IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation,

Appellant,

vs.

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

Respondents.

Supreme Court No. 73848

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

JOINT APPENDIX
VOLUME III

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

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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Cox & Larsen's Notice of Motion and Motion to Dismiss Complaint; Memorandum of Points and Authorities [subsequently superceded and ultimately never ruled on]	I	AA0040-0070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8	12/28/16	Plaintiff's Opposition to Motion to Dismiss; and Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA0073-0103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Cox & Larsen's Motion to Dismiss Complaint And Opposition to Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA0104-0124
10	01/27/17	Plaintiff's Reply in Support of Alternative Countermotion for Leave to Amend Complaint [subsequently superceded]	I	AA0125-0130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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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
3	10/05/16	Complaint [subsequently amended]	I	AA0007-0035
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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
35	06/22/17	Defendants Douglas D. Gerrard and Gerrard Cox & Larsen's Opposition to Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e)	V	AA0930-0944
24	04/07/17	Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen's (1) Reply in Support of Defendants' Request for Judicial Notice; (2) Response and Partial Objection to Plaintiff's Counter-Request for Judicial Notice; and (3) Request for Judicial Notice on Reply	III	AA0644-0694
33	06/05/17	Defendants' Memorandum of Costs and Disbursements	IV	AA0863-0912
7	12/02/16	Demand for Jury Trial	I	AA0071-0072
18	02/22/17	First Amended Complaint	I	AA0065-0196

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27	04/19/17	Minutes from April 19, 2017 hearing on Motion to Dismiss, and other pending filings entered by Court Clerk	IV	AA0784
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8	12/28/16	Plaintiff's Opposition to Motion to Dismiss; and Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA073-0103
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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 III**, 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:

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Attorney for Respondents

_____ Certified Mail
__X__ Electronic Filing/Service
_____ Email
_____ Facsimile
_____ Hand Delivery
_____ Regular Mail

An employee of Albright, Stoddard, Warnick & Albright

EXHIBIT N

ORIGINAL

FILED

JUN 24 4 20 PM '09

CLERK OF THE COURT

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Attorneys for Defendant R&S St. Rose, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

08A574852
202724

ROBERT E. MURDOCK and ECKLEY M. KEACH,

Plaintiffs,

vs.

SAIID FOROUZAN RAD, an individual; R. PHILIP 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 thorough X, inclusive,

Defendants.

CASE NO. A574852
DEPT. NO. XI

R&S ST. ROSE, LLC'S AMENDED ANSWER TO SECOND AMENDED COMPLAINT

Defendant, R & S St. Rose, LLC ("R & S"), by and through its attorneys, BAILUS COOK & KELESIS, LTD., answers Plaintiffs' Second Amended Complaint as follows:

RECEIVED
JUN 22 2009
CLERK OF THE COURT

THE PARTIES

1. R & S is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraphs 1, 2, 8 and 11 in Plaintiffs' Second Amended Complaint.

2. R & S admits the allegations contained in paragraphs 3, 4, 5, and 6 in Plaintiffs' Second Amended Complaint.

3. Answering paragraphs 7, 9 and 10, R&S denies that any "corporate shells" existed or that Nourafchan and Rad acted "through their corporate shells." R&S admits the remaining allegations in paragraphs 7, 9 and 10.

4. Paragraph 12 does not require as a response, as it asserts no factual allegations. To the extent that paragraph 12 may be interpreted as asserting facts, then they are denied.

5. R & S denies the allegations contained in paragraphs 13 through 22.

THE FACTS

6. R & S is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraphs 23, 24, 25, 26, 27, 29, 30, 32, 33, 34, 36, 52, 64, 65, 86, 87 and 88.

7. R & S denies the allegations in paragraphs 31, 42, 45, 46, 48, 49, 50, 54, 57, 58, 59, 60, 61, 62, 63, 66, 69, 70, 71, 72, 73, 74, 78, 79, 81, 82, 83, 84, 85, 91, 92, 93, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107.

8. R & S admits the allegations in paragraph 77.

9. Answering paragraph 28, R & S asserts that the e-mail referenced and the underlying documents referenced speak for themselves. Defendant denies any allegations set forth in this paragraph to the extent that they are inconsistent with the e-mail and/or the underlying documents referenced.

10. Answering paragraph 35, R & S denies that Mr. Burns was "an agent of Defendants Rad and Nourafchan." R & S is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 35, and therefore denies those allegations.

11. Answering paragraph 38, R & S asserts that the referenced documents speak for

themselves. Defendant denies any allegations set forth in this paragraph to the extent that they are inconsistent with the referenced documents.

12. Answering paragraph 39, R & S admits Plaintiff Murdock wired $100,000.00 but denies the remaining allegations.

13. Answering paragraph 37, R & S denies that the "R & S" ... "meant Defendants Rad and Nourafchan." R & S is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 37, and therefore denies those allegations.

14. Answering paragraph 40, R & S denies that Defendants Rad and Nourafchan faxed new wiring instructions to Mr. Keach. R & S is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 40, and therefore denies those allegations.

15. Answering paragraph 41, R & S admits that Mr. Keach wired $500,000.00 to R & S St. Rose, LLC. R & S is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 41 and therefore denies those allegations.

16. Answering paragraph 43, R & S asserts that the terms of the September 6, 2005 letter and the underlying documents referenced speaks for themselves. To the extent that the allegations in paragraph 43 are in conflict with the letter or the underlying documents referenced, they are denied. In further answering paragraph 43, R & S is without knowledge or information sufficient to form a belief as to when Mr. Murdock received the letter dated September 6, 2005, and therefore denies the allegation that it was received "[s]ometime after September 6, 2006."

17. Answering paragraph 44, R & S asserts that the terms of the letter and Promissory Note referenced therein speaks for themselves. To the extent that the allegations in paragraph 44 are in conflict with the letter or the Promissory Note, they are denied. In further answering paragraph 44, Defendant is without knowledge or information sufficient to form a belief as to whether Mr. Murdock was or was not alarmed by the contents of the letter, and therefore denies the allegation that "[n]othing about this letter alarmed Mr. Murdock." Additionally, R & S denies that a loan was made "to the R & S Defendants."

18. Answering paragraph 47, R & S asserts that the terms of the September 6, 2006 letter and the documents referenced therein speak for themselves. To the extent that the allegations in paragraph 47 are in conflict with the letter or the referenced documents, they are denied. R & S denies the remaining allegations in paragraph 47.

19. Answering paragraph 51, R & S admits that Plaintiffs received their first checks with interest and points by mid-September 2005, and that subsequent payments were also timely received. R & S denies the remaining allegations in paragraph 51.

20. Answering paragraph 53, R & S admits that as of October 2005, Plaintiffs had never met Defendants Rad and Nourafchan, but denies that Plaintiffs had loaned monies to Defendants Rad and Nourafchan and that Mr. Burns was the "agent of the R & S Defendants." As to the remaining allegations in paragraph 53, R & S is without knowledge or information sufficient to form a belief as to their truth or falsity, and therefore denies the same.

21. Answering paragraph 55, R & S denies that on or about November 4, 2005, Plaintiffs received a letter dated November 2, 2005 from Defendants. In further answering paragraph 55, R & S asserts that the November 2, 2005 letter speaks for itself. To the extent that any of the allegations in paragraph 55 are in conflict with the November 2, 2005 letter, they are denied.

22. Answering paragraph 56, R & S asserts that the terms of the Promissory Note speak for themselves. To the extent that any of the allegations in paragraph 56 are in conflict with the Promissory Note, they are denied. In further answering paragraph 56, Defendant is without knowledge or information sufficient to form as to the remaining allegations and therefore denies the same.

23. Answering paragraph 67, R & S admits that it (R & S St Rose, LLC) is the entity that owns the 38 acres of land referenced therein. Defendant denies the remaining allegations in paragraph 67.

24. Answering paragraph 68, R & S admits that R & S St. Rose Lenders, LLC is listed on the Promissory Note as the borrower, and that it (R & S St. Rose, LLC) is identified as the lender. R & S denies the remaining allegations in paragraph 68.

25. Answering paragraph 75, R & S admits that from September 2005 through Spring 2008, there was never a missed interest payment to Plaintiff, but deny that the Note had been in default since November 2006.

26. Answering paragraph 76, R & S admits Plaintiffs were notified Centex Homes was not going to be able to purchase the Property on September 1, 2006 and Plaintiffs were requested to execute an extension to the Promissory Note which was due and payable on November 1, 2006. R & S denies the notification was done and the extension was requested by the R & S Defendants.

27. Answering paragraph 80, R & S asserts that the terms and provisions of the Promissory Note speaks for themselves. To the extent that the allegations in paragraph 80 are in conflict with the note, they are denied.

28. R & S asserts that the language set forth in paragraphs 89 and 90 does not require a response because it improperly asserts legal conclusions, rather than stating factual allegations. To the extent that any response is required, R & S is without knowledge or information sufficient to form a belief as to the truth or falsity thereof, and therefore denies the same.

29. R & S denies the allegations contained in paragraph 94, and further asserts that it is violative of NRCP Rule 10(b) in that Plaintiffs have failed to limit the paragraph's contents to a statement of a single set of circumstances.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. Any claim for relief of Plaintiffs, or cause of action of Plaintiffs, as alleged in Plaintiffs' Complaint, are barred by the applicable statute of limitations.

3. The breach of contract alleged in the Complaint, and all damages resulting therefrom, was caused by the acts, omissions and breaches of Plaintiffs and third parties over whom R & S had no control.

4. Plaintiffs had knowledge of and assume the risks inherent to the matters at issue in the Complaint; therefore, the damages alleged by Plaintiffs were caused by and arose out of risks which Plaintiffs had knowledge of and assumed.

5. Plaintiffs' claims are barred by the doctrine of equitable estoppel.

6. Plaintiffs, by their own act and conduct, waived their right to assert any claim against R & S.

7. Damages and injuries, if any, suffered by the Plaintiffs are not attributable to any act, conduct, or omission on the part of R & S.

8. Plaintiffs are barred from relief for any claim by operation of the doctrine of laches.

9. As to any agreement, obligation or agreement alleged by Plaintiffs to have been breached by R & S, any duty of performance was excused by reason of failure of any consideration, breach of condition precedent or impossibility.

10. Neither Defendant nor any of the Defendants named in Plaintiffs' Complaint committed any acts of oppression, fraud, or mails, express or implied.

11. It has been necessary for R & S to employ the services of an attorney to defend this Complaint, and reasonable sums should be allowed as and for attorney's fees, together with the costs expended in this action.

Pursuant to the provisions of NRCP 11, at the time of the filing of the Answer to the Complaint, all possible affirmative defenses may not have been alleged inasmuch as insufficient facts and relevant information may not have been available after reasonable inquiry, and therefore, R & S reserves the right to amend this Answer to the Complaint to allege additional affirmative defenses if subsequent investigation so warrants.

WHEREFORE, Defendant, R & S St. Rose, LLC prays as follows:

1. That Plaintiffs take nothing by way of their Complaint.

2. For reasonable attorney's fees and costs of suit incurred herein;

3. For such other and further relief as the Court deems just and proper in the premises.

DATED this 24 day of June, 2009.

BAILUS COOK & KELESIS, LTD.

By _____
GEORGE P. KELESIS, ESQ.
Nevada Bar No. 0069
MARC P. COOK, ESQ.
Nevada Bar No. 4574
JULIE L. SANPEI, ESQ.
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(702) 737-7702
Attorneys for Defendant R&S St. Rose, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies pursuant to NRCP 5(b) that on the 24 day of June, 2009, I served the above and foregoing R&S ST. ROSE, LLC'S AMENDED ANSWER TO SECOND AMENDED COMPLAINT on the parties listed below, by placing a true and correct copy thereof in the United States Mail at Las Vegas, Nevada with first-class postage fully prepaid thereon, addressed as follows:

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Las Vegas, NV 89101
Plaintiff in Proper Person

Eckley M. Keach, Esq.
ECKLEY M. KEACH, CHTD.
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Ogonna M. Atamoh,
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Attorneys for Saiid Forouzan Rad, R. Phillip Nourafchan Forouzan, Inc., RPN, LLC, and R&S Investment Group, LLC

David J. Merrill
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Attorneys for Colonial Bancgroup, Inc.

An employee of BAILUS COOK & KELESIS, LTD.

EXHIBIT O

Electronically Filed
10/27/2009 01:04:45 PM

CLERK OF THE COURT

ANAC
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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.

AND ALL RELATED CLAIMS AND ACTIONS

Master Case No.: 08A574852
Consolidated with: 09A594512
Dept. No.: XI

R & S ST. ROSE LENDERS, LLC'S ANSWER TO SECOND AMENDED COMPLAINT AND COUNTERCLAIM

R & S St. Rose Lenders, LLC ("St. Rose Lenders") answers BB&T Corporation, as successor in interest to Federal Deposit Insurance Corporation, as receiver of Colonial Bank, N.A. ("BB&T"), Second Amended Complaint (the "Complaint") as follows:

GENERAL ALLEGATIONS

1. St. Rose Lenders is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraph 1 of the Complaint.

2. St. Rose Lenders admits the averments set forth in paragraph 2 of the Complaint.

3. St. Rose Lenders admits the averments set forth in paragraph 3 of the Complaint.

4. St. Rose Lenders admits the averments set forth in paragraph 4 of the Complaint.

5. St. Rose Lenders admits the averments set forth in paragraph 5 of the Complaint.

6. St. Rose Lenders admits the averments set forth in paragraph 6 of the Complaint.

7. St. Rose Lenders admits the averments set forth in paragraph 7 of the Complaint.

8. St. Rose Lenders is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraph 8 of the Complaint.

9. St. Rose Lenders admits the averments set forth in paragraph 9 of the Complaint.

10. In response to the averments set forth in paragraph 10 of the Complaint, St. Rose Lenders avers that that Loan Agreement entered into between Colonial Bank, N.A. ("Colonial Bank") and R & S St. Rose, LLC ("R&S") (the "First Colonial Loan") speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments in paragraph 10 to the extent they are inconsistent with the Loan Agreement.

11. In response to the averments set forth in paragraph 11 of the Complaint, St. Rose Lenders avers that the Promissory Note Secured by Deed of Trust ("the First Colonial Note") entered into between Colonial Bank and R&S speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments in paragraph 11 to the extent they are inconsistent with the First Colonial Note.

12. In response to the averments set forth in paragraph 12 of the Complaint, St. Rose Lenders avers that the Deed of Trust and Security Agreement and Fixture Filing with Assignment of Rents dated August 16, 2005 (the "First Colonial DOT") speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments in paragraph 12 to the extent they are inconsistent with the First Colonial DOT.

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13. In response to the averments set forth in paragraph 13 of the Complaint, St. Rose Lenders avers that the Second Short Form Deed of Trust with Assignment of Rents dated August 23, 2005 (the "St. Rose Lenders DOT") speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments in paragraph 13 to the extent they are inconsistent with the St. Rose Lenders DOT.

14. St. Rose Lenders denies the averments set forth in paragraph 14 of the Complaint. In addition, St. Rose Lenders avers that it paid consideration to R&S for the St. Rose Lenders DOT.

15. In response to the averments set forth in paragraph 15 of the Complaint, St. Rose Lenders admits that Forouzan, Inc. and RPN, LLC are the managers of both R&S and St. Rose Lenders. St. Rose Lenders denies any remaining averments set forth in paragraph 15 of the Complaint.

16. St. Rose Lenders admits the averments set forth in paragraph 16 of the Complaint.

17. In response to the averments set forth in paragraph 17 of the Complaint, St. Rose Lenders avers that the Subordination Agreement dated May 17, 2007 (the "St. Rose Lenders Subordination") speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments in paragraph 17 to the extent they are inconsistent with the St. Rose Lenders Subordination.

18. In response to the averments set forth in paragraph 18 of the Complaint, St. Rose Lenders avers that the St. Rose Lenders Subordination speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments set forth in paragraph 18 to the extent they are inconsistent with the St. Rose Lenders Subordination.

19. In response to the averments set forth in paragraph 19 of the Complaint, St. Rose Lenders avers that the Construction Loan Agreement dated July 17, 2007 entered into between Colonial Bank and R&S (the "Second Colonial Loan") speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments set forth in paragraph 19 to the extent they are inconsistent with the Second Colonial Loan.

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20. In response to the averments set forth in paragraph 20 of the Complaint, St. Rose Lenders avers that the Second Colonial Loan speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments set forth in paragraph 20 to the extent they are inconsistent with the Second Colonial Loan. St. Rose Lenders further denies that the Second Colonial Loan provided for a first priority deed of trust.

21. St. Rose Lenders denies the averments set forth in paragraph 21 of the Complaint.

22. St. Rose Lenders denies the averments set forth in paragraph 22 of the Complaint.

23. In response to the averments set forth in paragraph 23 of the Complaint, St. Rose Lenders avers that the Promissory Note Secured by Deed of Trust dated July 27, 2007 between R&S and Colonial Bank (the "Second Colonial Note") speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments set forth in paragraph 23 to the extent they are inconsistent with the Second Colonial Note.

24. In response to the averments set forth in paragraph 24 of the Complaint, St. Rose Lenders avers that the Guarantee dated July 27, 2007 (the "Guarantee") speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments set forth in paragraph 24 to the extent they are inconsistent with the Guarantee.

25. In response to the averments set forth in paragraph 25 of the Complaint, St. Rose Lenders avers that the Deed of Trust and Security Agreement and Fixture Filing with Assignment of Rents dated July 27, 2007 (the "Second Colonial DOT") speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments set forth in paragraph 25 to the extent they are inconsistent with the Second Colonial DOT. St. Rose Lenders further denies that Plaintiff intended the Second Colonial DOT as a first position deed of trust.

26. St. Rose Lenders denies the averments set forth in paragraph 26 of the Complaint.

27. St. Rose Lenders denies the averments set forth in paragraph 27 of the Complaint.

28. St. Rose Lenders denies the averments set forth in paragraph 28 of the Complaint.

29. St. Rose Lenders denies the averments set forth in paragraph 29 of the Complaint.

30. St. Rose Lenders denies the averments set forth in paragraph 30 of the Complaint.

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31. St. Rose Lenders denies the averments set forth in paragraph 31 of the Complaint.

32. St. Rose Lenders denies the averments set forth in paragraph 32 of the Complaint.

33. St. Rose Lenders denies the averments set forth in paragraph 33 of the Complaint.

FIRST CAUSE OF ACTION

(Declaratory Relief – Contractual Subrogation)

34. In response to the averments set forth in paragraph 34 of the Complaint, St. Rose Lenders repeats and realleges each of its responses to paragraphs 1 through 33 above, as if fully set forth herein.

35. St. Rose Lenders denies the averments set forth in paragraph 35 of the Complaint.

36. St. Rose Lenders denies the averments set forth in paragraph 36 of the Complaint.

37. In response to the averments set forth in paragraph 37 of the Complaint, St. Rose Lenders admits that it disputes that BB&T is to be subrogated to the priority of the First Colonial DOT. St. Rose Lenders otherwise denies any remaining averments set forth in paragraph 37 of the Complaint.

38. In response to the averments set forth in paragraph 38 of the Complaint, St. Rose Lenders admits that a dispute exists between St. Rose Lenders and BB&T concerning the priority of their respective deeds of trust and that the issue is ripe for judicial determination. St. Rose Lenders otherwise denies any remaining averments set forth in paragraph 38 of the Complaint and specifically denies that BB&T has any priority interest in the Property.

39. St. Rose Lenders denies the averments set forth in paragraph 39 of the Complaint.

40. St. Rose Lenders denies the averments set forth in paragraph 40 of the Complaint.

SECOND CAUSE OF ACTION

(Declaratory Relief/Quiet Title – Replacement)

41. In response to the averments set forth in paragraph 41 of the Complaint, St. Rose Lenders repeats and realleges each of its responses to paragraphs 1 through 40 above, as if fully set forth herein.

42. St. Rose Lenders is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraph 42 of the Complaint.

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43. St. Rose Lenders denies the averments set forth in paragraph 43 of the Complaint.

44. In response to the averments set forth in paragraph 44 of the Complaint, St. Rose Lenders admits that it had, and still has, an interest in the Property. St. Rose Lenders otherwise denies any remaining averments set forth in paragraph 44 of the Complaint.

45. St. Rose Lenders denies the averments set forth in paragraph 45 of the Complaint.

46. St. Rose Lenders denies the averments set forth in paragraph 46 of the Complaint.

THIRD CAUSE OF ACTION

(Equitable/Promissory Estoppel)

47. In response to the averments set forth in paragraph 47 of the Complaint, St. Rose Lenders repeats and realleges each of its responses to paragraphs 1 through 46 above, as if fully set forth herein.

48. St. Rose Lenders denies the averments set forth in paragraph 48 of the Complaint.

49. In response to the averments in paragraph 49 of the Complaint, St. Rose Lenders avers that the Second Colonial DOT speaks for itself and, thus, no response is required. To the extent a response is required, St. Rose Lenders denies any averments set forth in paragraph 49 of the Complaint to the extent they are inconsistent with the Second Colonial DOT.

50. St. Rose Lenders denies the averments set forth in paragraph 50 of the Complaint.

51. St. Rose Lenders denies the averments set forth in paragraph 51 of the Complaint.

52. St. Rose Lenders denies the averments set forth in paragraph 52 of the Complaint.

53. St. Rose Lenders denies the averments set forth in paragraph 53 of the Complaint.

54. St. Rose Lenders denies the averments set forth in paragraph 54 of the Complaint.

55. St. Rose Lenders denies the averments set forth in paragraph 55 of the Complaint.

FOURTH CAUSE OF ACTION

(Unjust Enrichment)

56. In response to the averments set forth in paragraph 56 of the Complaint, St. rose Lenders repeats and realleges its responses to paragraphs 1 through 55 above as if fully set forth herein.

57. St. Rose Lenders denies the averments set forth in paragraph 57 of the Complaint.

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58. St. Rose Lenders denies the averments set forth in paragraph 58 of the Complaint.

59. St. Rose Lenders denies the averments set forth in paragraph 59 of the Complaint.

60. St. Rose Lenders denies the averments set forth in paragraph 60 of the Complaint.

61. St. Rose Lenders denies the averments set forth in paragraph 61 of the Complaint.

FIFTH CAUSE OF ACTION

(Fraudulent Misrepresentation)

62. In response to the averments set forth in paragraph 62 of the Complaint, St. Rose Lenders repeats and realleges each of its responses to paragraphs 1 through 61 above as if fully set forth herein.

63. St. Rose Lenders denies the averments set forth in paragraph 63 of the Complaint.

64. St. Rose Lenders denies the averments set forth in paragraph 64 of the Complaint.

65. St. Rose Lenders denies the averments set forth in paragraph 65 of the Complaint.

66. St. Rose Lenders denies the averments set forth in paragraph 66 of the Complaint.

67. St. Rose Lenders denies the averments set forth in paragraph 67 of the Complaint.

68. St. Rose Lenders denies the averments set forth in paragraph 68 of the Complaint.

69. St. Rose Lenders denies the averments set forth in paragraph 69 of the Complaint.

70. St. Rose Lenders denies the averments set forth in paragraph 70 of the Complaint.

71. St. Rose Lenders denies the averments set forth in paragraph 71 of the Complaint.

72. St. Rose Lenders denies the averments set forth in paragraph 72 of the Complaint.

73. St. Rose Lenders denies the averments set forth in paragraph 73 of the Complaint.

74. St. Rose Lenders denies the averments set forth in paragraph 74 of the Complaint.

75. St. Rose Lenders denies the averments set forth in paragraph 75 of the Complaint.

76. St. Rose Lenders denies the averments set forth in paragraph 76 of the Complaint.

SIXTH CAUSE OF ACTION

(Civil Conspiracy)

77. In response to the averments set forth in paragraph 77 of the Complaint, St. Rose Lenders repeats and realleges each of its responses to paragraphs 1 through 76 above as if fully set forth herein.

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78. St. Rose Lenders denies the averments set forth in paragraph 78 of the Complaint.

79. St. Rose Lenders denies the averments set forth in paragraph 79 of the Complaint.

80. St. Rose Lenders denies the averments set forth in paragraph 80 of the Complaint.

81. St. Rose Lenders denies the averments set forth in paragraph 81 of the Complaint.

82. In response to the averments set forth in paragraph 82 of the Complaint, St. Rose Lenders admits that the St. Rose Lenders DOT is a first position lien against the Property as reflected in the public records of Clark County, Nevada. St. Rose Lenders denies the remaining averments set forth in paragraph 82 of the Complaint.

83. St. Rose Lenders denies the averments set forth in paragraph 83 of the Complaint.

84. St. Rose Lenders denies the averments set forth in paragraph 84 of the Complaint.

85. St. Rose Lenders denies the averments set forth in paragraph 85 of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Complaint, and each alleged cause of action therein, fails to set forth facts sufficient to state a claim upon which relief may be granted against St. Rose Lenders and further fails to entitle Plaintiff to the relief sought, or to any other relief whatsoever from St. Rose Lenders.

Second Affirmative Defense

Plaintiff's claims fail, in whole or in part, because Plaintiffs have failed to join indispensable parties, as required by N.R.C.P. 19.

Third Affirmative Defense

Plaintiff lacks standing to bring some or all of the claims set forth in the Complaint.

Fourth Affirmative Defense

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

Fifth Affirmative Defense

Plaintiff's claims are barred, in whole or in part, by a lack of privity of contract.

Sixth Affirmative Defense

Plaintiff's claims are barred, in whole or in part, by the statute of frauds.

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Seventh Affirmative Defense

Plaintiff's claims are barred, in whole or in part, as St. Rose Lenders will suffer material prejudice if the Court removes its priority position.

Eighth Affirmative Defense

Plaintiff's claims are barred, in whole or in part, by the parole evidence rule.

Ninth Affirmative Defense

Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

Tenth Affirmative Defense

Plaintiff's claims are barred, in whole or in part, because it has an adequate remedy at law.

COUNTERCLAIM

R & S St. Rose Lenders, LLC counterclaims against Plaintiff BB&T Corporation, as successor in interest to Federal Deposit Insurance Corporation, as receiver of Colonial Bank, N.A. ("Colonial") as follows:

1. Counterclaimant R & S St. Rose Lenders, LLC ("St. Rose Lenders") is a Nevada limited liability company with its principal place of business in Clark County, Nevada.

2. St. Rose Lenders is informed and believes that counterdefendant BB&T is a North Carolina corporation, that is successor in interest to the Federal Deposit Insurance Corporation as receiver of Colonial Bank, N.A.

3. On or about August 16, 2005, Defendant R & S St. Rose, LLC ("R&S St. Rose") entered into a Loan Agreement and Promissory Note, by the terms of which R&S St. Rose borrowed $29,305,250.00 from Colonial for the purchase of 38.67 acres of undeveloped real property located at the intersection of St. Rose Parkway and Spencer Road in Henderson, Nevada (the "Property"). The Promissory Note was secured by a Deed of Trust and Security Agreement and Fixture Filing with Assignment of Rents ("First Deed of Trust") with R&S St. Rose as trustor, Nevada Title Company ("Nevada Title") as trustee, and Colonial as beneficiary. Nevada Title recorded the First Deed of Trust on August 26, 2005.

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4. On or about August 23, 2005, R&S St. Rose entered into a Promissory Note, by the terms of which R&S St. Rose borrowed $12,000,000.00 from St. Rose Lenders. St. Rose Lenders borrowed the money that it lent to R&S St. Rose from private lenders, including Robert Murdock and Eckley Keach. The Promissory Note was secured by a Second Short Form Deed of Trust and Assignment of Rents ("Second Deed of Trust") with R&S St. Rose as trustor, Nevada Title as trustee, and St. Rose Lenders as beneficiary. Nevada Title recorded the Second Deed of Trust on September 16, 2005.

5. On or about July 27, 2007, R&S St. Rose entered into a Construction Loan Agreement and Promissory Note Secured by Deed of Trust, by the terms of which Colonial agreed to loan to R&S St. Rose funds in an amount not to exceed $43,980,000.00 that, in part, paid off and reconveyed the First Deed of Trust. The Promissory Note was secured by a Deed of Trust and Security Agreement and Fixture Filing with Assignment of Rents (the "Third Deed of Trust") with R&S St. Rose as trustor, Nevada Title as trustee, and Colonial as beneficiary. Nevada Title recorded the Third Deed of Trust on July 31, 2007.

6. Before entering into the Construction Loan Agreement and Promissory Note dated July 27, 2007, Nevada Title did not request that St. Rose Lenders subordinate or reconvey the Second Deed of Trust to Colonial's Third Deed of Trust and St. Rose Lenders did not subordinate or reconvey the Second Deed of Trust to Colonial's Third Deed of Trust.

7. In an e-mail dated September 5, 2008, Nevada Title confirmed that St. Rose Lenders' Second Deed of Trust had priority over Colonial's Third Deed of Trust.

8. Nevertheless, on April 28, 2009, Colonial recorded a Notice of Default and Election to Sell, giving notice that it intends to foreclose upon the Third Deed of Trust.

FIRST CAUSE OF ACTION

9. St. Rose Lenders incorporates by reference each of the averments set forth in paragraphs 1 through 8 above as if fully set forth herein.

10. An actual controversy has arisen and now exists between Colonial and St. Rose Lenders as to the priority of their respective rights and interests in the Property.

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11. There exists a justiciable controversy between parties whose interests are diverse. St. Rose Lenders has a legally protectable interest in the controversy, and the issues involved in the controversy are ripe for judicial determination.

12. St. Rose Lenders seeks to have the Court determine the question of priority of the Second and Third Deeds of Trust. A judicial declaration is necessary at this time, under the circumstances, in order that the parties may ascertain their rights under the Second and Third Deeds of Trust.

13. It has been necessary for St. Rose Lenders to obtain the services of an attorney to prosecute this action and St. Rose Lenders is entitled to recover its reasonable attorneys' fees and costs incurred.

SECOND CAUSE OF ACTION

14. St. Rose Lenders incorporates by reference each of the averments set forth in paragraph 1 through 13 above as if fully set forth herein.

15. Colonial's Notice of Default and Election to Sell threatens St. Rose Lenders with irreparable injury for which it has no adequate remedy at law.

16. St. Rose Lenders seeks to have the Court enjoin Colonial's attempted foreclosure until the Court determines the priority of the Second and Third Deeds of Trust.

17. It has been necessary for St. Rose Lenders to obtain the services of an attorney to prosecute this action and St. Rose Lenders is entitled to recover its reasonable attorneys' fees and costs incurred.

WHEREFORE, St. Rose Lenders prays as follows:

A. That Plaintiffs take nothing by way of their Complaint;

B. That the Complaint be dismissed with prejudice;

C. That the Court declare that the Second Deed of Trust has priority over Colonial's Third Deed of Trust;

D. That the Court enjoin Colonial's foreclosure pending a determination of the priority of the Second and Third Deeds of Trust;

E. That St. Rose Lenders be awarded its costs and attorneys' fees;

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F. For any further relief the Court deems appropriate.

DATED this 27th day of October 2009.

DAVID J. MERRILL, P.C.

By: */s/ David J. Merrill*
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(702) 566-1935
Attorney for R & S ST. ROSE LENDERS, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October 2009, a copy of the foregoing R & S St. Rose Lenders, LLC's Answer to Second Amended Complaint and Counterclaim was served by depositing a true and correct copy in the United States Mail, first class postage prepaid, and addressed to the following at their last known addresses:

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Henderson, Nevada 89074

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/s/ David J. Merrill
An employee of David J. Merrill, P.C.

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EXHIBIT P

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ROBERT MURDOCK, et al. Plaintiffs vs. SAIID RAD, et al. Defendants And related cases and parties	CASE NO. A-574852 A-594512 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EVIDENTIARY HEARING - DAY 1

FRIDAY, JANUARY 8, 2010

APPEARANCES:

FOR THE PLAINTIFFS: ROBERT E. MURDOCK, ESQ.
ECKLEY M. KEACH, ESQ.

FOR THE DEFENDANTS: DOUGLAS D. GERRARD, ESQ.
DAVID J. MERRILL, ESQ.
RICHARD F. HOLLEY, ESQ.
JULIE L. SANPEI, ESQ.

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

that may be as to Colonial Bank.

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

The issue here is, just as he's focused on, the Restatement. And the Restatement is clear. Mr. Gerrard cites 7.6. And he's right. "One who fully performs an obligation of another." Well, the problem for BB&T is -- or under 7.3 I will assume it's for yourself, because it's replacement. But the problem for BB&T is they didn't perform that obligation. They -- Colonial Bank may have. BB&T did not. They never did. They couldn't. They weren't even involved.

More importantly, Your Honor, BB&T bought these assets, according to this witness, I think he said August 14th, 2009. On August 14th, 2009, when BB&T bought these assets, one thing was very clear, because this Court was aware of it by then, they were in second position and everybody was claiming they were in second position. So they bought knowing

v. Far East National Bank, makes it pretty clear about who's a volunteer and not a volunteer where they say that, under doctrine of equitable subrogation they're a volunteer if in making a -- they have no interest of their own to protect, which BB&T didn't, they act without any obligation, legal or moral, which they did not, and, Your Honor, the last part, they can never, ever, ever overcome is they acted without being requested to do so by the person liable on the original obligation, which is R&S.

R&S didn't come and ask BB&T, hey, help me out here. R&S may have asked Colonial Bank, we need some help. Colonial Bank probably isn't a volunteer. Colonial Bank probably protected their interest, but not BB&T. This is not an assignment. Mr. Gerrard has to have this Court rule this was an assignment in order to get any kind of relief. Even then, though, Your Honor, equity would not apply to BB&T. There's no basis for them to tell this Court that they were misled somehow or they had some expectation that would justify them saying, we don't -- we don't go by the law, which is first in right first in time, we need something special because we put out this money with an expectation we'd be protected. That's just not true.

THE COURT: Thank you. The objection is overruled. I have two issues I have to determine as part of this hearing -- or at least two issues I have to determine. One is whether

there was in fact a replacement theory that should be applied to Colonial Bank as a result of the second loan that occurred in this. And then the second issue I have to determine is the nature of the relationship between the Colonial Bank loan and the BB&T entity's. And in making that determination I'm going to listen to the evidence before I apply the theories that you're saying, because I have to make a determination as to whether there's an assignment that exists, if it's a successor in interest that exists, or if it's some other nature of an acquisition.

Okay. Which is why I'm listening to evidence.

MR. GERRARD: Right. Thank you, Your Honor.

MR. KEACH: Thank you, Your Honor.

THE COURT: So that was the educating the Judge part of your argument, Mr. Keach?

MR. KEACH: It was, Your Honor.

THE COURT: I'd already read the brief.

Do you remember where you were, Mr. Gerrard?

MR. GERRARD: I -- just a second, Your Honor.

I do, Your Honor.

THE COURT: Okay.

BY MR. GERRARD:

Q All right. Now, Mr. Yach, I had just asked you before our break to describe to the Court what your understanding was with respect to the subordinate debt when

EXHIBIT Q

ORIGINAL

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ROBERT MURDOCK, et al. Plaintiffs vs. SAIID RAD, et al. Defendants And related cases and parties	CASE NO. A-574852 A-594512 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

PORTION OF EVIDENTIARY HEARING - DAY 6
(ARGUMENT OF RULE 50 MOTIONS)

TUESDAY, MARCH 30, 2010

APPEARANCES:

FOR THE PLAINTIFFS:	ROBERT E. MURDOCK, ESQ. ECKLEY M. KEACH, ESQ.
FOR THE DEFENDANTS:	DOUGLAS D. GERRARD, ESQ. DAVID J. MERRILL, ESQ. RICHARD F. HOLLEY, ESQ. JULIE L. SANPEI, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

the defense that this side of the table intends to present and what's going on in terms of Mr. Gerrard vis-a-vis whether he's resting except for Brad Burns, or whether he may have additional evidence or testimony above and beyond Brad Burns. Because, dependent upon -- if the situation is that he's resting, except Brad Burns has to come in and testify on April the 8th, then that's one scenario. If the scenario is he doesn't want to put on anything else now until Brad Burns testified and he's reserving his right to put on --

THE COURT: Did you hear how I asked him the question? I said, with the exception of Mr. Burns, who's not going to be here until April 8th.

Is that what I asked you?

MR. GERRARD: That's what you asked me, and said yes.

THE COURT: You don't have anything else you plan to put on?

MR. GERRARD: Well, in rebuttal.

THE COURT: You may have a rebuttal case that you put on --

MR. GERRARD: Yeah.

THE COURT: -- but you don't have anything else in your case in chief?

