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 IV

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Cox & Larsen's Notice of Motion and Motion to Dismiss Complaint; Memorandum of Points and Authorities [subsequently superceded and ultimately never ruled on]	I	AA0040-0070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8	12/28/16	Plaintiff's Opposition to Motion to Dismiss; and Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA0073-0103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& Larsen's Motion to Dismiss Complaint And Opposition to Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA0104-0124
10	01/27/17	Plaintiff's Reply in Support of Alternative Countermotion for Leave to Amend Complaint [subsequently superceded]	I	AA0125-0130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

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35	06/22/17	Defendants Douglas D. Gerrard and Gerrard Cox & Larsen's Opposition to Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e)	V	AA0930-0944
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
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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 IV**, 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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DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, Plaintiff, vs. DOUGLAS D. GERRARD, ESQ., individually; and GERRARD & COX, a Nevada professional corporation, d/b/a GERRARD COX & LARSEN; JOHN DOE INDIVIDUALS I-X; and ROE BUSINESS ENTITIES XI-XX, Defendants.	CASE NO. A-16-744561-C DEPT NO. XXVII **PLAINTIFF'S REPLY IN SUPPORT OF ITS COUNTER-REQUESTS FOR JUDICIAL NOTICE AND RESPONSE TO DEFENDANTS NEW REQUESTS**

COMES NOW, the Plaintiff, by and through its undersigned counsel of record, and hereby files these Reply Points and Authorities in Support of its Counter Requests for Judicial Notice, and in response to the Defendants Response and Partial Objection to the same (set forth at pages 5 through 15 of the Plaintiff's April 7, 2017 6:17:59 p.m. filing), and also responds to new and additional Requests for Judicial Notice now made by Defendants to support their new Reply brief arguments.

REPLY POINTS & AUTHORITIES

Reply in Support of Plaintiff's Requests Nos. 1 through 8. Defendants object to the first eight Requests for Judicial Notice made by Plaintiff on the basis of "relevancy" because the

facts on which judicial notice is requested therein are allegedly mere background information irrelevant to the core issues subject to the motion and are not "facts in issue" at this time. Moreover, the Defendants contend that judicial notice of these facts is unnecessary because the allegations of the Plaintiff's First Amended Complaint must in any event be taken as true. To the extent that these responses indicate Defendants' intention to concede the accuracy of the facts set forth in these Requests, then there is no basis to deny the Requests as the facts referenced therein are accurate and are not apparently disputed by the Defendants. These Requests should therefore be granted, or, in the alternative, treated as undisputed factual averments to be treated as true on a Motion to Dismiss.

Reply in Support of Plaintiff's Request No. 9. Defendants are concerned that Request No. 9 "insinuates" certain facts which are not in fact asserted in said Request, such as that "Defendants filed the . . . Amended Complaint [on behalf of BB&T] on their own without Plaintiff's participation." Defendants dispute this allegedly insinuated fact. However, no such factual assertion (or even any such factual insinuation) is made in Plaintiff's Request No. 9, which merely requested Judicial Notice that these Defendants filed an Amended Complaint in the Underlying Subject Litigation in which BB&T was substituted as the Plaintiff, in the place and stead of Colonial, such that these Defendants at that time became counsel of record for BB&T. Nothing stated in this Request No. 9 insinuates or makes any reference, one way or the other, to Plaintiff's participation in retaining these Defendants or the degree of knowledge or consent which Plaintiff had as to the filing of this Amended Complaint on their behalf, one way or the other. Nor was any such insinuation intended.

It is clear that at some point and time BB&T became the client of the Defendants and no one on either side of the instant lawsuit has disputed that. Plaintiff is glad to know that Defendants want no insinuation that they acted alone, and Plaintiff is relieved that Defendants concede that both BB&T and Gerrard and GC&L participated in the retention by BB&T of Defendants as BB&T's counsel. This should allow this Court to quickly reject certain of the frivolous arguments now raised by Defendants that BB&T has no standing to sue Defendants for their representation of BB&T.

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The Plaintiff's objections to Request No. 9, which object to statements which are not in fact made in Request No. 9, and "insinuations" which are not in fact made in Request No. 9, nor would be made by BB&T, should be disregarded. The remainder of the response to Request No. 9 seems to indicate that the Defendants do not contest the facts alleged and set forth in Request No. 9 such that there is no reason to deny this request. Request No. 9 should be granted, or treated as an uncontested factual averment.

Reply in Support of Plaintiff's Requests Nos. 10 and 11. Defendants' Requests No. 10 and 11 seek Judicial Notice that certain pleadings were filed in the Underlying Subject Litigation at issue herein, and that those pleadings made certain allegations or asserted certain defenses. Defendants dispute these Requests to the extent that they seek Judicial Notice of the truth of the cited sections of the pleadings. However, the truth of the cited sections of the pleadings is not at issue in these requests. Indeed, Plaintiff's Counter-Request filing made it very clear, in the initial legal analysis section thereof, that this Court cannot take judicial notice of the truth of any statement made in a court filing, but can only take notice of the truth of statements made in orders, judgments, and decrees, and even then, only with respect to non-dicta portions of said orders, judgments, and decrees, which are not reasonably disputed. *See*, Plaintiff's Response and Counter-Requests, filed March 27, 2017 at 4:08:06 p.m. at pp. 4-5, ll. 15-8. The requested facts at issue in Plaintiff's Requests Nos. 10 and 11, go to the fact that the Defendants herein, as counsel for the Plaintiff in the underlying litigation, made certain allegations which said Defendants should have known they would need to prove at trial, based on said allegations being denied in the answers thereto, and based on the affirmative defenses also asserted in response to said allegations. Thus, Request No. 10 and Request No. 11 merely seek for this Court to take Judicial Notice of the fact that certain pleadings exist in the Subject Underlying Litigation, and of the contents of said pleadings. Nothing set forth in the response from the Defendants, would preclude this Court from so ruling, and, thus, these requests should be granted.

Reply in Support of Plaintiff's Request No. 12. Defendants contend that Request No. 12 is irrelevant to the core issues subject to the Motion to Dismiss and unnecessary for this Court to judicially notice as involving matters which "are not 'facts in issue'." However, the Defendants then also seem to indicate that these facts *are* in issue by disingenuously contending that

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Defendants are not assured of the authenticity of the 2009 Bulk Assignment attached as *Exhibit L* to Plaintiff's Counter Requests for Judicial Notice. Thus, the first arguments raised by the Defendants seem to offset and overcome the second half of their response. In any event, a certified copy of this *Exhibit L* document has previously been provided in this matter, and another certified copy thereof is attached to this Reply. The original of that certified copy, with the raised stamp of the Recorder's Office, will be attached to the version of this filing which is delivered to this Court, such that no reasonable argument as to the authenticity of this document can be made, for purposes of objecting to judicial notice of the fact that this document exists and has been recorded, and states what it states in its contents. In any event, as the allegations of the FAC regarding this document must be assumed to be true, if this Request is not granted, the FAC should still be upheld in its descriptions of this document, which, taken as true, overcome the Motion to Dismiss.

Reply in Support of Plaintiff's Requests Nos. 13 and 14. In the response to these Requests, the Defendants once again seem to indicate that the facts requested to be taken notice of are not facts in issue, such that, if they are not to be contested, there is no reason to deny the Judicial Notice Request. Furthermore, the Defendants contend that they do not object to this Court taking judicial notice of these statements having been made and said during the hearings but do not wish this Court to take judicial notice of the veracity of the statements. The Plaintiff is not seeking judicial notice from this Court as to the veracity of the statements, but merely seeks judicial notice by this Court of what was said by counsel and the original Judge in the underlying suit, from which this Court can then ultimately derive its own rulings. Therefore, this Court should take Judicial Notice as requested in Plaintiff's Requests Nos. 13 and 14.

Reply in Support of Plaintiff's Request No. 15. Although the Defendants have themselves sought Judicial Notice from this Court of certain of the contents of the Findings of Fact and Conclusions of Law entered by the District Court in the Subject Underlying Litigation, which were, indeed, attached as Exhibit B to the Defendants' RFJN, Defendants nevertheless object to Plaintiff using this same document. The Defendants rely on case law indicating that taking Judicial Notice of a document is not the same as accepting a particular interpretation of its meaning. However, as the legal authorities cited in Plaintiff's Counter-Request clearly

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demonstrate, it is perfectly appropriate for this Court to take Judicial Notice of the accuracy of statements made in another (sufficiently related) case's court Orders, Judgments, and Decrees, as long as said findings, rulings, and decrees were not unnecessary dicta, having no preclusive effect in this instant action. Based thereon, no valid reason has been provided for denying Plaintiff's Request for Judicial Notice No. 15, which should be granted.

Reply in Support of Plaintiff's Request No. 16. This Request is not objected to and therefore should be granted.

Reply in Support of Plaintiff's Requests Nos. 17 and 18. Again, this Court can take Judicial Notice of statements that were made during the underlying court proceedings and then draw its own conclusions from those facts. Plaintiff is not asking this Court to judicially notice the veracity of any statements made in open court during the proceedings. Moreover, with respect to the specific bullet points which are numbered in the Defendants' response, the following should be noted:

(1) *First Bullet Point of Request 17.* There is no dispute that can legitimately be made that Gerrard rested his primary case in chief on March 30, 2010 and that the underlying court insured that Gerrard had done so save for the testimony of a witness, Brad Burns of Centex Homes, who would not be a proper witness to utilize to introduce evidence relating to the assignment from the FDIC as Receiver for Colonial to Branch Banking & Trust, given that Centex Homes' involvement in these matters had been long previous to that assignment. Defendants, on behalf of Plaintiff in the Subject Underlying Litigation, were allowed to call Brad Burns after otherwise completing their case in chief merely because he was not available on that date, as a concession to counsel in that case, in lieu of that court simply indicating that Mr. Burns would not be able to testify, at all, if he was not available at that point in the Trial. There could be no question in this case that the record is extremely clear both with respect to what was stated in the trial transcripts and what was later explained in the court's Findings of Fact and Conclusions of Law, as to the propriety of treating Gerrard's case in chief as having been completed with respect to all issues that involved BB&T's acquisition and ownership of its claims,

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for purpose of allowing the parties which opposed BB&T in the underlying case, to then make oral NRCP 52(c) motions with respect to whether Gerrard had adequately proven up BB&T's claims. These sources are well cited in the Plaintiff's Requests and are alleged and referenced in the Plaintiff's First Amended Complaint.

(2) *Second Bullet Point of Request 17.* Again, the Plaintiff is not asking for this Court to take judicial notice of the veracity of any statements made during the trial by any party, but merely to judicially notice the fact that the underlying court made certain statements and for this Court to then draw its own conclusions based thereon, as well as judicially noticing what other attorneys said during the hearings and to draw its own conclusions based on the underlying court's response thereto.

(3) *Fourth Bullet Point of Request 17.* This Court should certainly take Judicial Notice of the actual statements made on the pages referenced in the fourth bullet point of Request No. 17, including not only that which is now quoted by the Defendants in their Response, but all of the statements made in the related pages, and if this Court is more comfortable doing so, then taking Judicial Notice of the Plaintiff's summary and paraphrase, then that is fine with the Plaintiff.

(4) *The first bullet point of Request No. 18* asked this Court to take Judicial Notice as to when Mr. Gerrard finally attempted to introduce the 2009 Bulk Assignment, namely on March 31, 2010. If this Court is more comfortable taking Judicial Notice that Mr. Gerrard "first" attempted to introduce the 2009 Bulk Assignment on that date, given the Defendants contentions that the word "finally" is argumentative, then that is fine with the Plaintiff. It might also be noted that the Defendants' characterization of the FAC on this point is unfair and improper. More particularly, the Defendants contend that the FAC "fails to allege when it [BB&T] made Defendants aware of the 2009 Bulk Assignment." However, the FAC repeatedly indicated that the Defendants were or should have been aware of the 2009 Bulk Assignment, shortly after it was recorded. For purposes of a Motion to Dismiss, if any set of facts would entitle the Plaintiff to relief, then the Motion to

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Dismiss must be denied, and the accuracy of factual allegations must be assumed. Thus, based on applying these two rules, for purposes of reviewing the Motion to Dismiss, this Court must assume, factually, that the Defendants knew of the 2009 Bulk Assignment soon after it was recorded. The precise date on which the Defendants actually learned of the 2009 Bulk Assignment, and how they learned thereof (either by being informed thereof by the Plaintiff BB&T, or otherwise) is not yet known and will be the subject of discovery in this case. For purposes of the present Motion to Dismiss however, sufficient facts have been alleged as to what the Defendants knew or, alternatively, should have known, to overcome any Motion to Dismiss arguments with respect to these questions. As the Defendants have themselves repeatedly indicated throughout their Response to the Plaintiff's Counter-Requests for Judicial Notice, this Court is to take all of the factual allegations of the First Amended Complaint as true.

(5) Again, this Court is simply being asked in the *second bullet point of Request No. 18*, to accept and take Judicial Notice of the facts that certain statements were made by Mr. Gerrard, by the underlying court, and by other persons who spoke during those portions of the trial which are memorialized in the transcript pages attached as *Exhibit R* to Plaintiff's Requests. Plaintiff does not seek Judicial Notice by this Court of the veracity of the statements. Rather, this Court can take Judicial Notice that said statements were made, and then this Court can make its own conclusions based thereon.

(6) In its *third bullet point of Request No. 18*, Plaintiff seeks Judicial Notice that Mr. Gerrard moved to substitute the FDIC as the real party in interest. This fact is true and is not contested by the Defendants who merely object to the wording of Plaintiff's Request as argumentative. That is fine and the Plaintiff has no problem or concern with this Court judicially noticing the fact of Mr. Gerrard moving to substitute the FDIC as the real party in interest, as shown by the portion of the transcript cited, in whatever neutral terms this Court wishes to utilize. All of these bullet pointed requests should be granted.

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Reply in Support of Plaintiff's Requests Nos. 19 through 21. The Defendants are upset that Plaintiff wishes this Court to take Judicial Notice of Factual Findings and Conclusions of Law which were non-dicta, and which, therefore potentially significantly affect this action. Defendants argue that it is "improper" for this Court to classify portions of the underlying court's ruling as dicta or non-dicta for purposes of Judicial Notice. This argument is simply inaccurate. As noted in the legal authorities cited by the Plaintiff in its Response and Counter-Request filing, which legal authorities have not been refuted by the Defendants, this Court may only take Judicial Notice of non-dicta rulings in court orders, judgments, and decrees and should not take Judicial Notice of dicta findings or rulings, especially where such dicta, as here, has no preclusive effect in this litigation. *See, e.g., Jonathan Woodner Co. v. Adams*, 534 A.2d 292, 297 (D.C. Cir. 1987) the Circuit Court explained as follows: "Woodner claims that the trial judge erred in failing to take judicial notice of the entire Joyner opinion and refusing to permit the opinion's . . . statement of the facts to be read to the jury. While it is true that "[t]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records," 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5106 (Supp.1987), that does not necessarily imply that a court must therefore notice the truth of all facts that are asserted in those records. *Id.* at § 5104; *United States v. American Telephone & Telegraph Co.*, 83 F.R.D. 323, 334 n. 25 (D.D.C.1979) . . . . **[M]ere dicta . . . cannot be considered a resolution of an issue**, *Maggard v. O'Connell*, 227 U.S.App.D.C. 62, 68, 703 F.2d 1284, 1290 (1983), **and therefore is not a proper subject for judicial notice**." (Emphasis added.)

Thus, it is absolutely proper for this Court to determine whether certain rulings are dicta or non-dicta before determining which rulings it will accept as the basis for judicially noticed facts. Defendants request that the court consider each finding and conclusion in the FF&CL "of equal weight". This would be inappropriate. Only findings which are non-dicta are to be given any weight at all, for purposes of Judicial Notice. Dicta findings are of no preclusive effect in this case and should not be given equal weight with relevant material non-dicta findings and rulings and conclusions, but should be given zero weight by this Court.

Reply in Support of Plaintiff's Request No. 22. The arguments in response to Plaintiff's Request No. 22 are somewhat difficult to follow. Nevertheless, it suffices to say that the wording

of Plaintiff's Request No. 22 is clearly supported by the language of the underlying Motion to Alter or Amend Judgment filed by Gerrard and GC&L, on the pages cited in Plaintiff's Counter-Request, which clearly do indicate that an argument was made by Defendants in the Subject Underlying Litigation, that they were unfairly surprised when they were required to prove the BB&T acquisition of its claims. (The same argument, of "sand bagging" was also made orally during trial, *see*, *Exhibit BB* hereto, at line 23.) The district court in the Subject Underlying Litigation clearly read the motion as making such an argument, given the findings which that underlying district court chose to include in its order denying the motion as quoted in Plaintiff's Request No. 23.[2]

Reply in Support of Plaintiff's Request No. 23. Again, this Request is clearly supported by the language of the order therein on the pages cited for said quotations and the other arguments raised in opposition to said Request by the Defendants have already been addressed and demonstrated to be inaccurate, above. This Request should be granted.

Reply in Support of Plaintiff's Request No. 24. Plaintiff's Request No. 24 is clearly supported by the language of the Exhibit U attached in support of that Request, and the specific language of the Request is clearly taken from the most relevant portions of Exhibit U such that this Request should be granted.

Reply in Support of Plaintiff's Request No. 25. Plaintiff's Request No. 25 sought Judicial Notice from this Court of the date on which the Nevada Supreme Court rejected an *en banc* rehearing request of its earlier decision. Defendants wish this Court to take Judicial Notice not only of the majority opinion issued by the Nevada Supreme Court on May 31, 2013, but also of the dissenting opinion of two dissenting Justices.

The dissent is however irrelevant as the law of the underlying case is based on the 5-Justice majority's ruling which did not adopt the reasoning of the dissent, but instead upheld the lower court's decision rejecting BB&T's case, not on the merits, but because of Gerrard and

---

[2] Plaintiff does not seek Judicial Notice of *Exhibit BB* at this late date, but offers it for the Court's consideration *if* the Court determines it may appropriately review it under the *Baxter* decision described in the Opposition to the Motion to Dismiss the FAC at page 2, without altering the nature of Plaintiff's Motion into a Motion for Summary Judgment. Otherwise, this Court should not review that document or any other documents presented by either party herein, which it feels would not pass the *Baxter* test, but would, if reviewed, alter the nature of the Motion to Dismiss, but should instead simply take the allegations of the FAC as true, on all points, and deny the Motion to Dismiss based thereon.

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GC&L's failures to comply with NRCP 16.1 which led to subsequent failures, to be able to demonstrate that BB&T rightfully owned and had acquired the right to pursue the claims at issue (which it had in fact done). Thus, the majority opinion cited in Plaintiff's Request No. 25, clearly supports exactly the Judicial Notice that is sought by the Plaintiff herein.

Reply in Support of Plaintiff's Requests Nos. 26 and 27. These Requests are not objected to and therefore should be granted.

RESPONSE TO DEFENDANTS NEW REQUESTS FOR JUDICIAL NOTICE

Plaintiff hereby responds to the additional and new Requests for Judicial Notice also included in Defendants' April 7, 2017, 6:17:59 p.m., omnibus filing, at pp. 15-18 thereof, consisting of entirely new Requests numbered 10-18 (with multiple subparts) supported (allegedly) by new Exhibits Y through AA.

These Requests were filed after the end of the business day on Friday, April 17, 2017, such that they were not able to be meaningfully reviewed until Monday, April 10th, only seven (7) days before this Court's scheduled April 19th hearing. Essentially, these Requests constitute a brand new motion, scheduled to be heard seven (7) business days (instead of the standard 30) after their filing, meaning that any opposition or response thereto, instead of being filed (the standard) ten (10) business days later, would be due within six (6) business days, if the Court wanted to have only one evening to read the Opposition overnight, and would be due in only two (2) business days if the Court wanted to have the standard time period applicable to receiving a Reply brief. There is no procedural rule which allows for such a brand new motion to be filed only seven (7) days before a hearing. Thus, the attachment of these brand new Requests is improper and they should be stricken.

Furthermore, these Requests are provided in order to support new Reply brief arguments, not made in the Motion to Dismiss the First Amended Complaint, and not able to be addressed in the Opposition thereto, and they should be stricken on that basis as well.

Furthermore, these brand new Requests begin to run rather far afield from an analysis of whether the allegations of the FAC, taken as true, support a claim herein, and demonstrate that Defendants are increasingly seeking some sort of summary judgment adjudication of this case, by raising arguments on the basis of documents not referred to within the FAC, and/or not central to

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the Plaintiff's claims in the FAC, such that review of these documents would be incompatible with *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 930 (2015), in that review thereof would require this Court to treat the Motion to Dismiss as a Motion for Summary Judgment. This would be unfair to both sides of this suit, both of whom have relied, in their filings and arguments, upon the legal standards applicable to a Motion to Dismiss, not one for Summary Judgment, and neither of whom have provided affidavits in support of or as a defense to a Motion for Summary Judgment. The Motion to Dismiss should continue to be treated as a Motion to Dismiss, and, in order to further that end, these Requests should be denied.

Substantively, these new Defense Requests are also objectionable. **New Requests 10-14**, for example, are made by Defendants in support of a new Reply brief argument as to the issues originally intended to be tried at the limited subject Trial, which facts are irrelevant, however, given what happened at Trial once an NRCP 52(c) Motion was granted, forestalling the need for further adjudication of many of the issues set forth in the NQF, as discussed in Plaintiff's Reply in Support of its Alternative Countermotion for Leave to Amend, filed concurrently herewith, at pp. 8-10, and 11 thereof.

Similarly, Defendants **New Requests numbered 15-18** seek judicial notice of the arguments raised in appellate briefs (by lawyers other than Defendants) on behalf of BB&T. These Judicial Notice Requests are asserted to support a new Reply brief argument that, BB&T's decision not to seek to overturn the dicta portions of Judge Gonzalez's rulings on appeal, have some bearing on this case. This assertion is however false. The Nevada Supreme Court ruled against BB&T on the grounds that it had not proven that it had acquired Colonial's rights at issue in the Subject Underlying Litigation. The Nevada Supreme Court would not, therefore, have needed to address any arguments on the merits of BB&T's equitable subrogation claims and defenses, even if they had been directly argued on appeal. Had the Nevada Supreme Court ruled otherwise, and set aside the lower court's Rule 52(c) Order, it would still not have addressed the merits of these claims, but would have remanded the case to then allow the Trial to resume on those merits questions. BB&T's position on appeal was consistent with its position in this suit: the Rule 52(c) motion prevented any true adjudication of the merits of BB&T's claims and defenses.

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CONCLUSION

For the reasons stated above, Plaintiff's Requests for Judicial Notice should be granted, and Defendants new Requests should be denied.

DATED this 17th day of April, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 001394
D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 004904
801 South Rancho Drive, Suite D-4
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 12th day of April, 2017, service was made by the following mode/method a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF ITS COUNTER-REQUESTS FOR JUDICIAL NOTICE AND RESPONSE TO DEFENDANTS NEW REQUESTS** to the following person(s):

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

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

An Employee of Albright Stoddard Warnick & Albright

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

CERTIFIED COPY OF EXHIBIT L

Inst #: 200911030003188
Fees: $19.00
N/C Fee: $0.00
11/03/2009 02:08:59 PM
Receipt #: 115867
Requestor:
FIRST AMERICAN TITLE RENO
Recorded By: STN Pgs: 6
DEBBIE CONWAY
CLARK COUNTY RECORDER

NO APN#

Recording Requested by:
Name: First American Title Insurance Company
Address: 5310 Kietzke Lane, Suite 100
City/State/Zip: Reno, NV 89511-2043
Order Number: 121-2380972

ASSIGNMENT OF SECURITY INSTRUMENTS AND OTHER LOAN DOCUMENTS

(for Recorder's use only)

(Title of Document)

Recorder Affirmation Statement

Please complete Affirmation Statement below:

☒ I the undersigned hereby affirm that the attached document, including any exhibits, hereby submitted for recording does not contain the social security number of any person or persons. (Per NRS 239B.030)

-OR-

☐ I the undersigned hereby affirm that the attached document, including any exhibits, hereby submitted for recording does contain the social security number of a person or persons as required by law: _____
(State specific law)

W. D. Bernard — Escrow Officer
Signature **Title**

W. D. BERNARD
Print Signature

This page added to provide additional information required by NRS 111.312 Sections 1-2 and NRS 239B.030 Section 4.

(Additional recording fee applies)

THIS INSTRUMENT IS BEING RECORDED AS AN ACCOMODATION ONLY. NO LIABILITY EXPRESSED OR IMPLIED, IS ASSUMED BY FIRST AMERICAN TITLE CO.

