories of: Contractual (aka conventional) Subrogation; Replacement (which
13 is an analogue to equitable subrogation); Equitable Estoppel or Promissory Estoppel; Unjust
14 Enrichment; Fraudulent Misrepresentation; and Civil Conspiracy. Notice Doc A. Plaintiff BB&T
15 contends that at least one (or more) of these claims for relief set forth a valid claim on which it
16 would have prevailed on the merits, if BB&T had been able to demonstrate its own right, as
Colonial's successor, to pursue the same. FAC at ¶¶ 50-52.

17 **D. Defendants Should Have Known that they Would Need to Demonstrate that BB&T**
18 **Had Been Assigned and Now Owned Colonial's Construction Loan Rights.**

19 A number of events in the underlying suit should have apprised Defendants herein that
20 BB&T's right to bring the Colonial claims, as an owner and assignee of the subject Deed of Trust
21 and related Construction Loan documents, would be an important and contested factual question
22 in the underlying suit: For example, the underlying Second Amended Complaint alleged in ¶1 that
23 BB&T was a successor in interest to the FDIC, as the receiver of Colonial, and was entitled to an
24 interest in the real property at issue in the suit. Both St. Rose and R&S Lenders filed Answers to
25 this pleading in which they denied, for lack of sufficient knowledge, this first paragraph, and in
26 which both Defendants asserted BB&T's lack of standing, as well as the statute of frauds, as
Affirmative Defenses. FAC at ¶¶ 58-66; Notice Docs N and O.

27 Furthermore, the district court set the underlying suit for an evidentiary hearing as to
28 competing motions for preliminary injunction of the two lenders' foreclosure proceedings, to be

1 consolidated with trial on the merits as to certain claims, including the priority claims (the
2 “Trial”), and Murdock and Keach thereafter filed a Notice of Questions of Fact (the “NFQ”) to be
3 reviewed at this Trial. Item no. 24 in this list indicated that one question to be tried was “whether
4 BB&T paid proper consideration and thus is able to have an assignment that comes with equitable
5 rights.” FAC at ¶¶ 77-81. Additionally, questions asked during the deposition of BB&T’s PMK
6 Gary Fritz, included challenges as to whether the PAA adequately demonstrated that an
7 assignment to BB&T had occurred, and the Notice of that deposition also indicated that BB&T’s
8 acquisition of the Colonial rights was at issue. FAC at ¶¶ 89-92.

9 Based on all of these and other factors, Defendants Gerrard and GC&L knew or should
10 have known, prior to Trial, that BB&T would be required to prove at Trial, by a preponderance of
11 the evidence, that Colonial’s position under the 2007 Construction Loan Deed of Trust had been
12 assigned to BB&T, via a writing clearly setting forth this specific assignment, in order for BB&T to
13 demonstrate that it now owned and had succeeded to the right to pursue the claims previously
14 owned by Colonial. FAC at ¶¶ 66-93. This task could have been accomplished either by
15 ascertaining the existence of assignment documents which in fact existed at that time, beyond the
16 PAA, or by Defendants advising their client BB&T of the need to procure from the FDIC,
17 adequate new documentation, evidencing the assignment, such as schedules to the PAA, listing
18 excluded or included assets (as were referenced in the PAA but not actually created or attached) or
19 other assignment documents to be disclosed prior to Trial, for use at Trial. *Id.*

20 **E. Defendants Failed to Ready Themselves to Address this Issue at Trial.**

21 The Defendants herein however failed in their duty to ensure that any documents proving
22 the assignment to BB&T were procured and timely disclosed prior to Trial and then utilized
23 during Trial, so as to effectively address this key factual showing. FAC ¶¶ 66-93. Instead,
24 Defendants either never adequately examined the PAA to determine whether it sufficiently
25 demonstrated the assignment to BB&T; or knew that it was inadequate (as they averred in their
26 original Motion to Dismiss) but did nothing about this; never warned BB&T of the need to have
27 the FDIC create schedules for the PAA or other more adequate assignment documents; never
28 inquired of BB&T or the FDIC or the Clark County Recorder’s office, before Trial, to determine if
any more adequate assignment documentation existed, beyond the PAA (which did in fact exist);
never disclosed any such additionally procured documents in pre-trial disclosures; and never

1 introduced needed documentary evidence and witness testimony of the assignment during their
2 presentation of BB&T's case-in-chief. FAC at ¶¶ 94-102.

3 Prior to Trial, a document came to exist which more clearly demonstrated the assignment
4 to BB&T, than did the PAA, namely, an "Assignment of Security Instruments and Other Loan
5 Documents" from the FDIC, as Receiver for Colonial, to BB&T, dated October 23, 2009 and
6 recorded in Clark County, Nevada on November 3, 2009, and effective on the same date as the
7 PAA (sometimes herein the "2009 Bulk Assignment"). Notice Doc L; FAC at ¶¶ 72-76. This 2009
8 Bulk Assignment overcame the potential ambiguities in the PAA and, taken together with the
9 PAA, confirmed that the FDIC had transferred, among other items, Colonial's position under all of
10 its outstanding Nevada commercial loans and Nevada recorded security instruments (other than
11 MERS recorded documents), to BB&T, for an acknowledged consideration, which would include
12 an assignment of the Subject Colonial Construction Loan and the related 2007 Deed of Trust. *Id.*

13 After the 2009 Bulk Assignment document came to exist of record, the parties to the suit
14 were still able to supplement their disclosures, prior to Trial, in early December 2009, and the
15 underlying district court allowed discovery to continue until the eve of Trial, through December
16 28, 2009. FAC at ¶¶ 82-88. However, Defendants failed during this time period to disclose the
17 2009 Bulk Assignment, either because they failed to make the necessary inquiries to learn of it, or
18 because, knowing of the document, they simply failed to disclose it. *Id.*

19 **F. The Trial.**

20 The Trial was held over ten days, spanning a three month period, from January 8, 2010
21 until April 8, 2010. On the very first day of Trial, *pro se* party / attorney Keach questioned
22 whether any assignment to BB&T had once again taken place and asserted that "BB&T is not an
23 assignee in this case," because BB&T's "asset purchase" involved no assignment. FAC at ¶¶ 102-
24 103. Notice Doc P. The district court then indicated to Gerrard as follows: "I have two issues I
25 have to determine . . . [including] the nature of the relationship between the Colonial Bank loan
26 and the BB&T's entity's. And in making that determination I am going to listen to the evidence
27 before I apply the theories that you're saying because **I have to make a determination as to**
28 **whether there's an assignment that exists**, if it's a successor in interest . . . or . . . some other
nature of an acquisition." FAC at ¶ 104-107. Notice Doc P [emphasis added]. Defendants took no
action on the first day of Trial to clarify the meaning of these counsel and judicial statements, or to

1 object thereto if it was not in keeping with their own understanding of the issues to be tried. *Id.*

2 Notwithstanding what they knew or should have known, prior to Trial, as reiterated at the
3 beginning of Trial, about the need to show BB&T's acquisition and ownership of the subject loan
4 documents, the Defendants, having failed, prior to Trial, to procure and then disclose relevant
5 evidence on this issue (FAC at ¶¶ 66-107), then also failed, while putting on their six day primary
6 case-in-chief, to directly and adequately address this factual question, during Trial. For example,
7 the Defendants did not put witness Fritz on the stand, did not introduce any of Fritz's deposition
8 transcript during Trial (wherein he testified that BB&T had paid \$21.5 Billion for *all* non-
9 consumer loans of Colonial, which included the Subject Construction Loan, which thereafter
10 appeared on BB&T's General Ledger); did not introduce the PAA into evidence, and did not
11 introduce the 2009 Bulk Assignment, or any other documents bearing on this point, into evidence.
FAC, including at ¶¶ 108-112.

12 **G. Plaintiff's Claims in the Underlying Suit Were Rejected Due to an Evidentiary**
13 **Failure to Demonstrate Plaintiff Owned said Claims.**

14 After the close of BB&T's primary case-in-chief,² on or about March 30, 2010, almost
15 three months after Trial had begun, opposing party Keach and Murdock brought an oral motion
16 (ultimately joined by the other opposing parties in the suit) for judgment on partial findings
17 arguing that BB&T had not established a *prima facie* case that it had succeeded to and become the
18 owner of Colonial's former rights to assert the claims being litigated. In response to this Motion,
19 the underlying court allowed Defendants, on behalf of BB&T, to now introduce into evidence, for
20 the first time, the PAA, over objection, but ultimately advised Gerrard that this document was not
adequate to show that BB&T owned the claims it was pursuing at Trial, as follows:

21 I've admitted Exhibit 183 [the PAA], if it included some reference to this
22 particular asset, or a schedule that had excluded assets that didn't include this
23 asset, might comply with NRS 111.235, which would then put your client in a
24 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.

25 See, FAC at ¶¶ 111-118; Notice Doc B at p. 4, Notice Doc Q at pp. 56-57.

26 The court then indicated that it would allow Gerrard to attempt to introduce additional
27 evidence, and, the following day, Gerrard/GC&L attempted, for the first time, to provide the trial

28 ² With the exception of a witness from Centex Homes, not yet available on that date, whose involvement in the
underlying transactions would have long predated the assignment to BB&T.

1 court with the 2009 Bulk Assignment to BB&T, confirming that the FDIC had indeed transferred,
2 among other things, the Construction Loan and the 2007 Deed of Trust to BB&T. FAC ¶¶ 119-
3 125; Notice Doc L, Notice Doc R at pp. 6-12; and Notice Doc B at pp. 3-6. Whatever inquiries
4 suddenly allowed the Defendants to locate and produce this document, **literally overnight** and
5 prior to the next day of Trial, could and should have been made earlier, so as to timely discover
6 and disclose it prior to the commencement of Trial, *had they but timely recognized the need. Id.*
7 Indeed, after hearing arguments (Notice Doc R at pp. 13-41) the underlying Judge refused to admit
8 or consider this 2009 Bulk Assignment, because she would have expected it to have been
9 disclosed at least at some time prior to that March 31, 2010 date (Notice Doc R at p. 42, ll. 4-5);
10 FAC at ¶123. This evidentiary failure had occurred although the document existed and was a
11 publicly recorded document, prior to the January 2010 commencement of Trial, and prior to the
12 late December 2009 deposition of BB&T's PMK, Mr. Fritz, and prior to the early December 2009
13 pre-trial supplemental disclosure exchanges between the parties. FAC at ¶¶ 122-125.

14 Gerrard and GC&L, on behalf of BB&T, then orally moved the court to re-open BB&T's
15 case-in-chief, which motion was granted. FAC at ¶ 126. They then attempted to introduce into
16 evidence a newly created March 30, 2010 "Assignment" on which they had just obtained the
17 FDIC's signature. *Id.* at ¶ 127. Again, Defendants' ability to procure the creation and FDIC
18 execution of this document, **literally overnight**, demonstrates that they would have been able to
19 just as easily do so, in a timely manner before Trial, *had they but timely recognized the need.* The
20 court however also refused to admit or consider this document, as also not having been timely
21 disclosed. FAC at ¶¶ 127-130; Notice Docs B (at pp. 3-6) and R, at pp. 43-53.

22 Defendants Gerrard and GC&L then made an oral motion to substitute in the FDIC for
23 BB&T as the real party in interest. However, because the "internally inconsistent and incomplete"
24 PAA "prevents the Court from making a finding that an assignment has occurred" to BB&T, the
25 court did not grant the request for substitution, based "on the particular procedural posture of this
26 case." FAC at ¶ 132. Notice Doc B at p. 5. Thus, a ruling that BB&T had failed to demonstrate its
27 own ownership of the claims, including because of the failure to timely disclose relevant
28 documents beyond the PAA, was not treated as equivalent to a determination on the merits that the
FDIC was the true owner thereof, or the appropriate Plaintiff (the question of who now owned
Colonial's former rights having simply been inadequately demonstrated one way or the other).

1 In its Findings of Fact and Conclusions of Law ("FF&CL"), entered on June 23, 2010
2 (Notice Doc B), and referenced in the FAC at ¶¶ 134-145, the trial court indicated that BB&T's
3 claims were dismissed due to a "defect" which was "evidentiary" in nature, namely, because
4 "BB&T failed to meet its burden of proof to establish the Colonial Bank loan, note and deed of
5 trust at issue in this case were ever assigned to BB&T." Notice Doc B at p. 6, ll. 23-28. This
6 evidentiary failure was due to BB&T's counsel's failure, to adequately present its case; the district
7 court indicating that it had "given BB&T ample opportunity to submit proper admissible evidence
8 that the Colonial [loan documents] at issue in this case were . . . acquired by BB&T" but, because
9 BB&T's counsel had relied solely on the inadequate PAA, the burden of proof had not been met.
10 *Id.*, at pp. 6-7. The trial court's FF&CL further provided, at Findings 143 and 144 that:

11 143. BB&T has not shown the claims or causes of action against defendants
12 being pursued by BB&T belong to BB&T and it is the successor in interest with
13 the ability to assert these claims against defendants.

14 144. Since BB&T has not proved that it owns the actions or claims asserted
15 herein, it does not have the ability to assert the claims in the Second Amended
16 Complaint.

17 FAC at ¶ 138, Notice Doc B at page 24.

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

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

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

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

27 5. BB&T is not entitled to relief on its claim for equitable
28 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;**

FAC at ¶ 143, Notice Doc B at pp. 25-26. [Emphasis added.]

These rulings would not have been made, had the relevant actual facts and documents been timely procured, disclosed, and then presented during Trial, as BB&T was in fact an assignee and a successor, with the right to pursue Colonial's former legal and equitable claims, thereunder. FAC ¶¶ 140; 144. Defendants however, negligently failed to timely procure, disclose, and then present during Trial, the relevant documentary and other evidence, necessary to make a *prima facie* showing of BB&T's ownership of the claims, to obtain a correct ruling by the Trial court on this point, despite ample indications prior to and at the beginning of Trial, that this would be necessary. FAC at ¶¶ 58-112; 124; 147-152. Notice Doc B, at p. 6, l. 23 through p. 7, l. 7.

H. The Underlying Court Affirmed that Gerrard and GC&L Knew or Should Have Known, Prior to Trial, of the Need to Establish BB&T's Ownership of Its Claims.

On July 8, 2010, Defendants Gerrard and GC&L moved for a new trial on behalf of BB&T, or, in the alternative, to alter or amend the Judgment³ (FAC at ¶ 153, Notice Doc S), in which Motion Defendants sought to excuse their failure to timely present adequate evidence of an assignment to BB&T during Trial, by averring that they had been unfairly surprised by this defense being raised late in the day against them. Notice Doc S at p. 8. The underlying court ultimately denied 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 . . . 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.

³ No "Judgment" having yet been entered, this Motion actually sought to overturn the FF&CL.

1 **THIS COURT FINDS . . . BB&T was not unfairly surprised by the**
2 **challenge to its evidence via the N.R.C.P. 52 motion**

3 [Some emphasis added.] FAC at ¶ 154; Notice Doc T. These findings, which were necessary non-
4 *dicta* rulings, having survived and been upheld on appeal, are now dispositive herein. FAC ¶ 155.

5 **I. The Appeals.**

6 A “Final Judgment” document was entered by the district court on July 23, 2010 and again
7 on November 10, 2010. FAC at ¶156. On or about September 24, 2010, Defendants, on behalf of
8 BB&T, appealed the district court’s decision, and on May 31, 2013 a three-judge panel of the
9 Nevada Supreme Court rejected this appeal, reasoning as follows:

10 [T]he district court found that the PAA did not transfer the Construction
11 Loan to BB&T. We agree, and therefore conclude **that the district court’s**
12 **decision to grant R&S Lenders’ NRCP 52(c) motion after BB&T failed to**
13 **carry its evidentiary burden to prove its ownership of the Construction Loan**
14 **was not clearly erroneous.**

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

19 *See*, FAC at ¶¶ 158-159; Notice Doc U; emphasis added.

20 Plaintiff BB&T asserts in this case that, if Plaintiff’s priority claims had instead been
21 addressed on the merits, Plaintiff would have prevailed thereon, either at Trial or on appeal. FAC
22 at ¶¶ 159-162; 165-168; 171-174. BB&T sought *en banc* rehearing of the Nevada Supreme Court’s
23 three-judge decision by the entire Nevada Supreme Court, which was denied on February 21,
24 2014. FAC at ¶¶ 163-164; Notice Doc V.

25 BB&T then sought to appeal this decision to the United States Supreme Court, which
26 denied BB&T’s Petition for Writ of *Certiorari* on October 6, 2014. FAC at ¶¶ 169-170; Notice
27 Docs W and X. Plaintiff filed this legal malpractice lawsuit within less than two years after that
28 denial by the U.S. Supreme Court, on October 5, 2016 (the filing date of Plaintiff’s original
Complaint, later superseded by its First Amended Complaint).

29 **IV. LEGAL STANDARD APPLICABLE TO MOTION**

30 The motion to dismiss should not be granted unless it appears beyond all doubt that
31 Plaintiff BB&T could prove no set of facts which would entitle it to relief. *See, Buzz Stew, LLC v.*
32 *City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). “The standard of review

1 for a dismissal under NRCP 12(b)(5) is rigorous as the court must construe the pleading liberally
2 and draw every fair intendment in favor of the [non-moving party]. All factual allegations of the
3 complaint must be accepted as true.” *Vacation Village, Inc. v. Hitachi America, Ltd.*, 110 Nev.
4 481, 874 P.2d 744, 746 (1994) [citations and quotations omitted].

5 In reviewing a motion to dismiss, this Court’s “task is to determine whether or not the
6 challenged pleading sets forth allegations sufficient to make out the elements of a right to relief.”
7 *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). “The test” for determining this
8 question, “is whether the allegations give fair notice of the nature and basis of a legally sufficient
9 claim and the relief requested.” *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 858 P.2d
10 1258, 1260 (1993). The First Amended Complaint easily meets this standard.

11 V. RESPONSE TO DEFENDANTS’ LEGAL ARGUMENTS

12 A. Defendants Are Not Entitled to an Order of Dismissal, Based on the Original Court’s 13 Dicta Statements, Which Are Not Binding Herein, and Have No Preclusive Effect 14 Upon Plaintiff’s Case-Within-a-Case Allegations.

15 The required elements of a legal malpractice claim are (1) An attorney-client relationship;
16 (2) a duty owed by the attorney to use such skill, prudence, and diligence as lawyers of ordinary
17 skill and capacity possess in exercising and performing the tasks which they undertake; (3) a
18 breach of that duty; (4) which is the proximate cause of the client’s damages, and (5) actual loss
19 resulting from the negligence. *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308, 324 (2004); *Day v.*
20 *Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996). Plaintiff has alleged all of these elements.
21 FAC at ¶¶ 171-184, as well as specific facts demonstrating the same. FAC at ¶¶ 1-170.

22 Defendants focus their attack on the fourth element, averring that “Plaintiff cannot under
23 any theory support the essential elements of a legal malpractice claim, specifically, that any breach
24 proximately caused its damages” (Mot. at p. 9, ll. 21-22) because, Defendants argue, Plaintiff
25 would have lost its underlying priority suit in any event, and thus cannot prevail on the “case
26 within a case” element of this legal malpractice suit. Mot. at pp. 9-15. More particularly,
27 Defendants contend that Plaintiff could not have demonstrated the necessary elements of its
28 equitable replacement claims, based on certain statements made in the district court’s FF&CL,
which Defendants characterize as now binding and dispositive in regard to two of the elements of
such a claim (the reasonable expectation element and the lack of prejudice element). *Id.*

These Defendant arguments are premised on the assertion that this Court is bound by

1 certain of the statements of the FF&CL, Defendants arguing that “[e]ven if the trial court had
2 found that Plaintiff owned Colonial’s interest, Plaintiff nonetheless could not have won on the
3 merits” because after ruling on BB&T’s failure to demonstrate it owned its claims, the trial court
4 nevertheless “proceeded to address the merits of the priority of the competing deeds of trust” and
5 ruled against BB&T on that issue, and the “trial court’s ruling is dispositive of this issue” Mot. at
6 p.12 ll. 22-25; p. 14-15, ll. 27-3. However, these assertions must be rejected, given the *obiter dicta*
7 nature of any of Judge Gonzalez’s rulings which Defendants contend address the merits of the
8 BB&T priority-through-equitable-replacement claims, which *dicta* has no preclusive effect.

9 The district court ruled in its FF&CL that BB&T had not demonstrated that it owned the
10 claims it sought to pursue, including because the only document which might satisfy the statute of
11 frauds, and which was admitted into evidence during Trial on this question, the PAA, was
12 inadequate (FF&CL, Notice Doc B, at Conclusions of Law 2; 11-17). The district court further
13 recognized that BB&T was *therefore* not entitled to relief on its claims for equitable replacement
14 *because of* (“since”) BB&T had failed to establish the assignment to it of Colonial’s rights
15 (FF&CL at Conclusions 2-9). These rulings were all that was needed for the district court to grant
16 the R&S Lenders’ request for Declaratory Relief, as to its ability to now foreclose on its earlier
17 recorded deed of trust, and to afford the other relief in favor of the opposing parties, entered
18 against BB&T in the Judgments.

19 Thus, it was completely unnecessary for the underlying court to then speculate as to what
20 the outcome of any of the BB&T priority or other claims might have been, had the merits of those
21 questions been reached. Instead, because BB&T was in any event precluded from pursuing such
22 claims, due to Defendants’ failure to establish the truth that BB&T owned the same, no further
23 rulings were necessary, on the merits of claims which BB&T had not demonstrated that it owned.

24 Indeed, the underlying court acknowledged this, noting for example Gerrard’s concession
25 (made after the 2009 Bulk Assignment and the 2010 Assignment had been rejected as evidence)
26 that, if no assignment to BB&T had taken place under the only admitted evidence on this point,
27 the PAA, there was no basis to reach *any* of the BB&T claims asserted in the litigation (Notice
28 Doc B at pp. 5-6). The district court’s Finding 144 (in Notice Doc B), 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.” (Emphasis added.) Based

1 thereon, the district court then rejected the Plaintiff's equitable subrogation / replacement claims,
2 *not on the merits*, but because ("since") BB&T had not demonstrated its ownership of the same.
3 FF&CL, Notice Doc B, at Conclusions 2-9. Any further findings relating directly to the merits of
4 any of those claims were therefore unnecessary *dicta*, and, as such, are not controlling in this
5 subsequent legal malpractice case, and have no preclusive effect herein.

6 For example, in *Pollicino v. Roemer and Featherstonhaugh P.C.*, 277 A.D.2d 666, 668
7 (N.Y. Ct. App. 2000) the appellate court reversed a lower court's grant of summary judgment
8 dismissal of a legal malpractice suit, in a case where the underlying suit against a city Transit
9 Authority had been dismissed for procedural failures, and explained that: "Language that is not
10 necessary to resolve an issue . . . constitutes *dicta* and should not be accorded preclusive effect
11 Here, the law firm's failure to serve a proper notice of claim was an error requiring dismissal, and
12 [the underlying court] dismissed the complaint on that ground. Its [extraneous] comment
13 concerning the merits of plaintiff's claim [indicating that it would have been dismissed in any
14 event for failure to show that the Authority had notice of a dangerous condition], however, clearly
15 was *dicta* and, as such, is not entitled to preclusive effect" in the subsequent legal malpractice
16 case. *Id.* [Clarifying bracketed language added.]

17 Defendants argue that certain of the original court's rulings, in its FF&CL, suggest what
18 the outcome would have been on the merits of the equitable replacement claim, and must now be
19 treated as binding, under the doctrine of issue preclusion. Mot. at p. 13, ll. 1-7. However, this is
20 legally false. Where earlier rulings sought to be relied on in a later case were unnecessary *dicta*,
21 the doctrine of issue preclusion does not apply. Rather, for this Court to invoke that doctrine, a
22 four-part test must be met: "(1) the issue decided in the prior litigation must be identical to the
23 issue presented in the current action; (2) the initial ruling must have been **on the merits** and have
24 become final; (3) the party against whom the judgment is asserted must have been a party or in
25 privity with a party to the prior litigation" and (4) the issue must have been "actually **and**
26 **necessarily** litigated." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d-709, 713
27 (2008) (emphasis added).

28 In the present case, the issue of whether or not Colonial's deed of trust had priority over
the deed of trust of R&S Lenders was not "necessarily" litigated. Rather, that issue became moot,
upon the court's determination that BB&T had not shown that it owned the right to assert that

theory in the first place. Thus, the court's indications as to how it might have ruled thereon were unnecessary *dicta*. The Restatement (Second) of Judgments §27, entitled "Issue Preclusion-General Rule" explains this anti-*dicta* rule as follows, at comment h: "*h. Determinations not essential to the judgment.* If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of *dicta*, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation." This is also the law of Nevada. *See, e.g., Kahn v. Morse & Mowbray*, 121 Nev. 464, 117 P.3d 227 (2005)(district court improperly granted summary judgment dismissal of malpractice claims against law firm where the "factual bases for the legal malpractice claim were not actually **and necessarily** litigated in the prior lawsuit") (emphasis added).

Similarly, in *Schultz v. Boston Stanton*, 198 P.3d 1253, 1257 (Colo. Ct. App. 2008) a former criminal defense client sued his former lawyers for malpractice stemming from their failure to timely locate a witness and present his exculpatory testimony at trial in an earlier underlying criminal proceeding. The lawyers defended on the grounds of issue preclusion, based on an order denying a motion for new trial issued in that earlier underlying case, which order included a statement that such testimony would not have necessarily been dispositive, such that the witness's subsequent availability did not warrant a new trial. However, where that statement was not necessary to the outcome of that new trial motion, as the denial order also listed multiple other grounds for the ruling, it was not an effective defense to the legal malpractice suit, as it was "not conclusive" with respect to the issue, "standing alone," sought to be precluded. *Id.* Based thereon, the legal malpractice case was reinstated by the appellate court, and the lower court's erroneous dismissal of the same for lack of proximate causation, based on the *dicta* statements in the earlier underlying suit, was set aside.

It should be noted that the rule against affording any preclusive effect to *dicta* is based on a number of policy considerations, one of which (already mentioned in comment h to the Restatement quoted above) is especially applicable herein, namely that "unnecessary findings are usually not subject to appellate review." *Hansted v. Safeco Ins. Co. of America*, 562 A.2d 1148,

1 1150 (Conn. Ct. App. 1989) (quoting F. James & G. Hazard, Civil Procedure (3d Ed.) §11.16-
2 11.19, in ruling that unnecessary *dicta* from earlier personal injury proceeding would have no
3 preclusive effect in a subsequent suit by the defendant in that earlier case against his insurer). The
4 present case illustrates this very point, as the Nevada Supreme Court in this case did not address
5 (or need to reach) any of the court's rulings on the merits of the Colonial equitable
6 subrogation/replacement arguments, herein, thus making it extremely unfair to give any preclusive
7 effect to unnecessary dicta findings which have never been subjected to appellate review.

8 Defendants' arguments are based on a faulty premise. The question to be litigated before
9 this Court is *not* how Judge Gonzalez would have ruled, but will be to now newly and objectively
10 reach the merits of the questions which the underlying court need never have reached in the first
11 place. *See e.g., Nelson v. Quarles and Brady, LLP*, 997 N.E.2d 872, 894 (Ill. Ct. App. 2013) ("A
12 malpractice plaintiff is not required to demonstrate what award the original judge or jury would
13 have made if no malpractice had occurred. Once a malpractice Plaintiff has demonstrated that his
14 attorney fell below a reasonable standard of professional conduct, the fact finder must [then]
15 determine what a reasonable judge or jury would have concluded and compare that conclusion to
16 the actual resolution of the underlying action to determine damages."); *Mattco Forge, Inc. v.*
17 *Arthur Young & Co.*, 60 Cal.Rptr.2d 780, 793 (Ct. App. 1997) ("The trial-within-a-trial [of a legal
18 malpractice claim] . . . does not recreate what a particular judge or fact finder would have done.
19 Rather, the . . . standard remains an objective one. The trier of facts determines what should have
20 been, not what the result would have been . . . before a particular judge or jury."); *Collins v. Miller*
21 *& Miller, Ltd.*, 943 P.2d 747, 756 (Ariz. Ct. App. 1996) (in establishing causation in a legal
22 malpractice action, the plaintiff must convince the trier of fact that, but for the attorney's
23 negligence, a reasonable judge or jury would have decided in his or her favor in the underlying
24 action); Restatement (Third) of Law Governing Lawyers section 53, comment b (2000) ("The
25 judges or jurors who heard or would have heard the original trial or appeal may not be called as
26 witnesses to testify as to how they would have ruled" as such testimony would be irrelevant "the
27 issue [being] how a reasonable judge or jury would have ruled.").

28 Moreover, even if the underlying court's unnecessary *dicta* could be used for preclusive
effect, the use to which Defendants wish to put the court's *dicta* in this case is untenable, and both
of the arguments to the contrary cited by Defendants must fail:

(1) The Reasonable Expectation Test. “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.” *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 and concedes that “the equitable doctrine of replacement is functionally identical to equitable subrogation.” Motion at p. 10, ll. 25-26, 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 they interpret as questioning 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. 10-13. 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

1 refinancing mortgagee should be found to lack such an expectation **only** where there is *affirmative*
2 *proof that the mortgagee* [*i.e.*, in this case, Colonial] *intended to subordinate its mortgage to*
3 *the intervening interest* [*i.e.*, in this case, that of R&S Lenders].” *Houston*, 119 Nev. 485, 490-
4 91, 78 P.3d 71, 74-75 (2003) [emphasis added]. In other words, the reasonable expectation is to be
5 presumed, absent affirmative proof that it was the refinancing lender’s intent to lose the priority of
6 the earlier loan.

7 The district court’s *dicta* rulings on which Movants rely are all based on BB&T’s alleged
8 failure, at Trial, to establish that R&S Lenders were notified by Colonial of its intent that the
9 Construction Loan Deed of Trust was to have first priority, and Colonial’s failure to adequately
10 arrange for this subordination to take place, via a reconveyance of the R&S Lenders Second Deed
11 of Trust, as a communicated condition of the Construction Loan (Mot. at pp. 10-13; FF&CL at pp.
12 14-15; 27). Even if these findings and conclusions were accurate, however, and even if they had
13 some preclusive effect herein (which they do not), such inadequate action by Colonial to notify
14 and obtain a reconveyance from R&S Lenders, would have been *insufficient* grounds on which to
15 base a ruling that Colonial lacked the requisite reasonable expectation to claim that it retained the
16 priority of its earlier loan, under principles of equitable subrogation or replacement. Rather, for the
17 district court’s rulings to foreclose an equitable replacement ruling, under *Houston*, the district
18 court would have needed to find (and cite some *affirmative proof*) that Colonial *intended* that its
19 Construction Loan Deed of Trust would *not* enjoy priority from the date of its earlier loan paid off
20 thereby, and instead *intended* that the security for its new loan would be junior in priority to the
21 R&S Lenders Second Deed of Trust, even though Colonial’s new loan was paying off the loan
22 secured by the First Colonial Deed of Trust.

23 No such affirmative proof of any such Colonial intent to voluntarily lose its first priority
24 position was ever shown at Trial, or cited in the underlying court’s *dicta*. Indeed, just the opposite
25 evidence existed, as the district court found that “Colonial did not make land loans unless secured
26 by a first priority deed of trust,” ever, as a matter of policy, confirmed by three different witnesses
27 (FF&CL, Notice Doc B at p. 8), and that Colonial would not close escrow if the title insurer listed
28 the R&S Second Deed of Trust as an exception to title *Id.* at pp. 14-15. *See also*, Notice Doc B at
p. 11, last sentence of footnote 7 (noting evidence supporting trial testimony that the R&S entities
intended to release the Second Deed of Trust in order to procure the Construction Loan). If any of

1 the district court's *dicta* findings or conclusions are to be given preclusive effect (which would not
2 be proper) these additional findings would also need to be taken into account, which demonstrate
3 that BB&T would have prevailed on its claims, based on a new objective determination, in this
4 case, of what a reasonable court properly applying *Houston* would need to have ruled, if the merits
5 of the claims had truly been reached and decided under applicable law.

6 However, given that the entire BB&T suit was rejected because of the failure to timely
7 submit admissible evidence that BB&T owned Colonial's rights, the merits of these arguments
8 were never truly fully adjudicated and completely analyzed, including on appeal to the Nevada
9 Supreme Court, which upheld the district court's determination to exclude evidence of BB&T's
10 ownership because it had not been timely disclosed, and affirmed the lower court rulings on that
11 lack-of-adequate-ownership-evidence basis alone, without reaching beyond that question to review
12 the merits of BB&T's equitable replacement claims. As noted above, this lack of any meaningful
13 appellate review of the district court's merits *dicta*, is one of the policy reasons why it would be
14 especially inappropriate for this Court to now rely on such *dicta* as though it were preclusive
15 herein. This point is made in the FAC, when it alleges that Plaintiff would have prevailed on the
16 merits, either before the district court *or on appeal*, were it not for the evidentiary failure caused
17 by the Defendants' procedural and other errors, which prevented a true merits review from
18 occurring. FAC at ¶ 177. It is therefore inappropriate for Defendants to rely on never-fully-
19 reviewed-on-appeal *dicta* (the meaning and applicability and suggested outcome of which is in
20 any event ambiguous and disputed) to contend that the district court would have ruled against the
21 merits of BB&T's claims, in a manner now inaccurately asserted to be binding on this Court.

22 (2) The Prejudice Test. Similarly, Defendants' assertion that R&S Lenders would have
23 been prejudiced by Colonial's subsequent Lien being afforded priority, and therefore, equitable
24 subrogation/replacement principles would not apply, must also fail. First of all, the *dicta* findings
25 relied upon by Defendants as support for this argument appear to address the *contractual*
26 subrogation claim asserted by Colonial/BB&T, and not the question of whether R&S Lenders
27 would be unfairly prejudiced, as part of analyzing the *equitable* subrogation/replacement claims at
28 the heart of BB&T's case.

R&S Lenders knew, when it recorded its deed of trust, that said lien was junior in priority
to the Colonial lien (even naming its Deed of Trust a "Second" such instrument). As demonstrated

1 by other district court findings cited above, Colonial would not have advanced any new loan if it
2 had understood that R&S Lenders was to later contest the priority of Colonial's position, in which
3 event (of no new loan being advanced) R&S Lenders would still have been in second position,
4 such that it can claim no prejudice from Colonial instead having made the new loan but still
5 remaining in first position (up to the amount of the former loan which would otherwise have
6 stayed in place)! Thus, the *dicta* rulings cited by Defendants for this portion of their argument, in
7 addition to being legally entitled to no preclusive effect, have no actual bearing on the prejudice
8 element of an equitable replacement analysis or are at best of ambiguous meaning. Moreover,
9 Plaintiff would prevail on this prejudice component of its equitable replacement claim, under an
objective and correct review thereof.

10 (3) Assignment of Colonial's Claims. Defendants also aver that certain of Colonial's
11 claims, namely the tort-based claims, such as fraud and conspiracy, were not capable of being
12 legally assigned. Mot. at p. 14. Lest there be any confusion, it should be pointed out that, even if
13 this contention were accurate as to the fraud based claims, it would have no effect on those
14 equitable replacement claims which were at the heart of BB&T's original case. Relevant authority
15 demonstrates that, had the assignment of the relevant loan and deed of trust to BB&T, as clearly
16 demonstrated by the 2009 Bulk Assignment, been established at Trial, BB&T would have had full
17 rights to pursue all of Colonial's equitable subrogation / replacement priority claims thereunder. In
18 *Mort v. United States*, 86 F.3d 890, 894 (9th Cir. 1996), an appeal from a Nevada U.S. District
19 Court ruling, which was later cited with approval by the Nevada Supreme Court in *Houston*, the
20 Circuit rejected an argument that the assignee of a deed of trust could not have the same rights to
21 equitable subrogation as the original lender: "the general rule in most states is that where a valid
22 assignment of a mortgage has been consummated with proper consideration, the assignee is vested
23 with all the powers and rights of the assignor Thus, the [assignees] have the same rights to
equitable subrogation as [the assignor/original refinancing lender]." *Id.*

24 As to tort claims, Defendants' contention that fraud and fraud based claims are not
25 assignable must also be rejected. The movants' reliance on *Prosky v. Clark*, 32 Nev. 441, 109 P.
26 793 (1910), is unavailing. That 1910 case is arguably no longer valid in Nevada. (For example,
27 under the 2001 amendments to article 9 of the UCC, which have been adopted in Nevada at NRS
28 104.9101 *et seq.*, commercial tort claims are now included among the categories of security which

1 a creditor can acquire from a debtor (NRS 104.9102(1)(m).) Moreover, *Prosky*'s statement (109 P.
2 at 794) as to the non-assignability of fraud claims was itself mere *dicta* and its assertion that
3 "[r]ights of action based on fraud, *like that assigned by Pollard in the Gruber [v. Baker, 20 Nev.*
4 *453, 23 P. 858, 860 (1890)] case*, are held by the courts to be not assignable" must be properly
5 understood. (Emphasis of portions of quote omitted in Motion to Dismiss, and bracketed
6 completion of citation, added.) In the referenced *Gruber* case, it was determined that the assignee
7 did not have a sufficient interest in the underlying transaction to maintain a fraud claim based
8 thereon. This is simply not true here, where BB&T did not simply buy a chose in action from
9 Colonial, but was assigned the subject deed of trust, and therefore did have a sufficient interest in
10 the underlying transaction to maintain ancillary claims necessarily assigned as part of that
11 transaction's assignment.

12 For example, in *Waterton Global Mining Co., LLC v. Cummins Rocky Mountain, LLC*,
13 2015 WL 714485 (D. Nev. 2015), the U.S. District Court for Nevada reviewed the Nevada
14 Supreme Court's case law on the assignability of certain tort claims (including the *Prosky* case),
15 and determined that those rulings which limited assignability were applicable to personal torts, but
16 not to torts which involved property, which would necessarily be assignable to whoever currently
17 owned that property: "There is no indication, however, that the policies mentioned in [Nevada
18 cases such as] *Achrem [v. Expressway Plaza Ltd. P'ship*, 917 P.2d 447, 448 (Nev. 1996)(which
19 ruled that tort proceeds are assignable, but not the right to pursue the tort itself, by citing to an
20 Arizona personal injury case)], *Chaffee [v. Smith*, 645 P.2d 966 (Nev. 1982)(which ruled that legal
21 malpractice claims are not assignable)], and *Prosky* would apply in situations where a cause of
22 action for damage to property is assigned, since the harm alleged in such a claim is specific to the
23 property rather than the individual. . . . Damage to property harms the property owner
24 Because the property itself may be transferred the right to recover for the damage thereto may also
25 be transferred. . . . The Court, therefore, finds that under Nevada law, a tort action to recover
26 damages to property is likely assignable." *Id.* at *5 [bracketed language added].

27 Similarly, here, the complete property interest held by Colonial via its deed of trust was
28 fully assigned to BB&T, by the FDIC on Colonial's behalf as its receiver, such that BB&T would
also have thereby enjoyed an assignment of whatever legal theories existed against those who had
deprived that deed of trust of its intended priority, a property interest, including by the fraud and

1 conspiracy which Nourafchan and Rad/R&S Lenders were alleged to have engaged in when they
2 failed to reconvey their second deed of trust, as part of procuring the Colonial Construction Loan.
3 (And, again, to the degree that the underlying court is alleged to have otherwise addressed those
4 claims, any such rulings were unnecessary *dicta*, of no preclusive effect.)