MR. GERRARD: No.

THE COURT: See how I handled that so nicely, Mr.

Keach?

MR. KEACH: I appreciate that. Are they --

THE COURT: I had already asked the question nicely that way.

MR. KEACH: Okay. I appreciate that.

THE COURT: So now tell me what your issue is.

MR. KEACH: Well, now the issue is we have a motion.

THE COURT: So you want to make a 50(a) motion in an evidentiary hearing?

MR. KEACH: 50(a) or 52(c) or --

THE COURT: Whatever.

MR. KEACH: -- or a 41 or whatever it is, we want to make a motion.

THE COURT: Yeah. I don't know what you call them anymore.

MR. KEACH: Right.

THE COURT: So you want to make a motion before anybody else calls witnesses?

MR. KEACH: We do.

THE COURT: All right. Make motions.

MR. KEACH: Are we going to start at that end, Mr. Merrill, or do you want me to start at this end? You can.

MR. MERRILL: It's up to you.

MR. KEACH: Well, I was planning on Mr. Merrill starting, but, I mean, I can.

MR. MERRILL: I will take the floor, Your Honor.

Your Honor, we do have a motion to make, and principally it revolves around two issues. With respect to the contractual subrogation claim that BB&T is trying to assert here it is undisputed that St. Rose Lenders is not a party to the deed of trust. Mr. Gerrard has argued that under Section 5.03 of the deed of trust that he's entitled to contractual subrogation, and St. Rose Lenders is not a party to that. And because St. Rose Lenders is not a party to that deed of trust, it cannot be bound by it. You can only be bound by a contract if you're a party to it.

So we think the contractual subrogation, there's insufficient evidence to go forward. That claim has to be out.

With respect to the equitable subrogation and the replacement claims the real problem we have here, and I think that Your Honor has highlighted it several occasions, is BB&T really doesn't have any standing here, and Mr. Gerrard has presented no evidence whatsoever as to what BB&T has in this case. He's presented no evidence that BB&T owns this loan, what rights BB&T has with respect to this loan. There's been absolutely nothing at all.

Under Section 7.3 and 7.6 of the Restatement -- and now I'm assuming that replacement applies in Nevada, although we're arguing it doesn't, but I know the Court is reserving

that issue. But assuming that it does, they have not presented any evidence that BB&T -- that those would apply to BB&T. And specifically I'm looking at Section 7.6(b). 7.3, 7.6, they're essentially similar, as Mr. Gerrard has stated on numerous occasions, and the purpose of them is to avoid unjust enrichment.

Section 7.6(b) states by way of illustration, "Subrogation is appropriate to prevent unjust enrichment if the person seeking subrogation --"

Which in this case is BB&T, not Colonial Bank. Colonial Bank doesn't exist anymore. Colonial Bank has been substituted out of this case.

"-- if the person seeking subrogation," BB&T, "performs the obligation in order to protect his or her own interest." There's been no evidence presented by this side of the table that BB&T is doing anything to protect his or her own interest. "That --" BB&T "-- performed the obligation under a legal duty to do so." The plaintiff has presented no evidence that BB&T had a legal duty to do anything in this case. Number (3), "That --" BB&T "-- performed the obligation on account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition." Again, no evidence of a misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition -- I apologize -- regarding BB&T. And finally before is they have to

demonstrate that BB&T "performed the obligation upon a request from the obligor or the obligor's successor to do so if the person performing was promised repayment and reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged and if subrogation will not materially prejudice the holders of intervening interests in the real estate."

We have had zero testimony that R&S St. Rose asked BB&T to extend a loan. We don't know what BB&T has. We don't know what BB&T's rights require -- what, if any, rights it acquired here. And they have put on zero evidence even though Your Honor had said from the very beginning that this was an issue in the case.

I will also note that under NRS 111.235 that grants and assignments of deeds of trust have to be in writing. There is no document that has been admitted as evidence in this case showing any assignment or any acquisition by BB&T of this Colonial Bank deed of trust, Colonial Bank loan or whatever.

Brad Burns certainly can't testify to that. Brad Burns doesn't work for BB&T. If they are closing their case right now, Judge, then we respectfully request that you grant our motion on the contractual subrogation, equitable subrogation, and replacement arguments, because they have presented no evidence whatsoever that BB&T owns anything here

or has any rights or any standing in this case.

THE COURT: Anybody else on this side of the room want to join in the arguments or say anything in addition before I let Mr. Gerrard respond?

MR. KEACH: Yes, Your Honor.

MR. HOLLEY: Yes, Your Honor. I would like to raise a couple of other points.

THE COURT: Mr. Holley's next.

MR. HOLLEY: Thank you. One, just in terms of the nature of the interest that BB&T may hold, while Mr. Yach testified that BB&T bought some assets from Colonial Bank, those assets have not been specifically identified.

With respect to the second claim for relief on replacement, Your Honor, another item that they have failed to establish or one of the issues, the limitations on replacement, assuming that it's controlling in Nevada at all, deals with substantial prejudice to R&S Lenders. And I think Mr. Gerrard has put on evidence that there's been an increase in the principal amount of the indebtedness. There's been no evidence that R&S St. Rose Lenders consented to the increased amount. In fact, there's been evidence to the contrary, that the Lenders -- R&S Lenders did not consent in writing, and, second of all, there's no evidence that they consented verbally, either. With -- and the evidence has been that to the extent that Colonial Bank is involved in any of this at

And then they -- they end the discussion by saying, "If the Morts are equitably subrogation to the priority position of the current mortgage, the IRS will be in the same position it was in at the time the tax lien was filed. If equitable subrogation is denied, however, the government will receive a windfall, moving up to a better position than it originally had."

This case is directly on point with what it is that we're dealing with in this case. Being an assignee does not mean that you do not have the rights of the assignor to claim equitable subrogation. And this case says it squarely on all fours and makes it very clear that those rights exist.

Now, the notion that in a transaction like this where the FDIC takes over as a receiver that the FDIC does not have the right to convey everything that the bank that it took into receivership has is clearly covered by federal law. I didn't know that this was an issue until after this trial started and we heard from Mr. Keach about, you know, his argument that BB&T doesn't have those rights.

But the document itself makes an assignment in Section 3.1 --

THE COURT: That's Exhibit 183 --

MR. GERRARD: Yes.

THE COURT: -- Proposed Exhibit 183?

MR. GERRARD: Yes. It says, "The receiver sells,

MR. HOLLEY: Oh, I was here the whole time, Your Honor.

THE COURT: Wait, guys. Don't interrupt.

MR. GERRARD: You heard the representative of BB&T.

THE COURT: No, I heard him say that.

MR. GERRARD: He was here testifying as a representative of BB&T. To suggest that we didn't hear from representatives of BB&T is just a misstatement.

THE COURT: Okay.

MR. GERRARD: Both Mr. Yach and Ms. Singer testified as representatives of BB&T. And, in response to Mr. Keach, they both testified that this loan is owned by BB&T.

THE COURT: So --

MR. GERRARD: Both of them testified that this loan is now owned by their current employer, BB&T. They just said, we want to know what document shows that it was transferred. Well, you have it. It's this transfer agreement, which is a bulk assignment.

THE COURT: Well, here's the problem with that, and that's why I am not certain how we're going to handle this. But I don't want to blindside you, so we're going to figure something out. And I know Mr. Keach is going to get irritated with me.

I've admitted Exhibit 183. I think Exhibit 183, if it included some reference to this particular asset or a

schedule that had excluded assets that didn't include this asset, might comply with NRS 111.235, which would then put your client in a position where we might have some remedy. Without those kinds of things I think we have a potential standing issue, as Mr. Keach has framed it, or, you know, I guess that's the best way, or successor in -- a true successor in interest problem. So --

MR. GERRARD: Let me address --

THE COURT: -- I want to know --

MR. GERRARD: Can I address that? Because I think maybe --

THE COURT: Well, wait. Can I finish.

MR. GERRARD: Oh. I'm sorry. I thought you were.

THE COURT: I wasn't. I was taking a breath, because, remember, I'm not a hundred percent, either. And if I start laughing, I start coughing. So I've got to make sure I don't laugh.

So is there more, like the schedules, to Exhibit 183 that perhaps the folks at the FDIC would release to your client, rather than having your clients then return these assets to the FDIC because apparently they were never part of it, and now the FDIC has to either take part of the purchase price back or whatever.

MR. GERRARD: Can I respond to that?

THE COURT: Yes. The document issue.

thing, and that's this. We're talking about an equitable situation here, and as is, where is certainly plays into equity.

MR. GERRARD: Well --

THE COURT: Mr. Keach, I got that part.

MR. KEACH: Oh. You did, Your Honor. I just ready to move on.

MR. MERRILL: You're winning. Stop.

THE COURT: So with respect to contractual subrogation and replacement, you are going to make some phone calls and find out if there is something documentary in addition to Exhibit 183.

MR. GERRARD: All right. We'll look into that, Your Honor.

THE COURT: Okay. So here's the next question for you. When do you want to come back?

MR. GERRARD: Well --

THE COURT: I was planning to start tomorrow after you finish with Judge Adair or thereabouts. But it sounds like you've got to make some phone calls.

MR. GERRARD: I'm going to need to find out some information, and it's going to --

THE COURT: That's why I'm asking you some questions.

MR. GERRARD: -- it's going to take a little time,

EXHIBIT R

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ROBERT MURDOCK, et al. Plaintiffs vs. SAIID RAD, et al. Defendants And related cases and parties	CASE NO. A-574852 A-594512 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EVIDENTIARY HEARING - DAY 7
(CONTINUED ARGUMENT)

WEDNESDAY, MARCH 31, 2010

APPEARANCES:

FOR THE PLAINTIFFS: ROBERT E. MURDOCK, ESQ.
ECKLEY M. KEACH, ESQ.

FOR THE DEFENDANTS: DOUGLAS D. GERRARD, ESQ.
DAVID J. MERRILL, ESQ.
RICHARD F. HOLLEY, ESQ.
JULIE L. SANPEI, ESQ.

COURT RECORDER: TRANSCRIPTION BY:

JILL HAWKINS
District Court

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

as purchase agreement, BB&T purchased the loan at issue in this case." That's their statement. And there's never been anything presented to us that this was at issue in this case.

So, having said that, you can imagine why we were so surprised yesterday when suddenly there's this argument made, evidence is now closed and you haven't presented any evidence that you own the loan. Well, nobody ever raised it as an issue for this proceeding.

Having said that, I did exactly what Your Honor asked me to do, and I contacted BB&T, the person who's in charge of this acquisition and the lawyer at the FDIC, the top lawyer at the FDIC that was in charge of the entire transaction. And this is what I was able to find out.

THE COURT: Did they give you a document?

MR. GERRARD: May I approach, Your Honor?

THE COURT: Yes. Can we have the clerk mark them as your next in order.

MR. GERRARD: Sure.

THE COURT: Okay. Is it okay if we staple it, Mr. Gerrard?

MR. GERRARD: Yes. That'll be just fine. I have an extra copy for you.

THE COURT: Well, no. I want to ask a question before I look at it.

MR. GERRARD: Okay.

THE COURT: And you've handed it out to everybody?

MR. GERRARD: I just did.

THE COURT: Okay. Has everybody had a chance to look at it briefly?

MR. MERRILL: No, I did not.

MR. HOLLEY: Not yet, Your Honor.

THE COURT: Can anybody tell me if they have a problem with me looking at it?

MR. KEACH: I do.

THE COURT: Okay. So I'm not going to look at it yet, Mr. Gerrard.

MR. GERRARD: Okay. Well, I'm going to tell you it is that I found out.

THE COURT: So you're going to report on your homework assignment.

MR. GERRARD: Correct.

THE COURT: Okay.

MR. GERRARD: Yesterday you asked me if there was something in addition to Exhibit, what is it, 183, the purchase agreement.

THE COURT: 183, yes.

MR. GERRARD: Yes. There is an assignment of security instruments and other loan documents that was recorded with the Clark County Recorder on November 3rd of 2009 that is a bulk assignment of all loans --

MR. KEACH: And, of course, we object to all of this. This is not evidence in the case, I assume.

MR. GERRARD: Well, we're going to move it.

MR. KEACH: I mean, it's argument, not evidence.

THE COURT: Mr. Keach, could you sit down. He's reporting on the homework assignment.

MR. KEACH: No problem. I just want to make sure it's not evidence in the case.

THE COURT: I haven't looked at it, remember? I asked if anybody had an objection. I turned it over. I put it over here. I'm not looking at it.

MR. KEACH: Thank you, Your Honor.

THE COURT: I'm getting a report on the homework assignment so I can decide what to do, because he says he's been sandbagged.

MR. GERRARD: And in this document all of the rights to all Colonial Bank loans secured -- and deeds of trust in the state of Nevada are assigned from the FDIC to BB&T. And this is of public record. And I've given you a recorded copy. It's properly acknowledged. And you will also find that, as an offer of proof that I'm making to Your Honor right now, the last page of the exhibit is the certificate --

THE COURT: Proposed exhibit.

MR. GERRARD: -- is this -- okay, the proposed exhibit is the certificate of the Superintendent of the State

of Alabama Banking Department. And it has an appointment of the FDIC as a receiver to liquidate and distribute the assets of Colonial Bank.

The second-to-the-last page is an acceptance by the FDIC of that appointment as the receiver. Then you'll see that the third-to-the-last page is the same Superintendent of the State Banking Department authorizing the FDIC to liquidate and distribute the assets of Colonial Bank.

And you will see an assignment of all of those assets that here in Nevada in a recorded document that is in the public records, which I would argue to Your Honor under NRS 111.155 is admissible in evidence, because it is -- it has been properly acknowledged and recorded in the public records of Clark County, Nevada. And as such, under NRS 111.155, it may be read into evidence. I'd be happy to provide you with a copy of the statute if you don't have it handy.

THE COURT: No, I have a --

MR. KEACH: How about me? Can I have a copy of it?

MR. GERRARD: I only have one. I'll be happy to let you read it.

THE COURT: I don't need it. You can give it to Mr. Keach.

MR. GERRARD: So the point here, Your Honor, is we were not prepared to argue about standing, because it was not an issue that Your Honor identified for trial, it was not an

issue that Mr. Keach identified for trial, it was not an issue that Mr. Murdock identified for trial, it was not an issue that had been identified at the time that Your Honor requested all issues to be identified. And you issued a specific order --

THE COURT: All issues that were being advanced for trial on the merits to be identified.

MR. GERRARD: Correct.

THE COURT: Okay.

MR. GERRARD: And it was not identified at that time, and it was not included in any order, and so we didn't prepare anything for that, because we didn't think it was necessary. And as the trial brief of Mr. Murdock and Mr. Keach point out, it's a little self serving for them to argue to Your Honor in their trial brief that BB&T is the owner of the loan pursuant to this purchase agreement, which was our understanding, as well, we thought that was a non issue. They certainly didn't raise it as an issue. And suddenly at the end of the trial out of nowhere we have this raised as an issue.

So what we propose, Your Honor, is that Exhibit 183, which we believe in and of itself is more than sufficient to satisfy the requirement that all of the assets were acquired, let me make a comment about that. The FDIC's position, as well as my client's position, who are the only two parties to

this agreement and, under the terms of the agreement, the only two parties that have the right to raise any claims under the agreement, they both are --

MR. HOLLEY: If I could. And I apologize for interrupting.

THE COURT: I don't care what the FDIC thinks. How's that?

MR. GERRARD: Okay.

MR. HOLLEY: And moreover, he's not put anybody on from BB&T that can testify --

THE COURT: I understand. But I really don't care what the FDIC thinks.

MR. GERRARD: Okay. Well, the point here, Your Honor, is that the agreement is very clear in saying "all assets."

THE COURT: I understand that you think that, and we went through the agreement yesterday and I have some concerns about it, and I --

MR. GERRARD: And so now --

THE COURT: -- expressed them to you.

MR. GERRARD: So now I've provided you with a document that should clear up those concerns.

THE COURT: Okay. So does anybody have an objection, given the statutory authority that has been provided by Mr. Gerrard, for the foundation for the admission

of Proposed Exhibit Number 58?

MR. KEACH: I do, Your Honor.

THE COURT: All right. What is that objection?

MR. KEACH: It's lengthy, Your Honor.

THE COURT: I didn't say I'm not surprised.

MR. KEACH: Your Honor, first I want to address the issue of the trial brief.

THE COURT: Yes.

MR. KEACH: And that is this. Mr. Gerrard got that trial brief because the Court asked us if we had any problem with you giving it to him. That trial brief was never intended for Mr. Gerrard. That trial brief was presented to the Court on issues that we thought were going to arise based upon evidence that we thought was going to be admitted.

Candidly, we were very surprised when Mr. Gerrard failed to admit Exhibit 183, the assumption agreement. Candidly, we were a little shocked that Mr. Gerrard did not put on some evidence about the ownership of the loan. But in terms of what issues this Court said we were going to try when Mr. Gerrard tells that he is shocked that this is an issue, I have a little different recollection than he.

As I recall, the issues we are going to try were, A, the issue of priority, and, B, other issues that were on that list. Within the issue of priority certainly is the issue of whether or not they have standing to even bring the claims.

There was never a discussion that we had to break down what we were going to fight about in terms of priority. We were going to fight about whether there is a priority on behalf of his client, and that encompassed all issues regarding priority. In addition to that, the Court was also consolidating, as I understood it, other issues.

Now, yesterday the Court did something that really was not that surprising to me. The Court -- I have ultimate respect for you, Your Honor, and one of the reasons I do is twofold -- two reasons, is this, Your Honor. One, because you've been on this side of the table, you know what it is to be a lawyer, you give lawyers their day in court, you always treat lawyers respectfully, you always give a lawyer an opportunity to put his entire case on, and there are a lot of judges here who haven't practiced private practice who don't know what it is to, A, have a case, and, B, have a client. And I've always respected you. Although I haven't always agreed with you, I've always respected the fact that you always let lawyers represent their clients.

The second thing I respect, I've always respected about you, Your Honor, is the way you treat lawyers and handle your relationship with lawyers. And it was pretty obvious what happened yesterday, and I respect the Court for doing it, although again this is one those things I disagree with. And that is this. Exhibit 183, there's not one, there's not one

reference to in the evidence in this case. Not one person testified about it, no foundation was laid, nothing was discussed concerning that exhibit, not one piece of evidence. A lot of arguments, but, as we all know, arguments are not evidence. Nonetheless, the Court admitted that exhibit because I believe the Court protected Mr. Gerrard, who clearly made a mistake.

Now, candidly, it's not a surprise to us, because we always assumed that Exhibit 183 was going to be admitted. We thought he was going to read in the deposition transcript and would have gotten -- and gotten that exhibit in. So our argument and our theory concerning the necessary writing under 111.235, it never -- it really was never premised on the absence of Exhibit 183, because, as the Court was aware yesterday, as soon as you admitted it, we were prepared to argue all the different statutory provisions -- I mean contractual provisions, because we were very familiar with it. We thought that was where the argument was going to have to go in any event.

What we -- so what happened is two days ago, on Monday, Mr. Gerrard -- I ask him as we're leaving what he has left, and he tells me he's going to put on Theresa Cargill and Brad Burns. And I said, well, then I'm going to make Rule 41 motions. He said, well, you don't need to do that. I said, yeah, I'm going to do that. If you don't have anything else,

I'm just going to have the Court say that you've rested as to that. And there was a little discussion back and forth on that issue.

And then after court Mr. Murdock and I met with other counsel and discussed the issue that we raised. And what we agreed upon, Your Honor, was this, that we weren't going to raise the issue unless the Court agreed and assured us that the evidence was closed except for Brad Burns. And while I may have been a little pushy with the Court about getting the Court to give us that assurance, the Court did, and in clear and unambiguous terms the Court told me and everybody on this side of the table, feel free to make your argument on any issues you have because the only other evidence that's going to come in from that side of the table is coming in through Brad Burns and that's it. And as a result of that, Your Honor, and in strict reliance upon it, Your Honor, we moved forward.

Now, this issue would not be here had the Court not assured me that --

THE COURT: Can I stop you and ask a question, Mr. Keach, because I know -- I know what the argument is. Have you ever seen Proposed Exhibit 58? Since I've never -- I haven't looked at it yet. I don't know if it's something I've ever seen before.

MR. KEACH: Let me say this. It was never produced

in this case, but last night, when we began our search of the Recorder's records, I did see it. But until late last -- late yesterday afternoon --

THE COURT: It was never produced as part of this litigation?

MR. KEACH: Never.

THE COURT: It wasn't produced at the PMK deposition that occurred in wherever?

MR. KEACH: Not only not produced, not discussed by anyone in this case.

THE COURT: And when I ordered all of the transactional documents related to this transaction between BB&T and the FDIC as the receiver for Colonial Bank, it was never produced?

MR. KEACH: Never, Your Honor.

THE COURT: So you have concerns about that.

MR. KEACH: Your Honor, I have a big -- I have a big concern.

THE COURT: I just -- I just was trying to get to the end.

MR. KEACH: Well, Your Honor, I have a big concern -- these are the concerns I have. A, that we had -- that we had strict orders as to what was to be produced, how it was to be produced, and what was to happen. And so in terms of discovery, no, it was never produced.

THE COURT: So it's not like Exhibit 183 that you all knew about but somebody just thought it was admitted and maybe it wasn't. It's something that's totally new?

MR. KEACH: Completely new, Your Honor.

THE COURT: Okay.

MR. KEACH: Up until last night, when we did our --

THE COURT: I'm fine.

MR. KEACH: -- our own independent --

THE COURT: I was just trying to understand, because that's a different issue for me than one where there's a misconception as to whether something was admitted by the way that the exhibit numbers were read.

MR. KEACH: I understand that, Your Honor.

THE COURT: Okay.

MR. KEACH: I appreciated that and always respect the Court for doing what you do. And then the last thing I do want to say just as an aside, again, even though I don't agree with you, at least one thing I know in this court, it's always an honest opinion that you give, and always an honest decision. I do respect that and appreciate that. There's never -- there's never an issue that there's something phony going on. So I appreciate that, Your Honor.

But here's the real problem. We relied upon the Court and the Court's assurances; because, had we not, had you not given us those assurances and had Mr. Gerrard not told

you, the only other evidence I have is Brad Burns, we would have told the Court, we're not prepared to put on our defense. because that's what I told the Court, before we tell you we can go forward with defense we need to see -- have certain assurances. We would not have put on a defense. We would have told the Court, we have -- we reserve our right until after they rest, which is certainly our entitlement. The only reason we were moving forward was just for judicial economy, because we've had days that we were moving forward. There's no rule that says we have to put on a defense beforehand.

THE COURT: Absolutely not. There's -- that's a matter of common courtesy if it can be done.

MR. KEACH: Exactly right. And so, Your Honor, that's why we asked the Court, got our assurances, and relied upon it. For the Court now to admit any exhibit, to admit any evidence other than Brad Burns is improper, is clearly erroneous, is manifest error, and is a constitutional violation, Your Honor. It violates our due process rights to procedural due process, substantive due process, and equal protect under the laws under the Fifth and Fourteenth Amendments and under the Nevada Constitution, Your Honor.

Mr. Gerrard was on notice that priority was an issue in this case. Part and parcel of that is he has to establish certain facts, Fact A being his client has a right to bring the claim. 111.235 is clearly specific. It does appear from

his arguments today that maybe someone on the FDIC understood that 111.235 was specific and required something. But apparently Mr. Gerrard overlooked that. And while I know the Court -- I know the Court really does its best to protect lawyers -- and I have a lot of respect for Mr. Gerrard, too, because he's a really smart lawyer and he's a good lawyer. Sometimes people do make mistakes. The problem is the prejudice that occurs to our side when this Court gave us an assurance that this document would not come in --

THE COURT: Well, we didn't know this document existed; right?

MR. KEACH: Your Honor, nobody knew anything other than, A --

THE COURT: That's an important part that I need you to make sure that we all understand.

MR. KEACH: Here's what we knew. We knew that whether it existed or not -- and I didn't care at that point in time if it existed -- it wasn't evidence in this case.

THE COURT: And had never previously been disclosed as part of the case under Rule 16.

MR. KEACH: One hundred percent correct, Your Honor.

THE COURT: Just want to make sure that not only was it not evidence in the case, it is not information that was disclosed under Rule 16.1.

MR. KEACH: Never been disclosed in this case.

THE COURT: Okay. I just wanted to make sure, because that is an issue in my determination.

MR. KEACH: I appreciate that, Your Honor.

THE COURT: All right.

MR. KEACH: So, Your Honor, that's basically the grounds for my objection.

In terms of the exception, I didn't get to see the statute, because I didn't know it was going to come up, so --

THE COURT: You want to look at it?

MR. KEACH: He says he's got it, but he won't let me look at it.

THE COURT: Well, he said it was his only copy.

MR. GERRARD: I said I only have a copy.

MR. KEACH: Well, I'm not going to steal it. I'll take a moment just to read it, Your Honor.

THE COURT: Before I let Mr. Keach continue with his objection, does anyone else have an objection to Proposed Exhibit 58?

MR. MERRILL: I have the same objection Mr. Keach does, obviously, to Exhibit 58. I also want to address the sandbagging issue, but I don't know if you want me to address that now or you're just on the exhibit.

THE COURT: I'm just on Proposed Exhibit 58.

MR. MERRILL: That's fine, then. Thank you, Judge.

THE COURT: Which I notably have yet to look at.

MR. MERRILL: Oh. Yeah, well, that's true.

There is an issue, Judge. If you recall back I believe it was in -- it was either late November or early December of 2009 we noticed deposition of the person most knowledgeable of BB&T.

THE COURT: Yes, I recall that.

MR. MERRILL: Mr. Gerrard objected to that and said, you --

THE COURT: I told you you had to do it anyway.

MR. MERRILL: Yeah, we had to do it anyways. We did an amended notice of deposition. One of the categories we asked in our amended notice of deposition was that they produce someone to testify regarding all documents, memorandum, and correspondence concerning BB&T's acquisition of the loan between Colonial Bank and R&S St. Rose. We also asked to have somebody testify about the assignment of the policy of title insurance any endorsements issued to BB&T in connection with the loan between Colonial Bank and R&S St. Rose. There was no documents produced as a result or at that deposition regarding -- this document, I should say, was not produced as a result -- or at that deposition, and I believe that document predates -- predates this amended notice of deposition.

I don't believe -- I don't believe that BB&T ever actually produced the assignment and assumption agreement,

because the one that I know is 183 is not Bates stamped. I know I had a discussion with Mr. Gerrard, and he said, well, you can get it off the FDIC's Website, I think is where I got it. But I don't think even that document was ever produced.

THE COURT: But it was a document you guys knew about?

MR. MERRILL: But it was a document we knew about. But this we didn't know anything about. And we had asked in a notice of deposition that they have somebody testify about all the documents relating to that -- to that acquisition and that transfer and that assignment, and this wasn't one of them.

THE COURT: And that was something I ordered that occurred after you had a discovery dispute.

MR. MERRILL: Correct.

THE COURT: Mr. Holley.

MR. HOLLEY: Again, I -- just for the record I want the Court to understand that we incorporate the arguments that have been made today.

In addition to that I think the point that I want to make I believe does tie into admission of this exhibit and sort of follows on the heels of what Mr. Merrill indicated in terms of the person that we were asking to attend the deposition on behalf of BB&T. The person who attended on behalf of BB&T and designated as the person most knowledgeable is a Mr. Fritz. Mr. Fritz was not able to testify about any

of the information that Mr. Gerrard just told the Court he was able to obtain by virtue of a telephone call pursuant to the assignment the Court gave him yesterday afternoon regarding all of these things and to get a copy of this document that he now wants to introduce as additional exhibits.

So what we were given by BB&T in terms of a person was someone who had no information that -- based upon his limited testimony concerning this document or really concerning any of the documents regarding this particular transaction. And so for that reason again, Your Honor, it seems that this proposed exhibit is inappropriate.

THE COURT: So you believe that this document was covered within the scope of the 30(b)(6) designation --

MR. HOLLEY: Yes.

THE COURT: -- and no witness was produced who could testify or in fact did testify regarding this document?

MR. HOLLEY: That's correct, Your Honor. I think there was also an obligation to voluntarily supplemental under Rule 16.1, and that was never done, either.

THE COURT: Let me finish the objections on this side before I get back to you, because I want to get to all of them --

MR. GERRARD: Okay.

THE COURT: -- so you can address them all.

MR. GERRARD: All right.

THE COURT: Any more, Mr. Keach, now that you've had a chance to look at the statute that was kindly provided to you by Mr. Gerrard as his only copy which you're now going to give back to him?

MR. KEACH: I am, Your Honor.

Your Honor, I don't believe that statute trumps our evidentiary statute that requires some foundation to be laid. I would object based on hearsay.

THE COURT: Well, I mean, you would also object on the failure to disclose?

MR. KEACH: And foundation. I'm sorry?

THE COURT: And the failure to disclose?

MR. KEACH: Oh. Well, I've already my objection, I thought.

THE COURT: All right. I just want to make sure --

MR. KEACH: I mean, I can start over again.

THE COURT: No, that's okay. Please don't.

Anybody else on this side of the room?

Mr. Merrill. On the document issue only.

MR. MERRILL: Correct. But to make the objection you would have to refer to the document. I will just stand what I've said in the --

THE COURT: I don't want to refer to the document unless I have to.

MR. MERRILL: Okay. Then I will wait.

THE COURT: Okay. Mr. Gerrard.

MR. GERRARD: Sure.

THE COURT: A lot of people object to your document.

MR. GERRARD: Of course they do.

Again, Your Honor, I come back first and foremost to what I said at the beginning of my response to Your Honor's inquiry of yesterday. We were not on notice that this was any issue for this proceeding. And Your Honor specifically identified in the order what was going to be tried.

There were a lot of arguments that were made in court from time to time --

THE COURT: So you don't think that --

MR. GERRARD: -- but that doesn't mean that Your Honor's order was ever changed. I'm sorry. I didn't mean to talk over you.

THE COURT: It's okay. You don't think this issue is directly related to the issue of priority?

MR. GERRARD: Of course not. Because there's no question that the lien that we're talking about, the deed of trust exists.

THE COURT: You --

MR. GERRARD: There's no question it exists. The only question is who owns it. And that question was never raised. Now --

THE COURT: You recognize in the trial brief that I

made the plaintiffs produce to you even though they're not required to under the rule --

MR. GERRARD: Uh-huh.

THE COURT: -- they refer to the "as is" issues that are contained in Exhibit 183.

MR. GERRARD: Sure. The "as is" issues. But not that we don't own it.

THE COURT: Which are the issues I ruled on yesterday, are the "as is" issues.

MR. GERRARD: And obviously if want to re-entertain that, I'd be happy to argue that again, too. But I'm not going to.

THE COURT: No. I've already ruled on that one.

MR. GERRARD: I understand.

THE COURT: But you believe, I guess, that the proof of the assignment was not something that was ever going to be at issue in my determination of the priority?

MR. GERRARD: That's correct, Your Honor. And you were very specific about what was at issue. And if you look at what was filed by the plaintiffs before that, they identified 48 different issues, every minor issue that could be raised.

THE COURT: Yeah, I know.

MR. GERRARD: And this was not one of them. And so -- and Your Honor's order, irrespective of anything that Mr.

Merrill or anybody else might say to you and argue it at some point in time wasn't included in this proceeding.

THE COURT: And the order you're referring to is the minute order?

MR. GERRARD: November 23rd, 2009, which was when Your Honor very specifically told us what we were going to hear. Now --

THE COURT: Minute order specifically says, just so we're clear, because I don't want this to be unclear in the record, that we were looking at what issues would be advanced for the trial on the merits for the expedited hearing on the priority issues because the priority issues affect a preliminary injunction.

MR. GERRARD: I agree.

THE COURT: Because I was always going to try the priority issues here.

MR. GERRARD: Of course.

THE COURT: The other issues were how far do they get to go in the fraud and misrepresentations --

MR. GERRARD: Right.

THE COURT: -- that the other defendants made to them. And I basically said, we're not going to do it --

MR. GERRARD: I would --

THE COURT: -- and we've avoided that.

MR. GERRARD: Sure. And I would point out in that

-- in that minute order, Your Honor, it doesn't just say the issues. It says --

THE COURT: Numbers.

MR. GERRARD: -- as to the specific --

THE COURT: Right.

MR. GERRARD: -- items --

THE COURT: I know.

MR. GERRARD: Now, I've done this before with Your Honor. I've had several other matters where we had an evidentiary hearing and Your Honor spelled out the issues very clearly, and we were not allowed to go outside the issues, and there was a lot of argument about that. And I know how this works in front of Your Honor. And that is exactly what we prepared for in this trial, because that was Your Honor's order.

Now let me address this whole issue of not disclosing, okay, which I think is ridiculous. If you go back to the beginning of this case, we filed this lawsuit as Colonial Bank. We disclosed Colonial Bank's entire loan file that related to this transaction.

THE COURT: Well, that's not true, because I made you go back to Alabama and get the rest of it.

MR. GERRARD: Yeah. Which was a copy. That was a copy of the file. And we produced everything. And then they raised an issue, well, we think there might be something back

in Alabama. We produced everything that we had that relates to this loan.

Later on BB&T became the real party in interest. BB&T doesn't have anything that it didn't get from Colonial Bank. It has no other files, other than it has this purchase agreement. The purchase agreement itself is the only additional document that we had to produce. When they noticed up this deposition -- after the close of discovery, Your Honor allowed them to notice up this deposition. Read carefully their notice of what they asked for. They did not ask for an assignment. They asked for an assignment of a title policy. They did not ask for an assignment of the deed of trust.

THE COURT: And you're talking about the 30(b)(6) deposition.

MR. GERRARD: Yeah. But it wouldn't matter if they did. Well, the reason why is we didn't have any assignment of the deed of trust. Mr. Holley says -- or Mr. Merrill, I don't remember which one, just now said, I think it's interesting that in a few phone calls they could find that. Well, it wasn't my client that was able to locate it, it was the FDIC. It was the FDIC that told me and my client on the phone this morning that they thought such a document had been prepared and recorded. My client had no knowledge of it. And at the deposition my client testified that he had no knowledge of anything like that. It wasn't until Your Honor said

yesterday, is there anything else, and I said, I know that sometimes in these bulk sales there's something that gets recorded, and I specifically asked that question of the chief lawyer for the FDIC, and he said, I think that there was something like that done, and he identified for me the person who I could ask for that might know about that. My client didn't know that there was any more specific assignment. And again, the only document that it knew existed as it relates to the assignment when the deposition was taken was this Exhibit 183.

Now, I don't know what else we can do. You know, I mean, the point is -- that we were trying to make yesterday is bank treats this just as the FDIC did in this agreement as a whole asset sale. It's a -- I'm sorry, a whole bank sale. It's a whole bank sale of a $27 billion asset bank.

MR. KEACH: I'm going to object. This is testimony, not argument about the admission of the exhibit.

THE COURT: Oh, it's argument. He can keep arguing.

MR. GERRARD: The schedules of everything that make up those $27 billion in assets would be thousands and thousands of pages. And that's why the agreement says you buy everything.

THE COURT: Okay. Mr. Gerrard, let's stop for a second. Let's go to the minute order and go to filed document. It took me a minute because I'm trying to cross-

reference.

MR. GERRARD: Which filed document are you talking about?

THE COURT: The filed document on November 19th, 2009, filed by the plaintiffs. The plaintiffs --

MR. GERRARD: I have it in my hand.

THE COURT: -- plaintiffs said at Number 24 --

MR. GERRARD: I have that. Whether BB&T --

THE COURT: -- which was one of the items that I allowed to be advanced for purposes of the trial on the merits --

MR. GERRARD: Sure.

THE COURT: -- "whether BB&T paid proper consideration and thus is able to have an assignment that comes with equitable rights."

MR. GERRARD: Right. Whether they paid --

THE COURT: That is clearly an issue that everybody was on notice we were going to try. Are you telling me that you don't think the issue regarding the assignment therefore is important?

MR. GERRARD: No, Your Honor. Read what it says. It says, "whether BB&T paid proper consideration." That was the issue.

THE COURT: "...and thus is able to have an assignment --"

MR. GERRARD: And then as a result of that is -- are they able to have an assignment that comes with equitable rights. It doesn't say whether they have an assignment. It doesn't say there's a question about whether they have an assignment. It's what did they pay, that's what we want to know, and whether the amount of that payment allows them to have equitable rights. Yeah, we knew about that. That's why Your Honor allowed them to take the deposition. That's what they asked about. They asked how much was paid. That's what they wanted to know about.