When Recorded Return to:

Leisa DeSimone
Branch Banking and Trust
100 Colonial Bank Blvd
Building B – Third Floor
Montgomery, AL 36117

----------For Recorder's Use----------

State of Nevada:
County of Clark :

ASSIGNMENT OF SECURITY INSTRUMENTS AND OTHER LOAN DOCUMENTS

KNOW ALL PERSONS BY THESE PRESENTS: That the **FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for Colonial Bank** ("Assignor"), by virtue of its appointment by the Alabama Superintendent of Banks for the State of Alabama as receiver to liquidate and distribute the assets of Colonial Bank as set forth in that certain Certificate of Appointment dated August 14, 2009 and filed in the Office of the Judge of Probate of Montgomery County, Alabama on the 17th day of August, 2009 and recorded at Real Property Book 03936, Pages 534-536 (which is attached hereto as Exhibit A), for and in consideration of the sum of **TEN AND NO/100 DOLLARS ($10.00),** and other good and valuable consideration received from or on behalf of **Branch Banking and Trust Company**, a North Carolina banking corporation, ("Assignee"), the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, assign, transfer and set over unto Assignee all of Assignor's rights, title and interests in and to all those certain Mortgages, Security Deeds, Deeds to Secure Debt, Deeds of Trust, Assignments of Rents and Leases, UCC-1 financing statements, judgment liens, and all such other instruments and security agreements securing loans owned by Colonial Bank and held of record by Colonial Bank or any of its predecessors as of August 14, 2009 in the Public Records of the counties of the State of Nevada and all modifications, extensions, amendments and renewals thereto (collectively the "Security Instruments"), however, expressly excluding from the definition of Security Instruments all Mortgages, Security Deeds, Deeds to Secure Debt, Deeds of Trust and such other instruments registered under or by use of Mortgage Electronic Registration Systems, Inc. ("MERS") regardless of Colonial Bank's ownership or beneficial interest therein.

Assignor does further grant, bargain, sell, assign, transfer and set over unto Assignee all of Assignor's rights, title and interests in and to the promissory notes, loan documents and all other indebtedness secured by the Security Instruments, as evidenced by related promissory notes, any and all loan agreements, pledges, security agreements and UCC financing statements and all modifications, extensions, amendments and renewals to said documents and instruments together with any and all other loan documents, title policies and casualty insurance policies evidencing, securing or relating to any of the foregoing all of which have been delivered to the Assignee.

For purposes of clarification it is the intent of Assignor to convey to Assignee all interests of Colonial Bank in all Security Instruments existing of record as of August 14, 2009 and held by Assignor as receiver for Colonial Bank.

TO HAVE AND TO HOLD the same unto Assignee and its legal representatives, successors and assigns forever. This assignment is made as-is, without recourse, warranty or representation of any nature or kind whatsoever, whether express or implied.

IN WITNESS WHEREOF, this Assignment of Security Instruments is executed this the 23rd day of October, 2009, to be deemed effective as of the 14th day of August, 2009.

Signed, sealed and delivered in our presence:

Tamara A. Stidham

Print name: Tamara A. Stidham

Karen L. Lugen

Print name: Karen L. Lugen

FEDERAL DESPOSIT INSURANCE CORPORATION, as Receiver for Colonial Bank, an Alabama banking corporation.

By: Teresa Griswold

Printed Name: Teresa Griswold

Its: Attorney-in-fact

STATE OF ALABAMA)
: ss.
COUNTY OF MONTGOMERY)

Personally appeared before me, the undersigned authority in and for the said county and state, on this 23rd day of October, 2009, within my jurisdiction, the within named Teresa Griswold, who acknowledged that s/he is Attorney-in-fact of the Federal Deposit Insurance Corporation, and that for and on behalf of the said Federal Deposit Insurance Corporation, as Receiver for Colonial Bank, and as its act and deed s/he executed the above and foregoing instrument, after first having been duly authorized so to do.

Pamela A. Chesnutt

Signature of person taking acknowledgment

SEAL

Pamela A. Chesnutt

Name of acknowledger typed, printed or stamped

Notary Public

My Commission Expires: 11/17/09

This Instrument Prepared By:
Richard A. Wright, Esq.
Jones, Walker, Waechter, Poitevent,
Carrère & Denègre, L.L.P.
Post Office Box 46
Mobile, AL 36601

STATE OF ALABAMA
STATE BANKING DEPARTMENT

Bob Riley
Governor

John D. Harrison
Superintendent of Banks

STATE OF ALABAMA
MONTGOMERY COUNTY

I, John D. Harrison, Superintendent of Banks, under my hand and official seal and pursuant to Section 5-8A-24, Code of Alabama, 1975, hereby appoint the Federal Deposit Insurance Corporation, as receiver to liquidate and distribute the assets of Colonial Bank, with its principal place of business being in Montgomery, Montgomery County, Alabama.

I further direct that this Certificate of Appointment is to be filed in the Office of the Superintendent of Banks and that a certified copy of this Certificate of Appointment is to be filed in the Office of the Judge of Probate of Montgomery County, Alabama.

IN WITNESS WHEREOF, I have hereunto set my hand and the official seal of the State Banking Department on this the 14th day of August, 2009.

John D. Harrison
Superintendent of Banks
State of Alabama

SBD-105
CENTER FOR COMMERCE • 401 ADAMS AVENUE • P.O. BOX 4600 • MONTGOMERY, AL 36103-4600
TELEPHONE (334) 242-3452 • FAX (334) 242-3500 OR BUREAU OF LOANS (334) 353-5961

Exhibit A

FDIC
Division of Resolutions and Receiverships
Dallas Regional Office
1601 Bryan Street
Dallas, Texas 75201
Telephone (214) 754-0098

August 14, 2009

John D. Harrison
Superintendent of Banks
State of Alabama
State Banking Department
401 Adams Ave., Suite 680
Montgomery, AL 36104

Subject: **Colonial Bank**
Montgomery, Alabama– In Receivership
Acceptance of Appointment as Receiver

Dear Sir or Madam:

Please be advised that the Federal Deposit Insurance Corporation accepts its appointment as Receiver of the captioned depository institution, in accordance with the Federal Deposit Insurance Act, as amended.

Sincerely,

FEDERAL DEPOSIT INSURANCE CORPORATION

By: _____
Robert C. Schoppe
Receiver-In-Charge

STATE OF ALABAMA
STATE BANKING DEPARTMENT

TO WHOM IT MAY CONCERN:

I hereby certify that the attached is a true and correct copy of the Superintendent's certificate appointing the Federal Deposit Insurance Corporation as receiver to liquidate and distribute the assets of Colonial Bank, with its principal place of business being in Montgomery, Montgomery County, Alabama.

Given under my hand this the 17th day of August 2009.

Elizabeth T. Bressler
General Counsel
State of Alabama
State Banking Department

STATE OF ALA.
MONTGOMERY CO.
I CERTIFY THIS INSTRUMENT
WAS FILED ON
RLPY 03936 PG 0534-0536 2009 Aug 17
09:53AM
REESE MCKINNEY JR.
JUDGE OF PROBATE

INDEX	$5.00
REC FEE	$7.50
CERT	$1.00
CASH TOTAL	$13.50
107133	Clerk: SHAUNTE 09:54AM

SBD-107
CENTER FOR COMMERCE • 401 ADAMS AVENUE • P.O. BOX 4600 • MONTGOMERY, AL 36103-4600
TELEPHONE (334) 242-3452 • FAX (334) 242-3500 OR BUREAU OF LOANS (334) 353-5961

CERTIFIED COPY
I hereby certify this document was filed in Montgomery County, Alabama on 8/17/09 in
Book 3936
Page 534-536
Reese McKinney, Jr.
Judge of Probate

EXHIBIT BB

ORIGINAL

Electronically Filed
04/19/2010 04:08:23 PM

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

EVIDENTIARY HEARING - DAY 9
(ARGUMENT)

TUESDAY, APRIL 13, 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:
JILL HAWKINS
District Court

TRANSCRIPTION BY:
FLORENCE HOYT
Las Vegas, Nevada 89146

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

RECEIVED
APR 19 2010
CLERK OF THE COURT

You know, I find Mr. Holley's argument to be really almost comical. They bring a -- they take a deposition of BB&T's person most knowledgeable, and they serve a notice of that deposition and they ask for "all documents, memorandum, and correspondence regarding BB&T's acquisition of the loan." And the witness told him that the only document that exists, which was on the Internet, they could pull it down themselves, is this Exhibit 183. And there is nothing else. There's no other document that evidences the acquisition of this loan. This is it. And they've known about it from the beginning.

In Number 5 in their notice -- these are the two issues that they -- these are the two categories that they say should have covered this. Number 5 was an assignment of the policy of title insurance and any endorsements. It doesn't say anything about an assignment of the loan. And there isn't anything. There's no document that assigned this specific title policy for this specific loan.

THE COURT: I'm not concerned about whether the title policy was assigned or not --

MR. GERRARD: I understand that. But --

THE COURT: -- for the purposes of this proceeding.

MR. GERRARD: Well, the point here is this is a sandbagging. And whether Your Honor decides to condone it or not is up to you. But the point is this issue was never raised. It wasn't raised in any of the over 40 issues that

RPLY
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dca@albrightstoddard.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, Plaintiff, vs. DOUGLAS D. GERRARD, ESQ., individually; and GERRARD COX & LARSEN, a Nevada professional corporation, JOHN DOES I-X; and ROE BUSINESS ENTITIES XI-XX, Defendants.	CASE NO. A-16-744561-C DEPT NO. XXVII **PLAINTIFF'S REPLY IN SUPPORT OF ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND COMPLAINT** Date of Hearing: April 19, 2017 Time of Hearing: 10:00 a.m.

COMES NOW, Plaintiff, BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, qualified and registered to do business in Nevada (hereinafter "Plaintiff" or "BB&T"), by and through its attorneys of record, ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and hereby files the herein Reply Points and Authorities in Support of its Alternative Countermotion to Amend, which it included with its Opposition to the Motion to Dismiss First Amended Complaint filed by Defendants, DOUGLAS D. GERRARD, ESQ. (hereinafter "Gerrard") and GERRARD COX & LARSEN (hereinafter "GC&L") (collectively hereinafter the "Defendants").

Said Alternative Countermotion is opposed at page 20 of the Defendant's Reply Points and Authorities in Support of their Motion to Dismiss.

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

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

II. Response to Arguments Regarding the "Futile" Nature of Any Second Amended Complaint.

Defendants oppose the Alternative Countermotion to Amend on the grounds that any Amendment would be futile, based on the reasons set forth "above" in their Reply brief in support of their motion to dismiss. (This essentially concedes that there are no missing allegations in the First Amended Complaint, which means that, taking all of those allegations as true, the Motion to Dismiss should be denied. Thus, this is also essentially a concession that the true nature of the Motion to Dismiss is a premature motion for summary judgment, seeking an early and dispositive ruling on the merits of this action before any discovery is completed, and without presentation of all of the relevant facts to this Court, including live or affidavit witness testimony, in a more appropriate setting, such as a subsequent motion for summary judgment or at trial.)

The Defendants' futility argument is thus based on the Reply brief's reiteration of the common theme of the Motion: namely, the assertion that Plaintiff *cannot* allege or prove *any set of facts* which would allow it to prevail in this case, because of the statute of limitations and because of the "case within the case" / proximate damages arguments raised by Defendants. Most of Defendants' arguments on theses point have already been adequately addressed in the Opposition to the Motion to Dismiss and need not be restated here.

However, the Reply brief, which is the basis for the Opposition to the Alternative Countermotion, does raise a few new points, not set forth in the Motion (and thus not able to be

addressed in the Opposition), which should therefore either be stricken, or can also be addressed here, as relative to the futility argument raised in opposition to the alternative countermotion to amend. The most material of these new arguments are described and refuted below:

A. Judge Mahan's Decision in *BB&T v. Nevada Title Co.*

One of the new arguments raised by the Reply is to insist that a federal district court's decision authored by Judge Mahan in *BB&T v. Nevada Title Co.*, 2011 WL 1399833 (April 13, 2011) is somehow persuasive herein, as it took the position that BB&T was not a proper assignee of the Colonial deed of trust, thus supposedly supporting the assertion that BB&T has no standing to bring even this instant lawsuit for legal malpractice.

This argument however remains frivolous and absurd. Plaintiff has contended in the FAC that these Defendants represented Plaintiff in the underlying litigation. That fact has not been disputed. Nor have the existence of pleadings filed on behalf of BB&T by Gerrard and GC&L in the underlying suit been disputed, which pleadings clearly establish an attorney client relationship for purposes of establishing the first element of a legal malpractice claim, namely the standing element. None of those assertions are somehow undone by Judge Mahan's decision.

Rather, Judge Mahan's decision is **yet another example of the ways in which BB&T has been damaged by the malpractice at issue in this case, and using it against BB&T in this case is preposterous.** In Judge Mahan's decision, he ruled that, on the basis of claim preclusion *stemming from the underlying decision at issue in the Subject Underlying Litigation at issue in this case*,. BB&T could not sue Nevada Title for certain of its closing-services failures, because a necessary element of BB&T's claim was that it owned Colonial's former rights, and Judge Gonzalez had ruled that BB&T did not own such former rights. However, the FAC in this case avers that no such decision by Judge Gonzalez would have been reached, had the 2009 Bulk Assignment or other evidence been timely procured and disclosed by Defendants, for her review and analysis. This assertion must be taken as true by this Court at this stage of this case.

Moreover, the FAC is not only presumed true, but its accuracy on this point is also verified by another federal district court decision in Nevada (of at least as much persuasive authority herein as Judge Mahan's decision), which *did* review the 2009 Bulk Assignment Judge Gonzalez declined to admit due to procedural errors during discovery (the "same one at issue here"), and *did*

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rule that this 2009 Bulk Assignment was effective and *did* establish BB&T's ownership of a prior Colonial note and deed of trust, in Nevada, and upheld the rights to enforce and foreclose thereon, despite a Summary Judgment challenge. *See*, *BB&T v. Smoke Ranch Development, LLC*, 2014 WL 4796939 (U.S. Dist. Nev. Sept. 26, 2014), attached for the Court's convenience as *Attachment 1* hereto.

In the *Smoke Ranch* case, Nevada Federal Court Judge Gordon reviewed the same 2009 Bulk Assignment at issue in this litigation, which Judge Gonzalez declined to review because Defendants had not timely disclosed it, and held that said 2009 Bulk Assignment *did* clearly indicate that Colonial's rights in Nevada based promissory notes and security instruments had been conveyed to and acquired by BB&T. Judge Gordon's reasoning included the following: "Here, the Bulk Assignment is sufficient to demonstrate the purpose of delivery: transfer to BB&T of all of the FDIC's 'rights, title and interests in and to all those certain Mortgages, Security Deeds, Deeds to Secure Debt, Deeds of Trust, ..., and all such other instruments and security agreements securing loans owned ... and held of record by Colonial Bank or any of its predecessors as of August 14, 2009.'" *Id.* at *4. As already noted in the Plaintiff's Opposition, this assignment would mean that BB&T also had an assignment of Colonial's equitable subrogation rights, under relevant 9th Circuit and Nevada law.

Moreover, this *Smoke Ranch* decision rejected the very same argument that is now raised by Defendants in their Reply brief, and declined to rule that Judge Gonzalez's or Judge Mahan's decision and reasoning should be applied to a BB&T lawsuit arising out of Colonial's former Nevada notes and deeds of trust. Instead, Judge Gordon, with precise and logically impeccable reasoning, noted that the State Court decision which Judge Mahan had relied upon (*i.e.* the Subject Underlying Litigation at issue in this case) was based on an "evidentiary defect" and not a ruling on the merits as to the validity of the 2009 Bulk Assignment, such that said assignment was *not* forever thereafter banned from use by BB&T in Nevada, if BB&T properly presented it:

> Defendants also assert that the doctrine of issue preclusion requires dismissal of BB&T's claims because the Nevada state court has previously ruled that BB&T was not the proper successor in interest to Colonial Bank. *See Murdock v. Rad, et. al.*, 10-A-574852 (Decided June 18, 2010), affirmed by *R&S St. Rose Lenders, LLC v. Branch Banking & Trust Co.*, 56640, 2013 WL 3357064 (Nev. May 31, 2013)). (Dkt. # 94 at 7.) That case arose from a priority fight between BB&T and

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Saint Rose Lenders, LLC. The issue central to determining priority was whether BB&T had met its burden of proving that it received an assignment of Colonial Bank's interest in a 2007 Deed of Trust relating to a $43 million construction loan. (Dkt. # 79-15 at 5.)

The trial court refused to admit into evidence two **previously undisclosed** documents: **the Bulk Assignment (the same one at issue here)** and an unrecorded assignment specifically prepared in connection with the loan at issue. (*Id.* at 6.) The court also denied BB&T's request to reopen discovery. "The court found that there was no competent, admissible evidence offered by BB&T to establish whether the loan, note and deed of trust were excluded pursuant to [the PAA's] Sections 3.5 and/or 3.6 or purchased by BB&T pursuant to Section 3.1." (*Id.*) Thus, the deed of trust might fall into one of the PAA's exclusion categories. **In the absence of evidence to the contrary**, the court found that BB&T held a second priority lien position behind the St. Rose Lender's Deed of Trust. (*Id.* at 28.)

> Although BB&T repeatedly attempted to couch the issue as one of standing, it is not a standing issue. Rather, the defect which prompts the dismissal of BB&T's claims is evidentiary. BB&T failed to meet its burden of proof to establish that the Colonial Bank loan, note and deed of trust at issue in this case were ever assigned to BB&T. The Court has given BB&T ample opportunity to submit proper 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 [PAA], and no other admissible evidence, documentary or testimonial. The Court hereby finds that [the PAA] was not sufficient evidence, on its face, to establish that BB&T was assigned the 2007 Colonial Bank Deed of Trust.

(*Id.* at 6–7.)

On appeal, the Nevada Supreme Court noted that:

> "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."

(Dkt. 94-2 at 6 quoting *Caires v. JP Morgan Chase Bank*, 745 F.Supp.2d 40, 48-49 (D.Conn.2010).) The court agreed with the district court:

> 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

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> that PAA did not transfer the Construction Loan to BB&T. We agree....

(*Id.* at 7.)

Defendants also rely on *Branch Banking & Trust Co. v. Nevada Title Co.*, 2:10–CV-1970-JCM-RJJ, 2011 WL 1399833 (D. Nev. Apr. 13, 2011). (*See* Dkt. # 94 at 9.) In that case, Judge Mahan of this Court concluded that the state court's decision in *Murdock* was issue preclusive as to BB&T's complaint against a title company for "breach of contract for not removing the [St. Rose Lenders trust deed] from the title to the property," among other things. 2011 WL 1399833 at *2. The court concluded that BB&T did not have standing to bring those claims because the state court had already determined that BB&T did not acquire those rights. Id. at *2–4.

> **These cases do not support the conclusion that BB&T is precluded from bringing this action. To the contrary, it appears that BB&T may have learned its evidentiary lesson from Murdock.**[1] In Nevada, the elements necessary for application of issue preclusion are: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 713 (Nev.2008). I need look no further than the first prong.
>
> As quoted above, the decision in Murdock was based on the BB&T's lack of evidence. (Dkt. # 79–15 at 6 ("[T]he defect which prompts the dismissal of BB&T's claims is evidentiary.").) The **court either excluded from evidence or simply did not consider the Bulk Assignment** and other relevant documents. **Here, however, the Bulk Assignment is in evidence**, as are several related documents. **Accordingly**, Murdock is not controlling here, and **BB&T is not issue precluded** from enforcing its rights under the Promissory Note.

Id. at *7-8 [emphasis added].

Respectfully, Judge Gordon's decision is the superior of these two cases, as Judge Mahan failed to accurately apply the claim preclusion doctrine (which was properly understood by Judge Gordon who therefore declined to apply it), since Judge Gonzalez's decision, on which Judge Mahan relied, was based on an "evidentiary" defect (arising due to the failure of BB&T's counsel to timely disclose and thereby preserve for use at trial the 2009 Bulk Assignment). This does not preclude BB&T, in other cases, from properly presenting the available evidence that Defendants

[1] Plaintiff can rest assured that in this case, likewise, the relevant evidence will be disclosed and presented, including affidavits as necessary in response to any Motion for Summary Judgment, and including trial testimony. A motion to dismiss is not, however, the proper time for evidentiary review of such evidence, and testimony, or to consider challenges to the same.

should have presented in the underlying suit, as Judge Gordon allowed it to do (instead of improperly relying on a case which was not truly on the merits), and as this Court should also allow BB&T to do in this case.

Not only is Judge Gordon's decision correct on this point, but it is also illustrative on other relevant points herein: In the instant case, the issue before this Court is: what would have happened had Gerrard and GC&L realized the need to address BB&T's ownership at trial, timely disclosed the Bulk Assignment document which subsequent events demonstrated they could have done literally overnight from the date they finally realized they should, and timely preserved and presented other accompanying testimony and evidence on this point? The answer to that question, as demonstrated and illustrated by Judge Gordon's decision, is that BB&T would have prevailed under that scenario! Judge Mahan, by contrast, would not have reached the conclusion he reached if the evidentiary defect had not occurred in the underlying litigation at issue herein, and thus his decision merely demonstrates yet another way in which BB&T has apparently been damaged by the malpractice that is at issue in this case. To use that damage as a basis for saying that no remedy can exist for that damage, is a quintessential example of illogically circular reasoning (again, akin to stating "I can't be sued for your inability to play tennis based on my having broken your arm, given that you can't play tennis with a broken arm in any event").

To the degree that the *BB&T v. Smoke Ranch* decision relied not only on the 2009 Bulk Assignment, but also on affidavits from BB&T as to its possession of certain documents assigned in that 2009 Bulk Assignment, this further demonstrates that the Defendants' arguments are premature, and are better suited to a subsequent summary judgment motion, rather than a motion to dismiss, in order to allow any and all relevant evidence to be presented on these questions, including the 2009 Bulk Assignment, any appropriate affidavits, etc. No affidavits have been presented in this case by Defendants, to support a Motion for Summary Judgment, and the parties' exhibits should only be reviewed by this Court, if it feels it can do so pursuant to the parameters of *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 930 (2015), without turning the Motion to Dismiss into a Motion for Summary Judgment. At this stage, the allegations of the FAC must be taken as true and if insufficient, should be allowed to be amended. However, it does

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not appear that they are. Instead, it appears that Defendants' Motion must simply be rejected on the merits.

B. Whether Any District Court Rulings on the Equitable Subrogation Issues Were A Necessary Adjudication on the Merits.

The Reply brief now argues that the underlying district court's rulings suggesting how it might have ultimately ruled on the merits of BB&T's equitable subrogation claims, were not mere and unnecessary dicta, as to how the equitable subrogation claims might have turned out if BB&T's attorneys had demonstrated that BB&T owned the same, but were *necessary* to the Court's rulings on a counterclaim for declaratory relief which was asserted by R&S Lenders with respect to the priority of its Deed of Trust. Defendants argue that said counterclaim was separate and distinct and the rulings thereon were based on an adjudication of said counterclaim on its own merits, which was therefore necessary to reach that adjudication.

The history of the underlying suit, however, suggests otherwise.

This trial lasted 10 days. The ***only*** party to put on ***any witness testimony*** during those 10 days of Trial, appears to have been BB&T (whose trial witnesses were referenced as "Colonial's" witnesses in all but one of the Court transcripts). "Colonial" (in fact, BB&T) and **no other party**, presented witnesses on Day 1 of the trial;[2] Day 2 of the Trial; Day 3 of the Trial; Day 4 of the Trial;[3] Day 5 of the Trial; and Day 6 of the Trial (*See, Exhibit CC* hereto). The afternoon of Day 6 of the Trial and the entirety of Day 7 of the Trial consisted of arguments only (*see Exhibit DD hereto*), namely with respect to the oral NRCP 52(c) motion to rule on BB&T's claims and defenses on the grounds that, having rested its primary case in chief, save for the testimony of Brad Burns, who was not yet then available, BB&T had failed to demonstrate its acquisition of its claims, and other related arguments (such as on Gerrard's oral motion to substitute in FDIC if BB&T could not show that it was the real party in interest). The only party to present any witnesses on Day 8 of Trial was again, Colonial (*i.e.* BB&T). *See Exhibit EE hereto*. Day 9 of the

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[2] Although certain R&S Lenders' exhibits were introduced at trial, this was merely done by way of Gerrard stipulating to certain documents being admitted on the first day of trial, as shown by *Exhibit CC* hereto, and not as part of R&S Lenders ever commencing its own case on its own defenses or counterclaim.

[3] The trial transcript for part 2 of Day 4 characterized witness Rad as a witness for "Defendants" rather than clarifying "Colonial". However, as shown by the opening of his testimony, he was directly examined by Gerrard, and he was a Colonial (*i.e.*, BB&T) witness, as characterized by the transcript for Day 5 of the Trial. *See Exhibit CC* hereto.