5 **B. Defendants' Preposterous Argument that Plaintiff Has No Standing Must Be**
6 **Rejected.**

7 Defendants next rely on their inaccurate issue preclusion theory as grounds to absurdly
8 contend that, because BB&T failed to establish its ownership of the claims pursued in the
9 underlying suit, this Court must now rule that BB&T has no standing to pursue *this* malpractice
10 case and is not the real party-in-interest, entitled to seek relief, in *this* case! Mot. at pp. 15-16. This
11 argument is not just false, but frivolous.

12 The First Amended Complaint at issue in *this* suit clearly alleges that BB&T was
13 Defendants' client, as Defendants filed pleadings on BB&T's behalf. FAC at ¶¶ 46-48; 50.
14 Furthermore, the instant FAC alleges that BB&T was the rightful owner of the claims in the
15 underlying suit, and further alleges that this fact could have been demonstrated by the 2009 Bulk
16 Assignment, which is Notice Doc L (*see, e.g.*, FAC at 72-73). However, as described in the FAC,
17 and above, the underlying court declined to admit the 2009 Bulk Assignment into evidence, and
18 therefore never considered it, or reached the question of whether the 2009 Bulk Assignment
19 document effected an assignment to BB&T, even in non-controlling *dicta*. This occurred because
20 the Defendants' failed to timely disclose the 2009 Bulk Assignment, so as to preserve BB&T's
21 right to admit it as evidence to be considered by the court, on behalf of BB&T, during the Trial.

22 As Defendants themselves admit, issue preclusion only applies where there has been an
23 earlier ruling **on the merits**. Mot. at page 15, line 20. There has been no earlier ruling on the
24 merits (even in *dicta*) indicating whether the 2009 Bulk Assignment would have effectively
25 demonstrated an assignment, if it had been timely disclosed for use at Trial, and then been
26 admitted and considered at Trial. No argument was raised at Trial, much less accepted by the
27 court, that the document was inadequate, only that it was inadmissible, as not timely disclosed.
28 (Defendants can rest assured that said document will be disclosed in this case.) Similarly, there has
been no ruling on the merits as to what Fritz's testimony or deposition transcript would have
established about the transfers made under the PAA, had it been introduced at Trial (FAC ¶ 93),

1 because Defendants failed to present “admissible evidence, documentary or testimonial” on this
2 point. Notice Doc B at p. 7, ll. 3-4. *See also, id.*, at Conclusion of Law 16.

3 Plaintiffs are apparently contending that the FDIC would be the real party in interest in *this*
4 instant suit. It is telling, however, that the court did not grant the oral Motion to substitute the
5 FDIC as the real party in interest in the underlying suit. Had the court ruled on the merits, as
6 Defendants now aver, that BB&T was not the owner of its claims, such a substitution would have
7 made sense. But that is *not* what the district court ruled and, thus, that is *not* what it did. Rather, it
8 merely ruled that BB&T had *failed to prove* its ownership of the claims, as a necessary component
9 of its case, including because documentation which might have shown that ownership was
10 disclosed too late (by these Defendants) to be utilized at Trial, on this issue. This was not
11 equivalent (and was not treated by the underlying court as equivalent) to a ruling on the merits that
12 BB&T was not, in fact, the owner of the claims and not the real party-in-interest, but rather, was
treated as an evidentiary failure.

13 It is a preposterous *non-sequitur* for Defendants to now claim that the very court ruling
14 which resulted from their negligence, somehow prevents any remedy for that negligence. This
15 would be akin to arguing that because a defendant negligently broke a plaintiff’s arm, the plaintiff
16 can’t sue for her inability to play tennis, as she can’t play tennis with a broken arm anyway!

17 Nor has there been any ruling on the merits as to whether (even if the 2009 Bulk
18 Assignment had been reviewed and rejected on the merits by the court) a newly created
19 assignment document, such as that which was also introduced but deemed inadmissible by the
20 underlying court on March 31, 2010, might have adequately demonstrated the assignment, had it
21 been timely procured and disclosed. The instant suit alleges that Defendants knew or should have
22 known that the PAA was inadequate, and therefore had a duty to warn the Plaintiff of the need to
23 procure from the FDIC better written proof of the assignment, prior to Trial. As the events of
24 March 30 and 31, 2010 proved, this could have been readily accomplished (overnight) if only
25 Defendants had timely realized the need to do so. Their failure to timely realize this need is part of
26 their negligence claimed against them in this suit. FAC, at ¶¶ 68; 127-130. *See, e.g., In re Seare*,
27 493 B.R. 158, 188-89 (Bankr. D. Nev. 2013), *as corrected* (Apr. 10, 2013), *aff’d*, 515 B.R. 599
28 (B.A.P. 9th Cir. 2014)(the “[c]ompetent handling of a legal matter includes inquiry into and
analysis of the factual and legal elements of the problem” with the lawyer obligated to “provide

1 the bundle of services that are reasonably necessary to achieve the client's reasonably
2 anticipated result" such that, as a "baseline" obligation, "a lawyer must . . . learn about the client's
3 particular legal and financial situation, **and independently investigate any 'red flag' areas.**")
4 (citations and internal quotations omitted; emphasis added).⁴

5 **C. Plaintiff's Legal Malpractice Claims Are Not Barred by the Statute of Limitations.**

6 Finally, Movants contend that the present suit is barred by the statute of limitations
7 governing legal malpractice claims, at NRS 11.207. Mot. at pp. 16-19. However, Plaintiff has
8 clearly brought this suit within the four year limitation period of that statute (should it apply), as
9 well as within the two year limitations period (should it apply).

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

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

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

26 After *Semenza* established this claim accrual rule, another Nevada case reached the same
27 result, by also establishing a tolling rule, applicable during appeals. *See, K.J.B. Inc. v. Drakulich*,
28 811 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

⁴ In addition to relying on Judge Gonzalez's decision for this issue preclusion argument, Defendants' Motion makes oblique references to a second case, involving the title insurer, which allegedly reached the same result. However, Defendants have not provided any details regarding said second case, nor submitted a copy of relevant pleadings, motions, or the order involved (which would be extraneous to the pleadings in the FAC in any event), so as to allow for any intelligent response to this assertion, such that these claims should be stricken as unsupported and inappropriate to a Motion to Dismiss.

underlying litigation wherein the malpractice allegedly occurred.”).

These rulings, whether based on a delayed claim accrual or a tolling theory, continued to be effective, even after the language of the statute was revised, to arguably require a different result, because these precedents are based on common law principles, not dependent on the wording of the statute. *Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002) (“[W]hen the malpractice is alleged to have caused an 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 and notwithstanding 1997 revisions to language of NRS 11.207, based on still-applicable common law tolling and claim accrual principles).

Thus, the statute of limitations as to the claims in the present case did not begin to expire until the U.S. Supreme Court denied the Petition for Writ of *Certiorari* on October 6, 2014. This suit was filed on October 5, 2016, within two years of that date, such that, whether the statute’s two year, or four-year, limitations period applies, the present case was timely filed.

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 this legal malpractice suit. Motion at pp. 16-19. Numerous states which have addressed this argument 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 purposes of their similar malpractice tolling rules. For example, Texas, like Nevada, also recognizes that the statute of limitations on litigation malpractice claims is tolled until all appeals in the underlying suit are exhausted. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991). In *Golden v. McNeal*, 78 S.W.3d 488 (Tex. Ct. App. 2002), the court applied this rule to the time period *during which a petition seeking a writ of certiorari* was pending with the U.S. Supreme Court, and even to the time period of a subsequent pending request for rehearing of a denied petition, ruling that the statute of limitations did not commence to run until both of these filings were denied.

In *Haase v. Abraham Watkins*, 404 S.W.3d 75 (Tex. Ct. App. 2013), the Court expressed two policy reasons for this Texas rule: First, to avoid forcing a client into the untenable position of having to concurrently adopt inherently inconsistent litigation postures in the underlying case and in the malpractice suit; and Second, that tolling should occur until the viability of the malpractice

1 claim is certain. *Brady Vorwerck, supra*, 333 P.3d at 230, explains that Nevada's tolling rules for
2 legal malpractice actions, pending appeal, are also supported by similar public policy
3 considerations. Thus, treating the Petition for a Writ of *Certiorari* to the U.S. Supreme Court, filed
4 in this underlying matter, as anything other than an appeal, tolling or otherwise preventing the
5 running of the statute of limitations, would be against Nevada's public policies.

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

13 Although Nevada has never directly addressed this issue (of the effect of a petition seeking
14 *certiorari* from the U.S. Supreme Court), it is clear that Nevada would follow Texas and Arizona
15 and Kentucky, in ruling that tolling continues pending the outcome of such a petition. This is
16 demonstrated for example by *Kopicko v. Young*, 114 Nev. 1333, 971 P.2d 789 (1998), in which
17 attorney Young negligently filed a products liability suit (the "first suit") naming the wrong
18 defendants, negligently dismissed that suit with prejudice, and then filed a motion under the same
19 case number, to amend and name the proper defendant (Dow Corning) the actual product
20 manufacturer, which motion was denied because the first suit (in which it was filed) had already
21 been dismissed with prejudice. On February 13, 1991, Young informed his clients in writing of all
22 of these facts, that it was now probably too late to sue Dow Corning, and that they should seek
23 separate counsel regarding a potential malpractice claim against him. *Id.* at 1335, 790.

24 Young then attempted to revive the Kopickos' claims, not via an appeal in the first suit
25 where his malpractice had occurred, but via the filing of a *new and separate suit* (the "second
26 suit"), in Federal Court, against the correct defendant (DOW Corning). The second suit was
27 dismissed as untimely on October 12, 1993. The Kopickos then filed suit for malpractice against
28 Young within four years of this dismissal date, which the district court dismissed on the grounds
that the four-year statute of limitations had begun to run on the date the Kopickos learned of the

malpractice, February 13, 1991.⁵ This ruling was reversed by the Nevada Supreme Court, which indicated that “this matter should have been resolved based upon the fact that the cause of action for professional negligence did not accrue until the federal district court” issued its Order dismissing the second suit on October 12, 1993: “While the alleged acts of omission constituting malpractice clearly had occurred as of the time of Mr. Young’s correspondence of February 13, 1991, legal damages were not sustained until [the second suit] against Dow was dismissed Therefore, the ultimate malpractice action against Young did not accrue until dismissal [of the second suit] because no legal damages had yet been sustained as a result of the alleged negligence” until that time. *Kopicko*, 971 P.2d at 792, 114 Nev. at 1336-1337 [bracketed language added]. This reasoning is equally applicable hereto (even if the two-year, rather than the four-year limitations period is determined to apply), as, only once the U.S. Supreme Court had also rejected the matter could it truly be said that damages were certain, and the claim had accrued, even if the Petition to the U.S. Supreme Court were treated as though it was somehow separate and distinct from the original litigation and the State Court appeals.

Defendants’ attempts to find cases contrary to the foregoing has been unavailing. *Robbins & Seventko Orthopedic Surgery v. Geisenberger*, 674 A.2d 244 (Pa. Super. Ct. 1996), is from a State, Pennsylvania, which does not even recognize the litigation malpractice tolling rule during appeals, in the first place; and also relies on *Laird v. Blacker*, upheld by 828 P.2d 691, 693 (Cal. 1992), a decision which was expressly rejected by the Nevada Supreme Court in *Brady Vorwerck*. Similarly, the *Clark v. Velsicol Chem. Corp.*, 431 S.E.2d 227 (N.C. Ct.App. 1993) decision, deals with that state’s State Court tolling rules while litigation is pending in federal court, and is simply inapplicable. Defendants’ request for dismissal under the statute of limitations must therefore be rejected.

VI. CONCLUSION

For the reasons stated herein above, the Defendants’ Motion to Dismiss should be denied.

ALTERNATIVE COUNTERMOTION FOR LEAVE TO FURTHER AMEND

It is clear that no further amendment to the Plaintiff’s pleading is necessary, based on the foregoing. Nevertheless, if this Court determines that the FAC is inadequate in any measure, or subject to dismissal on any grounds, then the Plaintiff hereby countermoves and requests that, in

⁵ The two year legal malpractice limitations period was not at issue in the *Kopicko* case.

1 lieu of dismissal, this Court advise as to any omissions it finds to exist in the FAC, and that
2 Plaintiff be granted leave to amend to cure the same, within ten (10) days of the hearing of this
3 matter. This alternative Countermotion is based on the following:

4 Under NRCP 15(a), leave to amend "shall be freely given when justice so requires," and,
5 therefore, failure to grant such leave, absent a specific justification, is an abuse of discretion.
6 *Adamson v. Bowker*, 85 Nev. 115, 121, 450 P.2d 796, 800 (1969).

7 **DATED** this 21st day of March, 2017.

8 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**

9 

10 G. MARK ALBRIGHT, ESQ., Nv Bar No. 001394

11 D. CHRIS ALBRIGHT, ESQ., Nv Bar No. 004904

12 801 South Rancho Drive, Suite D-4.

13 Las Vegas, Nevada 89106

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

15 gma@albrightstoddard.com / dca@albrightstoddard.com

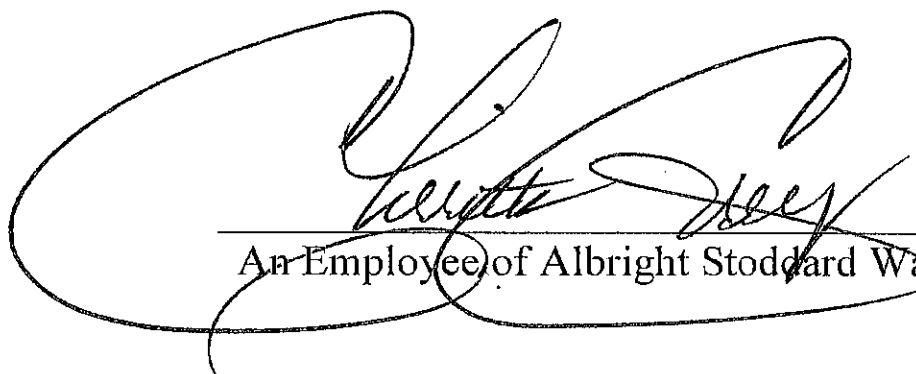
16 *Attorneys for Plaintiff*

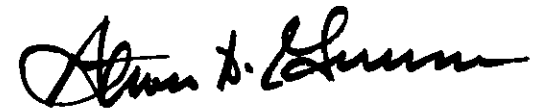
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 21st day of March, 2017, 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):

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

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


An Employee of Albright Stoddard Warnick & Albright



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G. MARK ALBRIGHT, ESQ.

Nevada Bar No. 001394

D. CHRIS ALBRIGHT, ESQ.

Nevada Bar No. 004904

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

801 South Rancho Drive, Suite D-4

Las Vegas, Nevada 89106

Tel: (702) 384-7111

Fax: (702) 384-0605

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

Defendants.

CASE NO. A-16-744561-C

DEPT NO. XXVII

**PLAINTIFF'S RESPONSE AND
PARTIAL OPPOSITION TO
DEFENDANTS' MARCH 8, 2017
REQUEST FOR JUDICIAL NOTICE
AND COUNTER-REQUEST FOR
JUDICIAL NOTICE BY PLAINTIFF**

Date of Hearing: April 19, 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 undersigned counsel of record, ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and hereby responds to, and opposes, in part, the Defendants' Request for Judicial Notice, filed on or about March 8, 2017, in conjunction with Defendants' new Motion to Dismiss, also filed on that date, and also hereby counter-requests that this Court take judicial notice of other facts and documents, as requested by Plaintiff. The specific responses to Defendants, and Plaintiff's own Requests are outlined below, and are supported by the Points and Authorities set forth below.

POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit is a legal malpractice case, in which Plaintiff alleges professional negligence on the part of the Defendants, who represented Plaintiff in a prior suit (the “underlying suit” or “Underlying Subject Litigation”) which underlying suit involved a lien priority dispute between the holders of two deeds of trust. Plaintiff filed its First Amended Complaint on February 22, 2017. Defendants filed their Motion to Dismiss on March 8, 2017, relying, in part, on certain documents attached to their concurrently filed Request for Judicial Notice as to certain facts allegedly demonstrated via certain of the previously filed documents attached to the Defendants’ Judicial Notice Request. Plaintiff has, concurrently herewith, opposed the Motion to Dismiss. In conjunction therewith, Plaintiff opposes some, but not all, of Defendants’ Requests for Judicial Notice, as set forth below, and Plaintiff also makes its own Requests for Judicial Notice as set forth herein.

The following legal analysis of the standards applicable to Requests for Judicial Notice, is therefore intended to support both Plaintiff’s response to Defendants’ Requests for Judicial Notice, set forth below, and also to support Plaintiff’s own Counter-Requests for Judicial Notice, also set forth below. As such, the following Legal Analysis explains both what is, and is not, an appropriate subject for Judicial Notice.

II. LEGAL ANALYSIS

NRS 47.150(1) allows this Court to take judicial notice of certain facts, and NRS 47.150(2) indicates that such notice should be taken by a court “if requested by a party and supplied with the necessary information” to do so. NRS 47.130(2)(b) indicates that a “judicially noticed fact must be . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

In Nevada, judicial notice has been properly taken of such matters as: information obtainable through the Nevada Secretary of State’s records and the operations of the state mail service (*Jory v. Bennight*, 91 Nev. 763, 765-767, 542 P.2d 1400, 1403-1404 (1975)); the public record of state district court proceedings (*Ainsworth v. Combined Ins. Co of America*, 774 P.2d 1003, 1024, 105 Nev. 237, 267 at n. 20 (1989) (*abrogated on other grounds by, Powers v. United*

1 *Services Auto. Ass'n*, 114 Nev. 690, 705, 626 P.2d 596, 605 (1998)) (*Cannon v. Taylor*, 88 Nev.
2 89, 493 P.2d 1313 (1972)); and the law of the case, as found in reported court opinions (*Andolino*
3 *v. State*, 99 Nev. 346, 351, 662 P.2d 631, 633 (1983)).

4 The extent and effect of judicial notice of proceedings in another case requires careful
5 analysis. In *Mack v. Estate of Mack*, 125 Nev. 80, 206 P.3d 98 (2009), the Nevada Supreme Court
6 examined the statutes governing judicial notice (NRS 47.130 – 47.170), in an appeal from certain
7 rulings in a divorce proceeding, during which the husband had shot his wife, leading to a separate
8 criminal proceeding. The Nevada Supreme Court reviewed whether it could take judicial notice
9 of facts from that related criminal proceeding, which it ultimately decided to do, explaining its
10 reasoning as follows:

11 [W]e may take judicial notice of facts generally known or capable of verification
12 from a reliable source, whether we are requested to or not. NRS 47.150(1).
13 Further, we may take judicial notice of facts that are “[c]apable of accurate and
14 ready determination by resort to sources whose accuracy cannot reasonably be
questioned, so that the fact is not subject to reasonable dispute.” See NRS
47.130(2)(b).

15 As a general rule, we will not take judicial notice of records in another and
16 different case, even though the cases are connected. *Occhiuto v. Occhiuto*, 97
17 Nev. 143, 145, 625 P.2d 568, 569 (1981) (citing *Giannopoulos v. Chachas*, 50
18 Nev. 269, 270, 257 P. 618, 618 (1927)). However, this rule is flexible in its
19 application and, under some circumstances, **we will invoke judicial notice to**
20 **take cognizance of the record in another case.** *Id.*

21 To determine if a particular circumstance falls within the exception, we examine
22 the closeness of the relationship between the two cases. *Id.* We have taken
23 judicial notice of other state court and administrative proceedings when a valid
24 reason presented itself. See, e.g., *id.*;¹ *Cannon v. Taylor*, 88 Nev. 89, 92, 493 P.2d
25 1313, 1314–15 (1972);² *State Farm Mut. v. Comm’r of Ins.*, 114 Nev. 535, 539,
26 958 P.2d 733, 735 (1998).³

27

28 ¹ In the *Occhiuto* decision, the Nevada Supreme Court reviewed a case involving a divorced couple who subsequently
reconciled, after which a new lawsuit was filed arising out of the prior settlement agreement, and out of certain land
transactions relating thereto, and upheld the lower court’s taking judicial notice of the original divorce proceedings.

² Supreme Court would take judicial notice of an attorney general’s opinion which the Supreme Court had not
previously been apprised of; in reviewing a request for rehearing of the Supreme Court’s original opinion.

³ During appeal from agency proceedings involving the correct interpretation of Nevada statutes regulating insurance
rate hikes, which led to a district court restraining order against insurance commissioner enforcing its ruling on this
topic, the Supreme Court took judicial notice of a summary judgment which had issued in a separate declaratory relief
case, which had been filed as a separate proceeding, for declaratory relief as to the meaning of the same statutes.

We hold that judicial notice may be taken [in the present divorce proceeding] of the outcome of a murder trial in which the deceased stood to gain financially from the killer because of the close relationship between the murder trial and the benefits to which the deceased's estate is entitled.

Id. 125 Nev. at 106, 206 P.3d at 106 [emphasis added].

Pursuant to the standard set forth in *Mack*, and in the other cases cited therein, it is clear that the present malpractice case is so closely related to the underlying suit, that it would be appropriate for this Court to take judicial notice of the existence and contents of filings which took place in that proceeding.

Once this Court determines that it may take judicial notice of the filings in another related proceeding, the next question is the effect of that judicial notice. More particularly, is this Court to establish by judicial notice the veracity and accuracy of another court's factual findings in another case proceeding? The answer to that question is very simple and very logical: this Court may take judicial notice of the accuracy of factual findings made in the earlier case, if contained in the other court's Orders, officially entered Findings of Fact and Conclusions of Law, and Judgment, **but only to the extent of dispositive rulings** entered after full adjudication, and **only with respect to findings which were essential, and not dicta.**

See, e.g., Fremont Indemnity Co. v. Fremont General Corp., 55 Cal. Rptr. 3d 621, 633 (Cal. Ct. App. 2007) (Although the existence of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable); *Sosinsky v. Grant*, 8 Cal. Rptr. 2d 552, 6 Cal. App. 4th 1548, 1568 (Ct. App. 1992) ("There exists a mistaken notion that [taking judicial notice of court records] means taking judicial notice of the existence of facts asserted in every document of a court file, including pleadings and affidavits. However, a court cannot take judicial notice of hearsay allegations as being true, just because they are part of a court record or file. A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of facts and conclusions of law, and judgments" [citations and internal quotation marks omitted]). *Murphy v. Islamic Republic of Iran*, 740 F. Supp.2d 51, 58-59 (D.C. Dist. 2010) ("Although a court clearly may judicially notice . . . findings of facts and conclusions of law in related cases, this Circuit has not directly considered whether and under what circumstances a court may

1 judicially notice the truth of such findings and conclusions. Circuits that have addressed this
2 question have concluded that ‘courts generally cannot take notice of findings of fact from other
3 proceedings for the truth asserted therein because these are disputable and usually are disputed;’
4 but because ‘it is conceivable that a finding of fact may satisfy the indisputability requirement,’
5 these courts have not adopted a *per se* rule against such notice. [Citations omitted.] This District
6 has followed a similar approach in FSIA cases: judicial notice of the truth of findings and
7 conclusions is not prohibited *per se*, but is inappropriate absent some particular indicia of
8 indisputability.”)

9 In *Jonathan Woodner Co. v. Adams*, 534 A.2d 292, 297 (D.C. Cir. 1987) the Circuit Court
10 explained as follows: “Woodner claims that the trial judge erred in failing to take judicial notice
11 of the entire Joyner opinion and refusing to permit the opinion’s . . . statement of the facts to be
12 read to the jury. While it is true that “[t]he most frequent use of judicial notice of ascertainable
13 facts is in noticing the content of court records,” 21 C. WRIGHT & K. GRAHAM, FEDERAL
14 PRACTICE AND PROCEDURE § 5106 (Supp.1987), that does not necessarily imply that a court
15 must therefore notice the truth of all facts that are asserted in those records. *Id.* at § 5104; *United*
16 *States v. American Telephone & Telegraph Co.*, 83 F.R.D. 323, 334 n. 25 (D.D.C.1979)
17 **[M]ere dicta . . . cannot be considered a resolution of an issue**, *Maggard v. O’Connell*, 227
18 U.S.App.D.C. 62, 68, 703 F.2d 1284, 1290 (1983), **and therefore is not a proper subject for**
19 **judicial notice.**” (Emphasis added.)

20 Based on that standard, certain of the Defendants’ Requests for Judicial Notice must be
21 rejected, as seeking from this Court a judicially noticed fact which is based on *dicta*, and which
22 should not be adjudicated at this early juncture, and Plaintiff’s own Requests should also be
23 properly understood, as limited. Thus, while Plaintiff does not contest that this Court may take
24 judicial notice of the existence and contents of certain documents attached to the Defendants’
25 Request for Judicial Notice, including in conjunction with the Motion to Dismiss, Plaintiff does
26 vociferously oppose any sought after Order from this Court which would accept, at face value, let
27 alone adopt, the language of the Defendants’ requested asserted facts as set forth in Defendants’
28 cover filing to which their exhibits are attached; or which would affirm, as factually accurate, by
judicial notice, facts set forth in the underlying court’s Findings of Fact and Conclusions of Law,

1 which are mere *dicta*, as to rulings which it was not necessary for that court to reach in the
2 underlying suit.

3 In the present case, it is especially important that this Court refrain from adopting *dicta*
4 statements from the underlying court, given that such *dicta* statements are not to be given
5 preclusive effect in a subsequent legal malpractice action, as explained in Plaintiff's Opposition to
6 the Motion to Dismiss, and the cases cited therein. *See, e.g., Pollicino v. Roemer and*
7 *Featherstonhaugh P.C.*, 277 A.D.2d 666, 668 (N.Y. Ct. App. 2000) (reversing a lower court's
8 grant of summary judgment dismissal of a litigation malpractice suit, stemming from an earlier
9 case against a city's Transit Authority, which lower court dismissal had been based on *dicta* in the
10 case where the malpractice occurred, and noting as follows: "Language that is not necessary to
11 resolve an issue . . . constitutes *dicta* and should not be accorded preclusive effect Here, the
12 law firm's failure to serve a proper notice of claim was an error requiring dismissal, . . . on that
13 ground. [The underlying court's extraneous] comment concerning the merits of plaintiff's claim
14 however, clearly was *dicta* and, as such, is not entitled to preclusive effect" in a subsequent legal
15 malpractice case.) [Bracketed language added.] This is also the law in Nevada. *See, Kahn v.*
16 *Morse & Mowbray*, 121 Nev. 464, 117 P.3d 227 (2005)(district court improperly granted
17 summary judgment dismissal of malpractice claims against law firm where the "factual bases for
18 the legal malpractice claim were not actually **and necessarily** litigated in the prior lawsuit")
(emphasis added).

19 *See also, Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008)
20 (issue preclusion requires that a four-part test must be met: which includes that the issue's
21 adjudication in the prior litigation must have been "actually **and necessarily** litigated"); The
22 Restatement (Second) of Judgments §27, entitled "Issue Preclusion-General Rule" at comment h
23 ("h. *Determinations not essential to the judgment.* If issues are determined but the judgment is not
24 dependent upon the determinations, relitigation of those issues in a subsequent action between the
25 parties is not precluded. Such determinations have the characteristics of *dicta*, and may not
26 ordinarily be the subject of an appeal by the party against whom they were made. In these
27 circumstances, the interest in providing an opportunity for a considered determination, which if
28 adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of
relitigation."); *Schultz v. Boston Stanton*, 198 P.3d 1253, 1257 (Colo. Ct. App. 2008)(reversing

1 lower court's dismissal of legal malpractice claim, which dismissal had been based on *dicta*
2 statements from court presiding over the underlying proceedings in which the malpractice
3 allegedly occurred). *Hansted v. Safeco Ins. Co. of America*, 562 A.2d 1148, 1150 (Conn. Ct. App.
4 1989) (unnecessary *dicta* from earlier personal injury proceeding would have no preclusive effect
5 in a subsequent suit by the defendant in that earlier case against his insurer).

6 III. EXAMINATION OF DEFENDANTS' REQUESTS 7 AND PARTIAL OPPOSITION THERETO

8 Based on the foregoing, the Plaintiffs' requests for judicial notice should be accepted or
9 rejected as follows:

10 **Response to Defendants' Requests Numbered 1-3:** The Defendants' first, second, and
11 third requests, which seek to have this Court take judicial notice of the fact that Defendants filed a
12 pleading in the Underlying Subject Litigation on behalf of Plaintiff, are not objected to by
13 Plaintiff, and this Court may take judicial notice of the existence and contents of said filing.

14 **Response to Defendants' Request Number 4:** Plaintiff has no objection to this Court
15 taking Judicial Notice of the existence and contents of the Findings of Fact and Conclusions of
16 Law entered in the Subject Underlying Litigation at issue in this case, attached (in an altered form)
17 as **Exhibit B** to Defendants' Requests, so long as the Court is aware that the boxes highlighting
18 certain of the text in **Exhibit B** were not originally contained in said documents, and are an
19 alteration thereof, which should be ignored, and as long as this Court recognizes that it may not
20 take judicial notice of the accuracy of any statements made in the Findings of Fact or Conclusions
21 of Law which consist of mere *dicta*, which was unnecessary to the court's disposition of that case,
22 such as any and all statements made therein which address how the merits of any of BB&T's
23 claims in that suit might have been adjudicated, had BB&T's acquisition and ownership of its
24 claims been established at trial by admissible evidence.

25 **Response to Defendants' Request, Numbered 5A-5U:** Based on the *no dicta* standard,
26 Plaintiff objects or consents to this Court's granting of Defendants' Requests for Judicial Notice
27 5A through 5U as follows:

28 5A. Plaintiff consents to this Court taking Judicial Notice of this fact, as established by
the FF&CL.

1 5B. thru 5P: Plaintiff objects to all of these Requests, as all of these Requests seek
2 judicial notice of unnecessary *dicta* in the underlying court's Findings of Fact and Conclusions of
3 Law. More particularly, all of these underlying court rulings address issues which relate to the
4 merits of BB&T's equitable subrogation/replacement arguments, which the underlying court did
5 not need to address, based on the underlying court's ruling that BB&T had failed to show that it
6 had acquired and now owned those claims, and could therefore not pursue them in any event.

7 5Q. Plaintiff objects to this Request because it is compound and therefore ambiguous.
8 Were it not compound Plaintiff would not necessarily object to the first component thereof, as to
9 this Court taking judicial notice of the underlying court's finding, quoted in this Request, of
10 deficiencies in the PAA, including as failing to have certain schedules attached thereto, as this was
11 a non-*dicta* ruling on the part of the district court, which was a necessary component of its ruling
12 that BB&T had failed to establish its ownership of its claims, which was later addressed and
13 upheld on appeal. It should be noted, however, that BB&T has alleged, in this instant case, that
14 Defendants should have been aware of this defect in the PAA, or were aware thereof, giving rise
15 to a duty by these Defendants to warn BB&T of the need to complete the Schedules to the PAA or
16 to warn BB&T of the need to otherwise procure further assignment documents from the FDIC,
17 which contention is not addressed in the underlying court's rulings. Moreover, BB&T does object
18 to the last portion of this compound Request for Judicial Notice, as consisting of unnecessary *dicta*
19 addressing an issue (whether the R&S Lenders' Second Deed of Trust was subject to
20 subordination), which goes to the merits of claims which did not need to be reached, on which the
underlying district court need not have opined.

21 5R. BB&T objects to this Request for Judicial Notice, as it is based on the underlying
22 court's review of a document which speaks for itself and will be subject to this Court's own
23 interpretation and is taken out of context and could therefore be misconstrued. The court's actual
24 rulings on this issue (if all of the court's statements at Trial and elsewhere in the FF&CL and in
25 other orders were taken into account) reflect that the PAA contained ambiguous language as to
26 exclusions which might have been overcome by PAA Schedules or other evidence of assignments,
27 had such evidence been timely disclosed and properly introduced into evidence, whereas this
28 Request, by quoting only this one FF&CL paragraph standing alone, suggests a blanket ruling

1 which could later be misconstrued if judicially noticed at this early stage of this litigation.

2 5S. Object, as dealing with *dicta*.

3 5T. Consent, so long as the basis for this underlying court ruling is properly
4 understood, or left open for this Court's future review and adjudication.

5 5U. Consent, so long as the basis for this underlying court ruling is properly understood
6 or left open this Court's future review and adjudication.

7 **Response to Request Number 6:** The Defendants' Sixth Request seeks judicial notice of
8 the issuance of a "Final Judgment" in the Underlying Suit on July 23, 2010, attached as **Exhibit C**
9 to the Requests. Plaintiff has no objection to this Request, to the extent that this Court may take
10 judicial notice of the existence and contents of said filing, without taking judicial notice of the
11 veracity of any underlying rulings referenced or incorporated therein which are based on *dicta*.
12 This would include the Judgment's incorporation of the Court's earlier FF&CL, to the extent of all
13 *dicta* therein.

14 **Response to Request Number 7:** Again, Plaintiff has no objection to this Court taking
15 judicial notice of the existence and contents of the July 23, 2010 Final Judgment, as long as this
16 Court does not take judicial notice of the accuracy of any unnecessary *dicta* findings set forth
17 therein, or incorporated therein by reference, including those *dicta* assertions set forth in the
18 underlying court's FF&CL, which are incorporated by reference therein. (Plaintiff also notes that
19 the reference to **Exhibit D** in this Request is inaccurate, as said document is already, and only,
20 attached to Defendants' Request as **Exhibit C**.)

21 **Response to Defendants' Requests Numbered 8 and 9:** Plaintiff objects to these
22 Requests, as premature, pending discovery being taken in this matter, simply to reserve any rights
23 in case these requests prove inaccurate upon the completion of such discovery.

24 **IV. CONCLUSION IN RESPONSE TO DEFENDANTS' REQUEST**

25 For the reasons stated above, the Defendants' March 8, 2017 Request for Judicial Notice
26 should not be granted in full. This Court may take judicial notice that the documents attached to
27 the Defendants' Request are copies of various items of public record filed with the Clark County
28 Eighth Judicial District Court's Clerk's Office, which exist and which may be reviewed by this
Court in conjunction with the Defendants' Motion to Dismiss. However, this Court should flatly

1 reject the Defendants' inappropriate attempts to prematurely obtain final factual and legal rulings
2 from this Court by adopting the Defendants' summarized construction and spin on the subject
3 documents, as set forth in the Defendants' Request, and should also reject the blatant attempt to
4 have this Court take judicial notice of the veracity of disputed and unnecessary *dicta* set forth in
5 the underlying court's Findings of Fact and Conclusions of Law, and Judgment, or of statements
6 therein which are taken out of context such that judicial notice thereof could be misconstrued.

7 V. ANALYSIS OF PLAINTIFF'S COUNTER-REQUESTS FOR JUDICIAL NOTICE

8 Based on the foregoing principles, it is respectfully suggested that this Court may take
9 judicial notice of the accuracy of the findings set forth in the district court's Orders, Findings of
10 Fact and Conclusions of Law, and Judgment, as set forth in this Counter-Request, including as
11 demonstrated from the records of the underlying suit. This does not mean, however, that this
12 Court should give a judicial notice stamp of approval to *dicta* set forth in those same Orders;
13 Findings of Fact and Conclusions of Law; or Judgments, such as with respect to findings which
14 the court presiding over the underlying suit need not have reached.

15 Based on the foregoing, Plaintiff hereby requests that this Court take judicial notice of the
16 existence of the following documents, and of the contents thereof, and of certain facts
17 demonstrated thereby, which cannot be reasonably disputed, including in conjunction with the
18 Opposition to the Motion to Dismiss which references certain of these documents and facts, as
19 described below. With respect to all Requests for Judicial Notice made herein, and made in
20 *Defendants'* Requests for Judicial Notice relating to court filings, it is requested that this Court
21 take notice of only the existence and contents of such filings, and not take judicial notice of the
22 veracity of any statements made in any such documents, unless expressly otherwise indicated
23 herein. Alternatively, if the Court chooses not to take judicial notice of any of the facts or
24 documents set forth and referenced below, it is requested that this Court treat the exhibits
25 referenced below as Exhibits to the Opposition to the Motion to Dismiss, but only if doing so will
26 not turn that Motion into a Motion for Summary Judgment, on the grounds referenced at page 2
of Plaintiff's Opposition to the Motion to Dismiss.

27 1. **It is requested that Judicial Notice be taken that:** On August 26, 2005, a Deed
28 of Trust and Security Agreement and Fixture Filing with Assignment of Rents was recorded

1 against the property described therein (hereinafter the "Property"), with the Clark County, Nevada
2 Recorder's Office, as Book and Instrument Number 20050826-0005282, in favor of Colonial
3 Bank N.A. ("Colonial"), securing a \$29,305,250.00 loan. *See, Exhibit D* hereto, a copy of this
4 recorded document (hereinafter the "First Colonial Deed of Trust"), including at page 5, setting
5 forth the amount secured.⁴

6 With respect to this recorded document, and all other documents referenced herein, below,
7 which have been recorded with the Clark County Recorder's office, as official real property
8 records, it is requested that judicial notice be taken not only of the existence and contents of said
9 documents, but of the veracity of the facts demonstrated thereby, as to said documents being
10 recorded with respect to the Property on the dates of recordation, affecting the Property as
11 indicated in the document's contents.

12 2. **It is requested that Judicial Notice be taken that:** On September 16, 2005, a
13 "Second Short Form Deed of Trust and Assignment of Rents" was recorded against the Property
14 with the Clark County, Nevada Recorder's Office, as Book and Instrument Number 20050916-
15 0002881, in favor of R&S St. Rose Lenders, LLC ("R&S Lenders"), securing a \$12,000,000.00
16 loan amount. *See, Exhibit E* hereto, a copy of this recorded document (hereinafter the "R&S
17 Lenders Second Deed of Trust"), including at page 1, setting forth the amount secured.

18 3. **It is requested that Judicial Notice be taken that:** On July 31, 2007, a Deed of
19 Trust and Security Agreement and Fixture Filing with Assignment of Rents was recorded against
20 the Property with the Clark County, Nevada Recorder's Office, as Book and Instrument Number
21 20070731-0004824, in favor of Colonial, which secured a \$43,980,000.00 obligation (hereinafter
22 the "2007 Colonial Deed of Trust"). *See, Exhibit F* hereto, a copy of this recorded document,
23 including at page 5, setting forth the amount secured.

24 4. **It is requested that Judicial Notice be taken that:** The "First Colonial Deed of
25 Trust" described in paragraph 1 above, was reconveyed on or about September 24, 2007, via a Full
26 Reconveyance recorded on that date with the Clark County Nevada Recorder's Office as Book and
27 Instrument Number 20070924-0000452. *See, Exhibit G* hereto, a copy of this recorded document.

28 ⁴ For the convenience of this Court, Plaintiff begins with **Exhibit D**, in deference to Defendants, whose own Request for Judicial Notice attached Exhibits A-C.

1 5. **It is requested that Judicial Notice be taken that:** On November 3, 2008, Robert
2 E. Murdock ("Murdock") and Eckley M. Keach ("Keach") in their alleged capacity as investors
3 and lenders of R&S St. Rose and/or R&S Lenders, with an alleged interest in the R&S Lenders
4 Second Deed of Trust, filed a Complaint against R&S Lenders instigating Case Number A-08-
5 574852, a copy of which is attached as **Exhibit H** hereto.

6 With respect to this Request, and all other requests for judicial notice of filings made by
7 the parties to the underlying suit, with the Court clerk, it is requested that this Court take judicial
8 notice solely of the existence and contents of the filings, not of the veracity of statements made
9 therein.