THE COURT: And then the answer was, we can't tell you 'cause the FDIC won't let us.

MR. GERRARD: That was not the answer. They gave you -- they gave the answer.

THE COURT: No. The answer when we asked how -- when I -- I was told in this courtroom that when the question was asked how much was paid for this loan, the FDIC would not allow anybody to be involved in knowing what that computation was as to how they got to the total amount that was paid.

MR. GERRARD: Yes. But they --

THE COURT: Okay.

MR. GERRARD: -- were allowed to testify what the discount was on total asset value. In other words, they said, this is how much we paid for deposits, we paid a premium of X percent, and this is how much we paid for all other assets,

we got a discount of -- it was like 6-1/2 percent. And that's what the testimony was. And they said, if you met those two, it's -- the net discount on everything if you take into account the premium paid for deposit is 4-1/2 percent. That's what came out of the deposition.

So just Number 24 doesn't say anything about standing. It doesn't say, whether BB&T has the right to the loan, doesn't say, whether they ever received an assignment. It doesn't say that.

THE COURT: Okay. I understand --

MR. GERRARD: So again, Your Honor --

THE COURT: -- your position.

MR. GERRARD: -- this was not ever an issue that was raised, and we believed, of course, the agreement was in evidence. We covered that yesterday. Because we stipulated to it.

THE COURT: I admitted the agreement yesterday. It's a non issue now.

MR. GERRARD: So we have the testimony of Mr. Fritz. We could have read that into the record. But there was no reason to, because this issue, Number 24, goes to prejudice. This was their argument. That said that, we were prejudiced by virtue of the amount that was paid. And that is their burden, not ours.

THE COURT: It doesn't only go to that issue. It

also goes to other issues.

MR. GERRARD: Well, Your Honor, do you think that this goes to whether we own the loan or not?

THE COURT: Whether --

MR. GERRARD: Does it say anything about that?

THE COURT: Whether there's an assignment.

MR. GERRARD: It doesn't say whether there's an assignment.

THE COURT: I understand what you're saying.

MR. GERRARD: Okay. I mean, I don't --

THE COURT: The way I read it -- the way I read it, it relates clearly to the equitable subrogation claim and whether your client has the right to pursue that.

MR. GERRARD: Sure. But that has nothing to do with the standing issue. It doesn't have anything to do with standing. Equitable subrogation under Mort -- we went through this yesterday --

THE COURT: I -- I understand.

MR. GERRARD: -- can be assigned. This isn't a question about whether my client had an assignment. Nobody questioned that coming into the trial in these issues that were required to be produced before the hearing of November 20th.

THE COURT: Is there anything else related to Proposed Exhibit 58 before we go to the rest of the issues?

MR. GERRARD: Sure.

THE COURT: Okay.

MR. GERRARD: Yeah. NRS 111.155.

THE COURT: Hold on. Let me go to that page in my book.

MR. GERRARD: Thank you.

THE COURT: Okay. I got it.

MR. GERRARD: "Every conveyance or instrument conveying or affecting real property which shall be acknowledged or proved and certified as prescribed in this chapter may, together with a certificate of acknowledgement or proof, be read in evidence without further proof.

THE COURT: And do you think that trumps the requirements under Rule 16 and Rule 16.1 and the Rule 26?

MR. GERRARD: Well, I don't think that we're talking about one trumping the other.

THE COURT: Absolutely.

MR. GERRARD: If we were never asked for that document or even knew it existed, because we're not the ones that prepared it and we're not the ones that recorded it, how -- how are we supposed to be the ones that have knowledge that the document exists? This came up yesterday. And again, Your Honor, I go back to the point that I tried to make to Your Honor yesterday. This is up to you to decide. You're the judge in this case. This agreement purports to transfer all

of the assets. Your Honor wasn't satisfied that that was enough.

THE COURT: Right.

MR. GERRARD: But that was never raised as an issue for this trial. I don't care what stretch you want to go to to say you think somebody identified that as an issue at that hearing. This is -- it's not here. It's not in the -- you required everyone to provide the written items that they believed would require proof at the trial.

THE COURT: Well, I required --

MR. GERRARD: That's what you said, all --

THE COURT: Remember, the plaintiffs wanted everything advanced on the merits, and they wanted a jury trial on all of these issues --

MR. GERRARD: Uh-huh.

THE COURT: -- rather than me doing this.

MR. GERRARD: Which is --

THE COURT: I -- can I finish.

MR. GERRARD: I'm sorry.

THE COURT: I was uncomfortable with that process because, number one, the discovery couldn't be completed in a timely fashion, and I had promised you when I consolidated the cases I was going to do my best to get the priority issues tried in a -- in a very quick way. I've done my best to do that, although I understand there's some bumps in the road

we've had.

So, I mean, I certainly was trying to have counsel identify issues that they wanted advanced on the trial on the merits so we wouldn't be in a position of having to have a jury trial while I'm trying to do a preliminary injunction hearing.

MR. GERRARD: But, Your Honor --

THE COURT: And that's what we were trying to do.

MR. GERRARD: I understand what you're saying. I just know what happened. And what happened, as Your Honor just stated, was that you asked everyone to identify the issues for trial, and it had to be put in writing. It had to be submitted by a date certain. Mr. Merrill --

THE COURT: Did anybody --

MR. GERRARD: Mr. Merrill didn't submit anything by a concern. Mr. Holley didn't.

THE COURT: Did anybody else submit anything?

MR. GERRARD: I'm sorry?

THE COURT: Did anybody else submit anything?

MR. GERRARD: We responded. We responded in writing with a written pleading with what we believed should be --

THE COURT: Hold on a second.

MR. GERRARD: -- for the hearing. Now, let me make --

THE COURT: Oh, yeah. You filed a response on

November 20th.

MR. GERRARD: Yeah. Now let me make the final -- the final point that I think is important. We have not closed our case. It doesn't matter how much they jump up and down, we have not closed --

THE COURT: You've closed your case with the exception of Brad Burns.

MR. GERRARD: Well, again, Your Honor, we didn't close our ability to introduce new exhibits.

THE COURT: You can always ask me to reopen, but you've closed your case with the exception of Brad Burns.

MR. GERRARD: Again, Your Honor, all I'm saying is you asked me if we had any other witnesses other than Brad Burns, would we be calling anyone else, are we done calling witnesses other than Brad Burns. That's what you asked. You didn't say, do you have any other exhibits other than the ones that are in evidence right now, and we didn't rest. You asked if we rested. Mr. Keach asked if we rested. I said, no, we do not rest until after we're done with the deposition of Mr. Burns. That's what we said.

THE COURT: Testimony.

MR. GERRARD: So, again, there has been no closing of evidence on our side of this case. And there's not going to be anything in the record that says that there was. Because that's not what you asked me. And you have it

recorded. You can certainly listen to it again. But that's not what you asked me, if all evidence which closed. You asked me if we intended to introduce any more witnesses, if other than Mr. Burns we were going to put any other witnesses on.

THE COURT: Okay.

MR. MERRILL: Judge, can I -- can I read --

THE COURT: You may.

MR. MERRILL: -- from the transcript on the first day of this trial, of January 8th, Friday, 2010. I'm reading from page 42, starting at line --

THE COURT: Hold on. Let me get there.

MR. MERRILL: I'm sorry.

THE COURT: It takes me a second. 42?

MR. MERRILL: 42, line 23. And I'm going to be reading Your Honor's statement. Let me know when you'd like me to proceed.

THE COURT: I'm trying to get the computer to go to page 42. All right. Keep going.

MR. MERRILL: Okay. This is your statement. This was after the argument between Mr. Keach and Mr. Gerrard in which Mr. Keach had to turn over his trial brief. And this is Your Honor's statement. "Thank you. The objection is overruled. I have two issues I have to determine as part of this hearing -- or at least two issues I have to determine.

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

Mr. Gerrard's response, "Right. Thank you, Your Honor." That ends on page 43, line 12.

That statement was made January 8th, 2010, the very first day of this evidentiary hearing, almost three months ago. So this whole issue, I've been sandbagged yesterday, he's not been sandbagged. Your Honor told him -- Your Honor told everyone on that day that was an issue. He decided not to put on any evidence respect to BB&T.

THE COURT: Okay. Anybody else want to talk with relationship to the admission of Proposed Exhibit 58?

MR. HOLLEY: Just one other comment, Your Honor. I know the Court hasn't looked at the proposed exhibit and Mr. Gerrard has. And I would suggest that he look in the upper left-hand corner and see if he wants to recant any of the

statements he made regarding BB&T's knowledge concerning this particular document.

MR. GERRARD: Upper left-hand corner of what?

THE COURT: Why don't you find it for him.

MR. HOLLEY: Your proposed exhibit.

MR. MURDOCK: The second page. The second page.

MR. GERRARD: Yeah, I understand.

MR. HOLLEY: Okay.

MR. GERRARD: No, I don't. The fact that it was returned to her after --

MR. HOLLEY: No. I'm not talking to the substance. I'm just asking you.

THE COURT: I don't want to know what's in the document, because it's not admitted.

MR. GERRARD: That's all right.

THE COURT: Okay. It is part of your record if somebody wants to address the issue at some higher level than me at some point in time. So it is part of the record, so if someone else decides to listen to it or review it, and an offer of proof has been made about what would be provided, I am declining to admit the exhibit on the basis that it was not produced pursuant to Rule 16 or 16.1 prior to these proceedings commencing. And while I understand that these proceedings have been very long in the time they've taken to get here, it's -- Mr. Merrill is correct, we are over three

months from when we started, I would assume that if it was something counsel thought was important for me to make a determination regarding the relationship between Colonial Bank and the BB&T entities that it would have been disclosed at least at some time prior to today.

MR. GERRARD: And just to make a record, Your Honor, that assumes, of course, that my client knew it existed prior to today.

THE COURT: Okay. One would assume that if your client had an assignment they would know it existed.

MR. GERRARD: Well, again, just to make the record, you know, I know what Your Honor's ruling is, the assignment is already stated very clearly in the assumption agreement, in the purchase and assumption agreement. Your Honor has ruled that you don't think that that --

THE COURT: Is clear.

MR. GERRARD: -- constitutes an assignment, and so we provided an additional document, a proposed exhibit that shows that that we were able to find after Your Honor asked that we look for it yesterday. And it was a document that was recorded November 3rd of 2009. And, again, Your Honor says that that wasn't produced in this case. I would also point out that, if I'm not mistaken, evidence was closed prior to November 3rd of 2009.

THE COURT: Thank you.

MR. MERRILL: Your Honor, can we mark for the record --

THE COURT: You can mark whatever you want for the record.

MR. MERRILL: -- the amended notice of deposition of the person most knowledgeable?

THE COURT: Absolutely. I don't have a copy. Do you need Mr. Burdette to make a copy for you?

MR. MERRILL: If you could, that would be fantastic.

THE COURT: Here's my next question. Mr. Gerrard, given my declination to admit Exhibit 58, we were in the middle of having a discussion about the contractual subrogation issues. Do you want to continue with that discussion at this time, or is there something else you want to do?

MR. GERRARD: Well, we're happy to continue to talk about it, Your Honor. I mean, obviously if your ruling is that we don't have any rights to the loan, because your ruling is that somehow there's no assignment as a result of Exhibit Number 183, I don't know, you know, how far we're going to go with that.

THE COURT: Right.

MR. GERRARD: I mean, the point -- the point is that the document itself provides for a right of subrogation. The argument that was made yesterday --

THE COURT: And the document being the note and the construction --

MR. GERRARD: The deed of trust.

THE COURT: Correct.

MR. GERRARD: The deed of trust.

Your Honor, if you'd give me just a minute.

THE COURT: Yes, I can.

MR. GERRARD: Thanks.

THE COURT: Why don't we take a short break.

(Court recessed at 3:26 p.m., until 3:39 p.m.)

THE COURT: Mr. Gerrard, can I have my rules back, or do you still need them?

MR. GERRARD: Can I use them for just a moment?

THE COURT: As long as you give them back.

MR. GERRARD: I will give them right back to you, Your Honor.

Based upon what Your Honor has already ruled, I have a couple of motions to make. The first is I move that we reopen the evidence on any remaining claims we haven't already discussed.

THE COURT: Okay. Does anybody want to respond to that?

MR. KEACH: To the extent it has anything to do with the issues that we've raised, I would object to it, A, because the Court and Mr. Gerrard have already told me I don't have to

worry about that; B, to the extent it has anything to do with any issue other than Brad Burns's testimony, I would object on the same grounds, because the Court and Mr. Gerrard -- although Mr. Gerrard kept saying that he said the only thing is I'm not going to put on any other witnesses, I don't recall it that way. I recall the Court saying, Mr. Gerrard, do you have anything else other than Brad Burns; and the answer was, no. And so "anything else other than Brad Burns" means anything else other than Brad Burns.

So based upon the Court's assurances to us, along with Mr. Gerrard's assurances to us, I would object.

THE COURT: Okay. So let me make it clear what you're asking me, Mr. Gerrard. Currently the only claim that I have actually dismissed is the equitable subrogation claim --

MR. GERRARD: Correct.

THE COURT: -- because I found that based on the "as is" provision in Exhibit 183, I believe, 183, that that created problems under the particular circumstances of this transaction.

MR. GERRARD: Correct.

THE COURT: So you're asking me to reopen with respect to what other claims do you believe we are --

MR. GERRARD: Replacement.

THE COURT: -- litigating related to the priority?

MR. GERRARD: Replacement.

THE COURT: The replacement theory and the contractual subrogation --

MR. GERRARD: Contractual subrogation.

THE COURT: -- which you've called conventional subrogation.

MR. GERRARD: Correct.

THE COURT: Okay. Other than that, does anybody else want to say anything?

MR. KEACH: Yes, I do, Your Honor.

THE COURT: Yes.

MR. KEACH: Your Honor, the issue that we raised has to do with whether or not there's a valid assignment of the claims -- or the loan and deed of trust of Colonial Bank. And we raise it via NRS 111.235, which requires a written document. And what we know now is that, other than Exhibit 183, there are no other written documents that have been produced in this case that will satisfy the elements of 111.235.

So it seems to me that the Court needs to consider what is the purpose in allowing additional testimony or evidence concerning those issues. If there are no written documents that can ever satisfy 111.235, what are we wasting additional time for? So in addition to the prior arguments I've made, Your Honor, I would add that as an objection, as

well, that it's cumulative and not likely to lead to any different result in this case.

THE COURT: Thank you.

Anybody else want to say anything prior to me considering the motion?

MR. MERRILL: Yes, Your Honor. I think with respect to the request to reopen evidence there's just no basis for it, Your Honor. As we read Your Honor's statement almost three months ago as to what was going to be tried, you were crystal clear that the assignment was at issue. Even Your Honor pointed out the filing back in November had reference to BB&T and what BB&T's rights were and what did BB&T pay for, what -- did they pay consideration to get -- to get an assignment. It was crystal clear that this was going to be an issue in this, and there just is no basis whatsoever to reopen the evidence on any remaining claims, because they've had ample time to do that, Judge.

THE COURT: The decision to grant or --

MR. GERRARD: Your Honor, can I --

THE COURT: Wait.

The decisions to grant requests to reopen are discretionary. I'm going to exercise my discretion to permit you to reopen with respect to the claims I have not already dismissed. Do you have some additional evidence other than Mr. Burns that you want to present at this time?

MR. GERRARD: I do, Your Honor.

THE COURT: What?

MR. GERRARD: Another exhibit that we would like to introduce, Your Honor.

THE COURT: So you're going to mark this as Proposed 59?

MR. GERRARD: Yes.

THE COURT: Okay. Don't give me one yet. Just --

MR. GERRARD: I won't. I'm waiting. Okay.

THE COURT: Did everybody get a copy of Proposed 59?

While we were off the record, Mr. Merrill, did you have your notice of 30(b)(6) deposition that we discussed in connection with the objection to Exhibit 58 marked as your next in order?

MR. MERRILL: Yes. It was marked as Proposed Exhibit 184.

THE COURT: Okay. I just wanted to make sure it was part of your record.

MR. MERRILL: Yes. Thank you, Judge.

THE COURT: All right. Mr. Gerrard, you've marked a Proposed Exhibit 59.

MR. GERRARD: In anticipation of what might happen today, Your Honor might rule, we took an additional step, and there is a new document that's been created -- could never have been produced before because it just came into existence

today. We have an assignment of --

MR. KEACH: Objection, Your Honor. If he has a witness to testify, to lay a foundation, he can do that. What he can't do -- unless he wants to get on the stand and testify to lay the foundation, I don't believe he's allowed to testify as to anything about the contents of the document. If he has a witness that he can show it to and identify, we can go through it. But I don't know why we should all of a sudden throw out the rules of evidence because Mr. Gerrard has made some mistakes in the case.

THE COURT: Mr. Keach, Mr. Gerrard has the opportunity to present a piece of evidence. If he's telling me why I should admit an exhibit, I'm going to listen to what he has to say. And if I decide that I'm going to admit it, we're all going to have a discussion about it. I certainly understand it is usually cleaner to have a witness to testify about it, but there are certain statutory schemes under which an exhibit can be admitted even if they don't have that.

The next question is are they preempted by our rules of civil procedure. And typically the answer to that is.

MR. KEACH: Thank you, Your Honor.

THE COURT: So, Mr. Gerrard.

MR. GERRARD: Your Honor, we have an assignment -- as an offer of proof I'll tell you we have 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. It's been acknowledged and certified in the manner required by NRS 111.155. It's going to be recorded as soon as we get the original back tomorrow. But what we have is a copy of that document that we would ask if evidence be reopened that we be allowed to admit into evidence. And then we will also -- well, that's -- there may be an additional exhibit, as well. But --

THE COURT: Okay. Hold on a second.

MR. GERRARD: -- for now --

THE COURT: So have you finished with what you want to say about Proposed Exhibit 59?

MR. GERRARD: I have, Your Honor.

THE COURT: All right. Does anyone object to the admission of Proposed Exhibit 59?

MR. KEACH: Yes, Your Honor.

THE COURT: And the basis of your objection, Mr. Keach?

MR. KEACH: First off, lack of foundation. Secondly, Your Honor, it was not produced in the case, a violation of Rule 16.1. Third, Your Honor, it violates everything that this Court promised us would not happen. Fourth, Your Honor, it violates the due process clause of the United States Constitution and the State of Nevada. Your Honor, it does not seem appropriate to me -- it's hearsay,

does not seem appropriate to me that Mr. Gerrard can't hear us say, you lost because you didn't do what you're supposed to do, and then come in here the next day and say, oops, I fixed it, Your Honor. It's inherently unfair.

THE COURT: Thank you, Mr. Keach.

Anybody else have an objection to Proposed Exhibit 59? Mr. Merrill.

MR. MERRILL: Yes, Your Honor. Also in addition to Rule 16.1 is Rule 26. We've been given no notice. Tamara Stidhem, the attorney -- the people -- the people who prepared this we haven't had an opportunity to depose, we haven't had an opportunity to question anybody. Again, this is hearsay. It's not admissible.

THE COURT: Anybody else? Mr. Holley.

MR. HOLLEY: Your Honor, I would join in the objections that have been made so far with respect to Proposed Exhibit 59.

THE COURT: Anything else? Mr. Murdock.

MR. MURDOCK: Your Honor -- and I do not recall -- what was the statute that was used before?

THE COURT: That would be 111.155.

MR. MURDOCK: Your Honor, I do not believe that this conforms to the statute at all. There is nothing bumpy here. This is a fax copy. It's not certified appropriately. And, as a result --

THE COURT: You're using my own words against me from the deposition yesterday, the certified copy thing, aren't you?

MR. MURDOCK: And it's not recorded.

THE COURT: Thank you.

MR. MURDOCK: Thank you, Your Honor.

THE COURT: Anything else on the objection to Proposed 59?

Mr. Gerrard.

MR. GERRARD: Yes. As I pointed out, Your Honor, this doesn't violate Rule 16.1, because it came into existence today. We'll be happy to provide a supplement if that's necessary. This comes up in response to an issue that we thought was covered already by an exhibit that we've already gone over ad nauseam, that being the assignment and assumption agreement. But this document clearly wasn't in existence, but it does make a specific assignment, it has been properly acknowledged as the statute requires. We will have the original for the Court tomorrow, but copies are allowed under the rules. And NRS 111.155 does provide that it can be read into evidence if it is acknowledged in the manner required by the statute.

So, again, if what we're trying to do is actually try this case on the merits, this is a document that we would like to admit into evidence so that we can get past this issue

that's been raised about whether or not my client owns the loan. And so if this -- if this document is allowed by Your Honor into evidence, then we can proceed with making the arguments on the remaining claims and producing any other evidence that would be necessary now in light of the new claims that have been raised, which we would -- we would at this point read in the deposition testimony of Gary Fritz.

THE COURT: Okay. The request to admit Exhibit 59 is denied. The late creation of an exhibit does not abrogate the requirements of disclosure to the parties in litigation.

MR. GERRARD: Okay. Then I have --

THE COURT: So any additional evidence?

MR. GERRARD: No. I have another motion for Your Honor.

THE COURT: Okay.

MR. GERRARD: Anticipating that you might go where you've gone, we're moving to substitute in the real party in interest, Colonial Bank and the FDIC as receiver for Colonial Bank, under Rule 25(c), Rule 21, and Rule 17(a).

THE COURT: That's why you needed to borrow my book.

MR. GERRARD: Of course. I just needed to find the right rules.

THE COURT: All right. Thank you.

Does anybody have --

MR. GERRARD: Let me just finish, Your Honor. If

the argument is there's been no assignment, then we'll put in the parties who without a doubt had the rights to this loan and we'll worry about taking care of those assignments after the fact. And since we started this case Colonial Bank as the party in interest and we changed it at the request of all the parties sitting on this side of the table that requested that the new would be BB&T --

MR. KEACH: No, I never requested that, Your Honor. He can't say everybody.

THE COURT: Mr. Keach, please sit down.

MR. GERRARD: Mr. --

MR. KEACH: Well, don't let him say that, because it's not true.

THE COURT: Well, don't -- don't interrupt. You'll be able to correct later when it's your turn.

MR. GERRARD: Mr. Holley stood up at a hearing and said, I think, Your Honor, that the right party in this case should be BB&T and we think that they should be substituted in as the party in interest, and all of the parties on that side agreed that that's what they should do, even Mr. -- Mr. Keach wasn't here. Mr. Murdock agreed. He was the one that was present at the hearing.

The point is that if they are going to make an argument that BB&T is not the correct party in interest, then we request under Rule 25(c), under Rule 21, and mostly under

Rule 17(a), that we be permitted to substitute in the real party in interest, which you can do at any point in the proceedings. And again, Your Honor, we started this as -- with -- for Colonial Bank. There's no prejudice to them, because it doesn't change any of the underlying issues in the case. There's no different factual issues. It's simply their legal standing argument. So again, if that's their argument, we're moving, Your Honor, that we substitute in the parties that have actual title by record of the deed of trust so that we can try this case on the merits.

THE COURT: Thank you.

Mr. Merrill.

MR. MERRILL: Your Honor, we obviously oppose that request to substitute in the real party in interest. After, what have we had, eight, nine days of trial, now they're trying to substitute in --

THE COURT: Today's Day 7.

MR. MERRILL: It's Day 7. Okay. Sorry. With respect to Mr. Gerrard's comment that they substituted in BB&T because we requested that, that is absolutely untrue. The original complaint that was filed was against Colonial Bank Group, Inc., and Mr. Gerrard wasn't representing them at that time. There was counterclaims and other claims made against Colonial Bank Group, Inc., Colonial Bank Group, Inc., filed bankruptcy, Mr. Gerrard had filed his separate case on behalf

of Colonial Bank, N.A., and we came together, and I think it's that point in time that Mr. Holley suggested that we all stipulate just everyone substitute in Colonial Bank, N.A. That's what was done. If the Court will recall, Mr. Gerrard had filed a first amended complaint, and then he filed a second amended complaint, and in open court I objected to the -- which added BB&T, I objected to the filing of the second amended complaint. And the Court said, I'm going to allow time anyways. And I believe it was -- it may have been the first that added BB&T, but I thought it was the second that added BB&T. But I'm not positive on that. But the discussion about bringing in BB&T, that was not true. It was Colonial -- it was changing Colonial Bank Group to Colonial Bank.

Like I said, we've been trial for seven days. To try and substitute in the real party in interest at this point in time is prejudicial to us, and in this situation is just -- he can't do it. He has no good cause to try and substitute in an alleged real party in interest in the middle of trial.

THE COURT: Okay. Mr. Holley.

MR. HOLLEY: Your Honor, I'll join the objection that has been made. And going to the good cause standard, while we have been here with seven days' worth of trial we have commenced our trial three months ago. And what the Court may recall is we expedited this entire proceeding at the insistence of Mr. Gerrard, not at the insistence of anybody

else. As a matter of fact, we didn't think it was necessary to expedite the process.

Now he's coming forward and wanting to delay the process, really, by substituting someone in at this late hour without demonstrating any cause, Your Honor. And so for that reason I think it's inappropriate to try to substitute Colonial Bank and/or the FDIC as the real party in interest.

THE COURT: Mr. Murdock.

MR. MURDOCK: Thank you, Your Honor. You know, I remember standing distinctly where Mr. Gerrard is sitting right now and this Court looking at me with wide eyes because I was pontificating about who actually has the note. And I was -- I couldn't probably get out the right words, but I didn't -- I kept saying, who owns the note, we don't know because somebody's in bankruptcy, somebody's in receivership, et cetera. And I said, all I want to see is the note. And you said to Mr. Gerrard, oh, no, no problem, if Mr. Gerrard says it, then it's okay, but let's get some evidence.

Well, now at this late moment he wants to bring in the FDIC, Colonial Bank as real parties in interest. Well, the real party in interest is sitting back there. That's part of the problem with this case. It's Nevada Title. So if he really wants to bring someone in, it should be Nevada Title.

But what this Court should do is dismiss the case, and, if they want, let them file a new lawsuit, Colonial party

and -- Colonial Bank and the FDIC. That's what should happen, Your Honor.

THE COURT: Mr. Keach.

MR. KEACH: Your Honor, I'll join in the arguments made by other counsel, but, candidly, I'm not prepared to argue this issue, because I don't really know a lot about Rule 25(c) and 17, because that doesn't happen a lot in personal injury cases. And so I would ask for leave to file additional briefs on the issue if the Court has any inclination to grant the motion.

THE COURT: How long would you request, Mr. Keach?

MR. KEACH: Couple days.

THE COURT: Okay. Mr. Gerrard --

MR. GERRARD: Well, Your Honor --

THE COURT: -- I have a request that I think is reasonable by Counsel that this issue needs to be briefed. I will join with the request of Counsel that, while I have had substitutions occur during trial before where somebody dies, it is unusual for me to get this kind of request at this stage in other types of circumstances.

So I'm going to let you, Mr. Gerrard, file a written brief on this. Can you do it by Friday?

MR. GERRARD: Yes, Your Honor.

THE COURT: And then can the defendants give me a response a week thereafter?

MR. MERRILL: Yes.

MR. KEACH: No problem, Your Honor.

THE COURT: And can I have a hearing on whether I will allow the substitution on April 13th.

MR. MERRILL: Sure.

MR. HOLLEY: Let me just check, Your Honor.

THE COURT: Okay. Now negotiate with me.

MR. GERRARD: I just always hate to --

THE COURT: Okay. And if the defendants could get me the briefs by Wednesday, the 7th, I could hear it at the same time I do Mr. Burns's testimony. But if you don't, then we've got to wait to hear it the next week.

MR. GERRARD: When did you ask for the opposing brief to be done, Your Honor?

THE COURT: Theirs on the 9th.

MR. GERRARD: On the 9th. Okay. I have another trial that's scheduled to start.

THE COURT: Is it local?

MR. GERRARD: Yes. It's in front of Judge Denton. It's supposed to start the second week. It's not for sure that it will go, because we're behind another -- another case that's like a three-week case, and ours is like two. But he told us -- that was the second week of the stack, and he said that's when we'd go if we go. So just keep -- you know, I think we set it. And if it's a problem --

EXHIBIT S

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CLERK OF THE COURT

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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 INVESTMENTS GROUP, LLC, a Nevada limited liability company; and DOES I through X, inclusive,

Defendants.

AND ALL RELATED CLAIMS.

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

Dept No.: XI

BB&T'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND JUDGMENT

BB&T'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW Branch Banking and Trust Company, successor in interest to Federal Deposit Insurance Corporation as receiver of Colonial Bank, N.A. ("BB&T"), by and through its attorneys of record, GERRARD COX & LARSEN, pursuant to N.R.C. P. 59, and submits its Motion for New Trial, or in the Alternative, Motion to Alter or Amend Judgment ("Motion").

Dated this 8th day of July, 2010

GERRARD, COX & LARSEN

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NOTICE OF MOTION

TO: ALL PARTIES; and

TO: THEIR COUNSEL.

PLEASE TAKE NOTICE that BB&T, by and through its attorneys of record, GERRARD COX & LARSEN, will bring the foregoing **BB&T'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND JUDGMENT,** on for hearing on the 20 day of August, 2010, at ~~the hour of~~ Chambers of said date, in Department XI, or as soon thereafter as counsel may be heard.

Dated this 8th day of July, 2010.

GERRARD, COX & LARSEN

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

NATURE OF MOTION

On or about June 23, 2010, this Court entered its Findings of Fact and Conclusions of Law in these consolidated proceedings pertaining to lien priority of the real property at issue. The Court entered its Findings of Fact and Conclusions of Law after having read and considered all pleadings and papers on file in the above-captioned case; having reviewed the documents it allowed to be admitted into evidence during trial as well as the briefs and points of authorities filed therein; and having heard the testimony of witnesses at the time of trial.

The Court's Findings of Fact and Conclusions of Law were formulated by the prevailing party, although BB&T submitted modifications to the proposed findings of fact and conclusions of law to the Court. The Court then used the proposed findings of fact and conclusions of law to draft the current version of the Findings of Fact and Conclusions of Law that were filed on June 23, 2010. Because there are numerous grounds upon which this Court should grant BB&T a new trial, and because the current version of the Findings of Fact and Conclusions of Law include findings and conclusions unsupported by the record, BB&T moves this Court for a new trial pursuant to N.R.C.P. 59(a). In the alternative, BB&T moves this Court to alter or amend the Findings of Fact and Conclusions of Law pursuant to N.R.C.P. 59(e).

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II.

STATEMENT OF FACTS

The evidentiary hearing held herein was consolidated with trial on the merits as to lien priority and expedited by this Court to determine if a $43,980,000.00 construction loan, note, and deed of trust (the "Construction Loan") made by Colonial Bank, N.A. ("Colonial Bank") was entitled to lien priority over a $12,000,000.00 note and deed of trust (the "R&S Lenders Loan") made by R & S St. Rose Lenders, LLC ("R&S Lenders").

During the course of this litigation, the Alabama State Banking Department closed Colonial Bank and appointed the Federal Deposit Insurance Corporation ("FDIC") as its receiver on August 14, 2009. That same day, the FDIC sold approximately $22 billion of Colonial Bank's

$25 billion in assets to BB&T pursuant to the August 14, 2009 Purchase and Assumption Agreement admitted into evidence as Exhibit #183 at the time of trial.

The evidentiary hearing lasted approximately ten (10) days that spanned over a three month period from January 8, 2010 until April 14, 2010. BB&T commenced these proceedings by presenting its case-in-chief. After the close of BB&T's case-in-chief on or about March 30, 2010, Day 6 of the evidentiary hearing, the Defendants[1] brought N.R.C.P. 52(c) motions for judgment on partial findings. In their 52(c) motions, the Defendants argued for the first time that BB&T did not have standing to assert the claims and rights previously held by Colonial Bank. The Defendants argued that the Purchase and Assumption Agreement did not satisfy N.R.S. 111.235 to effectuate a transfer of the loan at issue from the FDIC to BB&T.

At the Court's request, BB&T offered to the Court a bulk assignment recorded in the public record that assigned all of Colonial Bank's security instruments in Nevada to BB&T("Bulk Assignment"). In addition, BB&T also offered to the Court an executed, unrecorded assignment of the loan, note and deed of trust at issue, ("Loan Assignment"), in order to clarify any ambiguity of the Purchase and Assumption Agreement. The Court denied BB&T's offer of additional evidence and found that the Purchase and Assumption Agreement was internally inconsistent and incomplete and prevented the Court from finding that an assignment of the loan at issue had been made from the FDIC to BB&T.

In an effort to adjudicate the matter of lien priority on its merits as opposed to dismissal due to standing, BB&T then moved the Court to substitute in and/or join Colonial Bank or the FDIC as the real party in interest pursuant to N.R.C.P.25(c), N.R.C.P. 21, or N.R.C.P. 17(a). The Court denied BB&T's request and subsequently granted Defendants' Rule 52(c) motions indicating that there was no standing issue; rather, the Court stated that BB&T had failed to meet

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[1] "Defendants" includes Saiid Rad ("Rad"), R. Phillip Nourafchan ("Nourafchan"), Forouzan, Inc. ("Forouzan"), RPN, LLC ("RPN"), R & S Investment Group, LLC ("R&S Investment"), R & S St. Rose, LLC ("R&S"), R&S Lenders, Eckley M. Keach ("Keach"), and Robert E. Murdock ("Murdock").

its evidentiary burden to demonstrate that it had been assigned the loan at issue.[2]

As this case was clearly not adjudicated on its merits and for the reasons set forth below, BB&T requests that this Court grant its motion for a new trial pursuant to N.R.C.P. 59(a), or in the alternative, that BB&T's motion to amend or alter judgment pursuant to N.R.C.P. 59(e) be granted.

III.

STATEMENT OF AUTHORITIES

A. BB&T'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED IN ORDER TO ADJUDICATE THIS MATTER ON ITS MERITS.

1. Legal Standard.

A new trial may be granted pursuant to N.R.C.P. 59, which states:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) **Irregularity in the proceedings of the court**, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; **(3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial**; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, **(7) Error in law occurring at the trial and objected to by the party making the motion. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.**

N.R.C.P. 59(a)(emphasis added). Generally, a judgment supported by substantial evidence will not be disturbed. Brechan v. Scott, 92 Nev. 633 (1976). A decision cannot be set aside where

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[2] While the Court granted Defendants' Rule 52(c) motions on the premise that BB&T failed to meet its evidentiary burden to demonstrate that it was assigned the loan at issue, BB&T maintains that the question of ownership of the loan amounts to a standing issue. The record clearly reflects that the Court itself originally referred to this as a standing issue, but later couched it as an evidentiary issue to avoid the requirements of NRCP 17 after BB&T's subsequent pleadings made it clear that if it was a standing issue the Court was required to permit the joinder or substitution of the FDIC. Either BB&T holds the loan at issue or the loan is still held by the FDIC. In either event, public policy dictates that the case be decided on the merits. The Defendants should not be unjustly enriched at either BB&T or the FDIC's expense. The Court should resolve ownership of the loan at issue and then adjudicate any claims on their merits.

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no irregularity or error is shown, and the evidence or decision is in accordance with and justified by the evidence. See Scott v. Haines, 4 Nev. 426 (1868). However, an exception to the general rule applies where, upon all the evidence, it is clear that a wrong conclusion has been reached. Brechan, 92 Nev. 633; see also Kroeger Properties & Dev., Inc. v. Silver State Title Co., 102 Nev. 112 (1986) (the exceptions of plain error or manifest injustice will be strictly construed). The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse. Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241 (1978).

Pursuant to N.R.C.P. 59(a), BB&T requests a new trial in this matter, or at a minimum, to open the judgment and for the Court to take additional testimony and amend the findings as to BB&T's ownership of the loan at issue. The Court erred by failing to recognize BB&T's ownership of the loan at issue when Defendants Rad, Nourafchan, Forouzan, RPN, R&S Investment, and R & S St. Rose, LLC ("R&S") have already admitted as much. In addition, a new trial should be granted or at a minimum the judgment and evidence should be opened as the Court erred by not allowing additional testimony or admitting the Bulk Assignment (proposed Exhibit 58) and the executed, unrecorded Loan Assignment (proposed Exhibit 59) into evidence in order to clarify any ambiguity of the Purchase and Assumption Agreement. The decision of the Court not to permit these proposed exhibits and/or additional testimony is itself a clear error of law as the Purchase & Assumption Agreement is a fully integrated document and no parol evidence to explain this document is permitted under the parol evidence rule, until there is a determination that the document is ambiguous, *which finding was never made until after the close of evidence*.