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Trial and Day 10 of the Trial consisted entirely of argument only (*see Exhibit FF hereto*) namely further argument on the prior joined NRCP 52(c) motion for a judgment or as a matter of law on BB&T's claims and defenses, for failure to show BB&T's ownership of Colonial's former priority claims, and other related oral motions and arguments.[4]

Thus, after BB&T rested its primary case in chief, what was ultimately characterized as an NRCP 52(c) motion[5] ultimately joined by R&S Lenders, was argued against BB&T's right to pursue Colonial's prior claims and defenses in the case, and after BB&T called its last witness, those NRCP 52(c) motion arguments continued. NRCP 52(c) can preclude both a "claim" or a "defense" from being asserted. NRCP 52(c). Had that motion been denied, including R&S Lenders' joinder therein, **then** the trial would have resumed, with R&S Lenders **then** putting on **its own** witnesses, etc., both to defend against the case which BB&T had put on, and also with respect to establishing its own counterclaim. However, contrary to the assertions of the Reply brief, this did not occur, because it did not need to occur, because the ruling against BB&T's ownership of Colonial's claims (based on an evidentiary failure which the facts of the First Amended Complaint clearly allege might have been avoided by the Defendants) forestalled the need for a ruling on the merits of BB&T's claims, *and also forestalled the need for any further adjudication of the R&S Lenders' claims*, as, if BB&T did not own its own claims, then it also had no right to assert affirmative defenses against R&S Lenders' claims. In granting the NRCP 52(c) Motion, the Court was entering judgment as a matter of law "with respect to a claim or defense" as neither could be maintained by BB&T "without a favorable finding" on the relevant issue. *See*, NRCP 52(c).

Since the subject R&S Lenders' Second Deed of Trust was recorded years before Colonial's subject Construction Loan Deed of Trust, which BB&T subsequently acquired (but did not prove it had acquired), no party to the suit had any right, after the NRCP 52(c) ruling, to challenge the statutory presumption in favor of the R&S Lenders deed of trust. Based thereon, the

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[4] Plaintiff is not seeking judicial notice of any facts with respect to the exhibits hereto, as such a late request, so soon prior to the hearing, would be inappropriate. The Court may review the exhibits hereto to the extent it deems them to be compatible with *Baxter*, as able to be reviewed without altering the nature of the pending Motion into a Motion for Summary Judgment. Otherwise, assuming the facts of the FAC to be true, would be just as viable of a basis to approve the arguments set forth herein.

[5] *See Exhibit GG* hereto.

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district court could rule in favor of R&S Lenders "since" BB&T had not proven that it owned the right to bring an equitable subrogation challenge, either as a claim against R&S Lenders, or as a defense to R&S Lender's claims. Characterizing this chain of events as meaning that an adjudication *on the merits* in favor of R&S Lenders *needed to take place*, and did take place based on *R&S Lenders having independently proven up its distinct counterclaim case in chief*, separately and independently, on which a ruling on the merits was necessary, is simply inaccurate.

Instead, R&S St. Rose Lenders was not required to prove its entitlement to its victory on its declaratory relief claim, or ever put on that claim as though it were in fact a separate and distinct case, because the district court's ruling on the acquisition and ownership issue precluded any need for R&S St. Rose Lenders to do so. The point of the instant lawsuit is that the ruling on the ownership and acquisition question would have turned out differently had Defendants acted non-negligently, by timely realizing their need to procure and disclose documents for trial on that issue, which, had they but timely recognized the need to do, could have been accomplished literally overnight. The underlying Court's dicta rulings do not demonstrate in any preclusive manner what the outcome of the case might otherwise have been. Plaintiff is entitled to be heard on the merits, and not merely on a premature and early dispositive motion, on all of these issues and allegations of its FAC.

That it has been necessary to cite to various facts from the trial transcripts in order to more clearly verify these points, demonstrates that this new Reply argument is not appropriate to a Motion to Dismiss in any event, and should be stricken, to be brought before this Court only at some later date, after discovery has been conducted, such as on a Motion for Summary Judgment or at trial. The facts alleged in the FAC, if taken as true, clearly would entitle the Plaintiff to relief, and that is the question for today. If the FAC does not sufficiently set forth "a short and plain statement of the claim showing" that BB&T "is entitled to relief" (NRCP 8(a)), if said facts are assumed true, such that additional facts detailing more specific averments about the proceedings below, are necessary as part of the FAC, then leave to amend should be granted.

However, if that is not the case, then the Motion to Dismiss should be denied, and arguments requiring more detailed analysis of the evidence, as to matters which are not necessary to be alleged as part of the short and plan statement of the FAC, should be left to another day's

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review, on a motion for summary judgment or at trial, after discovery, and with available exhibits and affidavit or live testimony.

C. NQF Interpretation Matters.

Defendants argue that the NQF (Notice of Questions of Fact to be adjudicated at the limited trial, filed prior to the trial by a party opposing BB&T) did not include any issue apprising Gerrard and GC&L that the assignment to BB&T and its acquisition and ownership was going to be challenged. This is a new issue not raised in the Motion, which Plaintiff therefore did not address in its Opposition. Thus, this assertion (at page 9, lines 19-21 of the Defendants' Reply Brief) should be stricken.

This assertion, moreover, is refuted by Paragraphs 77-81 of the FAC, which allegations must be taken as true herein. Moreover, as Defendants are well aware, their reading of the NQF has already previously been refuted and rejected by the district court in the underlying suit, as demonstrated for example by the Trial transcript of Day 7 of the Trial at pp. 30-34 (attached as *Exhibit HH* hereto), especially at page 34, lines 11-13, thereby rendering this argument by Defendants highly disingenuous.

If this Court is going to consider this argument, raised for the first time in the Reply brief, then it is respectfully submitted that this Court should reject the same as contrary to the FAC paragraphs which must be read as true for present purposes. To the extent that any more detailed FAC allegations on this point are needed, leave to amend should be granted. Otherwise, to the extent that more detailed review of the record of the underlying court proceedings is necessary on this point, then this again demonstrates the impropriety of this argument at this early stage of the proceedings.

Defendants' arguments on this NQF point also ignore the district court's statements at the first day of trial in the underlying suit that whether or not BB&T had received an assignment of Colonial's claims was an issue to be tried; ignore the Answers to BB&T's Second Amended Complaint, which did not admit the allegations regarding BB&T's status as Colonial's successor, and which set forth affirmative defenses as to BB&T's standing; and ignore the numerous other allegations set forth in the First Amended Complaint establishing that the Defendants knew or should have known of the need to address the BB&T ownership and acquisition facts at trial. Had

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they done so, then, as the *Smoke Ranch* case demonstrates, they would have been recognized as the owners of the relevant documents and of the rights accruing thereunder.

Defendants also raise another new argument relating to the NQF: listing many of the questions of fact set forth therein which the underlying court indicated prior to trial would be addressed at the trial, in order to then bolster their claim that the dicta in the trial court Judge's Findings of Fact and Conclusions of Law was not really dicta, but comprised necessary rulings on distinct claims.

These arguments must however fail. Regardless of what issues the Court indicated prior to Trial, would be adjudicated at Trial, the actual history of the Trial turned out otherwise. BB&T was the *only* party to put on a case. BB&T's claims and defenses were then adjudicated as a matter of law under an NRCP 52(c) ruling that BB&T did not own those claims and defenses, and this adjudication was dispositive, by itself, to foreclose the need for any further evidentiary review, on the merits, of any of the issues which were otherwise to be raised at Trial, as demonstrated by the underlying court then issuing its FF&CL, without requiring any further trial on any of the other parties' defenses or counterclaims.

D. <u>Other New Arguments</u>.

Defendants other new Reply arguments (which they contend support their assertion that any amended FAC would still be futile) are likewise invalid. For example, the arguments regarding the contents of BB&T's briefs on appeal, should be repudiated for the reasons discussed at page 11 of "Plaintiff's Reply in Support of its Counter-Requests for Judicial Notice and Response to Defendants' New Requests" filed concurrently herewith. Any other new arguments in the Reply may easily be rejected if the allegations of the FAC are assumed to be true.

E. <u>Statute of Limitations</u>.

The Defendants' new statute of limitations arguments must also fail. There is no authority to support Defendants' position that a petition for writ is not an appeal in states recognizing an appellate tolling or delayed accrual rule for legal malpractice suits. The tolling or delayed accrual rule was eloquently summarized in the legal treatise *Legal Malpractice*, to be that the date of injury "coincides with the last possible date when the attorney's negligence becomes irreversible." R. Mallen and V. Levit *Legal Malpractice* §390, at 457 (1981), quoted with approval by *Neylan v.*

Moser, 400 N.W.2d 538, 542 (Iowa 1987). This definition easily encompasses both appeals and petitions for a writ of certiorari.

III. Conclusion.

Defendants' Opposition to the alternative Countermotion is based on the Reply arguments that the First Amended Complaint could not, under any set of allegations, properly show causation, and is barred by the statute of limitations. Those arguments must however be rejected for the reasons already set forth in the Opposition. New arguments in the Reply, not able to be addressed in that Opposition, should be stricken, and are in any event also inaccurate for the reasons set forth above. Such arguments are also, as demonstrated above, better suited to a Motion for Summary Judgment than a Motion to Dismiss. If such a Motion for Summary Judgment needs to be preceded by any necessary amendments to the FAC, then this Court should freely allow leave for such an amendment, on the basis of any concerns which it might express at the hearing, as to any missing factual allegations in the FAC

For the reasons set forth above and in the Plaintiff's previously filed Opposition to the Motion to Dismiss First Amended Complaint and Alternative Countermotion for Leave to Amend, the Court should not dismiss the Plaintiff's First Amended Complaint at this time. However, if the Court is inclined to do so, the Court should first allow an amendment as to any factual claims or allegations which the Court determines are lacking, if any.

DATED this 12th day of April, 2017.

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 12th day of April, 2017, service was made by the following mode/method a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND COMPLAINT** to the following person(s):

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An Employee of Albright Stoddard Warnick & Albright

ATTACHMENT 1

AA0732

KeyCite Blue Flag – Appeal Notification
Appeal Filed by BRANCH BANKING AND TRUST CO. v. SMOKE RANCH DEVELOPMENT, LLC, ET AL, 9th Cir., September 28, 2015

2014 WL 4796939
United States District Court,
D. Nevada.

BRANCH BANKING AND TRUST COMPANY, a North Carolina banking corporation, Plaintiff,
v.
SMOKE RANCH DEVELOPMENT, LLC, a Nevada limited liability company, Yoel Iny, an individual; Noam Schwartz, an individual; Yoel Iny, Trustee of the Y & T Iny Family Trust dated June 8, 1994, as amended; Noam Scwartz, Trustee of the Noam Schwartz Trust dated August 19, 1999; D.M.S.I., LLC, a Nevada limited liability company; and Does 1 through 10, inclusive, Defendants.

No. 2:12–CV–00453–APG–NJ.
|
Signed Sept. 26, 2014.

Attorneys and Law Firms

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Order Granting Partial Summary Judgment in Favor of Plaintiff

(Dkt.79, 80, 81, 82, 106)

ANDREW P. GORDON, District Judge.

***1** Branch Banking & Trust ("BB & T") has sued Smoke Ranch Development, LLC and several other defendants (collectively, "Defendants") alleging breaches of a promissory note and related guaranties. BB & T's claims arise from (1) a Promissory Note made payable to Colonial Bank, N.A. in the principal amount of $800,000 (Dkt.# 79–4) (the "Smoke Ranch Loan" or "Promissory Note"), (2) a Deed of Trust securing that Promissory Note against certain real property in Clark County, Nevada ("Smoke Ranch Property"), and (3) Commercial Guaranties entered into by Smoke Ranch's co-defendants (Dkt.# 1–3).

Defendants have filed two motions for summary judgment. In the first (Dkt. # 79), Defendants allege that BB & T lacks standing to enforce the Promissory Note and the Deed of Trust. In the second (Dkt.# 82), Defendants allege that BB & T has not complied with NRS § 40.459(1)(c), which caps the amount of a deficiency judgment a creditor may receive when it has purchased enforcement rights from someone else. Defendants also have asked me to certify questions of law to the Nevada Supreme Court regarding the proper interpretation of NRS § 40.459(1)(c). (Dkt.# 106.)

BB & T also filed two motions, the first of which (Dkt.# 80) seeks summary judgment as to liability against the Defendants for breaches of the Promissory Note and the Guaranties. BB & T's second motion (Dkt.# 81) requests a deficiency judgment hearing to determine the amount of its expected judgment. Because all of the pending motions derive from the same facts, I will address all of them in this Order. The following facts are undisputed, except where noted:

1. On September 26, 2005, Smoke Ranch executed a Promissory Note in favor of Colonial Bank, N.A. in the principal amount of $800,000, which had a maturity date of April 1, 2007. (Dkt.79–3.)

2. As security for the Promissory Note, Smoke Ranch executed a Deed of Trust encumbering the Smoke Ranch Property; the Deed of Trust was recorded on October 21, 2005. (Dkt.# 79–4.)

3. On October 6, 2005, Defendants Yoel my, Noam Schwartz, Y & T Family Trust, Noam Schwartz Trust, and DMSI LLC executed Guaranties regarding payment of the Promissory Note. (Dkt. # 86 at 46–72.)

4. The parties to the Promissory Note amended it through an unrecorded Change in Terms Agreement dated May 9, 2008, which extended the maturity date to April 1, 2010. (Dkt. # 86 at 67.)

5. On August 14, 2009, the Alabama State Banking Department closed Colonial Bank and the FDIC was named receiver in order to liquidate and distribute the bank's assets. (Dkt. # 86–3 at 56.)

6. On October 23, 2009, Tamara Stidham,[1] Karen Lugan, and Teresa Griswold executed a Bulk Assignment of Colonial Bank's assets from the FDIC to BB & T, but back-dated the Bulk Assignment's effective date to August 14, 2009. (*Id.* at 72.) Under the Bulk Assignment, the FDIC assigned all of its

> rights, title and interests in and to all those certain Mortgages, Security Deeds, Deeds to Secure Debt, Deeds of Trust, ..., and all such other instruments and security agreements securing loans owned ... and held of record by Colonial Bank or any of its predecessors as of August 14, 2009 in the Public Records of the Counties of the State of Nevada and all modifications, extensions, amendments and renewals.

***2** (Bulk Assignment, Dkt. # 86 at 71.) The Bulk Assignment was recorded in Clark County, Nevada on November 3, 2009. (*Id.* at 70.) The Bulk Assignment does not specifically reference, nor was it recorded against, the Smoke Ranch Property.

7. BB & T has submitted an Allonge that it asserts was "executed by the FDIC thereby assigning all rights, title and interest to BB & T." (Harms Declaration, Dkt. # 86–3 at 54 ("Harms Dec.").) The Allonge states that it is to be attached to the Promissory Note; it references Colonial Bank N.A. and Smoke Ranch Development, LLC., the May 9, 2008 date of the Change in Terms Agreement, the Loan account number and the principal amount of $800,000. (Dkt. # 86–1 at 9.) The Allonge also states that it became effective as of August 14, 2009, although there is no date of execution. (*Id.*) Only Tamara Stidham's signature is on the signature block. (*Id.*) The Allonge is not attached to any other document, such as the Promissory Note or Change in Terms Agreement.

8. Defendants point to a December 11, 2009 FDIC Limited Power of Attorney naming Tamara Stidham, among others, as its attorney-in-fact. (Dkt. # 79–16 at 2–3). Defendants emphasize that because that document was not executed until December 2009, Tamara Stidham was not authorized to execute the Allonge at the time of the Bulk Assignment notwithstanding the fact that this Limited Power of Attorney states that it shall be effective as of August 14, 2009 (the date of the Bulk Assignment). (Dkt. # 79 at 16.)

9. BB & T also has produced a document entitled Purchase and Assumption Agreement Whole Bank All Deposits Among FDIC and BB & T ("PAA"), dated August 14, 2009. (Dkt. # 86–1 at 65.) The PAA includes provisions structuring the asset purchase. Section 3.1 states that, subject to express exclusions in Sections 3.5 and 3.6, BB & T purchased all of the FDIC's rights, title, and interest in all of Colonial Bank's

> Assets (real, personal and mixed, wherever located and however acquired).... [The attached and incorporated] Schedules 3.1[2] and 3.1a[3] sets [sic] forth certain categories of [the] Assets [purchased under the PAA]. Such schedule is based upon the best information available to [FDIC] and may be adjusted as provided in Article VIII.... [BB & T] specifically purchases all mortgage servicing rights and obligations of [Colonial Bank].

(PPA, Dkt. # 86–1 at 25.) Schedule 3.1 refers to an "Attached List" and states:

> THE LIST(S) ATTACHED TO THIS SCHEDULE (OR SUBSCHDULE(S)) AND THE INFORMATION THEREIN, IS AS OF THE DATE OF THE MOST RECENT PERTINENT DATA MADE AVAILABLE TO THE ASSUMING BANK AS PART OF THE INFORMATION PACKAGE. IT WILL BE ADJUSTED TO REFLECT THE COMPOSITION AND BOOK VALUE OF THE LOANS AND ASSETS AS OF THE DATE OF BANK CLOSING. THE LIST(S) MAY NOT INCLUDE ALL LOANS AND ASSETS (E.G., CHARGED OFF LOANS). THE LIST MAY BE REPLACED WITH A MORE ACCURATE LIST POST CLOSING.

1 Colonial Bank employed Ms. Stidham as assistant general counsel during the two-year period preceding the FDIC receivership. (Stidham Depo. Dkt. # 79–13 at 12.) She then became BB & T's associate general counsel.

2 Schedule 3.1 relates to "Certain Assets Purchased." (Dkt. # 86–1 at 58.)

3 Schedule 3.1(a) relates to "Subsidiary and Other Business Combination Entities Acquired." (Dkt. # 86–1 at 59.)

(*Id.* at 58.) Despite this reference, no list is attached to the PAA. BB & T asserts that the "Note was listed in Schedule 4.15(B) of the [PAA,] establishing that the Note was among the commercial loans acquired." (Dkt. # 86 at 10 (citing Exhibit 8 to BB & T's Response, Dkt. # 86–2 at 60–61).) Exhibit 8 bears the heading "Non–Single Family Asset Detail for 10103—Colonial Bank," indicates that it is found on "Page 61 of 273," and identifies the Smoke Ranch Loan.

***3** Section 3.5 of the PAA identifies the following Colonial Bank assets as being excluded from purchase:

> (b) any interest, right, action, claim, or judgment against ... (iv) any other Person whose action or inaction may be related to any loss (exclusive of any loss resulting from such Person's failure to pay on a Loan made by the Failed Bank) incurred by the Failed Bank....

(*Id.* at 28.) The second exclusion section, Section 3.6(a), provides that the FDIC had the right to refuse to sell any Asset otherwise acquired under the PAA if the FDIC determined that the Asset was essential to the FDIC. (*Id.* at 29.) Such Assets included those that the FDIC determined to be: "the subject of any investigation relating to any claim with respect to any item described in Section 3.5(a) or (b), or the subject of, or potentially the subject of, any legal proceedings." (*Id.*) Nothing in the record indicates that the Smoke Ranch Loan was subject to any investigation or any legal proceedings as of the date the Bulk Assignment and PAA were executed.

10. On November 15, 2012, the FDIC and BB & T executed an Assignment of Deed of Trust, Loan Documents and Other Claims, which was recorded against the Smoke Ranch Property, dated ("2012 Assignment"). (Dkt.# 79–12.) That document states: "THIS ASSIGNMENT OF DEED OF TRUST, LOAN DOCUMENTS AND OTHER CLAIMS ("Assignment") is executed as of November 13, 2012, but is made effective as of August 14, 2009 ("Effective Date")...." (*Id* .) It further provides:

> 1. Assignment of Loan Documents. As of the Effective Date, [the FDIC] hereby assigns, sets over and transfers to [BB & T] all of its right, title and interest in, to and under the Loan and all the Loan Documents set forth on Exhibit "A"[4] ... together with all amendments, extensions, renewals and modifications thereto, including all of [the FDIC's] claims, demands, rights, remedies and interests therein, to have and to hold the same unto [BB & T], its successors and assigns.

4 Exhibit "A" lists each of the documents that form the Smoke Ranch Loan. (*Id.* at 6.)

(*Id.* at 3–4.)

ANALYSIS

I. Defendants' Motion for Summary Judgment (Dkt.# 79.)

Defendants contend that BB & T lacks standing to bring its claims because the Bulk Assignment did not specifically describe the Deed of Trust and was not recorded against the Smoke Ranch Property. (Dkt. # 79 at 14–16.) Defendants argue the 2012 Assignment and the Allonge do not cure the Bulk Assignment's defects because a party must have standing at the outset of litigation, and a defect in standing at the outset cannot be cured. (*Id.* at 12.) Finally, Defendants assert that BB & T is collaterally estopped from relying on the PAA because the Nevada state court has already determined that BB & T Is not the proper successor to Colonial Bank (although Defendants improperly raise this argument only in their Reply). (Dkt. # 94 at 10.)

1. UCC Art. 3 challenge

"The proper method of transferring the right to payment under a mortgage note is governed by Article 3 of the Uniform Commercial Code—Negotiable Instruments, because a mortgage note is a negotiable instrument." *Leyva v. Nat'l Default Servicing Corp.*, 255 P.3d 1275, 1279 (Nev.2011). UCC § 3–301 provides three methods by which a person can become entitled to enforce a note, two of which are relevant here: a person must either be a "holder" of the note, or attain the status of a "nonholder in possession of the [note] who has the rights of holder." UCC § 3–301(a)(1)–(2).

(i) BB & T has failed to establish that it has attained the status of "holder."

***4** A person is a "holder" if the person possesses the note and either (1) the note has been made payable to the person in possession, or (2) the note is payable to the

bearer of the note. UCC § 1–201(b)(21)(A). This inquiry requires examination of the face of the note and any endorsements. An endorsement means a signature, other than that of the maker, made for the purpose of negotiating the instrument. UCC § 3–204(a). This inquiry also includes determining whether any purported allonge was sufficiently affixed. *Id.; In re Weisband,* 427 B.R. 13, 19 (Bankr.D.Ariz.2010) (assignee failed to demonstrate it was the holder of the note because while it was in possession of the note, it provided no evidence that the endorsement was stapled or otherwise attached to the rest of the note); *In re Shapoval,* 441 B.R. 392, 394 (Bankr.D.Mass.2010) (same).

Here, the Promissory Note was payable to Colonial Bank. (Dkt. # 86 at 23.) The Allonge includes Tamara Stidham's endorsement (in her capacity as FDIC's attorney-in-fact), and states that it is to be affixed to the Note. While the copy of the Promissory Note attached to BB & T's Response includes the Allonge, the copy attached as an exhibit to BB & T's Motion for Summary Judgment does not include the Allonge. (Dkt. # 80–1 at 2.) This is not sufficient to establish that the Allonge was affixed to the Note. Thus, BB & T has not established that it is the holder of the Promissory Note. In order to enforce the Promissory Note, BB & T instead must prove it became a "nonholder in possession of the instrument who has the rights of a holder" under UCC § 3–301(a)(2).

(ii) BB & T is a nonholder in possession of the Promissory Note and is entitled to enforce it.

"An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." UCC § 3–203(a). "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument...." UCC § 3–203(b). While the failure to obtain the endorsement of the payee or other holder does not prevent a person in possession from being the "person entitled to enforce" the note, the possessor does not have the presumption of a right to enforce. Rather, the possessor of the note must demonstrate both the fact and the purpose of the delivery of the note to the transferee in order to qualify as the "person entitled to enforce." *Leyva,* 255 P.3d at 1281.

Here, the Bulk Assignment is sufficient to demonstrate the purpose of delivery: transfer to BB & T of all of the FDIC's "rights, title and interests in and to all those certain Mortgages, Security Deeds, Deeds to Secure Debt, Deeds of Trust, ..., and all such other instruments and security agreements securing loans owned ... and held of record by Colonial Bank or any of its predecessors as of August 14, 2009." (Dkt. # 81 at 65.) Attached to BB & T's supplemental brief (Dkt. # 114–1 at 29) is Dennis Harm's Declaration, which confirms the delivery of the Promissory Note to BB & T.

> ***5** BB & T has possession of the original of the following: (i) the Promissory Note, dated September 26, 2005 that was executed by Smoke Ranch Development, LLC in the original principle amount of $800,000.00; (2) the Deed of Trust and identified Assessor Parcel Number 138–22–102–004 executed by Smoke Ranch Development, LLC; (iii) each Commercial Guaranty dated September 26, 2005 ...; and (iv) the Change in Terms Agreement dates as of May 9, 2008 executed by Smoke Ranch Development, LLC.

(*Id.* at 30.) This is sufficient to establish that the FDIC delivered the Promissory Note to BB & T, that BB & T possesses the original Promissory Note, and that the purpose of the delivery was to give BB & T the entitlement to enforce the Promissory Note. Accordingly, BB & T is a nonholder in possession of the Promissory Note and is entitled to enforce it.

2. Defendants may not rely on Nevada's foreclosure statute, statute of frauds, or recording statutes to challenge BB & T's entitlement to enforce the Promissory Note.

On February 29, 2012, BB & T foreclosed on the property secured by the Deed of Trust. (Trustee's Deed Upon Sale, Dkt. # 81–1 at 31.) Defendants assert that BB & T's foreclosure was invalid because it failed to comply with Nevada's recording statutes and statute of frauds. (Dkt. # 79 at 14–16.) BB & T responds that the Bulk Assignment and the PAA, taken together, satisfy the statute of frauds. (Dkt. # 86 at 12.) BB & T further asserts that the recording statutes are inapplicable because they do not provide a remedy in the foreclosure context. (*Id.*)

Defendants rely on NRS § 106.210, which requires that

an assignee properly record the assignment of a deed of trust before it can foreclose on the real property encumbered by that deed of trust.[5] But this provision is inapplicable here because the statutory language at issue was added on July 1, 2011, well after the Bulk Assignment was executed (October 23, 2009. back-dated to August 14, 2009). Prior to July 1, 2011, the statute read:

> 1. Any assignment of a mortgage of real property, or of a mortgage of personal property or crops recorded prior to March 27, 1935, and *any assignment of the beneficial interest under a deed of trust may be recorded,* and from the time any of the same are so filed for record shall operate as constructive notice of the contents thereof to all persons.
>
> 2. Each such filing or recording shall be properly indexed by the recorder.