10 6. **It is requested that Judicial Notice be taken that:** Defendants herein, Gerrard
11 and GC&L filed a Complaint on behalf of Colonial on July 1, 2009, initiating Case No. A-09-
12 594512-C against various defendants listed therein, including R&S Lenders, which sought to
13 establish the priority of the 2007 Colonial Deed of Trust as against the 2005 R&S Lenders Deed of
14 Trust. A copy of this Complaint is attached as **Exhibit I** hereto.

15 7. **It is requested that Judicial Notice be taken that:** A motion to consolidate the
16 two above referenced suits was granted on or about August 6, 2009, and the two cases were
17 thereafter treated as a consolidated case. *See* **Exhibit J** (minutes of relevant hearing), and **Exhibit**
18 **K** hereto (Register of Actions docket sheet for Case No. A-09-594512-C, showing Related
19 Consolidated Case 08A574852). These two consolidated cases are hereinafter referred to as the
20 "underlying suit" or "Subject Litigation."

21 8. **It is requested that Judicial Notice be taken that:** On or about August 14, 2009,
22 the Federal Deposit Insurance Corporation (hereinafter the "FDIC") was appointed by the State of
23 Alabama Superintendent of Banks as Receiver for Colonial, and accepted this appointment in
24 accordance with the Federal Deposit Insurance Act, as amended. *See*, **Exhibit L** hereto, more
25 particularly described hereafter, at the 5th through 7th pages thereof.

26 9. **It is requested that Judicial Notice be taken that:** On October 1, 2009,
27 Defendants herein, Gerrard and GC&L, filed an Amended Complaint in the Underlying Subject
28 Litigation, substituting BB&T as the Plaintiff, in the place and stead of Colonial, and thereby
became counsel of record for BB&T. *See*, **Exhibit M** hereto.

1 10. **It is requested that Judicial Notice be taken that:** On or about October 7, 2009,
2 a Second Amended Complaint was filed by Gerrard and GC&L on behalf of BB&T, including to
3 obtain an order and judgment declaring and recognizing, on behalf of BB&T, that the Colonial
4 2007 Construction Loan Deed of Trust had a first priority position over the 2005 R&S Lenders
5 Deed of Trust, including based on theories of: Contractual Subrogation; Replacement; Equitable
6 Estoppel or Promissory Estoppel; Unjust Enrichment; Fraudulent Misrepresentation; and Civil
7 Conspiracy. *See, Exhibit A* to Defendants' March 8, 2017 Request for Judicial Notice. **It is**
8 **further requested that Judicial Notice be taken** that this Second Amended Complaint alleged in
9 ¶1, as follows: "BB&T is a North Carolina corporation, that is successor in interest to Federal
10 Deposit Insurance Corporation as receiver of Colonial Bank N.A., with sufficient minimum
11 contacts with the State of Nevada and entitled to an interest in certain real property at issue in this
12 case which is located in Clark County, Nevada."

13 11. **It is requested that Judicial Notice be taken that:** Both R&S St. Rose and R&S
14 Lenders filed Answers to the BB&T Second Amended Complaint, in which both Defendants
15 denied, for lack of sufficient knowledge, this first paragraph of Plaintiff's Second Amended
16 Complaint, and in which both Defendants asserted BB&T's lack of standing, and the statute of
17 frauds, as Affirmative Defenses. **Exhibit N** and **Exhibit O** hereto.

18 12. **It is requested that Judicial Notice be taken that:** The FDIC, as Receiver for
19 Colonial, recorded an "Assignment of Security Instruments and Other Loan Documents" on
20 November 3, 2009, in Clark County Nevada, as Book and Instrument Number 20091103.0003188
21 (hereinafter the "2009 Bulk Assignment") which had been executed by the FDIC in its capacity as
22 Receiver for Colonial on October 23, 2009, to be deemed effective on August 14, 2009, wherein
23 the FDIC transferred and assigned to BB&T, for a good and valuable consideration, the receipt
24 and adequacy of which it acknowledged, all "interest" of Colonial in all deeds of trust and security
25 instruments and other similar documents recorded in Nevada, as of August 14, 2009, together with
26 all related indebtedness and promissory notes as modified or amended or renewed, secured thereby
27 (excepting only any MERS filings). *See, the entirety of Exh. L* hereto, already referenced above
28 (sometimes herein the "2009 Bulk Assignment").

 13. **It is requested that Judicial Notice be taken that:** On January 8, 2010, at the

1 first day of the combined evidentiary hearing/trial (hereinafter the "Trial"), Eckley M. Keach
2 argued as follows to the Court, on his own and Mr. Murdock's behalf as pro se Plaintiffs in the
3 first of the two consolidated cases:

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

11 "Evidentiary Hearing - Day 1 Friday, January 8, 2010" Transcript, at p. 38, ll. 2-11, a copy of
12 selected pages of which transcript is attached hereto as **Exhibit P**.

13 14. **It is further requested that Judicial Notice be taken that:** On that same date,
14 the district court made the following statement regarding the issues involved in the Trial then
15 about to commence as follows:

16 I have two issues I have to determine as part of this hearing -- or at least two issues
17 I have to determine. One is whether there was in fact a replacement theory that
18 should be applied to Colonial Bank as a result of the second loan that occurred in
19 this. And then the second issue I have to determine is the nature of the relationship
20 between the Colonial Bank loan and the BB&T entity's. And in making that
21 determination, I'm going to listen to the evidence before I apply the theories that
22 you're saying, because I have to make a determination as to whether there's an
23 assignment that exists, if it's a successor in interest that exists, or if it's some other
24 nature of an acquisition. Okay. Which is why I'm listening to evidence.

25 Mr. Gerrard: Right. Thank you, Your Honor.

26 Said fact is demonstrated by "Evidentiary Hearing - Day 1, Friday, January 8, 2010" Transcript at
27 pp. 42-43, a copy of which pages are attached hereto as part of **Exh. P**.

28 15. **It is requested that Judicial Notice be taken that:** The district court in the
underlying Subject Litigation entered Findings of Fact and Conclusions of Law therein, on June
23, 2010 (hereinafter "FF&CL"), an altered copy of which is attached as **Exhibit B** to Defendants'
March 8, 2017 Request for Judicial Notice (said copy has been altered by the Defendants placing
emphasis boxes around certain of the text, which boxes were not included in the original
document and should be disregarded by this Court).

With respect to the contents of the FF&CL, and other Court Orders and Judgments
referenced below, it is requested that this Court take judicial notice of the existence and contents

1 of said documents, and of certain facts demonstrated thereby, if so requested below, but it is not
2 requested that this Court take judicial notice of the veracity of any of the assertions set forth
3 therein, as that is not necessary at this stage of these proceedings. It should also be understood that
4 any language in the FF&CL or other Orders and Judgments referring to any evidentiary failures as
5 "BB&T's" failures, are alleged, in this instant case, to have been caused by, or otherwise
6 attributable, in whole or in part, to BB&T's counsel, the Defendants herein. Said allegations need
7 not be fully adjudicated at this early stage of this suit, and are not intended to be ultimately
8 reached (one way or the other) by means of any judicial notice sought from this Court herein.
9 Furthermore, this Court should *not* take judicial notice of the veracity of any statements in the
10 FF&CL, or any of the underlying court's other orders or judgments, as to the merits of how the
11 claims might have been adjudicated if Colonial remained the claimant at Trial or if BB&T had,
12 through Defendant, met its burden, to show that it owned Colonial's former rights.

13 16. **It is further requested that this Court take Judicial Notice** that the following
14 procedural events occurred during the litigation of the underlying suit, as said events are described
15 at pages 3-5 of the district court's post-trial FF&CL attached as **Exhibit B** to Defendants' March
16 8, 2017 Request for Judicial Notice:

17 Both St. Rose Lenders and BB&T sought injunctive relief to prevent the
18 other from moving forward with a foreclosure on the property pending a
19 determination of priority of the deeds of trust. The Court granted a mutual
20 Temporary Restraining Order preventing either party from moving forward with
21 foreclosure until the issue of priority was resolved. With the consent of the parties,
22 the Court consolidated the Preliminary Injunction Hearing with a trial on the merits
23 regarding BB&T's claims for relief for contractual subrogation, equitable
24 subrogation, replacement, equitable/promissory estoppel, and unjust enrichment.
25 The parties also consented to an extension of the Temporary Restraining Order until
26 the conclusion of the trial and evidentiary hearing.

27 The trial commenced on January 8, 2010 with the initiation of BB&T's case
28 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").

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

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

14 I've admitted Exhibit 183. I think Exhibit 183, if it included some
15 reference to this particular asset or a schedule that had excluded
16 assets that didn't include this asset, might comply with NRS
17 111.235, which would then put your client in a position where it
18 might have some remedy. Without those kinds of things I think we
19 have a potential standing issue, as Mr. Keach has framed it, or you
20 know, I guess that's the best way, or successor in- a true successor
21 in interest problem.

22 (Transcript of hearing Day 6, March 30, 2010, page 56-57, lines 24-7.) The
23 Court then asked BB&T to return the following day with documentary evidence in
24 addition to Exhibit 183 to alleviate the Court's concern as to BB&T's ability to
25 assert its claims of contractual subrogation and replacement.

26 Upon returning to Court the following day, BB&T argued that standing was
27 not one of the issues that the Court identified in its November 23, 2009 minute
28 order to be advanced as part of the expedited hearing on the priority issues.
Nevertheless, BB&T reported to the Court that after speaking with the FDIC it
found a bulk assignment of security instruments and loan documents recorded on
November 3, 2009 in Clark County, which was read into the record pursuant to
NRS 111.155 and offered as an exhibit. BB&T also offered into evidence an
executed although unrecorded assignment, counsel had prepared with respect to the
loan at issue. The Court denied admission of both the bulk assignment as well as
the unrecorded assignment into evidence on the basis that neither had been
previously disclosed.

After the Court denied admission of the above assignments, BB&T moved
the Court to reopen evidence. The Court denied BB&T's request. BB&T then
moved the Court to substitute in the real party in interest, Colonial Bank and/or the
FDIC as receiver of Colonial Bank under Rule 25(c), Rule (21), or Rule 17(a).
After briefing on substitution/joiner of the real party in interest, the Court denied
BB&T's motion, stating:

Exhibit 183 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

1 conflicting evidence regarding this assignment is what led me to
2 the position that we're currently in, the ruling that I began to make
on the 41(b) motions at the time we had this motion presented.

3 For that reason and given the particular procedural posture of this
4 case, I'm going to deny the request for substitution of the real party
in interest.

5 (Transcript of hearing Day 9, April 13, 2010, page 25, lines 16-25.)

6 Counsel for BB&T conceded that if Exhibit 183, the Purchase and
7 Assumption Agreement, was not sufficient evidence, on its face, to establish that
BB&T was entitled to priority on the note and deed of trust, then all of its claims
8 must fail[.]

9 **Exhibit B** to Defendants' March 8, 2017 Request for Judicial Notice at pp. 3-5.

10 17. **It is requested that Judicial Notice be taken** that certain procedural events
11 occurred in the underlying Subject Litigation, as demonstrated at the following pages of **Exhibit**
12 **Q** hereto, consisting of certain pages of the transcript of "Portion of Evidentiary Hearing – Day 6
13 (Argument of Rule 50 Motions) Tuesday March 30, 2010" (which procedural events are also
14 demonstrated to have occurred based on **Exhibit B** to Defendants' March 8, 2017 Request for
Judicial Notice, quoted above).

- 15 • On the afternoon of March 30, 2010, day 6 of the Trial, after Gerrard had rested his
16 case in chief (save for one witness who would not be available until a later day, and
17 who would have no involvement in this question)⁵ Keach and Murdock, through Mr.
18 Keach, made a motion (under NRCP 50(a); and/or 52(c); and/or 41) to have the court
19 reject BB&T's claims for failure to demonstrate as part of their case in chief that
20 BB&T owned any right to pursue said claims. *See, Exh. Q* at pp. 3-8.
- 21 • The Keach arguments included an assertion that BB&T's equitable subrogation and
22 replacement claims could not be granted given that "[t]hey have put on zero evidence"
23 on the issue of what BB&T had acquired, "even though Your Honor had said from the
24 very beginning that this was an issue in the case" and nevertheless, "[t]here is no
25 document that has been admitted as evidence in this case showing any assignment or
26 any acquisition by BB&T of this Colonial Bank Deed of Trust . . . [or] loan" **Exh.**
27 **Q** hereto at pg. 7, ll. 8-13; and 16-19.

28 ⁵ This remaining witness, Brad Burns, was from Centex Homes, who had held an option against the Property, which it failed to exercise before the Colonial Construction Loan was issued, long before the assignment to BB&T.

- In response to this motion, Gerrard argued, among other things, that “I didn’t know this was an issue until after this trial started and we heard from Mr. Keach about . . . his argument that BB&T doesn’t have those rights.” **Exh. Q** at p. 31, ll. 16-19.
- At the end of these March 30, 2010 discussions, the district court indicated to Mr. Gerrard that he could seek out and attempt to introduce other documentary evidence in addition to the proposed trial exhibit 183 [the PAA], for the court’s subsequent consideration. *Id.* at page 69.

18. **It is requested that Judicial Notice be taken that:** The following arguments and colloquies took place on the next day of Trial, Day 7, as shown by **Exhibit R** hereto consisting of selected portions of the transcript for “Evidentiary Hearing - Day 7 (Continued Argument) Wednesday, March 31, 2010.”

- Mr. Gerrard finally attempted on this date to introduce the 2009 Bulk Assignment (**Exh. L** hereto) into evidence as proposed Exhibit 58, and made an offer of proof regarding what that document and its exhibits demonstrated about the assignment of the relevant Colonial Deed of Trust to BB&T, and the court heard objections to this request (*see*, **Exh. R** hereto, at pp. 6-42), and then denied this request on the grounds that said document had not previously been disclosed as it would have been expected to be “at least at some time prior to today.” **Exh. R** at p. 42, ll. 1-5.
- It is requested that this court also take judicial notice that, after the court declined to admit the 2009 Bulk Assignment, Defendant Gerrard then requested that he be allowed to reopen the evidence on any remaining claims (which included the replacement claim), and the court granted that request (**Exh. R** hereto at pp. 43-47); and that, pursuant thereto, Gerrard then sought to introduce another new exhibit, consisting of “a new document that’s been created . . . [and] just came into existence today” consisting of an “assignment of the specific deed of trust at issue in this case that was executed today by the FDIC, making specific assignment of this very deed of trust” which request by Gerrard was also denied. **Exh. R** at pp. 48-53.
- Furthermore, this court should take judicial notice that Gerrard next moved to substitute the FDIC as the real party in interest and objections were heard thereon,

1 **Exh. R** hereto at pp. 53-59. (As set forth above, and as noted in the FF&CL, this
2 request was ultimately also denied.)

3 19. **It is requested that Judicial Notice be taken that** the underlying suit was
4 adjudicated against BB&T, not on the merits, but due to an evidentiary failure to demonstrate that
5 BB&T had acquired and owned its stated claims, the merits of which claims need not therefore
6 have ever been reached, as shown for example at pages 6-7 of the FF&CL Defendants' **Exhibit B**,
7 lines 25-7, in which the district court in the underlying suit ruled as follows, as non-*dicta* findings
8 which were necessary to the Court's rulings in the case:

9 . . . the defect which prompts the dismissal of BB&T's claims is evidentiary.
10 BB&T failed to meets its burden of proof to establish that the Colonial Bank loan,
11 note and deed of trust at issue in this case were ever assigned to BB&T. The
12 Court has given BB&T ample opportunity to submit proper admissible evidence
13 that the Colonial Bank loan, note and deed of trust at issue in this case were one
14 of the assets acquired by BB&T when it purchased some of the Colonial Bank
15 assets. BB&T instead relied upon the language of the Purchase and Assumption
16 Agreement, and no other admissible evidence, documentary or testimonial. The
17 Court hereby finds that Exhibit 183, the Purchase and Assumption Agreement,
18 was not sufficient evidence, on its face, to establish that BB&T was assigned the
19 2007 Colonial Bank Deed of Trust.

20 Defendants' **Exh. B**, at pp. 6-7, ll. 25-7.

21 20. **It is requested that Judicial Notice be taken that** the underlying suit was
22 adjudicated against BB&T, not on the merits, but due to an evidentiary failure to demonstrate that
23 BB&T had acquired and owned its stated claims, the merits of which claims need therefore never
24 have been reached, as shown for example by the following factual findings 143 and 144, in the
25 FF&CL, which were non-*dicta* findings that were necessary to the Court's dispositive conclusions
26 in the case:

27 143. BB&T has not shown that the claims or causes of action against the
28 Defendants being pursued by BB&T belong to BB&T and it is the successor in
29 interest with the ability to assert these claims against the Defendants.

30 144. Since BB&T has not proved that it owns the actions or claims asserted
31 herein, it does not have the ability to assert the claims set forth in Plaintiff's
32 Second Amended Complaint.

33 **Exh. B**, at p. 24.

34 21. **It is requested that Judicial Notice be taken that** the underlying suit was

1 adjudicated against BB&T, not on the merits, but due to an evidentiary failure to demonstrate that
2 BB&T had acquired and owned its stated claims, the merits of which claims need not therefore
3 have ever been reached, as shown for example by the district court's June 23, 2010 FF&CL which
4 ruled as follows at the following paragraphs of the Conclusions of Law, in non-*dicta* findings
5 which were the basis for the district court's dispositive rulings:

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

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

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

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

14

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

18

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

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

26 **Exh. B** to Defendants' Request for Judicial Notice, at pp. 24-26.

27 22. **It is requested that Judicial Notice be taken that:** On July 8, 2010, Defendants
28 Gerrard and GC&L filed a Motion for New Trial, or in the Alternative, Motion to Alter or Amend
Judgment, on behalf of BB&T, a copy of which Motion (without the exhibits thereto) is attached
as **Exhibit S** hereto, in which Motion, Defendants Gerrard and GC&L sought, among other relief
not at issue in this Request, to excuse their failure to address or present evidence as to the
assignment to BB&T during presentation of BB&T's primary case-in-chief, including on the basis
that counsel had allegedly been unfairly surprised by contentions allegedly raised only after the

close of evidence, that their client was required to prove the assignment during their presentation of their client BB&T's case in chief **Exh. S** at p. 8.

23. **It is requested that Judicial Notice be taken that:** On or about October 5, 2010, the trial court issued an Order denying this post-trial Motion, a true and correct copy of which is attached hereto as **Exhibit T** in which Order the trial court made the following necessary non-*dicta* findings (in addition to other, *dicta* rulings, not at issue in this Request):

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, 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.

Exh. T hereto, at p. 2 [emphasis in original].

24. **It is requested that Judicial Notice be taken that:** 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, which on May 31, 2013 entered its "Order of Affirmance" a copy of which is attached hereto as **Exhibit U** which decision upheld the trial court's Judgment based on the following analysis, as to whether BB&T's ownership of its claims had been demonstrated at trial through timely disclosed evidence, and therefore did not reach the merits of those claims:

[T]he district court found that 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).

See, Exh. U hereto, page 6.

25. **It is requested that Judicial Notice be taken that:** BB&T sought an *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. *See, Exhibit V* hereto.

26. **It is requested that Judicial Notice be taken that:** A Petition for Writ of *Certiorari* was filed on behalf of BB&T on May 22, 2014, a copy of the first page of which, together with a docket sheet regarding the same is attached hereto as **Exhibit W**.

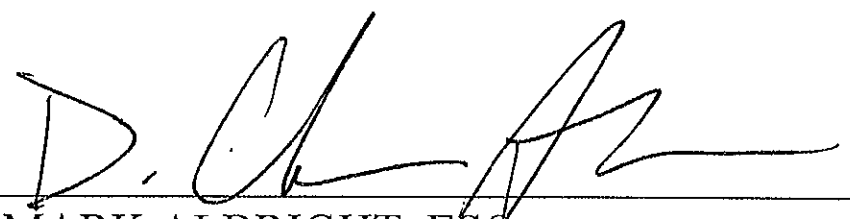
27. **It is requested that Judicial Notice be taken that:** The Petition for Writ of *Certiorari* was denied on October 6, 2014, as shown by the Denial Letter of said date, filed October 15, 2014, a copy of which is attached hereto as **Exhibit X**.

VI. CONCLUSION TO COUNTER-REQUEST FOR JUDICIAL NOTICE

For all of the foregoing reasons, Plaintiff respectfully submits that the Court take judicial notice of the foregoing facts, and/or the existence of the foregoing documents, and the contents thereof, but solely to the extent referenced above, and with the extent and effect of said Judicial Notice to be limited, as set forth above, including to exclude taking judicial notice of *dicta*.

DATED this 21st day of March, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT



G. MARK ALBRIGHT, ESQ.

Nevada Bar No. 001394

D. CHRIS ALBRIGHT, ESQ.

Nevada Bar No. 004904

801 South Rancho Drive, Suite D-4

Las Vegas, Nevada 89106

(702) 384-7111

gma@albrightstoddard.com

dca@albrightstoddard.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 2nd day of March, 2017, service was made by the following mode/method a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE AND PARTIAL OPPOSITION TO DEFENDANTS' MARCH 8, 2017 REQUEST FOR JUDICIAL NOTICE AND PLAINTIFF'S COUNTER-REQUEST FOR JUDICIAL NOTICE** to the following person(s):

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

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

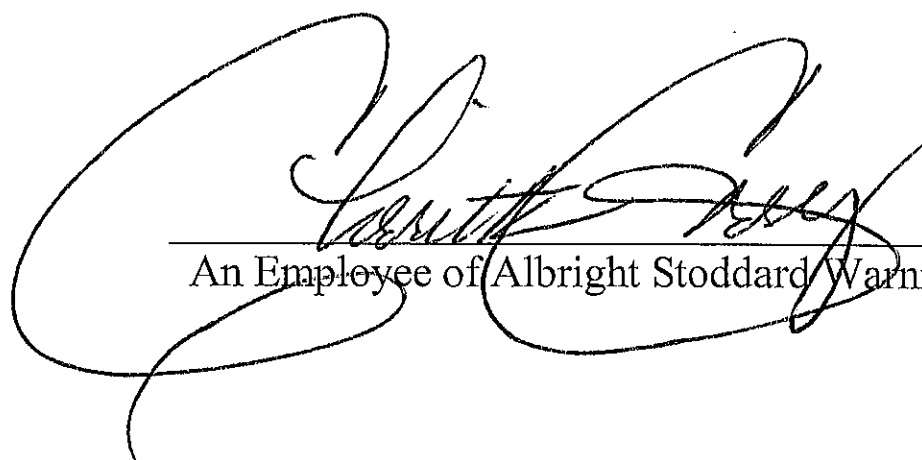

An Employee of Albright Stoddard Warnick & Albright

EXHIBIT D

AA0333

APN No. 177-26-701-019
177-26-801-011
177-26-801-016

WHEN RECORDED, MAIL TO:
Colonial Bank, N.A.
4670 S. Fort Apache, Suite 250
Las Vegas, Nevada 89147

20050826-0005282

Fee: \$40.00
N/C Fee: \$0.00

08/26/2005 14:37:01
T20050156846

Requestor:
NEVADA TITLE COMPANY

Frances Deane MSH
Clark County Recorder Pgs: 27

113

27

**DEED OF TRUST AND SECURITY AGREEMENT AND
FIXTURE FILING WITH ASSIGNMENT OF RENTS**

THIS DEED OF TRUST AND SECURITY AGREEMENT AND FIXTURE FILING WITH ASSIGNMENT OF RENTS ("Deed of Trust") is made as of the 16th day of August, 2005, by R & S ST. ROSE, LLC, a Nevada limited liability company, as trustor ("Trustor"), to NEVADA TITLE COMPANY, as trustee ("Trustee"), for the benefit of COLONIAL BANK, N.A. ("Beneficiary").

I. GRANTS AND OBLIGATIONS SECURED.

A. Grants.

1.01. Trustor hereby irrevocably grants, transfers and assigns to Trustee, in trust, for the benefit of Beneficiary, with power of sale and right of entry and possession, all right, title and interest of Trustor in and to that certain real property situated in the County of Clark, State of Nevada, described in Exhibit "A" attached hereto and made a part hereof (the "Land"), together with all right, title and interest of Trustor therein and in and to:

1

Hale Lane Peek Dennison and Howard
Attorneys and Counsellors at Law
Las Vegas, Nevada
(702) 222-2500

\\ODMA\PC\DOCS\HILRN\DOCS\469404\1
Syn\17408\0234\deed

AA0334

(a) All buildings and other improvements now or hereafter located on the Land, all water and water rights (whether riparian, appropriative, or otherwise, and whether or not appurtenant), pumps and pumping stations used in connection therewith and all shares of stock evidencing the same, all machinery, equipment, appliances, furnishings, inventory, fixtures, and other property used or useable in connection with the Land and the improvements thereon, including, but not limited to, all storage tanks and pipelines, all gas, electric, heating, cooling, air conditioning, refrigeration and plumbing fixtures and equipment, which have been or may hereafter be attached or affixed in any manner to any building now or hereafter on the Land (the "Improvements").

(b) All the rights, rights of way, easements, licenses, profits, privileges, tenements, hereditaments and appurtenances, now or hereafter in any way appertaining and belonging to or used in connection with the Land and/or the Improvements, and any part thereof or as a means of access thereto, including, but not limited to, any claim at law or in equity, and any after acquired title and reversion in or to each and every part of all streets, roads, highways and alleys adjacent to and adjoining the same.

(c) All rentals, earnings, income, accounts, accounts receivable, deposits, security deposits, receipts, royalties, revenues, issues and profits which, after the date hereof, and while any portion of the indebtedness secured hereby remains unpaid, may accrue from the Land and/or the Improvements and any part thereof, subject, however, to the right, power and authority conferred upon Trustor to collect and apply such proceeds set forth herein.

(d) All deposits made with or other security given to utility companies by Trustor with respect to the Land and/or the Improvements, and all advance payments of insurance premiums made by Trustor with respect thereto and claims or demands relating to insurance. Any of the foregoing arising or acquired by Trustor after the date hereof, the Land, the Improvements, and the other property described in subparagraphs (a), (b), (c), and (d) of this Section 1.01 are collectively defined hereinafter as the "Property".

1.02. Trustor hereby grants a security interest to Beneficiary in all of the following described property and any and all proceeds thereof (sometimes all of such being collectively referred to herein as the "Collateral"):

(a) all existing and future goods and tangible personal property located on the Property or wherever located now owned or hereafter acquired by Trustor and used in connection with the use, operation or occupancy of the Property or in construction of the Improvements, including, but not limited to, all appliances, furniture and furnishings, fittings, materials, supplies, equipment and fixtures, and all building material, supplies, and equipment

now or hereafter delivered to the Property and installed or used or intended to be installed or used therein; and all renewals or replacements thereof or articles in substitution thereof;

(b) all general intangibles relating to design, development, operation, management and use of the Property and construction of the Improvements, including, but not limited to, (i) all names under which or by which the Property or the Improvements may at any time be operated or known, all rights to carry on business under any such names or any variant thereof, and all goodwill in any way relating to the Property, (ii) all permits, licenses, authorizations, variances, land use entitlements, approvals and consents issued or obtained in connection with the construction of the Improvements, (iii) all permits, licenses, approvals, consents, authorizations, franchises and agreements issued or obtained in connection with the construction of the Improvements, or the use, occupancy or operation of the Property, (iv) all materials prepared for filing or filed with any governmental agency, and (v) all of Trustor's rights under any contract in connection with the development, design, use, operation, management and construction of the Property;

(c) all service, engineering, consulting, leasing, architectural and other similar contracts of any nature (including, without limitation, those of any general contractors and subcontractors), as such may be modified, amended or supplemented from time to time, concerning the design, construction, management, operation, occupancy, use, and/or disposition of any portion of or all of the Property;

(d) all architectural drawings, plans, specification, soil tests, feasibility studies, appraisals, engineering reports and similar materials relating to any portion of or all of the Property;

(e) all payment and performance bonds or guarantees and any and all modifications and extensions thereof relating to the Property;

(f) all reserves, deferred payments, deposits, refunds, cost savings and payments of any kind relating to the construction, design, development, operation, occupancy, use and disposition of any portion of or all of the Property;

(g) to the extent permitted to be assigned by Trustor, all proceeds of any commitment by any lender to extend permanent or additional construction financing to Trustor relating to the Property;

(h) all proceeds and claims arising on account of any damage to or taking of the Property or any part thereof, and all causes of action and recoveries for any loss or diminution in the value of the Property;

(i) all policies of, and proceeds resulting from, insurance relating to the Property or any of the above collateral, and any and all riders, amendments, extensions, renewals, supplements or extensions thereof, and all proceeds thereof;

(j) all shares of stock or other evidence of ownership of any part of the Property that is owned by Trustor in common with others, including all water stock relating to the Property, if any, and all documents or rights of membership in any owners' or members' association or similar group having responsibility for managing or operating any part of the Property; and

(k) all proceeds, whether cash, promissory notes, contract rights, or otherwise, of the sale or other disposition of all or any part of the estate of Trustor in and to the Property now or hereafter existing thereon.

The personal property in which Beneficiary has a security interest includes goods which are or shall become fixtures on the Property. This Deed of Trust is intended to serve as a fixture filing pursuant to the terms of the Nevada Uniform Commercial Code. This filing is to be recorded in the real estate records of the county in which the Property is located. In that regard, the following information is provided:

Name of Debtor: **R & S ST. ROSE, LLC, a Nevada
limited liability company**

Address of Debtor: See Paragraph 5.12

Debtor's State of Nevada
Organizational Filing
Number: E0445912005-5

Name of Secured Party: **COLONIAL BANK, N.A.**

Address of Secured Party: See Paragraph 5.12

Trustor warrants and agrees that there is no financing statement covering the foregoing Collateral, the Property, or any part thereof, on file in any public office, except for those in favor of Beneficiary.

1.03. Trustor hereby assigns and transfers to Beneficiary, as additional security, all damages, royalties and revenue of every kind, nature and description whatsoever that Trustor

may be entitled to receive from any person or entity owning or having or hereafter acquiring a right to the oil, gas or mineral rights and reservations of the Property, with the right in Beneficiary to receive and receipt therefor, and apply the same to the indebtedness secured hereby either before or after any default hereunder, and Beneficiary may demand, sue for and recover any such payments but shall not be required to do so.

B. Obligations Secured.

1.04. This Deed of Trust is given for the purpose of securing, in such order of priority as Beneficiary may determine:

(a) Payment of the indebtedness evidenced by a Promissory Note Secured By Deed of Trust of even date herewith and any renewals, extensions, modifications or amendments thereof, in the principal amount of **TWENTY NINE MILLION THREE HUNDRED FIVE THOUSAND TWO HUNDRED FIFTY AND NO/100THS DOLLARS (\$29,305,250.00)** (the "Note"), executed by Trustor, and payable to Beneficiary, together with interest thereon and late charges as provided therein, which is made a part hereof by reference. The Note contains a provision for changes in the rate of interest charged thereunder based upon the floating commercial loan rate of Beneficiary publicly announced from time to time as Beneficiary's Base Rate. Each change in the interest rate resulting from a change in Beneficiary's Base Rate shall become effective as of the day on which such change occurs.

(b) Payment of such further sums as Trustor, or any successor in ownership, hereafter may borrow from Beneficiary when evidenced by another note or notes, reciting it is so secured, payable to Beneficiary or order and made by Trustor, or any successor in ownership, and all renewals, extensions, modifications or amendments of such note or notes.

(c) Payment of all other moneys herein agreed or provided to be paid by Trustor and performance of all other obligations of Trustor contained herein and in that certain Loan Agreement of even date herewith between Trustor and Beneficiary (the "Loan Agreement") and any amendment, modification or change hereto or thereto, and any other loan documents executed in connection with the Loan Agreement, including payment of all sums expended or advanced by Beneficiary hereunder, together with interest thereon at the rate payable under the Note, in the preservation, enforcement and realization of the rights of Beneficiary hereunder or under any of the other obligations secured hereby, including, without limitation, attorney's fees, court costs, other litigation expenses and foreclosure expenses.

(d) Performance of each agreement of Trustor contained in any other agreement given by Trustor to Beneficiary which is for the purpose of further securing any indebtedness or obligation secured hereby.

II. COVENANTS OF TRUSTOR.

A. Condition and Operation of Property.

2.01. Trustor agrees (i) to keep the Property in good condition and repair, (ii) not to commit or permit any waste or deterioration of the Property, (iii) not to commit or permit any removal, demolition or substantial alteration of the Property except for such alterations as may be required by law, ordinance, rule, regulation or order of any governmental authority having jurisdiction over the Property other than as contemplated under the Loan Agreement, (iv) to complete in good and workmanlike manner any construction or restoration which may be performed on the Property and those alterations contemplated in the Loan Agreement, (v) to promptly restore any portion of the Property which may be damaged or destroyed and (vi) subject to the Loan Agreement, not to permit any mechanics' or materialmen's liens against the Property, and (vii) to perform each of Trustor's obligations set forth in the Loan Agreement.

2.02. Trustor shall not commit, permit or allow to exist, any violation of any law, ordinance, rule, regulation or order of any governmental authority having jurisdiction over the Property or of any matter or record affecting the Property.

2.03 Trustor shall maintain, or cause to be maintained, proper and accurate books, records and accounts reflecting all items of income and expense in connection with the operation of the Property or in connection with any services, equipment or furnishings provided in connection with the operation of the Property, whether such income or expense be realized by Trustor or by any other person or entity whatsoever excepting persons unrelated to and unaffiliated with Trustor and who leased from Trustor portions of the Property for the purposes of occupying the same. Upon the request of Beneficiary, Trustor shall prepare and deliver to Beneficiary such financial statements regarding operation of the Property as Beneficiary may reasonably request. Beneficiary, or its designee, shall have the right from time to time during normal business hours to examine such books, records and accounts and to make copies or extracts therefrom.

B. Insurance.

2.04. Trustor shall, at all times, provide, maintain and keep in force all of the following:

(a) A policy or policies of commercial general liability insurance with respect to the Property, including but not limited to owners and contractors liability, contractual liability, personal injury, completed operations, broad form property damage insuring Trustor and Beneficiary, as their interests may appear, against loss for any occurrence resulting in bodily

injury to or the death of one or more persons and consequential damages arising therefrom and property damage involving injury or destruction of the tangible property of third parties in the amount of no less than \$1,000,000.00, combined single limit. All policies should be on an "occurrence" basis with Beneficiary named as an additional insured under such policy or policies.

(b) A policy or policies of fire hazard insurance insuring the Property against loss or damage on an "Broad Form" basis and against such other risks or hazards as Beneficiary may from time to time reasonably designate in the amount of not less than 100% of the full replacement value of the Property without deduction for physical depreciation. Beneficiary shall be named as Loss Payee under such policy or policies.

(c) If requested by Beneficiary, flood insurance upon the Property in the event that such insurance is available pursuant to the provisions of the Flood Disaster Protection Act of 1973 or other applicable legislation. Beneficiary shall reserve the right to require that Trustor secure flood insurance in excess of the amount provided by the Flood Disaster Protection Act of 1973, if such insurance is commercially available, up to the amount provided in Paragraph 2.04(a) hereof.

(d) If requested by Beneficiary, statutory workers' compensation insurance (including employer's liability in amounts required by the State Industrial Insurance System and, if applicable, insurance covering claims of workers against employers arising under Federal law) covering Trustor and employees of Trustor, in such form as is reasonably satisfactory to Beneficiary and in amounts not less than any minimum amounts established by law.

(e) Such other insurance, and in such amounts, as may from time to time be reasonably required by Beneficiary.

Such insurance policies shall be updated at Beneficiary's request, but not less frequently than annually during the Loan term.

2.05. All policies required by Paragraph 2.04 shall (i) be issued by companies duly qualified and licensed to do such business in the State of Nevada and approved by Beneficiary, (ii) shall be subject to the reasonable approval of Beneficiary as to the insuring companies, amount, content and forms of policies and expiration dates, (iii) contain a Non-Contributory Standard Mortgagee Clause and the Lender's Loss Payable Endorsement (Form 438 BFU NS), or their equivalents, in favor of Beneficiary, (iv) provide that the proceeds thereof shall be payable to Beneficiary (to the extent of its interest) (v) provide that it cannot be modified or cancelled, to the extent that such modification or cancellation substantially effects the

Property, or Beneficiary's interest thereon, without thirty days' prior written notice to Beneficiary, and (vi) be primary and non-contributory with any other insurance of Beneficiary.

2.06. Trustor shall furnish to Beneficiary a certificate of each policy required under Paragraph 2.04 and, at least thirty days prior to expiration of any such policy, proof of issuance of a policy continuing in force the coverage provided by the expiring policy. In the event Trustor shall fail to maintain the insurance coverage required by this Deed of Trust, Beneficiary may (but shall be under no obligation to) take out the required policies of insurance and pay the premiums on the same or may make such repairs or replacements as are necessary and provide for payment thereof; and all amounts so advanced therefor by Beneficiary shall become an additional obligation of Trustor to Beneficiary, which amounts, together with interest thereon at the Default Rate (as defined and provided for in the Loan Agreement), Trustor agrees to pay.

2.07. After the happening of any casualty insured against under Paragraph 2.04, Trustor shall give prompt written notice thereof to Beneficiary.

2.08. Trustor hereby assigns to Beneficiary all insurance proceeds which it may be entitled to receive and such proceeds shall be delivered to and held by Beneficiary to be applied to the restoration of any portion of the Property that has been damaged or destroyed to the same condition, character and value as existed prior to such damage or destruction so long as the following conditions have been satisfied: (i) Trustor is not in default hereunder, (ii) Beneficiary's security is not materially impaired and (iii) Trustor deposits with it the additional amounts necessary to accomplish such restoration. The proceeds disbursed for restoration will be released to Trustor under the procedures set forth in the Loan Agreement. In the event that the above conditions are not satisfied, Beneficiary shall have the option, to apply the insurance proceeds upon any indebtedness secured hereby in such order as Beneficiary may determine or release such proceeds to Trustor without such release being deemed a payment of any indebtedness secured hereby, rather than to apply such proceeds to the restoration of the Property. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice. If the Property is restored at a cost less than the available insurance proceeds, then such excess proceeds shall, if Trustor is not then in default hereunder, be paid over to Trustor.

2.09. In the event of the foreclosure of this Deed of Trust or other transfer of the title to the Property in extinguishment, in whole or in part, of the indebtedness secured hereby, all right, title and interest of Trustor in and to any insurance policy then in force shall pass to the purchaser or grantee to the extent that such insurance policy affects the Property.

C. Payments.

2.10. Trustor shall pay the principal, interest and other charges due under the Note and the Loan Agreement according to their terms.

2.11. Trustor shall pay or cause to be paid:

(a) Prior to the assessment of any penalty or delinquency, all taxes, assessments and other governmental or public charges affecting the Property, including assessments on appurtenant water stock, and any accrued interest, cost and/or penalty thereon and shall submit paid receipt therefor to Beneficiary upon request.

(b) When due, all encumbrances (including any debt secured by deed of trust), ground rents, liens, and/or charges, with interest, on the Property or any part thereof which appear to be prior or superior hereto and all costs, fees and expenses related thereto.

(c) When due, all charges for utilities or services including, but not limited to, electricity, gas, water and sewer.

2.12. Upon the occurrence of a default by Trustor hereunder, Trustor shall pay to Beneficiary on the first day of each month, together with and in addition to the regular installments of principal and interest due under the Note, until the indebtedness secured hereby is paid in full, an amount equal to one-twelfth (1/12) of the yearly taxes and assessments, insurance premiums, lease rentals and other similar charges (including any amounts which may become payable by Trustor pursuant to Paragraph 2.28 hereinbelow) as estimated by Beneficiary to be sufficient to enable Beneficiary to pay at least thirty (30) days before they become due, all taxes, assessments, insurance premiums, and other similar charges against the Property. Beneficiary shall not be obligated to pay interest on any such sums. Upon demand of Beneficiary, Trustor shall deliver to Beneficiary such additional sums as are necessary to enable Beneficiary to pay such taxes, assessments, insurance premiums and similar charges.