2. The Defendants Have Already Admitted That BB&T Holds The Loan At Issue.

On or about October 7, 2009, BB&T filed its Second Amended Complaint. A true and correct copy of BB&T's Second Amended Complaint it attached hereto as Exhibit "1" and incorporated herein by this reference. In response to BB&T's Second Amended Complaint, Defendants Rad, Nourafchan, Forouzan, RPN, and R&S Investments filed their Answer on

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October 26, 2009. A true and correct copy of the Answer to Second Amended Cross-Complaint is attached hereto as Exhibit "2" and incorporated herein by this reference. Defendant R&S also responded to BB&T's Second Amended Complaint by filing an Answer on October 26, 2009. A true and correct copy of R&S St. Rose, LLC's Answer to BB&T Corporation's Second Amended Complaint is attached hereto as Exhibit "3" and incorporated herein by this reference (Exhibits "2" and "3" are collectively referred to as the "Answers").

While the Answers are not identical in terms of what is admitted or denied, both Answers admit the allegations found in Paragraph 23 of BB&T's Second Amended Complaint. Specifically, Rad, Nourafchan, Forouzan, RPN, R&S Investment, and R&S admit that:

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

Compare BB&T's Second Amended Complaint attached hereto as Exhibit "1" with the Answers attached hereto as Exhibits "2" and "3". As defined and plead in BB&T's Second Amended Complaint, the Plaintiff is BB&T not Colonial Bank. Accordingly, Rad, Nourafchan, Forouzan, RPN, R&S Investment, and R&S have already admitted that the promissory note at issue in this case is in favor of BB&T. This party admission reflects the understanding of Rad, Nourafchan, Forouzan, RPN, R&S Investment, and R&S that BB&T holds the loan at issue. As the above Defendants already admitted BB&T's ownership of the loan at issue, BB&T would not have been required to put on any additional evidence indicating its ownership of the same, (even if the parol evidence rule did not control the evidence permitted prior to a finding or challenge of ambiguity).

In addition, Murdock and Keach's understanding that BB&T owned the loan at issue is set forth in their Trial Memorandum filed on January 8, 2010. A true and correct copy of the Trial Memorandum is attached hereto as Exhibit "4" and incorporated herein by this reference. In their Trial Memorandum, Murdock and Keach never argue that BB&T does not own the loan at issue; rather, they argue BB&T should not be allowed to assert equitable claims when it bought the loan with full knowledge of the pending litigation and may have only paid pennies on the dollar.

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Specifically, Murdock and Keach state:

> **Pursuant to a Purchase and Assumption Agreement between the FDIC and BB&T dated August 14, 2009, BB&T purchased the loan at issue in this case.** Unfortunately, there have been no documents produced that specifically outline how much was paid for the loan or any other details of the transaction. In fact, the Purchase Agreement does not detail the same. **All we know is that BB&T paid something.**

See Trial Memorandum pg. 3, lns. 22-26, attached hereto as Exhibit "4" (internal parenthetical and footnote omitted)(emphasis added).

Murdock and Keach unequivocally state that BB&T purchased the loan at issue. Their Trial Memorandum as well as the other pleadings in this case demonstrate the Defendants' understanding that BB&T owns the loan at issue. The understanding that BB&T now holds the loan at issue, together with the parol evidence rule, explains why BB&T did not spend additional time to put forth evidence of its interest therein – the Defendants conceded BB&T's ownership interest and by virtue of their pleadings admitted as much. There was never any claim that the Purchase & Assumption Agreement was ambiguous, or that it failed to transfer the loan at issue to BB&T, until **after** the close of evidence.

For Murdock and Keach, as well as the other Defendants, to all of a sudden argue **after** the close of BB&T's case-in-chief that BB&T does not own this loan is nothing more than an attempt to avoid trying this case on its merits. If this Court requires additional evidence to set forth the ownership of the loan at issue, the Court need not look any further than the pleadings on file herein. In addition to the party admission in the Answers, Murdock and Keach's Trial Memorandum also establish BB&T's ownership of the loan at issue. In their Trial Memorandum, Murdock and Keach establish BB&T's ownership of the loan at issue through the testimony of Gary Fritz, the individual that BB&T designated as its N.R.C.P. 30(b)(6) deponent for the deposition that this Court ordered after the close of discovery. In their Trial Memorandum, Murdock and Keach state the following:

> However, the deposition of the PMK of BB&T regarding the transaction at issue was taken on December 28, 2009. Unfortunately, the transcript is not yet available. However, through same, BB&T now admits:
>
> 1. That it did not do any due diligence on this particular Note;

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2. **That it purchased the Note through a package bid** on the entire portfolio of Colonial;

3. That the FDIC invited BB&T and other banks to bid on the Colonial portfolio and set up an "interlink" site where it could view aspects of the portfolio;

4. That BB&T has no idea as to the value it place on the Note in question;

5. That the BB&T bid of 22 Billion Dollars was based upon various financial data;

6. That BB&T did not have to bid at all;

7. That BB&T could have bid for the portfolio without this particular Note;

8. That other banks bid lower amounts than BB&T for the portfolio;

9. That BB&T performed a risk analysis of the portfolio as a whole-not on individual loans;

10. That nothing stopped BB&T from asking questions about individual loans or getting information about individual loans;

11. That there was no market valuation done on the particular Note in question;

12. That if there is a "loss" on any ultimate collection, the FDIC will "share" in the loss up to 95% of same;

13. That the PMK knew nothing at all about this particular Note;

14. **That BB&T bought the particular Note** without doing any investigation in the middle of this litigation;

15. That BB&T had no idea of what priority they were getting with this particular Note;

16. That BB&T has no idea where the original Deed of Trust is.

Id. at pgs. 4-5 (emphasis added).

In summary, by virtue of the pleadings, the Defendants conceded BB&T's ownership before trial. The Answers filed by Rad, Nourafchan, Forouzan, RPN, R&S Investment, and R&S admit that BB&T holds the note. In addition, Defendants Murdock and Keach specifically state in their Trial Memorandum that BB&T purchased the loan at issue pursuant to the Purchase and Assumption Agreement. They also provide references to the testimony of BB&T's N.R.C.P.

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30(b)(6) designee, Gary Fritz, that BB&T bought this particular note. The only issue of fact advanced to trial was **how much** BB&T paid for the loan.[3] How much BB&T paid, or in other words the consideration BB&T paid for the loan, assumes the fact that BB&T owns the loan. And any argument with respect to the consideration BB&T paid is an equitable argument that would go to the prejudice of the intervening lien holder, R&S Lenders, which BB&T would address in its rebuttal, not its case-in-chief.

With regard to R&S Lenders' it too conceded BB&T's ownership of the loan at issue. In their Joint Pre-hearing Brief, R&S and R&S Lenders discuss BB&T's bid for Colonial Bank's assets, repeatedly citing to the deposition transcript of Gary Fritz, BB&T's N.R.C.P. 30(b)(6) designee with regard to the acquisition. A true and correct copy of the Joint Pre-hearing Brief is attached hereto as Exhibit "5" and incorporated herein by this reference. Specifically, in their Joint Pre-hearing Brief, R&S and R&S Lenders state:

> BB&T's bid was $22.5 billion minus a 4.5 discount – approximately $21.5 billion – which took into account the risks related to the various assets. After deduction for acquisition of the deposits, the discount was actually greater, 6.5%. **As such, the St. Rose Lenders loan was discounted by at least 6.5%.** The Purchase and Assumption Agreement stated the assets were acquired at "book value." **During the deposition of the BB&T PMK, it was revealed that the St. Rose Construction Loan was carried on Colonial Bank's books at $29,305,00** (sic)**...Nevertheless, prior to acquisition, it does not appear BB&T did any independent analysis of the R&S St. Rose construction loan. It had no idea what the Colonial Bank Deed of Trust's priority was at the time of bid.**

See Joint Pre-hearing Brief, pg. 18-19 attached hereto as Exhibit "5" (internal footnotes omitted) (emphasis added).

Again, Defendants are not contesting BB&T's ownership of the loan. The above discussion in the Joint Pre-hearing Brief goes to the consideration that BB&T paid for the loan at issue. As the deposition transcript of Gary Fritz was included as an exhibit to the Joint Pre-

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[3]Whether BB&T paid proper consideration and thus is able to have an "assignment" that comes with equitable rights is the only issue with regard to BB&T that was advanced and consolidated with trial on the merits as to lien priority as discussed below. None of the Defendants ever questioned BB&T's ownership of the loan at issue until after the close of BB&T's case-in-chief. While the consideration BB&T paid (which goes to prejudice) was advanced with trial on the merits, BB&T's ownership was not one of the issues this Court specifically advanced and consolidated for trial. It is manifestly unjust and against the public policy of trying cases on their merits to grant Defendants' Rule 52(c) motions and find that BB&T does not hold the loan at issue.

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hearing Brief, it too should be considered with regard to BB&T's ownership of the loan at issue.

As the Defendants herein have admitted BB&T's ownership of the loan at issue, they are estopped from asserting that there is no evidence of BB&T's ownership of this loan. Wherefore, BB&T should be granted a new trial or the judgment opened and additional proceedings commenced to litigate this case on its merits.

3. By Not Contesting BB&T's Ownership Until After The Close Of Evidence In Its Case-In-Chief, Defendants Waived Their Argument As To BB&T's Ownership Of The Loan At Issue.

The doctrine of waiver is an equitable doctrine based upon fairness and justice. Davidsohn v. Doyle, 108 Nev. 145, 149 (1992). The pleadings on file herein as well as the transcript of the evidentiary hearing prior to the close of BB&T's case-in-chief are completely devoid of any statements by the Defendants with respect to whether or not BB&T is the owner of the loan at issue. As such, the Defendants waived or are estopped from attacking BB&T's ownership by way of their Rule 52(c) motions. It was only **after** BB&T was forced to close its case-in-chief[4] did the Defendants argue for the first time, that BB&T did not have the ability to assert the actions and claims of Colonial Bank.

In fact, as set forth above, the Answers, Murdock and Keach's Trial Memorandum, R&S Lenders' Joint Pre-hearing Brief, as well as the other pleadings on file herein all support the fact that the Defendants conceded that BB&T was the successor in interest to the loan at issue and the Defendants admitted as much. Given the Defendants' admissions as well as the statements made in their pleadings, as well as the Purchase and Assumption Agreement and all other evidence offered herein, the Court should take judicial notice of BB&T's ownership of the loan at issue.

The Defendants should not be rewarded for sandbagging BB&T into believing that its ownership of the loan was not in dispute. Accordingly, this Court should either reopen the judgment to take additional testimony and evidence, or deem the Defendants as having waived

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[4] BB&T maintains that it did not close its case-in-chief and should have been allowed to put on additional evidence up and until the conclusion of the testimony of Brad Burns on Thursday, April 8, 2010. The Court's refusal to permit BB&T to put on evidence in between its witnesses is another irregularity of these proceedings that justifies BB&T's grounds for a new trial, or at a minimum to have the judgment opened and the findings amended by the Court.

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any argument as to BB&T's ownership of the loan in order to decide this case on its merits. Given the pleadings on file herein, to attack BB&T's ownership or "standing"[5] for the first time after the close of evidence in BB&T's case-in-chief is manifestly prejudicial and contrary to the public policy of having cases determined on their merits. The Defendants will not be prejudiced by this Court granting BB&T a new trial or opening judgment to allow for additional testimony to make new findings to reach the merits of lien priority.

4. Defendants' Attack Of BB&T's Ownership Of The Loan At Issue After The Close Of Evidence Amounts To Unfair Surprise.

BB&T was surprised to say the least when after the close of its case-in-chief Defendants argued for the first time in their Rule 52(c) motions that BB&T failed to provide evidence of its ownership of the loan at issue. The Defendants' surprise attack after the close of evidence amounts to unfair surprise and is grounds for a new trial or at a minimum for this Court to open the judgment in order to establish ownership of the loan at issue and the real party in interest. See Havas v. Haupt, 94 Nev. 591 (1978) ("The 'surprise' contemplated by NRCP 59(a) must result from some fact, circumstance, or situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against).

Before the start of the evidentiary hearing wherein the issues of lien priority were advanced and consolidated for trial on their merits, this Court was very specific as to what issues would be advanced and tried. Specifically, the Court directed the parties to submit briefs regarding which issues should be advanced and tried in this proceeding, and then issued a minute order setting forth the very specific issues which would be determined at this evidentiary hearing, with all other issues being reserved for the trial. See Minute Order from hearing on November

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[5] While the Defendants argued and this Court initially called BB&T's ownership of this loan a potential "standing" issue, the Court subsequently deemed it to be an evidentiary issue, finding that BB&T failed to meet its evidentiary burden to establish its ownership of the loan at issue. The Court's admission of the Bulk Assignment as well as the executed, unrecorded Loan Assignment would enable this Court to reach the merits of this case. How can the Court find that BB&T failed to present sufficient evidence on an issue that was not identified as an issue for the expedited evidentiary hearing (all other issues being reserved for the later trial), and never raised until after the close of evidence in BB&T's case-in-chief?

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23, 2009 attached hereto as Exhibit "6" and incorporated herein by this reference; see also Plaintiffs' 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 30.130 attached hereto as Exhibit "7" and incorporated herein by this reference.

Out of the 48 issues of fact the Defendants requested be determined in this evidentiary hearing and consolidated for trial, the Court identified 36 specific issues of fact and law which would be the subject matter of this expedited trial. See Minute Order attached hereto as Exhibit "6". Out of the 36 issues of fact and law, only one of those issues of fact makes any reference to BB&T at all. The other issues that were advanced do not reference BB&T in any way shape or form. The reason BB&T was not referenced nor its ownership of the loan at issue questioned and advanced to trial on the merits was because the parties already knew BB&T held the loan at issue and admitted the same. The one and only question of fact advanced to trial that references BB&T in any way is issue #24, which states:

> 24. Whether BB&T paid proper consideration and thus is able to have an "assignment" that comes with equitable rights?

BB&T's ownership of the loan, as successor in interest to the FDIC as receiver of Colonial Bank was not advanced to trial. There was no issue raised regarding whether an assignment of this loan from the FDIC to BB&T had ever been properly made. There was no issue identified regarding any ambiguities in the Purchase and Assumption Agreement. While Defendants would have this Court believe that issue #24 pertains to BB&T's ownership of the loan, the plain language of the issue does not support any such reading. Issue #24 pertains to the amount of consideration that BB&T paid. Issue #24 is nothing more than a reference to Murdock and Keach's legal argument made at trial, as stated in their Trial Memorandum, that equitable rights cannot be "assigned" (and states nothing about the loan not being assigned by the FDIC to BB&T). See Evidentiary Hearing Transcript – Day 1, pgs. 37-41 attached hereto as Exhibit "8" and incorporated herein by this reference; see also Trial Memorandum, attached hereto as Exhibit "4" (Murdock and Keach argue against the equitable remedy of replacement/subrogation on the basis that BB&T purchased the loan at issue with knowledge of its secondary position).

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The record is completely devoid of BB&T's ownership of the loan being called into question before the close of BB&T's case-in-chief, or of any claim the Purchase and Assumption Agreement is ambiguous in any manner. Until the close of BB&T's case-in-chief, Defendants argued that BB&T was not entitled to equitable relief because it purchased the loan with notice that it was behind or junior to the R&S Lenders Deed of Trust.[6] After the close of evidence, Defendants argued that BB&T failed to provide any evidence that it purchased the loan at all.

In keeping with the often stated public policy to adjudicate cases on their merits, this Court would be justified to grant BB&T's motion for a new trial, or at a minimum, open evidence in order to amend its findings rather than by disposing of this case due to Defendants' sandbagging BB&T by contesting its ownership of the loan only after the close of evidence.

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5. BB&T Was Not Afforded A Full Opportunity To Produce Evidence Of The Facts, Circumstances And Conditions Surrounding The Execution And Conduct Of The Parties To The Purchase And Assumption Agreement.

In denying BB&T's request to substitute in the real party in interest on Day 9 of the evidentiary hearing, the Court stated the following:

> 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 conflicting evidence regarding this assignment is what led me to the position that we're currently in, the ruling that I began to make on the 41(b) motions at the time we had this motion presented.
>
> For that reason and given the particular procedural posture of this case, I'm going to deny the request for substitution of the real party in interest.

See Evidentiary Hearing Transcript – Day 9, pg. 25 attached hereto as Exhibit "9" and incorporated herein by this reference.

The Court's determination that the Purchase and Assumption Agreement was internally inconsistent and incomplete was made **after** the close of evidence in BB&T's case-in-chief, as

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[6] Knowledge of an intervening lien is irrelevant under the Restatement (Third) of Property: Mortgages §§ 7.3 and 7.6 adopted by the Nevada Supreme Court in Houston v. Bank of Am. Fed. Sav. Bank, 119 Nev. 485 (2003).

was any claim of ambiguity regarding this document. See Evidentiary Hearing Transcript – Day 6, pgs. 2-3 attached hereto as Exhibit "10". Accordingly, BB&T was not only unaware of any ambiguity or the insufficiency of this document during its case-in-chief, but BB&T was precluded from presenting any additional evidence, including parol evidence, as BB&T's case-in-chief had been closed.

Once this Court deemed the Purchase and Assumption Agreement to be unclear or ambiguous, counsel for BB&T suggested to the Court that it would need to fly a representative of BB&T out from North Carolina in order to provide parole evidence as to the intent of the parties regarding the agreement. See Evidentiary Hearing Transcript – Day 6 pgs. 59-60 attached hereto as Exhibit "10" and incorporated herein by this reference. The Court denied BB&T's request and was not willing to allow counsel for BB&T to proceed with additional testimony to clarify the ambiguity of the Purchase and Assumption Agreement. Id.

Instead, the Court gave BB&T a "homework" assignment to contact the FDIC to see if there were any additional documents or schedules that were part of the Purchase and Assumption Agreement. Accordingly, BB&T presented the Bulk Assignment that had been recorded in the public records of Clark County as well as an executed, unrecorded Loan Assignment, assigning the loan at issue from the FDIC to BB&T. However, this Court improperly denied admission of the documentary evidence. See Evidentiary Hearing Transcript – Day 7 pgs. 41-42 attached hereto as Exhibit "11" and incorporated herein. The Court's basis for its denial was that the assignments had not been previously produced pursuant to N.R.C.P. 16.1. Id. However, as these assignments had not been executed until after the close of discovery in this case, BB&T could not have produced these assignments beforehand.

The Court's failure to permit BB&T to fly in a representative of BB&T to testify as to the Purchase and Assumption Agreement as well as the Court's failure to admit additional documentary evidence, including the assignments herein, denied BB&T a full opportunity to produce evidence surrounding the terms of the Purchase and Assumption Agreement which had been called into question only after the close of evidence.

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"When a contract is in any of its terms or provisions ambiguous or uncertain it is primarily the duty of the trial court to construe it **after a full opportunity is afforded all the parties** in the case to produce evidence of the facts, circumstances and conditions surrounding its execution and the conduct of the parties thereto." Fox v. First Western Sav. and Loan Ass'n, 86 Nev. 469, 473 (1970)(emphasis added) *citing* Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke & Co., 297 P.2d 428 (Cal. 1956).

Here, once the terms of the Purchase and Assumption Agreement were first called into question, BB&T should have been afforded the opportunity to present evidence of the facts, circumstances and conditions surrounding its execution and the conduct of the parties thereto. See Fox, 86 Nev. at 473; see also Beneficial Fire & Cas. Ins. Co., 297 P.2d at 431. By closing evidence before any question was raised about this document and by ruling that the Purchase and Assumption Agreement was ambiguous without first hearing evidence on this issue, the Court denied BB&T from having **a full opportunity** to present additional evidence as a matter of law. See id. This is clear error, especially in light of the fact that the Court intended to then use this very ambiguity in a fully integrated contract to rule against BB&T on all of its claims.[7]

This Court should have allowed BB&T to put on additional evidence as well as witnesses from BB&T and/or the FDIC regarding the Purchase and Assumption Agreement. As such, this Court should open the judgment and take additional evidence or grant BB&T a new trial.

6. The Bulk Assignment And Executed, Unrecorded Assignment Constitute Newly Discovered Evidence.

Pursuant to Rule 59(a), a new trial may be granted due to newly discovered evidence that is "material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial." The newly discovered evidence must be material and important to the movant. Whise v. Whise, 36 Nev. 16 (1913). In addition, the evidence must be sufficiently strong to make it probable that a different result would be

[7]The Court ruled against BB&T's claim of equitable subrogation due to the language of the Purchase and Assumption Agreement, despite the ambiguity that the Court found to prevent it from making a determination as to BB&T's ownership of the loan at issue. See Evidentiary Transcript – Day 6, pgs. 56-65 attached hereto as Exhibit "10".

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obtained in another trial. Id.

In this case, the Bulk Assignment that was recorded on or about November 9, 2009, was executed by the FDIC. Accordingly, BB&T's key witnesses were completely unaware that the Bulk Assignment even existed at the time of trial until this Court requested that BB&T ask the same of the FDIC. As the Bulk Assignment assigns all security instruments recorded in the State of Nevada in favor of Colonial Bank to BB&T, it would certainly include the loan at issue and decisively render a different result in the event of a new trial. See id. The executed, unrecorded Loan Assignment was not in existence at the time of trial, and is certainly new evidence created to directly address and resolve the ambiguity issue raised for the first time after the close of evidence. The Loan Assignment, if admitted into evidence would have eliminated any issue and certainly provides additional grounds for this Court to grant a new trial or open judgment and amend its findings regarding BB&T's ownership of the loan at issue.

B. IN THE ALTERNATIVE, THE FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD BE ALTERED OR AMENDED.

To the extent that this Court was unable to find that an assignment of the loan at issue had been made from the FDIC to BB&T, the Court's Findings of Fact and Conclusions of Law should be limited to BB&T's alleged failure to meet its evidentiary burden to prove ownership of the loan at issue. Due to the Court's inability to find that BB&T was the real party or successor in interest regarding the loan at issue, any and all findings and conclusions as to BB&T's interest therein would be premature. In addition, there are numerous findings and conclusions included in the current version of the Findings of Fact and Conclusions of Law filed June 23, 2010, that are unsupported by the record. As such and pursuant to N.R.C.P. 59(e), BB&T moves[8] this court to alter and/or amend the Findings of Fact and Conclusions of Law as set forth below. A true and correct copy of the Findings of Fact and Conclusions of Law are attached hereto as Exhibit "12" and incorporated herein by this reference.

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[8] N.R.C.P. 59(e) states: "A motion to alter or amend the judgment shall be filed no later than 10 days after service of written notice of entry of the judgment." Here, the Court's Findings of Fact and Conclusions of Law were filed on June 23, 2010. No Notice of Entry of Judgment has been served to date.

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Each of the following findings are unsupported by the record and/or is directly inconsistent with the evidence received at trial.

1.

(Introduction pgs. 6-7)

> 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 ample opportunity to submit proper admissible evidence that the Colonial Bank loan, note and deed of trust at issue in this case were one of the assets acquired by BB&T when it purchased some of the Colonial Bank assets. BB&T instead relied upon the language of the Purchase and Assumption Agreement, and no other admissible evidence, documentary or testimony.

While BB&T did rely upon the language of the Purchase and Assumption Agreement, which is a fully integrated contract for the sale of $22 billion of Colonial Bank's assets by the FDIC to BB&T, BB&T also relied upon the testimony of the Executive Vice-President and Manager of the Real Estate Division of BB&T, Mr. Richard Yach ("Yach"), as well as the testimony of Ms. Marty Singer ("Singer"), a Vice-President and Manager of BB&T. After the close of BB&T's case-in-chief, the Court, as the finder of fact, determined that the Purchase and Assumption Agreement was ambiguous and did not clearly transfer the loan, note, and deed of trust at issue. In addition to the above testimony, BB&T then read into the record pursuant to N.R.S. 111.155 the Bulk Assignment executed by the FDIC and recorded on November 3, 2009 in the Clark County Official Records, assigning all security instruments[9] held by Colonial Bank in the State of Nevada to BB&T. BB&T also offered into evidence the executed, unrecorded Loan Assignment with respect to this particular loan at issue.

Accordingly, BB&T not only relied upon the language of the Purchase and Assumption Agreement but the testimonial evidence of Yach and Singer. Once the Court determined the Purchase and Assumption Agreement was ambiguous, BB&T also presented parol evidence and

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[9] The only security instruments not assigned pursuant to the bulk assignment were those under or by use of Mortgage Electronic Registration Systems, Inc. ("MERS"), which does not apply to the loan, note, or deed of trust at issue herein.

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relied upon the Bulk Assignment that was already in the public record and read into the record of this proceeding. BB&T also relied upon and presented to the Court the executed, unrecorded Loan Assignment specifically identifying the loan at issue being assigned from the FDIC to BB&T. Although the Court refused to admit these assignments into evidence, the Bulk Assignment was public record upon which BB&T was entitled to rely upon and did so at the time of trial.

The above introductory language in the Findings of Fact and Conclusions of Law should reflect the record. See Evidentiary Hearing Transcript – Day 7 attached hereto as Exhibit "11".

2.

(Findings of Fact pg. 9)

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

This finding is unsupported by the record and should be deleted.

3.

(Findings of Fact pg. 14)

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

This finding is unsupported by the record. All of Colonial Bank's records indicate their intention to have a first priority deed of trust to secure the new loan. There is nothing to the contrary. Yach and Singer both testified that Colonial Bank would not have made the Construction Loan had it know that it was not receiving a first position lien on the Property. Steve Novacek ("Novacek") also testified that Colonial Bank would not have made the Construction Loan without a first position lien on the Property. The Escrow Instruction drafted by Novacek and sent to Nevada Title Company ("Nevada Title") indicated that the R&S Lenders Deed of Trust could not remain as an exception and would therefore have to be removed, not subordinated. See Evidentiary Hearing Transcript - Day 2, pg. 47, lns. 16-18 attached hereto as Exhibit "13" and incorporated herein by this reference.

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4.

(Findings of Fact pg. 15)

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

This finding is unsupported by the record. Brenda Burns testified that the R&S Lenders Deed of Trust would have to be reconveyed rather than subordinated pursuant the Escrow Instructions she received from Novacek. The above finding also contradicts Paragraph 112 that subordination would have been inconsistent with Novacek's escrow instructions. Accordingly, Brenda Burns knew by way of Colonial Bank's instructions that the R&S Lenders DOT would have to be released and reconveyed rather than subordinated.

5.

(Findings of Fact pg. 16)

> 65. On or about July 31, 2007, Colonial Bank closed the transaction in the approximate amount of $43,980,000.00 with the security of its Second Deed of Trust.
>
> 68. By reason of its collection of additional funds in the nature of the loan fee, payoff of the 2005 loan, reconveyance fee, appraisal fee, underwriting fee and interest reserve sums, Colonial Bank was the recipient of and beneficiary of the majority of the additional debt.
>
> 71. Colonial Bank never communicated to Rad, Nourafchan, R&S or St. Rose Lenders that it required a first priority deed of trust for the Construction Loan.

Paragraph 65 incorrectly states that Colonial Bank closed the above transaction. Colonial Bank did not close the above transaction; rather, Colonial Bank funded the $43,980,000.00 Construction Loan after receiving a confirmation that its instructions would be complied with. Nevada Title closed the transaction by recording the Construction Loan deed of trust.

In Paragraph 68, Rad and Nourafchan were the real beneficiaries of the additional debt as the Construction Loan paid off the $29,305,250.00 First Colonial DOT and kept Rad and Nourafchan from losing the Property to foreclosure. In addition, Rad, Nourafchan and their investors retained the benefits of the higher interest rates of their promissory notes from R&S Lenders without the risk of holding a second position lien subject to a first. Colonial Bank is

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certainly not the primary beneficiary of the additional indebtedness as this Court has determined that it essentially forfeited its first priority lien position for no apparent reason.

Paragraph 71 is incorrect because Colonial Bank communicated its requirement of a first deed of trust in a number of ways. Not only do the Construction Loan documents indicate that Colonial Bank required a first priority deed of trust, but the Construction Loan DOT contractually requires subrogation to the extent those funds are used to payoff any encumbrance on the Property. Rad, Nourafchan (in their representative capacities), and R&S were signatories to the Construction Loan and Construction Loan DOT. While R&S Lenders did not sign the Construction Loan or the Construction Loan DOT, the principals of R&S Lenders (Rad and Nourafchan) had constructive knowledge by virtue of Rad and Nourafchan agreeing in their representative capacities to the terms and conditions of the Construction Loan and Construction Loan DOT. In addition, Colonial Bank's closing agent, Nevada Title, informed the principals of R&S and R&S Lenders, Rad and Nourafchan, that the R&S Lenders DOT would have to be released or reconveyed. The statement that Colonial Bank never communicated its requirement of a first priority deed of trust to these parties is error.

6.

(Findings of Fact pg. 17)

> 74. At no time prior to the closing of the Construction Loan did Brenda Burns discuss with Rad, Nourafchan, R&S or St. Rose Lenders that reconveyance of the St. Rose Lenders Deed of Trust was a condition to closing of the loan transaction.
>
> 75. At no time prior to the closing of the Construction Loan did Colonial Bank discuss with Rad, Nourafchan, R&S or St. Rose Lenders that reconveyance of the St. Rose Lenders Deed of Trust was a condition to closing of the loan transaction.
>
> 78. Brenda Burns testified that she could not specifically remember what words either she or Rad used to allegedly discuss what was going to happen with the St. Rose Lenders Deed of Trust prior to closing the Construction Loan Agreement.
>
> 80. There is no evidence that Colonial Bank or BB&T informed Nourafchan that the St. Rose Lenders Deed of Trust would have to be reconveyed, subordinated or converted to equity.

Paragraphs 74 and 75 are unsupported by the record. Brenda Burns specifically testified that she did discuss with Rad and/or Nourafchan, as the principals of both R&S and R&S

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Lenders, that the $12,000,000.00 R&S Lenders DOT would have to be released in connection with the Construction Loan. Colonial Bank relied upon Nevada Title as its closing agent to determine how Colonial Bank was to receive a first position lien on the Property.

Regarding Paragraph 78, while Colonial Bank's closing agent, Brenda Burns, could not remember word for word the conversation she had with Rad, she testified that she informed Rad that the R&S Lenders DOT would have to be released as a condition of Colonial Bank funding the $43,980,000.00 Construction Loan. Rad and Nourafchan went so far as to provide Brenda Burns with the operating agreements for R&S and R&S Lenders to ensure her that they had the authority to release the $12,000,000.00 R&S Lenders DOT.

Yach testified that it was his understanding from a meeting with Rad and Nourafchan that in order for them to meet the 75% debt to value ratio to receive the Construction Loan, Rad and Nourafchan agreed to convert the $12,000,000.00 R&S Lenders DOT from debt into equity. As such, there is evidence in the record that Rad and Nourafchan knew that the R&S Lenders DOT would need to be released and converted into equity and Paragraph 80 should be altered to reflect the same.

7.

(Findings of Fact pg. 18)

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

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

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

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

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

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

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Paragraph 83 of the Findings of Fact and Conclusions of Law should be altered/amended as Brenda Burns testified that Rad and/or Nourafchan orally agreed to release the R&S Lenders DOT in connection with the Construction Loan.

Paragraph 84 needs to be amended as Brenda Burns testified that the transaction would not have closed had it not been for an oral agreement or representation by the principals of R&S and R&S Lenders to release and reconvey the R&S Lenders DOT.

Paragraphs 86 and 87 should be altered/amended as the Construction Loan documents as well as Colonial Bank's closing agent, Brenda Burns, indicated to Rad and Nourafchan, as the principals of R&S and R&S Lenders, that the R&S Lenders DOT would have to be released and reconveyed in connection with Colonial Bank funding the Construction Loan.

While the Construction Loan Agreement did not specifically use the words "first lien," the Construction Loan DOT did specify that Colonial Bank required to be subrogated to the lien priority of any encumbrance it paid off, clearly reflecting its intention to have a first priority loan. In addition, any disbursements, including the initial disbursement that paid off the First Colonial Loan were to be secured by a "first position lien" on the Property. As such, Paragraph 88 should be amended.

Finally, Paragraph 89 is incorrect. Colonial Bank did negotiate the requirement for the Construction Loan to be a first position deed of trust. In all material respects, the interest rate and other provisions of the First Colonial Loan were similar in nature to the Construction Loan. If Colonial Bank had not bargained for a first position deed of trust, the Construction Loan would have had a much higher interest rate to take into account the greater risk of being positioned behind the R&S Lenders DOT.

8.

(Findings of Fact pg. 19)

> 100. Reconveyance of the St. Rose Lenders Deed of Trust was not a condition for closing the Construction Loan transaction.
>
> 101. If reconveyance of the St. Rose Lenders Deed of Trust had been a condition for closing the Construction Loan, it would have been stated as such in the loan documents.

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> 102. If reconveyance had been a material term, Colonial Bank should have obtained a separate agreement from St. Rose Lenders prior to closing.
>
> 103. There is no proof of any executed agreement or consent by St. Rose Lenders to reconvey.

There is absolutely no support in the record for Paragraph 100. As set forth above, all of Colonial Bank's underwriting documents and the testimony of Yach, Singer, Novacek, and Burns, all clearly indicated a reconveyance of the R&S Lenders DOT was a condition for closing the Construction Loan transaction. Reconveyance of the R&S Lenders DOT is specified in the Escrow Instruction from Colonial Bank to Nevada Title. Reconveyance of the R&S Lenders DOT is also implied in the Construction Loan DOT regarding contractual subrogation. Colonial Bank's requirement to be subrogated to the lien position of any encumbrance it paid off directly implicates Colonial Bank's requirement – in the loan documents – that it retain a priority position over the R&S Lenders DOT. Paragraphs 101 and 102 should be amended.

With regard to Paragraphs 102 and 103, Brenda Burns, as closing agent for Colonial Bank, did obtain a separate agreement from the principals of both R&S and R&S Lenders that the R&S Lenders DOT would be removed and/or reconveyed and testified to that end. Brenda Burns' testimony is direct testimonial evidence of an agreement by R&S Lenders to reconvey their deed of trust. Brenda Burns' testimony should be reflected in the Findings of Fact and Conclusions of Law.

Adding these paragraphs, which are clearly contradicted by the only evidence regarding Colonial Bank's intentions and its conditions, is unsupportable by the record.

9.

(Findings of Fact pg. 21)

> 118. There was no showing by BB&T that because the managing officers of Forouzan and RPN, and the managing members of R&S and St. Rose Lenders were the same, that they can be treated as the same entity.
>
> 119. A uniformity of owners or interest alone is insufficient to demonstrate that entities are anything other than valid, separate or independent corporate entities.
>
> 121. Since St. Rose Lenders, was not a party to either the 2007 Colonial Bank Deed of Trust or the Construction Loan Agreement, it is not required to subrogate its Deed of Trust.

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

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

Paragraphs 118 and 119 misstate Nevada law and the evidence herein. All that is required to ignore the separate existence of Forouzan, RPN, R&S, and R&S Lenders is (1) that the entity must be influenced and governed by the same person asserted to be its alter ego; (2) a unity of interest and ownership such that one is inseparable from the other; and (3) that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice. See In re Giampietro, 317 B.R. 841, 848 (2004) citing Frank McCleary Cattle Co. v. Sewell, 73 Nev. 279, 317 P.2d 957 (1957)(applying criteria used to pierce the corporate veil to limited liability companies). "It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice." McCleary Cattle Co., 73 Nev. at 282, 317 P.2d at 959. Treating the above entities as separate results in the injustice that Rad and Nourafchan did not agree to the contractual subrogation as R&S Lenders set forth in the Construction Loan DOT that they agreed to as R&S. Accordingly, Rad and Nourafchan are unjustly enriched by retaining the favorable benefits of the terms associated with the R&S Lenders DOT but a lien position ahead of what that for which they bargained.

More importantly, as the Court is well aware, alter ego was not an issue presented at the expedited evidentiary hearing or identified as an issue for such proceeding, nor is it a claim advanced by BB&T for this trial.

As replacement/equitable subrogation would put Colonial Bank as well as R&S Lenders in exactly the position that the parties had bargained for before Colonial Bank made the Construction Loan, there would be no prejudice to R&S Lenders. Accordingly, no such consent on the part of R&S Lender is required and the above Paragraphs should be amended to reflect the same.

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10.

(Findings of Fact pg. 22)

> 130. BB&T's rights to assert claims against the Defendants would have to arise from the August 14, 2009 Purchase and Assumption Agreement.
>
> 132. Although the Purchase and Assumption Agreement states that there are schedules attached showing the assets purchased, BB&T indicated at the time of trial that no schedules had been prepared or existed.