(Emphasis added.) After it was amended by Laws 2011, c. 81, § 14.5, eff. July 1, 2011, the statute now provides:

> 1. *Any ... assignment of the beneficial interest under a deed of trust must be recorded* in the office of the recorder of the county in which the property is located, and from the time any of the same are so filed for record shall operate as constructive notice of the contents thereof to all persons.... *If the beneficial interest under a deed of trust has been assigned, the trustee under the deed of trust may not exercise the power of sale pursuant to NRS 107.080 unless and until the assignment is recorded* pursuant to this subsection.
>
> ***6** 2. Each such filing or recording must be properly indexed by the recorder.

(Emphasis added.) The Statutory Notes to the amendment provide that "[t]he amendatory provisions of ... Section 1 of this act apply only to ... any assignment of the beneficial interest under a deed of trust, which is made on or after October 1, 2011." Moreover, the Nevada Supreme Court applied the earlier version of the statute to a note and deed of trust in a similar case in which the assignment occurred before the statute was amended but the foreclosure occurred after. *Edelstein v. Bank of New York Mellon,* 286 P.3d 249, 253 nn. 3 & 5 (Nev.2012). Accordingly, the pre–2011 version of the statute applies in this case.

Defendants try to distinguish *Edelstein* by pointing out that, unlike the individual assignment of the deed of trust at issue in *Edelstein,* here the Bulk Assignment does not specifically identify the Promissory Note or Deed of Trust. Defendants also point to the 2012 Assignment as an indication that BB & T "did not have a valid assignment of the Promissory Note in dispute until November 13, 2012." (Dkt. # 79 at 12.) But these arguments are of no moment. The Bulk Assignment assigned all notes and deeds of trust owned or held by Colonial Bank that were not specifically excluded from assignment. Defendants have provided no evidence that the subject loan was excluded from the Bulk Assignment. Moreover, the 2012 Assignment is more akin to "belt and suspenders": it was not needed to assign the Promissory Note and Deed of Trust because they had already been transferred through the Bulk Assignment. And although the 2013 Assignment was executed November 13, 2012, it was specifically made effective as of August 14, 2009, the date the FDIC took control of Colonial Bank. (Dkt. # 79–12 at 2.) This further reflects the parties' intent that the Promissory Note and Deed of Trust were transferred from Colonial Bank to the FDIC and then to BB & T through the Bulk Assignment.

Similarly, Defendants' reliance on Nevada's statute of frauds is misplaced. NRS 111.205(1) provides that real property interests shall be assigned only in writing, subscribed by either the assigning party or by that party's lawful agent. "The purpose of the statute of frauds is to prevent a contracting party from creating a triable issue concerning the terms of the contract—or for that matter concerning whether a contract even exists—on the basis of his say-so alone." *Cloud Corp. v. Hasbro, Inc.,* 314 F .3d 289, 296 (7th Cir.2002). Here, the documents, taken as a whole, confirm that the Promissory Note and Deed of Trust were assigned to BB & T in writing. Thus, the statute of frauds is satisfied.

The Bulk Assignment is sufficient evidence of the assignment of the Promissory Note and Deed of Trust from the FDIC to BB & T. Because the Bulk Assignment occurred prior to the amendment to NRS 106.210, the statute's earlier language controls. BB & T was not required to record an individual assignment against the subject property before foreclosing on it, and thus it properly foreclosed.

5 NRS 106.210 is made applicable to deeds of trust by NRS 107.070, which states that "Nile provisions of NRS 106.210 ... apply to deeds of trust as therein specified."

3. Plaintiffs are not collaterally estopped from relying on the PAA.

*7 Defendants also assert that the doctrine of issue preclusion requires dismissal of BB & T's claims because the Nevada state court has previously ruled that BB & T was not the proper successor in interest to Colonial Bank. *See Murdock v. Rad, et. al.*, 10–A–574852 (Decided June 18, 2010), *affirmed by R & S St. Rose Lenders, LLC v. Branch Banking & Trust Co.*, 56640, 2013 WL 3357064 (Nev. May 31, 2013)). (Dkt. # 94 at 7.) That case arose from a priority fight between BB & T and Saint Rose Lenders, LLC. The issue central to determining priority was whether BB & T had met its burden of proving that it received an assignment of Colonial Bank's interest in a 2007 Deed of Trust relating to a $43 million construction loan. (Dkt. # 79–15 at 5.)

The trial court refused to admit into evidence two previously undisclosed documents: the Bulk Assignment (the same one at issue here) and an unrecorded assignment specifically prepared in connection with the loan at issue. (*Id.* at 6.) The court also denied BB & T's request to reopen discovery. "The court found that there was no competent, admissible evidence offered by BB & T to establish whether the loan, note and deed of trust were excluded pursuant to [the PAA's] Sections 3.5 and/or 3.6 *or* purchased by BB & T pursuant to Section 3.1." (*Id.*) Thus, the deed of trust might fall into one of the PAA's exclusion categories. In the absence of evidence to the contrary, the court found that BB & T held a second priority lien position behind the St. Rose Lender's Deed of Trust. (*Id.* at 28.)

> Although BB & T repeatedly attempted to couch the issue as one of standing, it is not a standing issue. Rather, the defect which prompts the dismissal of BB & T's claims is evidentiary. BB & T failed to meet its burden of proof to establish that the Colonial Bank loan, note and deed of trust at issue in this case were ever assigned to BB & T. The court has given BB & T ample opportunity to submit proper 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 [PAA], and no other admissible evidence, documentary or testimonial. The Court hereby finds that [the PAA] was not sufficient evidence, on its face, to establish that BB & T was assigned the 2007 Colonial Bank Deed of Trust.

(*Id.* at 6–7.)

On appeal, the Nevada Supreme Court noted that:

> "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."

(Dkt. 94–2 at 6 quoting *Caires v. JP Morgan Chase Bank,* 745 F.Supp.2d 40, 48–49 (D.Conn.2010).) The court agreed with the district court:

> ***8** 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....

(*id.* at 7.)

Defendants also rely on *Branch Banking & Trust Co. v. Nevada Title Co.*, 2:10–CV–1970–JCM–RJJ, 2011 WL 1399833 (D.Nev. Apr. 13, 2011). (*See* Dkt. # 94 at 9.) In that case, Judge Mahan of this Court concluded that the state court's decision in *Murdock* was issue preclusive as to BB & T's complaint against a title company for "breach of contract for not removing the [St. Rose Lenders trust deed] from the title to the property," among other things. 2011 WL 1399833 at *2. The court

concluded that BB & T did not have standing to bring those claims because the state court had already determined that BB & T did not acquire those rights. *Id.* at *2–4.

These cases do not support the conclusion that BB & T is precluded from bringing this action. To the contrary, it appears that BB & T may have learned its evidentiary lesson from *Murdock.* In Nevada, the elements necessary for application of issue preclusion are: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby,* 194 P.3d 709, 713 (Nev.2008). I need look no further than the first prong.

As quoted above, the decision in *Murdock* was based on the BB & T's lack of evidence. (Dkt. # 79–15 at 6 ("[T]he defect which prompts the dismissal of BB & T's claims is evidentiary.").) The court either excluded from evidence or simply did not consider the Bulk Assignment and other relevant documents. Here, however, the Bulk Assignment is in evidence, as are several related documents. Accordingly, *Murdock* is not controlling here, and BB & T is not issue precluded from enforcing its rights under the Promissory Note.

For the reasons discussed above, Defendants' Motion for Summary Judgment (Dkt. # 79) is denied.

II. BB & T's Motion for Summary Judgment (Dkt.# 80) and Defendants' Motion for Summary Judgment (Dkt.# 82)

BB & T moves for summary judgment on its breach of the Promissory Note and Guaranties. (Dkt.# 80.) Defendants respond that BB & T cannot prove the consideration it paid for the right to enforce the debt as required under NRS § 40.459(1)(c). (Dkt. # 89 at 4.) Defendants also assert that because BB & T did not timely comply with NRS § 163.120, which establishes procedures for asserting contract claims against a trust, BB & T cannot assert its claims against the defendant trusts. (*Id.* at 4–5.)

1. Defendants' objection to the Harms Declaration is overruled .

*9 As an initial matter, Defendants object to the Declaration of Dennis Harms (BB & T's custodian of records), which authenticates 11 documents including the Promissory Note, Guaranties, Deed of Trust, Bulk Assignment, and 2012 Assignment. (Dkt. # 89 at 5–6.) Defendants argue that Harms has no personal knowledge of the documents. (*Id.* at 7.) The objection is overruled. "A witness does not have to be the custodian of documents offered into evidence to establish Rule 803(6)'s foundational requirements." *United States v. Childs,* 5 F.3d 1328, 1334 (9th Cir.1993) (citing *United States v. Ray,* 930 F.2d 1368, 1370 (9th Cir.1991)); *see also Bergen v. F/V St. Patrick,* 816 F.2d 1345, 1353 (9th Cir.1987), *modified on other grounds,* 866 F.2d 318 (9th Cir.), *cert. denied,* 493 U.S. 871 (1989). "The phrase 'other qualified witness' is broadly interpreted to require only that the witness understand the record-keeping system." *Ray,* 930 F.2d at 1370.

Harms' Declaration states that he is familiar with the books, records, and files, and that those items were maintained in the ordinary course of business of Colonial Bank, the FDIC, and BB & T. There is no requirement that BB & T establish when and by whom the documents were prepared. *Id.* (citing *United States v. Huber,* 772 F.2d 585, 591 (9th Cir.1985) ("there is no requirement that the government show precisely when the [record] was compiled"); *United States v. Basey,* 613 F.2d 198, 201 n. 1 (9th Cir.1979) (college records properly admitted to establish defendant's address even though the custodian did not herself record the information and did not know who did), *cert. denied,* 446 U.S. 919 (1980)).

2. BB & T is entitled to summary judgment as to liability for breach of contract.

It is undisputed that the Promissory Note and Guaranties are valid contracts. It is also undisputed that the Defendants defaulted on the Smoke Ranch Loan. As a result, BB & T seeks entry of judgment for liability on those contracts, and then for a deficiency hearing to determine the amount of the judgment. Defendants counter that BB & T has failed to provide the proof of the consideration that it paid for the assignment of the rights under the Promissory Note and Deed of Trust, as required under NRS § 40.459(1)(c). That statute provides:

> 1. After the hearing, the court shall award a money judgment against the debtor, guarantor or surety who is personally liable for the debt. The court shall not render judgment for more than:
>
> ....
>
> (c) If the person seeking the judgment acquired the

> right to obtain the judgment from a person who previously held that right, *the amount by which the amount of the consideration paid for that right* exceeds the fair market value of the property sold at the time of sale or the amount for which the property was actually sold, whichever is greater, with interest from the date of sale and reasonable costs, whichever is the lesser amount. (Emphasis added.)

***10** The language in subsection (1)(c) limiting recovery to the amount of consideration paid was added by the Nevada Legislature in 2011 through Assembly Bill 273 ("AB 273"). *See* 2011 Nevada Laws Ch. 311. The prior version of NRS § 40.459 provided:

> After the hearing, the court shall award a money judgment against the debtor, guarantor or surety who is personally liable for the debt. The court shall not render judgment for more than:
>
> 1. The amount by which *the amount of the indebtedness which was secured* exceeds the fair market value of the property sold at the time of the sale, with interest from the date of the sale; or
>
> 2. The amount which is the difference between the amount for which the property was actually sold and *the amount of the indebtedness which was secured,* with interest from the date of sale, whichever is the lesser amount. (Emphasis added.)

This change in the statutory language negatively impacts the rights of a creditor to recover a deficiency amount.

> *Following the enactment of NRS 40.459(1)(c), a successor holder is now limited in its recovery,* in a deficiency action or suit against the guarantor, to the sum by which the amount paid for the "right to obtain the judgment" exceeds the greater of the fair market value or the actual sale price. Under NRS 40.459(1)(c), no award may be made for other amounts that the successor in interest may have incurred following the acquisition of the right to obtain the judgment, such as accrued interest, costs and fees, and any advances, as provided in NRS 40.451 and NRS 40.465. *Thus, NRS 40.459(1)(c) attaches a new disability to a successor lienholder's ability to obtain a deficiency judgment.*

Sandpointe Apts. v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 87, 313 P.3d 849, 855–56 (2013) (emphasis added). BB & T contends that the new language does not apply to it because it acquired the debt in 2009 (before the new language was adopted), although the foreclosure sale occurred in February 2012 (after the new language went into effect). BB & T asserts that its rights under the loan documents vested when it purchased the asset in 2009, and applying the 2011 amendment would constitute an impermissible retroactive application of the statute. (Dkt. # 88 at 10.)

The Nevada Supreme Court held last year that the new language of NRS § 40.459(1)(c) applies only to *foreclosures* that were completed after it went into effect. *Sandpointe,* 129 Nev. Adv. Op. 87, 313 P.3d 849, 857 (Nev.2013). Judge Jones of this Court recently went further and held that the new statutory language would violate the Contract Clause of the United States Constitution if it applied to *assignments* that were completed before the statute's effective date. *Eagle SPE NV I, Inc. v. Kiley Ranch Communities,* 3:12–CV–00245–RCJ, 2014 WL 1199595 (D.Nev. Mar. 24, 2014).

In *Sandpointe,* the FDIC became the receiver of Silver State Bank in 2008. 313 P.3d at 851. In 2009, the debtor, Sandpointe, defaulted on its loan. *Id.* In 2010, the FDIC sold the Sandpoint loan and guaranty to Multibank pursuant to a large structured sale. *Id.* In turn, Multibank transferred its interest in the loan and guaranty to its subsidiary CML–NV, whose sole purpose was to pursue collections. *Id.* In early 2011, before enactment of AB 273, CML–NV foreclosed on the property. *Id.* at 851–52. After the June 10, 2011 enactment of AB 273, CML–NV filed a complaint for breach of contract and deficiency. *Id.* at 852. Sandpointe moved for partial summary judgment, seeking application of the "consideration paid" requirement newly added to NRS § 40.459(1)(c). *Id.* CML–NV filed a countermotion for summary judgment arguing that the new statutory language could not apply retroactively. *Id* . The district court granted the countermotion, holding that NRS § 40.459(1)(c) could apply only to loans entered into after June 10, 2011. The Nevada Supreme Court agreed.

***11** In Nevada, the sale of the secured property is the event that vests the right to deficiency. Following the trustee's sale, the amount of a deficiency is crystalized because that is the subject date for determining both the fair market value and trustee's sale price of the property securing the loan. *See* NRS 40.459(1); *In re Filippini,* 66 Nev. 17, 22, 202 P.2d 535, 537 (1949) (defining a "vested right[ ]," in relevant part, as "some interest in the property that has become fixed and established").) "In other words, the fair market value of the property is determined on the day of the trustee's sale, and that value can be used in a future deficiency action." *Id.* Further, NRS 40.462(1), which governs the distribution of foreclosure sale proceeds, provides that the right to receive proceeds from the sale vests

> at the time of the foreclosure sale; it is logical that the right to a judgment for the amount not received in a foreclosure sale would arise on the same date as the right to receive amounts received from the sale. The trustee's sale marks the first point in time that an action for deficiency can be maintained and commences the applicable six-month limitations period.

Id. at 856. Thus, the court held that if the trustee's sale occurred before the effective date of NRS § 40.459(1)(c), application of the statute would impermissibly impact rights that had already vested in the foreclosing party. *Id.* at 859. The court emphasized the presumption against retroactivity. *Id.* at 857–58 (citing *U.S. Fid. & Guar. Co. v. United States ex rel. Struthers Wells Co.,* 209 U.S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.")).

The Nevada Supreme Court concluded its analysis of vested rights as of the date of the trustee's sale. *Id.* at 856. Judge Jones of this Court recently went further and determined that the right to obtain a deficiency judgment vests at the time the contract is entered into.

> Although the present right to collect a deficiency of a particular amount does not vest until a foreclosure sale, the right to obtain a deficiency judgment in the future (based upon the ownership of the debt) is a valuable contingent right held by the creditor before any foreclosure proceedings commence. That right is in a sense already vested before foreclosure because the ability to foreclose exists only if the debtor owes the creditor a certain amount of money. The foreclosure is just an action upon the security, and a deficiency judgment is just a remedy whereby the action upon the security will not frustrate the creditor's ability to make himself whole on the debt.

Eagle SPE, 2014 WL 1199595 *5. *See also Royston v. Miller,* 76 F. 50, 53–54 (C.C.D.Nev.1896)("A vested right is property arising from contract or from the principles of the common law, which cannot be destroyed, divested, or impaired by legislation.").

> ***12** [NRS § 40.459(1)(c)] speaks to the time that an assignee acquires the *right* to obtain a deficiency judgment, not the time that an assignee actually obtains the deficiency judgment itself. The "right" referred to in the statute, i.e., the right "acquired" by the assignee, is the contingent right to obtain a deficiency judgment upon foreclosure, because it is a right "*to obtain* the judgment" in the future. This reading is further supported by the fact that the statute notes that the assignee obtains this right "from a person who previously held that right," i.e., the assignor. And the statute clearly does not contemplate that the assignor already had a deficiency judgment, because the statute begins, "If the person *seeking* the judgment acquired the right to obtain the judgment from a person who previously held that right." Plaintiff interprets the statute as if it read, "If the person seeking *to enforce* the judgment acquired the judgment from a person who previously held that *judgment,* the amount by which the amount of the consideration paid for that *judgment* exceeds the fair market value of the property...." The statute does not so read.

Eagle SPE, 2014 WL 1199595 at *6 (emphasis and omission of internal citations in original).[6] Judge Jones then examined whether the retroactive application of NRS § 40.459(1)(c) would violate the Contract Clause of Article 1, § 10 of the United States Constitution, which provides that "No State shall ... pass any ... Law impairing the Obligation of Contracts." Determining whether a state law violates the Contract Clause involves a three-step inquiry:

> The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. If this threshold inquiry is met, the court must inquire whether the State, in justification, [has] a significant and legitimate public

6 *Eagle SPE* addressed four loans that Colonial Bank made to the defendants between April 2007 and February 2008. *Id.* at *1. Following Colonial Bank's failure, the FDIC assigned those loans to BB & T in the same August 14, 2009 Bulk Assignment at issue in the present case. *Id.* BB & T assigned its rights in those four loans to Eagle SPE in August 2010. *Id.* On November 8, 2011, Eagle SPE foreclosed on the property and brought a deficiency action against the defendants. *Id.* at *1–2.

purpose behind the regulation, such as the remedying of a broad and general social or economic problem, to guarantee that the State is exercising its police power, rather than providing a benefit to special interests. Finally, the court must inquire whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

Id. at *7 (quoting *RUI One Corp. v. City of Berkeley,* 371 F.3d 1137, 1147 (9th Cir.2004) (internal citations and quotation marks omitted in original)).

As to the threshold inquiry, "the statute substantially impairs any existing assignment by reducing the amount an assignee can recover on debt he already purchased under a legal regime where his potential recovery was not limited by the amount he paid for the debt, and without any refund or other benefit offsetting the loss in value." *Id.* at *7.

***13** As to the second step, the court found that while the amendment had a legitimate public purpose (remedying the broad social and economic problems flowing from widespread real estate foreclosures), retroactive application to pre-enactment assignments would benefit special interests. Specifically, the statute provides "a windfall to a particular class (mortgagors) that could not have been reasonably expected under the mortgage and assignment when made, to the detriment of another distinct class (mortgage assignees)." *Id* . at *8. While contractual rights may be impaired "where reasonably necessary to prevent unexpected windfalls," here the statute "*creates* an unexpected windfall as opposed to avoiding one." *Id.* (emphasis in original, citations omitted.)

> [T]he impairment of the contract here thwarts the reasonable expectations of mortgage assignees and provides a windfall to mortgagors that could not have been reasonably expected from the contract under the law existing when the contract was made. The law is therefore more in the character of a special interests benefit than a neutral exercise of the police power.

Id.

As to the third step, the court held that if the statute was applied to pre-enactment assignments, the resulting adjustment to the contracting parties' rights and responsibilities would be based on unreasonable conditions. *Id.* The statute would impair the value of the asset (the right to collect the debt), and this result cannot withstand scrutiny. *Id.* at 11 (citing *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 445 (1934) (conditions reasonable where the "integrity of the mortgage indebtedness is not impaired" and the "right of a mortgagee-purchaser to title or to obtain a deficiency judgment ... are maintained")). Judge Jones explained:

> [A]n assignee's reliance upon the ability to collect the full amount owed under the mortgage is vital. An assignee who purchases a defaulted mortgage under the amended statute can only profit thereby if the value of the security is greater than the price of the assignment plus the costs of foreclosure. And this will almost never be the case in practice, because where the value of the security minus the costs of foreclosure is greater than the price of a prospective assignment, no rational lender will sell the mortgage at such a price in the first place. The lender is better off foreclosing himself and realizing a smaller loss than he is selling the mortgage for less than he can get through foreclosure. This, of course, was the entire purpose of the statute: to eliminate the economic incentive for banks to sell defaulted mortgages rather than negotiate directly with homeowners.

2014 WL 1199595 at *11. Moreover, less restrictive alternatives were available to serve the purposes of the law:

> The Nevada Legislature could simply have prohibited outright the assignment of defaulted mortgages on Nevada real property, or permitted them only for a fixed percentage of the

> amount due on the loan. In either case, no assignee would face the unexpected, retroactive destruction of the value of his contract that Plaintiff faces here, because the law affecting any assignment contract would be known at the time of assignment, and not only afterwards. That option would also have prevented the sale of mortgages at discount rates. Similarly, the Nevada Legislature could have provided additional pre-foreclosure safeguards to encourage foreclosure alternatives.

***14** *Id.* at *12. Further, the application of the statute to pre-enactment assignments does nothing to advance the Legislature's stated purpose of encouraging negotiation between mortgagees and mortgagors; assignees had no reason to think that the value of their contracts would be limited when they purchased mortgages before the law took effect. *Id.* Thus, the statute, if applied retroactively, would adjust the contracting parties' rights and responsibilities based on unreasonable conditions, and therefore would violate the Contract Clause.

The holding and rationale of *Eagle SPE* apply with equal force in this case. The Bulk Assignment and PAA were executed on August 14, 2009, so BB & T acquired the asset well before NRS § 40.459(1)(c) became effective. Retroactively applying that statute to the facts of this case would violate of the Contract Clause. Accordingly, BB & T is entitled to judgment as to liability for breach of contract and breach of guaranty.[7]

[7] Because NRS § 40.459(1)(c) cannot apply retroactively to pre-enactment assignments such as the one at issue here, I do not need to reach BB & T's remaining arguments regarding that statute. Nor do I need to certify to the Nevada Supreme Court any questions of law arising from the proper interpretation of "consideration" under the statute. Accordingly, Defendants' Motion to Certify Questions of Law to the Nevada Supreme Court (Dkt.# 106) is denied.

3. NRS § 163.120

The Trust Defendants assert that BB & T failed to comply with NRS § 163.120(2), which sets forth notice requirements for a plaintiff suing a trust for breach of a contract entered into by a trustee. (Dkt. # 89 at 5–6.) The statute provides as follows:

> A judgment may not be entered in favor of the plaintiff in the action unless the plaintiff proves that within 30 days after filing the action, or within 30 days after the filing of a report of an early case conference if one is required, whichever is longer, or within such other time as the court may fix, and more than 30 days before obtaining the judgment, the plaintiff notified each of the beneficiaries known to the trustee who then had a present interest ... of the existence and nature of the action. The notice must be given by mailing copies to the beneficiaries at their last known addresses. The trustee shall furnish the plaintiff a list of the beneficiaries to be notified, and their addresses, within 10 days after written demand therefor, and notification of the persons on the list constitutes compliance with the duty placed on the plaintiff by this section. Any beneficiary ... may intervene in the action and contest the right of the plaintiff to recover.

NRS § 163.120(2). The Trust Defendants refused BB & T's demand for lists of beneficiaries. In separate orders, I required the Trust Defendants to produce a list of the beneficiaries (Dkt.# 118) and the parties to file briefs informing me whether they believe BB & T satisfied the statute (Dkt.# 123). In their supplemental briefs, the Trust Defendants argue only that BB & T failed to serve notice on the "Trust Remaindermen," that is, the individuals who would become beneficiaries if the present beneficiaries die. (Dkt. # 129 at 2:12–15.) That argument fails.