2.13. Trustor shall pay immediately, upon demand, after expenditure, all sums expended or expenses incurred by Trustee and/or Beneficiary under any of the terms of this Deed of Trust, including without limitation, any fees and expenses (including reasonable attorneys' fees) incurred in connection with any reconveyance of the Property or any portion thereof, or to compel payment of the Note or any portion of the indebtedness evidenced thereby or in connection with any default thereunder, including without limitation attorneys' fees incurred in any bankruptcy or judicial or nonjudicial foreclosure proceeding, with interest from date of expenditure at the Interest Rate provided for in the Note.

2.14. Trustor shall pay the amount demanded by Beneficiary or its authorized servicing agent for any statement regarding the obligations secured hereby; provided, however, that such amount may not exceed the maximum amount allowed by law at the time request for the statement is made.

D. Condemnation.

2.15. If the Property, or any part thereof, is taken or damaged by reason of any public improvement or condemnation proceeding, or in any other manner, Beneficiary shall be entitled to all compensation, awards and other payments or relief therefor to which Trustor shall be entitled, and shall be entitled at its option to commence, appear in and prosecute in its own name any action or proceeding or to make any compromise or settlement in connection with such taking or damage to the extent of the interests of Trustor therein. All such compensation, awards, damages, rights of action and proceeds to which Trustor shall be entitled (the "Proceeds") are hereby assigned to Beneficiary, who shall after deducting therefrom all its reasonable expenses, including attorneys' fees, apply or release the Proceeds with the same effect and as provided in Paragraph 2.08 above with respect to disposition of insurance proceeds; provided, that if there are any excess Proceeds after application thereof to the restoration of the Property, Beneficiary shall be entitled to apply such excess to the reduction of the principal balance due under the Note without any adjustment in the dollar amount of the monthly installments due under the Note. Trustor agrees to execute such further assignments of the Proceeds as Beneficiary or Trustee may require. Nothing herein contained shall prevent the accrual of interest as provided in the Note on any portion of the Proceeds to be applied to the principal balance due under the Note until the Proceeds are received by Beneficiary.

E. Rents and Leases.

2.16. Subject to the provisions of the Loan Agreement, Trustor shall submit to Beneficiary for its prior written approval the form of the tenant lease to be used by Trustor for leasing any portion of the Improvements, and after approval by Beneficiary in accordance with the Loan Agreement, shall not materially modify such form of lease without the prior written consent of Beneficiary. Trustor shall not accept prepayments of rent for any period in excess of one month and shall perform all covenants of the Lessor under all leases affecting the Property ("Leases"). "Leases", as used herein, includes any extensions or renewals thereof and any amendments consented to by the Beneficiary. Trustor shall not amend or terminate any Leases without the prior written consent of Beneficiary and shall not consent to any assignment or subletting under any Leases without the prior written consent of Beneficiary. Trustor shall immediately give notice to Beneficiary of any default under any of the Leases it receives or delivers. Beneficiary shall have the right but not the obligation, to cure any default of Trustor

under any of the Leases and all amounts disbursed in connection with said cure shall be deemed to be disbursements under the Loan Agreement.

2.17. Each lease of any portion of the Improvements shall be absolutely subordinate to the lien of this Deed of Trust but shall contain a provision satisfactory to Beneficiary that in the event of the exercise of the private power of sale or a judicial foreclosure hereunder such lease, at the option of the purchaser at such sale, shall not be terminated and the tenant thereunder shall attorn to such purchaser and, if requested to do so, shall enter into a new lease for the balance of the term of such lease then remaining upon the same terms and conditions. Each such lease shall, at the request of Beneficiary, be assigned to Beneficiary and each such assignment shall be recorded and acknowledged by the tenant thereunder.

2.18. Notwithstanding anything to the contrary contained herein, Trustor hereby absolutely and unconditionally assigns and transfers to Beneficiary all the leases, income, rent, issues, deposits, profits and proceeds of the Property to which Trustor may be entitled, whether now due, past due or to become due, and hereby gives to and confers upon Beneficiary the right, power and authority to collect such income, rents, issues, deposits, profits and proceeds of the Property to which Trustor may be entitled, whether now due, past due or to become due. The assignment of the Leases constitutes an irrevocable direction and authorization of all tenants under the Leases to pay all rent, income and profits into an account specified by Beneficiary upon demand and without further consent or other action by Trustor. Trustor irrevocably appoints Beneficiary its true and lawful attorney, at the option of Beneficiary at any time, to demand, receive and enforce payment, to give receipts, releases, and satisfactions, and to sue, either in the name of Trustor or in the name of Beneficiary, for all such income, rents, issues, deposits, profits and proceeds and apply the same to the indebtedness secured hereby. It is understood and agreed that neither the foregoing assignment of leases, income, rents, issues, deposits, profits and proceeds to Beneficiary nor the exercise by Beneficiary of any of its rights or remedies under this Paragraph 2.18 or under Paragraph 2.28 hereof shall be deemed to make Beneficiary a "mortgagee-in-possession" or otherwise responsible or liable in any manner with respect to the Property or the use, occupancy, enjoyment or operation of all or any portion thereof. Notwithstanding anything to the contrary contained herein or in the Note secured hereunder, so long as no Event of Default, as defined in the Loan Agreement shall have occurred, Trustor shall have a license to collect all income, rents, issues, profits and proceeds from the Property as trustee for the benefit of Beneficiary and Trustor shall apply the funds so collected as set forth in the Loan Agreement. Upon the occurrence of an Event of Default, such license shall be deemed revoked and any rents received thereafter by Trustor shall be delivered in kind to Beneficiary. Trustor hereby irrevocably constitutes and appoints Beneficiary its true and lawful attorney-in-fact to enforce in Trustor's name or in Beneficiary's name or otherwise all rights of Trustor in the instruments, including without limitation checks and money orders, tendered as payments of rents and to do any and all things necessary and proper to carry out the purposes hereof.

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Hale Lane Peek Dennison and Howard
Attorneys and Counsellors at Law
Las Vegas, Nevada
(702) 222-2500

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F. Other Rights and Obligations.

2.19. In addition to any other grant, transfer or assignment effectuated hereby, without in any manner limiting the generality of the grants in Article I hereof, Trustor shall assign to Beneficiary Trustor's interest in all agreements, contracts, leases, licenses and permits affecting the Property in any manner whatsoever, such assignments to be made, if so requested by Beneficiary, by instruments in form satisfactory to Beneficiary but no such assignment shall be construed as a consent by Beneficiary to any agreement, contract, license or permit so assigned, or to impose upon Beneficiary any obligations with respect thereto.

2.20. In the event of the passage, after the date of this Deed of Trust, of any law deducting from the value of the Property for the purpose of taxation, any lien thereon, or changing in any way the laws now in force for the taxation of deeds of trust or debts secured by deeds of trust, or the manner of the collection of any such taxes, so as to affect this Deed of Trust, or imposing payment of the whole or any portion of any taxes, assessments or other similar charges against the Property upon the Beneficiary, the indebtedness secured hereby shall immediately become due and payable at the option of the Beneficiary; provided, however, that such election by Beneficiary shall be ineffective if such law either (a) shall not impose a tax upon Beneficiary nor increase any tax now payable by Beneficiary or (b) shall impose a tax upon Beneficiary or increase any tax now payable by Beneficiary and prior to the due date: (i) Trustor is permitted by law and can become legally obligated to pay such tax or the increased portion thereof (in addition to all interest, additional interest and other charges payable hereunder and under the Note without exceeding the applicable limits imposed by the usury laws of the State of Nevada); (ii) Trustor does pay such tax or increased portion; and (iii) Trustor agrees with Beneficiary in writing to pay, or reimburse Beneficiary for the payment of, any such tax or increased portion thereof when thereafter levied or assessed against the Property or any portion thereof. The obligations of Trustor under such agreement shall be secured hereby.

2.21. If required by Beneficiary at any time during the term of this Deed of Trust, Trustor will execute and deliver to Beneficiary, in form satisfactory to Beneficiary, an additional security agreement and/or financing statement covering all personal property of Trustor which may at any time be furnished, placed on, or annexed or made appurtenant to the Property and used, useful or held for use, in the operation of the improvements thereon. Any breach of or default under such security agreement shall constitute an event of default under this Deed of Trust.

2.22. Trustor shall do any and all acts which, from the character or use of the Property or the Collateral, may be reasonably necessary to protect and preserve the security of Beneficiary, the specific enumerations herein not excluding the general.

2.23. Trustor will faithfully perform each and every covenant to be performed by Trustor under any lien or encumbrance upon or affecting the Property, including, without limiting the generality hereof, mortgages, deeds of trust, leases, declaration of covenants, easements, conditions and/or restrictions and other agreements which affect the Property, in law or in equity, which Beneficiary reasonably believes may be prior and superior to the lien or charge of this Deed of Trust. A breach of or a default under any such lien or encumbrance shall constitute an event of default under this Deed of Trust.

2.24. Upon election of either Beneficiary or Trustee so to do, employment of an attorney is authorized and payment by Trustor of all attorneys' fees, costs and expenses in connection with any action and/or actions (including the cost of evidence or search of title), which may be brought for the foreclosure of this Deed of Trust, and/or for possession of the property covered hereby, and/or for the appointment of a receiver, and/or for the enforcement of any covenant or right in this Deed of Trust contained as hereinafter provided shall be secured hereby.

2.25. No personal property covered by the security interest granted herein may be removed from the Property without the prior written consent of Beneficiary unless Trustor shall immediately replace such personal property with similar property of equivalent value on which Beneficiary has a valid first lien.

2.26. In the event that the interest of Trustor in the Property, or any part thereof, or any interest therein is sold, conveyed, alienated, further encumbered or otherwise transferred by the Trustor, voluntarily or involuntarily, whether by operation of law or otherwise, the Note, irrespective of the maturity dates expressed therein, at the option of Beneficiary, and without demand or notice, shall immediately become due and payable. In the event that Beneficiary does not elect to declare the Note immediately due and payable, then, unless indicated otherwise in writing by Beneficiary, Trustor shall nevertheless remain primarily liable for the obligations hereunder and under the Note and any other instrument securing the Note. This provision shall apply to each and every sale, conveyance, alienation, encumbrance or transfer, regardless whether or not Beneficiary has consented to, or waived, Beneficiary's rights hereunder, whether by action or non-action in connection with any previous sale, conveyance, alienation, encumbrance or transfer and whether or not the holder has received any payments after said transfer.

Notwithstanding the foregoing, provided that no Event of Default then exists under the Loan Agreement, or any obligation secured hereby, Beneficiary shall, upon request of Trustor, cause to be released from the lien hereof one (1) or more legally created, described and assessed parcels and improvements constructed thereon upon payment to Beneficiary in the amount applicable to each such parcel as set forth in Exhibit "B" attached

hereto and by this reference made a part hereof. Trustor shall pay any and all cost and expense incurred in connection with such releases.

2.27. Trustor agrees to execute such documents and take such action as Beneficiary shall reasonably determine to be necessary or desirable to further evidence, perfect or continue the perfection of the lien and security interest granted by Trustor herein.

2.28. Following a ten (10) day written notice to Trustor (unless Beneficiary reasonably determines that emergency circumstances exist which would make the giving of such notice impractical), at the time and in the manner herein provided, Beneficiary may, without releasing Trustor from any obligation hereunder and without waiving its right to declare a default or impairing any declaration of default as herein provided or any sale proceeding predicated thereon:

(a) Make any payment or perform any act in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary and Trustee being authorized to enter upon and take possession of the Property for such purposes;

(b) Commence, appear in and/or defend any action or proceedings purporting to affect the security hereof, and/or any additional or other security therefor, the interests, rights, powers and/or duties of Trustee and/or Beneficiary hereunder, whether brought by or against Trustor, Trustee or Beneficiary;

(c) Pay, purchase, contest or compromise any claim, debt, lien, charge or encumbrance which in the judgment of either may affect or appear to affect the security of this Deed of Trust, the interest of Beneficiary or the rights, powers and/or duties of Trustee and/or Beneficiary hereunder; and

(d) Upon an event of default hereunder or under the Note, Beneficiary is authorized either by itself or by its agents to be appointed by it for that purpose or by a receiver appointed by a court of competent jurisdiction, to enter into and upon and take and hold possession of any portion or all of the Property, both real and personal, and exclude Trustor and all other persons therefrom; and to operate and manage the Property and rent and lease the same, perform such reasonable acts of repair or protection as may be reasonably necessary or proper to conserve the value thereof, and collect any and all income, rents, issues, profits and proceeds therefrom, the same being hereby assigned and transferred to Beneficiary for the benefit and protection of Beneficiary, and from time to time apply and/or accumulate such income, rents, issues, profits and proceeds in such order and manner as Beneficiary or such receiver in its sole discretion shall consider advisable, to or upon the following: the expense of receivership, if any, the proper costs of upkeep, maintenance, repair and/or operation of the Property, the repayment of any sums theretofore or thereafter advanced pursuant to the terms of this Deed of Trust upon

the indebtedness secured hereby, the taxes and assessments upon the Property then due or next to become due, and/or upon the unpaid principal of such indebtedness. The collection and/or receipt of income, rents, issues, profits and/or proceeds from the Property by Beneficiary, its agent or receiver, after declaration of default and election to cause the Property to be sold under and pursuant to the terms of this Deed of Trust shall not affect or impair such default or declaration of default or election to cause the Property to be sold or any sale proceedings predicated thereon, but such proceedings may be conducted and sale effected notwithstanding the receipt and/or collection of any such income, rents, issues, profits and/or proceeds. Any such income, rents, issues, profits and/or proceeds in the possession of Beneficiary, its agent or receiver, at the time of sale and not theretofore applied as herein provided, shall be applied in the same manner and for the same purposes as the proceeds of the sale. Neither Trustee nor Beneficiary shall be under any obligation to make any of the payments or do any of the acts referred to in this Paragraph and any of the actions referred to in this Paragraph may be taken by Beneficiary irrespective of whether any notice of default or election to sell has been given hereunder and without regard to the adequacy of the security for the indebtedness evidenced by the Note.

III. DEFAULTS AND REMEDIES.

A. Defaults.

3.01. Trustor shall be in default hereunder upon the breach of any covenant or warranty contained herein, or if an Event of Default shall have occurred and be continuing under the Loan Agreement, the Note, or any other obligation secured hereby, subject to any applicable notice requirement and opportunity to cure.

B. Remedies.

3.02. Upon the occurrence of any default hereunder, or under the Note, the Loan Agreement or any other documents executed in connection herewith, then and in each such event, Beneficiary may declare all sums secured hereby immediately due and payable either by commencing an action to foreclose this Deed of Trust as a mortgage, or by the delivery to Trustee of a written declaration of default and demand for sale and of written notice of default and of election to cause the Property to be sold, which notice Trustee shall cause to be duly filed for record in case of foreclosure by exercise of the power of sale herein. Should Beneficiary elect to foreclose by exercise of the power of sale herein, Beneficiary shall also deposit with Trustee this Deed of Trust, the Note and such receipts and evidence of expenditures made and secured hereby as Trustee may require, and notice of sale having been given as then required by law and after lapse of such time as may then be required by law after recordation of such notice of default, Trustee, without demand on Trustor, shall sell the Property at the time and place of sale fixed by it in said notice of sale, either as a whole or in separate parcels, and in such order as

it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee may postpone sale of all or any portion of the Property by public announcement at such time and place of sale, and from time to time thereafter may postpone such sale by public announcement at the time fixed by the preceding postponement. Trustee shall deliver to such purchaser its deed or deeds conveying the Property, or any portion thereof, so sold, but without any covenant or warranty, express or implied. The recitals in such deed or deeds of any matters or facts, shall be conclusive proof of the truthfulness thereof. Any person, including Trustor, Trustee or Beneficiary, may purchase at such sale.

3.03. Beneficiary, from time to time before Trustee's sale, may rescind any such notice of breach or default and of election to cause the Property to be sold by executing and delivering to Trustee a written notice of such rescission, which notice, when recorded, shall also constitute a cancellation of any prior declaration of default and demand for sale. The exercise by Beneficiary of such right of rescission shall not constitute a waiver of any breach or default then existing or subsequently occurring, or impair the right of Beneficiary to execute and deliver to Trustee, as above provided, other declarations of default and demand for sale, and notices of breach or default, and of election to cause the Property to be sold to satisfy the obligations hereof, nor otherwise affect any provision, agreement, covenant or condition of the Note, the Loan Agreement and/or of this Deed of Trust or any of the rights, obligations or remedies of the parties hereunder.

3.04. After deducting all costs, fees and expenses of Trustee and of this Trust, including the cost of evidence of title in connection with sale and attorneys' fees, Trustee shall apply the proceeds of sale as required by applicable law.

3.05. If Beneficiary at any time holds additional security for any obligations secured hereby, it may enforce the terms hereof or otherwise realize upon the same, at its option, either before or concurrently herewith or after a sale is made hereunder, and may apply the proceeds upon the indebtedness secured hereby without affecting the status of or waiving any right to exhaust all or any other security, including the security hereunder, and without waiving any breach or default or any right or power whether exercised hereunder or contained herein or in any such other security.

3.06. No remedy herein conferred upon or reserved to Trustee or Beneficiary is intended to be exclusive of any other remedy herein or by law provided or permitted, but each shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute. Every power or remedy given by this instrument to Trustee or Beneficiary or to which either of them may be otherwise entitled, may be exercised concurrently or independently, from time to time and as often as may be deemed expedient by Trustee or Beneficiary and either of them may pursue inconsistent remedies.

3.07. Subject to any notice requirement and opportunity to cure contained herein, in the event of a default hereunder, Beneficiary, as a matter of right and without notice to Trustor or anyone claiming under it, and without regard to the then value of the Property or the interest of Trustor therein, shall have the right to apply to any court having jurisdiction to appoint a receiver or receivers of the Property, and Trustor hereby irrevocably consents to such appointment and waives notice of any application therefor. Any such receiver or receivers shall have all the usual powers and duties of receivers in like or similar cases and all the powers and duties of Beneficiary in case of entry as provided herein and shall continue as such and exercise all such powers until the date of confirmation of sale of the Property unless such receivership is sooner terminated.

IV. COLLATERAL.

4.01. With respect to the security interest granted in paragraph 1.02, Beneficiary shall have all the rights and remedies granted to a secured party under Article 9 of the Uniform Commercial Code, as well as all other rights and remedies available at law or in equity. Trustor shall, upon the demand of Beneficiary, assemble all of such personal property and make it available to Beneficiary at the Property, which is hereby agreed to be reasonably convenient to Beneficiary. The proceeds of any sale of such personal property shall be applied first to the expenses of Beneficiary in retaking, holding, preparing for sale, selling or similar matters, including reasonable attorney's fees.

4.02. Until Beneficiary exercises its right to collect proceeds of the Collateral pursuant hereto, Trustor will collect with diligence any and all proceeds of the Collateral. Upon written request by Beneficiary, any proceeds received by Trustor shall be in trust for Beneficiary, and Trustor shall keep all such collections separate and apart from all other funds and property so as to be capable of identification as the property of Beneficiary and shall deliver such collections at such time as Beneficiary may request to Beneficiary in the identical form received, properly endorsed or assigned when required to enable Beneficiary to complete collection thereof.

4.03. Trustor shall (i) permit representatives of Beneficiary to inspect the Collateral and Trustor's books and records relating to the Collateral and make extracts therefrom and to arrange for verification of the amount of Collateral, under procedures acceptable to Beneficiary, at Trustor's expense; (ii) promptly notify Beneficiary of any attachment or other legal process levied against any of the Collateral and any information received by Trustor relative to the Collateral, Trustor's debtors or other persons obligated in connection therewith, which may in any way affect the value of the Collateral or the rights and remedies of Beneficiary in respect thereto; (iii) reimburse Beneficiary upon demand for any and all costs, including without limitation reasonable attorneys' and accountants' fees, and other expenses incurred in collecting any sums payable by Trustor under any obligation secured hereby, or in the checking, handling and collection of the Collateral and the preparation and enforcement of any agreement

relating thereto; (iv) notify Beneficiary of each location at which the Collateral is or will be kept, other than for temporary processing, storage or similar purposes, and of any removal thereof to a new location, including without limitation each office of Trustor at which records relating to the Collateral are kept; (v) provide, maintain and deliver to Beneficiary certificates of insurance insuring the Collateral against loss or damage by such risks and in such amounts, forms and by such companies as Beneficiary may require and with loss payable to Beneficiary, and in the event Beneficiary takes possession of the Collateral, the insurance policy or policies and any unearned or returned premium thereon shall at the option of Beneficiary become the sole property of Beneficiary; (vi) do all acts necessary to maintain, preserve and protect all Collateral, keep all Collateral in good condition and repair and prevent any waste or unusual or unreasonable depreciation thereof; and (vii) join with Beneficiary at its request from time to time in executing financing statements, amendments thereto and continuation statements, and pay the cost of the filing of the same whenever Beneficiary deems desirable, and execute and deliver to Beneficiary further documents and instruments and do such other acts and things as Beneficiary may reasonably request in order to effectuate fully the purposes and intent hereof. Trustor hereby authorizes Beneficiary to file financing statements, amendments and continuation statements in such filing offices as Beneficiary deems appropriate in connection with the security interest granted herein.

4.04. Beneficiary may at any time, without prior notice to Trustor, collect proceeds of the Collateral and may give notice of assignment to any and all of Trustor's debtors, and Trustor does hereby irrevocably constitute and appoint Beneficiary its true and lawful attorney-in-fact to enforce in Trustor's name or in Beneficiary's name or otherwise all rights of Trustor in the Collateral and to do any and all things necessary and proper to carry out the purposes hereof; provided, however, Trustor shall have the right to collect, retain, use and enjoy such proceeds subject to the terms hereof and the documents securing Trustor's obligations thereunder prior to any default under the Loan Agreement or any of said documents. It is hereby recognized that the power of attorney herein granted is coupled with an interest and shall not be revocable and Beneficiary shall have the right to exercise this power of attorney upon any default under the Loan Agreement, hereunder or any of the documents securing Trustor's obligations thereunder. (Beneficiary shall promptly notify Trustor of any action taken by Beneficiary pursuant to this provision but Beneficiary's failure to do so shall not invalidate any such act, affect any of Trustor's obligations to Beneficiary or give rise to any right, claim or defense on the part of Trustor).

V. MISCELLANEOUS PROVISIONS.

5.01. By accepting payment of any sum secured hereby after its due date or in an amount less than the sum due, Beneficiary does not waive its rights either to require prompt payment when due of all other sums so secured or to declare a default as herein provided for failure to pay the total sum due.

18

Hale Lane Peek Dennison and Howard
Attorneys and Counsellors at Law
Las Vegas, Nevada
(702) 222-2500

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AA0351

5.02. At any time, or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed of Trust and the Note for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby or the effect of this Deed of Trust upon the remainder of the Property, Trustee may: reconvey any part of the Property; consent in writing to the making of any map or plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating the lien or charge hereof.

5.03. Beneficiary 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 this Deed of Trust.

5.04. Beneficiary is authorized by itself, its agents, employees or workmen, to enter at any reasonable time upon any part of the Property for the purpose of inspecting the same, and for the purpose of performing any of the acts it is authorized to perform under the terms of the Loan Agreement and this Deed of Trust.

5.05. Subject to the provisions of Paragraph 2.26 hereof, this Deed of Trust applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. The term "Beneficiary" shall mean the owner and holder, including pledgees, of the Note, now or hereafter and whether or not named as Beneficiary herein. In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

5.06. Trustee, upon presentation to it of an affidavit signed by or on behalf of Beneficiary, setting forth any fact or facts showing a default by Trustor under any of the terms or conditions of this Deed of Trust, is authorized to accept as true and conclusive all facts and statements in such affidavit and to act hereunder in complete reliance thereon.

5.07. If any provision hereof should be held unenforceable or void, then such provision shall be deemed separable from the remaining provisions and shall in no way affect the validity of this Deed of Trust.

5.08. Trustee accepts this Trust when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law. The Trust created hereby is irrevocable by Trustor.

5.09. Trustee shall be under no obligation to notify any party hereto of any action or proceeding of any kind in which Trustor, Beneficiary and/or Trustee shall be a party, unless brought by Trustee, or of any pending sale under any other deed of trust.

19

Hale Lane Peek Dennison and Howard
Attorneys and Counsellors at Law
Las Vegas, Nevada
(702) 222-2500

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AA0352

5.10. Beneficiary may, from time to time, by a written instrument executed and acknowledged by Beneficiary and recorded in the county or counties where the Property is located, substitute a successor or successors for the Trustee named herein or acting hereunder.

5.11. The right to plead any and all statutes of limitation as a defense to any demand secured by this Deed of Trust is hereby waived to the full extent permitted by law.

5.12. All notices hereunder shall be deemed to have been duly given if personally delivered or mailed by United States registered or certified mail, with return receipt requested, postage prepaid to the parties at the following addresses (or at such other addresses as shall be given in writing upon any party to the others) and shall be deemed complete upon any such mailing:

To Trustor: **R & S St. Rose, LLC**
 c/o 3075 E. Flamingo Road, Suite 102A
 Las Vegas, Nevada 89121

To Beneficiary: **Colonial Bank, N.A.**
 4670 S. Fort Apache, Suite 250
 Las Vegas, Nevada 89147

5.13. Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to Trustor at the address set forth above.

5.14. Upon written request of Beneficiary stating that all sums secured hereby have been paid and upon surrender to Trustee of this Deed of Trust and the Note for cancellation and retention and upon payment of its fees, Trustee shall reconvey, without warranty, the Property then held hereunder. The recitals in such reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons legally entitled thereto."

5.15. Without affecting the liability or obligations of any person, including Trustor, for the performance of any obligations secured hereby (excepting only any person or property otherwise expressly released in writing by Beneficiary), Beneficiary may from time to time and without notice release any person liable for payment of any of said indebtedness or the performance of said obligations, extend the time of payment or otherwise alter the terms of any of said obligations, accept additional security therefor of any kind, including trust deeds or mortgages, or alter, substitute or release any property securing said obligations.

5.16. The provisions of this Deed of Trust governing the contractual rights and obligations of Trustor, Beneficiary and Trustee shall be construed according to the laws of the State of Nevada. The provisions of this Deed of Trust are intended to be supplemental and in addition to the provisions contained in the Loan Agreement. Any assignment of this Deed of Trust shall be considered an assignment of the Note and the Loan Agreement.

5.17. This Deed of Trust may be executed in counterparts, all of which executed counterparts shall together constitute a single document. Signature pages may be detached from the counterparts and attached to a single copy of this document to physically form one document.

IN WITNESS WHEREOF, Trustor has executed this Deed of Trust and Security Agreement and Fixture Filing with Assignment of Rents as of the day first written above.

**R & S ST. ROSE, LLC, a Nevada
limited liability company**

**By: FOROUZAN INC., a Nevada
corporation, Manager**

By: 

**SAID FOROUZAN RAD
Its: President**

**By: RPN, LLC, a Nevada limited
liability company, Manager**

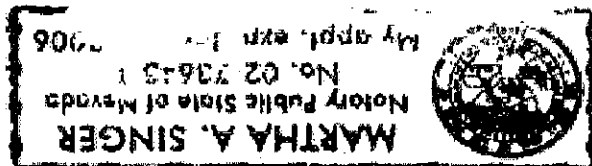
By: 

**R. PHILLIP NOURAFCHAN
Its: Manager**

"Trustor"

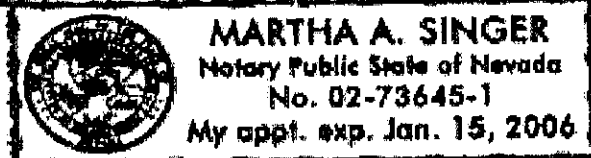
STATE OF NEVADA)
)ss.
COUNTY OF CLARK)

This instrument was acknowledged before me on Aug 23, 2005, by
Saiid Forouzan Rad, as President of Forouzan Inc., Manager of R & S St. Rose, LLC.

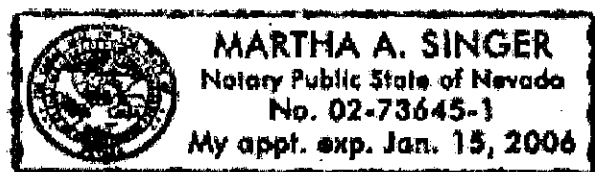


Martha A. Singer
Notary Public
My Commission Expires: 1/15/06

STATE OF Nevada)
)ss.
COUNTY OF Clark)



This instrument was acknowledged before me on Aug 23, 2005, by
R. Phillip Nourafchan, as Manager of RPN, LLC, Manager of R & S St. Rose, LLC.



Martha A. Singer
Notary Public
My Commission Expires: 1/15/06

EXHIBIT "A"
LEGAL DESCRIPTION

PARCEL 1:

THAT PORTION OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26,
TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., DESCRIBED AS FOLLOWS:

LOT 4-3 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS,
PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY,
NEVADA.

PARCEL 2:

THAT PORTION OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26,
TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., DESCRIBED AS FOLLOWS:

LOT 4-4 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS,
PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY,
NEVADA.

PARCEL 3:

THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE
NORTHWEST QUARTER (NW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF
THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH,
RANGE 61 EAST, M.D.M.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK
COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED
FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL
RECORDS.

FURTHER EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO
CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED
RECORDED JANUARY 27, 1998 IN BOOK 980127 AS INSTRUMENT NO. 01298
OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY
CLARK COUNTY IN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK
20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

PARCEL 4:

THE EAST HALF (E ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE NORTHWEST QUARTER (NW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M.

EXCEPTING THEREFROM THAT PORTION CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

PARCEL 5:

SOUTHEAST QUARTER (SE ¼) OF THE NORTHWEST QUARTER (NW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF BRUCE STREET AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED DECEMBER 24, 1997 IN BOOK 971224 AS INSTRUMENT NO. 00917 AND RE-RECORDED APRIL 9, 1998 IN BOOK 980409 AS INSTRUMENT NO. 01289 AND RE-RECORDED OCTOBER 12, 1998 IN BOOK 981012 AS INSTRUMENT NO. 00903 AND RE-RECORDED DECEMBER 8, 1998 IN BOOK 981208 AS INSTRUMENT NO. 00688 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

PARCEL 6:

THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., LYING NORTHEASTERLY OF THE NORTHEASTERLY RIGHT OF WAY LINE OF SPENCER STREET AS LOCATED ON THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 30, 1998 IN BOOK 980130 AS INSTRUMENT NO. 01806.

PARCEL 7:

THAT PORTION OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.B. & M., CLARK COUNTY, NEVADA, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST (NE) OF THE SOUTH HALF (S ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 26; THENCE SOUTH 00°21'02" WEST ALONG THE EAST LINE THEREOF, 98.88 FEET TO A POINT ON THE NORTHWESTERLY EASEMENT LINE OF LAKE MEAD DRIVE (ST. ROSE PARK WAY) (300.00 FEET WIDE); THENCE SOUTH 48°18'18" WEST ALONG SAID NORTHWESTERLY EASEMENT LINE 243.23 FEET; THENCE NORTH 41°42'17" WEST, 304.80 FEET; THENCE CURVING TO THE RIGHT ALONG THE ARC OF A 1080.00 FOOT RADIUS CURVE CONCAVE NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 02°37'57", AN ARC LENGTH OF 49.62 FEET TO A POINT ON THE NORTH LINE OF THE SAID SOUTH HALF (S ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 26, A RADIAL LINE TO SAID POINT BEARS SOUTH 50°55'40" WEST; THENCE SOUTH 89°21'22" EAST ALONG SAID NORTH LINE, 417.18 FEET TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 30, 1998 IN BOOK 980130 AS INSTRUMENT NO. 01321 OF OFFICIAL RECORDS.

NOTE: THE ABOVE METES AND BOUNDS DESCRIPTION APPEARED PREVIOUSLY IN THAT CERTAIN DOCUMENT RECORDED MAY 5, 1998 IN BOOK 980505 AS INSTRUMENT NO. 02057.

PARCEL 8:

THAT PORTION OF THE SOUTH HALF (S ½) OF THE SOUTHEAST QUARTER (SE ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., LYING NORTHWESTERLY OF THE NORTHWESTERLY LINE OF LAKE MEAD DRIVE (NOW KNOWN AS ST. ROSE PARKWAY) AS THE SAME NOW EXISTS.

EXHIBIT "B"

RELEASE SCHEDULE

The release price for each parcel shall be an amount equal to one hundred percent (125%) of the amount advanced in connection with such parcel by Beneficiary under the Loan evidenced by the Note as reasonably determined by Beneficiary.

EXHIBIT E

20050916-0002881

A.P. N.: 177-26-701-019, 177-26-801-011 and 177-26-801-016

Fee: \$23.00
N/C Fee: \$0.00

09/16/2005 14:11:50
T20050170853

Requestor:
NEVADA TITLE COMPANY

When recorded mail to:
R & S St. Rose Lenders, LLC
3110 South Durango 203
Las Vegas, Nevada 89117

Frances Deane
Clark County Recorder

MSH
Pgs: 10

SECOND

SHORT FORM DEED OF TRUST AND ASSIGNMENT OF RENTS

This Deed of Trust, made this 23 day of August, 2005 between R & S ST. ROSE, LLC, a Nevada limited liability company, herein called GRANTOR OR TRUSTOR whose address is 3110 South Durango Drive Suite 203, Las Vegas, Nevada 89117, NEVADA TITLE COMPANY, a Nevada Corporation, herein called TRUSTEE, and R & S ST. ROSE LENDERS LLC, a Nevada limited liability company, herein called BENEFICIARY, Witnesseth: That Trustor IRREVOCABLY GRANTS, TRANSFERS AND SIGNS TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in Clark County, Nevada, described as:

SEE LEGAL DESCRIPTION ATTACHED HERETO
AND MADE A PART HEREOF AS EXHIBIT "A".

This lien is subordinate and inferior to that certain Deed of Trust dated August __, 2005, in favor of Colonial Bank, in the amount of \$

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining. TOGETHER WITH the rents, issues and profits thereof, reserving the right to collect and use the same except during continuance of some default hereunder and during continuance of such default authorizing Beneficiary to collect and enforce the same by any lawful means in the name of any party hereto.

For the Purpose of Securing: 1. Performance of each agreement of Trustor incorporated by reference or contained herein. 2. Payment of the indebtedness evidenced by one promissory note of even date herewith, and any extension or renewal thereof, in the principal sum of \$12,000,000.00 executed by Trustor in favor of Beneficiary or order. 3. Payment of such additional sums as may hereafter be advanced for the account of Trustor or Assigns by Beneficiary with interest thereon.

To Protect the Security of this Deed of Trust, Trustor Agrees: By the execution and delivery of this Deed of Trust and the note secured hereby, that provisions (1) to (16) inclusive of the Deed of Trust recorded in the Book and at the page, or Document No. of Official Records in the Office of the county recorder of the county where said property is located, noted below opposite the name of such county, viz:

County	Doc.No.	Book	Page	County	Doc.#	Book	Page
Clark	413987	514		Lyon	88486	31mtgs.	
Churchill	104132	34mtgs.	591	Mineral	76648	16mtgs.	534-537
Douglas	24495	22	415	Nye	47157	67	163
Elko	14831	43	343	Ormsby	72637	19	102
Esmeralda	26291	3Hdeeds	138-141	Pershing	57488	28	58
Eureka	39602	3	283				

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Humboldt	116986	3	83	Storey	28573	Rmtgs.	112
Lander	41172	3	758	Washoe	407205	734	221
Lincoln	41292	0.mtgs.	467	Wh. Pine	128126	261	331-344

(which provisions, identical in all counties, are printed on the reverse hereof) hereby are adopted and incorporated herein and made a part hereof as fully as though set forth herein at length; that he will observe and perform said provisions, and that the references to property, obligations, and parties in said provisions shall be construed to refer to the property, obligations, and parties set forth in the Deed of Trust.

The parties agree that with respect to provision 16, the amount of fire insurance required by covenant 2 shall be \$ () and with respect to attorney's fees provided by for covenant 7 the percentage shall be reasonable as determined by a court with jurisdiction.

The undersigned Trustor requests that a copy of any Notice of Default and of any Notice of Sale hereunder be mailed to him at his address herein above set forth.

IN WITNESS WHEREOF, this instrument has been executed, on the date first set forth above.

R & S ST. ROSE, LLC, a Nevada limited liability company

BY: FOROUZAN, INC., a Nevada corporation,, its Manager

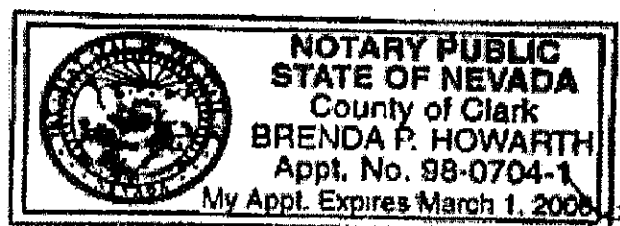
By: *S. Forouzan Rad*
Salid Forouzan Rad-President

BY: RPN, LLC, a Nevada limited liability company, its Manager

By: *R. Phillip Nourafchan*
R. Phillip Nourafchan-Manager

State of NEVADA)
) ss:
County of Clark)

This instrument was acknowledged before me on August 23, 2005
by Salid Forouzan Rad as President
of Fourouzan, Inc.



Brenda P. Howarth
NOTARY PUBLIC
My Commission Expires: 11/01/2006

Humboldt	116986	3	83	Storey	28573	Rmtgs.	112
Lander	41172	3	758	Washoe	407205	734	221
Lincoln	41292	0.mtgs.	467	Wh. Pine	128126	261	331-344

(which provisions, identical in all counties, are printed on the reverse hereof) hereby are adopted and incorporated herein and made a part hereof as fully as though set forth herein at length; that he will observe and perform said provisions, and that the references to property, obligations, and parties in said provisions shall be construed to refer to the property, obligations, and parties set forth in the Deed of Trust.

The parties agree that with respect to provision 16, the amount of fire insurance required by covenant 2 shall be \$ () and with respect to attorney's fees provided by for covenant 7 the percentage shall be reasonable as determined by a court with jurisdiction.

The undersigned Trustor requests that a copy of any Notice of Default and of any Notice of Sale hereunder be mailed to him at his address herein above set forth.

IN WITNESS WHEREOF, this instrument has been executed, on the date first set forth above.

R & S ST. ROSE, LLC, a Nevada limited liability company

BY: **FOROUZAN, INC., a Nevada corporation,, its Manager**

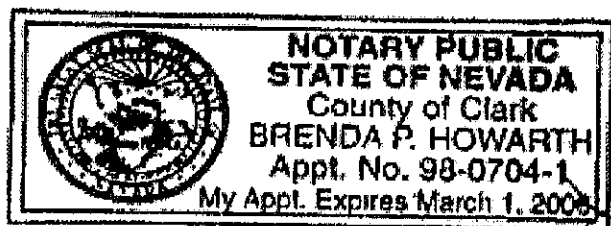
By: *S. Forouzan Rad*
Salid Forouzan Rad-President

BY: **RPN, LLC, a Nevada limited liability company, its Manager**

By: *R. Phillip Nourafchan*
R. Phillip Nourafchan-Manager

State of NEVADA }
 County of Clark } ss:

This instrument was acknowledged before me on August 23, 2005
 by Salid Forouzan Rad as President
 of Fourouzan, Inc.