BB&T's rights to assert claims against the Defendants do come through the Purchase & Assumption Agreement as set forth in Paragraph 130 of the Findings of Fact and Conclusions of Law; however, BB&T's rights regarding replacement/equitable subrogation arise from those rights held Colonial and then transferred to the FDIC by operation of law and subsequently assigned to BB&T by way of the Purchase & Assumption Agreement as well as the Bulk Assignment and the Loan Assignment. Accordingly, any and all rights held by the FDIC as receiver of Colonial Bank, as well as any and all additional rights held by the FDIC under Federal law, were assigned to BB&T. Any rights not assigned to BB&T were retained by the FDIC.

Regarding Paragraph 132, the Purchase and Assumption Agreement references schedules 3.1 and 3.1a that set forth certain *categories* of assets purchased. The Purchase and Assumption Agreement does not indicate that the schedules (which were not prepared in this instance) specifically reference which assets were sold to BB&T or retained by the FDIC. Therefore, at best, the schedules would have only set forth certain *categories* of assets purchased by BB&T. The Court's mistaken belief that the schedules would list this particular asset is error.

11.

(Findings of Fact pg. 23)

> 135. The Purchase and Assumption Agreement does not indicate whether the 2007 Colonial Bank Deed of Trust, that was the subject of pending litigation involving allegations of fraud, was included as an excluded asset.
>
> 136. Based upon the fact that legal proceedings were pending which included allegations of fraud at the time the Purchase and Assumption Agreement was entered into, the 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.

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Paragraphs 135 and 136 identify that either BB&T was assigned the loan at issue or the FDIC retained the loan at issue pursuant to the Purchase and Assumption Agreement. Here, the Court should amend these paragraphs to set forth its reasoning for denying BB&T's motion to substitute in and/or join the FDIC as the real party in interest to determine the ownership of the loan at issue. Either BB&T or the FDIC owns this loan. While BB&T has asserted its ownership of the loan through testimonial evidence of Yach and Singer and documentary evidence including the Purchase & Assumption Agreement as well as the Bulk Assignment read into the record and the Loan Assignment, the FDIC has not intervened in this matter claiming any rights to the loan at issue. The Court's findings as to why it refused to bring in the FDIC to clear up any ownership issue with respect to the loan will provide a clear record for future review. In addition, the Court's reasoning for excluding the bulk assignment should also be set forth in its findings in order to provide a clear record for future review.

12.

(Findings of Fact pg. 23)

> 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 loan at issue has occurred.

At the time that BB&T closed its case-in-chief, the Court had not determined that the Purchase and Assumption Agreement was ambiguous. As such, BB&T was precluded by the parol evidence rule from presenting either witnesses to testify about the Purchase and Assumption Agreement, as it is a fully integrated contract, or additional documentary evidence such as the Bulk Assignment. Accordingly, Paragraph 137 should be removed in its entirety, as BB&T was not permitted by the parol evidence rule to present any such evidence until the Purchase and Assumption Agreement was claimed or determined to be ambiguous.

With respect to Paragraph 138, the Court's determination that the fully integrated Purchase and Assumption Agreement is internally inconsistent and incomplete and prevents the Court from finding an assignment of the loan at issue, after BB&T closed its case-in-chief, begs

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the question as to why the Court denied BB&T's motion for the substitution and/or joinder of the FDIC as the real party in interest. Accordingly, the Court's reasoning as to its denial of BB&T's motion to substitute/join the real party in interest should be set forth in the Findings of Fact and Conclusions of Law.

13.

(Findings of Fact and Conclusions of Law pg. 24)

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

Paragraph 143 and 144 essentially state that BB&T lacks standing to assert the claims set forth in its Second Amended Complaint without using the word "standing." While this Court has been unwilling to call it a standing issue, that is exactly what all the Defendants argued that BB&T lacked, but only after BB&T closed its case-in-chief. Accordingly, this Court should alter these two paragraphs to reflect the Defendants' arguments as to standing and clarify how BB&T allegedly failed to meet its evidentiary burden .

14.

(Conclusions of Law pg. 25)

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

Paragraph 2 should reflect the evidentiary standard that BB&T has allegedly failed to meet – by a preponderance of the evidence. That is to say, that the documentary evidence of the Purchase and Assumption Agreement as well as the Bulk Assignment read into the record and the testimonial evidence offered by BB&T's officers, Yach and Singer, as well as one of its transactional attorney, Novacek, failed to establish by a preponderance of the evidence that BB&T owned the loan at issue.

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15.

(Conclusions of Law pg. 25)

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

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

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

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

8. BB&T has not demonstrated that it as been assigned the interest in the 2007 Colonial Bank Deed of Trust at issue and therefore has not shown it has the ability to assert the claims presented in the Second Amended Complaint filed by Colonial Bank on October 7. 2009.

The above paragraphs should also be amended to reflect the Court's determination that BB&T has failed to meet its evidentiary burden to establish, by a preponderance of the evidence, that it is entitled to relief on its claims found in the Second Amended Complaint. As they stand, the above paragraphs indicate that BB&T has not demonstrated it is a successor in interest at all. The Purchase and Assumption Agreement indicates that BB&T is a successor in interest, this Court was simply not able to declare that BB&T was a successor in interest to the loan at issue.

16.

(Conclusions of Law pg. 25)

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

The above paragraph should be deleted in its entirety as the Court never concluded the Purchase and Assumption Agreement excluded all such actions. In addition, this conclusion is irrelevant as it relates to R&S Lenders, a limited liability company.

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17.

(Conclusions of Law pg. 26)

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

The above paragraph should be amended in that the Court determined that BB&T failed to meet its evidentiary burden to show by a preponderance of the evidence that it was the successor in interest to the FDIC. Whether the claims or causes of action pursued by BB&T belong to BB&T is not an evidentiary issue, but a matter of law as to contract interpretation. Accordingly, the conclusion should state that as a matter of law BB&T does not own the claims or causes at issue.

18.

(Conclusions of Law pg. 26)

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.

The above paragraph should be amended in that BB&T provided the Bulk Assignment as well as the executed, unrecorded Loan Assignment as to the 2007 Colonial Bank Deed of Trust being assigned by the FDIC to BB&T. In addition, BB&T provided testimonial evidence from Yach and Singer that BB&T held the loan at issue.

19.

(Conclusions of Law pg. 26)

17. The Purchase and Assumption Agreement, Exhibit 183, does not comply with the requirements of either NRS 11.205 or NRS 111.235 as to the 2007 Colonial Bank Deed of Trust.

Paragraph 17 should be deleted in its entirety as the Court made no such finding. In addition, it is an incorrect legal conclusion as the Purchase and Assumption Agreement is a fully integrated contract effecting a transfer of not only this loan at issue, but all of Colonial Bank's Nevada assets to BB&T, and no evidence was ever presented to the contrary.

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20.

(Conclusions of Law pg. 27)

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

Paragraph 22 should be deleted in its entirety as Colonial Bank did have a reasonable expectation that it would receive a reconveyance. As Yach, Singer, Novacek, and Burns all testified, the closing instructions from Colonial Bank to Nevada Title indicated that the R&S Lenders Deed of Trust could not remain as an exception on title and would therefore need to be removed and reconveyed. There is no evidence supporting this paragraph contained in the record. The expectation of Colonial Bank that there would be a reconveyance and that its loan would be secured by a first priority deed of trust, has been clearly testified to by four witnesses and numerous documents, all of which is uncontroverted in the record. How this could not create a reasonable expectation in the minds of Colonial Bank's employees and representatives, is beyond explanation.

21.

(Conclusions of Law pg. 27)

> 24. Reconveyance of the St. Rose Lenders Deed of Trust was not a condition for closing the Construction Loan transaction.
>
> 25. If reconveyance of the St. Rose Lenders Deed of Trust had been a condition of the Construction Loan, it would have been stated as such in the loan documents.
>
> 26. If reconveyance had been a material term, Colonial Bank would have obtained a separate agreement from St. Rose Lenders prior to closing.
>
> 27. There is no proof of any executed agreement or consent by St. Rose Lenders to reconvey.

Paragraph 24 should be deleted as Yach, Singer, Novacek and Brenda Burns all testified that reconveyance was a condition for closing the Construction Loan. Paragraph 25 is inaccurate in that the condition of reconveyance was set forth in the closing instructions from Colonial Bank to Nevada Title. In addition, the contractual subrogation provisions in the 2007 Colonial Bank

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Deed of Trust require subrogation to the extent the Construction Loan paid off any encumbrance on the Property. The loan documents evidence the requirement of a first position deed of trust, implicating a release or reconveyance of the St. Rose Lenders Deed of Trust. Paragraph 26 is inaccurate in that Colonial Bank did obtain a separate agreement from St. Rose Lenders to release and/or reconvey its deed of trust from its closing agent, Brenda Burns. Brenda Burns testified that Rad indicated to her before the close of the Construction Loan that the St. Rose Lenders Deed of Trust would be reconveyed. For this same reason, Paragraph 27 is inaccurate. Brenda Burns' testimony is proof of an agreement to reconvey. To the extent that these conclusions do not pertain to BB&T's alleged evidentiary failure to demonstrate that it is successor in interest to Colonial Bank regarding the loan at issue, they are irrelevant and should be deleted.

III.

CONCLUSION

Pursuant to N.R.C.P. 59(a), this Court should grant BB&T's motion for a new trial or at a minimum, reopen the judgment and take additional testimony to clarify any ambiguity with regard to whether the Purchase and Assumption Agreement transferred the loan at issue from the FDIC to BB&T. In the alternative, pursuant to N.R.C.P. 59(e), the Findings of Fact and Conclusions of Law should be amended. The Findings of Fact and Conclusions of Law contain numerous statements that are completely unsupported by the record or were not even issues to be determined at this expedited proceeding. These findings must be deleted or amended to create findings that are consistent and supported by the actual record.

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DATED this 8th day of July, 2010.

GERRARD, COX & LARSEN

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EXHIBIT T

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ROBERT E. MURDOCK, et al.,

Plaintiffs,

vs.

SAIID FOROUZAN RAD, et al.,,

Defendants.

AND ALL RELATED CLAIMS AND ACTIONS

MASTER CASE NO. A574852
DEPT. NO. XI
(Consolidated with 09-A-594512-C)

ORDER DENYING BB&T CORPORATION'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND JUDGMENT

Date of Hearing: 8/26/10
Time of Hearing: 9:00 AM

On July 8, 2010, Defendant BB&T Corporation filed a Motion for New Trial, or in the Alternative, Motion to Alter or Amend Judgment (the "Motion"). On July 29, 2010, Defendants Saiid Forouzan Rad, R. Phillip Nourafchan, Forouzan, Inc., RPN, LLC, and R&S St. Rose Lenders and R&S St. Rose, LLC, filed Defendants' Joint Opposition to BB&T Corporation's Motion for New Trial, or in the Alternative, Motion to Alter or Amend Judgment (the "Opposition").

The Motion came before the Court on August 26, 2010; Plaintiffs, Robert Murdock and Eckley Keach not appearing; Defendant BB&T Corporation appearing through counsel Douglas

Gerrard of Gerrard Cox & Larsen; Saiid Forouzan Rad, R. Phillip Nourafchan, Forouzan, Inc., and RPN, LLC appearing through counsel Richard Holley of Santoro Driggs Walch Kearney Holley & Thompson; R&S St. Rose Lenders, LLC appearing through counsel David Merrill of David J. Merrill, PC., and R&S St. Rose, LLC appearing through counsel Julie Sanpei of Bailus Cook & Kelesis, Ltd.

Following oral argument, the Court requested supplemental briefing by the parties, as to certain issues, which was received from BB&T Corporation on September 10, 2010 ("BB&T Supplement") and from Saiid Forouzan Rad, R. Phillip Nourafchan, Forouzan, Inc., RPN, LLC, R&S St. Rose Lenders, LLC and R&S St. Rose, LLC on September 20, 2010 ("R&S Supplement").

The Court having reviewed all papers and pleadings contained in the related briefing and oral argument and having considered the issues raised by BB&T Corporation in the Motion and BB&T Supplement as well as the Opposition and R&S Supplement and being fully informed:

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.

THIS COURT FINDS that BB&T is not entitled to a new trial pursuant to N.R.C.P. 59(a).

THIS COURT FURTHER FINDS that the Finding of Fact and Conclusions of Law paragraphs which BB&T sought to have altered or amended are adequately supported by the trial record.

THIS COURT FURTHER FINDS that the disputed Finding of Fact and Conclusions of Law paragraphs accurately represent the Court's findings and conclusions following the trial.

THIS COURT FINDS that as to Findings of Fact paragraphs 118 and 119 which were the subject of the supplemental briefings, BB&T placed joint ownership of the R&S parties at issue during the trial by attempting to utilize common ownership as a reason to disregard corporate formalities.

THIS COURT FINDS that BB&T introduced common ownership and management as a factual issue and legal theory to advance its lien priority arguments against the R&S parties by eliciting and commenting on joint ownership testimony to attempt to support its contentions.

THE COURT FURTHER FINDS that Conclusion of Law paragraph 10 which was also a subject of the supplemental briefings, is correctly stated as a finding made by the Court which accurately sets forth the language of section 3.5 and incorporates the definition of "person," as contained in the Purchase and Assumption Agreement.

THIS COURT FINDS that no alteration or amendment of the Findings of Fact and Conclusions of Law entered on June 23, 2010 is warranted.

NOW, THEREFORE,

IT IS HEREBY ORDERED that BB&T's Motion for a New Trial is DENIED.

IT IS FURTHER ORDERED that BB&T's alternative Motion to Alter or Amend Judgment is DENIED.

DATED this 5 day of ~~September~~ October, 2010.

DISTRICT COURT JUDGE

Prepared and Submitted By:

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EXHIBIT U

IN THE SUPREME COURT OF THE STATE OF NEVADA

R & S ST. ROSE LENDERS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant/Cross-Respondent,
vs.
BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN INTEREST TO FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF COLONIAL BANK, N.A.,
Respondent/Cross-Appellant,
and
COMMONWEALTH LAND TITLE INSURANCE COMPANY, AS ASSIGNEE OF ROBERT E. MURDOCK, ESQ.; AND ECKLEY M. KEACH, ESQ.,
Respondent.

No. 56640

FILED

MAY 31 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from a final district court judgment and order determining lien priority in consolidated contract actions. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

In August of 2005, R. Phillip Nourafchan and Saiid Forouzan Rad formed R&S St. Rose Lenders, LLC (R&S Lenders) to fund the purchase of undeveloped real property on the corner of St. Rose Parkway and Spencer Road in Henderson, Nevada (the Property). R&S St. Rose LLC (St. Rose), also managed by Nourafchan and Rad, was formed to enter into a land-banking arrangement with developer Centex Homes. Under the arrangement, St. Rose would purchase the Property for $45

million and hold it for a year. During that time, Centex could exercise its purchase option and buy the Property from St. Rose for $54 million.

St. Rose's acquisition money came from three sources: (1) a promissory note payable to Colonial Bank, N.A. (Colonial) in the amount of $29 million secured by a first-priority deed of trust against the Property (the Purchase Loan); (2) nonrefundable deposits in the amount of $8 million from Centex; and (3) a promissory note payable to R&S Lenders in the amount of $12 million secured by a deed of trust against the Property that was recorded after the Colonial Bank deed of trust (R&S Lenders Deed of Trust).

Rad and Nourafchan obtained the financial backing for R&S Lenders by soliciting funds from private investors, including Eckley M. Keach and Robert E. Murdock. Keach agreed to loan $500,000, and Murdock agreed to loan $100,000. Keach and Murdock obtained individual promissory notes to secure their loans. Both promissory notes required St. Rose to pay monthly interest on the principal amounts at a rate of 12.5% per annum, due on the first day of each month, and contained late-fee provisions. However, these notes were not secured by a beneficial interest in a deed of trust.[1]

When Centex decided not to exercise its purchase option, St. Rose needed additional money to hold and develop the Property. In 2007, St. Rose obtained an additional loan from Colonial not exceeding $43 million (the Construction Loan). The Construction Loan was intended to pay off the Purchase Loan and provide funding for improvements on the

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[1]Keach and Murdock subsequently assigned their judgment against R&S Lenders to respondent Commonwealth Title Insurance Company.

Property. A deed of trust in favor of Colonial secured the Construction Loan (the 2007 Deed of Trust). As part of the Construction Loan transaction, Nevada Title Company issued Colonial a title insurance policy for $44 million. This title policy insured that the 2007 Deed of Trust was in first priority position against the Property and that the R&S Lenders Deed of Trust was removed as an exception to marketable title. Funds from the Construction Loan were used to pay off the amount due under the Purchase Loan. However, Nevada Title did not obtain a release, reconveyance, or a subordination agreement for the R&S Lenders Deed of Trust.

When St. Rose defaulted on the Construction Loan and stopped making payments to R&S Lenders, Colonial and R&S Lenders recorded notices of default. Both foreclosure proceedings were enjoined pending the outcome of this dispute between R&S Lenders and Colonial regarding the priority of the deeds of trust. During the litigation, the Alabama State Banking Department closed Colonial and named the Federal Deposit Insurance Corporation (FDIC) as receiver. The same day, Branch Banking and Trust (BB&T) and the FDIC entered into a "Purchase and Assumption Agreement, Whole Bank All Deposits" (the PAA) to transfer Colonial's assets to BB&T.

R&S Lenders appeals from a district court order granting summary judgment in favor of Murdock and Keach on their claims for breach of the promissory notes. R&S Lenders alleges that the district court erred when it calculated the interest due under Murdock and Keach's promissory notes. BB&T appeals the district court's determination that the R&S Lenders Deed of Trust had priority over the 2007 Deed of Trust because BB&T did not prove that it received a valid

assignment of the Construction Loan from the FDIC. BB&T alleges that the district court improperly analyzed its ownership of the Construction Loan.

The district court did not err in its interest calculations on Murdock and Keach's promissory notes

We review an order granting a motion for summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Prejudgment interest awards are reviewed for error. *Schiff v. Winchell*, 126 Nev. ___, ___, 237 P.3d 99, 100 (2010).

On appeal, R&S Lenders challenges the district court's calculation of interest in its order granting Murdock and Keach's motion for summary judgment. Specifically, R&S Lenders argues that allowing a 5% monthly late fee to accrue on the total amount owed after the maturity date was not provided for in the notes and is contrary to law. R&S Lenders also argues that the imposition of the 25% default rate on the entire prejudgment amount owed to Murdock and Keach is improper compound interest.

We conclude that the district court did not err when it determined that the calculations attached to Murdock and Keach's motion for summary judgment accurately set forth the amount owed by R&S Lenders under the promissory notes. The plain language of the promissory notes allows a 5% monthly charge as liquidated damages in two amounts: first, on delinquent monthly interest payments, and second, on the entire amount due under the promissory notes if not paid by the maturity date. Further, we conclude that the district court's provision for a 25% default rate does not equate with ordering compound interest because the interest is not being added back into the principal. *See* 44B Am. Jur. 3d *Interest and Usury* § 54 (2007) (compound interest occurs

when "accrued interest is added periodically to the principal, and interest is then computed upon the new principal thus formed," and is not the mere "allowance of interest on overdue installments of interest").

The district court's conclusion that BB&T did not prove ownership of the loan was supported by substantial evidence

On cross-appeal, BB&T challenges the district court's rulings relating to its claims against St. Rose for failure to pay under the Construction Loan and the respective priorities of the 2007 Deed of Trust and the R&S Lenders Deed of Trust. Specifically, BB&T argues that the district court erred in determining that it lacked standing to assert the claims it raised in its complaint. BB&T further contends that the district court should not have concluded that the R&S Lenders Deed of Trust had priority over the 2007 Deed of Trust. R&S Lenders responds that the district court properly granted its NRCP 52(c) motion because BB&T failed to prove that it owned the Construction Loan, which was an implied element of its claim.

We will not set aside a district court's findings of fact and conclusions of law unless clearly erroneous. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005). Generally, a merger transfers all assets and liabilities, while in an asset purchase, assets and liabilities are not assumed unless otherwise specified. *See Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 268, 112 P.3d 1082, 1087 (2005); *Caires v. JP Morgan Chase Bank*, 745 F. Supp. 2d 40, 48-49 (D. Conn. 2010) ("the FDIC [has the] ability to designate specific assets and liabilities for purchase and assumption . . . [and] a Court should look to the purchase and assumption agreement governing the transfer of assets between the FDIC and a subsequent purchaser of assets of a failed

bank to determine which assets and corresponding liabilities are being assumed").

The PAA was an asset purchase and therefore the district court looked to its language in order to determine which assets and corresponding liabilities were transferred to BB&T. However, due to the omission of the schedules of assets, the district court found that 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.[2]

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 M.C. Multi-Family Dev. v. Crestdale Assocs.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008) (we review a district court's decision to deny admission of evidence for abuse of discretion).

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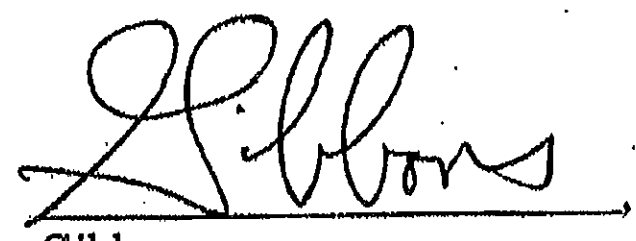
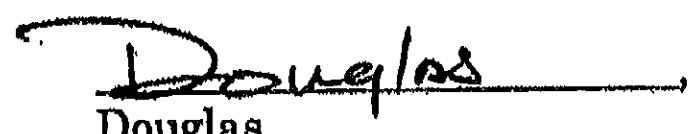
[2]BB&T urges us to adopt the reasoning in *Branch Banking & Trust Co. v. Navarre 33, Inc.*, No. 3:10CV10/MCR/EMT, 2012 WL 2377851 (N.D. Fla. May 21, 2012), but we conclude the reasoning of that case is unpersuasive. Although *Navarre* involved the same PAA between the FDIC and BB&T, the case concerned a breach of contract relating to a promissory note. *Id.* at *1. The Federal District Court for the Northern District of Florida concluded that the no genuine issues of material fact existed regarding whether the PAA excluded the promissory note at issue. *Id.* at *5-6. Therefore, not only did *Navarre* deal with a different procedural posture, it also involved the negotiation of a promissory note, not the assignment of a deed of trust.

We have considered the parties' remaining arguments and conclude they are without merit. Accordingly, we

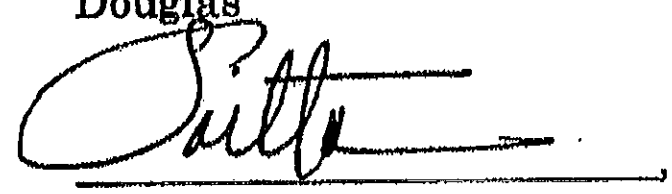
ORDER the judgment of the district court AFFIRMED.



Gibbons, J.



Douglas, J.



Saitta, J.

cc: Elizabeth Goff Gonzalez, District Court Judge
Larry J. Cohen, Settlement Judge
David J. Merrill, P.C.
Early Sullivan Wright Gizer & McRae, LLP
Gerrard Cox & Larsen
Meier & Fine, LLC
Eighth District Court Clerk

EXHIBIT V

IN THE SUPREME COURT OF THE STATE OF NEVADA

R & S ST. ROSE LENDERS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant/Cross-Respondent,
vs.
BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN INTEREST TO FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF COLONIAL BANK, N.A.,
Respondent/Cross-Appellant,
and
COMMONWEALTH LAND TITLE INSURANCE COMPANY, AS ASSIGNEE OF ROBERT E. MURDOCK, ESQ. AND ECKLEY M. KEACH, ESQ.,
Respondents.

No. 56640

FILED

FEB 21 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING EN BANC RECONSIDERATION

En banc reconsideration under NRAP 40A

En banc reconsideration is disfavored and will only be ordered (1) to maintain uniformity of this court's decisions, or (2) when "the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a). A petition for en banc reconsideration will not be considered when it raises a point for the first time, or when it merely reargues matters presented in the appeal. NRAP 40A(c).

The argument that this court's order will cast doubt on thousands of assets that have been transferred to other lending institutions is a new argument raised here for the first time, and is therefore not a proper basis for en banc reconsideration

Branch Banking & Trust Company (BB&T) argues that the Purchase and Assumption Agreement (PAA) in this case was "not an aberration, but is consistent with numerous other [PAAs] the [Federal

Deposit Insurance Corporation (FDIC)] has used to transfer bulk assets to other lending institutions." BB&T argues that because the FDIC uses this practice for "numerous other purchase and assumption agreements," this court's order potentially casts doubt on the validity of "the hundreds of thousands of loans transferred by the FDIC under other purchase and assumption agreements virtually identical to the one at hand that do not provide lists as part of their schedules."

This is argument has not been previously raised and is therefore improper. NRAP 40A(c). In its briefs, BB&T argued that the district court had an obligation to substitute the FDIC as a real party in interest pursuant to NRCP 17(a) or to add the FDIC as an indispensable party under NRCP 19. BB&T argued that when the district court "erroneous[ly] determin[ed] that BB&T lacked standing[,] .... [t]here [was] no question that the only other possible owner of the Construction Loan and the right to enforce same is the FDIC." However, BB&T failed to make the public policy argument that the FDIC practice was so prevalent that thousands of other FDIC asset transfers would be cast into doubt. Thus, this is a new argument that was not previously raised and is not a proper basis for en banc reconsideration. NRAP 40A(c).

Additionally, in response to the dissenting justices' concerns, we note that the underlying order is supported by both Nevada case law and the Nevada Rules of Civil Procedure. In an asset purchase, assets and liabilities are not assumed to be transferred unless specified. *See Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 268, 112 P.3d 1082, 1087 (2005); *Caires v. JP Morgan Chase Bank*, 745 F. Supp. 2d 40, 48-49 (D. Conn. 2010) ("the FDIC [has the] ability to designate specific assets and liabilities for purchase and assumption .... [and] a Court should look

to the purchase and assumption agreement governing the transfer of assets between the FDIC and a subsequent purchaser of assets of a failed bank to determine which assets and corresponding liabilities are being assumed"). Here, the PAA was an asset purchase, and therefore, the district court properly looked to its language in order to determine which assets and corresponding liabilities were transferred to BB&T. This decision was not clearly erroneous because BB&T failed to satisfy its evidentiary burden to prove its ownership of the Construction Loan. It was consistent with established Nevada law,[1] and is therefore not a proper basis for en banc reconsideration.

Further, while the dissenting justices note that a written, notarized assignment can be sufficient evidence to demonstrate an assignment of assets, a conclusion which we do not dispute, the district court excluded these documents because they were not properly produced in accordance with NRCP 16.1(a)(1) or NRCP 26(3)(a). *See M.C. Multi-Family Dev. v. Crestdale Assocs.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008) (we review a district court's decision to deny admission of evidence for abuse of discretion). Nothing in the record suggests that this was an abuse of discretion or at odds with existing Nevada law. Finally, we review a district court's denial of a motion for substitution or joinder of the

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[1]Additionally, we are unpersuaded that *Branch Banking & Trust Co. v. Navarre 33, Inc.*, 2012 WL 2377851 (N.D. Fla. May 21, 2012), an unpublished federal case that is factually distinguishable from this situation, provides such a comprehensive national consensus so as to warrant reconsideration.

real party in interest under NRCP 17 for an abuse of discretion. *See NAD, Inc. v. Eighth Judicial Dist. Court*, 115 Nev. 71, 76, 976 P.2d 994, 997 (1999). Nothing in the record demonstrates that the district court abused its discretion in denying the motion for substitution because (1) the evidence did not demonstrate that the FDIC was the actual owner of the Construction Loan, and (2) the motion to substitute the FDIC was made at such a late date in the district court proceedings.

Thus, having considered the petition, we conclude that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

_____, C.J.
Gibbons

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Elizabeth Goff Gonzalez, District Judge
David J. Merrill, P.C.
Early Sullivan Wright Gizer & McRae, LLP
Gerrard Cox & Larsen
Meier & Fine, LLC
Eighth District Court Clerk

PICKERING, J., with whom HARDESTY, J., agrees, dissenting:

This case merits en banc reconsideration for two reasons. First, the district court and panel decisions in this case place Nevada at odds with uniform law established by state and federal courts across the country. Second, in their procedural aspect, the decisions conflict with settled Nevada law.

At issue is the proper interpretation of the Purchase and Assumption Agreement (P & A Agreement) that the Federal Deposit Insurance Corporation (FDIC) entered into with respondent/cross-appellant Branch Banking and Trust Co. (BB&T) on August 14, 2009, after Colonial Bank failed and the FDIC became its receiver.[1] Subparagraph 3.1 of the P & A Agreement, entitled "Assets Purchased by Assuming Bank," provides:

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[1]The P & A Agreement, as well as other information related to Colonial's failure and the FDIC's appointment as receiver, is publicly available on the FDIC's official website. *See* http://www.fdic.gov/bank/individual/failed/colonial-al.html. A copy of the P & A agreement was in evidence in district court as exhibit 183 and is reprinted in volume 18 of the joint appendix to this appeal at pages 3539 – 3666. Comparison of exhibit 183, 18 JA 3539, with the P & A Agreement on the FDIC website demonstrates that the two are identical. And even if they weren't, judicial notice of the web version is appropriate, as numerous courts have held. *See, e.g., Jaimes v. JPMorgan Chase Bank, NA*, No. 12 C 3162, 2013 WL 677740, at *1 n.2 (N.D. Ill. Feb. 25, 2013) (taking judicial notice of an FDIC P & A Agreement "because it is a public record and not the subject of reasonable dispute" and collecting cases in which other courts also took judicial notice of the P & A Agreement and its provisions); *Allen v. United Fin. Mortg. Corp.*, 660 F. Supp. 2d 1089, 1093-94 (N.D. Cal. 2009) (consulting web version of P & A Agreement to clarify exhibit).

> With the exception of certain assets expressly excluded in Sections 3.5 and 3.6, *the Assuming Bank [BB&T] hereby purchases from the Receiver [FDIC], and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank, all right, title, and interest of the Receiver in and to all of the assets (real, personal and mixed, wherever located and however acquired)* including all subsidiaries, joint ventures, partnerships, and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated, *of the Failed Bank [Colonial] whether or not reflected on the books of the Failed Bank as of Bank Closing*. Schedules 3.1 and 3.1a attached hereto and incorporated herein sets forth certain categories of Assets purchased hereunder. Such schedule is based upon the best information available to the Receiver and may be adjusted as provided in Article VIII. . . . The subsidiaries, joint ventures, partnerships, and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated being purchased by the Assuming Bank includes, but is not limited to, the entities listed on Schedule 3.1a. Notwithstanding Section 4.8, the Assuming Bank specifically purchases all mortgage servicing rights and obligations of the Failed Bank.

(Emphasis added.)

The underlying dispute concerns competing claims to priority between BB&T, as successor-in-interest to the FDIC as receiver for Colonial Bank, on a $43,980,000 construction loan secured by a deed of trust on 38 acres of commercial property, and appellant/cross-respondent R&S St. Rose Lenders, who held a $12,300,000 note, also secured by a deed of trust on the property. Following an expedited evidentiary hearing, the district court ruled in favor of R & S St. Rose Lenders. It did so based on its determination that the P & A Agreement did not give BB&T

standing to assert rights under the Colonial note and deed of trust. Specifically, the district court opined that the P & A Agreement is "internally inconsistent and . . . incomplete, and prevents the Court from making a finding as to whether an assignment of the loan at issue has occurred." The flaw, in the district court's view, lay in the schedules to the P & A Agreement that, insofar as relevant to this dispute, were either not attached or included headings only, no lists.

The panel affirmed. Its decision, although designated unpublished (more accurately, non-precedential), is available on Westlaw, a national legal database. *R & S St. Rose Lenders, LLC v. Branch Banking & Trust Co.*, No. 56640, 2013 WL 3357064 (Nev. May 31, 2013). The panel decision holds that, "[t]he district court's conclusion that BB&T did not prove ownership of the loan was supported by substantial evidence." *Id.* at *2. It affirms the district court's holding that "[BB&T] lacked standing to assert the claims it raised in its complaint," *id.*, because the schedules attached to the P & A Agreement did not explicitly reference the particular loan and deed of trust being contested in this case. The panel order states the point this way:

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

Id. at *3.

This line of reasoning, concerning the identical P & A Agreement, *see* note 1, *supra*, was considered and rejected in *Branch Banking & Trust Co. v. Navarre 33, Inc.*, No. 3:10cv10/MCR/EMT, 2012 WL 2377851 (N.D. Fla. May 21, 2012). The borrower in *Navarre 33* argued that the P & A Agreement did not establish BB&T as the holder of the promissory note and guaranty sought to be enforced. Rejecting this argument, the district court looked first to 12 U.S.C. §§ 1821(c) and 1821(d)(2)(A)(i), which establish that when Colonial Bank failed and the FDIC became its receiver, the FDIC succeeded to "'all rights, titles, powers, and privileges of the insured depository institution.'" *Id.* at *6 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)). "This [statutory] language indicates that the FDIC as receiver 'steps into the shoes' of the failed bank, obtaining the rights 'of the insured depository institution' that existed prior to receivership." *Id.* (quoting *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994)). Colonial Bank's interest in the note and guaranty were thus transferred "by operation of law" to the FDIC. *Id.*

The *Navarre 33* court then turned to the P & A Agreement that the FDIC, having stepped into Colonial Bank's shoes as receiver, entered into with BB&T. "Section 3.1 of the P & A Agreement [reprinted above]," the court wrote, "describes the assets purchased by BB&T, which include *all* of Colonial's assets, *except those expressly excluded in Section 3.5 and 3.6 of the P & A Agreement.*" *Id.* (emphasis added to that in original). Since "[n]either of the cross-referenced sections of the P & A Agreement, 3.5 and 3.6, appears on its face to exclude the promissory note or guarantees from the assets purchased by BB & T," the *Navarre 33* court held that, "the broad language of Section 3.1 of the P & A Agreement, describing the assets purchased by BB&T, sufficiently indicates that

BB&T is the current holder of the Note and Guarantees that are the subject of the instant case." *Id.*; *see* 12 U.S.C. § 1821(d)(2)(G)(i)(II) (giving the FDIC, as receiver, authority to "'transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer").

The panel rejected *Navarre 33* on the basis that it addressed a note and associated guaranty rather than, as here, a note and deed of trust. *R & S St. Rose Lenders*, 2013 WL 3357064 at *3 n.2. But this is a distinction without a difference. The FDIC used a form of P & A Agreement much like the one at issue here and in *Navarre 33* when Washington Mutual collapsed and the FDIC stepped in as receiver and transferred WaMu's assets and liabilities to J.P. Morgan Chase Bank. *See* www.fdic.gov/about/freedom/Washington Mutual P and A.pdf. Case after case construing the FDIC/J.P. Morgan Chase Bank P & A Agreements has held that, under 12 U.S.C. § 1821(d)(2)(G)(i)(II), the FDIC, as receiver, has authority to "'transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer'" and that the P & A Agreement effects a valid and complete "transfer" as authorized by this statute. Thus, courts elsewhere have rejected as "frivolous" the "argument that each Washington Mutual Bank mortgage loan acquired by Chase from the FDIC had to be 'individually identified'" in a schedule to the P & A Agreement for the transfer described in Section 3.1 to be effective. *Drobny v. JP Morgan Chase Bank, N.A.*, 929 F. Supp. 2d 839, 845-46 (N.D. Ill. 2013) (quoting 12 U.S.C. § 1821(d)(2)(G)(i)(II) and *Stehrenberger v. JP Morgan Chase Bank, N.A.*, No. 2:12-cv-874, 2012 WL 5389682, at *1-*2 (S.D. Ohio Nov. 2, 2012)); *Jones v. JP Morgan Chase Bank, N.A.*, No. 12-

cv-00488-LHK, 2012 WL 4815468, at *1 (N.D. Cal. Oct. 9, 2012) (relying on the broad language in Section 3.1 of the P & A Agreement to reject as meritless the borrower's argument that Chase did not own the note and deed of trust because the P & A Agreement did not explicitly list them as purchased assets); *Beka Realty, LLC v. JP Morgan Chase Bank*, N.A., No. 503666/12, 2013 WL 5629590, at *4 (N.Y. Sup. Ct. Sept. 25, 2013) ("it has been specifically held that there is no requirement that the FDIC as receiver, endorse or assign [a specific] note and mortgage" to Chase for Chase to be entitled to enforce them (internal quotation omitted)) (citing cases); *see also Demelo v. U.S. Bank Nat'l Ass'n*, 727 F.3d 117, 125 (1st Cir. 2013) (rejecting variation of specific-assignment argument on federal Supremacy Clause grounds); *Robinson v. Fed. Nat'l Mortg. Ass'n*, No. 13-1868 (JNE/JSM), 2014 WL 258644, at *11-12 (D. Minn. Jan. 23, 2014) (to similar effect). To require specific listing of each asset transferred in the P & A Agreement would significantly disrupt the operation of the FDIC in stepping in as receiver for failed banks and immediately transferring the failed bank's operations to another healthy bank with no interruption in service.