BB & T contends (and the Defendants do not contradict) that Yoel my and Tikva my "are designated as lifetime beneficiaries" of the Y & T my Family Trust, and that "Noam Schwartz is the lifetime beneficiary" of the Noam Schwartz Trust. (Dkt. # 128 at 4, 5, 16, 17.) BB & T also contends (and the Defendants do not contradict) that these three individuals received proper notice of the claims asserted in this lawsuit. (*Id.* at 5–6.) Based on the

supplemental briefs and attached exhibits, I conclude that Yoel my, Tikva my and Noam Schwartz received proper notice under NRS § 163.120(2). Thus, the only issue is whether the "Trust Remaindermen" should have received notice.

***15** Defendants identify the Inys' five children as Trust Remaindermen of the Y & T my Family Trust, and five other individuals as Trust Remaindermen of the Noam Schwartz Trust. (*Id.* at pp. 13–14.) Previously, however, the Defendants represented that the present beneficiaries (Yoel In). Tikva my and Noam Schwartz) are the "exclusive beneficiaries" of their respective trusts during their lifetimes, and that the Trust Remaindermen become beneficiaries only upon the death of the respective present beneficiaries. (*Id.* at 4–6.) NRS § 163.120(2) requires only that notice be given to "each of the beneficiaries ... who then had a present interest...." On its face, this applies to the present beneficiaries, not the Trust Remaindermen. Defendants argue that, because "present interest" is not defined, the spirit and purpose of the statute dictate that the Trust Remaindermen should be entitled to notice and an opportunity to participate in the litigation. (Dkt. # 129 at 4–7.) That interpretation is not supported by the statute's plain language and could easily be taken to an extreme to also require notice to the future heirs or beneficiaries of the Trust Remaindermen. Such an interpretation could greatly expand the scope of the litigation into an unwieldy process. The statute is clearly designed to afford notice to the present beneficiaries of a trust so they can determine whether they should intervene in the lawsuit to protect their interests in the trust property. The notice provided in this case to Yoel my, Tikva my and Noam Schwartz satisfied the requirements of NRS § 163.120(2).

Based on the foregoing, BB & T's Motion for Summary Judgment (Dkt .# 80) is granted and the Defendants' Motion for Summary Judgment (Dkt.# 82) is denied.

III. BB & T's Application for Deficiency Judgment Hearing (Dkt .# 81.)

BB & T seeks a hearing under NRS § 40.457 to determine the amount of its deficiency judgment. (Dkt.# 81.) Opposing such a hearing, Defendants again raise the issues of whether BB & T has standing to seek a deficiency and whether NRS § 40.459(1)(c) should apply in this case. (Dkt. # 84 at 4–7.) As discussed above, those arguments lack merit. Defendants' remaining arguments are that: (1) BB & T must present evidence that the applicable London Interbank Offered Rates ("LIBOR") were not manipulated; and (2) BB & T is bound by the allegations of property value in its Amended Complaint and is thus precluded from introducing contradictory evidence. (*Id.* at 8–9.)

On May 23, 2013, Magistrate Judge Koppe addressed the LIBOR issue and ruled against Defendants, though she denied the motion without prejudice. (Dkt. # 85 at 3.) As discussed in Judge Koppe's order, the LIBOR manipulation scandal is not relevant to any of BB & T's claims. Nevertheless, BB & T will have to prove at the deficiency hearing that it properly calculated the amount of the amount of the judgment it is seeking.

As to the second matter, BB & T is not bound to the allegation in its Amended Complaint that "[o]n the date of the trustee's sale of the Property, the fair market value of the Property was approximately $545,000." (Dkt. # 5 at 6:12–13.) Defendants contend that this allegation constitutes a judicial admission, thus barring BB & T from offering expert testimony that the value was anything less. (Dkt. # 84 at 9.) BB & T responds that its allegation is simply an approximation, not an unequivocal statement of fact, and therefore is not binding as a judicial admission. (Dkt.# 90.)

***16** " 'Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.' " *Am. Title Ins. Co. v. Lacelaw Corp.,* 861 F.2d 224, 226 (9th Cir.1988) (quoting *In re Fordson Engineering Corp.,* 25 B.R. 506, 509 (Bankr.E.D.Mich.1982)). Factual assertions in pleadings, unless amended, are considered judicial admissions conclusively binding on the party who made them. *Id.* (citing *White v. Arco/Polymers, Inc.,* 720 F.2d 1391, 1396 (5th Cir.1983)); *Fordson,* 25 B.R. at 509. To qualify as a judicial admission, the admission must be deliberate, clear, and unequivocal. *Estate of Strickland v. Strickland,* CV–12–433–TUC–JGZ, 2013 WL 673513 (D.Ariz. Feb. 25, 2013) ("The Estate's admission that Jacaruso was the sole beneficiary before and after her marriage to Strickland was deliberate, clear, and unequivocal. It therefore constitutes a judicial admission which the Estate cannot now retract."). "Where ... the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight." *Sicor Ltd. v. Cetus Corp.,* 51 F.3d 848, 859–60 (9th Cir.1995).

Here, BB & T alleged in its Amended Complaint that the fair market value was "approximately $545,000." (Dkt. # 5 at 6:12–13.) This is not an unequivocal statement of fact, but rather an approximation, an estimate. The fair market value of the subject property is "a disputed and critical issue in the litigation." (Dkt. # 90 at 4.) The

parties have retained experts to appraise the value of the subject property as of the date of foreclosure. That will be the primary focus of the deficiency hearing. Accordingly, BB & T is not bound to the allegation in the Amended Complaint about the approximate value of the property at the time of foreclosure.

The parties are to appear at a **status check on October 16, 2014** at 2:00 p.m. to discuss the details and scheduling of the deficiency hearing.

CONCLUSION

IT IS HEREBY ORDERED THAT Defendants' Motions for Summary Judgment (Dkt.79 and 82) are **DENIED.**

IT IS FURTHER ORDERED THAT Defendants' Motion to Certify Questions of Law to the Nevada Supreme Court (Dkt.# 106) is **DENIED.**

IT IS FURTHER ORDERED THAT Plaintiffs' Motion for Summary Judgment (Dkt.# 80) is **GRANTED.** Judgment is hereby entered in favor of BB & T finding the Defendants liable under the Promissory Note and Guaranties. The amount of the judgment will be determined at a deficiency judgment hearing under NRS § 40.457.

IT IS FURTHER ORDERED THAT Plaintiffs Application for Deficiency Judgment Hearing Pursuant to NRS § 40.457 (Dkt.# 81) is **GRANTED. A status check is set for October 16, 2014 at 2:00 p.m.** to discuss the amount of time needed for that hearing, and the parties', counsels', and witnesses' schedules.

All Citations

Not Reported in F.Supp.3d, 2014 WL 4796939, 84 UCC Rep.Serv.2d 764

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EXHIBIT CC

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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

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:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

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

A No.

MR. HOLLEY: Your Honor, I'll pass the witness.

THE COURT: Okay. Why don't we break for lunch. Can you guys be back at 1:30, so a little under an hour?

MR. KEACH: I'm here.

THE COURT: Okay. Thank you.

And, Mr. Gerrard, will that give you an opportunity to look at the documents, since you're clearly not going to eat lunch?

MR. GERRARD: Will the courtroom be open like 10 minutes before we get back or --

THE COURT: Sure. We'll open at 1:15.

MR. GERRARD: Okay. Good.

(Court recessed at 12:35 p.m., until 1:35 p.m.)

THE COURT: All right. Sir, if you could come back up. I'd like to remind you you're still under oath.

And, Mr. Gerrard, you said you had some additional documents to which you were able to stipulate at this time?

MR. GERRARD: Yes, Your Honor. I can stipulate to Exhibits 101 through 106 --

THE COURT: 101 through 106 will be admitted.

MR. GERRARD: -- 109 through 129.

THE COURT: Any other objections to 109 through 129? They'll be admitted.

THE COURT: Did you have an objection to 101 through

106? I'm hearing none.

MR. GERRARD: 134 through 136.

THE COURT: Any objections to 134 through 136?

They'll be admitted.

MR. GERRARD: 138 through 140.

THE COURT: Any objection?

MR. GERRARD: 142 through 148.

THE CLERK: Through 148?

MR. GERRARD: Correct.

THE COURT: 132?

MR. GERRARD: 142 to 148.

THE COURT: No objections?

They'll be admitted.

MR. GERRARD: And then 150 to 169.

THE COURT: Any objections?

150 through 169 will be admitted.

MR. GERRARD: 171 and 175 to 179.

THE COURT: Any objection to 171?

It'll be admitted.

175 to 179?

MR. GERRARD: And then what are those last three?

THE COURT: Be admitted.

Okay. Mr. Gerrard, I lost you on --

MR. GERRARD: Just a second, Your Honor. There's one more. Mr. Merrill gave me three more exhibits right

before we left for lunch.

THE COURT: They aren't marked yet.

MR. GERRARD: Okay.

THE COURT: Was there an exhibit that you were stipulating to between 37 and 41?

MR. GERRARD: Yeah. 138 through 140.

THE COURT: Okay. Any objection to 138 through 140? They'll be admitted. Thank you. That was where I lost you. You were going a bit faster than I was.

MR. GERRARD: Just to be clear, the ones I'm not stipulating to are 7, 8, 30, 31 -- 7, 8, 30, 31, 32, 33, 37, 41, 49, 70, 72, 73, 74, and 80. There's a 1 in front of all those.

(Defendant R&S St. Rose Lenders Exhibits 101 through 106, 109 through 129, 134 through 136, 138 through 140, 142 through 148, 150 through 169, 171, and 175 through 179 admitted)

THE COURT: Are we ready to resume the examination? Ms. Sanpei, we're up to you. Do you have any cross-examination?

MS. SANPEI: No questions, Your Honor.

THE COURT: Okay. Mr. Murdock.

MR. MURDOCK: Thank you, Your Honor.

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* * *

EXHIBITS

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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

DEPT. NO. XI

Transcript of Proceedings

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EVIDENTIARY HEARING - DAY 2

JANUARY 11, 2010

APPEARANCES:

FOR THE PLAINTIFFS: ROBERT MURDOCK, ESQ.
MARTIN ECKLEY 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

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FLORENCE HOYT
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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

EVIDENTIARY HEARING - DAY 3

TUESDAY, JANUARY 12, 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:

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District Court

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* * *

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

PORTION OF EVIDENTIARY HEARING - DAY 4

FRIDAY, JANUARY 15, 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:

JILL HAWKINS
District Court

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DISTRICT COURT
CLARK COUNTY, NEVADA
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CLERK OF THE COURT

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 4
(TESTIMONY OF SAIID RAD)

FRIDAY, JANUARY 15, 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. SAMPEI, ESQ.

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

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CLERK OF THE COURT

LAS VEGAS, NEVADA, FRIDAY, JANUARY 15, 2010, 3:23 P.M.

(Prior proceedings not transcribed)

(Court recessed at 3:16 p.m., until 3:23 p.m.)

THE COURT: Are we ready?

Mr. Rad, if you'd come up to the witness stand.

SAID FOROUZAN RAD, DEFENDANTS' WITNESS, SWORN

THE CLERK: Please be seated, and state and spell your name.

THE WITNESS: Saiid Forouzan Rad. Saiid, S-A-I-I-D, Forouzan, F-O-R-O-U-Z-A-N, Rad, R-A-D.

DIRECT EXAMINATION

BY MR. GERRARD:

Q Good afternoon, Mr. Rad. My name's Doug Gerrard. We've never actually met.

Isn't it true, sir, that you are a member of an entity known as R&S St. Rose LLC?

A "You" meaning Saiid Forouzan Rad?

Q You have an entity, Forouzan, Inc., of which you're the sole -- you're the president, sole director; correct?

A I'm the president.

Q And you're on the board of directors; correct?

A Correct, sir.

Q Okay. And your entity Forouzan, Inc., is the sole -- excuse me, is one of two members of R&S St. Rose LLC; correct?

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* * *

ORIGINAL

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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

EVIDENTIARY HEARING - DAY 5
(CONTINUED TESTIMONY OF SAIID RAD)

MONDAY, MARCH 29, 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

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DISTRICT COURT
CLARK COUNTY, NEVADA
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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
(TESTIMONY OF TERESA CARGILL AND PHILLIP NOURAFCHAN)

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

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
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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: JILL HAWKINS
District Court

TRANSCRIPTION BY: FLORENCE HOYT
Las Vegas, Nevada 89146

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DISTRICT COURT
CLARK COUNTY, NEVADA
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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.
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DISTRICT COURT
CLARK COUNTY, NEVADA
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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 8
(TESTIMONY OF BRADLEY BURNS)

THURSDAY, APRIL 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: JILL HAWKINS District Court	TRANSCRIPTION BY: FLORENCE HOYT Las Vegas, Nevada 89146

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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

EVIDENTIARY HEARING - DAY 9
(ARGUMENT)

TUESDAY, APRIL 13, 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: JILL HAWKINS District Court	TRANSCRIPTION BY: FLORENCE HOYT Las Vegas, Nevada 89146

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DISTRICT COURT
CLARK COUNTY, NEVADA
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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 10
(CONTINUED ARGUMENT)

WEDNESDAY, APRIL 14, 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

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EXHIBIT GG

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 10
(CONTINUED ARGUMENT)

WEDNESDAY, APRIL 14, 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: JILL HAWKINS District Court	TRANSCRIPTION BY: FLORENCE HOYT Las Vegas, Nevada 89146

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

for motion calendar.

MR. GERRARD: So what were you thinking of, Your Honor?

MR. KEACH: Your Honor, I'd just ask the Court merely to let me correct the record just briefly. And I think it's a -- ours was a 52(c) motion.

THE COURT: Okay. Sorry. I'm old. They were 41(b) motions in the old days.

MR. KEACH: Those were in the old days. This is a 52(c), Your Honor.

THE COURT: Yeah. So whatever rule was the right rule. We were arguing the motions that we always argue when the plaintiff is done with their evidence, except for in this case Mr. Burns's testimony.

So when do you guys want to come back?

MR. GERRARD: Well, when is Your Honor thinking?

THE COURT: I've got plenty of time. You guys always have plenty of scheduling problems. Should we start with Mr. Murdock and Mr. Keach, who always have the most scheduling problems, or, you know --

When can you guys come back?

MR. MURDOCK: We're at your beck and call, Your Honor.

THE COURT: Oh. How do you feel about tomorrow?

MR. KEACH: Good.

EXHIBIT HH

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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

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.

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?

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

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

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

Party Information

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

Events & Orders of the Court

04/19/2017 All Pending Motions (10:00 AM) (Judicial Officer Allf, Nancy)

Minutes
04/19/2017 10:00 AM
- DEFENDANT'S MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES...PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT; AND ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND Upon inquiry of the Court whether or not Mr. Mark Albright intended to speak to day, Mr. Mark Albright stated he did not. Arguments by Mr. Mariam and Mr. Chris Albright regarding the merits of and opposition to the pending motions. Mr. Chris Albright stated with regard to the U.S. Supreme Court rule 13 which is not in his briefs he could provide a supplement for. COURT ORDERED, Defendant s Motion and Motion to Dismiss First Amended Complaint; Memorandum of Points and Authorities, as to Standing motion is DENIED, Statute of limitation TAKEN UNDER SUBMISSION and CONTINUED TO CHAMBERS CALENDAR for determination as to whether or not the matter can go forward, both parties may submit supplemental briefs no later than April 28, 2017; Plaintiff s Opposition to Motion to Dismiss First Amended Complaint; and Alternative Countermotion for Leave to Amend CONTINUED TO CHAMBERS for decision. 5/16/2016 (CHAMBERS) DECISION: DEFENDANT'S MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT; AND ALTERNATIVE COUNTERMOTION FOR LEAVE TO AMEND

Parties Present
Return to Register of Actions

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DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, Plaintiff, vs. DOUGLAS GERRARD, ESQ., Defendant.	CASE NO. A-16-744561-C DEPT. XXVII

BEFORE THE HONORABLE NANCY L. ALLF, DISTRICT COURT JUDGE

WEDNESDAY, APRIL 19, 2017

TRANSCRIPT OF PROCEEDINGS

DEFENDANT'S MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

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

APPEARANCES:

For the Plaintiff: (via CourtCall) D. CHRIS ALBRIGHT, ESQ.
GEORGE MARK ALBRIGHT, ESQ.

For the Defendant: ROBERT S. LARSEN, ESQ.
CRAIG J. MARIAM, ESQ.

RECORDED BY: TRACI RAWLINSON, COURT RECORDER

WEDNESDAY, APRIL 19, 2017 AT 11:00 A.M.

THE COURT: Branch Banking vs. Gerrard.

MR. MARIAM: Good morning, Your Honor, Craig Mariam for the Defendants.

MR. LARSEN: Rob Larsen, also for the Defendants.

THE COURT: Thank you.

MR. LARSEN: And with us is Mr. Gerrard.

THE COURT: Thank you and welcome.

MR. CHRIS ALBRIGHT: Good morning, Your Honor, Chris Albright for the Plaintiff.

MR. MARK ALBRIGHT: Mark Albright appearing --

THE COURT: Hang on.

MR. MARK ALBRIGHT: -- for the Plaintiff also, Your Honor.

THE COURT: We -- we have, let's hear from the courtroom and then on the phone, please. One more in the courtroom.

MR. CHRIS ALBRIGHT: Chris Albright on behalf of the Plaintiff.

THE COURT: Thank you. And on the phone, please.

MR. MARK ALBRIGHT: Attorney Mark Albright appearing also on behalf of Plaintiff.

THE COURT: Thank you. Mr. Mark Albright, do you intend to speak today?

MR. MARK ALBRIGHT: No, Your Honor.

THE COURT: Thank you, very much. All right, this is the Defendant's Motion to Dismiss the First Amended Complaint and then the Plaintiff has an

Opposition and a Countermotion for Leave to Amend. Mr. Mariam.

MR. MARIAM: Thank you, Your Honor. So, this case is a generation old, there are a lot of issues --

THE COURT: There -- and the record was extensive, we did our best to get through it.

MR. MARIAM: Yes. And so for as today is concerned I think there are a few independently, potentially dispositive issues, whether it's a statute of limitations, the issue that the opposition raised is regarding dicta, the issue of standing. I think they're all independent of each other.

Before I kind of go through a narrative or regurgitate what's in the papers, I just wondered if you had any particular inquiries.

THE COURT: No, I -- I -- not really. I -- I made some preliminary, you know, impressions. I formed some with regard to the standing argument. I wasn't sure that that was a winner for the Defendant and your causation issue appeared to be factual, so that -- it appeared to me as though the -- the Plaintiff had stated a cause, doesn't mean they're going to win, but they stated a cause of action.

The issue that I'm most concerned about for the Plaintiff is the statute of limitations argument. My inclination was to require additional briefing and to grant the countermotion. If that --

MR. MARIAM: Okay. Yeah.

THE COURT: -- if that focuses the parties.

MR. MARIAM: Absolutely. So I'll start with that now.

THE COURT: And -- and that -- that doesn't mean that I make up my mind before listening.

MR. MARIAM: So on the statute of limitations issue, I think the -- the primary point to -- to understand and consider is that the remittitur issue enclosed the case, the appellate case, on March 18th of 2014. Two years after that date, would have been either March 17th or March 18th of 2016 and the case was filed months after that.

THE COURT: February 22, 2017 -- oh, that's the first Amended Complaint, you're right.

MR. MARIAM: Yes. The case was filed actually on --

THE COURT: In '15.

MR. MARIAM: -- on October 5th of 2016. So that's six months or so after the statute of limitations.

THE COURT: I say -- I see October 14 of 2015, but that's not enough of a difference to matter.

MR. MARIAM: Okay. Either way -- yeah, you're right -- so either way -- I don't know what the date, if that's right, I have October 5th, but either way, it would be well past the argument and so far as we're making as to the statute of limitations.

The only issue really to consider is whether the Petition to the Supreme Court for a writ continues to toll the statutory time period. We have presented to the Court author -- it's -- it's -- it's not an issue that has been vetted extensively, but it certainly is an issue that has been discussed in terms of whether an appeal as a matter of right versus a matter of discretion, tolls the statute of limitations. And it has been found that discretionary appeals do not, and that's -- there are -- there are, some out of state cases that were cited to that end. And it only makes sense, because as I said to start, the remittitur

issue; when a remittitur issues, the case is closed. That end -- that -- that ends the tolling period and commences the statute of limitations. There -- there was no petition or request for a stay, they could have asked for one, they could have filed a motion to stay the issuance of the remittitur pending the petition for the writ, and that did not happen.

The argument in opposition, the way I read it is -- is rhetoric. There's not a lot of -- in fact, there's no binding authority on point, it's persuasive argument. And I think that -- I think that really goes both ways. We did vet this issue in significant detail in terms of research, and we have presented to the Court what we could find. I can -- you know, if your thought is to allow supplemental briefing, I would love the opportunity to continue to look at that, but we did, we did look at it in detail. And I think it comes down to a matter of common sense. Like I said, the case is closed, the case is closed and the statute is no longer tolled. That's the gist of the argument -- that is the argument on the statute of limitations grounds.

The other two primary -- I guess, primary points in the motion are the issue of standing and the issue of -- I don't know if -- causation is how it's term -- it's termed, but I think it's really an issue of collateral estoppel or issue conclusion or res judicata. It essentially says that the court -- what, seven years ago, whatever it was, 2010, issued findings of fact and conclusions of law, relative to the merit in this case. Also, those findings of fact and conclusions of law were not appealed. There was an appeal as to the standing issue, but there was no appeal as to the -- the merit-based argument, and this was not dicta. Dicta, you know, we go through the authority and I won't re -- I won't regurgitate it for you, but the findings by the prior court, the District

Court, were necessary and required for it to issue its declaratory relief judgment, the judgment affecting the declaratory request. These issues were presented to the parties before trial, there was a list of issues to be decided at trial. I think there were twenty-something of them, off hand. The majority of them did not relate to standing. In fact, none of them related to standing, that's a different issue. They all related to the merit of the Equitable Subrogation claim and they were decided.

This was a 10-day trial, witnesses were heard. It was not a consecutive trial, these 10 days were prolonged over a period of a month because the trial was -- I wasn't there, but it seemed intense based on reading the transcripts and the issues, there was a lot of argument. In fact, after the findings of fact and conclusions of law were rendered, our client objected and petitioned the Court, moved the Court, to exclude to remove the findings of fact that relate to the merit-based conclusions. And to focus the findings of fact only on standing so that they could then address the issue itself, from the appellate court. The Court denied that request and issued its findings of fact as you have seen. And I, you know, one thing I do want to do and I -- this is, I tend to try to avoid regurgitation as I've now said three times, but I do want to read a couple of --

THE COURT: It's fine.

MR. MARIAM: -- the findings of fact --

THE COURT: Sure.

MR. MARIAM: -- because I think they are important. These are, you know, they -- they are, the findings of fact and conclusions of law are contained in our client's request for judicial notice. I don't know that there's an

opposition on this particular issue because they are in the court record, and all we're asking the Court to do is look at the actual findings by the Court, which it would do in any case.

So to the point, and there's so many of them, so I'm just going to read a few. Findings of fact 28 and 29 addressed a declaratory relief claim, requested by St. Rose with lenders, and that's the first cause of action. And it -- and, the finding is specific, St. Rose -- St. Rose lenders deed of trust should retain its priority over the 2007 Colonial Bank deed of trust, that follows it. Facts 121 and 122, 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 require --

THE COURT: And it's the August 26, '05, $29 million construct -- is that -- or was that at the acquisition loan?

MR. MARIAM: There were -- yeah, so there the acquisition loan and then there was the construction loan.

THE COURT: '05 and '07.

MR. MARIAM: Correct.

THE COURT: 29,000,000 and 43,000,000.

MR. MARIAM: Correct.

THE COURT: All right.

MR. MARIAM: Yes.

THE COURT: And then the intervening loan by St. Rose lenders.

MR. MARIAM: The second -- prior -- at one time it was the second priority loan -- priority deed and then it became the first, yes.

THE COURT: I got it.

MR. MARIAM: Yes.

THE COURT: I just want to make sure -- I have the contacts.

MR. MARIAM: Yeah, okay. And then -- and then so fact 121, this is the finding fact that was ex -- that was incorporated into the judgment. Since St. Rose lenders was not a party to either the 2007 Colonial Bank deed of trust, or the loan agreement, it is not required to subrogate its deed of trust. That's a finding, that's a conclusion. 122, an agreement which prejudices lien holders or impairs their security, requires their consent. It's a finding of law, 122.

We can litigate this case again, and go through the process, spend a lot of money, force our client through depositions, testimony, trial, but given the findings of fact that already occur, this -- this -- the case within the case, cannot be proven. Whether that's termed causation, whether that's termed issue conclusion, I think it could be either, but it's clear there's no way to interpret these findings other than what they are. To argue they are dicta is simply incorrect, not only -- for three reasons, one, there is no appeal on that issue, that issue is waived, the opposition cannot make that argument, the issue is waived. Two, there was an objection by our client following trial, the Judge denied that objection -- denied the motion and issued the merit based findings. Three -- what was my third one?

THE COURT: Statute of limitations, standing, causation?

MR. MARIAM: The statute of limitations is independent; the statute of limitation is an issue. And I think if that's -- that's -- if the statute wasn't tolled, this all becomes moot. In the event the statute of limitations is in play, this no longer becomes moot.