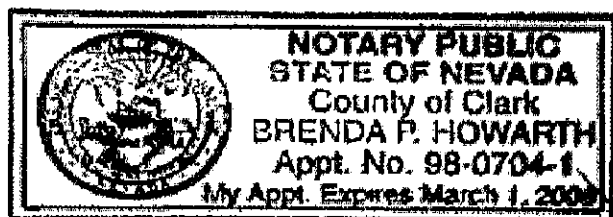
Brenda P. Howarth
 NOTARY PUBLIC
 My Commission Expires: 11/01/2008

State of NEVADA)
County of Clark) ss:

This instrument was acknowledged before me on August 23, 2007
by R. Phillip Nourafchan as Manager
of RPN, LLC, a Nevada limited liability company

Brenda P. Howarth
NOTARY PUBLIC

My Commission Expires: March 1, 2009



State of NEVADA)
County of Clark) ss:

This instrument was acknowledged before me on August 03, 2005
by R. Phillip Nourafchan as Manager
of RPN, LLC, a Nevada limited liability company

Brenda P. Howarth
NOTARY PUBLIC

My Commission Expires: March 1, 2008

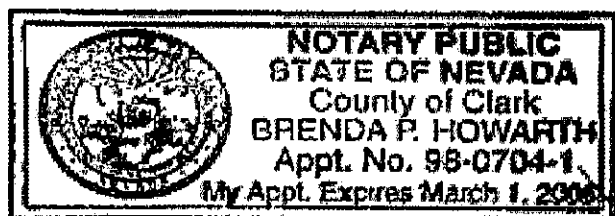


EXHIBIT "A"

LEGAL DESCRIPTION

PARCEL 1:

THAT PORTION OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., DESCRIBED AS FOLLOWS:

LOT 4-3 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS, PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

PARCEL 2:

THAT PORTION OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., DESCRIBED AS FOLLOWS:

LOT 4-4 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS, PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

PARCEL 3:

THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE NORTHWEST QUARTER (NW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

FURTHER EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 27, 1998 IN BOOK 980127 AS INSTRUMENT NO. 01298 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY
CLARK COUNTY IN ORDER OF VACATION RECORDED JULY 8, 2002 IN
BOOK 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

PARCEL 4:

THE EAST HALF (E ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE NORTHWEST QUARTER (NW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M.

EXCEPTING THEREFROM THAT PORTION CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

PARCEL 5:

SOUTHEAST QUARTER (SE ¼) OF THE NORTHWEST QUARTER (NW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF BRUCE STREET AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED DECEMBER 24, 1997 IN BOOK 971224 AS INSTRUMENT NO. 00917 AND RE-RECORDED APRIL 9, 1998 IN BOOK 980409 AS INSTRUMENT NO. 01289 AND RE-RECORDED OCTOBER 12, 1998 IN BOOK 981012 AS INSTRUMENT NO. 00903 AND RE-RECORDED DECEMBER 8, 1998 IN BOOK 981208 AS INSTRUMENT NO. 00688 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

PARCEL 6:

THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., LYING NORTHEASTERLY OF THE NORTHEASTERLY RIGHT OF WAY LINE OF SPENCER STREET AS LOCATED ON THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 30, 1998 IN BOOK 980130 AS INSTRUMENT NO. 01806.

PARCEL 7:

THAT PORTION OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.B. & M., CLARK COUNTY, NEVADA, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST (NE) OF THE SOUTH HALF (S ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 26; THENCE SOUTH 00°21'02" WEST ALONG THE EAST LINE THEREOF, 98.88 FEET TO A POINT ON THE NORTHWESTERLY EASEMENT LINE OF LAKE MEAD DRIVE (ST. ROSE PARKWAY) (300.00 FEET WIDE); THENCE SOUTH 48°18'18" WEST ALONG SAID NORTHWESTERLY EASEMENT LINE 243.23 FEET; THENCE NORTH 41°42'17" WEST, 304.80 FEET; THENCE CURVING TO THE RIGHT ALONG THE ARC OF A 1080.00 FOOT RADIUS CURVE CONCAVE NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 02°37'57", AN ARC LENGTH OF 49.62 FEET TO A POINT ON THE NORTH LINE OF THE SAID SOUTH HALF (S ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 26, A RADIAL LINE TO SAID POINT BEARS SOUTH 50°55'40" WEST; THENCE SOUTH 89°21'22" EAST ALONG SAID NORTH LINE, 417.18 FEET TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 30, 1998 IN BOOK 980130 AS INSTRUMENT NO. 01321 OF OFFICIAL RECORDS.

NOTE: THE ABOVE METES AND BOUNDS DESCRIPTION APPEARED PREVIOUSLY IN THAT CERTAIN DOCUMENT RECORDED MAY 5, 1998 IN BOOK 980505 AS INSTRUMENT NO. 02057.

PARCEL 8:

THAT PORTION OF THE SOUTH HALF (S ½) OF THE SOUTHEAST QUARTER (SE ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., LYING NORTHWESTERLY OF THE NORTHWESTERLY LINE OF LAKE MEAD DRIVE (NOW KNOWN AS ST. ROSE PARKWAY) AS THE SAME NOW EXISTS.

EXHIBIT F

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(C29)

20070731-0004824

APN No. 177-26-701-019
177-26-801-011
177-26-801-016

Fee: \$42.00
N/C Fee: \$25.00

07/31/2007 14:13:36
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Requestor:
NEVADA TITLE COMPANY

Debbie Conway OSA
Clark County Recorder Pgs: 29

WHEN RECORDED, MAIL TO:
Colonial Bank, N.A.
4670 S. Fort Apache, Suite 250
Las Vegas, Nevada 89147

The undersigned hereby affirms that this document,
including any exhibits, submitted for recording does not
contain the social security number of any person or
persons. (Per NRS 239B.030)

**DEED OF TRUST AND SECURITY AGREEMENT AND
FIXTURE FILING WITH ASSIGNMENT OF RENTS**

THIS DEED OF TRUST AND SECURITY AGREEMENT AND FIXTURE FILING
WITH ASSIGNMENT OF RENTS (the "Deed of Trust") is made as of the 27th day of July,
2007, by R & S ST. ROSE, LLC, a Nevada limited liability company, as trustor (the "Trustor"), to
NEVADA TITLE COMPANY, as trustee (the "Trustee"), for the benefit of COLONIAL BANK,
N.A., as beneficiary (the "Beneficiary").

I. GRANTS AND OBLIGATIONS SECURED.

A. Grants.

1.01. Trustor hereby irrevocably grants, transfers and assigns to Trustee, in trust, for
the benefit of Beneficiary, with power of sale and right of entry and possession, all right, title and
interest of Trustor in and to that certain real property situated in the County of Clark, State of
Nevada, described in Exhibit "A" attached hereto and made a part hereof (the "Land"), together
with all right, title and interest of Trustor therein and in and to:

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Hale Lane Peek Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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(a) All buildings and other improvements now or hereafter located on the Land, all water and water rights (whether riparian, appropriative, or otherwise, and whether or not appurtenant), pumps and pumping stations used in connection therewith and all shares of stock evidencing the same, all machinery, equipment, appliances, furnishings, inventory, fixtures, and other property used or useable in connection with the Land and the improvements thereon, including, but not limited to, all storage tanks and pipelines, all gas, electric, heating, cooling, air conditioning, refrigeration and plumbing fixtures and equipment, which have been or may hereafter be attached or affixed in any manner to any building now or hereafter on the Land (the "Improvements").

(b) All the rights, rights of way, easements, licenses, profits, privileges, tenements, hereditaments and appurtenances, now or hereafter in any way appertaining and belonging to or used in connection with the Land and/or the Improvements, and any part thereof or as a means of access thereto, including, but not limited to, any claim at law or in equity, and any after acquired title and reversion in or to each and every part of all streets, roads, highways and alleys adjacent to and adjoining the same.

(c) All rentals, earnings, income, accounts, accounts receivable, deposits, security deposits, receipts, royalties, revenues, issues and profits which, after the date hereof, and while any portion of the indebtedness secured hereby remains unpaid, may accrue from the Land and/or the Improvements and any part thereof, subject, however, to the right, power and authority conferred upon Trustor to collect and apply such proceeds set forth herein.

(d) All deposits made with or other security given to utility companies by Trustor with respect to the Land and/or the Improvements, and all advance payments of insurance premiums made by Trustor with respect thereto and claims or demands relating to insurance. Any of the foregoing arising or acquired by Trustor after the date hereof, the Land, the Improvements, and the other property described in subparagraphs (a), (b), (c), and (d) of this Section 1.01 are collectively defined hereinafter as the "Property".

1.02. Trustor hereby grants a security interest to Beneficiary in all of the following described property and any and all proceeds thereof (sometimes all of such being collectively referred to herein as the "Collateral"):

(a) all existing and future goods and tangible personal property located on the Property or wherever located now owned or hereafter acquired by Trustor and used in connection with the use, operation or occupancy of the Property or in construction of the Improvements, including, but not limited to, all appliances, furniture and furnishings, fittings, materials, supplies, equipment and fixtures, and all building material, supplies, and equipment now or hereafter delivered to the Property and installed or used or intended to be installed or used therein; and all renewals or

replacements thereof or articles in substitution thereof;

(b) all general intangibles relating to design, development, operation, management and use of the Property and construction of the Improvements, including, but not limited to, (i) all names under which or by which the Property or the Improvements may at any time be operated or known, all rights to carry on business under any such names or any variant thereof, and all goodwill in any way relating to the Property, (ii) all permits, licenses, authorizations, variances, land use entitlements, approvals and consents issued or obtained in connection with the construction of the Improvements, (iii) all permits, licenses, approvals, consents, authorizations, franchises and agreements issued or obtained in connection with the construction of the Improvements, or the use, occupancy or operation of the Property, (iv) all materials prepared for filing or filed with any governmental agency, and (v) all of Trustor's rights under any contract in connection with the development, design, use, operation, management and construction of the Property;

(c) all construction, service, engineering, consulting, leasing, architectural and other similar contracts of any nature (including, without limitation, those of any general contractors and subcontractors), as such may be modified, amended or supplemented from time to time, concerning the design, construction, management, operation, occupancy, use, and/or disposition of any portion of or all of the Property;

(d) all architectural drawings, plans, specification, soil tests, feasibility studies, appraisals, engineering reports and similar materials relating to any portion of or all of the Property;

(e) all payment and performance bonds or guarantees and any and all modifications and extensions thereof relating to the Property;

(f) all reserves, deferred payments, deposits, refunds, cost savings and payments of any kind relating to the construction, design, development, operation, occupancy, use and disposition of any portion of or all of the Property;

(g) to the extent permitted to be assigned by Trustor, all proceeds of any commitment by any lender to extend permanent or additional construction financing to Trustor relating to the Property;

(h) all proceeds and claims arising on account of any damage to or taking of the Property or any part thereof, and all causes of action and recoveries for any loss or diminution in the value of the Property;

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Hale Lane Peck Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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(i) all policies of, and proceeds resulting from, insurance relating to the Property or any of the above collateral, and any and all riders, amendments, extensions, renewals, supplements or extensions thereof, and all proceeds thereof;

(j) all shares of stock or other evidence of ownership of any part of the Property that is owned by Trustor in common with others, including all water stock relating to the Property, if any, and all documents or rights of membership in any owners' or members' association or similar group having responsibility for managing or operating any part of the Property; and

(k) all proceeds, whether cash, promissory notes, contract rights, or otherwise, of the sale or other disposition of all or any part of the estate of Trustor in and to the Property now or hereafter existing thereon.

The personal property in which Beneficiary has a security interest includes goods which are or shall become fixtures on the Property. This Deed of Trust is intended to serve as a fixture filing pursuant to the terms of the Nevada Uniform Commercial Code. This filing is to be recorded in the real estate records of the county in which the Property is located. In that regard, the following information is provided:

Name of Debtor: R & S ST. ROSE, LLC, a Nevada
limited liability company

Address of Debtor: See Paragraph 5.12

Debtor's State of Nevada
Organizational Filing
Number: E0445912005-5

Name of Secured Party: COLONIAL BANK, N.A.

Address of Secured Party: See Paragraph 5.12

Trustor warrants and agrees that there is no financing statement covering the foregoing Collateral, the Property, or any part thereof, on file in any public office, except for those in favor of Beneficiary.

1.03. Trustor hereby assigns and transfers to Beneficiary, as additional security, all damages, royalties and revenue of every kind, nature and description whatsoever that Trustor may be

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Hale Lane Peck Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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damages, royalties and revenue of every kind, nature and description whatsoever that Trustor may be entitled to receive from any person or entity owning or having or hereafter acquiring a right to the oil, gas or mineral rights and reservations of the Property, with the right in Beneficiary to receive and receipt therefor, and apply the same to the indebtedness secured hereby either before or after any default hereunder, and Beneficiary may demand, sue for and recover any such payments but shall not be required to do so.

B. Obligations Secured.

1.04. This Deed of Trust is given for the purpose of securing, in such order of priority as Beneficiary may determine:

(a) Payment of the indebtedness evidenced by a Promissory Note Secured By Deed of Trust of even date herewith and any renewals, extensions, modifications or amendments thereof, in the principal amount of **FORTY THREE MILLION NINE HUNDRED EIGHTY THOUSAND AND NO/100THS DOLLARS (\$43,980,000.00)** (the "Note"), executed by Trustor, and payable to Beneficiary, together with interest thereon and late charges as provided therein, which is made a part hereof by reference. The Note contains a provision for changes in the rate of interest charged thereunder based upon the floating commercial loan rate of Beneficiary publicly announced from time to time as Beneficiary's Base Rate. Each change in the interest rate resulting from a change in Beneficiary's Base Rate shall become effective as of the day on which such change occurs.

(b) Payment of such further sums as Trustor, or any successor in ownership, hereafter may borrow from Beneficiary when evidenced by another note or notes, reciting it is so secured, payable to Beneficiary or order and made by Trustor, or any successor in ownership, and all renewals, extensions, modifications or amendments of such note or notes.

(c) Payment of all other moneys herein agreed or provided to be paid by Trustor and performance of all other obligations of Trustor contained herein and in that certain Construction Loan Agreement of even date herewith between Trustor and Beneficiary (the "Loan Agreement") and any amendment, modification or change hereto or thereto, and any other loan documents executed in connection with the Loan Agreement, including payment of all sums expended or advanced by Beneficiary hereunder, together with interest thereon at the rate payable under the Note, in the preservation, enforcement and realization of the rights of Beneficiary hereunder or under any of the other obligations secured hereby, including, without limitation, attorney's fees, court costs, other litigation expenses and foreclosure expenses.

(d) Performance of each agreement of Trustor contained in any other agreement given by Trustor to Beneficiary which is for the purpose of further securing any

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Hale Lane Peck Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 317-3000

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indebtedness or obligation secured hereby.

II. COVENANTS OF TRUSTOR

A. Condition and Operation of Property.

2.01. Trustor agrees (i) to keep the Property in good condition and repair, (ii) not to commit or permit any waste or deterioration of the Property, (iii) not to commit or permit any removal, demolition or substantial alteration of the Property except for such alterations as may be required by law, ordinance, rule, regulation or order of any governmental authority having jurisdiction over the Property other than as contemplated under the Loan Agreement, (iv) to complete in good and workmanlike manner any construction or restoration which may be performed on the Property and those alterations contemplated in the Loan Agreement, (v) to promptly restore any portion of the Property which may be damaged or destroyed and (vi) subject to the Loan Agreement, not to permit any mechanics' or materialmen's liens against the Property, and (vii) to perform each of Trustor's obligations set forth in the Loan Agreement.

2.02. Trustor shall not commit, permit or allow to exist, any violation of any law, ordinance, rule, regulation or order of any governmental authority having jurisdiction over the Property or of any matter or record affecting the Property.

2.03 Trustor shall maintain, or cause to be maintained, proper and accurate books, records and accounts reflecting all items of income and expense in connection with the operation of the Property or in connection with any services, equipment or furnishings provided in connection with the operation of the Property, whether such income or expense be realized by Trustor or by any other person or entity whatsoever excepting persons unrelated to and unaffiliated with Trustor and who leased from Trustor portions of the Property for the purposes of occupying the same. Upon the request of Beneficiary, Trustor shall prepare and deliver to Beneficiary such financial statements regarding operation of the Property as Beneficiary may reasonably request. Beneficiary, or its designee, shall have the right from time to time during normal business hours to examine such books, records and accounts and to make copies or extracts therefrom.

B. Insurance.

2.04. Trustor shall, at all times, provide, maintain and keep in force all of the following:

(a) A policy or policies of commercial general liability insurance with respect to the Property, including but not limited to owners and contractors liability, contractual

liability, personal injury, completed operations, broad form property damage insuring Trustor and Beneficiary, as their interests may appear, against loss for any occurrence resulting in bodily injury to or the death of one or more persons and consequential damages arising therefrom and property damage involving injury or destruction of the tangible property of third parties in the amount of no less than \$2,000,000.00, combined single limit. All policies should be on an "occurrence" basis with Beneficiary named as an additional insured under such policy or policies.

(b) A policy or policies of builder's risk insurance insuring the Property against loss or damage on an "All-Risk" basis and against such other risks or hazards as Beneficiary may from time to time reasonably designate in the amount of not less than 100% of the full replacement value of any improvements constructed on the Property without deduction for physical depreciation. Beneficiary shall be named as Loss Payee under such policy or policies.

(c) If requested by Beneficiary, flood insurance upon the Property in the event that such insurance is available pursuant to the provisions of the Flood Disaster Protection Act of 1973 or other applicable legislation. Beneficiary shall reserve the right to require that Trustor secure flood insurance in excess of the amount provided by the Flood Disaster Protection Act of 1973, if such insurance is commercially available, up to the amount provided in Paragraph 2.04(a) hereof.

(d) If requested by Beneficiary, statutory workers' compensation insurance (including employer's liability in amounts required by the State Industrial Insurance System and, if applicable, insurance covering claims of workers against employers arising under Federal law) covering Trustor and employees of Trustor, in such form as is reasonably satisfactory to Beneficiary and in amounts not less than any minimum amounts established by law.

(e) Such other insurance, and in such amounts, as may from time to time be reasonably required by Beneficiary.

Such insurance policies shall be updated at Beneficiary's request, but not less frequently than annually during the Loan term.

2.05. All policies required by Paragraph 2.04 shall (i) be issued by companies duly qualified and licensed to do such business in the State of Nevada and approved by Beneficiary, (ii) shall be subject to the reasonable approval of Beneficiary as to the insuring companies, amount, content and forms of policies and expiration dates, (iii) contain a Non-Contributory Standard Mortgagee Clause and the Lender's Loss Payable Endorsement (Form 438 BFU NS), or their equivalents, in favor of Beneficiary, (iv) provide that the proceeds thereof shall be payable to Beneficiary (to the extent of its interest) (v) provide that it cannot be modified or cancelled, to the

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Hale Lane Peck Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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extent that such modification or cancellation substantially effects the Property, or Beneficiary's interest thereon, without thirty days' prior written notice to Beneficiary, and (vi) be primary and non-contributory with any other insurance of Beneficiary.

2.06. Trustor shall furnish to Beneficiary a certificate of each policy required under Paragraph 2.04 and, at least thirty days prior to expiration of any such policy, proof of issuance of a policy continuing in force the coverage provided by the expiring policy. In the event Trustor shall fail to maintain the insurance coverage required by this Deed of Trust, Beneficiary may (but shall be under no obligation to) take out the required policies of insurance and pay the premiums on the same or may make such repairs or replacements as are necessary and provide for payment thereof; and all amounts so advanced therefor by Beneficiary shall become an additional obligation of Trustor to Beneficiary, which amounts, together with interest thereon at the Default Rate (as defined and provided for in the Loan Agreement), Trustor agrees to pay.

2.07. After the happening of any casualty insured against under Paragraph 2.04, Trustor shall give prompt written notice thereof to Beneficiary.

2.08. Trustor hereby assigns to Beneficiary all insurance proceeds which it may be entitled to receive and such proceeds shall be delivered to and held by Beneficiary to be applied to the restoration of any portion of the Property that has been damaged or destroyed to the same condition, character and value as existed prior to such damage or destruction so long as the following conditions have been satisfied: (i) Trustor is not in default hereunder, (ii) Beneficiary's security is not materially impaired and (iii) Trustor deposits with it the additional amounts necessary to accomplish such restoration. The proceeds disbursed for restoration will be released to Trustor under the procedures set forth in the Loan Agreement. In the event that the above conditions are not satisfied, Beneficiary shall have the option, to apply the insurance proceeds upon any indebtedness secured hereby in such order as Beneficiary may determine or release such proceeds to Trustor without such release being deemed a payment of any indebtedness secured hereby, rather than to apply such proceeds to the restoration of the Property. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice. If the Property is restored at a cost less than the available insurance proceeds, then such excess proceeds shall, if Trustor is not then in default hereunder, be paid over to Trustor.

2.09. In the event of the foreclosure of this Deed of Trust or other transfer of the title to the Property in extinguishment, in whole or in part, of the indebtedness secured hereby, all right, title and interest of Trustor in and to any insurance policy then in force shall pass to the purchaser or grantee to the extent that such insurance policy affects the Property.

C. Payments.

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Hale Lane Peck Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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2.10. Trustor shall pay the principal, interest and other charges due under the Note and the Loan Agreement according to their terms.

2.11. Trustor shall pay or cause to be paid:

(a) Prior to the assessment of any penalty or delinquency, all taxes, assessments and other governmental or public charges affecting the Property, including assessments on appurtenant water stock, and any accrued interest, cost and/or penalty thereon and shall submit paid receipt therefor to Beneficiary upon request.

(b) When due, all encumbrances (including any debt secured by deed of trust), ground rents, liens, and/or charges, with interest, on the Property or any part thereof which appear to be prior or superior hereto and all costs, fees and expenses related thereto.

(c) When due, all charges for utilities or services including, but not limited to, electricity, gas, water and sewer.

2.12. Upon the occurrence of a default by Trustor hereunder, Trustor shall pay to Beneficiary on the first day of each month, together with and in addition to the regular installments of principal and interest due under the Note, until the indebtedness secured hereby is paid in full, an amount equal to one-twelfth (1/12) of the yearly taxes and assessments, insurance premiums, lease rentals and other similar charges (including any amounts which may become payable by Trustor pursuant to Paragraph 2.28 hereinbelow) as estimated by Beneficiary to be sufficient to enable Beneficiary to pay at least thirty (30) days before they become due, all taxes, assessments, insurance premiums, and other similar charges against the Property. Beneficiary shall not be obligated to pay interest on any such sums. Upon demand of Beneficiary, Trustor shall deliver to Beneficiary such additional sums as are necessary to enable Beneficiary to pay such taxes, assessments, insurance premiums and similar charges.

2.13. Trustor shall pay immediately, upon demand, after expenditure, all sums expended or expenses incurred by Trustee and/or Beneficiary under any of the terms of this Deed of Trust, including without limitation, any fees and expenses (including reasonable attorneys' fees) incurred in connection with any reconveyance of the Property or any portion thereof, or to compel payment of the Note or any portion of the indebtedness evidenced thereby or in connection with any default thereunder, including without limitation attorneys' fees incurred in any bankruptcy or judicial or nonjudicial foreclosure proceeding, with interest from date of expenditure at the Interest Rate provided for in the Note.

2.14. Trustor shall pay the amount demanded by Beneficiary or its authorized servicing agent for any statement regarding the obligations secured hereby; provided, however, that such amount may not exceed the maximum amount allowed by law at the time request for the statement is made.

D. Condemnation.

2.15. If the Property, or any part thereof, is taken or damaged by reason of any public improvement or condemnation proceeding, or in any other manner, Beneficiary shall be entitled to all compensation, awards and other payments or relief therefor to which Trustor shall be entitled, and shall be entitled at its option to commence, appear in and prosecute in its own name any action or proceeding or to make any compromise or settlement in connection with such taking or damage to the extent of the interests of Trustor therein. All such compensation, awards, damages, rights of action and proceeds to which Trustor shall be entitled (the "Proceeds") are hereby assigned to Beneficiary, who shall after deducting therefrom all its reasonable expenses, including attorneys' fees, apply or release the Proceeds with the same effect and as provided in Paragraph 2.08 above with respect to disposition of insurance proceeds; provided, that if there are any excess Proceeds after application thereof to the restoration of the Property, Beneficiary shall be entitled to apply such excess to the reduction of the principal balance due under the Note without any adjustment in the dollar amount of the monthly installments due under the Note. Trustor agrees to execute such further assignments of the Proceeds as Beneficiary or Trustee may require. Nothing herein contained shall prevent the accrual of interest as provided in the Note on any portion of the Proceeds to be applied to the principal balance due under the Note until the Proceeds are received by Beneficiary.

E. Rents and Leases.

2.16. Subject to the provisions of the Loan Agreement, Trustor shall submit to Beneficiary for its prior written approval the form of the tenant lease to be used by Trustor for leasing any portion of the Improvements, and after approval by Beneficiary in accordance with the Loan Agreement, shall not materially modify such form of lease without the prior written consent of Beneficiary. Trustor shall not accept prepayments of rent for any period in excess of one month and shall perform all covenants of the Lessor under all leases affecting the Property ("Leases"). "Leases", as used herein, includes any extensions or renewals thereof and any amendments consented to by the Beneficiary. Trustor shall not amend or terminate any Leases without the prior written consent of Beneficiary and shall not consent to any assignment or subletting under any Leases without the prior written consent of Beneficiary. Trustor shall immediately give notice to Beneficiary of any default under any of the Leases it receives or delivers. Beneficiary shall have the right but not the obligation, to cure any default of Trustor under any of the Leases and all amounts disbursed in connection with said cure shall be deemed to be disbursements under the Loan Agreement.

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Hale Lane Peck Dennison and Howard
Attorneys and Counselors at Law
Reno, Nevada
(775) 327-3000

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2.17. Each lease of any portion of the Improvements shall be absolutely subordinate to the lien of this Deed of Trust but shall contain a provision satisfactory to Beneficiary that in the event of the exercise of the private power of sale or a judicial foreclosure hereunder such lease, at the option of the purchaser at such sale, shall not be terminated and the tenant thereunder shall attorn to such purchaser and, if requested to do so, shall enter into a new lease for the balance of the term of such lease then remaining upon the same terms and conditions. Each such lease shall, at the request of Beneficiary, be assigned to Beneficiary and each such assignment shall be recorded and acknowledged by the tenant thereunder.

2.18. Notwithstanding anything to the contrary contained herein, Trustor hereby absolutely and unconditionally assigns and transfers to Beneficiary all the leases, income, rent, issues, deposits, profits and proceeds of the Property to which Trustor may be entitled, whether now due, past due or to become due, and hereby gives to and confers upon Beneficiary the right, power and authority to collect such income, rents, issues, deposits, profits and proceeds of the Property to which Trustor may be entitled, whether now due, past due or to become due. The assignment of the Leases constitutes an irrevocable direction and authorization of all tenants under the Leases to pay all rent, income and profits into an account specified by Beneficiary upon demand and without further consent or other action by Trustor. Trustor irrevocably appoints Beneficiary its true and lawful attorney, at the option of Beneficiary at any time, to demand, receive and enforce payment, to give receipts, releases, and satisfactions, and to sue, either in the name of Trustor or in the name of Beneficiary, for all such income, rents, issues, deposits, profits and proceeds and apply the same to the indebtedness secured hereby. It is understood and agreed that neither the foregoing assignment of leases, income, rents, issues, deposits, profits and proceeds to Beneficiary nor the exercise by Beneficiary of any of its rights or remedies under this Paragraph 2.18 or under Paragraph 2.28 hereof shall be deemed to make Beneficiary a "mortgagee-in-possession" or otherwise responsible or liable in any manner with respect to the Property or the use, occupancy, enjoyment or operation of all or any portion thereof. Notwithstanding anything to the contrary contained herein or in the Note secured hereunder, so long as no Event of Default, as defined in the Loan Agreement shall have occurred, Trustor shall have a license to collect all income, rents, issues, profits and proceeds from the Property as trustee for the benefit of Beneficiary and Trustor shall apply the funds so collected as set forth in the Loan Agreement. Upon the occurrence of an Event of Default, such license shall be deemed revoked and any rents received thereafter by Trustor shall be delivered in kind to Beneficiary. Trustor hereby irrevocably constitutes and appoints Beneficiary its true and lawful attorney-in-fact to enforce in Trustor's name or in Beneficiary's name or otherwise all rights of Trustor in the instruments, including without limitation checks and money orders, tendered as payments of rents and to do any and all things necessary and proper to carry out the purposes hereof.

F. Other Rights and Obligations.

2.19. In addition to any other grant, transfer or assignment effectuated hereby, without in any manner limiting the generality of the grants in Article I hereof, Trustor shall assign to Beneficiary Trustor's interest in all agreements, contracts, leases, licenses and permits affecting the Property in any manner whatsoever, such assignments to be made, if so requested by Beneficiary, by instruments in form satisfactory to Beneficiary but no such assignment shall be construed as a consent by Beneficiary to any agreement, contract, license or permit so assigned, or to impose upon Beneficiary any obligations with respect thereto.

2.20. In the event of the passage, after the date of this Deed of Trust, of any law deducting from the value of the Property for the purpose of taxation, any lien thereon, or changing in any way the laws now in force for the taxation of deeds of trust or debts secured by deeds of trust, or the manner of the collection of any such taxes, so as to affect this Deed of Trust, or imposing payment of the whole or any portion of any taxes, assessments or other similar charges against the Property upon the Beneficiary, the indebtedness secured hereby shall immediately become due and payable at the option of the Beneficiary; provided, however, that such election by Beneficiary shall be ineffective if such law either (a) shall not impose a tax upon Beneficiary nor increase any tax now payable by Beneficiary or (b) shall impose a tax upon Beneficiary or increase any tax now payable by Beneficiary and prior to the due date: (i) Trustor is permitted by law and can become legally obligated to pay such tax or the increased portion thereof (in addition to all interest, additional interest and other charges payable hereunder and under the Note without exceeding the applicable limits imposed by the usury laws of the State of Nevada); (ii) Trustor does pay such tax or increased portion; and (iii) Trustor agrees with Beneficiary in writing to pay, or reimburse Beneficiary for the payment of, any such tax or increased portion thereof when thereafter levied or assessed against the Property or any portion thereof. The obligations of Trustor under such agreement shall be secured hereby.

2.21. If required by Beneficiary at any time during the term of this Deed of Trust, Trustor will execute and deliver to Beneficiary, in form satisfactory to Beneficiary, an additional security agreement and/or financing statement covering all personal property of Trustor which may at any time be furnished, placed on, or annexed or made appurtenant to the Property and used, useful or held for use, in the operation of the improvements thereon. Any breach of or default under such security agreement shall constitute an event of default under this Deed of Trust.

2.22. Trustor shall do any and all acts which, from the character or use of the Property or the Collateral, may be reasonably necessary to protect and preserve the security of Beneficiary, the specific enumerations herein not excluding the general.

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Hale Lane Peck Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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2.23. Trustor will faithfully perform each and every covenant to be performed by Trustor under any lien or encumbrance upon or affecting the Property, including, without limiting the generality hereof, mortgages, deeds of trust, leases, declaration of covenants, easements, conditions and/or restrictions and other agreements which affect the Property, in law or in equity, which Beneficiary reasonably believes may be prior and superior to the lien or charge of this Deed of Trust. A breach of or a default under any such lien or encumbrance shall constitute an event of default under this Deed of Trust.

2.24. Upon election of either Beneficiary or Trustee so to do, employment of an attorney is authorized and payment by Trustor of all attorneys' fees, costs and expenses in connection with any action and/or actions (including the cost of evidence or search of title), which may be brought for the foreclosure of this Deed of Trust, and/or for possession of the property covered hereby, and/or for the appointment of a receiver, and/or for the enforcement of any covenant or right in this Deed of Trust contained as hereinafter provided shall be secured hereby.

2.25. No personal property covered by the security interest granted herein may be removed from the Property without the prior written consent of Beneficiary unless Trustor shall immediately replace such personal property with similar property of equivalent value on which Beneficiary has a valid first lien.

2.26. Except as otherwise provided herein, in the event that the interest of Trustor in the Property, or any part thereof, or any interest therein is sold, conveyed, alienated, further encumbered or otherwise transferred by the Trustor, voluntarily or involuntarily, whether by operation of law or otherwise, the Note, irrespective of the maturity dates expressed therein, at the option of Beneficiary, and without demand or notice, shall immediately become due and payable. In the event that Beneficiary does not elect to declare the Note immediately due and payable, then, unless indicated otherwise in writing by Beneficiary, Trustor shall nevertheless remain primarily liable for the obligations hereunder and under the Note and any other instrument securing the Note. This provision shall apply to each and every sale, conveyance, alienation, encumbrance or transfer, regardless whether or not Beneficiary has consented to, or waived, Beneficiary's rights hereunder, whether by action or non-action in connection with any previous sale, conveyance, alienation, encumbrance or transfer and whether or not the holder has received any payments after said transfer.

Notwithstanding the foregoing, provided that Trustor is not then in default hereunder, under the Loan Agreement, or any obligation secured hereby, Beneficiary shall, upon request of Trustor, cause to be released from the lien hereof one (1) or more legally described and assessed parcels and improvements constructed thereon upon payment to Beneficiary in the amount applicable to each such parcel as set forth in Exhibit "B" attached hereto and by this reference made a part hereof. Trustor shall pay any and all cost and expense incurred in connection with such releases.

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Hale Lane Peck Deunison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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2.27. Trustor agrees to execute such documents and take such action as Beneficiary shall reasonably determine to be necessary or desirable to further evidence, perfect or continue the perfection of the lien and security interest granted by Trustor herein.

2.28. Following a ten (10) day written notice to Trustor (unless Beneficiary reasonably determines that emergency circumstances exist which would make the giving of such notice impractical), at the time and in the manner herein provided, Beneficiary may, without releasing Trustor from any obligation hereunder and without waiving its right to declare a default or impairing any declaration of default as herein provided or any sale proceeding predicated thereon:

(a) Make any payment or perform any act in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary and Trustee being authorized to enter upon and take possession of the Property for such purposes;

(b) Commence, appear in and/or defend any action or proceedings purporting to affect the security hereof, and/or any additional or other security therefor, the interests, rights, powers and/or duties of Trustee and/or Beneficiary hereunder, whether brought by or against Trustor, Trustee or Beneficiary;

(c) Pay, purchase, contest or compromise any claim, debt, lien, charge or encumbrance which in the judgment of either may affect or appear to affect the security of this Deed of Trust, the interest of Beneficiary or the rights, powers and/or duties of Trustee and/or Beneficiary hereunder; and

(d) Upon an event of default hereunder or under the Note, Beneficiary is authorized either by itself or by its agents to be appointed by it for that purpose or by a receiver appointed by a court of competent jurisdiction, to enter into and upon and take and hold possession of any portion or all of the Property, both real and personal, and exclude Trustor and all other persons therefrom; and to operate and manage the Property and rent and lease the same, perform such reasonable acts of repair or protection as may be reasonably necessary or proper to conserve the value thereof, and collect any and all income, rents, issues, profits and proceeds therefrom, the same being hereby assigned and transferred to Beneficiary for the benefit and protection of Beneficiary, and from time to time apply and/or accumulate such income, rents, issues, profits and proceeds in such order and manner as Beneficiary or such receiver in its sole discretion shall consider advisable, to or upon the following: the expense of receivership, if any, the proper costs of upkeep, maintenance, repair and/or operation of the Property, the repayment of any sums theretofore or thereafter advanced pursuant to the terms of this Deed of Trust upon the indebtedness secured hereby, the taxes and assessments upon the Property then due or next to become due, and/or upon the unpaid principal of such indebtedness. The collection and/or receipt of income, rents, issues, profits

and/or proceeds from the Property by Beneficiary, its agent or receiver, after declaration of default and election to cause the Property to be sold under and pursuant to the terms of this Deed of Trust shall not affect or impair such default or declaration of default or election to cause the Property to be sold or any sale proceedings predicated thereon, but such proceedings may be conducted and sale effected notwithstanding the receipt and/or collection of any such income, rents, issues, profits and/or proceeds. Any such income, rents, issues, profits and/or proceeds in the possession of Beneficiary, its agent or receiver, at the time of sale and not theretofore applied as herein provided, shall be applied in the same manner and for the same purposes as the proceeds of the sale. Neither Trustee nor Beneficiary shall be under any obligation to make any of the payments or do any of the acts referred to in this Paragraph and any of the actions referred to in this Paragraph may be taken by Beneficiary irrespective of whether any notice of default or election to sell has been given hereunder and without regard to the adequacy of the security for the indebtedness evidenced by the Note.

III. DEFAULTS AND REMEDIES.

A. Defaults.

3.01. Trustor shall be in default hereunder upon the breach of any covenant or warranty contained herein, or if an Event of Default shall have occurred and be continuing under the Loan Agreement, the Note, or any other obligation secured hereby, subject to any applicable notice requirement and opportunity to cure.

B. Remedies.

3.02. Upon the occurrence of any default hereunder, or under the Note, the Loan Agreement or any other documents executed in connection herewith, then and in each such event, Beneficiary may declare all sums secured hereby immediately due and payable either by commencing an action to foreclose this Deed of Trust as a mortgage, or by the delivery to Trustee of a written declaration of default and demand for sale and of written notice of default and of election to cause the Property to be sold, which notice Trustee shall cause to be duly filed for record in case of foreclosure by exercise of the power of sale herein. Should Beneficiary elect to foreclose by exercise of the power of sale herein, Beneficiary shall also deposit with Trustee this Deed of Trust, the Note and such receipts and evidence of expenditures made and secured hereby as Trustee may require, and notice of sale having been given as then required by law and after lapse of such time as may then be required by law after recordation of such notice of default, Trustee, without demand on Trustor, shall sell the Property at the time and place of sale fixed by it in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee may postpone sale of all or any portion of the Property by public announcement at such time and place of sale, and from time

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Hale Lane Peek Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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to time thereafter may postpone such sale by public announcement at the time fixed by the preceding postponement. Trustee shall deliver to such purchaser its deed or deeds conveying the Property, or any portion thereof, so sold, but without any covenant or warranty, express or implied. The recitals in such deed or deeds of any matters or facts, shall be conclusive proof of the truthfulness thereof. Any person, including Trustor, Trustee or Beneficiary, may purchase at such sale.

3.03. Beneficiary, from time to time before Trustee's sale, may rescind any such notice of breach or default and of election to cause the Property to be sold by executing and delivering to Trustee a written notice of such rescission, which notice, when recorded, shall also constitute a cancellation of any prior declaration of default and demand for sale. The exercise by Beneficiary of such right of rescission shall not constitute a waiver of any breach or default then existing or subsequently occurring, or impair the right of Beneficiary to execute and deliver to Trustee, as above provided, other declarations of default and demand for sale, and notices of breach or default, and of election to cause the Property to be sold to satisfy the obligations hereof, nor otherwise affect any provision, agreement, covenant or condition of the Note, the Loan Agreement and/or of this Deed of Trust or any of the rights, obligations or remedies of the parties hereunder.

3.04. After deducting all costs, fees and expenses of Trustee and of this Trust, including the cost of evidence of title in connection with sale and attorneys' fees, Trustee shall apply the proceeds of sale as required by applicable law.