It is true, as the majority notes, that BB&T did not specifically argue on direct appeal that the district court decision, if upheld, puts Nevada at odds with established national law. But BB&T did cite, and the panel rejected, *Navarre 33*. That a panel decision creates substantial uncertainty with respect to Nevada business transactions because it is at odds with commercial law elsewhere—much of it decided in the past two years—is a legitimate basis for en banc reconsideration. *See* NRAP 40A(a) (en banc reconsideration may be appropriate when "the proceeding involves a substantial precedential . . . or public policy issue"). The

occasion to make a national-precedent and policy-based argument for en banc consideration arose when the panel affirmed and thereafter denied panel rehearing. I thus disagree that the policy concerns articulated by BB&T in its petition for en banc reconsideration have been waived.

Finally, the procedural aspects of this case also merit reconsideration. This appeal grew out of an expedited evidentiary hearing the district court ordered to decide the relative priority of the notes and deeds of trust held by BB&T and R&S St. Rose Lenders on a piece of commercial property. The order setting the hearing adopted a list of issues to be tried that several parties submitted. That list did not challenge BB&T's status as successor-in-interest to Colonial via the P & A Agreement. Thus, it is not surprising that BB&T did not focus its evidence on the FDIC's acquisition and transfer of Colonial's assets to BB&T. When, as the hearing neared completion, the district court rejected the P & A Agreement as insufficient to establish BB&T's standing to enforce the Colonial note and deed of trust—a seemingly singular position under caselaw elsewhere—BB&T sought leave to admit documents specifically assigning the note and deed of trust in issue. The district court excluded these documents on the grounds they were not disclosed before discovery closed. But of course they were not—they did not exist before discovery concluded; indeed, one was created overnight, specifically to allay the district court's stated concern that BB&T lacked standing. So, accepting *arguendo* that the P & A Agreement did not effect a valid transfer—though cases elsewhere reject this conclusion—the specific assignment later recorded against the property established it and should have been accepted as proof of that fact, *see Einhorn v. BAC Home Loans Servicing, Inc.*, 128 Nev. ___, ___, 290 P.3d 249, 254 (2012) (absent

evidence to controvert authenticity, a notarized, recorded assignment "carries a presumption of authenticity, NRS 52.165, that makes it self-authenticating" (internal quotation omitted)); *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. ___, ___, 286 P.3d 249, 260 (2012) ("To prove that a previous beneficiary properly assigned its beneficial interest in the deed of trust, the new beneficiary can demonstrate the assignment by means of a signed writing.").

The holding that the P & A Agreement did not establish BB&T as Colonial's successor-in-interest for purposes of the priority contest between it and R & S St. Rose Lenders, moreover, did not establish the absolute priority of R & S St. Rose Lenders' note and deed of trust. On the contrary, it represented, at best, a decision that BB&T was not the real party in interest entitled to maintain this action. NRCP 17(a) declares that, "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." After the P & A Agreement's sufficiency became an issue, BB&T sought relief under NRCP 17(a), which the district court denied. And, rather than hold simply that BB&T failed to prove its case and denying its claim without prejudice, the district court proceeded to declare R & S St. Rose Lenders the victor, with priority over the Colonial note and deed of trust. This, too, was error and had the effect of awarding R & S St. Rose Lenders a $12,300,000 victory on the merits to which it did not prove its entitlement.

For these reasons, I respectfully dissent from the denial of en banc reconsideration in this case.

Pickering, J.
Pickering

I concur:

Hardesty, J.
Hardesty

EXHIBIT W

13-1413

No.

FILED

MAY 22 2014

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

BRANCH BANKING & TRUST COMPANY, AS SUCCESSOR IN INTEREST TO THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF COLONIAL BANK, N.A.,

Petitioner,

v.

R & S ST. ROSE LENDERS LLC, A NEVADA LIMITED LIABILITY COMPANY; COMMONWEALTH LAND TITLE INSURANCE COMPANY, AS ASSIGNEE OF ROBERT E. MURDOCK, ESQ.; AND ECKLEY M. KEACH, ESQ.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

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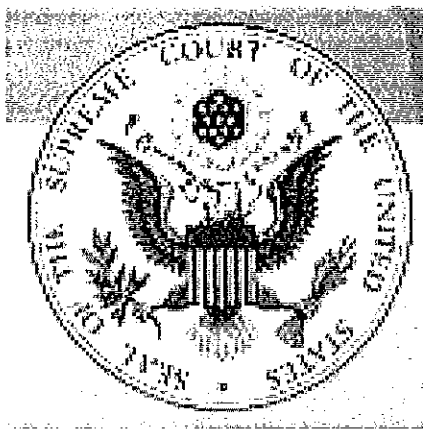

SUPREME COURT
OF THE UNITED STATES

No. 13-1413

Title:	Branch Banking and Trust Company, as Successor In Interest to the Federal Deposit Insurance Corporation as Receiver of Colonial Bank, N.A., Petitioner v. R & S St. Rose Lenders, LLC, et al.
Docketed:	May 27, 2014
Lower Ct:	Supreme Court of Nevada
Case Nos.:	(56640)
Decision Date:	May 31, 2013
Rehearing Denied:	February 21, 2014

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 22 2014	Petition for a writ of certiorari filed. (Response due June 26, 2014)
Jun 26 2014	Brief of respondent R & S St. Rose Lenders, LLC in opposition filed.
Jul 16 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 6 2014	Petition DENIED.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Glenn F. Meier Counsel of Record	Meier & Fine, LLC 2300 West Sahara Avenue Suite 1150Box 11 Las Vegas, NV 89102 gmeier@nvbusinesslawyers.com	(702) 673-1000
Party name: Branch Banking and Trust Company, as Successor in Interest to the Federal Deposit Insurance Corporation as Receiver of Colonial Bank, N.A.		
Attorneys for Respondents:		
David J. Merrill Counsel of Record	David J. Merrill PC 10161 Park Run Drive, Suite 150 Las Vegas, NV 89145 david@djmerrillpc.com	(702) 566-1935
Party name: R & S St. Rose Lenders, LLC		

EXHIBIT X

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 6, 2014

Clerk
Supreme Court of Nevada
Supreme Court Building
201 S. Carson Street, Suite 201
Carson City, NV 89701-4780

Re: Branch Banking and Trust Company, as Successor in Interest to the Federal Deposit Insurance Corporation as Receiver of Colonial Bank, N.A.
v. R & S St. Rose Lenders, LLC, et al.
No. 13-1413
(Your No. 56640)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

IJ 24729

RPLY
CRAIG J. MARIAM, ESQ.
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, Plaintiff, vs. DOUGLAS D. GERRARD, ESQ., individually; and GERRARD COX & LARSEN, a Nevada professional corporation, JOHN DOES I-X; and ROE BUSINESS ENTITIES XI-XX, Defendant.	Case No.: A-16-744561-C Dept. No.: XXVII Honorable Nancy L. Allf **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** [Concurrently filed with Defendants (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] Date: April 19, 2017 Time: 10:00 a.m. Dept: XXVII

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

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

COMES NOW Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen ("Firm") (collectively, "Defendants"), by and through their attorneys, Craig J. Mariam, Esq., Robert S. Larsen, Esq., and Wing Yan Wong, Esq, of the law firm of Gordon & Rees LLP, and submit the instant 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 ("Reply") as follows:

I. INTRODUCTION

Plaintiff Branch Banking and Trust Company's failure to allege facts that tend to establish, but for the alleged malpractice, it would have succeeded at trial, is fatal to the allegations in the First Amended Complaint ("FAC"). In opposing the Motion, Plaintiff selectively and misleadingly adopts the District Court's Findings of Fact and Conclusions of Law ("FFCL") in the litigation underlying this action, styled *Murdock et al. v. Rad, et al.*, Eighth Judicial District Court Case Number A-08-574852, consolidated with Case No. A-09-594512-C ("*Murdock* Litigation").

Plaintiff does not dispute the fact that the FFCL was adopted by the court in its July 23, 2010 Final Judgment. *See* Request for Judicial Notice ("RFJN") Nos. 6, 7. Therein, the court ruled on the merits of Plaintiff's claims – and the claims of St. Rose Lenders – notwithstanding the issue of standing and ownership, holding that, regardless of Plaintiff's purported ownership of Colonial's assets, the St. Rose Lenders' September 16, 2005 deed of trust ("Second DOT") maintained priority over the 2007 Colonial Bank deed of trust ("Third DOT"). Thus, no other facts will show Defendants caused Plaintiff's damages, and this case fails from the outset.

Plaintiff avers that the court's ruling was mere *dicta* and should not apply here to preclude its attempt to relitigate its case. However, this argument is without support, as the entirety of the court's ten day trial concerned the issue of priority – not Plaintiff's ownership of Colonial's assets. Further, the issues of priority were inherent to a counterclaim brought by the *Murdock* Litigation defendant and cross-claimant R&S St. Rose Lenders, LLC ("St. Rose

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Lenders") (see Answer to Second Amended Complaint, attached as Exhibit O to Plaintiff's Counter-Request for Judicial Notice ["Plaintiff's RFJN"]), as well as the questions identified for trial in the Notice of Questions of Fact ("NQF") brought by the *Murdock* Litigation plaintiffs Robert Murdock and Eckley Keach (see Request for Judicial Notice in Support of Reply ["Reply RFJN"] at Nos. 11A-11H). Thus, the court's ruling on the merits of the priority issue was not the "mere *dicta*" Plaintiff prefers.

Further, regardless of the priority issue, Plaintiff attempts to relitigate the court's other rulings, improperly turning this malpractice action into an appeal on the merits of its case. However, Plaintiff fails to rebut (1) the preclusive effect of the district court's ruling on equitable subrogation pursuant to the "Reasonable Expectation Test," (2) the court's rulings concerning the prejudice afforded to the other parties, and (3) the fact that Colonial's remaining claims were not assignable in any respect as a matter of law. As the court did not abuse its discretion in holding against Plaintiffs case on the merits, it cannot show it was damaged by the Defendants.

As the district court made substantive rulings on the merits that were incorporated into a final judgment, Plaintiff cannot show but-for causation, cannot show that it suffered damages, and cannot show it has standing to proceed as a real party in interest here – justifying dismissal of this malpractice action.

And, Plaintiff wrongly seeks to change black letter law concerning the applicable statute of limitations for litigation-based malpractice claims. As such, Plaintiff fails to rebut how this delayed and untimely action must be dismissed.

II. LEGAL ANALYSIS

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

1. The District Court Reached the Merits on the Issue of Loan Priority

a. *The St. Rose Lenders Brought a Counterclaim for Declaratory Relief Concerning the Justiciable Controversy of Priority, In Which the Court Made a Ruling On The Merits*

Plaintiff cannot establish that it suffered any damages proximately caused by Defendants' alleged malpractice. Legal malpractice requires a "cases-within-the case" analysis where the

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plaintiff must show "that but for the alleged malpractice, he would have received a better result [.]" *Chandler v. Black & Lobello*, 2014 Nev. Dist. LEXIS 1, *12 (D. Nev., Feb. 26, 2014).

Plaintiff is thus required to prove that, but-for Defendants' alleged failure to submit purported evidence of BB&T's asset acquisition, BB&T would have won the day in the *Murdock* Litigation. However, although the Court ruled against BB&T on the issue of standing, the absence of this ruling would have made no difference in the outcome of the case, since the court found against BB&T substantively and on the merits regarding the subrogation and replacement claims, as shown in the Findings of Fact and Conclusions of Law ("29. St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust").

Plaintiff does not oppose the fact that causation is a required element for a legal malpractice claim. *See Day v. Zubel*, 112 Nev. 972, 922 P.2d 536, 538 (1996); Opp'n at p. 14. Instead, Plaintiff claims that the court's rulings concerning the merits of its equitable subrogation claims were mere *dicta*. Opp'n at p. 15-24. Plaintiff cites numerous non-Nevada cases for its position that pleading the "trial-within-a-trial" but-for causation element does not require recreating "what a reasonable judge or fact finder would have done" absent the alleged malpractice. Opp'n at 18:7-25 (quoting *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal.Rptr2d 780, 793 (Cal. Ct. App. 1997)). However, Plaintiff's argument misses the point as this case requires n o supposition about "what a reasonable judge or fact finder would have done" – because in this case the court made an actual, final and binding ruling on the priority issues, so no hypothetical analysis of what the court "would have done" is necessary.

Whether or not a ruling is *dicta* depends on whether it is "unnecessary to a determination of the questions involved." *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 216 P.3d 779, 785, 125 Nev. 527, 536 (Nev. 2009) (*quoting St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (Nev. 2009)). To determine whether any ruling by the district court is *dicta*, the Court must examine whether the issues involved "necessitated a determination" as to whether St. Rose had priority over the Third DOT. *See St. James Village, Inc.*, 125 Nev. at 216, 210 P.3d at 193.

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However, as shown below, the court *did* determine the merits of these claims in the *Murdock* Litigation, specifically the equitable subrogation/replacement issues, in clear language that is not mere *dicta*.

First, the St. Rose Lenders brought a counterclaim against Plaintiff that "necessitated a determination" of the declaratory relief claims on the issue or priority between the competing deeds, regardless of the ownership of the loans at issue. Counterclaims and crossclaims under Nevada law are given independent analysis from the core complaint in a given action. See NRCP Rule 13; see also *City of Reno v. Second Judicial Dist. Court ex rel. County of Washoe*, 84 Nev. 322, 326, 440 P.2d 395, 398 (1968) (court could decide compulsory counterclaim even though the original action had been dismissed); *Executive Mgmt. v. Ticor Title Ins. Co.*, 114 Nev. 823, 837, 963 P.2d 465, 474 (1998) (party asserting permissive crossclaim has the option to pursue that claim in an independent action, and if such a claim is neither asserted nor litigated, the parties cannot be barred from asserting it in a later action by principles of res judicata, waiver or estoppel); *Ennor v. Raine*, 27 Nev. 178, 211, 74 P. 1, 1 (Nev. 1903) (a "counterclaim is a complaint.").

The St Rose Lender's declaratory relief claim requested the district court find as follows:

> 10. An actual controversy has arisen and now exists between Colonial and St. Rose Lenders as to the priority of their respective rights and interests in the Property.
>
> 11. There exists a justiciable controversy between parties whose interests are diverse. St. Rose Lenders has a legally protectable interest in the controversy, and the issues involved in the controversy are ripe for judicial determination.
>
> 12. St. Rose Lenders seeks to have the Court determine the question of priority of the Second and Third Deeds of Trust. A judicial declaration is necessary at this time, under the circumstances, in order that the parties may ascertain their rights under the Second and Third Deeds of Trust.
>
> 13. It has been necessary for St. Rose Lenders to obtain the services of an attorney to prosecute this action and St. Rose Lenders is entitled to recover its reasonable attorneys' fees and costs incurred.

See Exhibit O to Plaintiffs' RFJN at pp. 10-11 (emphasis added).

This claim for declaratory relief did not depend on the ownership of the Third DOT because the ownership has no bearing on the priority of each security interest. *Id*. Thus, this

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cause of action requested and required a determination from the court, free of any condition: to "determine the question of priority of the Second and Third Deeds of Trust." *Id.*

Further, the first requirement under Nevada law for declaratory relief is a finding that "a justiciable controversy exists between persons with adverse interests[.]" *Cty. of Clark, ex rel., Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 752, 961 P.2d 754, 756 (1998) (*quoting Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 10, 908 P.2d 724, 725 (1996)).

Here, a justiciable controversy existed regardless of whether Plaintiff owned the loan because the declaratory relief action was directed at the issue of priority. Specifically, the counterclaim stated that "[a]n actual controversy has arisen and now exists between Colonial and St. Rose Lenders as to the priority of their respective rights and interests in the Property." Exhibit O to Plaintiffs' RFJN at p. 10, ¶ 10. Thus, the St. Rose Lenders sought to put to rest the issue of priority concerning Colonial's priority, regardless whether Colonial owned the right to assert that priority or whether that right belonged to some other subsequent party, be it the FDIC or Plaintiff.

The district court ruled on this very narrow issue, stating in the FFCL – which Plaintiff selectively admits is otherwise binding – as follows:

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

RFJN at Nos. 2T, 2U (emphasis added). The FFCL was formally adopted in the Final Judgment entered on July 23, 2010, which ordered specifically that "The Findings of Fact and Conclusions of Law are hereby incorporated herein[.]" See RFJN at Nos. 6, 7.

Thus, these rulings are not mere *dicta* as the Plaintiff would prefer, but a binding court ruling. It reaches the merits of the counterclaim brought by St. Rose Lenders and determined a cause of action separate from the causes of action brought by Plaintiff concerning equitable subrogation. Because St. Rose Lenders sought a declaration that its Second DOT had priority over the Third DOT, regardless of who owned it, the district court made extensive findings and conclusions on the merits of the equitable subrogation and replacement arguments. *E.g.,*

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Conclusions of Law, ¶ 22-27 of FFCL, Exhibit B to the RFJN. The district court found Colonial's Third DOT was junior to the St. Rose Lenders' Second DOT. Therefore, even if Plaintiff had successfully proven it owned the Third DOT, Plaintiff would have sustained the same damages it is now claiming. Since Colonial's Third DOT was junior, Plaintiff's interest was also junior. Whether Plaintiff had ownership of the Third DOT became, and was, irrelevant to the final priority determination between the trust deeds at issue. Plaintiff could not have received any better result even if Plaintiff was determined to be the owner of the loan. The damages, namely the loss of priority, were not caused by any action by Defendants.

The only Nevada case substantively cited by Plaintiff on this point, *Kahn v. Morse & Mowbray*, 121 Nev. 464, 475, 117 P.3d 227, 235 (Nev. 2005) ("*Kahn*"), is of little help – as that malpractice case concerned disputed factual issues over an attorney's advice on settlement that were *not reached in the prior action*. This is distinguishable, as the case here concerns the preclusive reach of the district court's ruling on the issue of priority, which was the *sole focus* of the district court's ten-day trial – not an issue concerning out-of-court factual representations that were never resolved, as was the case in *Kahn*. *Id.* ("The court in the prior action did not address the factual bases underlying this malpractice claim."). As shown above, the district court *did reach the merits of the priority issue*, made extensive factual and legal findings on the priority issue, and ultimately made a final ruling that the Third DOT *did not* have priority over the Second DOT.

b. *The Ruling on the St. Rose Lenders' Declaratory Relief Action Affected Dependent Issues that Concerned the Entirety of the Litigation*

The district court's ruling further affected the entirety of the underlying litigation, not just claims between St. Rose Lenders and Plaintiff. A court's early determination of a declaratory relief claim is especially helpful to determine dependent issues. *See El Capitan Club v. Fireman's Fund Ins.*, 89 Nev. 65, 68, 506 P.2d 426, 428 (1973) (declaratory relief judgment ruled proper in case over insurance coverage even before any judgment was recovered against the insured.)

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First, as Plaintiff admits, the St. Rose Lenders were attempting to foreclose on the property subject to the various loans and trust deeds in the Murdock Litigation. Opp'n at 5:4-8. To initiate foreclosure proceedings, a party must demonstrate it has the authority to foreclose under Nevada law. *See* Nev. Rev. Stat. Ann. § 107.080 (a power of sale in a foreclosure action requires recording "a notarized affidavit of authority to exercise the power of sale"); *see also Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1279 (2011) (concluding that strict compliance with statutory requirements is a necessary predicate to obtaining a foreclosure certificate). As a result, to initiate foreclosure proceedings, the St. Rose Lenders had to establish its authority to do so – namely, it had to establish its priority. Thus, the St. Rose Lenders' foreclosure request depended on declaratory relief sought – and granted – by the district court.

Further, the St. Rose Lenders and Plaintiff were embroiled in litigation with numerous parties concerning the subject property, loans, and trust deeds – including the plaintiffs in the *Murdock* Litigation, Murdock and Keach. Exhibit A to RFJN. The St. Rose Lenders presented this issue to the district court "in order that the parties may ascertain their rights under the Second and Third Deeds of Trust." Exhibit O to Plaintiffs' RFJN at p. 11, ¶ 12. This determination did not require that Plaintiff have rights to the Second or Third Deeds of Trust, in the event that St. Rose Lenders also failed to establish their own priority. Thus, the position of the St. Rose Lenders as to the entirety of the action depended on the district court's ruling on the issue of priority – regardless of who owned the Third DOT.

Specifically, the NQF – which Plaintiff admits was submitted by Murdock and Keach (FAC at ¶ 77; Opp'n at p. 7:2-3) – identified numerous specific issues concerning priority that were to be determined by the district court in the 10-day trial, including:

> 1. Whether there was an intention on the part of Colonial Bank that the July 2007 DOT would be in first position. [. . . .]
>
> 8. Whether Colonial Bank's failure to explicitly demand first position in its Loan Documents makes clear that Colonial Bank had no need to have first position? [. . . .]
>
> 26. Whether the failure of Colonial Bank to demand subordination (or reconveyance) as subordination was demanded when the original Note

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> was modified, establishes affirmative proof that Colonial intended to be in whatever position it was in. [. . . .]
>
> 36. Whether Colonial told its counsel that the R&S Lenders DOT needed to be reconveyed?
>
> 37. Whether Colonial told R&S that the R&S Lenders DOT required reconveyance? [. . . .]
>
> 46. Whether Colonial Bank waived any conditions precedent regarding the priority of title?
>
> 47. Whether Colonial Bank could have inserted a condition precedent that it had priority on any of the loan documents that it wrote, but did not.
>
> 48. Whether Colonial Bank's silence in the loan documents it drafted and provided to R&S regarding the priority issue and the reconveyance issue is tantamount to an admission that the fact of priority and reconveyance did not exist.

See Reply RFJN at Nos. 10, 11A-11H. None of the aforementioned questions were omitted from the court's consideration. See Reply RFJN at Nos. 13-14.

As such, the district court's ruling was not merely for the benefit of issues relevant between St. Rose Lenders and Plaintiff, but *all parties* in the underlying dispute. The NQF makes clear that the entire purpose and scope of the district court's limited trial concerned the issues of priority and reconveyance. Thus, the district court's ruling concerned far more than the narrow concern of Plaintiff's ownership of the loan, and expressly included and decided the larger issue of priority – finally decided by the district court in a ruling Plaintiff seeks to re-litigate here. It was only on the final day of the limited trial that the district court surprised Defendants with its position on the issue of what Colonial assets Plaintiff owned – an issue not identified in the NQF – and an issue that does not matter here.

c. *Plaintiff Failed to Appeal the Issue of Priority to the Supreme Court*

Plaintiff further claims that the district court's ruling on priority was *dicta* as a result of the Nevada Supreme Court's limited appellate review, hypothesizing that, because the Nevada Supreme Court ruled narrowly on the subject of the district court's determination to exclude evidence, that "this lack of any meaningful appellate review of the district court's merits *dicta*, is one of the policy reasons why it would be especially inappropriate for this Court to now rely on such *dicta* as though it were preclusive herein." Opp'n at 21:6-19.

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It is axiomatic that an appellate court may only decide the issues presented by the appealing parties – as a failure to appeal constitutes waiver to argue omitted issues. *See generally Butwinick v. Hepner*, 128 Nev. 718, 722, 291 P.3d 119, 122 (Nev. 2012) (appellant waived argument for dismissal of counterclaims "either because they stipulated to the dismissal in the district court or because they did not raise any arguments related to those counterclaims in their opening brief on appeal"); *see also Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1059, 194 P.3d 709, 716 (Nev. 2008) (had a party properly appealed a dismissal in its first case, "the propriety of the dismissal could have been addressed, and if it was improper, the case would have been remanded for a trial on the merits.").

Close examination of Plaintiff's appellate brief shows that Plaintiff – represented by different counsel, and not Defendants – chose *not to appeal the priority issue to the Nevada Supreme Court*. Reply RFJN Nos. 15, 16. Specifically, Plaintiff's cross-appeal appellate brief presented three issues for appellate review:

> I. WHETHER THE DISTRICT COURT ERRED IN DETERMINING WITH THE EVIDENCE PRESENTED AND STATUTORILY REQUIRED PRESUMPTIONS, THAT BB&T DID NOT HAVE STANDING TO ASSERT ITS EQUITABLE CLAIMS.
>
> II. WHETHER THE DISTRICT COURT ERRED BY FAILING TO ALLOW ADMISSION OF THE 2009 ASSIGNMENT OF SECURITY INSTRUMENTS (PROPOSED EXHIBIT 58) AND THE 2010 ASSIGNMENT OF DEED OF TRUST (PROPOSED EXHIBIT 59).
>
> III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT ALLOWING THE FDIC TO BE SUBSTITUTED IN AS A REAL PARTY IN INTEREST OR IN THE ALTERNATIVE BY RENDERING ITS DECISION WITHOUT NAMING AN INDISPENSABLE PARTY.

Reply RFJN Nos. 17.

Further, examination of the brief shows that Plaintiff made an erroneous assumption that "[t]he District Court's judgment was not based on a legal analysis of BB&T's equitable claims for priority, but instead on a finding that BB&T had not shown that it had standing to assert claims arising from the Construction Loan" claiming further that "[i]n *dicta*, the District Court went on to unnecessarily and inappropriately rule on issues of lien priority." Reply RFJN Nos. 18A, 18B. Thus, Plaintiff's appeal focused merely on the standing and evidentiary issues ruled

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upon by the district court, assuming - wrongly – that the district court's substantive rulings on priority were mere *dicta*. Exhibit U to Plaintiff's RFJN at pp. 5-7.

Plaintiff's brief does mention, in passing, that "the underlying lien priority dispute cannot properly be resolved until the merits of BB&T's claims are considered." Reply RFJN No. 18 C. However, to the extent that this passing reference to the merits of the priority issue was before the court of appeals, the court of appeals held expressly that "We have considered the parties remaining arguments and conclude they are without merit." Exhibit U to Plaintiff's RFJN at p. 7. Thus, even to the extent that Plaintiff brought the priority issue up on appeal, the court of appeal was not convinced to overturn the district court's decision, and the Nevada Supreme Court's ruling is of no consequence here.

2. Plaintiff Cannot – as a Matter of Law – Establish Equitable Subrogation or Replacement Due to the District Court's Binding Ruling

a. *Plaintiff Fails to Rebut the Preclusive Effect of the District Court's Ruling On Equitable Subrogation Pursuant to the "Reasonable Expectation Test"*

Plaintiff attempts to re-argue the merits of its claims as to equitable subrogation and replacement in the *Murdock* Litigation, claiming that, even if the district court's ruling on the St. Rose Lender's declaratory relief was binding – which it is – that the preclusive effect of this ruling is "untenable" for three reasons.

First, Plaintiff seeks to relitigate its equitable subrogation claim pursuant to the "Reasonable Expectation Test." In quoting liberally from the case *Houston v. Bank of America Fed. Sav. Bank*, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003), Plaintiff claims that a court must find for equitable subrogation unless "there is affirmative proof that the mortgagee [i.e., in this case, Colonial] intended to subordinate its mortgage to the intervening interest [i.e., in this case, that of R&S Lenders]." Opp'n at 19:1-3. Plaintiff claims that the district court failed to "cite some *affirmative proof* [ ] that Colonial *intended* that its Construction Loan Deed of Trust would *not* enjoy priority[.]" Id. at p. 20:16-18 (emphasis in original).

Plaintiff misapplies *Houston*, as the court there found that the bank in that case "paid off the entire former mortgage 'with the intention and belief it would acquire [the intervening mortgagee]'s first-position deed of trust lien on the Property." *Houston*, 119 Nev. at 491, 78

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P.3d at 75. However, the opposite and requisite finding was made by the district court in the *Murdock* Litigation, which found that Colonial "did not have a reasonable expectation that it would receive a reconveyance of the [Second DOT]" to put it in first priority position. See RFJN at 5J. Thus, Plaintiff's theory as to the "reasonable expectation test" is off-point.

b. *Plaintiff Fails to Rebut the Preclusive Effect of the District Court's Ruling on Equitable Subrogation Pursuant to the "Prejudice Test"*

Plaintiff next contends that the district court misapplied the "prejudice test" of equitable subrogation, again relying on *Houston* and its other misapplied citation to caselaw. Opp'n at pp. 21-22. However, the *Houston* court not did not involve the issue of reconveyance between loans, and is thus distinguishable to the facts of this case. Other courts holding in favor of equitable subrogation in circumstances similar to the *Murdock* Litigation held so because the subrogating party "obtained a reconveyance" from the intervening lien holder. *See Meier v. Tms Mortg.*, 2000 Nev. Dist. LEXIS 204, *5 (Nev. Dist. Ct. Feb. 16, 2000). (Equitable subrogation is only proper "unless the superior or equal equities of others would be prejudiced thereby[.]") *see also Houston*, 119 Nev. at 491, 78 P.3d at 75 ("Subrogation will not be granted if it would result in injustice or prejudice to an intervening lienor."). A district court does not abuse its discretion in weighing the prejudice served to an intervening lien holder and refusing to grant equity on the issue of equitable subrogation. *See Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 433, 245 P.3d 535, 542 (Nev. 2010) (refusing equity where "subrogation, under the circumstances, would be detrimental to a junior lienholder").

Plaintiff claims that "Plaintiff would prevail on this prejudice component of its equitable replacement claim, under an objective and correct review thereof." Opp'n at p. 22:8-9. However, such a review *was given* by the district court, which heard substantial evidence and testimony concerning the reconveyance issue as it affected the rights and equities of the R&S Lenders, finding that R&S Lenders had not consented to a reconveyance of their loan, and Colonial Bank had not made such a reconveyance a condition of making its new loan and releasing its senior deed of trust. See FFCL, Findings of Fact numbers 79, 80, 83, 85, 105, attached as Exhibit B to the RFJN. This led to the following express findings:

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

RFJN Nos. 5G, 5H, 5I. Thus, the district court made express findings on the issue of prejudice and equity to the R&S Lenders. Likewise, the district court made express conclusions of law on the issue of reconveyance and equitable subrogation. RFJN at Nos. 5J, 5K, 5P, 5Q. Thus, the district court did rule on the merits of their case, and found it lacking.

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

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

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

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

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

B. Plaintiff Fails to Rebut How Its Lack of Injury Means It Lacks Standing

Plaintiff misunderstands its own standing, framing Defendants' argument through hyperbolic terms such as "preposterous" and "frivolous." Opp'n. at 24:5-10. However, there is

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no dispute that a party *must* be injured to have standing. *See Schwartz v. Lopez*, 382 P.3d 886, 894 (Nev. 2016) ("Generally, a party must show a personal injury and not merely a general interest that is common to all members of the public."); *see also Heller v. Legislature of Nev.*, 120 Nev. 456, 461, 93 P.3d 746, 749 (Nev. 2004) (party lacks standing to request relief if he "will gain no direct benefit from its issuance and suffer no direct detriment if it is denied.")

As previously argued, the district court ruled on the merits of the priority issue brought by St. Rose Lenders regardless of the issue of Plaintiff's ownership of the loan, precluding Plaintiff from raising that issue again pursuant to the doctrine of issue preclusion. *See, e.g., Five Star Capital Corp.*, 124 Nev. at 1059, 194 P.3d at 716. As the priority issue went against Plaintiff *regardless of its theory of malpractice*, Plaintiff cannot show injury.

Further, Plaintiff postulates that Defendants' argument is that "the FDIC would be the real party in interest in this instant suit," theorizing that its failed motion to substitute the FDIC as a real party in interest has some bearing on the proceedings. Opp'n. at 25:3-5.

That is not Defendants' contention. In arguing that a plaintiff lacks standing, a given defendant does not need hunt for what party does have standing – as it is plaintiff's burden to establish its standing. *See Heller*, 120 Nev. at 461, 93 P.3d at 749. The issue is clear: a required element for standing is injury. *See id.*; *see also* NRCP 17(a) ("Every action shall be prosecuted in the name of the real party in interest.").

Moreover, this is not the first instance where Plaintiff found itself before a Court lacking standing over the *same documents* in the *same underlying litigation*. In the case *Branch Banking & Trust Co. v. Nevada Title Co.*, 2011 U.S. Dist. LEXIS 40788, *3-5 (D. Nev. Apr. 13, 2011), Judge Mahan of the federal district court concluded that the state district court's decision in the *Murdock* Litigation was issue preclusive as to BB&T's complaint against Nevada Title Company for "breach of contract for not removing the [the Second DOT] from the title to the property," among other things. The court concluded that Plaintiff did not have standing to bring those claims because the district court in the *Murdock* Litigation had already determined that Plaintiff did not acquire those rights, stating as follows:

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> Here, in order for Branch Banking to have standing to bring its claims, it must have acquired that right from its predecessor Colonial Bank. As the state court determined that it did not acquire those rights, this court is unable to address the liability claims against Nevada Title, because Branch Banking does not have the right to bring such claims.

Id. at *7-8. Further still, the court there examined the 2009 Bulk Assignment that Plaintiff argues supports its case, finding that upon review of the document "that it does not address the exclusion in the [PAA] of 'rights, actions, or claims against others whose action or inaction may be related to a loss.'" Id. at *9. Thus, a court of competent jurisdiction has ruled in favor of issue preclusion once on this exact issue, and this Court should do so again.

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

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

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

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

The *Murdock* Litigation was affirmed on appeal by the Nevada Supreme Court on May 31, 2013 – a fact that Plaintiff does not and cannot refute. As described in the instant Motion, a writ of certiorari is not an appeal guaranteed by right to civil cases filed in state court. Motion at

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p. 17:10-27. Thus, this action is untimely in that it was filed on October 5, 2016 – 493 days after the statute of limitations had run.

It is true that Nevada tolls the statute of limitations until the underlying case has been affirmed on appeal. *Semenza*, 765 P.2d at 186. However, the language in the controlling Nevada case law extends this tolling rule to "an" appeal, not "all" appeals. *See id.* Further, none of the controlling cases cited by Plaintiff extend this "litigation tolling rule" to writs of certiorari filed in civil state cases to the United State Supreme Court.

The malpractice action *Hewitt v. Allen*, 118 Nev. 216, 219, 43 P.3d 345 (Nev. 2002), cited by Plaintiff, was based on a criminal case were the plaintiff had voluntarily dismissed an appeal after determining it was futile. In the resulting malpractice suit, the Nevada Supreme Court held only "that a party does not abandon his right to pursue a claim of legal malpractice by voluntarily dismissing his appeal from an adverse judgment where the judgment is not likely to be reversed due to a finding of judicial error." *Id.* The effect of a writ of certiorari to the United States Supreme Court was not involved – or discussed – in that case. *Id.*

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

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

Nevada law has never held that the statute of limitations for legal malpractice actions is tolled until the United States Supreme Court rules on a writ of certiorari. And the out-of-state cases cited by Plaintiff do not further its argument. Similar to the Nevada cases cited by Plaintiff, the Texas case *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 155 (Tex. 1991) did not involve or discuss the effect of a writ of certiorari. It, too, has no application here.

Plaintiff also cites the Texas case *Golden v. McNeal*, 78 S.W.3d 488, 493 (Tex. Ct. App. 2002) to stand for the proposition that a legal malpractice action is tolled until a party exhausts "all" avenues of appeal. However, the court in that case incorrectly held that a writ of certiorari

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is a "matter of right." *Id.* It is not; the United States Supreme Court carries discretion "granted only for compelling reasons" to entertain them. *See* Sup. Ct. R. 10; see also 28 U.S. Code §§ 1254, 1257.

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

Plaintiff places emphasis on the case *Kopicko v. Young*, 114 Nev. 1333, 1334, 971 P.2d 789, 789 (Nev. 1998) ("*Kopicko*") for the proposition that "it is clear that Nevada would follow Texas and Arizona and Kentucky" law. Opposition at p. 28:12-29:13. However, Plaintiff's citation to this case is deceiving. The only non-Nevada law cited in this case is found in a concurrence drafted by Justice Springer. *Id.*, 114 Nev. at 1337-1338, 971 P.2d at 791. Further, the binding majority opinion made similar analysis to the court in *K.J.B., Inc.*, 811 P.2d 1305, 107 Nev. 367, ruling that a legal malpractice action did not accrue in that matter until a federal trial court ruled on a motion to dismiss. Like the *K.J.B., Inc.* case, *Kopicko* ***did not concern an appeal***, let alone a writ of certiorari. *Kopicko*, 114 Nev. at 1334-1335, 971 P.2d at 789-790. Thus, *Kopicko* is factually distinguishable and illuminates nothing.