The one thing I am not addressing today because it's in the papers,

is the issue of standing -- the issue of -- I can't read the writing, can I ask? And the point that's being made to me is kind of what I said, if it is a final finding and order on the merits, that was an appeal. And if there's no appeal on the issue on the merits, does it -- the argument here is waived.

The issue -- but, I was going to say is the issue of standing, the real party in interest, I think its dispositive, but I can see your point of it, that it's fact based. And I can see that, and that's why I'm kind of putting that aside for today, because I think these two other issues --

THE COURT: I really focused on the statute of limitation argument.

MR. MARIAM: Okay. The statute of limitations argument is what I said, I'm happy to go look further and brief it, if that's what you would like. I don't know --

THE COURT: If -- if you think you fully exhausted the briefing on that, then I'm not going to require you to do additional.

MR. MARIAM: We did -- we did exhaust it. I don't want to say we didn't, we looked high and low and I thought we found authority of point so, but if you don't think so, we're happy --

THE COURT: It just -- it appears to be an open issue in Nevada, there's no decision on point, that's --

MR. MARIAM: Right, that's true. And if there's issues that -- that we'd have to look at out of state court contacts. But we'd also look at common sense. And just the fact that the remittitur issue and the case is closed and there was no stay. I think that's -- and it's discretionary, the writ's discretionary. An appeal limit is an appeal, a writ -- a petition for a writ is a petition for a writ, it's -- it's like any -- any, you know, interlocutory writ, and

then that doesn't stay the case either.

So, I don't remember what my third point was on the other issue, but I think the two points I made --

THE COURT: If it -- if it comes to you, you can address it in your reply, and if necessary I'll give Mr. Albright a chance to respond and give you the last word.

MR. MARIAM: Sure. Okay. Thank you.

THE COURT: Thank you, Mr. Mariam. Mr. Albright.

MR. CHRIS ALBRIGHT: Thank you, Your Honor. Looking at the statute of limitations question, which I would agree is probably the most relevant question to a Motion to Dismiss. I think you've indicated you might like some further briefing and I think you're going to get further briefing, I'm sure.

THE COURT: Only if you tell me you think you can --

MR. CHRIS ALBRIGHT: If this is -- well, I mean on the other issues, if you deny the Motion to Dismiss, I'm sure there will be another Motion for Summary Judgment someday, which some of the other issues will be better adjudicated in that venue with affidavits and so forth.

But the first -- the first Nevada case to say that Nevada is going to follow the rule, which not all courts, not all states follow, some states do, that you don't sue your attorney for litigation malpractice until any appeals have run their course was the *Semenza* case, *Semenza v. Nevada Medical Liability Insurance Company.* And they base the decision on a claim of cruel theory rather than a tolling theory. There's later Nevada cases that say, we're also going to apply a tolling theory. And, but this is what *Semenza* said, it said: a legal malpractice action does not accrue until the Plaintiff's damages are certain and not

contingent upon the outcome of an appeal.

Period, an appeal. Doesn't say the state court appeal, doesn't say an appeal as of right, it says an appeal. Now, in Nevada you have 30 days to file a notice of appeal. At the U.S. Supreme Court under U.S. Supreme Court Rule 13, you have 90 days to file a petition for writ of cert. And in fact what rule 13 also says is it indicates that if you're not within that time frame, the clerk is not even to file the petition. And we've submitted as one of our exhibits, which I think you can review without turning this into Motion for Summary Judgment, under *Baxter*, because it's referenced in our amended complaint, we've submitted a copy of the first page of the petition and it's -- it's file stamped. It was accepted by U.S. Supreme Court, and it's not rejected as untimely, and then it was later ruled that they would not accept petition.

And so you have Your Honor, is you have a subset of states that recognize this litigation, claim accrual rule or litigation tolling rule. And then within that subset of states you have a pretty small subset that has also addressed this petition for writ question. And it appears to me that the cases that are all directly on point, and obviously they're all just persuasive because Nevada has a rule, but the cases that are really directly on point and that they come from states where there is a litigation malpractice tolling rule or claim accrual delayed -- delayed claim accrual rule. Those cases, Texas, Arizona, Kentucky, the ones that we've cited in our brief, they all seem -- they all seem to say that, yeah, a petition for writ of cert counts as a malpractice tolling appeal. And in fact, what's interesting is that there's a couple of those cases that even seem to indicate that -- that the time to appeal, or the claim accrual

does not occur until the time for filing a petition for rehearing of the denial of cert is in place. So that arguably you could say that it -- that it's 90 days later even if we hadn't filed an appeal or a -- or a petition for writ, we could argue that the -- that the statute of limitations didn't start to run until that point. We don't have to argue that and so we don't have to reach that question. But clearly the case law that is directly on point from the states that do have this rule all seems to indicate that that's the way that that turns out.

And I think one of the things that's important that we've cited in our brief is the -- is the *Kopicko* decision, because in *Kopicko* what happened is they went back to this claim accrual theory and they said, look Nevada lawyer files a lawsuit, doesn't file it against the right party, has it dismissed, tries to -- tries to move to amend, can't do that because the case has been dismissed, tells his clients I've committed malpractice, you may need to get a malpractice attorney against me. So his clients are aware of everything that's happened that constitutes malpractice. And then what he does, is he doesn't go and file an appeal, he files a whole different action, and -- and what the Nevada Supreme Court said is only after that whole new action had been adjudicated against this lawyer had the claims really accrued, because only at that point was the damage fully sustained and irreversible. And -- and that's really what we have here, is until the U.S. Supreme Court said we're going to deny your petition for writ of certiorari the -- the damages which had been caused by the alleged malpractice in this case, were not yet clearly and definitively irreversible. And so I think *Kopicko* seems to me to indicate that although the Nevada Supreme Court has never addressed this direct question, on all fours, that if you look at how the claim acccrual rule works, as it applies to litigation malpractice cases,

the way it works is you wait to see when has the client been injured in a manner which has become irreversible, and if the client does something to try to reverse the damage and he's not able to succeed in that endeavor, be it a whole new lawsuit, not even an appeal, or be it a petition for writ, then and only then can you say that the claim has now accrued in the statute of limitations has started to run. And I don't think there's any question of fact in this case that we filed within two years of the -- of the petition being denied.

It sounds, Your Honor, like you're not interested in a whole lot of argument on the other points that been raised. I -- I think you're right that -- that a factual cause of action for malpractice has been asserted. If you take our complaint, we have alleged that we were represented by these attorneys and that's not really disputed, so we have standing to sue them for malpractice. We have alleged that they knew or should have known that one of the things they needed to do for us was to procure evidence and disclose evidence and use evidence at trial that would show that we owned the deed of trust under which we had also therefore acquired under Nevada in Ninth Circuit law the equitable subrogation rights of the prior owner of the deed of trust. And we haven't just made that allegation in a conclusory fashion; we've cited lots and lots and lots of facts that show. Here's one reason why they should have known that; it was in the affirmative defenses, it was in the denials to the complaint, here's a -- here's a reason, it was in what was stated by the Judge at the beginning of trial, it was in the NQAF which they disagree with us on that point, but the lower court agreed with our reading of that. In any event, you know, these are facts that are not just conclusory alleged we have actually set forth distinct facts to support these allegations. And if you assume that all

those facts are true, then the next thing that we have alleged is we say look, had they realized in time that they needed to do this, it could have been done very easily, because there was in fact an assignment and in fact there's a federal case in Nevada, the *Smokehouse* case, in which the federal Judge here in Nevada has said yeah, that 2009 bulk assignment transferred Colonial's former Nevada deeds of trust over to BB&T. And so if they would've presented that, then they would've prevailed on that point had they timely realized the need to do so. And what would that have meant, well that would have meant that we had under the *Houston* case under the *Mort* case we had equitable subrogation rights, and really equitable replacement rights given the nature of these two loans. And we think we would have prevailed on that and -- and their response on that is to say, well we think those issues are tried and they were adjudicated and so therefore you don't get to try them again. Well, we disagree with that, we don't think that they were tried. In fact, what happens at trial is Mr. Gerrard puts on his case for BB&T and when he's done putting on that case, arguments resume on the -- on the rule 52(c) motion that had been started before his last witness was put on the stand. And those arguments are adjudicated against BB&T. And based on that, the Court doesn't say, okay now it's your turn, R&S Lenders, put on your case. R&S Lenders doesn't have to put on their case, you know, in -- in fact there's a line in the descent, which you know, obviously I don't like the descent and they do, but again, this line probably the majority would've agreed with that the Nevada Supreme Court, where -- where Justice Pickering says, you know what happened here is that R&S St. Rose Lenders received a $12,300,000 victory, you know, which it did not -- to which it did not prove its entitlement. She says on the merits, I think

it's as though on the merits. But that's really what happened here is R&S did not have to prove up their claim, and so the rulings that the Court made on that issue are in fact dicta, they are of no preclusive effect in this case. This has happened lots of times before, and we've cited lots of cases in our briefs where a judge rules against a party on some procedural issue, and then -- and I can understand the temptation to do this as a judge, says, but by the way the client would've lost anyway on the merits. And -- and what they review in courts have said again and again and again on those types of cases, is they've said, you don't get to rely on that in the malpractice suit. Because it's dicta, because it wasn't necessary, because it has no preclusive effect under -- in Nevada under *Five Star* and because the whole point of the trial of the malpractice case is not to determine well what would the other judge have done, but rather to reach an objective review of the underlying merits as they might've been reached in the case were it not for the procedural -- or in this case evidentiary problem. They say, you know, we can come back and retry that. I don't think it's ever been tried, I don't think it would be a re-trial, but again I think that Your Honor is right, the first Amended Complaint, if you assume everything that's in there is true, clearly states a cause of action for legal malpractice and unless the statute of limitations arguments are persuasive to you that the Defendants have -- have made, I -- I don't see any reason to grant the motion. I think the motion should be denied and they should file an answer, and then if we want to have subsequent briefing on -- on issues that are really more along the lines of Motion for Summary Judgment with affidavits and so forth, then we can get into some of these arguments again.

THE COURT: And -- and if given the opportunity would you have

anything to add to your brief about statute of limitations?

MR. CHRIS ALBRIGHT: Well some of what I discussed this morning, Your Honor, with respect to U.S. Supreme Court Rule 13, I don't think is in my briefs. I -- I don't know if this is being recorded for us to get a transcript?

THE COURT: Always.

MR. CHRIS ALBRIGHT: Okay. And so if you would like that put forth in writing, I'd be happy to do that -- that is a little bit new from what was in my briefs.

THE COURT: When will -- could you have that to me by Friday the 28th?

MR. CHRIS ALBRIGHT: Sure.

THE COURT: Okay. So, thank you. And the reply, please.

MR. MARIAM: Thank you, Your Honor. Two foundational points and then I'll focus on the statute of limitations only. One, the argument made by Counsel relative to the standing issue misses the fact that the assumption agreement, the purchase agreement from the FDIC, disallows the claim to have accrued -- occurred in the first place. It disallows litigation. The -- Judge Gonzalez found that in her findings of fact and conclusions of law. It's not in this motion, it's a summary judgment issue. We will be raising that, but I wanted to address that point because it -- it was mentioned. Second, I -- I think you were going to do this but if -- if there is further briefing we'd of course appreciate the opportunity to respond on that.

Focusing on the statute of limitations issue, *Semenza* is the seminal case, I -- you cited to it a lot -- it's the -- it's the seminal case relating to the accrual of a legal malpractice claim. But, it doesn't -- it's not relevant here, I don't think there's an argument that -- well, strike that -- it -- it's -- it's pertinent

in some respect, but the issue really is tolling, in this case. But taking Plaintiff -- Counsel's argument at face value, *Semenza* says that the statute of limitation begins to toll as of the date of an adverse ruling on appeal. That date was even earlier than the remittitur. The -- that date was May 31st of 2013. That's when the trial court -- the Supreme Court affirmed the ruling of the trial court, and then there was an en banc decision on February 21st, 2014. The remittitur issued a little -- about a month later, on March 18th, 2014 and that was the end of the appeal. A writ is not an appeal I think -- and I think that's black letter law, a writ is a -- a petition for a writ is a request for a higher court to address an issue in the lower court, but it's not an appeal. It's not an issue, it's not -- it's discretionary, these things are denied summarily more often than not. But an appeal is decided on the merits, an appeal is a matter of right. Briefing is had, argument is made and a decision on the merits is rendered. And that occurred in this case. A remittitur then issued and the case was closed.

One thing we did address in the papers, the moving papers, on this -- on the statute of limitations issue, is public policy. Because public policy is probably going to be relevant in interpreting the -- the state legislature's desire here and we've cited to various Nevada cases that say, for example, the Court, in quotes: must give the statute interpretation that reason and public policy would indicate the legislature intended. A concrete timeframe from within -- within which a Plaintiff must file a lawsuit and after which a Defendant is afforded a level of security.

That's *Winn v. Sunrise Hospital Medical Center* Nevada, 2012.

In malpractice actions, public policy weighs the interest of the representing client with the interest of counsel allowing clients to, quote, 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. That case is actually quoted from Indiana, that's *Silvers v. Brodeur* on page 18 of the moving papers.

The case upon which the Plaintiff relies in opposition, and also cited to during argument a moment ago, is the *Kopicko* case, if I'm saying that correctly -- *Kopicko* case. That case did not concern an appeal, it didn't concern a petition for a writ. It's factually distinguishable, it's irrelevant to the analysis here. And the proposition that Plaintiff puts forth that --that it's clear that Nevada would follow Texas and Arizona and Kentucky law is -- is speechless. There is no support for that statement. The case cited is off point, it doesn't address an appeal. The cases -- there are some cases on point that the defense cited and I -- I will say it four times, I don't want to regurgitate what's in the papers, but in particular there is the Pennsylvania action that was cited -- this is Robbins Sevenko Orthopedic Surgeons vs. Geisenberger. And that case refused to extend the tolling period to writs of certiorari to the U.S. Supreme Court because with time, memory -- quote: memories fade, witnesses disappear or die, and evidence is lost.

It's also cited by *Laird,* 235 Cal App 3d, at 8 14 [sic]. These are all in the papers, page 18 of the moving papers.

And, finally I'll just address the North Carolina court's opinion in *Clark*, that's page 19, and -- I'm sorry, I'm now reading from my reply, this is where we address the opposition, page 19: the logic expressed by the North Carolina court is the same expressed by many other courts, that, quote, a petition for writ of certiorari is not an appeal of right, and no review is guaranteed once the

petition is filed.

Appeals, and then it says the same thing, twice.

So instead of beating around the bush, as -- as has been done, the direct issue in this case is whether a writ is an appeal, and it is not, and when the appeal was ultimately concluded. And that is as of the date of the remittitur, case closed. Two years from that date would've been the expiration of the statute of limit -- the statute of limitations, this case was filed approximately six months later, the case is barred. I really do want to continue to talk about the other issues, but I -- I think they've been vetted fully. I think -- I would hope the Court would take one last look, hopefully, at the findings of fact and conclusions of law by Judge Gonzalez, and -- and -- and -- and -- and identify on the face of those findings that this is not dicta, they were required to issue the judgement in the first place, and that to force Mr. Gerrard through another trial, to sit through deposition, summary judgments, the cost expense, the only -- the only -- the only gaining parties would be us, the attorneys, and I don't want that to happen.

So just as matter of policy, hopefully, finality can be had one way or another at this stage in the proceeding. Thank you.

THE COURT: Thank you, both. This is the Defendant's Motion to Dismiss the First Amended Complaint, along with the Plaintiff's countermotion, the matter is submitted. With regard to the first grounds for the motion standing causation, motion's denied because the complaint states a claim for which relief could be granted. However, the matter with regard to the statute of limitations is taken under submission for a determination as to whether or not the matter can go forward on a timely basis. The briefing schedule, both

parties will be allowed to submit supplemental briefs no later than May 28th -- I'm sorry, April 28th, 2017, and the matter will be set on my May 16th, 2017 Chambers calendar for decision. And it could be that the decision --

MR. MARK ALBRIGHT: Thank you, Your Honor.

THE COURT: -- doesn't fully explore the result into -- and directs one party to prepare findings and conclusions, just to let you know.

MR. CHRIS ALBRIGHT: Okay.

THE COURT: It may be in a conclusory fashion, but I need to re-review the issue of statute of limitations before I can rule dispositively on the motion.

MR. CHRIS ALBRIGHT: Thank you, Your Honor.

THE COURT: Thank you both.

MR. MARIAM: Thank you for your time. Thank you, have a good day.

[Proceeding concluded at 11:36 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Brynn Griffiths
Court Recorder/Transcriber

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DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, Plaintiff, vs. DOUGLAS D. GERRARD, ESQ., individually; and GERRARD & COX, a Nevada professional corporation, d/b/a GERRARD COX & LARSEN; JOHN DOE INDIVIDUALS I-X; and ROE BUSINESS ENTITIES XI-XX, Defendants.	CASE NO. A-16-744561-C DEPT NO. XXVII **SUPPLEMENTAL BRIEF ON STATUTE OF LIMITATIONS ISSUES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date of Hearing: May 16, 2017 Time of Hearing: In Chambers

COMES NOW, Plaintiff, BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, qualified and registered to do business in Nevada (hereinafter "Plaintiff" or "BB&T"), by and through its attorneys of record, ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and, pursuant to the Court's directive at the hearing of Defendants' Motion to Dismiss First Amended Complaint, held on April 19, 2017, hereby submits these Supplemental Points and Authorities in Opposition to the Motion to Dismiss, as to the Statute of Limitations defense raised in said Motion.

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SUPPLEMENTAL POINTS AND AUTHORITIES ON STATUTE OF LIMITATIONS QUESTIONS

I.

INTRODUCTION AND OVERVIEW

This Supplemental Brief will demonstrate that (in addition to all of the reasons already provided) the Defendants' statute of limitations arguments must be rejected based on the following principles of Nevada law and the following application of said principles to the facts of this case:

Claim Accrual Principles

- A litigation malpractice claim does not accrue in Nevada until damages are certain, such that the statute of limitations on such a claim does not begin to run until that date.
- Although a State court appeal is the most common event preventing damages from becoming certain, and thereby delaying accrual of a litigation malpractice claim, it is *not* the *only* event which can prevent a claim from accruing by rendering the finality of damages uncertain. Instead, any action taken by the client which delays the certainty of damages, or renders the effects of the lawyer's negligence potentially reversible, prevents claim accrual from occurring, and thereby prevents commencement of the running of the statute of limitations, until such action is completed.

Application of Claim Accrual Principles to this Case

- Applying these principles to this case, BB&T's timely filing of a Petition for Writ of Certiorari to the U.S. Supreme Court prevented the damages stemming from Defendants' malpractice from becoming certain, as said damages did not become irreversible until the Petition for Writ of Certiorari was denied by the U.S. Supreme Court. Based thereon, the Plaintiff's damages were uncertain, and its claims did not accrue, until the date of the U.S. Supreme Court's decision to deny the Petition, October 6, 2014, at which point, at the earliest, the statute of limitations first began to run, such that the two year statute of limitations would have expired no earlier than October 6, 2016.
- The instant legal malpractice suit was therefore timely filed, as it was filed on October 5, 2016, within two years of the date the statute of limitations began to run.

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Tolling Principles

- Based on the foregoing principles, this case need not be analyzed on a tolling theory, which need not be reached.

- Nevertheless, the same conclusion would also be reached under a tolling analysis, as the statute of limitations is also tolled on a legal malpractice claim arising in litigation, until the claimant's damages are certain, and any proceedings stemming from the litigation are complete.

II.

SUPPLEMENTAL STATEMENT OF FACTS.

By way of reminding this Court of the relevant timeline, the following events occurred on the following dates, as claimed in the First Amended Complaint, or as otherwise discussed in the parties' filings herein. With respect to Nevada appellate events, set forth in more detail below than previously, a copy of the Nevada Supreme Court's docket sheet is attached hereto as **Exhibit "A"** by way of reference.

November 3, 2008:	Murdock and Keach filed Clark County Nevada Complaint against R&S Lenders initiating Case No. A-08-574852.
July 1, 2009:	Colonial, through attorneys Gerrard and GC&L, Defendants herein, filed its own separate Complaint initiating Case No. A-09-594512.
August 6, 2009:	Two cases comprising the original underlying suit consolidated.
August 14, 2009:	Colonial closed by the Alabama State Banking Department, FDIC named as its Receiver, in which capacity it signs a "Purchase and Assumption Agreement, Whole Bank All Deposits" (the "PAA"), with BB&T.
October 1, 2009:	Gerrard and GC&L file an Amended Complaint, now naming BB&T as their client in the underlying consolidated suit.
October 7, 2009:	Second Amended Complaint filed in BB&T's name by Gerrard and GC&L in the underlying consolidated suit, seeking a ruling that BB&T's Deed of Trust (acquired from Colonial) has priority over R&S St. Rose Lenders' Deed of Trust, based on principles of equitable replacement.
October 27, 2009:	R&S St. Rose Lenders files an Answer to BB&T's Second Amended Complaint, denying BB&T's allegation of ownership, and raising statute of frauds and standing as affirmative defenses.
November 3, 2009:	Recordation date of Nevada "Assignment of Security Instruments and Other Loan Documents" (the "2009 Bulk Assignment") from the FDIC, as Receiver for Colonial, to BB&T, with effective date of August 14, 2009.

December 3-4, 2009:	Pre-trial disclosures exchanged between parties to the underlying consolidated suit, including from BB&T.
December 28, 2009:	Deposition of BB&T's PMK regarding acquisition issues takes place, during which the efficacy of the PAA is challenged.
January 8, 2009:	Trial of certain issues in underlying consolidated case begins.
March 30, 2010:	BB&T's primary case in chief, other than one unavailable witness, closes, on sixth day of trial. Oral NRCP 52(c) motion brought by Keach, eventually joined by R&S St. Rose Lenders, arguing that BB&T has failed to meet its burden of proof that it acquired Colonial's subject Note and Deed of Trust in order to have any equitable subrogation/replacement rights related thereto.
March 31, 2010:	At further argument, Gerrard and GC&L attempt, for the first time, to introduce the 2009 Bulk Assignment. Court declines to admit or consider it, as she would have expected it to be disclosed to the other parties at some point prior to that March 31, 2010 date. Gerrard and GC&L then attempt to introduce a new specific assignment just signed by the FDIC. Court declines to admit for similar reasons.
June 23, 2010:	Underlying court's Findings of Fact and Conclusions of Law ("FF&CL") entered, rejecting BB&T's arguments due to a "defect" which was "evidentiary" in nature, namely, because "BB&T failed to meet its burden of proof to establish the Colonial Bank loan, note and deed of trust . . . were ever assigned to BB&T" such that "BB&T is not entitled to relief on its claim for equitable subrogation" or "on its claim for equitable replacement since it has not demonstrated it is a successor in interest" to Colonial.
July 8, 2010:	Defendants Gerrard and GC&L moved for a new trial on behalf of BB&T, or, in the alternative, to alter or amend.
October 5, 2010:	Underlying court denies this Motion, including because "counsel for BB&T was aware of [the challenged BB&T acquisition and ownership] issue . . . prior to the start of trial; . . . therefore, . . . BB&T was . . . not unfairly surprised by the . . . N.R.C.P. 52 motion . . . ."
July 23, 2010:	**"Final Judgment" entered** (followed by a subsequent "Final Judgment" which included costs and fees awards entered on November 10, 2010).
August 12, 2010:	**Notice of Appeal** filed.
May 31, 2013:	**Nevada Supreme Court 3-Judge Panel issues Order of Affirmance** concluding "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 . . ." under disclosure rules.
June 18, 2013:	BB&T timely files a Petition for Rehearing with the Nevada Supreme Court, within 18 days as required by NRAP 40(a)(1).

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September 26, 2013:	**Order Denying Petition for Rehearing issued by Nevada Supreme Court Panel.**
October 8, 2013:	Petition for En Banc reconsideration filed by BB&T with Nevada Supreme Court, in a timely manner under NRAP 26(a) and NRAP 40A.
February 21, 2014:	**Nevada Supreme Court denies Petition for Rehearing.**
May 22, 2014:	**Petition for Writ of Certiorari filed with the U.S. Supreme Court,** within the 90 day period allowed by U.S. Supreme Court Rule 13. Court clerk file-stamps this Petition, rather than rejecting it for filing, as Rule 13 directs the Clerk to do for Petitions filed too late.
October 6, 2014:	**U.S. Supreme Court denies BB&T's Petition for Writ of Certiorari.**
October 15, 2014:	U.S. Supreme Court's Denial of Petition (having been provided by the U.S. Supreme Court Clerk to the Nevada Supreme Court Clerk pursuant to U.S. Supreme Court Rule 16(3)) file-stamped as entered with the Nevada Supreme Court.
October 31, 2014:	Last day to file a Petition with the U.S. Supreme Court, for Rehearing of the denial of the Petition for Writ of Certiorari expires (under the 25-day time limit, set by U.S. Supreme Court Rule 44), without any Petition for Rehearing being filed.
October 5, 2016:	**Instant lawsuit filed in Clark County Nevada District Court,** by BB&T, against Gerrard and GC&L, for litigation malpractice arising out of their representation of BB&T in the underlying suit, less than two years after denial of cert. petition.