3.05. If Beneficiary at any time holds additional security for any obligations secured hereby, it may enforce the terms hereof or otherwise realize upon the same, at its option, either before or concurrently herewith or after a sale is made hereunder, and may apply the proceeds upon the indebtedness secured hereby without affecting the status of or waiving any right to exhaust all or any other security, including the security hereunder, and without waiving any breach or default or any right or power whether exercised hereunder or contained herein or in any such other security.

3.06. No remedy herein conferred upon or reserved to Trustee or Beneficiary is intended to be exclusive of any other remedy herein or by law provided or permitted, but each shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute. Every power or remedy given by this instrument to Trustee or Beneficiary or to which either of them may be otherwise entitled, may be exercised concurrently or independently, from time to time and as often as may be deemed expedient by Trustee or Beneficiary and either of them may pursue inconsistent remedies.

3.07. Subject to any notice requirement and opportunity to cure contained herein, in the event of a default hereunder, Beneficiary, as a matter of right and without notice to Trustor or anyone claiming under it, and without regard to the then value of the Property or the interest of

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Hale Lane Peek Demison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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Trustor therein, shall have the right to apply to any court having jurisdiction to appoint a receiver or receivers of the Property, and Trustor hereby irrevocably consents to such appointment and waives notice of any application therefor. Any such receiver or receivers shall have all the usual powers and duties of receivers in like or similar cases and all the powers and duties of Beneficiary in case of entry as provided herein and shall continue as such and exercise all such powers until the date of confirmation of sale of the Property unless such receivership is sooner terminated.

IV. COLLATERAL.

4.01. With respect to the security interest granted in paragraph 1.02, Beneficiary shall have all the rights and remedies granted to a secured party under Article 9 of the Uniform Commercial Code, as well as all other rights and remedies available at law or in equity. Trustor shall, upon the demand of Beneficiary, assemble all of such personal property and make it available to Beneficiary at the Property, which is hereby agreed to be reasonably convenient to Beneficiary. The proceeds of any sale of such personal property shall be applied first to the expenses of Beneficiary in retaking, holding, preparing for sale, selling or similar matters, including reasonable attorney's fees.

4.02. Until Beneficiary exercises its right to collect proceeds of the Collateral pursuant hereto, Trustor will collect with diligence any and all proceeds of the Collateral. Upon written request by Beneficiary, any proceeds received by Trustor shall be in trust for Beneficiary, and Trustor shall keep all such collections separate and apart from all other funds and property so as to be capable of identification as the property of Beneficiary and shall deliver such collections at such time as Beneficiary may request to Beneficiary in the identical form received, properly endorsed or assigned when required to enable Beneficiary to complete collection thereof.

4.03. Trustor shall (i) permit representatives of Beneficiary to inspect the Collateral and Trustor's books and records relating to the Collateral and make extracts therefrom and to arrange for verification of the amount of Collateral, under procedures acceptable to Beneficiary, at Trustor's expense; (ii) promptly notify Beneficiary of any attachment or other legal process levied against any of the Collateral and any information received by Trustor relative to the Collateral, Trustor's debtors or other persons obligated in connection therewith, which may in any way affect the value of the Collateral or the rights and remedies of Beneficiary in respect thereto; (iii) reimburse Beneficiary upon demand for any and all costs, including without limitation reasonable attorneys' and accountants' fees, and other expenses incurred in collecting any sums payable by Trustor under any obligation secured hereby, or in the checking, handling and collection of the Collateral and the preparation and enforcement of any agreement relating thereto; (iv) notify Beneficiary of each location at which the Collateral is or will be kept, other than for temporary processing, storage or similar purposes, and of any removal thereof to a new location, including without limitation each

office of Trustor at which records relating to the Collateral are kept; (v) provide, maintain and deliver to Beneficiary certificates of insurance insuring the Collateral against loss or damage by such risks and in such amounts, forms and by such companies as Beneficiary may require and with loss payable to Beneficiary, and in the event Beneficiary takes possession of the Collateral, the insurance policy or policies and any unearned or returned premium thereon shall at the option of Beneficiary become the sole property of Beneficiary; (vi) do all acts necessary to maintain, preserve and protect all Collateral, keep all Collateral in good condition and repair and prevent any waste or unusual or unreasonable depreciation thereof; and (vii) join with Beneficiary at its request from time to time in executing financing statements, amendments thereto and continuation statements, and pay the cost of the filing of the same whenever Beneficiary deems desirable, and execute and deliver to Beneficiary further documents and instruments and do such other acts and things as Beneficiary may reasonably request in order to effectuate fully the purposes and intent hereof. Trustor hereby authorizes Beneficiary to file financing statements, amendments and continuation statements in such filing offices as Beneficiary deems appropriate in connection with the security interest granted herein.

4.04. Beneficiary may at any time, without prior notice to Trustor, collect proceeds of the Collateral and may give notice of assignment to any and all of Trustor's debtors, and Trustor does hereby irrevocably constitute and appoint Beneficiary its true and lawful attorney-in-fact to enforce in Trustor's name or in Beneficiary's name or otherwise all rights of Trustor in the Collateral and to do any and all things necessary and proper to carry out the purposes hereof; provided, however, Trustor shall have the right to collect, retain, use and enjoy such proceeds subject to the terms hereof and the documents securing Trustor's obligations thereunder prior to any default under the Loan Agreement or any of said documents. It is hereby recognized that the power of attorney herein granted is coupled with an interest and shall not be revocable and Beneficiary shall have the right to exercise this power of attorney upon any default under the Loan Agreement, hereunder or any of the documents securing Trustor's obligations thereunder. (Beneficiary shall promptly notify Trustor of any action taken by Beneficiary pursuant to this provision but Beneficiary's failure to do so shall not invalidate any such act, affect any of Trustor's obligations to Beneficiary or give rise to any right, claim or defense on the part of Trustor).

V. MISCELLANEOUS PROVISIONS.

5.01. By accepting payment of any sum secured hereby after its due date or in an amount less than the sum due, Beneficiary does not waive its rights either to require prompt payment when due of all other sums so secured or to declare a default as herein provided for failure to pay the total sum due.

5.02. At any time, or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed of Trust and the Note for

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Hale Lane Peck Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby or the effect of this Deed of Trust upon the remainder of the Property, Trustee may: reconvey any part of the Property; consent in writing to the making of any map or plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating the lien or charge hereof.

5.03. Beneficiary 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 this Deed of Trust.

5.04. Beneficiary is authorized by itself, its agents, employees or workmen, to enter at any reasonable time upon any part of the Property for the purpose of inspecting the same, and for the purpose of performing any of the acts it is authorized to perform under the terms of the Loan Agreement and this Deed of Trust.

5.05. Subject to the provisions of Paragraph 2.26 hereof, this Deed of Trust applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. The term "Beneficiary" shall mean the owner and holder, including pledgees, of the Note, now or hereafter and whether or not named as Beneficiary herein. In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

5.06. Trustee, upon presentation to it of an affidavit signed by or on behalf of Beneficiary, setting forth any fact or facts showing a default by Trustor under any of the terms or conditions of this Deed of Trust, is authorized to accept as true and conclusive all facts and statements in such affidavit and to act hereunder in complete reliance thereon.

5.07. If any provision hereof should be held unenforceable or void, then such provision shall be deemed separable from the remaining provisions and shall in no way affect the validity of this Deed of Trust.

5.08. Trustee accepts this Trust when this Deed of Trust, duly executed and acknowledged, is made a public record as provided by law. The Trust created hereby is irrevocable by Trustor.

5.09. Trustee shall be under no obligation to notify any party hereto of any action or proceeding of any kind in which Trustor, Beneficiary and/or Trustee shall be a party, unless brought by Trustee, or of any pending sale under any other deed of trust.

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Hale Lunc Peck Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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5.10. Beneficiary may, from time to time, by a written instrument executed and acknowledged by Beneficiary and recorded in the county or counties where the Property is located, substitute a successor or successors for the Trustee named herein or acting hereunder.

5.11. The right to plead any and all statutes of limitation as a defense to any demand secured by this Deed of Trust is hereby waived to the full extent permitted by law.

5.12. All notices hereunder shall be deemed to have been duly given if personally delivered or mailed by United States registered or certified mail, with return receipt requested, postage prepaid to the parties at the following addresses (or at such other addresses as shall be given in writing upon any party to the others) and shall be deemed complete upon any such mailing:

To Trustor: R & S St. Rose, LLC
3110 S. Durango Drive, Suite 203
Las Vegas, Nevada 89117

To Beneficiary: Colonial Bank, N.A.
4670 S. Fort Apache, Suite 250
Las Vegas, Nevada 89147

5.13. Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to Trustor at the address set forth above.

5.14. Upon written request of Beneficiary stating that all sums secured hereby have been paid and upon surrender to Trustee of this Deed of Trust and the Note for cancellation and retention and upon payment of its fees, Trustee shall reconvey, without warranty, the Property then held hereunder. The recitals in such reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons legally entitled thereto."

5.15. Without affecting the liability or obligations of any person, including Trustor, for the performance of any obligations secured hereby (excepting only any person or property otherwise expressly released in writing by Beneficiary), Beneficiary may from time to time and without notice release any person liable for payment of any of said indebtedness or the performance of said obligations, extend the time of payment or otherwise alter the terms of any of said obligations, accept additional security therefor of any kind, including trust deeds or mortgages, or alter, substitute or release any property securing said obligations.

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Hale Lane Peek Dennison and Howard
Attorneys and Counsellors at Law
Reno, Nevada
(775) 327-3000

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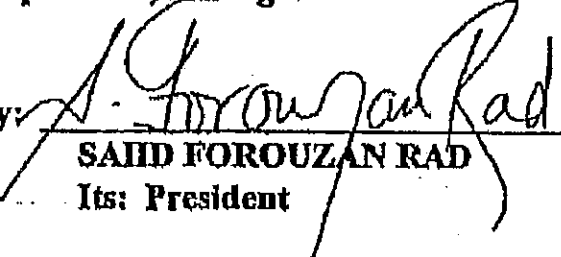
5.16. The provisions of this Deed of Trust governing the contractual rights and obligations of Trustor, Beneficiary and Trustee shall be construed according to the laws of the State of Nevada. The provisions of this Deed of Trust are intended to be supplemental and in addition to the provisions contained in the Loan Agreement. Any assignment of this Deed of Trust shall be considered an assignment of the Note and the Loan Agreement.

5.17. This Deed of Trust may be executed in counterparts, all of which executed counterparts shall together constitute a single document. Signature pages may be detached from the counterparts and attached to a single copy of this document to physically form one document.

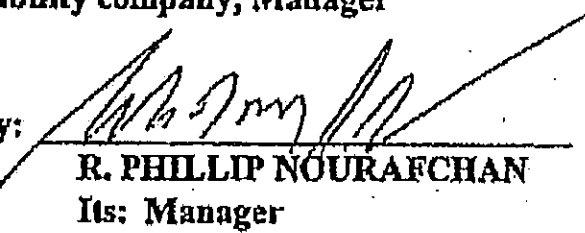
IN WITNESS WHEREOF, Trustor has executed this Deed of Trust and Security Agreement and Fixture Filing with Assignment of Rents as of the day first written above.

R & S ST. ROSE, LLC, a Nevada
limited liability company

By: FOROUZAN INC., a Nevada
corporation, Manager

By: 
SAID FOROUZAN RAD
Its: President

By: RPN, LLC, a Nevada limited
liability company, Manager

By: 
R. PHILLIP NOURAFCHAN
Its: Manager

"Trustor"

CLARIFICATION COPY

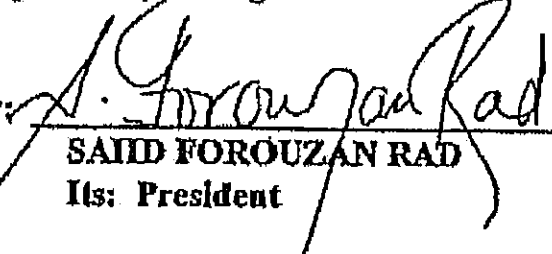
5.16. The provisions of this Deed of Trust governing the contractual rights and obligations of Trustor, Beneficiary and Trustee shall be construed according to the laws of the State of Nevada. The provisions of this Deed of Trust are intended to be supplemental and in addition to the provisions contained in the Loan Agreement. Any assignment of this Deed of Trust shall be considered an assignment of the Note and the Loan Agreement.

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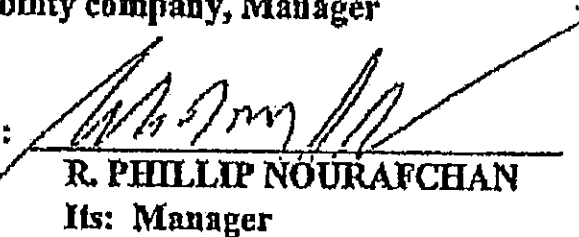
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**R & S ST. ROSE, LLC, a Nevada
limited liability company**

By: **FOROUZAN INC., a Nevada
corporation, Manager**

By: 
SAID FOROUZAN RAD
Its: President

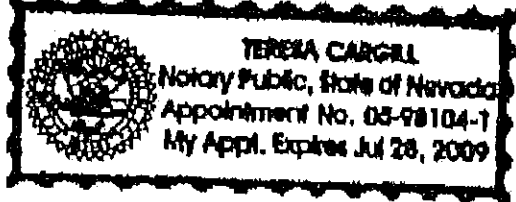
By: **RPN, LLC, a Nevada limited
liability company, Manager**

By: 
R. PHILLIP NOURAFCHAN
Its: Manager

"Trustor"

STATE OF NEVADA)
)ss.
COUNTY OF CLARK)

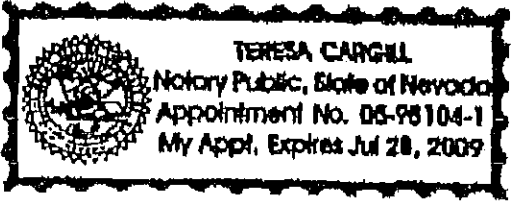
This instrument was acknowledged before me on July 30, 2007, by
Saïd Forouzan Rad, as President of Forouzan Inc., Manager of R & S St. Rose, LLC.



Teresa Cargill
Notary Public
My Commission Expires: 7/28/09

STATE OF NV)
)ss.
COUNTY OF Clark)

This instrument was acknowledged before me on July 30, 2007, by R.
Phillip Nourafchan, as Manager of RPN, LLC, Manager of R & S St. Rose, LLC.

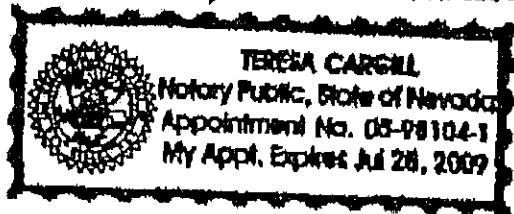


Teresa Cargill
Notary Public
My Commission Expires: 7/28/09

CLARIFICATION COPY

STATE OF NEVADA)
)ss.
COUNTY OF CLARK)

This instrument was acknowledged before me on July 30, 2007, by
Said Forouzan Rad, as President of Forouzan Inc., Manager of R & S St. Rose, LLC.



Teresa Cargill
Notary Public
My Commission Expires: 7/28/09

STATE OF NV)
)ss.
COUNTY OF Clark)

This instrument was acknowledged before me on July 30, 2007, by R.
Phillip Nourafchan, as Manager of RPN, LLC, Manager of R & S St. Rose, LLC.



Teresa Cargill
Notary Public
My Commission Expires: 7/28/09

EXHIBIT "A"
LEGAL DESCRIPTION

PARCEL I:

THAT PORTION OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26,
TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA,
DESCRIBED AS FOLLOWS:

LOT 4-3 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS,
PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY,
NEVADA.

PARCEL II:

THAT PORTION OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26,
TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA,
DESCRIBED AS FOLLOWS:

LOT 4-4 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS,
PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY,
NEVADA.

PARCEL III:

THE WEST HALF (W ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE
NORTHWEST QUARTER (NW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF
THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH,
RANGE 61 EAST, M.D.M.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK
COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED
FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL
RECORDS.

FURTHER EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO
CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED
RECORDED JANUARY 27, 1998 IN BOOK 980127 AS INSTRUMENT NO. 01298
OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY
CLARK COUNTY IN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK
20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

CB 000793

CLTIC000458

AA0397

Order No. 07-02-0978-BB

PARCEL IV:

THE EAST HALF (E ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE NORTHWEST QUARTER (NW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA.

EXCEPTING THEREFROM THAT PORTION CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

PARCEL V:

SOUTHEAST QUARTER (SE ¼) OF THE NORTHWEST QUARTER (NW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF BRUCE STREET AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED DECEMBER 24, 1997 IN BOOK 971224 AS INSTRUMENT NO. 00917 AND RE-RECORDED APRIL 9, 1998 IN BOOK 980409 AS INSTRUMENT NO. 01289 AND RE-RECORDED OCTOBER 12, 1998 IN BOOK 981012 AS INSTRUMENT NO. 00903 AND RE-RECORDED DECEMBER 8, 1998 IN BOOK 981208 AS INSTRUMENT NO. 00688 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

CB 000794

CLTIC000459

AA0398

PARCEL VI:

THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., LYING NORTHEASTERLY OF THE NORTHEASTERLY RIGHT OF WAY LINE OF SPENCER STREET AS LOCATED ON THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 30, 1998 IN BOOK 980130 AS INSTRUMENT NO. 01806, OFFICIAL RECORDS.

PARCEL VII:

THAT PORTION OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.B. & M., CLARK COUNTY, NEVADA, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER (NE COR.) OF THE SOUTH HALF (S ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 26; THENCE SOUTH 00°21'02" WEST ALONG THE EAST LINE THEREOF, 98.88 FEET TO A POINT ON THE NORTHWESTERLY EASEMENT LINE OF LAKE MEAD DRIVE (ST. ROSE PARKWAY) (300.00 FEET WIDE); THENCE SOUTH 48°18'18" WEST ALONG SAID NORTHWESTERLY EASEMENT LINE 423.23 FEET; THENCE NORTH 41°42'17" WEST, 304.80 FEET; THENCE CURVING TO THE RIGHT ALONG THE ARC OF A 1080.00 FOOT RADIUS CURVE CONCAVE NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 02°37'57", AN ARC LENGTH OF 49.62 FEET TO A POINT ON THE NORTH LINE OF THE SAID SOUTH HALF (S ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 26, A RADIAL LINE TO SAID POINT BEARS SOUTH 50°55'40" WEST; THENCE SOUTH 89°21'22" EAST ALONG SAID NORTH LINE, 417.18 FEET TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 30, 1998 IN BOOK 980130 AS INSTRUMENT NO. 01321 OF OFFICIAL RECORDS.

NOTE: THE ABOVE METES AND BOUNDS DESCRIPTION APPEARED PREVIOUSLY IN THAT CERTAIN DOCUMENT RECORDED MAY 5, 1998 IN BOOK 980505 AS INSTRUMENT NO. 02057, OFFICIAL RECORDS.

CB 000795

CLTIC000460

AA0399

Order No. 07-02-0978-BB

PARCEL VIII:

THAT PORTION OF THE SOUTH HALF (S ½) OF THE SOUTHEAST QUARTER (SE ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA, LYING NORTHWESTERLY OF THE NORTHWESTERLY LINE OF LAKE MEAD DRIVE (NOW KNOWN AS ST. ROSE PARKWAY) AS THE SAME NOW EXISTS.

CB 000796

CLTIC000461

AA0400

EXHIBIT "B"
RELEASE SCHEDULE

Until such time as the Beneficiary has received \$24,000,000.00 in principal reduction payments under the Note, the release price for each parcel shall be an amount equal to one hundred percent (100%) of the net sale proceeds from the sale of such parcel to a third party, but in no event less than \$1,234,548.75 per acre, or portion thereof, as reasonably determined by Beneficiary. Thereafter, the release price shall be in an amount equal to \$1,543,185.93 per acre, or portion thereof, as reasonably determined by Beneficiary.

For purposes hereof, the term "net sale proceeds" shall mean the gross sales price of a parcel less reasonable and customary closing costs and commissions to the extent actually incurred by Trustor.

EXHIBIT G

20070924-0000452

Fee: \$14.00
N/C Fee: \$0.00

09/24/2007 09:04:23
T20070170467

Requestor:
NEVADA TITLE COMPANY

Debbie Conway SOL
Clark County Recorder Pgs: 1

A.P.N: 177-26-701-019
177-26-801-011 and 016
Ref#: Recon-09-2007

When Recorded Mail To:
Colonial Bank
4670 S. Fort Apache Suite 250
Las Vegas, NV 89126

THE UNDERSIGNED HEREBY AFFIRMS THAT THERE IS NO SOCIAL SECURITY
NUMBER CONTAINED IN THIS DOCUMENT

FULL RECONVEYANCE

Nevada Title Company, a Nevada Corporation, Trustee under that certain Deed of Trust executed by R & s ST. ROSE, LLC, A NEVADA LIMITED LIABILITY COMPANY, Trustor(s), recorded in Book 20050826, Instrument No. 05282 of Official Records, in the office of the County Recorder of Clark County, State of Nevada, having been requested in writing, by the holder of the obligation secured by said Deed of Trust, to reconvey the estate granted to trustee under said Deed of Trust, DOES HEREBY RECONVEY to the person or persons legally entitled thereto, without warranty, all the estate, title, and interest acquired by Trustee under said Deed of Trust.

IN WITNESS WHEREOF, NEVADA TITLE COMPANY, has caused its corporate name and seal to be hereto affixed by its Authorize Officer thereunto duly authorized on date shown in the acknowledgement certificate shown below.

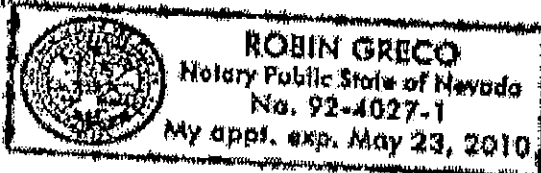
NEVADA TITLE COMPANY

BY: Sue Dudzinski
Sue Dudzinski, Vice President

State of NEVADA)
County of CLARK)

On September 20, 2007, personally appeared before me, a Notary Public, Sue Dudzinski, Vice President, personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that she executed the above instrument.

Notary Public



AA0403

EXHIBIT H

ORIGINAL

FILED

Nov 3 11 25 AM '08

E. J. [Signature]
CLERK OF THE COURT

1 **COMP**

2 Robert E. Murdock, Esq.
3 Nevada Bar No. 4013
4 MURDOCK & ASSOCIATES, CHTD.
5 520 South Fourth Street
6 Las Vegas, NV 89101
7 (702) 384-5563
8 Plaintiff in Pro Per

9 Eckley M. Keach, Esq.
10 Nevada Bar No. 1154
11 ECKLEY M. KEACH, CHTD.
12 520 South Fourth Street
13 Las Vegas, NV 89101
14 (702) 384-5563
15 Plaintiff in Pro Per

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

14 **ROBERT E. MURDOCK and**
15 **ECKLEY M. KEACH,**

16 Plaintiffs,

17 vs.

18 **SAHD FOROUZAN RAD, an individual;**
19 **R. PHILLIP NOURAFCHAN, an individual;**
20 **FOROUZAN, INC., a Nevada corporation;**
21 **RPN LLC, a Nevada limited liability**
22 **company; R & S ST. ROSE LLC, a Nevada**
23 **limited liability company; R & S ST.**
24 **ROSE LENDERS, LLC and DOES I**
25 **through X, inclusive,**

26 Defendants.

CASE NO.
DEPT. NO.

**COMPLAINT IN
BUSINESS COURT**

A5748S2
X1

25 COME NOW Plaintiffs in Pro Per Robert E. Murdock and Eckley M. Keach and hereby
26 allege as follows:

- 27 1. Plaintiff Robert E. Murdock is a resident of Las Vegas, Clark County, Nevada.
- 28 2. Plaintiff Eckley M. Keach is a resident of Las Vegas, Clark County, Nevada.

RECEIVED
NOV 03 2008
CLERK OF THE COURT

AA0405

1 3. Upon information and belief, Defendant Saiid Forouzan Rad (hereafter referred to
2 as "Rad") is a resident of Las Vegas, Clark County, Nevada, who lists his business address with the
3 Nevada Secretary of State as 3110 South Durango Drive, Las Vegas, Nevada 89117.

4 4. Upon information and belief, Defendant R. Phillip Nourafchan (hereafter referred to
5 as "Nourafchan") is a resident of Las Vegas, Clark County, Nevada, who lists his business address
6 with the Nevada Secretary of State as 3110 South. Durango Drive, Las Vegas, Nevada 89117.

7 5. Upon information and belief, Defendant Forouzan, Inc. is a Nevada corporation
8 created by Rad in September 2002 and does business in Nevada and which lists its business address
9 with the Nevada Secretary of State as 3110 South Durango Drive, Las Vegas, Nevada 89117.

10 6. Upon information and belief, Defendant RPN LLC is a Nevada limited liability
11 corporation created by Nourafchan in November 1999 and does business in Nevada and which lists
12 its business address with the Nevada Secretary of State as 3110 South Durango Drive, Las Vegas,
13 Nevada 89117.

14 7. Upon information and belief, Defendant R & S St. Rose LLC (hereafter referred to
15 as "R & S") is a Nevada limited liability corporation created by Nourafchan and Rad on July 13,
16 2005 and does business in Nevada, with Nourafchan and Rad acting as Managers of the entity
17 through their corporate shells, Defendant Forouzan, Inc. and Defendant RPN LLC, and which lists
18 its business address with the Nevada Secretary of State as 3110 South Durango Drive, Las Vegas,
19 Nevada 89117.

20 8. Upon information and belief, Defendant R & S St. Rose Lenders, LLC (hereafter
21 referred to as "Lenders") is a Nevada limited liability corporation created by Nourafchan and Rad
22 on August 2, 2005 and does business in Nevada, with Nourafchan and Rad acting as Managers of
23 the entity through their corporate shells, Defendant Forouzan, Inc. and Defendant RPN LLC, and
24 which lists its business address with the Nevada Secretary of State as 3110 South Durango Drive,
25 Las Vegas, Nevada 89117.

26 9. The true names or capacities, whether individual, corporate, associate or otherwise,
27 of Defendants Does I through X, inclusive, are unknown to Plaintiffs, who therefore sue said
28 Defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that each

1 of the Defendants designated herein as Doe is responsible in some manner for the events and
2 happenings referred to herein and caused injury and damages proximately thereby to Plaintiffs as
3 herein alleged. Plaintiffs will ask leave of court to amend this Complaint to insert the true names
4 and capacities of said Defendants Does I through X, inclusive, when same have been ascertained by
5 Plaintiffs, together with appropriate charging allegations and to join such defendants in this action.

6 10. At all times mentioned herein, Defendants, and each of them, were acting as the
7 agents, servants and/or employees of one another and performed the acts described herein in such
8 capacity, and that the acts complained of by Plaintiffs against Defendants were performed by
9 Defendants and/or Defendants' agents with the consent and approval of Defendants.

10 11. Upon information and belief, Rad is the alter ego of Defendant Forouzan, Inc.

11 12. Upon information and belief, Nourafchan is the alter ego of Defendant RPN LLC.

12 13. Upon information and belief, Rad and Nourafchan are the alter egos of Defendant R
13 & S St. Rose LLC.

14 14. Upon information and belief, Rad and Nourafchan are the alter egos of Defendant R
15 & S St. Rose Lenders, LLC.

16 15. In August 2005, Plaintiffs were solicited to participate in a real estate transaction with
17 Defendants Rad and Nourafchan concerning 38 acres located at St. Rose Parkway and Spencer Road,
18 hereafter referred to as the "Property."

19 16. The nature of the transaction was that Defendants Rad and Nourafchan were going
20 to buy the Property, hold it for a year, and then sell it to Centex Homes.

21 17. Plaintiffs were led to believe the purchase price was to be approximately
22 \$45,000,000.00.

23 18. Colonial Bank was going to loan Defendants Rad and Nourafchan approximately
24 \$28,000,000.00 and receive a Promissory Note Secured by a First Deed of Trust.

25 19. Plaintiffs and other investors were going to loan Defendants Rad and Nourafchan
26 approximately \$12,000,000.00 and each investor was going to receive a Promissory Note Secured
27 by a Second Deed of Trust, and Centex Homes was to deposit approximately \$8,000,000.00.

28 //

1 20. Upon information and belief, the purchase price told to Plaintiffs was incorrect, the
2 actual amount of the loans told to Plaintiffs was incorrect, the actual amount of money received by
3 Defendants as told to Plaintiffs was incorrect, that these inaccuracies inured to the benefit of
4 Defendants without the knowledge or consent of Plaintiffs and that Defendants have not properly
5 accounted to Plaintiffs for the money.

6 21. From September 1, 2005 until November 30, 2006, Plaintiffs were supposed to
7 receive monthly interest payments as set forth in their respective Promissory Notes Secured by a
8 Second Deed of Trust.

9 22. Then, on November 30, 2006, Plaintiffs were supposed to receive all of their principal
10 back.

11 23. Based upon this understanding, Plaintiff Murdock loaned Defendants Rad and
12 Nourafchan \$100,000.00 on or about August 23, 2005 by wiring this amount of money to Colonial
13 Bank in Las Vegas, Nevada, to an account for the benefit of Defendants Rad and Nourafchan which
14 was titled in the name of Defendant R & S St. Rose LLC.

15 24. Based upon this understanding, Plaintiff Keach loaned Defendants Rad and
16 Nourafchan \$500,000.00 on or about August 23, 2005 by wiring this amount of money to Colonial
17 Bank in Las Vegas, Nevada, to an account for the benefit of Defendants Rad and Nourafchan which
18 was titled in the name of Defendant R & S St. Rose LLC.

19 25. Thereafter, on or about September 6, 2005, Defendants Rad and Nourafchan mailed
20 to Plaintiffs their respective Promissory Notes.

21 26. The Promissory Note indicated it was "Secured By Deed of Trust" and that Plaintiff
22 Murdock was the lender.

23 27. The Promissory Note indicated it was "Secured By Deed of Trust" and that Plaintiff
24 Keach was the lender.

25 28. In both Promissory Notes, however, the Borrower was identified as Defendant R &
26 S St. Rose Lenders, LLC, notwithstanding the fact that Plaintiffs' money was wired to and loaned
27 to Defendant R & S St. Rose LLC.

28 //

1 29. Furthermore, the cover letter accompanying the Promissory Notes indicated that the
2 Deed of Trust and an Operating Agreement for Defendant R & S St. Rose Lenders, LLC would be
3 forthcoming.

4 30. The fact that Lender was substituted for R & S is significant because the Property was
5 being purchased by R & S, Plaintiffs' money was wired to R & S, and the only entity that could give
6 Plaintiffs a Deed of Trust on the Property was R & S.

7 31. Although the Promissory Notes state on their face that they are "Secured By Deed Of
8 Trust," this was a false representation due to the fact that Lender was identified as the Borrower and
9 Lender did not own the Property.

10 32. These facts concerning the true ownership of the Property were not disclosed to
11 Plaintiffs.

12 33. Plaintiffs would not have loaned R & S money if Plaintiffs were not going to be
13 properly secured by a Deed of Trust, as was clearly represented by Defendants.

14 34. In the fall of 2006, Defendants notified Plaintiffs that Centex Homes was not going
15 to be able to purchase the Property on September 1, 2006 as it had planned and Defendants requested
16 that each Plaintiff execute an extension to the Promissory Note which was due and payable on
17 November 1, 2006.

18 35. Plaintiff Keach refused to execute the extension as requested.

19 36. On November 30, 2006, Defendants did not repay the Promissory Notes as required
20 by the express terms of the Notes, and the Promissory Notes remain unpaid as of the filing of this
21 Complaint even though Plaintiffs have fully performed all obligations required of them.

22 37. Plaintiffs have demanded repayment on the Promissory Notes, yet Defendants have
23 failed and refuse, and continue to fail and refuse, to perform as required under the terms of the Notes.

24 38. The Promissory Notes contain specific provisions for costs, fees, late charges, interest
25 rates and damages when the Notes are in default, all to Plaintiffs' benefit.

26 39. In mid-year 2007, Defendants have again asked Plaintiffs to execute documents
27 allowing Defendants to refinance the debt obligations Defendants have regarding the Property, which
28 requests Plaintiffs have refused.

1 40. Unbeknownst to Plaintiffs until the end of the summer of 2008, and without
2 Plaintiffs' knowledge or consent, Defendants executed a new Note Secured by First Deed of Trust
3 in favor of Colonial Bank in approximately July 2007 for a substantially greater amount than the
4 original note held by Colonial Bank which was designed to further dilute Plaintiffs' position.

5 41. Although it is true that Colonial Bank had a First Deed of Trust on September 1,
6 2005, which was superior to the Second Deed of Trust that was supposed to secure Plaintiffs'
7 Promissory Notes, the September 1, 2005 First Deed of Trust was canceled in July 2007 and replaced
8 with a new First Deed of Trust dated July 2007.

9 42. The First Deed of Trust dated July 2007 currently held by Colonial Bank is
10 subordinate to the obligations owed by Defendants to Plaintiffs which were in default since
11 November 1, 2006, and were in default in July 2007 when Colonial Bank obtained the First Deed
12 of Trust dated July 2007.

13 43. Upon information and belief, Colonial Bank was on notice of the rights of Plaintiffs
14 and the obligations of Defendants to Plaintiffs when it canceled the September 2005 First Deed of
15 Trust and replaced it with the First Deed of Trust dated July 2007.

16 44. As such, Plaintiffs' position regarding the Property which was of record since
17 September 1, 2005 is superior to that of Colonial Bank by virtue of its First Deed of Trust dated July
18 2007.

19 45. At a foreclosure sale of the Property, Defendants' obligation to Plaintiffs must be
20 satisfied before Defendants' obligation to Colonial Bank.

21 46. Plaintiffs are informed and believe that Defendants are again trying to renegotiate the
22 debt with Colonial Bank or to execute another note in favor of another bank or entity, in order to
23 obtain even more money from them, and to place even more debt on the Property by executing
24 another Deed of Trust for an even larger amount of money as, once again, in September 2008,
25 Defendants have requested that Plaintiffs execute documents that would allow Defendants to enter
26 into yet another new First Deed of Trust so that Defendants place an even larger debt obligation on
27 the Property, and wish to have Plaintiffs modify the loan terms which Plaintiffs have decided not to
28 do.

1 47. By virtue of the fact that Defendants agreed that Plaintiffs were to have a Deed of
2 Trust to secure their investment, and Plaintiffs relied upon this, Plaintiffs are entitled to a Lis
3 Pendens on the Property pending the outcome of this lawsuit to protect their interest in the land.

4 48. Defendants have shown by their conduct that they are not fit to manage the Property,
5 and they should be prohibited from taking any action that encumbers the Property.

6 49. As a further direct and proximate result of the conduct of Defendants, and each of
7 them, Plaintiffs have suffered damages in an amount in excess of \$10,000.00, and in an amount to
8 be proved at trial.

9 50. As a further direct and proximate result of the conduct of Defendants, and each of
10 them, and in addition to all other damages to which Plaintiffs are entitled, Plaintiffs are entitled to
11 late charges, default interest rates and attorney fees, all in an amount in excess of \$10,000.00.

12 51. As a further direct and proximate result of the conduct of Defendants, and each of
13 them, Plaintiffs are entitled to all costs of collection and attorney's fees, all in an amount in excess
14 of \$10,000.00.

15 52. The conduct, actions and breaches by Defendants, as herein alleged, were intentional,
16 willful, wanton, oppressive, malicious, and with a conscious disregard to the rights of Plaintiffs and
17 of the possible results of such actions, Plaintiffs seek exemplary and punitive damages in an amount
18 in excess of \$10,000.00.

19 WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as
20 follows:

21 1. For general and special damages in an amount in excess of \$10,000.00;

22 2. For immediate repayment of the principal loaned by Plaintiffs to Defendants in an
23 amount in excess of \$10,000.00;

24 3. For all unpaid interest and default interest in an amount in excess of \$10,000.00;

25 4. For all costs of collection in an amount in excess of \$10,000.00;

26 5. For an award for contractual and/or statutory attorney's fees in an amount in excess
27 of \$10,000.00;

28 6. For punitive damages in an amount in excess of \$10,000.00;

1 7. For a temporary, preliminary and permanent injunction prohibiting Defendants from
2 placing any further encumbrances, debt or mortgages on the Property;

3 8. For declaratory relief concerning the rights of Plaintiffs;

4 9. For an accounting of all moneys Defendants have received from all sources regarding
5 the Property and the disposition thereof;

6 10. For the appointment of a receiver to protect the Property from any further waste or
7 mismanagement;

8 11. For a lis pendens on the Property;

9 12. For a determination of alter ego status;

10 13. For an order of foreclosure to allow a forced sale of the Property and the Court
11 administered disposition of the proceeds; and

12 14. For such other and further relief this Court may deem just and proper.

13 MURDOCK & ASSOCIATES, CHTD.
14 ECKLEY M. KEACH, CHTD.

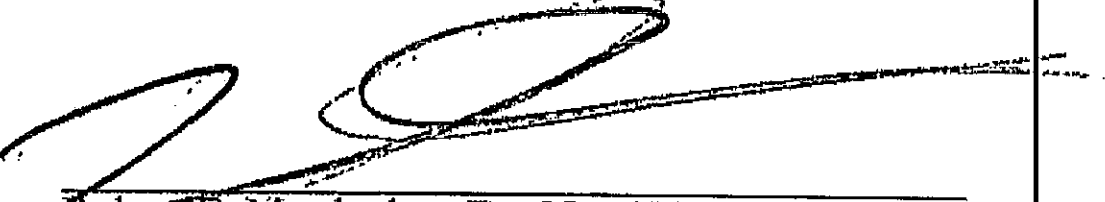
15 
16 _____
17 Robert E. Murdock Bar No. 4013
18 Eckley M. Keach Bar No. 1154
19 520 South Fourth Street
20 Las Vegas, NV 89101
21 Plaintiffs in Pro Per
22
23
24
25
26
27
28

EXHIBIT I

AA0413

ORIGINAL

8

1 **COMP**

2 Douglas D. Gerrard, Esq.

3 Nevada Bar No. 4613

4 Sheldon A. Herbert, Esq.

5 Nevada Bar No. 5988

6 **GERRARD COX & LARSEN**

7 2450 Saint Rose Pkwy., Suite 200

8 Henderson, NV 89074

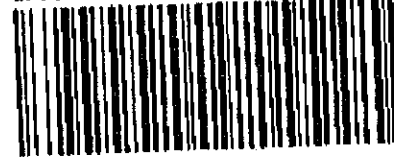
9 (702) 796-4000

10 Attorneys for Plaintiff,

11 **COLONIAL BANK, N.A.**

A-09-594512-C

218260



FILED

JUL 1 4 52 PM '09

[Signature]
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

12 COLONIAL BANK, N.A., an Alabama
13 corporation,

14 Plaintiff,

15 vs.

16 R&S ST. ROSE LENDERS, LLC, a Nevada
17 limited liability company, R&S ST. ROSE,
18 LLC, a Nevada limited liability company,
19 FOROUZAN, INC., a Nevada corporation,
20 RPN, LLC, a Nevada limited liability
21 company, SAID FOROUZAN RAD, an
22 individual, R. PHILLIP NOURAFCHAN,
23 an individual, DOES 1-10, and ROE
24 ENTITIES 1-10, inclusive,

25 Defendants.

Case No.: A-09-594512-C

Dept No.: VII

EXEMPT FROM ARBITRATION

PER NAR 3(A): Equitable and
Declaratory Relief; involves title to
real estate.