3. <u>The Intent Of The Legislature And Public Policy Favors Accrual Of Statute Of Limitations After Affirming The First Appeal</u>

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

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The Nevada Supreme Court has remarked that the "public-policy considerations that form the basis for any statute of limitations" are "a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security." *See Winn v. Sunrise Hosp. & Med. Ctr.*, 277 P.3d 458, 465 (Nev. 2012). In malpractice actions, public policy weighs the interests of the represented client with the interests of counsel, allowing clients to "file claims against their attorneys when they become aware that they have suffered harm, yet relieves attorneys from the prospect of unlimited and unending liability." *See Silvers v. Brodeur*, 682 N.E.2d 811, 818 (Ind. Ct. App. 1997).

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

Plaintiff fails to distinguish the caselaw cited in the underlying Motion concerning the policy considerations to limit the statute of limitations. Plaintiff first attacks the Pennsylvania case *Robbins & Seventko Orthopedic Surgs. v. Geisenberger*, 449 Pa. Super. 367, 376, 674 A.2d 244, 248 (Pa. Super. Ct. 1996) ("*Robbins*"), and a California case quoted therein, *Laird v. Blacker*, 235 Cal. App. 3d 1795, 279 Cal. Rptr. 2d 700 (1991). Both of these cases refused to extend a tolling rule to writs of certiorari to the United States Supreme Court because, in that time, "memories fade, witnesses disappear or die, and evidence is lost." *Robbins*, 449 Pa. Super. at 374, 674 A.2d at 247; *Laird* 235 Cal. App. 3d at 1814, 279 Cal. Rptr. at 711.

It is true that Pennsylvania does not recognize the litigation tolling rule. See *Robbins*, 449 Pa. Super. at 374, 674 A.2d at 247. However, Nevada ***does*** recognize the same competing policy considerations that governed the *Robbins* and *Laird* cases, namely the "legitimate interest in the finality of judgments," to avoid trying cases "after a significant passage of time [where] both parties are hindered by the likelihood that key evidence and witnesses will no longer be

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available for presentation to the trier of fact." *Snow v. State*, 105 Nev. 521, 524, 779 P.2d 96, 98 (1989). Thus, in weighing policy considerations, both *Robbins* and *Laird* show the importance of limiting statutes of limitation tolling rules from needlessly elongating time for accrual, a consideration of great weight in Nevada. *Id.*

Plaintiff claims further that the North Carolina case *Clark v. Velsicol Chem. Corp.*, 110 N.C. App. 803, 808, 431 S.E.2d 227, 229-230 (N.C. Ct. App. 1993) ("*Clark*") is inapplicable because it "deals with that state's State Court tolling rules while litigation is pending in federal court." This statement, which relies on a superfluous distinction between cases filed in state and federal court, flies in the face of Plaintiff's prior citation to *Kopicko*, which ***also*** concerned a lawsuit filed to federal court. *Kopicko*, 114 Nev. at 1334-1335, 971 P.2d at 789-790.

Further, the North Carolina court's opinion in *Clark* did not rest on a mere distinction between state and federal cases for the sake of a malpractice action. *Clark*, 110 N.C. App. at 808, 431 S.E.2d at 229-230. The court's ruling there specifically concerned the effect of a writ of certiorari to the United States Supreme Court, stating that "for the purpose of tolling the statute of limitations, we do not consider the action alive while a decision to grant or deny the petition was pending." *Id.* The logic expressed by the North Carolina court is the same expressed by many other courts, that "[a] petition for writ of certiorari is not an appeal of right, and no review is guaranteed once the petition is filed." *Id.*; *see also Kendrick v. City of Eureka*, 82 Cal. App. 4th 364, 371, 98 Cal. Rptr. 2d 153, 157 (Cal. App. 1st Dist. 2000) ("appeals to the United States Supreme Court are not afforded as a matter of right, but are completely discretionary with that body.") Thus, Plaintiff's writ of certiorari was not an "appeal of right" that is comparable to Plaintiff's initial appeal within the State of Nevada's court system. See Nev. Const. Art. 6, § 4.

Given that (1) Plaintiff was aware of all conduct that occurred in the limited trial ending on April 14, 2010 (and does not claim otherwise), (2) Plaintiff filed various motions and appeals on the issues complained of in the underlying malpractice action, and (3) Plaintiff eventually hired new counsel to file its writ of certiorari with the United States Supreme Court – it is paradoxical for Plaintiff to claim it was unaware of "all facts relevant to the foregoing elements

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and damage has been sustained" to commence its malpractice action until the Supreme Court denied its writ of certiorari over six years after all the substantive facts found in the instant litigation occurred. *See Semenza,* 765 P.2d at 186 (*citing Jewett v. Patt*, 95 Nev. 246, 247, 591 P.2d 1151, 1152 (1979)).

III. OPPOSITION TO ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND

Plaintiff moves, in the alternative, for leave to amend – again – its First Amended Complaint if dismissal is granted. However, leave to amend is properly denied where further amendment is "futile." See *Allum v. Valley Bank*, 109 Nev. 280, 287, 849 P.2d 297, 302 (Nev. 1993) (quoting *Reddy v. Litton Indus.*, 912 F.2d 291, 296 (9th Cir. Cal. 1990)).

As argued above, it is not possible for Plaintiff to establish a factual basis for its claims, as its entire theory of this case is legally defective. Plaintiff fails to articulate any theory of causation, as even assuming, *arguendo*, that Defendants breached a professional duty, Plaintiff lost the entirety of its claims on their merits when the district court ruled that it was unwilling to use its equity powers to justify equitable subrogation or replacement under the circumstances of this case, shown in Section II(A)(2). Thus, any amendment is futile to cure these defects, which amount to legally impossible claims.

IV. CONCLUSION

Plaintiff fails to articulate any reason to salvage its case. In sum, the record shows – and Plaintiff fundamentally admits – that Defendants attempted every possible legal strategy to ensure Plaintiff succeeded at its limited trial in the *Murdock* Litigation. However, Plaintiff's case was doomed, given Colonial's failure to ensure the Second DOT was reconveyed or make such reconveyance a condition of extending its new loan. Neither the FAC nor the Opposition rebuts the fact that Defendants played no role in the transactional work that resulted in this failure to adequately secure the Colonial loan. As litigation counsel, the record from the district court shows that Defendants did everything in their power to litigate this case, to no avail. As

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Plaintiff's legal malpractice cause of action fails, so must this Court dismiss without leave to amend given that such amendment would be futile.

DATED this 7th day of April, 2017.

Respectfully submitted,

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CERTIFICATE OF MAILING

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of GORDON & REES LLP, and that on the 7th day of April, 2017, the foregoing **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** was served upon those persons designated by the parties in the E-Service Master List in the Eighth Judicial District court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-1 and the Nevada Electronic Filing and Conversion Rules, upon the following:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, Plaintiff, vs. DOUGLAS D. GERRARD, ESQ., individually; and GERRARD COX & LARSEN, a Nevada professional corporation, JOHN DOES I-X; and ROE BUSINESS ENTITIES XI-XX, Defendant.	Case No.: A-16-744561-C Dept. No.: XXVII **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** [Concurrently filed with Reply in Support of Motion to Dismiss First Amended Complaint] Date: April 19, 2017 Tim: 10:00 a.m. Dept.: XXVII Judge: Honorable Nancy L. Allf

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

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

COMES NOW, Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen ("Firm") (collectively, "Defendants"), by and through their attorneys, Craig J. Mariam, Esq., Robert S. Larsen, Esq., and Wing Yan Wong, Esq, of the law firm of Gordon & Rees LLP, submit the Instant (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, as follows:

I. INTRODUCTION

Defendants' Requests for Judicial Notice ("RFJN") submitted in support of their Motion to Dismiss ("Motion") is proper under NRS 47.130, and applicable caselaw.

The RFJN is especially proper given the nature of this case – a litigation malpractice case concerning Defendants' actions in the case styled *Murdock et al. v. Rad, et al.*, Eighth Judicial District Court Case Number A-08-574852, consolidated with Case No. A-09-594512-C ("*Murdock* Litigation"). A case of litigation malpractice concerns a "trial-within-a-trial" analysis, making examination of facts in the underlying case essential to the instant dispute. *See Orrick, Herrington & Sutcliffe, LLP v. Superior Court*, 107 Cal. App. 4th 1052 (2003).

In opposition, Plaintiff Branch Banking & Trust Company ("Plaintiff") takes issue with the phrasing used in the underlying RFJN, but does not directly dispute any of the facts requested for judicial notice. Further, each fact presented in the RFJN is taken from the supporting record from the *Murdock* Litigation, shown in clearly marked exhibits. Thus, the Court may examine the record for itself to see that the RFJN is accurate.

Further, in opposing Defendants' Motion, plaintiff Branch Banking & Trust Company ("Plaintiff") submitted its own Counter-Request for Judicial Notice ("Plaintiff's RFJN"). The majority of the Plaintiff's RFJN is immaterial to the instant lawsuit, as Plaintiff seeks to simply re-litigate the *Murdock* Litigation. Further, Plaintiff has burdened Defendants and the Court with an overbearing and unnecessary number of requests and documents to consider for the sake of

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the instant Motion that merely attempt to substantiate claims in the First Amended Complaint ("FAC") that the Court must take as true on a motion to dismiss in any event. Instead of focusing on the issues crucial to its lawsuit, Plaintiff's RFJN submits 27 requests and twenty-three additional exhibits that almost entirely concern immaterial background facts involved in the *Murdock* Litigation. To the extent that these requests involve facts that are irrelevant to the core question of Defendants' malpractice and to the instant Motion to Dismiss, they must be denied.

Finally, in responding to Plaintiff's Opposition, Defendants require a modest number of additional Requests for Judicial Notice on Reply ("Reply RFJN"), detailed below.

II. LEGAL STANDARD FOR REQUESTS FOR JUDICIAL NOTICE

NRS 47.130 authorizes only the following subject matter for judicial notice:

> 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.

Thus, to the extent that any fact requested for judicial notice by the Plaintiff is "subject to reasonable dispute," the Court may not afford this fact judicial notice under NRS 47.130.

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

As such, even where documents are alleged in the four corners of the pleadings, the Court may not take judicial notice of facts in any document forwarded by the Plaintiff whose authenticity is questioned. *See id*.

Moreover, "generally, this court will not take judicial notice of facts in a different case, even if connected in some way, *unless the party seeking such notice demonstrates a valid reason for doing so*." *Kahn v. Dodds*, 127 Nev. 196, 221, 252 P.3d 681, 699, fn. 9 (Nev. 2011)

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(emphasis added). Thus, all of Plaintiff's requests concerning the *Murdock* Litigation hinge on the reasoning and wording of the request as supplied by Plaintiff. (See *id.*)

Further, a party cannot judicially notice irrelevant facts. See *Mangini v. R. J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 1063, 875 P.2d 73, 76 (Cal. 1994) ("only *relevant* material may be noticed." [emphasis in original]).

Finally, a party may not judicially notice statements made by an attorney, judge, or witness at a hearing for the truth of the matter asserted. See, e.g., *People v. Surety Insurance Co.*, 136 Cal. App. 3d 556, 564, 186 Cal. Rptr. 385, 390 (Cal. App. 2d Dist. 1982) (judicial notice could not properly be taken of the truth of comments made at a hearing by an attorney and a judge).

III. DEFENDANTS' REPLY IN SUPPORT OF THEIR RFJN

Defendants' Requests No. 1-3: Plaintiff offers no objection.

Defendants' Request No. 4: Plaintiff offers no substantive objection, only taking umbrage with how Defendants submitted exhibits to the Court with highlighting "brackets" surrounding quoted language. However, Defendants merely acted to aid the Court in finding the source of specific language used in its Motion through using highlighting brackets – a common practice in courts of law throughout the county. As requests for judicial notice take notice of facts – not documents – the practice of highlighting documents used as exhibits is no different than highlighting documents submitted to the Court for any other purpose. Further, Plaintiff attempts to make substantive legal arguments concerning what is or is not "*dicta*" in the supportive documents. However, what is – or is not – "*dicta*" in the trial court's opinions is not what is subject to judicial notice. Courts do not assume the truth of pleaded contentions and legal conclusions in judicially noticing facts. *See In re Social Services Payment Cases*, 166 Cal. App. 4th 1249, 1263, 83 Cal. Rptr. 3d 434, 445 (Cal. App. 2d Dist. 2008). Thus, the Court may rely on the document itself to see what it says.

Defendants' Requests No. 5A-5U: Plaintiff offers piecemeal objections to these requests concerning the Murdock Litigation Findings of Fact and Conclusions of Law ("FFCL"), often consenting to the Court taking judicial notice thereto. To the extent that Plaintiff does object to

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these requests, Plaintiff proceeds with substantive legal arguments concerning what is or is not "*dicta*" in the supportive documents. As previously argued, courts do not assume the truth of pleaded contentions and legal conclusions in judicially noticing facts. *See In re Social Services Payment Cases*, 166 Cal. App. 4th at 1263, 83 Cal. Rptr. 3d at 445. Thus, the Court may rely on the document itself to see what it says

Defendants Request No. 6: Plaintiff offers no substantive objection, instead, making improper legal arguments concerning what is or is not "*dicta*" in the supportive documents. As previously argued, courts do not assume the truth of pleaded contentions and legal conclusions in judicially noticing facts. *See In re Social Services Payment Cases*, 166 Cal. App. 4th at 1263, 83 Cal. Rptr. 3d at 445. Thus, the Court may rely on the document itself to see what it says.

Defendants Request No. 7: Plaintiff offers no substantive objection, instead, making improper legal arguments concerning what is or is not "*dicta*" in the supportive documents. As previously argued, courts do not assume the truth of pleaded contentions and legal conclusions in judicially noticing facts. *See In re Social Services Payment Cases*, 166 Cal. App. 4th at 1263, 83 Cal. Rptr. 3d at 445. Thus, the Court may rely on the document itself to see what it says.

Defendants Requests No. 8-9: Plaintiff objects that these requests are "premature, pending discovery being taken in this matter[.]" In so objecting, Plaintiff does not claim that these requests are inaccurate or misleading. Further, no discovery is necessary, as the facts for requests 8 and 9 are easily verified through review of the Nevada Supreme Court docket, accurately linked in said requests. Further, these requests concern *filings made by the Plaintiff*, and thus, Plaintiff needs no discovery to verify what it did or did not file in its appeal to the Nevada Supreme Court.

IV. DEFENDANTS' RESPONSE AND PARTIAL OBJECTION TO PLAINTIFF'S RFJN

Plaintiff's Request No. 1: This request seeks to judicially notice the fact a deed was supposedly recorded with the Clark County Recorder. Defendants dispute and object to this request and accompanying **Exhibit D** on the basis of relevancy, as such facts are mere background information, and irrelevant to the core issues subject to the Motion, and unnecessary

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for the Court to judicially notice. *See Mangini*, 7 Cal. 4th at 1063, 875 P.2d at 76 "only *relevant* material may be noticed." [emphasis in original]). As such, these are not "facts in issue" or "facts from which they may be inferred" for the purpose of judicial notice pursuant to NRS 47.130. Moreover, judicial notice of this fact is unnecessary for the purpose of the Court's determination of Defendants' Motion, as the fact requested for judicial notice is alleged in the FAC. (FAC ¶¶ 13, 14.) A court must take facts alleged in the pleadings "at face value" on a motion to dismiss. *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (Nev. 1985). Thus, the Court need not burden itself with judicially noticing facts that merely repeat what is alleged in the pleadings on a motion to dismiss.

Plaintiff's Request No. 2: This request seeks to judicially notice the fact a deed was supposedly recorded with the Clark County Recorder. Defendants dispute and object to this request and accompanying **Exhibit E** on the basis of relevancy, as such facts are mere background information, and irrelevant to the core issues subject to the Motion, and unnecessary for the Court to judicially notice. (See *Mangini*, 7 Cal. 4th at 1063, 875 P.2d at 76 ("only *relevant* material may be noticed." [emphasis in original]). As such, these are not "facts in issue" or "facts from which they may be inferred" for the purpose of judicial notice pursuant to NRS 47.130. Moreover, judicial notice of this fact is unnecessary for the purpose of the Court's determination of Defendants' Motion, as the fact requested for judicial notice is alleged in the FAC. (FAC ¶¶ 16-18.) A court must take facts alleged in the pleadings "at face value" on a motion to dismiss. *Edgar*, 101 Nev. 226, 227, 699 P.2d 110, 111 (Nev. 1985). Thus, the Court need not burden itself with judicially noticing facts that merely repeat what is alleged in the pleadings on a motion to dismiss.

Plaintiff's Request No. 3: This request seeks to judicially notice the fact a deed was supposedly recorded with the Clark County Recorder. Defendants dispute and object to this request and accompanying **Exhibit F** on the basis of relevancy, as such facts are mere background information, and irrelevant to the core issues subject to the Motion, and unnecessary for the Court to judicially notice. (See *Mangini*, 7 Cal. 4th at 1063, 875 P.2d at 76 ("only *relevant* material may be noticed." [emphasis in original]). As such, these are not "facts in

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issue" or "facts from which they may be inferred" for the purpose of judicial notice pursuant to NRS 47.130. Moreover, judicial notice of this fact is unnecessary for the purpose of the Court's determination of Defendants' Motion, as the fact requested for judicial notice is alleged in the FAC. (FAC ¶¶ 22-26.) A court must take facts alleged in the pleadings "at face value" on a motion to dismiss. *Edgar*, 101 Nev. 226, 227, 699 P.2d 110, 111 (Nev. 1985). Thus, the Court need not burden itself with judicially noticing facts that merely repeat what is alleged in the pleadings on a motion to dismiss.

Plaintiff's Request No. 4: This request seeks to judicially notice the fact a deed was supposedly reconveyed. Defendants dispute and object to this request and accompanying **Exhibit G** on the basis of relevancy, as such facts are mere background information, and irrelevant to the core issues subject to the Motion to Dismiss, and unnecessary for the Court to judicially notice. (See *Mangini*, 7 Cal. 4th at 1063, 875 P.2d at 76 ("only *relevant* material may be noticed." [emphasis in original]). As such, these are not "facts in issue" or "facts from which they may be inferred" for the purpose of judicial notice pursuant to NRS 47.130.

Plaintiff's Request No. 5: This request seeks to judicially notice the fact that the *Murdock* Litigation plaintiffs initiated the underlying lawsuit. Defendants object to this request and accompanying **Exhibit H** only on the basis that judicial notice of this fact is unnecessary for the purpose of the Court's determination of Defendants' Motion, as the fact requested for judicial notice is alleged in the FAC. (FAC ¶ 38.) A court must take facts alleged in the pleadings "at face value" on a motion to dismiss. *Edgar*, 101 Nev. 226, 227, 699 P.2d 110, 111 (Nev. 1985). Thus, the Court need not burden itself with judicially noticing facts that merely repeat what is alleged in the pleadings on a motion to dismiss.

Plaintiff's Request No. 6: This request seeks to judicially notice the fact that Colonial Bank, N.A., an Alabama Corporation ("Colonial") in the *Murdock* Litigation filed its initial complaint. Defendants object to this request and accompanying **Exhibit I** only on the basis that judicial notice of this fact is unnecessary for the purpose of the Court's determination of Defendants' Motion, as the fact requested for judicial notice is alleged in the FAC. (FAC ¶ 40.) A court must take facts alleged in the pleadings "at face value" on a motion to dismiss. *Edgar*,

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101 Nev. 226, 227, 699 P.2d 110, 111 (Nev. 1985). Thus, the Court need not burden itself with judicially noticing facts that merely repeat what is alleged in the pleadings on a motion to dismiss.

Plaintiff's Request No. 7: This request seeks to judicially notice the fact that a motion consolidate was granted, consolidating Colonial's action with the *Murdock* Litigation. Defendants object to this request and accompanying **Exhibit J** and **Exhibit K** only on the basis that judicial notice of this fact is unnecessary for the purpose of the Court's determination of Defendants' Motion, as the fact requested for judicial notice is alleged in the FAC. (FAC ¶¶ 5, 40.) A court must take facts alleged in the pleadings "at face value" on a motion to dismiss. *Edgar*, 101 Nev. 226, 227, 699 P.2d 110, 111 (Nev. 1985). Thus, the Court need not burden itself with judicially noticing facts that merely repeat what is alleged in the pleadings on a motion to dismiss.

Plaintiff's Request No. 8: This request seeks to judicially notice the fact that the Federal Deposit Insurance Corporation ("FDIC") was supposedly appointed as Receiver for Colonial by the State of Alabama Superintendent of Banks. Defendants object to this request and accompanying **Exhibit L** only on the basis that judicial notice of this fact is unnecessary for the purpose of the Court's determination of Defendants' Motion, as the fact requested for judicial notice is alleged in the FAC. (FAC ¶ 44.) A court must take facts alleged in the pleadings "at face value" on a motion to dismiss. *Edgar*, 101 Nev. 226, 227, 699 P.2d 110, 111 (Nev. 1985). Thus, the Court need not burden itself with judicially noticing facts that merely repeat what is alleged in the pleadings on a motion to dismiss.

Plaintiff's Request No. 9: This request seeks to judicially notice the fact that Defendants "filed an Amended Complaint in the Underlying Subject Litigation, substituting BB&T as the Plaintiff, in the place and stead of Colonia, and thereby became counsel of record for BB&T. Defendants dispute and object to this request and accompanying **Exhibit M** based on the wording of the Request as argumentative, as it insinuates that Defendants filed the aforementioned Amended Complaint on their own without Plaintiff's participation. Defendants dispute that the aforementioned Amended Complaint was filed without Plaintiff's knowledge or

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consent, as Plaintiff was substantively involved in and aware of this filing. Further, Defendants object on the basis that judicial notice of this fact is unnecessary for the purpose of the Court's determination of Defendants' Motion, as the fact requested for judicial notice is alleged in the FAC. (FAC ¶¶ 46, 47.) A court must take facts alleged in the pleadings "at face value" on a motion to dismiss. *Edgar*, 101 Nev. 226, 227, 699 P.2d 110, 111 (Nev. 1985). Thus, the Court need not burden itself with judicially noticing facts that merely repeat what is alleged in the pleadings on a motion to dismiss.

Plaintiff's Request No. 10: This request seeks to judicially notice the fact that Defendants filed a Second Amended Complaint on behalf of Plaintiff in the *Murdock* Litigation. Defendants do not object to the use of Exhibit A to Defendants' own RFJN, do not dispute what the Second Amended Complaint says on its face, and do not dispute the fact that it was filed in the *Murdock* Litigation. However, Defendants dispute this request as argumentative to the extent it seeks to judicially notice the truth of the cited sections of the pleading. Courts do not take judicial notice of factual allegations in pleadings. *Espinoza v. Calva*, 169 Cal.App.4th 1393, 1396, 87 Cal. Rptr. 3d 492 (Cal. App. 4th Dist. 2008) ["We can take judicial notice of the fact the pleadings were filed, but not of the truth of the statements contained in them."].) Thus, it is improper to judicially notice any allegation in this document for its truth.

Plaintiff's Request No. 11: This request seeks to judicially notice the fact that various parties in the *Murdock* Litigation filed answers to Plaintiff's Second Amended Complaint. Defendants do not object to the use of **Exhibit N** and **Exhibit O**, and do not dispute what the aforementioned exhibits say on their faces or the fact that they were filed in the *Murdock* Litigation. However, Defendants dispute this request as argumentative to the extent it seeks to judicially notice the truth of the cited sections of the pleading. Courts do not take judicial notice of factual allegations in pleadings. *Espinoza v. Calva*, 169 Cal.App.4th 1393, 1396, 87 Cal. Rptr. 3d 492 (Cal. App. 4th Dist. 2008) ["We can take judicial notice of the fact the pleadings were filed, but not of the truth of the statements contained in them."].) Thus, it is improper to judicially notice any allegation in these documents for its truth.

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Plaintiff's Request No. 12: This request seeks to judicially notice the fact a document was supposedly recorded with the Clark County Recorder, the aforementioned "2009 Bulk Assignment." Defendants dispute and object to this request and accompanying **Exhibit L** on the basis of relevancy, as such facts are mere background information, and irrelevant to the core issues subject to the Motion, and unnecessary for the Court to judicially notice. (See *Mangini*, 7 Cal. 4th at 1063, 875 P.2d at 76 ("only *relevant* material may be noticed." [emphasis in original]). As such, these are not "facts in issue" or "facts from which they may be inferred" for the purpose of judicial notice pursuant to NRS 47.130. Moreover, Defendants object to the request as argumentative, as Request No. 12 mischaracterizes and improperly assumes what assets or interest transferred from Colonial to Plaintiff, if any. Likewise, Defendants are not assured of the authenticity of this document at this time, and object on that basis. Judicial notice is only appropriate for documents "whose authenticity no party questions[.]" *Thunder Props*, 2014 Nev. Dist. LEXIS 207 at *8-9.

Plaintiff's Request No. 13-14: These requests collectively seek to judicially notice the statements of Eckley M. Keach, Mr. Gerrard, and the Court on January 8, 2010 to the district court in the *Murdock* Litigation. Defendants do not object to the fact that these statements were said, but do dispute and object to the veracity and substance of the statements themselves. *See, e.g., Surety Insurance Co.*, 136 Cal. App. 3d at 564, 186 Cal. Rptr. at 390 (judicial notice could not properly be taken of the truth of comments made at a hearing by an attorney and a judge). Moreover, Defendants dispute and object to this request and accompanying **Exhibit P** on the basis of relevancy, as such facts are mere background information, and irrelevant to the core issues subject to the Motion, and unnecessary for the Court to judicially notice. (See *Mangini*, 7 Cal. 4th at 1063, 875 P.2d at 76 ("only *relevant* material may be noticed." [emphasis in original]). As such, these are not "facts in issue" or "facts from which they may be inferred" for the purpose of judicial notice pursuant to NRS 47.130.

Plaintiff's Request No. 15: This request seeks to judicially notice select language from the Court's binding Findings of Fact and Conclusions of Law ("FFCL"), attached as Exhibit B to Defendants' RFJN. Defendants object to the extent that Plaintiff offers its own argumentative

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interpretation of the FFCL for what it says, an improper attempt to argue disputed legal contentions in a request for judicial notice. *See Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn.*,18 Cal. App. 3d 1023, 1038, 96 Cal.Rptr. 338, 347-348 (Cal. App. 4th Dist. 1971) ("Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning.") As a result, the language in the FFCL and its legal effect on this case should be considered on its own absent the argumentative language in this request.

Plaintiff's Request No. 16: Defendants do not dispute the purely procedural facts described in pages 3-5 of the FFCL attached as Exhibit B quoted in this request.

Plaintiff's Request No. 17-18: These requests collectively seek to judicially notice the statements made by various parties during the March 30, 2010 and March 31, 2010 days of the limited trial in the Murdock litigation. Both of these request are improper as compound, evident by how both requests are broken into bullet-points. Moreover, the requests ask for the court to make improper conclusions as follows:

1. The first bullet point of Request No. 17 asks this Court to accept as true whether or not Mr. Gerrard "rested his case in chief" on March 30, 2010. Defendants dispute that Mr. Gerrard's case in chief closed on this date, as he had yet to finish introducing evidence and had yet to examine his last witness, Brad Burns, as Plaintiff admits. *See* Plaintiff's RFJN at p. 17:16-17 ("save for one witness").

2. The first, second, and third bullet points of Request No. 17 ask this Court to accept as true arguments made by Mr. Keach, Mr. Gerrard, the Court, and other persons who spoke during the limited trial and memorialized in the transcript attached as **Exhibit Q**. Defendants do not object to the fact that these statements were said, but do dispute and object to the veracity and substance of the statements. *See, e.g., People v. Surety Insurance Co.*, 136 Cal. App. 3d at 564, 186 Cal. Rptr. at 390 (judicial notice could not properly be taken of the truth of comments made at a hearing by an attorney and a judge).

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3. The fourth bullet point of Request No. 17 asks the Court to judicially notice Plaintiff's summary and paraphrasing of the trial court's instructions to Mr. Gerrard at the conclusion of the March 30, 2010 day of the limited trial. Defendants dispute and object to the request on the basis it is argumentative to the extent that it mischaracterizes the trial court's instruction to Mr. Gerrard. The trial court's own words best speak for themselves:

> **THE COURT:** So with respect to contractual subrogation and replacement, you are going to make some phone calls and find out if there is something documentary in addition to Exhibit 163 [the PAA].
>
> **MR. GERRARD:** All right. We'll look into that, Your Honor.

See **Exhibit Q** to the Plaintiff's RFJN at p. 69:9-14. Moreover, it is improper for the court to take judicial notice of statements made in open court for the truth of the matter asserted. *See, e.g., People v. Surety Insurance Co.*, 136 Cal. App. 3d at 564, 186 Cal. Rptr. at 390 (judicial notice could not properly be taken of the truth of comments made at a hearing by an attorney and a judge).

4. The first bullet point of Request No. 18 asks this Court to accept as true whether Mr. Gerrard "finally" attempted to introduce the 2009 Bulk Assignment on March 31, 2010. Defendants dispute and object to this request as vague and ambiguous. First, it condenses a complex evidentiary issue covering dozens of pages in the cited transcript only over a brief sentence, evidenced by the citation to "*see*, **Exh. R** hereto at pp. 6-42." *See* Plaintiff's RFJN at p. 18:15-16. Such a monumental summarization is extreme and improper. Moreover, Defendants dispute and object to Request No. 19 as it is argumentative. The request uses of the word "finally" in this section of the request, which implies that Defendants had prior knowledge of the 2009 Bulk Assignment and prior opportunity to introduce it. This is a fact that is not supported in the FAC, as Plaintiff fails to allege when it made Defendants aware of the 2009 Bulk Assignment. Moreover, it is improper for the court to take judicial notice of statements made in open court for the truth of the matter asserted. *See, e.g., People v.*

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Surety Insurance Co., 136 Cal. App. 3d at 564, 186 Cal. Rptr. at 390 (judicial notice could not properly be taken of the truth of comments made at a hearing by an attorney and a judge).

5. The second bullet point of Request No. 18 asks this Court to accept as true arguments made by Mr. Gerrard, the Court, and other persons who spoke during the limited trial and memorialized in the transcript attached as **Exhibit R**. Defendants do not object to the fact that these statements were said, but do dispute and object to the veracity and substance of the statements. *See, e.g., People v. Surety Insurance Co.*, 136 Cal. App. 3d at 564, 186 Cal. Rptr. at 390 (judicial notice could not properly be taken of the truth of comments made at a hearing by an attorney and a judge). Further, the request asks this Court to accept as true Plaintiff's mischaracterization of how Mr. Gerrard sought to introduce the 2009 Bulk Assignment and the March 2010 Assignment. Defendants dispute and object to Plaintiff's rendition of the facts as argumentative, and instead request the Court consider the cited transcript on this point.

6. The third bullet point of Request No. 18 asks this Court to accept as true Plaintiff's mischaracterization of how Mr. Gerrard moved to substitute the FDIC as the real party in interest. Defendants dispute and object to Plaintiff's rendition of the facts as argumentative, and instead request the Court consider the cited transcript on this point.

Plaintiff's Request No. 19-21: These requests seek to judicially notice select language from the Court's binding FFCL, attached as Exhibit B to Defendants' RFJN. Defendants object to the extent that Plaintiff offers its own argumentative *interpretation* of the FFCL for what it says, an improper attempt to argue disputed legal contentions in a request for judicial notice. *See Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn.*,18 Cal. App. 3d 1023, 1038, 96 Cal.Rptr. 338, 347-348 (Cal. App. 4th Dist. 1971) ("Taking judicial notice of a document is not

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the same as accepting the truth of its contents or accepting a particular interpretation of its meaning.")

Further, Defendants dispute and object to the Plaintiff's classification of various rulings as either *dicta* or non-*dicta*. Such classification is disputed, and it requests the Court to make a legal conclusion, improper subject matter for judicial notice pursuant to pursuant to NRS 47.130.

To the degree that the Court analyzes the FFCL, Defendants request that the Court consider each finding and conclusion therein of equal weight. Plaintiff's position is counter to the express language of NRCP 52, which states that "Findings of fact shall not be set aside unless clearly erroneous [. . . .] The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Plaintiff makes no argument that these findings are "clearly erroneous." Thus, the Court must not take Plaintiff's invitation to weigh one lone finding higher or lower than the others. Regardless, weighing the individual findings and conclusions of the FFCL is improper for the basis of a request for judicial notice.

Plaintiff's Request No. 22: This request seeks to judicially notice the fact that Defendants, on behalf of Plaintiff, filed a Motion for New Trial, or in the Alternative, Motion to Alter or Amend Judgment on July 8, 2010 in the *Murdock* Litigation. Defendants dispute and object to the request and the accompanying **Exhibit S** as argumentative and calls for a legal conclusion to extent Plaintiff mischaracterizes what Plaintiff, acting through counsel, hoped to achieve in filing its Motion for New Trial, or in the Alternative, Motion to Alter or Amend Judgment. Defendants dispute that they "failed" to address or present evidence as to the assignment, and likewise dispute that such evidence was necessary given the Notice of Question of Fact forwarded by the *Murdock* Litigation parties. Plaintiff attempts to use a request for judicial notice as a source of argument, not fact – an improper basis for judicial notice pursuant to NRS 47.130.

Plaintiff's Request No. 23: This request seeks to judicially notice the fact that the trial court in the *Murdock* Litigation issued an Order on October 5, 2010 on Plaintiff's Motion for New Trial, or in the Alternative, Motion to Alter or Amend Judgment. Defendants dispute and object to the request and the accompanying **Exhibit T** as argumentative and calls for a legal

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conclusion to the extent it mischaracterizes the Order and its findings, calling various rulings "dicta" and "nondicta". Such classification is disputed, and it requests the Court to make a legal conclusion, improper subject matter for judicial notice pursuant to pursuant to NRS 47.130. To the extent that the Court relies on the findings made in **Exhibit T**, Defendants request that the Court review the entire Order, not just those provisions Plaintiff removes from context.

Plaintiff's Request No. 24: This request seeks to judicially notice the fact that Defendants, on behalf of Plaintiff, appealed the trial court's ruling in the Murdock Litigation to the Nevada Supreme Court, and the Supreme Court's ensuing May 31, 2013 ruling. Defendants object to the extent that this request is improperly compound. Further, Defendants object to the extent that the Plaintiff removes the Nevada Supreme Court's language from the context of the full opinion. Thus, to the extent that the Court relies on **Exhibit U**, Defendants request that the Court review the entire ruling, not just those provisions Plaintiff removes from context.

Plaintiff's Request No. 25: This request seeks to judicially notice the fact that Plaintiff sought an *en banc* rehearing of the Nevada Supreme Court's May 31, 2013 ruling. Defendants object to the extent that the request ignores the strongly worded dissenting opinion of Justices Pickering and Hardesty, attached thereto to **Exhibit V**. To the degree that the Court judicially notices the contents of **Exhibit V**, Defendants request the Court judicially notice the contents of the document in its entirety.

Plaintiff's Request No. 26: This request seeks to judicially notice the fact Plaintiff submitted a writ of certiorari to the United States Supreme Court on May 22, 2014. Defendants have no objection to this request.

Plaintiff's Request No. 27: This request seeks to judicially notice the fact the United States Supreme Court denied the May 22, 2014 writ of certiorari submitted by the Plaintiff. Defendants have no objection to this request.

V. DEFENDANTS' RFJN IN SUPPORT OF REPLY

Defendants will, and hereby do, respectfully request, in considering Defendants' Reply in Support of Motion to Dismiss the First Amended Complaint, that this Court take judicial notice of the following facts, pursuant to NRS 47.130, submitted in addition to the previously submitted

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Request for Judicial Notice in Support of Defendants' Motion to Dismiss the First Amended Complaint:

10. The fact that, on November 19, 2009, the *Murdock* Litigation plaintiffs Robert Murdock and Eckley Keach submitted a Notice of Questions of Fact and Request for *Sua Sponte* Addition of Nevada Title as a Party Pursuant to NRCP19(a), NRCP 17(a), and NRS 30.130 ("NQF"), attached hereto as **Exhibit Y**. See also FAC at ¶ 77.