III.

SUPPLEMENTAL LEGAL ANALYSIS

A. Claim Accrual Principles

(i) A Litigation Malpractice Claim Does Not Accrue in Nevada until Damages Are Certain.

A legal malpractice claim is premature until appeal from the underlying case is decided. Defendants apparently concede this point, but they fail to recognize that this is but one application and illustration of a more fundamental rule, the existence of which they also fail to recognize, such that their arguments are overly narrow, as based on a simplistic premise, which does not take into account the broader and more fundamental precept at issue herein. That broader and more fundamental principle is that litigation malpractice claims do not accrue until damages are certain. For example, in *Nevada Medical Liability Ins. Co. v. Semenza*, 765 P.2d 184, 185-186, 104 Nev.

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666, 667-668 (1989) the Nevada Supreme Court explained the fundamental principles of claim accrual as follows:

> In Nevada, legal malpractice is premised upon an attorney-client relationship, a duty owed to the client by the attorney, breach of that duty, and the breach **as proximate cause of the client's damages**. *See Warmbrodt v. Blanchard,* 100 Nev. 703, 706–707, 692 P.2d 1282, 1285 (1984). Such an action **does not accrue until the plaintiff knows, or should know, all facts relevant to the foregoing elements and damage has been sustained**. . . . [W]here **damage** has not been sustained **or where it is too early to know whether damage has been sustained**, a legal malpractice action **is premature** and should be dismissed. . . . **[N]o one has a claim against another without having incurred damages.**

[Emphasis added. Citations and quotations omitted].

After describing this general rule, the *Semenza* Court indicated, *as one particular application of that general rule*, that:

> **From the above, it follows** that *a legal malpractice action does not accrue until the plaintiff's damages are certain and not contingent upon the outcome of* ***an*** *appeal*. . . . [w]here there has been no final adjudication of the client's case in which the malpractice allegedly occurred, **the element of injury or damage remains speculative and remote**, thereby making premature the cause of action for professional negligence. . . . Apparent damage may vanish with successful prosecution of **an** appeal and ultimate vindication of an attorney's conduct by **an** appellate court. . . . Therefore, 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. [Emphasis added.]

Id. citations and quotations omitted, emphasis added.

What Defendants' arguments fail to understand is that the post-appeal-accrual rule is but one illustration and example of the broader and more fundamental claim accrual rule's application. As one of the cases relied upon in *Semenza* put it: "In civil actions for damages, two elements must coalesce before a cause of action can exist: (a) a breach of some legally recognized duty owed by the defendant to the plaintiff; (b) which causes the plaintiff some legally cognizable damage." *Woodruff v. Tomlin*, 511 F.2d 1019, 1021 (6th Cir. 1975). Thus, for example, the delayed accrual rule was explained in the treatise *Legal Malpractice*, to be that the date of injury "coincides with *the last possible date* when the attorney's negligence becomes *irreversible*." R. Mallen and V. Levit *Legal Malpractice* §390, at 457 (1981), quoted with approval by *Neylan v. Moser*, 400 N.W.2d 538, 542 (Iowa 1987) [emphasis added].

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(ii) State Court Appeals Are <u>Not</u> the Only Event Which Can Delay the Certainty of Damages and Therefore Delay the Accrual of a Claim.

In Nevada, a legal malpractice claim stemming from litigation malpractice, need not be brought pending the outcome of appellate activity which could mitigate the client's damages or exonerate the attorney. It is **vital to understand, however,** that **this rule merely illustrates and applies a much more fundamental concept,** namely *that a limitations period does not begin to run until a claim has accrued*, and a claim does not accrue until all of the elements of the claim have occurred and are known to the claimant, including damages, as illustrated by *Semenza*, above. Although a state court appeal is the most common event preventing damages from becoming certain, and thereby delaying accrual of a litigation malpractice claim, it is *not* the *only* event which can prevent a claim from accruing by rendering the finality of damages uncertain. Instead, any event which delays the certainty of damages, and renders the damages potentially reversible, prevents claim accrual from occurring, and thereby prevents commencement of the running of the statute of limitations.

Courts must of course be practical and reasonable in applying both the general claim accrual rule and any of its applications. That is to say, when answering the question "when does a litigation malpractice claim accrue" the answer would normally be: "on the date of an adverse Judgment." However, if a timely appeal is taken from that Judgment, within thirty (30) days of notice of entry of the Judgment, then that preliminary answer (which might have appeared correct during the interim period before Notice of Appeal was filed) is no longer accurate. Rather, upon a timely notice of appeal being filed, the statute of limitations is treated as though it had not yet begun to run, inasmuch as that event makes it "too early to know whether damage has been sustained." *Semenza*, 104 Nev. at 668, 765 P.2d at 186.

As the Arizona Supreme Court has explained the foregoing concepts, "in legal malpractice cases, the injury or damaging effect on the unsuccessful party is not ascertainable until the appellate process is completed **or** is waived by a failure to appeal." *Amfac Distribution Corp. v. Miller,* 138 Ariz. 152, 673 P.2d 792 (1983) [emphasis added.] Thus, where an appeal is pursued, the accrual date must be established by looking back on all events, after the Judgment, which may

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have ultimately established the final actual accrual date, until any right to pursue any further appeals is foregone or waived by failure to further appeal.[1]

This same analysis would also necessarily apply to any other attempts, including subsequent actions after an initial appeal, to reverse the damages caused by the malpractice. Thus, for example, after an appeal is rejected, the statute of limitations might be said to apparently begin running again, but, based on the *Semenza* claim accrual reasoning, "it follows" that this will only actually be the case if no Petition for Rehearing is filed, within the 18 day limit of NRAP 40(a)(1), and no subsequent petition for *en banc* reconsideration is filed within the ten (10) court day limit of NRAP 26(a) and NRAP 40A(b). Both of these events occurred herein, thereby further postponing the claim accrual date. *See, e.g., Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1999) (legal malpractice action was tolled while Motion for Re-hearing of State Supreme Court's decision was pending).

The same analysis then also continues to apply, if a Petition for a Writ of Certiorari is filed within the 90-day period established by U.S. Supreme Court Rule 13. This also occurred herein. Only once that Petition was rejected, could it be said that the statute of limitations began to accrue (and even that date might have become mooted in favor of a subsequent date, had any Petition for Rehearing then been filed with the U.S. Supreme Court).

B. <u>The Proper Application of the Delayed Claim Accrual Rule to the Facts of this Case Requires that Movants' Motion to Dismiss Be Denied</u>.

Movants' contention that the present legal malpractice claims accrued when the State Supreme Court rejected Plaintiff's appeal must be rejected.

(i) Neither the Two Year Nor the Four Year Statute of Limitations May Commence to Run Until a Claim Has Accrued, Which Did Not Occur Herein Until October 6, 2014, Less Than Two Years Before the Filing of the Initial Complaint Initiating this Malpractice Action.

Nevada's two year statute of limitations for legal malpractice, running from discovery of a claim, is based upon and codifies longstanding common law discovery-accrual and discovery-tolling rules, and thus begins to run "after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action." NRS

[1] Nor is there any duty to further appeal if doing so would be futile. *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 349 (2002).

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11.207(1). Those "material facts for an attorney malpractice action include those facts that pertain to the presence and causation of damages on which the action is premised." *Brady Vorwerck v. New Albertson's*, 130 Nev. Adv. Op. 68, 333 P.3d 229, 235 (2014). Thus, in the present case, the entirety of the material facts constituting the basis for a claim were not known (or indeed knowable) until the U.S. Supreme Court rejected the Petition for Writ of Certiorari.

Similarly, Nevada's four year statute of limitations begins to accrue upon the date the final element of a client's claim for malpractice accrues: namely, when the client "sustains damage" as a proximate result of the attorney's conduct. NRS 11.207(1).

Again, this principle must also be understood in relation to longstanding Nevada law, such as that in the earlier paragraphs of the *Semenza* decision: Until "damage has been sustained" based on an attorney breach which was a "proximate cause of the client's damages" a claim cannot have yet accrued. *Semenza*, 104 Nev. at 667-68 765 P.2d at 185-86. Indeed, even where damage has apparently been sustained, if it is "too early to know" whether damage has been sustained, the statute of limitations does not begin to run, as the claim has not yet truly accrued. *Id.* No statute of limitations can begin to accrue until this occurs, as the statute would otherwise cut off claims before they exist.

Thus, no further tolling of an already accrued claim needs to be demonstrated in this case, in order for this Court to reject the statute of limitations argument raised by Movants, under either the 2-year or the 4-year limitations periods. (If the 4-year statute of limitations applies, the limitations period would be met even if claim accrual began upon entry of the Nevada Supreme Court's 3-Justice Panel opinion rejecting the state court appeal. However, neither statute of limitation had expired in any event before the filing of this suit.)

The claims at issue herein had not yet even accrued until October 6, 2014, BB&T having declined to pursue any further appeal, such as by a Petition for Rehearing to the U.S. Supreme Court, after that date. Only once the Petition for Writ of Certiorari was rejected had legally cognizable damage accrued, and only once no further rehearing was sought thereon, was it known that October 6, 2014 was the accrual date. Only at that point, when the damage from Defendants' conduct had become certain and irreversible, could it be said that "damage ha[d] been sustained" before which "an action does not accrue." *Semenza*, *infra*.

(ii) ***Kopicko v. Young Illustrates These Points.***

It is important to understand that the above-referenced analysis is not dependent upon invoking the statute of limitations tolling-pending-appeal rule created by *K.J.B.* Rather, the more fundamental claim accrual rules, as discussed in the earlier paragraphs of *Semenza* quoted above, and as discussed in *Woodruff* and *Neylan* cited above, including as adopted in the statutory language itself, apply to prevent the limitations period from beginning to run herein until the rejection of the Petition for Writ of Certiorari.

This is illustrated, as explained in the original Opposition, by the *Kopicko v. Young*, 114 Nev. 1333, 971 P.2d 789 (1998) decision, the importance of which was misconstrued by Defendants during oral argument. In that case, attorney Young filed a products liability suit (the "first suit") naming the wrong defendants, dismissed that suit with prejudice, and then filed a motion under the same case number, to amend and name the proper defendant (Dow Corning) the actual product manufacturer. This motion was denied because the first suit in which it was filed had already been dismissed with prejudice. On February 13, 1991, Young informed his clients in writing of all of these facts, that it was now probably too late to sue Dow Corning, and that they should seek separate counsel regarding a potential malpractice claim against him. *Id.* 114 Nev. at 1335, 971 P.2d at 790.

Pursuant to Defendants' arguments raised herein, no timely appeals being filed in *that* original case, such that "conclusion of the litigation wherein the malpractice allegedly occurred" had taken place, the statute of limitations should immediately have commenced to run upon the denial of the motion to amend the first suit, if not upon the earlier dismissal date of that first suit, and expired upon the running of the limitations period thereafter. This analysis, which is essentially identical to that upon which Defendants rely herein, was however rejected by the Nevada Supreme Court, in a decision which illustrates that the tolling rule is but one application of the broader and more fundamental claim accrual rule, as shown by the ultimate disposition in *Kopicko*:

Young then attempted to pursue the Kopickos' claims anyway, not via an appeal in the litigation where his malpractice had occurred, but via the filing of *a new and separate suit* (the "second suit"), in Federal Court, against the correct defendant (DOW Corning). The second suit

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was dismissed as untimely on October 12, 1993. The Kopickos then filed suit for malpractice against Young on October 16, 1995, which the district court dismissed on the grounds that the statute of limitations had begun to run on the date the Kopickos learned of the malpractice, February 13, 1991. This ruling was however reversed by the Nevada Supreme Court, which indicated that, rather than dispose of the case based on an analysis of the date of "discovery" of the claim, "this matter should have been resolved based upon the fact **that the cause of action for professional negligence *did not accrue*** until the federal district court" issued its Order dismissing the second suit on October 12, 1993: "While the alleged acts of omission constituting malpractice clearly had occurred as of the time of Mr. Young's correspondence of February 13, 1991, **legal damages were not sustained** until the federal action against Dow was dismissed . . . . Therefore, **the ultimate malpractice action against Young *did not accrue* until dismissal because no legal damages had yet been sustained** as a result of the alleged negligence" until that time. *Kopicko,* 971 P.2d at 792, 114 Nev. at 1336-1337 [emphasis added].

This ruling is equally applicable hereto, in which, only once the final attempt to undo the damages, via the Petition to the U.S. Supreme Court, had failed, were damages rendered certain.

Defendants' counsel argued at the April 19th, 2017 hearing before Your Honor, that *Kopicko* was irrelevant and its use by Plaintiff's counsel was "specious" because it did not involve an appeal, or a certiorari petition to the U.S. Supreme Court. However, that *Kopicko* did not involve an appeal **is the whole point**: *Kopicko* demonstrates that the appeal tolling rule *is but one possible application and but one possible example* of the more fundamental rule that requires damages to have accrued and to have become certain before a litigation malpractice claim accrues! Other actions by a client which might undo the effect of its attorney's malpractice will also delay claim accrual.

The Defendants' arguments are all based on the erroneous premise that there exists only one narrow rule, their version of which might be paraphrased as: "a legal malpractice claim is tolled pending an appeal [of right, solely to a State appellate court]." However, even the first part of this assertion is but a narrow example of one application of the more fundamental claim accrual rule truly at issue, and the second [bracketed portion] of this assertion is simply inaccurate.

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Kopicko did not involve a question of tolling a malpractice suit, "pending the outcome of the underlying lawsuit in which the malpractice allegedly occurred" (*Brady Vorwerk*, infra) as attorney Young and the Kopickos *did not continue to litigate or appeal that first lawsuit in which Young's malpractice occurred.* Based on Defendants' reasoning herein, that fact alone would be dispositive, as the only applicable tolling rule which Defendants wish to recognize could not be invoked. However, the *Kopicko* decision, nevertheless ruled that a later accrual date applied to the client's claims, and delayed the running of the limitations period, **based on the more fundamental rule of determining when a claim accrued,** which, in *Kopicko*, was the date on which a district court ruling, in a wholly separate lawsuit from the suit in which the malpractice occurred, finally and irreversibly demonstrated the existence of damages, which were at that point no longer uncertain. Thus, *Kopicko* demonstrates that *any* legal attempt to undo the effect of a lawyer's malpractice, which thereby causes the damages to be uncertain, may prevent the statute of limitations from running. The attempts which count, for purposes of this rule, are *not* limited to appeals of right to the State Supreme Court.

Rather, as noted above, the relevant date of injury "coincides with the last possible date when the attorney's negligence becomes irreversible." R. Mallen and V. Levit *Legal Malpractice* §390, at 457 (1981), quoted with approval by *Neylan v. Moser*, 400 N.W.2d 538, 542 (Iowa 1987). That occurred, in *Kopicko*, once a second, federal, suit was dismissed, and occurred, in the present case, once a petition for a writ of certiorari to the U.S. Supreme Court was denied. There is no reason why the same logic and reasoning relied upon in *Kopicko* would not apply herein.

See also, *Grunwald v. Bronkesh*, 621 A.2d 459, 499 (N.J. 1993) in which the New Jersey Supreme Court expressly *declined to follow* Nevada's litigation appeal tolling rules, but **nevertheless** determined (based **not** on a tolling rule, but on the more fundamental principle of claim accrual) that the malpractice claim against an attorney in that suit arose and accrued upon the issuance of a Chancery Court Opinion which confirmed that an agreement drafted by the attorney was unenforceable, and that the attorney's advice regarding the same was invalid. Thus, regardless of whether the litigation and appeal tolling rule applies (either because a jurisdiction rejects it, or because it is factually inapposite, or because it simply need not be reached) the more fundamental accrual question (when did a viable claim for legal malpractice come to exist) must

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still be answered. And that question will still be related to the date on which the effect of the malpractice is made irreversible, in this and other comparable cases: via the conclusion of any attempt to forestall or reverse the damages caused by the legal malpractice, which attempts (including writ petitions) must run their course before a statute of limitations will begin to expire.

C. Application of Tolling Principles to the Facts of this Case Requires the Same Result.

Based on the foregoing analysis, this Court need not even reach the question of whether the statute of limitations was tolled pending the U.S. Supreme Court's rejection of the Petition for Certiorari, as the claim had simply not yet accrued before that point, thereby delaying the running of the statute of limitations based on the more fundamental principle of claim accrual. Nevertheless it should be noted that, if this Court did want to also analyze the issue under a tolling analysis, the same result would be necessary.

After the *Semenza* case, subsequent Nevada case law created an express tolling rule, derived in part from, but not displacing or superceding, the claim accrual rule. More particularly, in *K.J.B. Inc. v. Drakulich*, 811 P.2d 1305, 1306, 107 Nev. 367, 369-70 (1991) the Nevada Supreme Court noted that "*Semenza* did not specifically determine **whether the statute of limitations would be tolled** against a cause of action for attorney malpractice pending the outcome of the underlying lawsuit in which the malpractice occurred" (emphasis added) and chose to "resolve this issue" by articulating an express tolling rule as applicable in those circumstances (in addition to the claim accrual rule articulated in *Semenza*): "[T]he statute of limitations . . . does not commence to run against a cause of action for attorney malpractice until the conclusion of the underlying litigation wherein the malpractice allegedly occurred." *Id.*

Both claim accrual and tolling principles were upheld by Nevada cases (which sometimes emphasized that a claim had not accrued, and sometimes emphasized the tolling of a claim), even after the actual language of the Nevada statute of limitations, NRS 11.207, was revised in 1997, such that the principles involved are based on common law, and are not dependent on the statutory language. *See e.g.*, *Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002) ("damages do not begin to accrue until the underlying legal action has been resolved .... [W]hen the malpractice is alleged to have caused an adverse ruling in an underlying action, the malpractice action does not accrue while **an** appeal from the adverse ruling is pending.") (emphasis added); *Brady Vorwerck v.*

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New Albertson's, 130 Nev. Adv. Op. 68, 333 P.3d 229, 335 (2014) (recognizing ongoing validity of pre 1997 case law, after statutory revisions, in a case ruling that "the two-year statute of limitations in NRS 11.207, as revised by the Nevada Legislature in 1997, is tolled against a cause of action for attorney malpractice, pending the outcome of the underlying lawsuit in which the malpractice allegedly occurred").

The "tolling" rule is also, ultimately, based on the question of when damages become certain. For example, in *John Peter Lee, Ltd. v. District Court*, 2016 WL 327869 (Nevada January 22, 2016) [unpublished disposition] Docket No. 66465, an unpublished opinion which is not mandatory authority, but can nevertheless be cited to this Court for its persuasive value under NRAP 36(c)(3), the Nevada Supreme Court upheld a district court ruling as having properly "concluded that the statute of limitations period was tolled until the underlying matter was **completely** resolved . . ." (*1 emphasis added) which complete resolution, in that case, occurred not based on any appellate ruling dates, but when a settlement was reached in the underlying case. *See also*, *id.*, at *3.

Therefore, Plaintiff brought this suit in a timely manner, including under a claim tolling analysis, as, only after the Petition to the U.S. Supreme Court was rejected, could it be said that "the underlying matter was completely resolved." Accordingly, the U.S. writ petition was "an appeal" under the tolling-pending-appeal rules. Indeed, no other outcome would be reasonable, based on the public policy reasons for the tolling rules.

As previously pointed out in Plaintiff's earlier briefs, that small subsection of states which, like Nevada, have a litigation-and-appeal tolling rule for legal malpractice claims, *and* which have addressed the question of whether a Writ-for-Cert. Petition to the U.S. Supreme Court, qualifies as a tolling event thereunder, appear to have consistently taken the position that such tolling continues to occur while a Petition for Writ of Certiorari to the U.S. Supreme Court is pending.

See, e.g., Barker v. Miller, 918 S.W.2d 749, 752 (Ky. Ct. App. 1996) ("Had Barker sought a writ of certiorari within the ninety-day period, the statute of limitations would have been tolled pending the ruling of the United States Supreme Court on his petition.")

The U.S. District Court for Arizona's decision in *MacKenzie v. Leonard, Collins and Gillespie, P.C.*, 2009 WL 2383013 at *3 (U.S. D. Ariz. 2009) is especially interesting in this case,

in that it applied Arizona's state tolling rule to the federal appeals process, including appeals to the U.S. Supreme Court, which civil litigants in federal court, just like civil litigants who begin in state court, must take up via a petition for writ of certiorari, being afforded no appellate rights, as of right, thereby demonstrating the contrived nature of Defendants' reliance on this distinction. Ruled the court:

> In this case, the last day on which a petition for writ of certiorari could have been filed with the Supreme Court of the United States was July 23, 2008. *See Sup.Ct. R. 13*. That is the date on which "the appellate process [was] completed or waived by a failure to appeal," [citation omitted] and thus the date after which the claim accrued. Before that date, damages were still "contingent on the outcome of the appeal," *Amfac Distribution Corp. v. Miller,* 138 Ariz. 155, 156, 673 P.2d 795, 796 (Ct.App.1983) because Defendants could have elected to file a petition for writ of certiorari with the Supreme Court of the United States.

This analysis puts to rest the Defendants' argument that discretionary appeals, such as writ petitions, do not toll the statute of limitations, as well as their new argument based thereon, raised at oral argument, that even the requests for rehearing filed before the Nevada Supreme Court would therefore not have tolled the statute of limitations. *See also*, *Gilbride, Heller & Brown, P.A. v. Watkins*, 2001 WL 277992 (Fla. 2001), which rejected similar theories, and held that Judgment was not final for purposes of statutes of limitations commencing to run, while *any* appellate possibilities, including in that case a discretionary appeal attempt via a writ for certiorari to the Florida Supreme Court, was pending. (The *Gilbride* case did not involve and thus did not reach the question of Writ petitions to the U.S. Supreme Court.)

See, also, Golden v. McNeal, 78 S.W.3d 488 (Tex. Ct. App. 2002) (applying Texas Supreme Court's tolling rule to time period *during which a petition seeking a writ of certiorari* was pending with the U.S. Supreme Court, and to the time period of a subsequent pending request for rehearing of a denied petition to the U.S. Supreme Court, and ruling that the statute of limitations did not commence to run until both of these filings were denied); *Haase v. Abraham Watkins*, 404 S.W.3d 75 (Tex. Ct. App. 2013) (same; and expressing two policy reasons for this Texas rule: First, to avoid forcing a client into the untenable position of having to concurrently

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adopt inherently inconsistent litigation postures in the underlying case and in the malpractice suit; and Second, that tolling should occur until the viability of the malpractice claim is certain.).[2]

There is no valid basis to reject the reasoning of these decisions in this case, as Nevada's tolling rule is based on similar public policy concerns as have been cited in the foregoing Texas case. And those policy concerns remain equally valid while *any* request for a higher court's review is pending. For example, in *Brady Vorwerck v. New Albertson's*, 130 Nev. Adv. Op. 68, 333 P.3d 229, 235 (2014) the Nevada Supreme Court explained that Nevada's tolling of the legal malpractice statute of limitations pending appeal, is supported by public policy considerations, in that "the rule . . . permits the final resolution of the damages incurred during the litigation . . . thereby preventing judicial resources from being spent on a claim for damages that may be reduced or cured during litigation." Obviously, this same policy applies during the pendency of a U.S. Supreme Court petition.

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

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[2] It is perhaps interesting that the Texas Supreme Court case which both of these cases apply, itself indicated (in dicta, as no further writs were at issue) that the tolling would occur through the last appellate request of right the client could seek from the Texas high court. Nevertheless, this was not read by later Texas appellate courts as precluding an application of the tolling rule during further U.S. Supreme Court cert. petitions, thereby, again, demonstrating that Defendants' reliance on this ("of right") distinction is misplaced, as the cases which use such language do so only within the context of the facts before them.

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IV.

CONCLUSION

Based on the arguments set forth herein, and on the other arguments set forth in the other pleadings, papers, and filings on file before this Court, Defendants' Motion to Dismiss the First Amended Complaint should be denied.