Date: N/A

Time: N/A

COMPLAINT

26 COMES NOW Plaintiff, COLONIAL BANK, N.A., an Alabama corporation
27 ("Colonial"), by and through its attorneys, GERRARD COX & LARSEN, and for its Complaint
28 against the Defendants, and each of them, alleges and avers as follows:

GENERAL ALLEGATIONS

1. Colonial is incorporated in the State of Alabama, 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.

\\

RECEIVED

JUL 01 2009

CLERK OF THE COURT

GERRARD, COX & LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000

AA0414

13

GERRARD, COX & LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000

2. Upon information and belief, Defendant R&S ST. ROSE LENDERS, LLC ("R&S Lenders") is organized in the State of Nevada with an interest in certain real property at issue in this case which is located in Clark County, Nevada.

3. Upon information and belief, Defendant R&S ST. ROSE, LLC ("R&S") is organized in the State of Nevada with an interest in certain real property at issue in this case which is located in Clark County, Nevada.

4. Upon information and belief, Defendant FOROUZAN, INC. ("Forouzan") is incorporated in the State of Nevada and doing business in Clark County, Nevada.

5. Upon information and belief, Defendant RPN, LLC ("RPN") is organized in the State of Nevada and doing business in Clark County, Nevada.

6. Upon information and belief, Defendant SAIID FOROUZAN RAD ("Rad") is a resident of Clark County, Nevada.

7. Upon information and belief, Defendant R. PHILLIP NOURAFCHAN ("Nourafchan") is a resident of Clark County, Nevada.

8. The true names and capacities, whether individual, corporate, associate, or otherwise of Defendant DOES 1-10, and ROE ENTITIES 1-10, inclusive, are not known to Plaintiff at this time and are therefore named as fictitious Defendants. Plaintiff is informed and believes, and upon such alleges, that each of the Defendants designated as a Doe, or a Roe Entity is responsible in some manner for the events and happenings referred to in this Amended Complaint. Plaintiff will ask leave of this Court to amend this Amended Complaint and insert the true names and capacities of said DOES 1-10, and ROE ENTITIES 1-10, inclusive, when the same have been ascertained by Plaintiff, together with the appropriate charging allegations, and to join these Defendants in this action.

9. On or about August 26, 2005, R&S was the owner of certain real property located in Clark County, Nevada (the "Property"), and more fully described as:

PARCEL I:

THAT PORTION OF THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA, DESCRIBED AS FOLLOWS:

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1 LOT 4-3 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS,
2 PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY,
3 NEVADA.

4 PARCEL II:

5 THAT PORTION OF THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26,
6 TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA,
7 DESCRIBED AS FOLLOWS:

8 LOT 4-4 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS,
9 PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY,
10 NEVADA.

11 PARCEL III:

12 THE WEST HALF (W1/2) OF THE SOUTHWEST QUARTER (SW1/4) OF THE
13 NORTHWEST QUARTER (NW 1/4) OF THE SOUTHWEST QUARTER (SW 1/4)
14 OF THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22
15 SOUTH, RANGE 61 EAST, M.D.M.

16 EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK
17 COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED
18 FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL
19 RECORDS.

20 FURTHER EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO
21 CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED
22 RECORDED JANUARY 27, 1998 IN BOOK 980127 AS INSTRUMENT NO. 01298
23 OF OFFICIAL RECORDS.

24 TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY
25 CLARK COUNTY IN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK
26 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

27 PARCEL IV:

28 THE EAST HALF (E 1/2) OF THE SOUTHWEST QUARTER (SW 1/4) OF THE
NORTHWEST QUARTER (NW 1/4) OF THE SOUTHWEST QUARTER (SW 1/4)
OF THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22
SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA.

EXCEPTING THEREFROM THAT PORTION CONVEYED TO CLARK COUNTY
BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY
9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY
CLARK COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN
BOOK 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

PARCEL V:

SOUTHEAST QUARTER (SE 1/4) OF THE NORTHWEST QUARTER (NW 1/4) OF
THE SOUTHWEST QUARTER (SW 1/4) OF THE SOUTHEAST QUARTER (SE 1/4)
OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK
COUNTY, NEVADA.

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EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF BRUCE STREET AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED DECEMBER 24, 1977 IN BOOK 971224 AS INSTRUMENT NO. 00917 AND RE-RECORDED APRIL 9, 1998 IN BOOK 980409 AS INSTRUMENT NO. 01289 AND RE-RECORDED OCTOBER 12, 1998 IN BOOK 981012 AS INSTRUMENT NO. 00903 AND RE-RECORDED DECEMBER 8, 1998 IN BOOK 981208 AS INSTRUMENT NO. 00688 OF OFFICIAL RECORDS.

TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

PARCEL VI:

THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHWEST QUARTER (SW ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., LYING NORTHEASTERLY OF THE NORTHEASTERLY RIGHT OF WAY LINE OF SPENCER STREET AS LOCATED ON THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 30, 1998 IN BOOK 980130 AS INSTRUMENT NO. 01806, OFFICIAL RECORDS.

PARCEL VII:

THAT PORTION OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.B. & M., CLARK COUNTY, NEVADA, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER (NE COR.) OF THE SOUTH HALF (S ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 26; THENCE SOUTH 00°21'02" WEST ALONG THE EAST LINE THEREOF, 98.88 FEET TO A POINT ON THE NORTHWESTERLY EASEMENT LINE OF LAKE MEAD DRIVE (ST. ROSE PARKWAY) (300.00 FEET WIDE); THENCE SOUTH 48°18'18" WEST ALONG SAID NORTHWESTERLY EASEMENT LINE 423.23 FEET; THENCE NORTH 41°42'17" WEST, 304.80 FEET; THENCE CURVING TO THE RIGHT ALONG THE ARC OF A 1080.00 FOOT RADIUS CURVE CONCAVE NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 02°37'57", AN ARC LENGTH OF 49.62 FEET TO A POINT ON THE NORTH LINE OF THE SAID SOUTH HALF (S ½) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHWEST QUARTER (SW ¼) OF THE SOUTHEAST QUARTER (SE ¼) OF SAID SECTION 26, A RADIAL LINE TO SAID POINT BEARS SOUTH 50°55'40" WEST; THENCE SOUTH 89°21'22" EAST ALONG SAID NORTH LINE, 417.18 FEET TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 30, 1998 IN BOOK 980130 AS INSTRUMENT NO. 01321 OF OFFICIAL RECORDS.

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1 NOTE: THE ABOVE METES AND BOUNDS DESCRIPTION APPEARED
2 PREVIOUSLY IN THAT CERTAIN DOCUMENT RECORDED MAY 5, 1998 IN
3 BOOK 980505 AS INSTRUMENT NO. 02057, OFFICIAL RECORDS.

4 PARCEL VIII:

5 THAT PORTION OF THE SOUTH HALF (S ½) OF THE SOUTHEAST QUARTER
6 (SE 1/4) OF THE SOUTHWEST QUARTER (SW 1/4) OF THE SOUTHEAST
7 QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST,
8 M.D.M., CLARK COUNTY, NEVADA, LYING NORTHWESTERLY OF THE
9 NORTHWESTERLY LINE OF LAKE MEAD DRIVE (NOW KNOWN AS ST. ROSE
10 PARKWAY) AS THE SAME NOW EXISTS.

11 LOT 12, BLOCK B, according to the Final Map of FARM LANE ESTATES
12 PHASE 1, filed in the Office of the County Recorder of Lyon County, Nevada
13 on January 15, 1998 as Document No. 214235.

14 APN #020-672-01.

15 10. On or about August 26, 2005, R&S obtained a loan from Plaintiff in the principal
16 amount of \$29,305,250.00 (the "First Colonial Loan").

17 11. On or about August 26, 2005, R&S executed a promissory note in favor of
18 Plaintiff in the principal amount of \$29,305,250.00 (the "First Colonial Note").

19 12. On or about August 26, 2005, R&S secured the First Colonial Loan and First
20 Colonial Note by recording a first position Deed of Trust against the Property in favor of
21 Plaintiff in the principal amount of \$29,305,250.00 as Document No. 05282 in Book 20050826
22 of the Official Records of Clark County, Nevada (the "First Colonial DOT").

23 13. On or about September 16, 2005, R&S recorded a second position Deed of Trust
24 against the Property in favor of Defendant R&S Lenders in the principal amount of
25 \$12,000,000.00 as Document No. 02881 in Book 20050916 in the Official Records of Clark
26 County, Nevada (the "R&S Lenders DOT").

27 14. Plaintiff is without information as to whether R&S Lenders paid any
28 consideration to R&S for the R&S Lenders DOT.

15. Upon information and belief, Defendants R&S and R&S Lenders are related
entities, each of which is owned and/or controlled by, Defendant Forouzan and Defendant RPN,
who are also the members/managers of both R&S and R&S Lenders.

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1 16. Upon information and belief, Defendant Rad is the president of Forouzan and
2 Nourafchan is the manager of RPN.

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

6 18. Pursuant to the R&S Lenders Subordination Agreement, R&S Lenders
7 recognized that the First Colonial DOT and its related loan was going to be modified to extend
8 the maturity date of the First Colonial Note, and acknowledged that Plaintiff was to always
9 retain a first position lien against the Property.

10 19. On or about July 27, 2007, Plaintiff agreed to make a development loan to R&S
11 in the amount of \$43,980,000.00 (the "Second Colonial Loan") to be secured by a first priority
12 lien against the Property.

13 20. The proceeds of the Second Colonial Loan were to be used to pay off the First
14 Colonial Loan and provide funds for construction of improvements on the Property.

15 21. It was understood and agreed-to, by all parties to this action, that Plaintiff was
16 to obtain a replacement first position lien against the Property to secure repayment of the Second
17 Colonial Loan, and that the R&S Lenders DOT would be released and reconveyed or
18 subordinated to the new construction loan deed of trust.

19 22. On or about July 27, 2007, R&S executed a promissory note in favor of Plaintiff
20 in the principal amount of \$43,980,000.00 (the "Second Colonial Note").

21 23. Defendants Rad and Nourafchan guaranteed the repayment of the Second R&S
22 Note.

23 24. On or about July 31, 2007, R&S recorded what was intended by Plaintiff to be
24 a new first position Deed of Trust against the Property in favor of Plaintiff in the principal
25 amount of \$43,980,000.00 as Document No. 0004824 in Book 20070731 of the Official Records
26 of Clark County, Nevada (the "Second Colonial DOT").

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1 35. The Second Colonial DOT is entitled to the same priority as the First Colonial
2 DOT to the extent of the terms of the First Colonial Loan.

3 36. Plaintiff's legal fees and costs in prosecuting this action are covered and secured
4 by its subrogated lien position in the same manner as if Plaintiff was defending its lien rights
5 under the First Colonial DOT.

6 **SECOND CAUSE OF ACTION**

7 **(Equitable Subrogation / Declaratory Relief)**

8 37. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1
9 through 36 of its Complaint and incorporates the same by this reference as if more fully set forth
10 herein.

11 38. At the time Plaintiff made the Second Colonial Loan, Plaintiff paid the entirety
12 of the First Colonial Loan and was promised repayment of the Second Colonial Loan and
13 reasonably expected to receive a security interest in the Property with the priority of the First
14 Colonial DOT and First Colonial Loan, which it was paying off.

15 39. Plaintiff is subrogated to all of the rights of the First Colonial Loan and the
16 First Colonial DOT and is entitled to the lien priority and all associated rights of the First
17 Colonial Loan and the First Colonial DOT, including the power of sale to foreclose its
18 subrogated position in the same manner as if it were the actual holder of the First Colonial Loan
19 and First Colonial DOT, and all interest and late charges called for under the First Colonial
20 Loan.

21 40. Plaintiff's subrogated lien position is in a senior position to the R&S Lenders
22 DOT, and all of R&S Lenders' interest and rights to the Property are subject to the Plaintiff's
23 lien.

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1 41. Plaintiff is entitled to a declaration that (i) it holds a first priority lien against
2 the Property which is governed by the loan documents of the First Colonial Loan and First
3 Colonial DOT; (ii) it has received an equitable assignment of all rights under the First Colonial
4 Loan and First Colonial DOT; and (iii) it can foreclose its equitably subrogated/assigned lien
5 using a non-judicial foreclosure in the same manner as if it was the beneficiary under the First
6 Colonial DOT.

7 42. Plaintiff's legal fees and costs in prosecuting this action are covered and
8 secured by its subrogated lien position in the same manner as if Plaintiff was defending its lien
9 rights under the First Colonial Loan and DOT.

10 43. R&S Lenders will not be prejudiced because it bargained for and received a
11 second
12 priority lien, which was at all times junior and subordinate to the First Colonial DOT.

13 **THIRD CAUSE OF ACTION**

14 **(Declaratory Relief/Quiet Title - Equitable Subordination)**

15 44. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1
16 through 43 of its Complaint and incorporates the same by this reference as if more fully set forth
17 herein.

18 45. Defendants have been unjustly enriched by virtue of the release of the First
19 Colonial DOT from the title to the Property.

20 46. Plaintiff was not acting as a volunteer when it paid off the First Colonial DOT.

21 47. Plaintiff was not primarily liable for the First Colonial DOT.

22 48. Plaintiff paid off the entire First Colonial DOT.

23 49. Plaintiff paid off the First Colonial DOT and released it from title to the Property
24 in reliance upon the representations and promises of the Defendants that they would release the
25 R&S Lenders DOT as a lien against the Property. Plaintiff would not have funded the Second
26 Colonial Loan or have released the First Colonial DOT had Plaintiff known that the Second
27 Colonial Loan would not be secured by a first priority lien against the Property.

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1 50. R&S Lenders is an insider to R&S, and both are controlled by the same people.

2 51. Upon information and belief, R&S Lenders paid no consideration or insufficient
3 consideration for the R&S Lenders DOT.

4 52. Equitable subordination of the R&S Lenders DOT to the Second Colonial DOT
5 will not work any injustice to the rights of the Defendants as they will be in the same position
6 they were in before the First Colonial DOT was paid off.

7 53. The Plaintiff has an inadequate remedy at law.

8 54. Plaintiff is entitled to an order subordinating the R&S Lenders DOT to the
9 Second Colonial DOT.

10 55. The Plaintiff has been required to hire an attorney to obtain the relief set forth
11 herein and as a result, is entitled to its attorneys fees and costs incurred.

12 **FOURTH CAUSE OF ACTION**

13 **(Unjust Enrichment)**

14 56. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1
15 through 55 of its Complaint and incorporates the same by this reference as if more fully set forth
16 herein.

17 57. Defendants received the benefit of the release of the First Colonial DOT and the
18 funding of the Second Colonial Loan.

19 58. Plaintiff was not acting as a volunteer, gratuitously, or officiously when it paid
20 off the First Colonial DOT.

21 59. It would be unjust and inequitable for Defendants to retain the benefit of the
22 Second Colonial Loan and the payoff of the First Colonial DOT.

23 60. Defendants should be compelled to disgorge the benefits they received from
24 Plaintiff.

25 61. Plaintiff has been required to retain the services of an attorney in order to
26 prosecute this matter, and Plaintiff is entitled to reasonable attorneys' fees and costs thereof.

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FIFTH CAUSE OF ACTION

(Fraudulent Misrepresentation)

62. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1 through 61 of its Complaint and incorporates the same by this reference as if more fully set forth herein.

63. Prior to closing the Second Colonial Loan, Defendants promised and represented that they would release and reconvey the R&S Lenders DOT if the transaction closed.

64. Plaintiff was unaware that Defendants statements, that they would release the R&S Lenders DOT, were false.

65. In reliance upon the representations of the Defendants, Plaintiff closed the escrow involving the Second Colonial Loan and released the First Colonial DOT.

66. As a direct and proximate result of the false representations of the Defendants, Plaintiff has been damaged in an amount in excess of \$10,000.00.

67. Defendants have acted intentionally, fraudulently, maliciously, and oppressively and they should be assessed with exemplary and punitive damages for their misconduct.

68. Plaintiff has been required to retain the services of an attorney in order to prosecute this matter, and Plaintiff is entitled to reasonable attorneys' fees and costs thereof.

SIXTH CAUSE OF ACTION

(Civil Conspiracy)

69. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1 through 68 of its Complaint and incorporates the same by this reference as if more fully set forth herein.

70. Upon information and belief, R&S, R&S Lenders, Forouzan, RPN, Rad, and/or Nourafchan conspired, agreed, and combined to cause Plaintiff to release the First Colonial DOT which was clearly in a first lien position against the Property with priority over the R&S Lenders DOT.

71. Defendants engaged in the forgoing conspiracy to induce Plaintiff into acting as it did.

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1 72. By making false representations about their intention to release the R&S Lenders
2 DOT, Defendants took steps in furtherance of their conspiracy and with the intent to defraud
3 Plaintiff.

4 73. Defendants have accepted and received the benefits of their illegal conspiracy
5 because the R&S Lenders DOT now appears in the public records of Clark County, Nevada as
6 a first position lien against the Property.

7 74. As a direct and proximate cause of R&S, R&S Lenders, Forouzan, RPN, Rad,
8 and/or Nourafchan's conspiracy, Plaintiff has been damaged in an amount in excess of Ten
9 Thousand Dollars (\$10,000.00), in an amount to be determined at trial.

10 75. As a direct and proximate cause of R&S, R&S Lenders, Forouzan, RPN, Rad,
11 and/or Nourafchan's conspiracy, Plaintiff has incurred special damages in the form of attorneys
12 fees and costs in an amount in excess of Ten Thousand Dollars (\$10,000.00), in an amount to
13 be determined at trial.

14 76. Defendants have acted intentionally, fraudulently, maliciously, and oppressively
15 and they should be assessed with exemplary and punitive damages for their misconduct.

16 WHEREFORE, Plaintiff prays for relief against Defendants as follows:

17 1. For an Order declaring that the Second Colonial DOT replaces and modifies the
18 First Colonial DOT, and is entitled to the same first position priority against title to the Property
19 and the right to non-judicially foreclose its interests in the First Colonial DOT;

20 2. For an Order declaring that the R&S Lenders DOT is either expunged from title
21 to the Property, or equitably subordinated to the Second Colonial DOT and junior in lien priority
22 with respect to title to the Property;

23 3. For an Order compelling Defendants to disgorge the benefits they unjustly
24 received in excess of \$10,000.00;

25 4. For general damages in an amount in excess of \$10,000.00;

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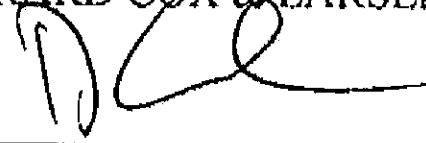
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5. For exemplary and punitive damages in an amount in excess of \$10,000.00;
 6. For attorneys fees and costs incurred in prosecuting this matter; and
 7. For such other and further relief as the Court deems appropriate in the premises.
- Dated this 18th day of July, 2009.

GERRARD COX & LARSEN



Douglas D. Gerrard, Esq.
Nevada Bar No. 4613
Sheldon A. Herbert, Esq.
Nevada Bar No. 5988
2450 Saint Rose Pkwy., Suite 200
Henderson, NV 89074
Attorneys for Plaintiff,
COLONIAL BANK, N.A.

EXHIBIT J

Skip to Main Content Logout My Account Search Menu New District Civil/Criminal Search Refine
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Location : District Court Civil/Criminal Help

REGISTER OF ACTIONS**CASE NO. A-09-594512-C**

Colonial Bank N.A., Plaintiff(s) vs. R&S St. Rose Lenders, LLC; R & S
St. Rose LLC; Fopouzan Inc; RPN LLC; Saïd Rad; R Nourafchan,
Defendant(s)

Case Type: Title to Property

Subtype: Quiet Title

Date Filed: 07/01/2009

Location: Department 11

Cross-Reference Case Number: A594512

RELATED CASE INFORMATION**Related Cases**

08A574852 (Consolidated)

PARTY INFORMATION

Defendant	Fopouzan Inc	Lead Attorneys Richard F. Holley Retained 7027910308(W)
Defendant	Nourafchan, R Phillip	Richard F. Holley Retained 7027910308(W)
Defendant	R & S St. Rose LLC	Julie L Sanpel Retained 7027377702(W)
Defendant	R&S St. Rose Lenders, LLC	David J Merrill Retained 702-566-1935(W)
Defendant	Rad, Saïd Forouzan	Richard F. Holley Retained 7027910308(W)
Defendant	RPN LLC	Richard F. Holley Retained 7027910308(W)
Plaintiff	Colonial Bank N.A.	Douglas D Gerrard Retained 7028949391(W)

EVENTS & ORDERS OF THE COURT

08/06/2009 **Motion to Consolidate** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Keach, E. & R & S St. Rose Motion to Consolidate A574852 & A594512

Minutes

08/06/2009 9:00 AM

- PLAINTIFFS' JOINDER TO MOTION TO CONSOSLIDATE...R & S
ST. ROSE, LLC'S JOINDER IN MOTION TO
CONSOLIDATE...DEFTS FOROUZAN RAD, R PHILLIPS
FOROUZAN, RPN LLC, AND R AND S INVESTMENT GROUP'S
MOTION TO CONSOLIDATE (A574852 & A594512): Colloquy
regarding bifurcation or segment trial if consolidated. Arguments by
Counsel. COURT ORDERED, Motion to Consolidate, GRANTED.
Upon Court's inquiry, Counsel noted it would be demanding a Jury;
Court directed Counsel to file their jury demand within 14 days. Court
noted the rule 16 Conference was held in this case (lead case), not in
the other case, and requested parties to have a conference and then
return to this Court. COURT ORDERED, matter set for a status check
regarding the status conference. Counsel to fax proposed schedules if
not agreed upon, by noon the day before.
*****A594512 CONSOLIDATED TO A574852 (LEAD

9/28/2016

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6898166&HearingID=93589851&SingleViewMode=Minutes>

CASE)*****
ALL FUTURE MINTUTES*****

Parties Present

Return to Register of Actions

EXHIBIT K

AA0430

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REGISTER OF ACTIONS**CASE No. A-09-594512-C**Colonial Bank N.A., Plaintiff(s) vs. R&S St. Rose Lenders, LLC; R & S
St. Rose LLC; Fopouzan Inc; RPN LLC; Saïd Rad; R Nourafchan,
Defendant(s)§
§
§
§
§
§Case Type: **Title to Property**
Subtype: **Quiet Title**
Date Filed: **07/01/2009**
Location: **Department 11**
Cross-Reference Case Number: **A594512****RELATED CASE INFORMATION****Related Cases**

08A574852 (Consolidated)

PARTY INFORMATION

Defendant	Fopouzan Inc	Lead Attorneys Richard F. Holley <i>Retained</i> 7027910308(W)
Defendant	Nourafchan, R Phillip	Richard F. Holley <i>Retained</i> 7027910308(W)
Defendant	R & S St. Rose LLC	Julie L Sanpei <i>Retained</i> 7027377702(W)
Defendant	R&S St. Rose Lenders, LLC	David J Merrill <i>Retained</i> 702-566-1935(W)
Defendant	Rad, Saïd Forouzan	Richard F. Holley <i>Retained</i> 7027910308(W)
Defendant	RPN LLC	Richard F. Holley <i>Retained</i> 7027910308(W)
Plaintiff	Colonial Bank N.A.	Douglas D Gerrard <i>Retained</i> 7028949391(W)

EVENTS & ORDERS OF THE COURT**DISPOSITIONS**

07/23/2010 **Order of Dismissal** (Judicial Officer: Gonzalez, Elizabeth)
Debtors: Colonial Bank N.A. (Plaintiff)
Creditors: RPN LLC (Defendant), R&S St. Rose Lenders, LLC (Defendant), R & S St. Rose LLC (Defendant), Fopouzan Inc (Defendant),
Saïd Forouzan Rad (Defendant), R Phillip Nourafchan (Defendant)
Judgment: 07/23/2010, Docketed: 08/10/2010
Comment: See Final Judgment filed in case A574852 on 07/23/2010

OTHER EVENTS AND HEARINGS

07/01/2009 **Complaint**
07/01/2009 **Initial Appearance Fee Disclosure**
07/01/2009 **Notice of Lis Pendens**
07/13/2009 **Affidavit**
Affidavit of Service
07/13/2009 **Affidavit**
Affidavit of Service
07/13/2009 **Affidavit**
Affidavit of Service
07/13/2009 **Affidavit**
Affidavit of Service
07/13/2009 **Affidavit**
Affidavit of Service
07/21/2009 **Affidavit of Service**

08/06/2009 **Affidavit of Service**
Motion to Consolidate (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Keach, E. & R & S St. Rose Motion to Consolidate A574852 & A594512
Parties Present
Minutes
 Result: Granted
 08/10/2009 **Initial Appearance Fee Disclosure**
 08/10/2009 **Motion to Dismiss**
Motion to Dismiss or in the Alternative Motion for A More Definite Statement
 08/11/2009 **Joinder**
Defendant R & S St. Rose Lenders, LLC's Joinder in Motion to Dismiss or, in the Alternative, Motion for a More Definite Statement
 08/11/2009 **Initial Appearance Fee Disclosure**
Defendant R & S St. Rose Lenders, LLC's Initial Appearance Fee Disclosure
 08/11/2009 **Initial Appearance Fee Disclosure**
Defendant R & S St. Rose Lenders, LLC's Initial Appearance Fee Disclosure
 08/14/2009 **Notice of Entry of Order**
Notice of Entry of Order (A594512)
 08/14/2009 **Motion to Dismiss**
Motion to Dismiss, or in the Alternative Motion for More Definite Statement Pursuant to NRCP 12 (e)
 08/18/2009 **Re-Notice**
 08/21/2009 **Joinder To Motion**
Defendant's Joinder to Motion to Dismiss or in the Alternative Motion for More Definite Statement
 08/24/2009 **Opposition to Motion to Dismiss**
Colonia Bank, N.A.'s Opposition to R & S St. Rose, LLC's Motion to Dismiss, or in the Alternative, Motion for a more Definite Statement and Countermotion for Partial Summary Judgment
 08/26/2009 **Brief**
Plaintiffs' Friend of the Court Brief Regarding Temporary Restraining Order and Preliminary Injunction Motions
 08/27/2009 **Opposition to Motion to Dismiss**
Colonial Bank NAs Opposition to Motion to Dismiss and Countermotion for Partial Summary Judgment
 08/28/2009 **Notice of Vacating Deposition**
Notice of Vacating Deposition of Person(s) Most Knowledgeable of Colonial Bancgroup Inc
 08/28/2009 **Notice of Vacating Deposition**
Notice of Vacating Deposition of R. Phillip Nourafchan
 08/28/2009 **Notice of Vacating Deposition**
Notice of Vacating Deposition of Said Rad
 09/01/2009 **Reply**
R & S St. Rose Lenders, LLC's Reply in Support of Application for: Temporary Restraining Order, on Shortened Time, and Motion for Preliminary Injunction
 09/02/2009 **Substitution of Attorney**
 09/03/2009 **Notice of Vacating Deposition**
Notice of Vacating Deposition of Person Most Knowledgeable of R&S St Rose Lenders LLC
 09/03/2009 **Notice of Vacating Deposition**
Notice of Vacating Deposition of Teresa Cargill
 09/03/2009 **Notice of Vacating Deposition**
Notice of Vacating Deposition of Brad Burns
 09/03/2009 **Notice of Vacating Deposition**
Notice of Vacating Deposition of Brenda Howarth
 09/10/2009 **Motion to Dismiss** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Deft R and S St. Rose LLC's Motion to Dismiss or in the Alternative Motion for A More Definite Statement
 09/10/2009 **Joinder** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Defendant R & S St. Rose Lenders, LLC's Joinder in Motion to Dismiss or, in the Alternative, Motion for a More Definite Statement
 09/10/2009 **Joinder** (9:00 AM) (Judicial Officer Gonzalez, Elizabeth)
Defendant's R & S St. Rose Lenders, LLC's Joinder to Motion to Dismiss or in the Alternative Motion for More Definite Statement
 09/10/2009 **Reply in Support**
Reply in Support of Motion to Dismiss or in the Alternative Motion for More Definite Statement Pursuant to NRCP 12(e)
 09/10/2009 **Reply to Opposition**
R&S St Rose LLC's Reply to Colonial Bank's Opposition to Motion to Dismiss, or in the Alternative, Motion for a More Definite Statement and Opposition to Countermotion for Partial Summary Judgment
 09/11/2009 **Joinder**
Defendant R&S St. Rose Lenders, LLC's Joinder in R&S St. Rose, LLC's Reply to Colonial Bank's Opposition to Motion to Dismiss, or in the Alternative, Motion for a More Definite Statement and Opposition to Countermotion for Partial Summary Judgment
 09/14/2009 **Notice of Taking Deposition**
Re-Notice of Taking Deposition of Brad Burns
 09/14/2009 **Notice of Taking Deposition**
Re-Notice of Taking Deposition of Said Rad
 09/14/2009 **Notice of Taking Deposition**
Re-Notice of Taking Deposition of Teresa Cargill
 09/14/2009 **Notice of Taking Deposition**
Re-Notice of Taking Deposition of R Phillip Nourafchan
 09/14/2009 **Notice of Taking Deposition**
Re-Notice of Taking Deposition of Person(s) Most Knowledgeable of Colonial Bancgroup Inc
 09/14/2009 **Notice of Taking Deposition**
Re-Notice of Taking Deposition of Person(s) Most Knowledgeable of R&S St Rose Lenders LLC
 09/14/2009 **Notice of Taking Deposition**
Re-Notice of Taking Deposition of Brandon Howarth
 09/15/2009 **Suggestion of Bankruptcy**
Suggestion of Bankruptcy and Notice of Automatic Stay
 09/17/2009 **Notice of Taking Deposition**
Notice of Taking Deposition of Custodian of Records of Douglas D Gerrard
 09/17/2009 **Notice of Taking Deposition**
Notice of Taking Deposition of Stephen V Novacek
 09/18/2009 **Affidavit of Service**
 09/24/2009 **Affidavit of Service**

Affidavit of Service
 10/02/2009 **Amended Notice of Taking Deposition**
 Amended Notice of Taking Deposition of Person Most Knowledgeable of R & S St Rose Lenders LLC
 10/09/2009 **Order Granting**
 Order Granting Motion to Dismiss or in the Alternative Motion for More Definite Statement Pursuan to NRCP 12(e) and Denying Colonial Motion for Partial Summary Judgment
 10/09/2009 **Receipt of Copy**
 10/09/2009 **Receipt of Copy**
 10/09/2009 **Receipt of Copy**
 10/09/2009 **Receipt of Copy**
 10/09/2009 **Receipt of Copy**
 10/09/2009 **Receipt of Copy**
 10/13/2009 **Notice of Vacating Deposition**
 Notice of Vacating Deposition of Brenda Howarth
 10/15/2009 **Supplement**
 Plaintiffs' Second Supplemetn to Rule 16 Disclosures
 10/22/2009 **Order**
 Order Consolidating Trial on the Merits as to Lien Priority with Evidentiary Hearing on Preliminary Injunction
 10/26/2009 **Answer**
 R & S St Rose LLC's Answer to BB & T Corporation' Second Amended Complaint
 10/26/2009 **Answer**
 Answer to Second Amended Cross-Complaint
 10/26/2009 **Notice of Entry of Order**
 Notice of Entry of Order Consolidating Trial on the Metits as to Lien Priority with Evidentiary Hearing on Preliminary Injunction
 10/27/2009 **Answer to Amended Complaint**
 R & S St. Rose Lenders LLC's Answer to Second Amended Complaint and Counterclaim
 10/27/2009 **Certificate of Mailing**
 11/04/2009 **Demand for Jury Trial**
 11/05/2009 **Pre-Trial Disclosure**
 Colonial Bank's Pretrial Disclosures
 11/05/2009 **Expert Witness Dislosure**
 Colonial Bank's Expert Disclosure
 11/05/2009 **List of Witnesses**
 R & S St. Rose Lenders, LLC's List of Witnesses and Exhlbits
 11/06/2009 **Joinder**
 Plaintiffs Joinder in R & S St. Rose Lenders LLC's List of Witnesses and Exhibits
 11/06/2009 **Motion**
 Plaintiff's Motion to Vacate or in the Alternative Continue "Trial on the Merits" on OST
 11/06/2009 **Receipt of Copy**
 11/09/2009 **Motion**
 Plaintiffs' Motion to Preclude Hearsay Evidence on Order Shortening Time
 11/09/2009 **Receipt of Copy**
 11/09/2009 **Receipt of Copy**
 11/09/2009 **Motion to Continue**
 R & S St. Rose Lenders, LLC's Motion on Shortened Time for Continuance of hearing on November 12 & 13
 11/10/2009 **Opposition to Motion**
 Colonial Bank's Opposition to Plaintiff's Motion to Preclude Hearsay Evidence
 11/10/2009 **Reply to Opposition**
 Plaintiffs' Reply to Colonial Bank's Opposition in November 9, 2009 Letter from Douglas D Gerrard Esq to Plaintiffs' Motion to Vacate
 11/10/2009 **Opposition to Motion**
 Opposition to Plaintiff's Motion to Vacate or in the Alternative Continue "Trial on the Merits" on Order Shortening Time
 11/12/2009 **Receipt of Copy**
 11/12/2009 **Trial Subpoena**
 11/19/2009 **Notice**
 Plaintiff's Notice of Questions of Fact and Request for SUA Sponte Addition of Nevada Title as a Party Pursuant to NRCP 19(a), NRCP 17(a) and NRS 31.130
 11/20/2009 **Response**
 BB&Ts Response to Plaintiffs notice of Questions of Fact and Request for Sua Sponte Addition of Nevada Title as a Party
 11/24/2009 **Motion for Summary Judgment**
 Plaintiff's Motion for Summary Judgment Against R&S St. Rose Lenders, LLC
 11/24/2009 **Receipt of Copy**
 11/25/2009 **Motion for Preliminary Injunction**
 Colonial Bank's Motion for Preliminary Injunction on Order Shortening Time
 12/01/2009 **Receipt of Copy**
 12/03/2009 **Motion to Enforce**
 Plaintiff's Molton to Enforce the Collateral Estoppel Effect of Judge Silver's Rulings on Order Shortening Time
 12/03/2009 **Receipt of Copy**
 12/03/2009 **Receipt of Copy**
 12/03/2009 **Receipt of Copy**
 12/03/2009 **Receipt of Copy**
 12/03/2009 **Receipt of Copy**
 12/03/2009 **Receipt of Copy**
 12/04/2009 **Pre-Trial Disclosure**
 Plaintiffs' PreTrial Disclosures
 12/08/2009 **Reply**
 Plaintiff's Reply to Breif Re: Whether the Negligence or Actions of an Escrow Agent can be Imputed to a Lender as a Defense to a Replacement / Equitable Subrogation Case
 12/09/2009 **Receipt of Copy**
 12/10/2009 **Supplement**
 Supplement to Plaintiffs' Pretrial Disclosure
 12/15/2009 **Receipt of Copy**
 12/15/2009 **Receipt of Copy**
 12/15/2009 **Receipt of Copy**
 12/15/2009 **Receipt of Copy**

12/15/2009	Opposition to Motion <i>R&S St Rose Lenders LLC's Opposition to Plaintiffs' Motion to Enforce the Collateral Estoppel Effect of Judge Silver's Rulings on Order Shortening Time</i>
12/15/2009	Opposition to Motion For Summary Judgment <i>R & S St. Rose Lenders, LLC's Opposition to Plaintiff's Motion for Summary Judgment and Countermotion for Continuance Pursuant to N.R.C.P. 56(F)</i>
12/16/2009	Motion for Protective Order
12/22/2009	Reply in Support <i>Plaintiffs' Reply in Support of Motion for Summary Judgment Against R & St. Rose Lenders LLC</i>
12/23/2009	Answer to Counterclaim <i>BB & T Corporation's Answer to R & S St Rose Lenders, LLC's Counterclaim</i>
09/28/2011	Order to Statistically Close Case <i>Civil Order to Statistically Close Case</i>

FINANCIAL INFORMATION

	Defendant R & S St. Rose LLC		
	Total Financial Assessment		223.00
	Total Payments and Credits		223.00
	Balance Due as of 03/20/2017		0.00
08/10/2009	Transaction Assessment		223.00
08/10/2009	Payment (Window)	Receipt # 2009-04053-CCCLK	Bailus Cook (223.00)
	Defendant R&S St. Rose Lenders, LLC		
	Total Financial Assessment		1,483.00
	Total Payments and Credits		1,483.00
	Balance Due as of 03/20/2017		0.00
08/12/2009	Transaction Assessment		1,483.00
09/02/2009	Wiznet	Receipt # 2009-51421-FAM	David J Merrill PC (1,483.00)
	Plaintiff Colonial Bank N.A.		
	Total Financial Assessment		256.00
	Total Payments and Credits		256.00
	Balance Due as of 03/20/2017		0.00
07/01/2009	Transaction Assessment		250.00
07/01/2009	Payment (Window)	Receipt # 2009-35052-FAM	Gerrard, Douglas D (250.00)
07/01/2009	Transaction Assessment		6.00
07/01/2009	Payment (Window)	Receipt # 2009-35057-FAM	Gerrard, Douglas D (6.00)

EXHIBIT L

AA0435

NO APN#

Recording Requested by:

Name: First American Title Insurance
Company

Address: 5310 Kietzke Lane, Suite 100

City/State/Zip: Reno, NV 89511-2043

Order Number: 121-2380972

Inst #: 200911030003188

Fees: \$19.00

N/C Fee: \$0.00

11/03/2009 02:08:59 PM

Receipt #: 110867

Requestor:

FIRST AMERICAN TITLE RENO

Recorded By: STN Pgs: 6

DEBBIE CONWAY

CLARK COUNTY RECORDER

Assignment Of Security Instruments
And Other Loan Documents
(Title of Document)

(for Recorder's use only)

Recorder Affirmation Statement

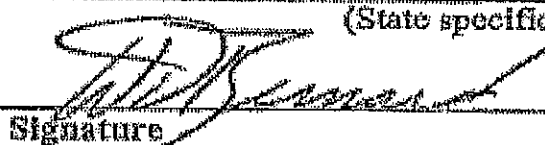
Please complete Affirmation Statement below:

☒ I the undersigned hereby affirm that the attached document, including any exhibits, hereby submitted for recording does not contain the social security number of any person or persons. (Per NRS 239B.030)

-OR-

☐ I the undersigned hereby affirm that the attached document, including any exhibits, hereby submitted for recording does contain the social security number of a person or persons as required by law:

(State specific law)

 Escrow Officer
Signature Title

W. D. Bernard
Print Signature

This page added to provide additional information required by NRS 111.312 Sections 1-2 and NRS 239B.030 Section 4.

(Additional recording fee applies)

THIS INSTRUMENT IS BEING RECORDED
AS AN ACCOMODATION ONLY. NO
LIABILITY EXPRESSED OR IMPLIED, IS
ASSUMED BY FIRST AMERICAN TITLE CO.