11. The fact that the NQF identified for adjudication at the limited trial various issues, specifically, the following relevant questions (among many others):

A. 1. Whether there was an intention on the part of Colonial Bank that the July 2007 DOT would be in first position.

B. 8. Whether Colonial Bank's failure to explicitly demand first position in its Loan Documents makes clear that Colonial Bank had no need to have first position?

C. 26. Whether the failure of Colonial Bank to demand subordination (or reconveyance) as subordination was demanded when the original Note was modified, establishes affirmative proof that Colonial intended to be in whatever position it was in.

D. 36. Whether Colonial told its counsel that the R&S Lenders DOT needed to be reconveyed?

E. 37. Whether Colonial told R&S that the R&S Lenders DOT required reconveyance?

F. 46. Whether Colonial Bank waived any conditions precedent regarding the priority of title?

G. 47. Whether Colonial Bank could have inserted a condition precedent that it had priority on any of the loan documents that it wrote, but did not.

H. 48. Whether Colonial Bank's silence in the loan documents it drafted and provided to R&S regarding the priority issue and the reconveyance issue is tantamount to an admission that the fact of priority and reconveyance did not exist.

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12. The fact that the district court in the *Murdock* Litigation held a "status check" hearing on November 23, 2009. A true and correct copy of relevant pages of the transcript of the November 23, 2009 hearing is attached hereto as **Exhibit Z**.

13. The fact that the district court in the *Murdock* Litigation reviewed the NQF during the status check hearing held on November 23, 2009. See **Exhibit Z**.

14. The fact that the district court in the *Murdock* Litigation made the following ruling during the November 23, 2009 status check hearing concerning issues from the NQF advanced for a limited trial:

> [. . . .] I am going to grant an expedited proceeding to make a determination of the primarily priority issues which have some overlapping issues. For that reason, I am now going to go through the very lengthy document that Mr. Keach gave us and tell you which of the issues that he has addressed in this I am going to advance to our expedited proceeding [. . . .] We are going to advance Item Number 1, Item Number 2, Item Number 3, Item Number 4, Item Number 7, Item Number 8, Item Number 9, Item Number 10, Item Number 12, Item Number 13, 14, 15, 16, 17, 18, 21, 24, 26, 27, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 44, 45, 46 through 48.

See **Exhibit Z** at 88:17-89:8.

15. The fact that Plaintiffs filed a brief in the Murdock Litigation appeal to the Nevada Supreme Court, appeal number 56640, electronically filed on September 20, 2012, entitled "Respondent/Cross-Appellant's Opening Brief on Cross-Appeal" ("Plaintiff's Opening Brief"). See **Exhibit AA** hereto.

16. The fact that, as evidenced on the face page of Plaintiff's Opening Brief, Plaintiffs did not use Defendants as counsel on appeal. **Exhibit AA** at p. 1.

17. The fact that Plaintiff's Opening Brief presented three issues for appellate review:

I. WHETHER THE DISTRICT COURT ERRED IN DETERMINING WITH THE EVIDENCE PRESENTED AND STATUTORILY REQUIRED PRESUMPTIONS, THAT BB&T DID NOT HAVE STANDING TO ASSERT ITS EQUITABLE CLAIMS.

II. WHETHER THE DISTRICT COURT ERRED BY FAILING TO ALLOW ADMISSION OF THE 2009 ASSIGNMENT OF SECURITY INSTRUMENTS

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(PROPOSED EXHIBIT 58) AND THE 2010 ASSIGNMENT OF DEED OF TRUST (PROPOSED EXHIBIT 59).

III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT ALLOWING THE FDIC TO BE SUBSTITUTED IN AS A REAL PARTY IN INTEREST OR IN THE ALTERNATIVE BY RENDERING ITS DECISION WITHOUT NAMING AN INDISPENSABLE PARTY.

Exhibit AA at p. 4.

18. The fact that Plaintiff's Opening Brief states the following:

A. "The District Court's judgment was not based on a legal analysis of BB&T's equitable claims for priority, but instead on a finding that BB&T had not shown that it had standing to assert claims arising from the Construction Loan." **Exhibit AA** at pp. 11-12.

B. "In dicta, the District Court went on to unnecessarily and inappropriately rule on issues of lien priority." **Exhibit AA** at pp. 16-17.

C. "[T]he underlying lien priority dispute cannot properly be resolved until the merits of BB&T's claims are considered." **Exhibit AA** at p. 46.

VI. CONCLUSION

Plaintiff's objections to the Defendants' RFJN lack merit, as those requests concern facts and statements properly evidenced in the *Murdock* Litigation at the focus of this malpractice action. Further, Plaintiff's RFJN submits improper argument and disputed facts to the Court for consideration as judicially noticeable facts. Such disputed facts and argumentative language is improper for the Court to judicially notice. Moreover, to the extent that Defendants do not object to a given document, Defendants request that the Court consider the contents of such document in its entirety. Finally, Defendants request that this Court add the above Reply RFJN to its

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previously submitted RFJN supporting the instant Motion, as reference to said facts and supportive documents is necessary to rebuke the arguments forwarded by Plaintiff's Opposition.

DATED this 7th day of April, 2017.

Respectfully submitted,

GORDON & REES, LLP

/s/ Craig J, Mariam

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CERTIFICATE OF MAILING

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of GORDON & REES LLP, and that on the 7th day of April, 2017, the foregoing **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** 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
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/s/ Gayle Angulo
An Employee of GORDON & REES, LLP

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EXHIBIT Y

EXHIBIT Y

ORIGINAL

NOTC
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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. AND RELATED CLAIMS.	CASE NO. 08-A-574852 DEPT. NO. XI *CONSOLIDATED WITH:* CASE NO. 09-A-594512 **PLAINTIFFS' 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 30.130** **DATE: November 23, 2009** **TIME: 9:00 a.m.**

COME NOW Plaintiffs Robert E. Murdock and Eckley M. Keach and hereby file their 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 30.130 as follows.

This Notice is made and based on the following Points and Authorities, all pleadings and papers on file herein, and any argument of counsel as may be had by the Court.

DATED this 19th day of November, 2009.

MURDOCK & ASSOCIATES, CHTD.
ECKLEY M. KEACH, CHTD.

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Plaintiffs

POINTS AND AUTHORITIES

As this Court is aware, "The Nevada Constitution states, in pertinent part, that '[t]he right of trial by [j]ury shall be secured to all and remain inviolate forever,' Nev. Const. art. 1, §3, and guarantees the right to have factual issues determined by a jury. The right to a jury trial extends to civil proceedings, such as the district court complaint filed in the underlying action. A statute will unconstitutionally restrict the right to a jury trial when that right is 'burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.'" **Zamora v. Price**, 213 P.3d 490, 493 (Nev. 2009) (internal citations and quotation marks omitted). While admittedly, a declaratory relief action can be characterized as equitable, Nevada statutory authority **allows** for a jury trial. As this Court knows, the Legislature has enacted the Uniform Declaratory Judgment Act. In a case where declaratory relief is requested, NRS 30.110 controls:

> "NRS 30.110 Jury trial. When a proceeding under NRS 30.010 to 30.160, inclusive, involves the determination of an issue of fact, **such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.**"

Hence, a jury trial may be had on all issues, equitable and legal. The Court does not need to separate issues that are equitable and legal in nature. As long as there are issues which require the determination by a jury, the Court may allow for all of the issues to be tried by a jury. See also, **Cox v. Glenbrook Co.**, 78 Nev. 254, 371 P.2d 647 (1962). In deciding upon such, this Court knows that the Sections within the Uniform Act are to be liberally construed and applied: "NRS 30.010 to 30.160, inclusive, are declared to be remedial; their purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and are to be liberally construed and administered." NRS 30.140.

In this case, the issues are so intertwined, that separating the issues would be complex and could lead to results which are divergent. The entire case should be tried before a jury. The jury can make specific findings based upon Special Interrogatories. This Court can then weigh the equities based upon the facts found by the jury.

The facts which require determination by a jury solely with regard to Colonial Bank's claims are as follows:[1]

1. Whether there was an intention on the part of Colonial Bank that the July 2007 DOT would be in first position.

2. Whether Colonial Bank ever expressed that to Nevada Title?

3. Whether Colonial Bank ever expressed that to R&S?

4. Whether Nevada Title ever expressed Colonial Bank's intent to R&S?

5. Whether Nevada Title was negligent in its escrow function as opposed to its title function?

6. Whether it was Nevada Title's responsibility to draft a reconveyance?

7. Whether Colonial Bank should have drafted a reconveyance if it actually expected it?

8. Whether Colonial Bank's failure to explicitly demand first position in its Loan Documents makes clear that Colonial Bank had no need to have first position?[2]

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[1] Of course, as discovery moves along, this list may be added to or reduced.

[2] This is important because of the equitable subrogation claim. As this Court knows, equitable subrogation in Nevada attempts, in effect, to avoid unjust enrichment. See **Houston v. Bank of Am. Fed. Sav. Bank**, 119 Nev. 485, 490-491(Nev. 2003); **Restatement (Third) of Prop.: Mortgages** § 7.6 cmt. a. "Unjust enrichment occurs when ever [sic] a person has and retains a benefit which in equity and good conscience belongs to another." **LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975**, 113 Nev. 747, 756 (Nev. 1997). However, "An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement. 66 **Am. Jur. 2d Restitution** §6 (1973). "The doctrine of unjust enrichment or recovery in quasi contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another [or should pay for]." 66 **Am. Jur. 2d Restitution** §11 (1973); see **Lipshie v. Tracy Investment Co.**, 93 Nev. 370, 379, 566 P.2d 819, 824 (1977) ("To permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles.")." **Id.** Here, there is a contract. Hence, if a finding is made that the contract did not call for first position status, then even under equitable principles, Colonial cannot be moved up.

9. Whether the Construction Loan documents (Exhibit B therein) make clear that Colonial Bank did not demand or require first position on the initial 29 Million Dollars, but only on the subsequent disbursements?

10. What prejudice will be suffered by moving Colonial Bank up to Murdock and Keach?

11. Did Murdock and Keach ever agree to be "subordinated" to anything but the 29 Million Dollar first loan, payable at a certain date?

12. Did Colonial Bank ever speak with or notify Murdock, Keach, or any other R&S Lender about what R&S was doing?

13. Did Nevada Title demand authority paperwork to be signed regarding Rad and Nourafchan's authority to sign off on any alleged reconveyance?

14. Did Nevada Title write any documents, letters, notes, or anything else regarding the alleged reconveyance?

15. Did Rad ever tell Nevada Title that he would reconvey for R&S Lenders?

16. Did Nourafchan ever tell Nevada Title that he would reconvey for R&S Lenders?

17. Did R&S Lenders ever tell Nevada Title that it would reconvey?

18. Did Rad, Nourafchan or R&S ever tell Colonial Bank that it would reconvey?

19. If it or they did, does such a finding also clarify a fraud on Murdock and Keach?

20. Are Murdock and Keach "worse off" by placing Colonial's 43 Million Dollar loan in front of them as opposed to the 29 Million Dollar loan?

21. Was the July 2007 loan a new loan or a modification?

22. Was the Colonial Loan in July of 2007 appropriate or was it to provide quick monies to Colonial and its employees?

23. Was the new loan simply an effort to clear a bad loan off the books?

24. Whether BB&T paid proper consideration and thus is able to have an "assignment" that comes with equitable rights?

25. Whether the claims of Colonial's expert that no bank would not expect to have first position with this sort of loan is accurate or believable.

26. Whether the failure of Colonial Bank to demand subordination (or reconveyance) as subordination was demanded when the original Note was modified, establishes affirmative proof that Colonial intended to be in whatever position it was in.

27. Whether Colonial Bank when it paid off the original 29 Million Dollars did so with the intention and belief that it would acquire the same position as with the original loan when it made a brand new loan on the property.

28. Whether Nevada Title's negligence was the proximate cause of any damages Colonial Bank may suffer as a result of not being in first position ahead of the 12 Million Dollar Deed of Trust held by R & S Lenders?

29. Whether Colonial Bank has an adequate remedy at law?

30. What agreements have been entered into between Colonial Bank and Nevada Title that may affect Colonial Bank's claim that it is entitled to equity?

31. Whether Colonial Bank has unclean hands because of its negligence in not specifically placing the issue of priority in the Bank's loan agreements?

32. Whether Colonial Bank provided this loan to R&S in bad faith?

33. Whether Colonial Bank has unclean hands in its handling of the matter in question?[3]

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[3] It has long been established that one who seeks equity must do equity and that "he who comes into equity must come with clean hands." **Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.**, 324 U.S. 806, 814 (1945). See generally **Shondel v. McDermott**, 775 F.2d 859, 867-68 (7th Cir. 1985) (Posner, J.) (noting that the concept of "clean hands" originated in "the moralistic, rule-less, natural-law character of the equity jurisprudence created by the Lord Chancellors of England when the office was filled by clerics," and observing that "[t]oday, 'unclean hands' really just means that in equity as in law the plaintiff's fault, like the defendant's, may be relevant to the question of what if any remedy the plaintiff is entitled to"). Equity's "unclean hands" doctrine demands that "[one] who seeks equity must do equity." **Mfr.'s Fin. Co. v. McKey**, 294 U.S. 442, 449, 79 L. Ed. 982, 55 S.Ct. 444 (1935). In **Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.**, 182 P.3d 764 (Nev. 2008), our Court discussed the application of the doctrine of "unclean hands:" "The unclean hands doctrine generally 'bars a party from receiving equitable relief because of that party's own inequitable conduct.... the unclean hands doctrine does not apply unless the misconduct at issue is 'connected with the matter in litigation so that it has in some manner affected the equitable relations subsisting between the parties and arising out of the transaction.... In determining whether a party's connection with an action is sufficiently offensive to bar equitable relief, two

34. Did Brenda Burns lie about Rad agreeing to reconvey the property?

35. Did Rad lie about denying that he told Brenda Burns that he would reconvey the property?

36. Whether Colonial told its counsel that the R&S Lenders DOT needed to be reconveyed?

37. Whether Colonial told R&S that the R&S Lenders DOT required reconveyance?

38. Whether Brad Burns told Rick Yach that the R&S Lenders DOT was going to be "converted" to equity?

39. Whether anyone associated with R&S or R&S Lenders told Colonial Bank that the R&S Lenders DOT was going to be "converted" to equity?

40. Who drafted the budgets for the construction loan?

41. Who drafted the original subordination agreement?

42. Whose job it was to draft any alleged R&S Lenders reconveyance?

43. Whether Colonial Bank undertook its own review of the construction loan budgets in its determination of whether to grant the loan?

44. Whether the loan committee at Colonial Bank ever told R&S that the R&S Lenders DOT needed to be reconveyed?

45. Whether through action or inaction, did Colonial Bank waive the need for a first deed of trust?

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factors must be considered: (1) the egregiousness of the misconduct at issue, and (2) the seriousness of the harm caused by the misconduct. Only when these factors weigh against granting the requested equitable relief will the unclean hands doctrine bar that remedy. The district court has broad discretion in applying these factors, and we will not overturn the district court's determination unless it is unsupported by substantial evidence." 182 P. 3rd at 766, 767. In this case, the trier of fact will be required to make certain determinations as to the conduct of Colonial Bank, such as whether it was pushing this loan through so quickly, and without making sure it was fully protected, because it wanted to clear the loan from its books, or because it wanted to show a $500,000.00 fee that was earned and that it had collected $3,000,000.00 in prepaid interest that it was holding so as to boost the balance sheet of Colonial Bank. (In light of Colonial Bank's failure earlier this year, the facts may show that Colonial was willing to do anything to show profitability.) Once these factual issues are determined, an analysis will occur as to the application of the doctrine of unclean hands.

46. Whether Colonial Bank waived any conditions precedent regarding the priority of title?

47. Whether Colonial Bank could have inserted a condition precedent that it had priority on any of the loan documents that it wrote, but did not.

48. Whether Colonial Bank's silence in the loan documents it drafted and provided to R&S regarding the priority issue and the reconveyance issue is tantamount to an admission that the fact of priority and reconveyance did not exist.

These facts must be determined by a jury before the Court undertakes any equitable analysis.

There is another issue which this Court needs to look at before it determines any issues related to priority. That is, **Nevada Title needs to be made a party**. Let us be clear here. Plaintiffs are **NOT** arguing that Nevada Title needs to be made a party due to its insurance function. Instead, assuming that Colonial Bank did tell Nevada Title that R&S had to reconvey, and Nevada Title failed to take steps to ensure that it did, Nevada Title is negligent in its actions. This is, as Robbie Graham of Nevada Title stated, "an escrow function as opposed to a title function."[4] In essence, Ms. Graham was admitting that the failure of Nevada Title to ensure a reconveyance was negligent. Its errors and omissions policy is in effect. Nevada Title did not miss the R&S Lenders DOT; it merely was careless in dealing with it. It had a duty and it breached that duty. In fact, Steve Novacek was clear that Nevada Title should not have closed without a reconveyance. Novacek Deposition at 80, 101-103. As a result of Nevada Title's failures, Colonial's counsel placed Nevada Title on notice. Novacek Deposition at 76-77; see, also, Letter from Novacek to Nevada Title dated June 24, 2009. According to Mr. Novacek, Nevada Title was specifically instructed that it was not to close the transaction until there was clear title. *Id.* According to Mr. Novacek, this meant, or implied, that the R & S St. Rose Lenders Deed of Trust needed to be off the title and, thus, reconveyed. Novacek Deposition at 44, 75. Nevada Title accepted this duty. See Deposition of Brenda Burns at 35-37. Thus, there was a duty, and there was a breach. The question left deals with proximate cause and damages.

[4] See Graham email to Novacek dated June 23, 2009.

In this instance, the damages are that Colonial was placed in second position. The proximate cause is the failure of Nevada Title to ensure that a reconveyance took place. This is the essence of negligence.

Nevada Title **must** be made a party for full relief per Rule 19. "A district court is obligated to, *sua sponte*, join a necessary party under NRCP 19(a) if the litigants have not joined that party." **Blaine Equip. Co. v. State**, 122 Nev. 860, 865 (Nev. 2006); see, also, **University of Nevada v. Tarkanian**, 95 Nev. 389, 396, 594 P.2d 1159, 1163 (1979) (stating that "[a]s is shown by the mandatory language of Rule 19(a), the enforcement of the rule is not left to the parties themselves"). Thus, even if the parties won't do it, this Court has the authority to, and is mandatorily obligated to, join the party.

> "Under NRCP 19(a), "[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined" if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

Blaine Equip. Co. v. State, 122 Nev. 860, 865 (Nev. 2006).

There is no doubt but that Nevada Title is a necessary party to this case. Clearly, Nevada Title has an interest in the outcome of this proceeding. It was its negligence, according to Mr. Novacek, which caused the problem. If Nevada Title is not made a party at this stage, there is a real possibility of inconsistent obligations. For example, the Court could rule that R&S Lenders has priority. Then, in a separate case (which is sure to be filed), Colonial sues Nevada Title for its negligence.[5] A jury could find that Nevada Title was not negligent. Thus, inconsistent verdicts.

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[5] While Colonial may have a claim under the Title Policy because clear title was obviously not given, but was insured, Nevada Title could have a defense based upon the value of the property. The policy may only insure the value "today" as opposed to the value of the loan (43 Million). Hence, leaving Nevada Title out leaves many unanswered questions for future litigation which,

In addition to Rule 19, Nevada Title also needs to be made a party per NRS 30.130: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Certainly Nevada Title has an interest which may be affected. For example, if this Court were to rule that R&S has the priority, Nevada Title would be out some 29 Million Dollars. The addition of Nevada Title is not even arguable--it is mandatory. If the Court goes ahead without Nevada Title, it could be making a declaration which could be prejudicing the rights of persons not parties to this proceeding.

Nevada Title also needs to be made a party because it is clear that **it is the real party in interes**t. See, NRCP 17(a). "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

In its pleading opposing the Motion to Vacate, Colonial makes this clear. Nevada Title is the one actually defending this case. Again, this is because Nevada Title has agreed to defend and indemnify. Thus, if this is true, then why should Nevada Title get the equitable defenses allegedly had by Colonial? If this Court allows this, Nevada Title would be allowed to commit negligence (again on the escrow side, not the title side) with no repercussions. Tort law does not allow this. The Court needs to understand that Plaintiffs are <u>not</u> claiming this based upon Nevada Title's insurance policy. This is solely based upon Nevada Title's negligence in failing

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as the Court knows, could result in inconsistent verdicts. Nevada Title needs to be bound by this action. See NRS 30.130.

to follow the instructions of Colonial Bank to have its new loan in first position. Nevada Title performed two functions for Colonial Bank in this transaction. First, Nevada Title performed an escrow function which required Nevada Title to handle accumulation and execution of the proper documents between the parties and the recording of these documents once all of the proper documents were in order. The second function Nevada Title performed in this case was to provide title insurance on the property insuring Colonial Bank's title was as described to it by Nevada Title. This second function did not have to occur. In any escrow closing, title insurance is not required, but rather is optional. In fact, there are completely separate charges for the insurance as opposed to the escrow functions. Consequently, in any escrow closing where the title company handles the escrow and also provides insurance, it is performing two separate and distinct functions.

In this case, once Nevada Title was placed on notice that it was required to clear any prior claims, and in particular, the 12 Million Dollar Deed of Trust held by R & S Lenders, any failure by Nevada Title to comply with this instruction was a breach of duty, under ordinary tort principles, of its escrow function. Then, any damages Colonial Bank may thereafter suffer as a result of that breach are compensable. This has nothing to do with the title insurance. In fact, Colonial Bank would have its claim for negligence against Nevada Title in this case even if Nevada Title did not provide insurance, or even if no one provided title insurance. This claim of negligence has nothing to do with insurance, but only the negligent handling of the escrow. Accordingly, it is clear this is different from the ordinary duty of an insurer to its insured to cover policy claims. Nevada Title's breach of duty under its escrow function, which is separate and apart from any insurance it may have provided, provides Colonial Bank with a full, speedy and adequate remedy at law, which will defeat any claims for equity by Colonial Bank.

Once Nevada Title is a party, it is clear that Colonial Bank has an adequate remedy at law thereby precluding any "equitable" claims. **Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n,** 98 Nev. 275 (Nev. 1982) (The district court was without authority to grant equitable relief, since an adequate remedy exists at law).

Thus, the "equitable" claims will all be disposed of once Nevada Title is brought in. At that point, there is no issue as to what a jury will determine versus what the Court will determine. The jury trial can then proceed forthwith with finality for all parties involved.

Respectfully submitted,

MURDOCK & ASSOCIATES, CHTD.
ECKLEY M. KEACH, CHTD.

Robert E. Murdock Bar No. 4013
Eckley M. Keach Bar No. 1154
520 South Fourth Street
Las Vegas, NV 89101
Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby declares she is an employee of Murdock & Associates, Chtd. and that on November 19, 2009 she served by facsimile and U.S. Mail, postage fully prepaid, a true copy of the foregoing PLAINTIFFS' NOTICE OF QUESTIONS OF FACT AND REQUESET FOR *SUA* SPONTE ADDITION OF NEVADA TITLE AS A PARTY PURSUANT TO NRCP 19(a), NRCP 17(a) and NRS 30.130 in the United States mail, postage fully prepaid, addressed as follows:

Richard F. Holley, Esq.
Santoro, Driggs, Walch, Kearney,
Holley & Thompson
400 South Fourth St., 3rd Floor
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An employee of Murdock & Associates, Chtd.

EXHIBIT Z

EXHIBIT Z

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ROBERT MURDOCK, et al. Plaintiffs vs. SAIID RAD, et al. Defendants And related cases and parties	CASE NO. A-574852 A-594512 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

STATUS CHECK - TRIAL PROTOCOL DECISIONS

MONDAY, NOVEMBER 23, 2009

APPEARANCES:

FOR THE PLAINTIFFS: ECKLEY M. KEACH, ESQ.

FOR THE DEFENDANTS: DOUGLAS D. GERRARD, ESQ.
DAVID J. MERRILL, ESQ.
RICHARD F. HOLLEY, ESQ.
JULIE L. SANPEI, ESQ.

COURT RECORDER:
JILL HAWKINS
District Court

TRANSCRIPTION BY:
FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, MONDAY, NOVEMBER 23, 2009, 9:06 A.M.

(Court was called to order)

THE COURT: All right. Let's go to Business Court. Good morning. This is Murdock and Keach versus Rad. How are you all bright shiny faces this morning?

MR. GERRARD: Good morning, Your Honor.

THE COURT: And do I have everybody I need?

MR. KEACH: You do, Your Honor.

MR. GERRARD: You do.

THE COURT: Mr. Keach, are you representing Mr. Murdock today?

MR. KEACH: Your Honor, I am present on my behalf, as well as Mr. Murdock's.

THE COURT: How are you today?

MR. KEACH: I'm good. How about yourself?

THE COURT: I'm well, thank you.

Okay. The reason I had Katy call some of you, and I hope she called all of you so that most of you at least got notice, is because there's also now a motion for preliminary injunction again filed by Mr. Gerrard, which may or may not change some of the issues. And since you were already coming today but I couldn't set it on an OST for today, I thought it would be important that we discuss all of the issues at the same time.

So, Mr. Keach, since you're the one who filed the

THE COURT: Okay. Because this is the third application for injunctive relief by different parties on different sides of the V, it is apparent to me that the parties in this case believe that it is important I resolve at least some of the issues prior to a foreclosure occurring on the property. There are currently two foreclosures scheduled, one for November 30th by Mr. Merrill's clients, and one for December 16 by Mr. Gerrard's clients.

Given these facts and because it appears that there are substantial issues that I have to resolve that include some factual issues, I am going to grant the relief -- the injunctive relief.

However, I am going to make it mutual. Which means that none of the parties will foreclose upon their interests until after I have had an opportunity to make this decision.

Since I have previously said that if I gave this relief I would do it in an expedited fashion, I am going to grant an expedited proceeding to make a determination on the primarily priority issues which have some overlapping issues.

For that reason I am now going to go through the very lengthy document that Mr. Keach gave us and tell you which of the issues that he has addressed in this I am going to advance to our expedited proceeding.

And, Ms. Sanpei, I'm waiting for a response from Judge Earl's office to confirm your date. Soon as I get that,

I'll then negotiate dates with you.

Does everybody have Mr. Keach's document? And we're going to start on page 4 of Mr. Keach's document. We are going to advance Item Number 1, Item Number 2, Item Number 3, Item Number 4, Item Number 7, Item Number 8, Item Number 9, Item Number 10, Item Number 12, Item Number 13, 14, 15, 16, 17, 18, 21, 24, 26, 27, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 44, 45, 46 through 48.

MR. HOLLEY: You said what about 46?

THE COURT: 46 through 48.

Now, if there is anyone who believes that a particular item on the list that was provided by Mr. Keach should either be included in the proceeding that I've not mentioned or excluded that I mentioned from the proceeding, I would be happy to have that discussion now, because I need to make a couple of other findings. And given the mutuality of the injunctive relief I have entered, the problematic bond requirement which has previously been an issue for all of us will not be enforced, since it is a mutual injunctive relief. Which means Mr. Gerrard will not have to post the bond and Mr. Merrill's client will not have to post the bond. This is on the assumption that I am able to get this proceeding resolved within the next 60 days. If for any reason I am not able to get this proceeding resolved in the next 60 days, I will revisit the bond issue.

MR. GERRARD: Would you like me to prepare an order that states that and states this?

THE COURT: That would be lovely. But you've got to send a copy around to everybody.

Mr. Keach, can you come up here.

Have a nice Thanksgiving for all of you.

MR. GERRARD: Thanks.

MR. MERRILL: Thank you, Your Honor. You, too.

THE PROCEEDINGS CONCLUDED AT 11:39 A.M.

* * * * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE HOYT, TRANSCRIBER

9/8/10

DATE

EXHIBIT AA

EXHIBIT AA

IN THE SUPREME COURT OF THE STATE OF NEVADA

R & S ST. ROSE LENDERS, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellant/Cross-Respondent,

vs.

BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN INTEREST TO THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF COLONIAL BANK, N.A.,

Respondent/Cross-Appellant,

and

COMMONWEALTH LAND TITLE INSURANCE COMPANY, AS ASSIGNEE OF ROBERT E. MURDOCK, ESQ.; AND ECKLEY M. KEACH, ESQ.

Respondents.

No.: 56640

RESPONDENT/CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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BRANCH BANKING AND TRUST COMPANY,
SUCCESSOR IN INTEREST TO THE FEDERAL DEPOSIT INSURANCE
CORPORATION AS RECEIVER OF COLONIAL BANK, N.A.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN DETERMINING WITH THE EVIDENCE PRESENTED AND STATUTORILY REQUIRED PRESUMPTIONS, THAT BB&T DID NOT HAVE STANDING TO ASSERT ITS EQUITABLE CLAIMS.

II. WHETHER THE DISTRICT COURT ERRED BY FAILING TO ALLOW ADMISSION OF THE 2009 ASSIGNMENT OF SECURITY INSTRUMENTS (PROPOSED EXHIBIT 58) AND THE 2010 ASSIGNMENT OF DEED OF TRUST (PROPOSED EXHIBIT 59).

III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT ALLOWING THE FDIC TO BE SUBSTITUTED IN AS A REAL PARTY IN INTEREST OR IN THE ALTERNATIVE BY RENDERING ITS DECISION WITHOUT NAMING AN INDISPENSABLE PARTY.

Funds from the Construction Loan were used to fully pay off and satisfy the $29,797,628.72 owing under Colonial's First Loan. (6 JA 1233). Accordingly, pursuant to the plain language of the 2007 Deed of Trust, Colonial succeeded to the priority position of the First Colonial Deed of Trust against the Property. (16 JA 3336-3364).

In July of 2008 Colonial first learned that the R&S Lenders Deed of Trust appeared to be in first position against the Property. (16 JA 3366). St. Rose subsequently defaulted on the Construction Loan by failing to pay the amounts due under the loan. (17 JA 3531-3532). On April 3, 2009, Colonial demanded that St. Rose cure its default. (17 JA 3531-3532). When St. Rose failed to cure, Colonial recorded a Notice of Default. (17 JA 3533-3535). On July 15, 2009, R&S Lenders also recorded a Notice of Default. (18 JA 3536-3538). Both foreclosure proceedings were enjoined pending the outcome of the dispute between St. Rose and Colonial regarding the priority of their respective deeds of trust. (4 JA 938-939).

Ultimately, as discussed in more detail subsequently, the District Court determined that the R&S Lenders Deed of Trust had priority over the 2007 Deed of Trust. (12 JA 2532-2559). The District Court's judgment was not based on a legal analysis of BB&T's equitable claims for priority, but instead on a finding that

BB&T had not shown that it had standing to assert claims arising from the Construction Loan. (12 JA 2532-2559).

STATEMENT OF PROCEDURAL HISTORY

On November 3, 2008, Robert E. Murdock ("Murdock") and Eckley M. Keach ("Keach") filed the Complaint instigating this litigation. (1 JA 12-21, 26-50). Murdock and Keach subsequently filed both a First and Second Amended Complaint. (1 JA 12-22, 26-50). Colonial was first named as a party in Murdock and Keach's Second Amended Complaint filed on April 3, 2009. (1 JA 26). Colonial answered and filed a Cross-Complaint against St. Rose for indemnity and contribution. (1 JA 70-146).

On July 1, 2009, Colonial filed a separate Complaint against R&S Lenders, Forouzan, RPN, Rad and Nourafchan. (1 JA 202-214). On August 11, 2009, the District Court consolidated Murdock and Keach's action with that of Colonial. (4 JA 837-839).

On August 14, 2009, Colonial was closed by the Alabama State Banking Department, and the FDIC was named its Receiver. (13 JA 2578). Also on August 14, 2009, BB&T and the FDIC, in its capacity as Receiver of Colonial, entered into a "Purchase and Assumption Agreement, Whole Bank All Deposits" (previously defined as the "PAA"), which transferred virtually all of Colonial's

> Exhibit 183 [the PAA] is internally inconsistent and is incomplete. It prevents the Court from making a finding that an assignment has occurred of the loan that is at issue. The insufficient and conflicting evidence regarding this assignment is what led me to the position that we're currently in, the ruling that I began to make on the 41(b) [sic] motions at the time we had this motion presented. For that reason and given the particular procedural posture of the case, I'm going to deny the request for substitution of the real party in interest. (11 JA 2365).

This statement was incorporated into the District Court's Findings of Fact. (12 JA 2536).

Ultimately, the District Court's Findings of Fact provide that BB&T's claims were dismissed because "BB&T failed to establish the Colonial Bank loan, Note and Deed of Trust at issue in the case were ever assigned to BB&T." (12 JA 2537). The District Court's Findings of Fact further provide that:

> BB&T has not shown the claims or causes of action against defendants being pursued by BB&T belong to BB&T and it is the successor in interest with the ability to assert these claims against defendants…***since BB&T has not proved that it owns the actions or claims asserted herein, it does not have the ability to assert the claims in the Second Amended Complaint***. (12 JA 2557) (emphasis added).

Once the District Court determined that BB&T lacked standing to assert the claims alleged in its Second Amended Complaint, the District Court's inquiry should have ended. However, the District Court did not end its inquiry after making the dispositive finding that BB&T lacked standing to assert its claims. (12 JA 2532-2559). In dicta, the District Court went on to unnecessarily and

inappropriately rule on issues of lien priority. (12 JA 2558). Based on its decision that BB&T could not pursue claims related to the Construction Loan, the District Court concluded that "St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust." (12 JA 2558). In essence, the District Court extrapolated its decision regarding the ownership of the Construction Loan and 2007 Deed of Trust into an unnecessary (and erroneous) conclusion regarding the priority of such loan.

SUMMARY OF ARGUMENT

A de novo review of BB&T's standing clearly shows that BB&T owned the Construction Loan and had the right to assert a claim for priority of the 2007 Deed of Trust, and that the District Court's determination to the contrary was erroneous and against the clear evidence. Pursuant to NRS 47.250 BB&T was entitled to a presumption that it owned the Construction Loan and 2007 Deed of Trust. The District Court failed to give BB&T the benefit of this presumption even though no rebuttal evidence was produced. Even without this presumption, the evidence presented by BB&T demonstrated by a preponderance of evidence that BB&T owned the Construction Loan and 2007 Deed of Trust. The PAA which was admitted into evidence by the District Court clearly evidences that the Construction Loan, and thereby the right to enforce the 2007 Deed of Trust was transferred from the FDIC to BB&T.

interest to the Construction Loan. (12 JA 2558). Once the District Court found that BB&T lacked standing to pursue its claims, the District Court could not reach the merits of the lien priority dispute.

In error, the District Court held that because it could not determine whether BB&T owned the Construction Loan, the R&S Lenders Deed of Trust should enjoy senior priority against the Property. (12 JA 2558). For example, Conclusions of Law 3, 4, 5, and 7, which collectively grant lien priority to the R&S Lenders' Deed of Trust, are each predicated on the District Court's finding that "[BB&T] has not demonstrated that it is a successor in interest." These Conclusions of Law were made without consideration of any other evidence. (12 JA 2532-2559). The District Court's conclusion regarding ownership of the Construction Loan cannot be extended to determine the priority of such loan. See e.g., Fontenot v. Wells Fargo, 198 Cal. App. 4th at 272. As such, if this Court finds that BB&T has standing to pursue claims related to the Construction Loan, none of the District Court's Findings of Fact with regard to lien priority can be affirmed because the underlying lien priority dispute cannot properly be resolved until the merits of BB&T's claims are considered.

Similarly, even if this Court finds that the District Court properly determined that BB&T lacked standing to pursue claims related to the Construction Loan, the District Court's Findings of Fact with respect to lien priority – e.g., Conclusions of

Law 2-4, 7, 22, 24-27, 29 – should still be set aside. As discussed above, the District Court's findings regarding ownership could not properly be extrapolated to issues of lien priority. See e.g., Fontenot v. Wells Fargo, 198 Cal. App. 4th at 272. Additionally, the District Court refused to substitute, or join as an indispensable party, the only other possible owner of the Construction Loan – the FDIC – prior to issuing its default determination regarding lien priority. Accordingly, even if this Court affirms the District Court's finding that that BB&T did not show that it owned the Construction Loan, this Court should still vacate the District Court's Findings of Fact with respect to lien priority, and the FDIC should be made a party to this case on remand.

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CONCLUSION

For the foregoing reasons, BB&T respectfully requests the Findings of Fact and Judgment of the District Court be overturned, and that this matter be remanded to the District Court for further proceedings regarding BB&T's claims for lien priority.

Dated: September 19, 2012

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/s/Glenn F. Meier

By:_____

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