AA0436

When Recorded Return to:

Leisa DeSimone
Branch Banking and Trust
100 Colonial Bank Blvd
Building B - Third Floor
Montgomery, AL 36117

For Recorder's Use

State of Nevada:

County of Clark:

**ASSIGNMENT OF SECURITY INSTRUMENTS
AND OTHER LOAN DOCUMENTS**

KNOW ALL PERSONS BY THESE PRESENTS: That the **FEDERAL DEPOSIT INSURANCE CORPORATION**, in its capacity as Receiver for Colonial Bank ("Assignor"), by virtue of its appointment by the Alabama Superintendent of Banks for the State of Alabama as receiver to liquidate and distribute the assets of Colonial Bank as set forth in that certain Certificate of Appointment dated August 14, 2009 and filed in the Office of the Judge of Probate of Montgomery County, Alabama on the 17th day of August, 2009 and recorded at Real Property Book 03936, Pages 534-536 (which is attached hereto as Exhibit A), for and in consideration of the sum of **TEN AND NO/100 DOLLARS (\$10.00)**, and other good and valuable consideration received from or on behalf of **Branch Banking and Trust Company**, a North Carolina banking corporation, ("Assignee"), the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and set over unto Assignee all of Assignor's rights, title and interests in and to all those certain Mortgages, Security Deeds, Deeds to Secure Debt, Deeds of Trust, Assignments of Rents and Leases, UCC-1 financing statements, judgment liens, and all such other instruments and security agreements securing loans owned by Colonial Bank and held of record by Colonial Bank or any of its predecessors as of August 14, 2009 in the Public Records of the counties of the State of Nevada and all modifications, extensions, amendments and renewals thereto (collectively the "Security Instruments"), however, expressly excluding from the definition of Security Instruments all Mortgages, Security Deeds, Deeds to Secure Debt, Deeds of Trust and such other instruments registered under or by use of Mortgage Electronic Registration Systems, Inc. ("MERS") regardless of Colonial Bank's ownership or beneficial interest therein.

Assignor does further grant, bargain, sell, assign, transfer and set over unto Assignee all of Assignor's rights, title and interests in and to the promissory notes, loan documents and all other indebtedness secured by the Security Instruments, as evidenced by related promissory notes, any and all loan agreements, pledges, security agreements and UCC financing statements and all modifications, extensions, amendments and renewals to said documents and instruments together with any and all other loan documents, title policies and casualty insurance policies evidencing, securing or relating to any of the foregoing all of which have been delivered to the Assignee.

AA0437

For purposes of clarification it is the intent of Assignor to convey to Assignee all interests of Colonial Bank in all Security Instruments existing of record as of August 14, 2009 and held by Assignor as receiver for Colonial Bank.

TO HAVE AND TO HOLD the same unto Assignee and its legal representatives, successors and assigns forever. This assignment is made as-is, without recourse, warranty or representation of any nature or kind whatsoever, whether express or implied.

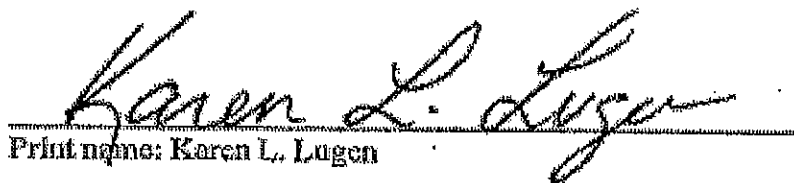
IN WITNESS WHEREOF, this Assignment of Security Instruments is executed this the 23rd day of October, 2009, to be deemed effective as of the 14th day of August, 2009.

Signed, sealed and delivered in our presence:

FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver for Colonial
Bank, an Alabama banking corporation.



Print name: Tamara A. Stidham

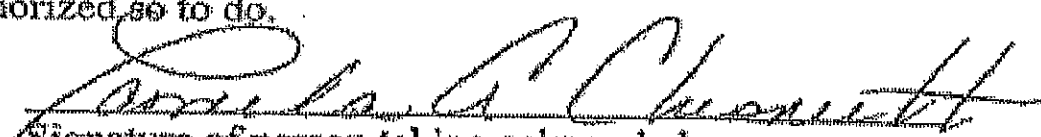


Print name: Karen L. Lugen

By: 
Printed Name: Teresa Griswold
Its: Attorney-in-fact

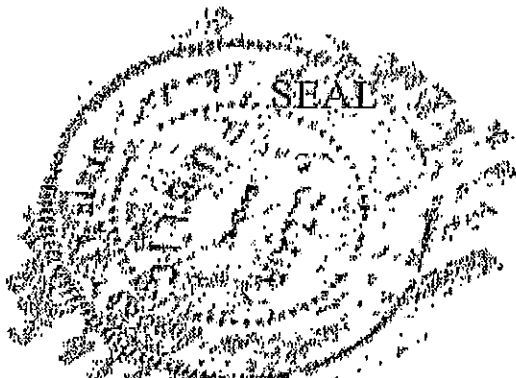
STATE OF ALABAMA)
 : ss.
COUNTY OF MONTGOMERY)

Personally appeared before me, the undersigned authority in and for the said county and state, on this 23rd day of October, 2009, within my jurisdiction, the within named Teresa Griswold, who acknowledged that s/he is Attorney-in-fact of the Federal Deposit Insurance Corporation, and that for and on behalf of the said Federal Deposit Insurance Corporation, as Receiver for Colonial Bank, and as its act and deed s/he executed the above and foregoing instrument, after first having been duly authorized so to do.


Signature of person taking acknowledgment

Pamela A. Chesnutt
Name of acknowledger typed, printed or stamped
Notary Public

My Commission Expires: 11/17/09



This Instrument Prepared By:
Richard A. Wright, Esq.
Jones, Walker, Waechter, Poitevent,
Carrère & Denègre, L.L.P.
Post Office Box 46
Mobile, AL 36601

AA0438



Bob Riley
Governor

STATE OF ALABAMA
STATE BANKING DEPARTMENT



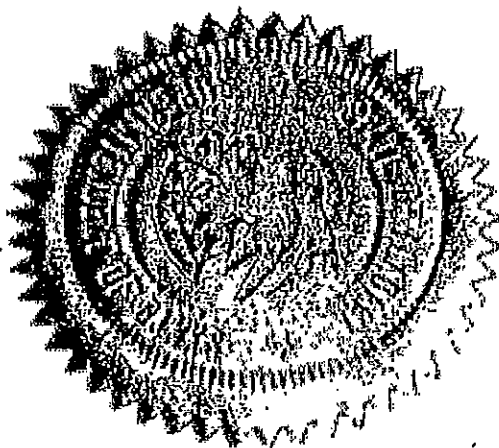
John D. Harrison
Superintendent of Banks


STATE OF ALABAMA
MONTGOMERY COUNTY

I, John D. Harrison, Superintendent of Banks, under my hand and official seal and pursuant to Section 5-8A-24, Code of Alabama, 1975, hereby appoint the Federal Deposit Insurance Corporation, as receiver to liquidate and distribute the assets of Colonial Bank, with its principal place of business being in Montgomery, Montgomery County, Alabama.

I further direct that this Certificate of Appointment is to be filed in the Office of the Superintendent of Banks and that a certified copy of this Certificate of Appointment is to be filed in the Office of the Judge of Probate of Montgomery County, Alabama.

IN WITNESS WHEREOF, I have hereunto set my hand and the official seal of the State Banking Department on this the 14th day of August, 2009.




John D. Harrison
Superintendent of Banks
State of Alabama

SBD-103

CENTER FOR COMMERCE • 401 ADAMS AVENUE • P.O. BOX 4800 • MONTGOMERY, AL 36103-4800
TELEPHONE (334) 242-2422 • FAX (334) 242-3500 OR BUREAU OF LOANS (334) 855-5741

Exhibit A



FDIC
Division of Resolutions and Receiverships
Dallas Regional Office
1601 Bryan Street
Dallas, Texas 75201

Telephone (214) 754-6000

August 14, 2009

John D. Harrison
Superintendent of Banks
State of Alabama
State Banking Department
401 Adams Ave., Suite 680
Montgomery, AL 36104

Subject: Colonial Bank
Montgomery, Alabama-- In Receivership
Acceptance of Appointment as Receiver

Dear Sir or Madam:

Please be advised that the Federal Deposit Insurance Corporation accepts its appointment as Receiver of the captioned depository institution, in accordance with the Federal Deposit Insurance Act, as amended.

Sincerely,

FEDERAL DEPOSIT INSURANCE CORPORATION

By:


Robert C. Schoppe
Receiver-in-Charge

H:01.b LDCMFI/Accept Appointment as Receiver.doc

04/08

AA0440



STATE OF ALABAMA
STATE BANKING DEPARTMENT



TO WHOM IT MAY CONCERN:

I hereby certify that the attached is a true and correct copy of the Superintendent's certificate appointing the Federal Deposit Insurance Corporation as receiver to liquidate and distribute the assets of Colonial Bank, with its principal place of business being in Montgomery, Montgomery County, Alabama.

Given under my hand this the 17th day of August 2009.

Elizabeth T. Bressler
Elizabeth T. Bressler
General Counsel
State of Alabama
State Banking Department



STATE OF ALA.
MONTGOMERY CO.
I CERTIFY THIS INSTRUMENT
WAS FILED ON
RLPY 03030 PG 0534-0536 2009 AUG 17
09:16AM
REESE MCKINNEY JR.
JUDGE OF PROBATE

INDEX	\$5.00
REC FEE	\$7.50
CERT	\$1.00
CASH TOTAL	\$13.50
107133	Clerk: SHAUNTE 08:54AM

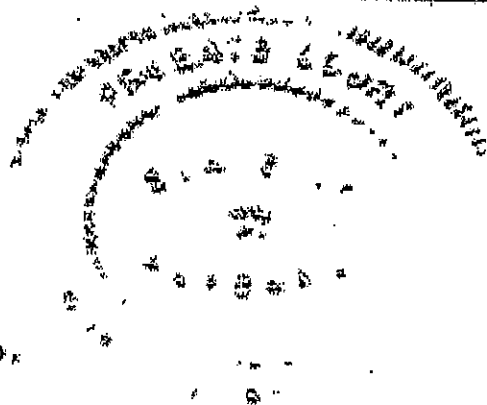
SBD-107

CENTER FOR COMMERCE • 401 ADAMS AVENUE • P.O. BOX 4600 • MONTGOMERY, AL 36103-4600
TELEPHONE (334) 242-3452 • FAX (334) 242-8500 OR BUREAU OF LOANS (334) 383-5801

CERTIFIED COPY

I hereby certify this document was filed in
Montgomery County, Alabama on 8/17/09 in
Book 3436
Page 534-536

Reese McKinney Jr.
Reese McKinney Jr.
Judge of Probate

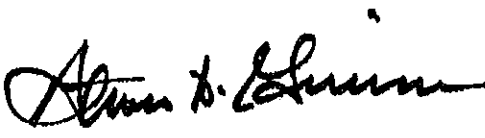


AA0441

EXHIBIT M

AA0442

Electronically Filed
10/01/2009 02:45:55 PM


CLERK OF THE COURT

1 **ACOM**
Douglas D. Gerrard, Esq.
2 Nevada Bar No. 4613
Sheldon A. Herbert, Esq.
3 Nevada Bar No. 5988
Aaron B. Shumway, Esq.
4 Nevada Bar No. 10759
GERRARD COX & LARSEN
5 2450 St. Rose Pkwy., Suite 200
Henderson, Nevada 89074
6 (702) 796-4000
Attorneys for BB&T Corporation
7 *as successor in interest to Federal*
Deposit Insurance Corporation,
8 *as receiver of Colonial Bank N.A.*

9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11 ROBERT E. MURDOCK and ECKLEY M.
12 KEACH,

13 Plaintiffs,

13 vs.

14 SAIID FOROUZAN RAD, an individual; R. PHILLIP
15 NOURAFCHAN, an individual; FOROUZAN, INC., a
Nevada corporation; RPN LLC, a Nevada limited
16 liability company; R & S ST. ROSE, LLC, a Nevada
limited liability company; R & S ST. ROSE
17 LENDERS, LLC, a Nevada limited liability company;
COLONIAL BANCGROUP, INC.; R & S
18 INVESTMENTS GROUP, LLC, a Nevada limited
liability company; and DOES I through X, inclusive,

19 Defendants.

Master Case No. **08-A574852**
(consolidated with **09-A594512**)

Dept No.: XI

AMENDED COMPLAINT

20 ///
21 ///
22 ///
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27 ///
28 ///

GERRARD, COX & LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000

GERRARD, COX & LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000

1 BB&T, CORPORATION as successor in interest to
2 Federal Deposit Insurance Corporation, as receiver of
Colonial Bank N.A.

3 Cross-Complainant,

4 vs.

5 R & S ST. ROSE LENDERS, LLC, a Nevada limited
6 liability company, R & S ST. ROSE, LLC, a Nevada
7 limited liability company, FOROUZAN, INC., a Nevada
8 corporation, RPN, LLC, a Nevada limited liability
company, SAIID FOROUZAN RAD, an individual, R.
PHILLIP NOURAFCHAN, an individual, and DOES 1-
10, and ROE ENTITIES 1-10, inclusive,

9 Cross-Defendants,

10
11 R & S ST. ROSE LENDERS, LLC, a Nevada limited
liability company,

12 Cross-plaintiff,

13 vs.

14 COLONIAL BANCGROUP, INC.

15 Cross-defendant.
16

17 **AMENDED COMPLAINT**

18 COMES NOW Cross-Complainant BB&T CORPORATION, as successor in interest to
19 Federal Deposit Insurance Corporation, as receiver of Colonial Bank N.A. ("BB&T" or
20 "Plaintiff"), by and through its attorneys, GERRARD COX & LARSEN, and for its First
21 Amended Complaint, alleges and avers as follows:

22 **GENERAL ALLEGATIONS**

23 1. BB&T is a North Carolina corporation, that is successor in interest to Federal
24 Deposit Insurance Corporation as receiver of Colonial Bank N.A., with sufficient minimum
25 contacts with the State of Nevada and entitled to an interest in certain real property at issue in this
26 case which is located in Clark County, Nevada.

27 2. Upon information and belief, Defendant R&S ST. ROSE LENDERS, LLC ("R&S
28 Lenders") is organized in the State of Nevada with an interest in certain real property at issue in
this case which is located in Clark County, Nevada.

GERRARD, COX & LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000

1 3. Upon information and belief, Defendant R&S ST. ROSE, LLC ("R&S") is
2 organized in the State of Nevada with an interest in certain real property at issue in this case
3 which is located in Clark County, Nevada.

4 4. Upon information and belief, Defendant FOROUZAN, INC. ("Forouzan") is
5 incorporated in the State of Nevada and doing business in Clark County, Nevada.

6 5. Upon information and belief, Defendant RPN, LLC ("RPN") is organized in the
7 State of Nevada and doing business in Clark County, Nevada.

8 6. Upon information and belief, Defendant SAID FOROUZAN RAD ("Rad") is a
9 resident of Clark County, Nevada.

10 7. Upon information and belief, Defendant R. PHILLIP NOURAFCHAN
11 ("Nourafchan") is a resident of Clark County, Nevada.

12 8. The true names and capacities, whether individual, corporate, associate, or
13 otherwise of Defendant DOES 1-10, and ROE ENTITIES 1-10, inclusive, are not known to
14 Plaintiff at this time and are therefore named as fictitious Defendants. Plaintiff is informed and
15 believes, and upon such alleges, that each of the Defendants designated as a Doe, or a Roe Entity
16 is responsible in some manner for the events and happenings referred to in this Amended
17 Complaint. Plaintiff will ask leave of this Court to amend this Amended Complaint and insert
18 the true names and capacities of said DOES 1-10, and ROE ENTITIES 1-10, inclusive, when the
19 same have been ascertained by Plaintiff, together with the appropriate charging allegations, and
20 to join these Defendants in this action.

21 9. On or about August 26, 2005, R&S was the owner of certain real property located
22 in Clark County, Nevada (the "Property"), and more fully described as:

23 PARCEL I:

24 THAT PORTION OF THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26,
25 TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA,
DESCRIBED AS FOLLOWS:

26 LOT 4-3 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS,
27 PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY,
NEVADA.

28 ///

GERRARD, COX & LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000

1 PARCEL II:

2 THAT PORTION OF THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26,
3 TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK COUNTY, NEVADA,
DESCRIBED AS FOLLOWS:

4 LOT 4-4 AS SHOWN BY MAP THEREOF ON FILE IN FILE 93 OF PARCEL MAPS,
5 PAGE 53, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY,
NEVADA.

6 PARCEL III:

7 THE WEST HALF (W1/2) OF THE SOUTHWEST QUARTER (SW1/4) OF THE
8 NORTHWEST QUARTER (NW 1/4) OF THE SOUTHWEST QUARTER (SW 1/4) OF
THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22 SOUTH,
9 RANGE 61 EAST, M.D.M.

10 EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY
BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY
11 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

12 FURTHER EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO
CLARK COUNTY BY THAT CERTAIN GRANT, BARGAIN, SALE DEED
13 RECORDED JANUARY 27, 1998 IN BOOK 980127 AS INSTRUMENT NO. 01298 OF
OFFICIAL RECORDS.

14 TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK
COUNTY IN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK
15 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

16 PARCEL IV:

17 THE EAST HALF (E 1/2) OF THE SOUTHWEST QUARTER (SW 1/4) OF THE
18 NORTHWEST QUARTER (NW 1/4) OF THE SOUTHWEST QUARTER (SW 1/4) OF
THE SOUTHEAST QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22 SOUTH,
19 RANGE 61 EAST, M.D.M., CLARK COUNTY , NEVADA.

20 EXCEPTING THEREFROM THAT PORTION CONVEYED TO CLARK COUNTY
BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY
21 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

22 TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK
COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK
23 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

24 PARCEL V:

25 SOUTHEAST QUARTER (SE 1/4) OF THE NORTHWEST QUARTER (NW 1/4) OF
THE SOUTHWEST QUARTER (SW 1/4) OF THE SOUTHEAST QUARTER (SE 1/4)
26 OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST, M.D.M., CLARK
COUNTY, NEVADA.

27 EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY
BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED FEBRUARY
28 9, 1977 IN BOOK 706 AS INSTRUMENT NO. 665363 OF OFFICIAL RECORDS.

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 (702) 796-4000

1 TOGETHER WITH THAT PORTION OF BRUCE STREET AS VACATED BY
 2 CLARK COUNTY IN AN ORDER OF VACATION RECORDED DECEMBER 24,
 3 1977 IN BOOK 971224 AS INSTRUMENT NO. 00917 AND RE-RECORDED APRIL
 4 9, 1998 IN BOOK 980409 AS INSTRUMENT NO. 01289 AND RE-RECORDED
 5 OCTOBER 12, 1998 IN BOOK 981012 AS INSTRUMENT NO. 00903 AND RE-
 6 RECORDED DECEMBER 8, 1998 IN BOOK 981208 AS INSTRUMENT NO. 00688
 7 OF OFFICIAL RECORDS.

8 TOGETHER WITH THAT PORTION OF RUSH AVENUE AS VACATED BY CLARK
 9 COUNTY IN AN ORDER OF VACATION RECORDED JULY 8, 2002 IN BOOK
 10 20020708 AS INSTRUMENT NO. 00842 OF OFFICIAL RECORDS.

11 PARCEL VI:

12 THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHWEST QUARTER
 13 (SW ½) OF THE SOUTHWEST QUARTER (SW 1/4) OF THE SOUTHEAST
 14 QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST,
 15 M.D.M., LYING NORTHEASTERLY OF THE NORTHEASTERLY RIGHT OF WAY
 16 LINE OF SPENCER STREET AS LOCATED ON THAT CERTAIN GRANT,
 17 BARGAIN, SALE DEED RECORDED JANUARY 30, 1998 IN BOOK 980130 AS
 18 INSTRUMENT NO. 01806, OFFICIAL RECORDS.

19 PARCEL VII:

20 THAT PORTION OF THE SOUTHWEST QUARTER (SW 1/4) OF THE SOUTHEAST
 21 QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST,
 22 M.D.B. & M., CLARK COUNTY, NEVADA, DESCRIBED AS FOLLOWS:

23 BEGINNING AT THE NORTHEAST CORNER (NE COR.) OF THE SOUTH HALF
 24 (S ½) OF THE SOUTHWEST QUARTER (SW 1/4) OF THE SOUTHWEST QUARTER
 25 (SW 1/4) OF THE SOUTHEAST QUARTER (SE 1/4) OF SAID SECTION 26;
 26 THENCE SOUTH 00°21'02" WEST ALONG THE EAST LINE THEREOF, 98.88 FEET
 27 TO A POINT ON THE NORTHWESTERLY EASEMENT LINE OF LAKE MEAD
 28 DRIVE (ST. ROSE PARKWAY) (300.00 FEET WIDE); THENCE SOUTH 48°18'18"
 WEST ALONG SAID NORTHWESTERLY EASEMENT LINE 423.23 FEET; THENCE
 NORTH 41°42'17" WEST, 304.80 FEET; THENCE CURVING TO THE RIGHT
 ALONG THE ARC OF A 1080.00 FOOT RADIUS CURVE CONCAVE
 NORTHEASTERLY, THROUGH A CENTRAL ANGLE OF 02°37'57", AN ARC
 LENGTH OF 49.62 FEET TO A POINT ON THE NORTH LINE OF THE SAID
 SOUTH HALF (S ½) OF THE SOUTHWEST QUARTER (SW 1/4) OF THE
 SOUTHWEST QUARTER (SW 1/4) OF THE SOUTHEAST QUARTER (SE 1/4) OF
 SAID SECTION 26, A RADIAL LINE TO SAID POINT BEARS SOUTH 50°55'40"
 WEST; THENCE SOUTH 89°21'22" EAST ALONG SAID NORTH LINE, 417.18 FEET
 TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM THAT PORTION AS CONVEYED TO CLARK COUNTY
 BY THAT CERTAIN GRANT, BARGAIN, SALE DEED RECORDED JANUARY 30,
 1998 IN BOOK 980130 AS INSTRUMENT NO. 01321 OF OFFICIAL RECORDS.

NOTE: THE ABOVE METES AND BOUNDS DESCRIPTION APPEARED
 PREVIOUSLY IN THAT CERTAIN DOCUMENT RECORDED MAY 5, 1998 IN
 BOOK 980505 AS INSTRUMENT NO. 02057, OFFICIAL RECORDS.

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1 PARCEL VIII:

2 THAT PORTION OF THE SOUTH HALF (S ½) OF THE SOUTHEAST QUARTER
3 (SE 1/4) OF THE SOUTHWEST QUARTER (SW 1/4) OF THE SOUTHEAST
4 QUARTER (SE 1/4) OF SECTION 26, TOWNSHIP 22 SOUTH, RANGE 61 EAST,
5 M.D.M., CLARK COUNTY, NEVADA, LYING NORTHWESTERLY OF THE
6 NORTHWESTERLY LINE OF LAKE MEAD DRIVE (NOW KNOWN AS ST. ROSE
7 PARKWAY) AS THE SAME NOW EXISTS.

8 10. On or about August 26, 2005, R&S obtained a loan from Plaintiff in the principal
9 amount of \$29,305,250.00 (the "First Colonial Loan").

10 11. On or about August 26, 2005, R&S executed a promissory note in favor of
11 Plaintiff in the principal amount of \$29,305,250.00 (the "First Colonial Note").

12 12. On or about August 26, 2005, R&S secured the First Colonial Loan and First
13 Colonial Note by recording a first position Deed of Trust against the Property in favor of Plaintiff
14 in the principal amount of \$29,305,250.00 as Document No. 05282 in Book 20050826 of the
15 Official Records of Clark County, Nevada (the "First Colonial DOT").

16 13. On or about September 16, 2005, R&S recorded a second position Deed of Trust
17 against the Property in favor of Defendant R&S Lenders in the principal amount of
18 \$12,000,000.00 as Document No. 02881 in Book 20050916 in the Official Records of Clark
19 County, Nevada (the "R&S Lenders DOT").

20 14. Plaintiff is without information as to whether R&S Lenders paid any consideration
21 to R&S for the R&S Lenders DOT.

22 15. Upon information and belief, Defendants R&S and R&S Lenders are related
23 entities, each of which at all times relevant to this case, is owned and/or controlled by,
24 Defendants Forouzan and RPN, who are also the members/managers of both R&S and R&S
25 Lenders.

26 16. Upon information and belief, Defendant Rad is the president of Forouzan and
27 Defendant Nourafchan is the manager of RPN.

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

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1 18. Pursuant to the R&S Lenders Subordination Agreement, R&S Lenders recognized
2 that the First Colonial DOT and its related loan was going to be modified to extend the maturity
3 date of the First Colonial Note, and acknowledged that Plaintiff was to retain a first position lien
4 against the Property.

5 19. On or about July 27, 2007, Plaintiff agreed to make a development loan to R&S
6 in the amount of \$43,980,000.00 (the "Second Colonial Loan") to be secured by a first priority
7 lien against the Property.

8 20. The Second Colonial Loan was to be used to pay off the First Colonial Note and
9 provide funds for construction of improvements on the Property, and was to be secured by a first
10 priority deed of trust against the Property.

11 21. Within one week prior to Colonial funding the Second Colonial Loan, the escrow
12 officer at Nevada Title Company ("Nevada Title") that was handling the transaction, Brenda
13 Burns, told Defendants Rad and/or Nourafchan that Plaintiff would not close and fund the Second
14 Colonial Loan unless it was secured by a first priority lien against the Property, which required
15 the release and reconveyance of the R&S Lenders DOT.

16 22. Defendants Rad and/or Nourafchan, individually and in their capacity as the
17 managing officers of Forouzan and RPN, respectively, the managing entities of R&S and R&S
18 Lenders, responded by telling and assuring Brenda Burns that they would cause the reconveyance
19 of the R&S Lenders DOT in order to close escrow of the Second Colonial Loan.

20 23. On or about July 27, 2007, R&S executed a promissory note in favor of Plaintiff
21 in the principal amount of \$43,980,000.00 (the "Second Colonial Note").

22 24. Defendants Rad and Nourafchan guaranteed the repayment of the Second Colonial
23 Note.

24 25. On or about July 31, 2007, R&S recorded what was intended by Plaintiff to be a
25 new first position Deed of Trust against the Property in favor of Plaintiff in the principal amount
26 of \$43,980,000.00 as Document No. 0004824 in Book 20070731 of the Official Records of Clark
27 County, Nevada (the "Second Colonial DOT").

28 ///

1 26. The conversation described in ¶¶ 21 & 22 above occurred within a few days prior
2 to the recording of the Second Colonial DOT on or about July 31, 2007. Brenda Burns clearly
3 explained to Defendants Rad and/or Nourafchan that they would have to provide a reconveyance
4 of the R&S Lenders DOT as the Second Colonial Loan was to be a first position lien on the
5 Property. Defendants Rad and/or Nourafchan knowingly and fraudulently assured Brenda Burns
6 in their individual capacity and in their capacity as the managing officers of Forouzan and RPN,
7 respectively, the controlling entities of R&S and R&S Lenders, that they would release and
8 reconvey the R&S Lenders DOT.

9 27. In reliance upon the misrepresentations and promises that Defendants Rad and/or
10 Nourafchan made in their individual capacity and in their capacity as the managing members of
11 Forouzan and RPN, respectively, the controlling entities of R&S and R&S Lenders, the Second
12 Colonial Loan and escrow closed when Plaintiff funded the Second Colonial Loan and released
13 and reconveyed the First Colonial DOT.

14 28. On July 9, 2008, Brenda Burns followed up on the R&S Lenders DOT
15 reconveyance that Defendants Rad and Nourafchan were to have provided to Nevada Title in
16 connection with the Second Colonial Loan, requesting that R&S Lenders execute a Substitution
17 of Trustee and Deed of Reconveyance. Within a few days of July 9, 2008, Defendants Rad and/or
18 Nourafchan responded to Brenda Burns' email requesting a reconveyance by way of a telephone
19 call during which Rad again confirmed that R&S Lenders would be reconveying the R&S
20 Lenders DOT.

21 29. Between July 9, 2008 and September 5, 2008, Defendants Rad and/or Nourafchan,
22 in their individual capacity and in their capacity as the managing officers of Forouzan and RPN,
23 respectively, the controlling entities of R&S and R&S Lenders, indicated to Brenda Burns that
24 they were in the process of preparing new loan documents and a deed of trust which they intended
25 to record directly after they reconveyed the R&S Lenders DOT. To assist in preparing the
26 necessary documents, Rad and/or Nourafchan requested copies of any deeds of trust encumbering
27 the Property.

28 ///

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1 30. On or about September 5, 2008, in response to Defendants Rad and Nourafchan's
2 request to provide any deeds encumbering the Property, Brenda Burns sent copies of the Second
3 Colonial DOT as well as the R&S Lenders DOT to Defendants Rad and Nourafchan, confirming
4 the need for the R&S Lenders DOT reconveyance.

5 31. On or about September 17, 2008, Teresa Cargill, an agent/employee of an entity
6 controlled by Defendants Rad and Nourafchan, requested additional information in the form of
7 a title report from Brenda Burns to purportedly assist their attorney in preparing new loan
8 documents and a deed of trust in connection with reconveying the R&S Lenders DOT.

9 32. On or about September 25, 2008, Brenda Burns provided the amended preliminary
10 title report to Defendants Rad and Nourafchan, which clearly showed that the R&S Lenders DOT
11 needed to be reconveyed since it was still in a senior lien position as to the Second Colonial Loan.

12 33. The Plaintiff has been required to hire an attorney to obtain the relief set forth
13 herein and as a result, is entitled to its attorneys fees and costs incurred.

14 **FIRST CAUSE OF ACTION**

15 **(Declaratory Relief/Quiet Title - Replacement)**

16 34. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1 through
17 33 of its Amended Complaint and incorporates the same by this reference as if more fully set
18 forth herein.

19 35. At the time that the escrow closed relative to the Second Colonial Loan, Plaintiff
20 paid the entirety of the amounts owed on the First Colonial Loan.

21 36. The First Colonial DOT was released of record as part of the transaction and
22 replaced with the Second Colonial DOT, which was intended to be a first position lien against
23 the Property.

24 37. At the time that the escrow closed relative to the Second Colonial Loan,
25 Defendants Rad and Nourafchan on behalf of R&S Lenders already had a purported lien interest
26 in the Property and did not acquire any new or additional interest in the Property during the time
27 that Plaintiff's lien interests were not of record, if any.

28 ///

39. Plaintiff's legal fees and costs in prosecuting this action are covered and secured by its subrogated lien position in the same manner as if Plaintiff was defending its lien rights under the First Colonial DOT.

(Unjust Enrichment)

41. Defendants R&S, R&S Lenders, Forouzan, RPN, Rad and Nourafchan received the benefit of the release of the First Colonial DOT and the funding of the Second Colonial Loan.

43. It would be unjust and inequitable for Defendants R&S, R&S Lenders, Forouzan, RPN, Rad and Nourafchan to retain the benefit of the Second Colonial Loan and the payoff of the First Colonial DOT.

45. Plaintiff has been required to retain the services of an attorney in order to prosecute this matter, and Plaintiff is entitled to reasonable attorneys' fees and costs thereof.

(Fraudulent Misrepresentation)

47. Prior to Colonial funding the Second Colonial Loan on or about July 27, 2007, Brenda Burns informed Defendants Rad and/or Nourafchan that Plaintiff was to obtain a first

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1 position lien against the Property to secure repayment of the Second Colonial Loan, and that the
2 R&S Lenders DOT would have to be released and reconveyed in connection with the transaction.

3 48. Defendants Rad and/or Nourafchan, individually and in their capacity as the
4 managing officers of Forouzan and RPN, respectively, the controlling entities of R&S and R&S
5 Lenders, knowingly and fraudulently misrepresented to the escrow agent handling the transaction
6 that they would reconvey the R&S Lenders DOT in order to close escrow of the Second Colonial
7 Loan on July 31, 2007.

8 49. In reliance upon the fraudulent misrepresentations that Defendants Rad and/or
9 Nourafchan made to the escrow officer, Brenda Burns, Plaintiff funded the Second Colonial
10 Loan. Escrow closed and the First Colonial DOT was released and reconveyed.

11 50. On July 9, 2008, Brenda Burns followed up by email on the R&S Lenders DOT
12 reconveyance that Defendants Rad and Nourafchan, individually and in their representative
13 capacities, agreed to provide in connection with the Second Colonial Loan.

14 51. In a conversation with Brenda Burns occurring a few days following her July 9,
15 2008 email to Defendants Rad and/or Nourafchan, Defendants Rad and/or Nourafchan again
16 stated that they would reconvey the R&S Lenders DOT.

17 52. Between July 9, 2008 and September 5, 2008, Defendants Rad and/or Nourafchan,
18 in their individual capacity and in their capacity as the managing officers of Forouzan and RPN,
19 respectively, the controlling entities of R&S and R&S Lenders, knowingly misrepresented to
20 Brenda Burns that they were in the process of preparing new loan documents and a deed of trust
21 in connection with reconveying the R&S Lenders DOT, and they requested copies of any deeds
22 of trust encumbering the Property.

23 53. On or about September 5, 2008, in response to Defendants Rad and/or
24 Nourafchan's request to provide any deeds encumbering the Property, Brenda Burns sent copies
25 of the Second Colonial DOT as well as the R&S Lenders DOT to Defendants Rad and/or
26 Nourafchan, confirming the need for the R&S Lenders DOT to be reconveyed as it was still in
27 a first priority position.

28 ///

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1 54. On or about September 17, 2008, Teresa Cargill, an agent/employee of an entity
2 controlled by Defendants Rad and Nourafchan, requested additional information in the form of
3 a title report from Brenda Burns, purportedly in order to prepare new loan documents and a deed
4 of trust in connection with reconveying the R&S Lenders DOT.

5 55. On or about September 25, 2008, Brenda Burns provided the amended preliminary
6 title report to Defendants Rad and Nourafchan, individually and in their capacity as the managing
7 officers of Forouzan and RPN, the controlling entities of R&S and R&S Lenders, which clearly
8 showed that the R&S Lenders DOT needed to be reconveyed since it was still in a senior lien
9 position as to the Second Colonial Loan.

10 56. Plaintiff was unaware that Defendants Rad and/or Nourafchan's
11 misrepresentations that they would release the R&S Lenders DOT were false. Defendants Rad
12 and/or Nourafchan made these misrepresentations in their individual capacity and in the their
13 capacity as the managing officers of Forouzan and RPN, respectively, the controlling entities of
14 R&S and R&S Lenders.

15 57. In reliance upon these fraudulent misrepresentations that Defendants Rad and/or
16 Nourafchan knew were false, Plaintiff funded the Second Colonial Loan. Escrow closed on the
17 Second Colonial Loan and the First Colonial DOT was released and reconveyed.

18 58. As a direct and proximate result of the fraudulent misrepresentations made by
19 Defendants Rad and Nourafchan, Plaintiff has been damaged in an amount in excess of
20 \$10,000.00.

21 59. Defendants Rad and Nourafchan, individually and in their capacity as the
22 managing officers of Forouzan and RPN, the controlling entities of R&S and R&S Lenders, have
23 acted intentionally, fraudulently, maliciously, and oppressively and they should be assessed with
24 exemplary and punitive damages for their misconduct.

25 60. Plaintiff has been required to retain the services of an attorney in order to
26 prosecute this matter, and Plaintiff is entitled to reasonable attorneys' fees and costs thereof.

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FOURTH CAUSE OF ACTION
(Civil Conspiracy)

61. Plaintiff repeats and realleges the allegations set forth in Paragraphs No. 1 through 60 of its Amended Complaint and incorporates the same by this reference as if more fully set forth herein.

62. Prior to the close of escrow for the Second Colonial Loan, Defendants Rad, Nourafchan, Forouzan, RPN, R&S, and R&S Lenders, conspired, agreed, and combined to knowingly misrepresent to escrow officer Brenda Burns, the escrow agent for the Plaintiff, that they would release and reconvey the R&S Lenders DOT in order to close escrow and have the First Colonial DOT released and reconveyed.

63. Defendants' conspiracy to fraudulently misrepresent to escrow officer, Brenda Burns, that the R&S Lenders DOT would be reconveyed was agreed to in order to obtain the Second Colonial Loan and avoid losing the Property to foreclosure and/or to elevate the priority of the R&S Lenders DOT from a second position lien to a first position lien.

64. Defendants engaged in the forgoing conspiracy to induce Plaintiff into acting as it did.

65. By making fraudulent misrepresentations about their intention to release the R&S Lenders DOT, Defendants took steps in furtherance of their conspiracy and with the intent to defraud Plaintiff.

66. Defendants have accepted and received the benefits of their illegal conspiracy because the R&S Lenders DOT now appears in the public records of Clark County, Nevada, as a first position lien against the Property and they were able to avoid a foreclosure of the First Colonial Loan and First Colonial DOT which would have extinguished the interest of the Defendants in and to the Property.

67. As a direct and proximate cause of Defendants' conspiracy, Plaintiff has been damaged in an amount in excess of Ten Thousand Dollars (\$10,000.00), in an amount to be determined at trial.

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1 68. As a direct and proximate cause of Defendants’ conspiracy, Plaintiff has incurred
2 special damages in the form of attorneys fees and costs in an amount in excess of Ten Thousand
3 Dollars (\$10,000.00), in an amount to be determined at trial.

4 69. Defendants have acted intentionally, fraudulently, maliciously, and oppressively
5 and they should be assessed with exemplary and punitive damages for their misconduct.

6 WHEREFORE, Plaintiff prays for relief against Defendants as follows:

7 1. For an Order declaring that the Second Colonial DOT replaces the First Colonial
8 DOT, and is entitled to the same first position priority against title to the Property and the right
9 to non-judicially foreclose its interests in the First Colonial DOT;

10 2. For an Order declaring that the R&S Lenders DOT is either expunged from title
11 to the Property, or junior in lien priority with respect to title to the Property;

12 3. For an Order compelling Defendants to disgorge the benefits they unjustly
13 received in excess of \$10,000.00;

14 4. For general damages in an amount in excess of \$10,000.00;

15 5. For exemplary and punitive damages in an amount in excess of \$10,000.00;

16 6. For attorneys fees and costs incurred in prosecuting this matter; and

17 7. For such other and further relief as the Court deems appropriate in the premises.

18 Dated this 1st day of October, 2009.

19

20

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21

22

/s/ Douglas D. Gerrard
Douglas D. Gerrard, Esq.
Nevada Bar No. 4613
Sheldon A. Herbert, Esq.
Nevada Bar No. 5988
Aaron B. Shumway, Esq.
Nevada Bar No. 10759
2450 Saint Rose Pkwy., Suite 200
Henderson, NV 89074
*Attorneys for BB&T Corporation
as successor in interest to Federal
Deposit Insurance Corporation,
as receiver of Colonial Bank N.A.*

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GERRARD, COX & LARSEN
2450 St. Rose Parkway, Suite 200
Henderson, Nevada 89074
(702) 796-4000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **AMENDED COMPLAINT** was sent this 1st day of October, 2009, by United States Mail, first class, postage fully prepaid, and addressed as follows:

Julie L. Sanpai, Esq.
BAILUS COOK & KELESIS, LTD.
400 South 4th Street, Suite 300
Las Vegas, NV 89101
Attorney for R & S St. Rose, LLC

David J. Merrill, Esq.
DAVID J. MERRILL, P.C.
2850 West Horizon Ridge Parkway, Suite 200
Las Vegas, NV 89052
Attorney for R & S St. Rose Lenders, LLC

Richard F. Holley, Esq.
SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY
& THOMPSON
400 South 4th Street, 3rd Floor
Las Vegas, NV 89101
*Attorneys for Saiid Forouzan Rad, R. Phillip
Nourafchan, Forouzan, Inc., RPN LLC and
R & S Investment Group, LLC*

Eckley M. Keach, Esq.
ECKLEY M. KEACH, CHTD.
520 South Fourth Street
Las Vegas, NV 89101
Plaintiff

Robert E. Murdock, Esq.
MURDOCK & ASSOCIATES, CHTD.
520 South Fourth Street
Las Vegas, NV 89101
Plaintiff

/s/ Jennifer Hanks
Jennifer Hanks, An employee of
GERRARD, COX & LARSEN