DATED this 28th day of April, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 28th day of April, 2017, service was made by the following mode/method a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF ON STATUTE OF LIMITATIONS ISSUES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT** to the following person(s):

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EXHIBIT "A"

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Case Information: 56640

Short Caption:	R & S ST. ROSE LENDERS VS. BRANCH BANKING	**Classification:**	Civil Appeal - General - Other
Lower Court Case(s):	Clark Co. - Eighth Judicial District - 08A574852 Clark Co. - Eighth Judicial District - 09A594512	**Case Status:**	Remittitur Issued/Case Closed
Disqualifications:		**Panel Assigned:**	En Banc
Replacement:			
To SP/Judge:	08/20/2010 / Cohen, Larry	**SP Status:**	Completed
Oral Argument:	04/10/2013 at 10:00 AM	**Oral Argument Location:**	Regional Justice Center
Submission Date:	04/10/2013	**How Submitted:**	After Oral Argument

+ Party Information

Docket Entries

Date	Type	Description	Pending?	Document
08/20/2010	Filing Fee	Received Filing Fee Paid on Filing. $250.00 from David J. Merrill, PC--check no. 1465.		
08/20/2010	Notice of Appeal Documents	Filed Certified Copy of Notice of Appeal/Settlement. Notice Re Settlement Conference Program and Suspension of Rules mailed to all counsel. (The requesting of transcripts and briefing are stayed pursuant to NRAP 16(a)(1). Docketing Statement Form mailed to counsel for appellant(s).)		10-21405
08/20/2010	Settlement Notice	Issued Notice: Assignment to Settlement Program. Settlement Judge: Larry J. Cohen		10-21455
09/13/2010	Docketing Statement	Filed Docketing Statement.		10-23434
09/15/2010	Settlement Program Report	Filed Early Case Assessment Report/Appropriate for Settlement Program. This case is appropriate for mediation and a settlement conference is scheduled for October 11, 2010.		10-23819
10/05/2010	Filing Fee	Filing Fee Paid. $250.00 from Gerrard & Cox check no. 31479. (Cross-appeal)		
10/05/2010	Notice of Appeal Documents	Filed Notice of Cross-Appeal. (Docketing statement mailed to counsel for cross-appellant.) MURDOCK vs. RAD - A574852		10-25729
10/13/2010	Notice of Appeal Documents	Filed Notice of Appeal/Amended/Supplemental.		10-26822

		MURDOCK vs. RAD - A574852	
11/02/2010	Notice/Outgoing	Issued Notice to File Docketing Statement. Due date: 10 days.	10-28666
11/15/2010	Notice of Appeal Documents	Filed Notice of Appeal/Amended/Supplemental. (Second Amended Notice of Appeal.) MURDOCK VS. R & S. ST. ROSE - 08A574852	10-29829
12/07/2010	Notice of Appeal Documents	Filed Notice of Appeal/Amended/Supplemental. (Third Amended Notice of Appeal.) MURDOCK VS. R&S ST. ROSE - 08A574852 -	10-31897
02/15/2011	Settlement Program Report	Filed Interim Settlement Program Report. The settlement conference is continued to the following date: March 31, 2011. Settlement Program Status Report and Request for Continuance in Program (90 days).	11-04939
02/23/2011	Settlement Program Report	Filed Interim Settlement Program Report. The settlement conference is continued to the following date: 4/6/11	11-05646
02/25/2011	Settlement Order/Procedural	Filed Order Granting Extension of Time for Status Report. The time for filing a Final Settlement Conference Status Report is extended to 5/17/11.	11-05916
04/05/2011	Notice/Incoming	Filed Notice of Pending Bankruptcy.	11-10071
07/12/2011	Notice/Incoming	Filed Notice of Assignment and Substitution of Attorney - Respondents assigned all right, titile and interest to their respective judgments to Commonwealth Land Title and substitute John O'Meara as attorney.	11-20774
07/13/2011	Notice/Outgoing	Issued Notice to Provide Proof of Service of Notice of Assignment and Substitution of Attorney on Gerrard, Cox & Larsen and David Merrill. Due date: 10 days.	11-20870
07/13/2011	Notice/Outgoing	Issued Notice to Provide Proof of Service of Notice of Assignment and Substitution of Attorney on Settlement Judge.	11-20872
07/18/2011	Notice/Incoming	Filed Proof of Service of Notice of Assignment and Substitution of Attorney on Settlement Judge and other parties.	11-21580
07/28/2011	Motion	Filed Respondent Commonwealth Title Insurance Company as Assignee of Robert Murdock, Esq. and Eckley Keach, Esq.'s Motion to Associate Counsel (Scott Evan Gizer).	11-22765
08/24/2011	Order/Procedural	Filed Order. Robert E. Murdock, Esq., and Eckley M. Keach, Esq., have filed a Notice of Assignment and Substitution of Attorney. No other party has filed any response or opposition to the assignment and substitution. Accordingly, the clerk shall modify the caption on this court's docket so that it is consistent with the caption on this order. Further, the clerk shall remove Eckley M. Keach, Esq., and Murdock & Associates, Chtd., from the docket as they are no longer counsel of record for this appeal. The clerk shall also add Mr. O'Meara to the docket of this appeal as counsel of	11-25770

		record for Commonwealth. Commonwealth has filed a motion to associate California attorney Scott Evan Gizer of the law firm of Early Sullivan, Wright, Gizer & McRae, LLP, in this matter pursuant to SCR 42. We grant the motion. Mr. Gizer shall be permitted to appear on behalf of Commonwealth in this appeal. Nevada attorney John O'Meara shall be responsible for all matters presented by Mr. Gizer in this matter. Finally, appellant/cross-respondent, R & S St. Rose Lenders, LLC, filed a Notice of Pending Bankruptcy. Counsel for R & S: 15 days to file a status report.	
09/08/2011	Notice/Incoming	Filed Status Report.	11-27364
10/18/2011	Notice of Appeal Documents	Filed Notice of Appeal/Amended/Supplemental. (Fourth Amended NOA).	11-32168
10/27/2011	Notice/Incoming	Filed Status Report.	11-33242
11/08/2011	Notice/Incoming	Filed Substitution of Local Counsel. (Scott E. Gizer of the law firm of Early Sullivan Gizer & McRae LLP as resident Nevada counsel in the place and stead of the law firm of Bremer, Whyte, Brown & O'Meara LLP).	11-34513
02/29/2012	Order/Procedural	Filed Order. R & S has filed a "Status Report" indicating that the bankruptcy court has entered an order allowing this appeal to proceed. The settlement judge shall resume settlement proceedings. Final report: due 60 days. To date, Branch Banking has failed to comply with the notice to file the docketing statement: due 10 days.	12-06487
03/14/2012	Docketing Statement	Filed Docketing Statement-Civil Appeals.	12-08249
03/15/2012	Docketing Statement	Filed Addendum to Docketing Statement-Civil Appeals.	12-08260
04/10/2012	Settlement Program Report	Filed Final Report/No Settlement. The parties were unable to agree to a settlement of this matter.	12-11301
04/18/2012	Settlement Order/Procedural	Filed Order: No Settlement/Briefing Reinstated For Appeal and Cross-Appeal. The parties were unable to agree to a settlement. Appellant/cross-respondent ("appellant") and respondent/cross-appellant ("cross-appellant") shall each have seven days from the date of this order to file and serve a transcript request form. Appellant: 60 days to file the opening brief and appendix.	12-12520
04/24/2012	Transcript Request	Filed Request for Transcript of Proceedings. Transcripts requested: January 8, 2010; January 11, 2010; January 12, 2010; January 15, 2010; March 29, 2010; March 30, 2010; March 31, 2010; April 1, 2010; April 8, 2010; April 13, 2010; April 14, 2010; May 4, 2010; May 27, 2010; July 27, 2010; August 17, 2010; August 26, 2010; August 27, 2010; September 10, 2010; September 17, 2010; September 24, 2010; October 1, 2010; December 30, 2010; January 7, 2011; January 20, 2011; February 1, 2011;	12-13048

		February 18, 2011 and March 3, 2011. To Court Reporter: Jill Hawkins.	
04/25/2012	Transcript Request	Filed Request for Transcript of Proceedings. Transcripts requested: 10/8/09; 11/12/09; 11/23/09; 12/16/09; 12/29/09; 1/6/10; 4/1/10; 4/8/10; 4/13/10; 4/14/10; 5/4/10; 5/27/10; 7/1/10; 8/17/10; 8/26/10; 9/17/10; and 3/3/11. To Court Reporter: Jill Hawkins.	12-13146
04/25/2012	Transcript Request	Filed Amended Request for Transcript of Proceedings. Transcripts requested: 1/8/10, 1/11/10, 1/12/10, 1/15/10, 3/29/10, 3/30/10, 3/31/10, 4/8/10, 4/13/10, and 4/14/10. To Court Reporter: Jill Hawkins. Respondents/Cross-Appellants.	12-13195
05/29/2012	Transcript	Filed Notice from Court Reporter. Jill Hawkins stating that the requested transcripts were delivered. Dates of transcripts: 10/08/09, 11/12/09, 11/23/09, 12/16/09, 12/29/09, 1/06/10, 4/08/10, 4/13/10, 4/14/10, and 8/26/10.	12-16735
05/29/2012	Transcript	Filed Notice from Court Reporter. Jill Hawkins stating that the transcripts for 4/1/10, will not be provided as there was nothing scheduled on that day. The transcripts for 5/4/10, 5/27/10, 8/17/10, 9/17/10, and 3/03/11, will not be provided as these transcripts have been previously requested by Meier & Fine who will provide copies to David J. Merrill, P.C.	12-16736
05/29/2012	Transcript	Filed Notice from Court Reporter. Jill Hawkins stating that the transcripts for 1/8/10, 1/11/10, 1/15/10, 3/29/10, 3/30/10, 3/31/10, 4/08/10, 4/13/10, and 4/14/10 were previously filed and received prior to the request.	12-16738
05/29/2012	Transcript	Filed Notice from Court Reporter. Jill Hawkins stating that the requested transcripts were delivered. Dates of transcripts: 7/27/10, 8/26/10, 12/30/10, 1/20/11, 2/01/11, 5/04/10, 5/27/10, 8/17/10, 9/17/10, and 3/03/11.	12-16739
06/12/2012	Motion	Filed Stipulation for Extension of Time to File Opening Brief.	12-18412
06/12/2012	Notice/Outgoing	Issued Notice Stipulation Approved. Opening Brief and Appendix due July 6, 2012.	12-18416
07/06/2012	Appendix	Filed Joint Appendix - Volume 1.	12-21226
07/06/2012	Appendix	Filed Joint Appendix - Volume 2.	12-21227
07/06/2012	Appendix	Filed Joint Appendix - Volume 3.	12-21228
07/06/2012	Appendix	Filed Joint Appendix - Volume 4.	12-21229
07/06/2012	Appendix	Filed Joint Appendix - Volume 5.	12-21230
07/06/2012	Appendix	Filed Joint Appendix - Volume 6.	12-21231
07/06/2012	Appendix	Filed Joint Appendix - Volume 7.	12-21235
07/06/2012	Appendix	Filed Joint Appendix - Volume 8.	12-21236
07/06/2012	Appendix	Filed Joint Appendix - Volume 9.	12-21237
07/06/2012	Appendix	Filed Joint Appendix - Volume 10.	12-21238
07/06/2012	Appendix	Filed Joint Appendix - Volume 11.	[illegible]

07/06/2012	Appendix	Filed Joint Appendix - Volume 12.	12-21240
07/06/2012	Appendix	Filed Joint Appendix - Volume 13.	12-21241
07/06/2012	Appendix	Filed Joint Appendix - Volume 14.	12-21242
07/06/2012	Appendix	Filed Joint Appendix - Volume 15.	12-21243
07/06/2012	Appendix	Filed Joint Appendix - Volume 16.	12-21244
07/06/2012	Appendix	Filed Joint Appendix - Volume 17.	12-21246
07/06/2012	Appendix	Filed Joint Appendix - Volume 18.	12-21247
07/06/2012	Brief	Filed Opening Brief.	12-21331
07/09/2012	Notice/Incoming	Filed Certificate of Service of Opening Brief and Appendices.	12-21344
07/18/2012	Motion	Filed Stipulation for Extension of Time. Parties stipulate to extend time for Respondent/Cross-Appellant to file Answering/Opening Brief and Respondent to file Answering Brief (30 days).	12-22595
07/18/2012	Notice/Outgoing	Issued Notice Stipulation Approved. Respondent/Cross-Appellant Branch Banking and Trust Co. Answering/Opening Brief due: September 5, 2012. Respondent Commonwealth Land Title Insurance Co. Answering Brief due: September 5, 2012.	12-22611
08/28/2012	Motion	Filed Emergency Motion Under NRAP 27(e).	12-27303
08/30/2012	Motion	Filed Notice of Non-Opposition to Emergency Motion Filed on August 28, 2012.	12-27599
09/05/2012	Brief	Filed Respondents Commonwealth Land Title Insurance Company (as Assignedd of Robert Murdock and Eckley Keach) Answering Brief.	12-28063
09/05/2012	Appendix	Filed Appendix to Respondents Commonwealth Land Title Insurance Company (as Assignedd of Robert Murdock and Eckley Keach) Answering Brief.	12-28067
09/10/2012	Notice/Incoming	Filed Certificate of Service of Respondent's Brief.	12-28448
09/12/2012	Order/Procedural	Filed Order Granting Motion for Extension of Time. Respondent/Cross-Appellant: Combined Answering Brief and Opening Brief on Cross-Appeal due: September 19, 2012.	12-28761
09/20/2012	Brief	Filed Respondent/Cross-Appellant's Answering Brief and Opening Brief on Cross-Appeal.	12-29770
09/20/2012	Appendix	Filed Appendix to Answering Brief.	12-29771
09/20/2012	Notice/Incoming	Filed Certificate of Mailing of Respondent/Cross-Appellant's Answering Brief and Opening Brief on Cross-Appeal.	12-29772
10/04/2012	Motion	Filed Stipulation for Extension of Time to File Reply Brief and Answering Brief on Cross-Appeal.	12-31353
10/04/2012	Notice/Outgoing	Issued Notice Stipulation Approved. Reply Brief and Answering Brief on Cross-Appeal due on November 5, 2012.	12-31357
11/06/2012	Brief	Filed Appellant/Cross-Respondent's Combined Answering Brief on Cross-Appeal and Reply Brief on Appeal.	12-35104

11/06/2012	Notice/Incoming	Filed Certificate of Service - Appellant/Cross-Respondent's Combined Answering Brief on Cross-Appeal and Reply Brief on Appeal.	12-35105
11/19/2012	Motion	Filed Stipulation for Extension of Time to file the Reply Brief. (Respondent/Cross-Appellant Branch Banking and Trust Company)	12-36697
11/19/2012	Notice/Outgoing	Issued Notice Stipulation Approved. Reply Brief due December 10, 2012.	12-36702
12/10/2012	Notice/Incoming	Filed Certificate of Mailing of Respondent/Cross-Appellant's Reply Brief on Cross-Appeal.	12-38829
12/11/2012	Brief	Filed Respondent/Cross-Appellant's Reply Brief on Cross-Appeal.	12-38907
12/11/2012	Case Status Update	Briefing Completed/To Screening.	
02/26/2013	Order/Procedural	Filed Order Directing Clerk to Schedule Oral Argument. The clerk of this court is directed to schedule this matter for oral argument before the Southern Nevada Panel on the next available calendar.	13-05909
03/08/2013	Notice/Outgoing	Issued Notice Scheduling Oral Argument. Oral argument is scheduled for Wednesday, April 10, 2013, @ 10:00 a.m. in Las Vegas. Argument is scheduled for 30 minutes.	13-07075
03/27/2013	Notice/Outgoing	Issued Oral Argument Reminder Notice.	13-09042
04/10/2013	Case Status Update	Oral argument held this day. Case submitted for decision. To the Southern Nevada Panel. SNP13-MG/MD/NS.	
05/31/2013	Order/Dispositional	Filed Order of Affirmance. "ORDER the judgment of the district court AFFIRMED." SNP13-MG/MD/NS	13-16053
06/18/2013	Filing Fee	E-Payment $150.00 from Rachel E. Donn.	
06/18/2013	Post-Judgment Petition	Filed Respondent/Cross-Appellant's Petition for Rehearing.	13-17915
06/19/2013	Order/Procedural	Filed Order Directing Answer to Petition for Rehearing. Appellant/Cross-Respondent: Answer due: 15 days.	13-18008
07/01/2013	Motion	Filed Stipulation for Extension of Time.	13-19253
07/03/2013	Order/Procedural	Filed Order Approving Stipulation for Extension of Time. Appellant/cross-respondent shall have until July 19, 2013, to file and serve the answer to the petition for rehearing.	13-19477
07/19/2013	Post-Judgment Petition	Filed Appellant/Cross-Respondent's Answer to Respondent/Cross-Appellant's Petition for Rehearing	13-21245
09/26/2013	Post-Judgment Order	Filed Order Denying Rehearing. "Rehearing Denied." NRAP 40(c).	13-28773
10/08/2013	Post-Judgment Petition	Filed Petition for En Banc Reconsideration (Respondents/Cross-Appellant's Petition for Rehearing En Banc Pursuant to NRAP 40A).	13-30040
02/21/2014	Post-Judgment Order	Filed Order Denying En Banc Reconsideration. Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we "ORDER the petition DENIED."	14-05744

		Pickering, J., with whom Hardesty, J., agrees, dissenting. EN BANC	
03/18/2014	Remittitur	Issued Remittitur.	14-08720
03/18/2014	Case Status Update	Remittitur Issued/Case Closed	
04/01/2014	Remittitur	Filed Remittitur. Received by District Court Clerk on March 21, 2014.	14-08720
06/02/2014	Notice/Incoming	Filed Notice from US Supreme Court/Certiorari Filed. A petition for a writ of certiorari was filed on May 22, 2014, and placed on the docket as Case No. 13-1413.	14-17807
10/15/2014	Notice/Incoming	Filed Notice from US Supreme Court/Certiorari Denied. The petition for a writ of certiorari is denied.	14-34239

SB
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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 Honorable Nancy L. Allf **SUPPLEMENTAL BRIEFING OF POINTS AND AUTHORITIES ON STATUTE OF LIMITATION ISSUES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date: May 16, 2017 Time: (In Chambers) Dept: XXVII

DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S SUPPLEMENTAL BRIEFING OF POINTS AND AUTHORITIES ON STATUTE OF LIMIATION ISSUES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

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

their Supplemental Briefing of Points and Authorities on Statute Of Limitation Issues in Support of Defendants' Motion to Dismiss First Amended Complaint ("FAC").

DATED this 28th day of April, 2017.

Respectfully submitted,

GORDON & REES, LLP
/s/ Craig J. Mariam

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SUPPLEMENTAL BRIEFING

I. INTRODUCTION

The filing of a petition for a writ of certiorari to the United States Supreme Court does not delay accrual of the statute of limitations for legal malpractice. United States Supreme Court Rule 13, as plaintiff posits, does not change the outcome. Rule 13 concerns the timing of when a party can file a writ of certiorari to the U.S. Supreme Court – it does not change the fundamental issue here: that a petition for writ of certiorari from a civil state case is *not an appeal* at all, and not applicable to the litigation malpractice rule.

In Nevada, the appeal *ends* – at the latest – when the Nevada Supreme Court issues a remittitur. Here, on March 18, 2014, the remittitur issued. *See* Request for Judicial Notice filed in support of the instant Motion ("RFJN"), at Nos. 15; 16. Plaintiff in the underlying 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") never filed a motion for stay of the remittitur. *See id*. Accordingly, the remittitur was issued and the case was closed on March 18, 2014. *See id*. Plaintiff filed this action on October 5, 2016, over two years after the appeal terminated, making its action untimely.

Moreover, the basis of the litigation malpractice rule is "discovery" of damages, not an

arbitrary distinction between legal procedures. *See Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988). The logic behind Nevada's application of the doctrine is that "[a]pparent damage may vanish with successful prosecution of an appeal and ultimate vindication of an attorney's conduct by an appellate court." *Id.* (*quoting Amfac Distribution Corp. v. Miller*, 673 P.2d 795, 796 (Ariz.App. 1983)).

The Nevada Supreme Court is duty-bound to review the case, and in so reviewing on non-discretionary appeal, is guaranteed to give the plaintiff an answer: either the case is overturned or remanded in some fashion, and the attorney's conduct is vindicated; or the case is affirmed, and the plaintiff's awareness of an injury rooted in legal malpractice is assured.

The same "guaranteed" result is not true of the U.S. Supreme Court, as a petition for issuance of writ of certiorari is a discretionary review by the Highest Court – not an appeal, and certainly not an appeal of right. Sup. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.").

Likewise, the U.S. Supreme Court is limited in its discretion in the context of state cases, where its review is designed to settle disputes over federal questions. *See* 28 U.S.C. § 1257. Here, plaintiff's petition to the U.S. Supreme Court concerned three issues about the District Court's abuse of discretion on an *evidentiary* issue – not an issue that concerns federal questions, and thus, was assured, at the outset, to be denied by the U.S. Supreme Court.

Finally, a collection of cases across the country shows that Nevada's application of the litigation malpractice rule that prolongs the accrual of the statute of limitations for legal malpractice actions is generous, and should not be stretched further.

II. LEGAL ARGUMENTS

A. Plaintiff's Citation to Supreme Court Rule 13 Is Off-Point and Inapplicable.

Plaintiff argued during the April 19, 2017 hearing on the underlying Motion that U.S. Supreme Court Rule 13 would govern.

Rule 13 governs the timeliness of filing petitions for writs of certiorari to the U.S. Supreme Court, as such petitions are only afforded "after entry of the judgment." This Rule is a

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jurisdictional provision and does not affect the merits of the issues presented for review on a petition for writ of certiorari. *See* Sup. Ct. R. 13(2) ("The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time."). As will be discussed below, the more applicable rules concern the U.S. Supreme Court's discretion to grant or deny petitions for writs of certiorari in the first place, distinguishing them from traditional appeals. *See* Sup. Ct. R. 10; R. 18. As it is, Rule 13 is off-point, as defendants do not question whether plaintiff's petition to the U.S. Supreme Court was timely.

B. The Remittitur Unequivocally Demonstrates the Finality of the Trial Court's Judgment, and Damages, if any, Became Final upon Issuance of the Remittitur.

Once the Nevada Supreme Court issues a remittitur, damages become certain, because at that time the judgment is final. *In re Estate of Miller*, 125 Nev. 42, 216 P.3d 239, 242 (2009) ("the reversal and remittitur comprise the judgment by which the parties and the district court are thereafter bound"). Thereafter, because a plaintiff can no longer claim damages were uncertain, the application of the litigation malpractice rule is no longer justified or warranted.

The policy underlying the litigation malpractice rule is the plaintiff's "discovery" of damages resulting from her attorney's negligence, premised on the theory that a client has not "discovered" her damages in a malpractice case until an adverse appellate court ruling. *See Semenza*, 104 Nev. at 668, 765 P.2d at 186; *see also Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 333 P.3d 229, 232 (Nev. 2014).

In this case, once the Nevada Supreme Court issued its remittitur, the remittitur "terminated the case below as to all issues settled by the judgment." *Cerminara v. Eighth Jud. Dist. Ct.*, 104 Nev. 663, 665, 765 P.2d 182, 184 (1988) ("Upon receipt of this court's remittitur, it was the duty of the district court to comply with the mandate of this court without variation"). A remittitur is "[a] certified copy of the judgment and opinion of the court." NRAP 41(a)(2). "The purpose of a remittitur, aside from returning the record on appeal to the district court, is twofold: it divests this court of jurisdiction over the appeal and returns jurisdiction to the district court, and it formally informs the district court of this court's final resolution of the appeal." *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998); *see In re Estate of Miller*, 216 P.3d

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at 242 (the offer of judgment rule "connotes a final judgment," which is satisfied by the reversal and remittitur by the Nevada Supreme Court); NRS 177.305 (in the context of criminal cases "After the certificate of judgment has been remitted, the appellate court of competent jurisdiction shall have no further jurisdiction of the appeal or of the proceedings thereon, and all orders which may be necessary to carry the judgment into effect shall be made by the court to which the certificate is remitted.").

Remittitur carries the same finality in other jurisdictions. *See e.g., Robbins v. Pfeiffer*, 407 So.2d 1016, 1017 (Fla. Dist. Ct. App. 1981) (judgment affirmed on appeal was final upon issuance of mandate); *Brandon v. Caisse*, 172 Ill.App.3d 841, 122 Ill. Dec. 746 (1988) (appellate judgment is final when entered); *Begley v. Vogler*, 612 S.W.2d 339, 341 (Ky. 1981) (remittitur merely a revesting of jurisdiction with further action required by the trial court). Across these jurisdictions, one effect remains in common: the remittitur "gives the trial court such jurisdiction as it needs to implement the appellate court's decision in the matter" and the judgment is final upon issuance of the remittitur. *Chase Manhanttan Bank v. Principal Funding Corp.*, 2004 UT 9, 111, 89 P.3d 109 (2004); *Robbins*, 407 So.2d at 1017 (compliance with mandate "by the lower court is purely ministerial act").

Reinforcing the idea that the remittitur constitutes final judgment, the Nevada Supreme Court expressly rejected a party's argument to treat a petition for writ of mandamus as an appeal for purposes of NRCP 41(e). *See Monroe v. Columbia Sunrise Hosp.*, 123 Nev. 96, 102, 158 P.3d 1008, 1012 (2007) (party "was not entitled to an additional three years to bring her case to trial after we granted her petition for a writ of mandamus").

In *Monroe*, a party argued that the Nevada Supreme Court's "grant of mandamus falls within the 'appeal extension' of NRCP 41(e), allowing her an additional three years to bring her case to trial." 123 Nev. at 102, 158 P.3d at 1012. The Court rejected that argument, explaining that the statute was clear that the extension applies only to appeals following judgments. *Id.* The Court was explicit in rejecting the attempt to equate an appeal with a writ of mandamus, stating, "Here, no appeal was taken, and this court did not issue a remittitur, it issued a writ of mandamus

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and a notice in lieu of remittitur." *Id*. Thus, a writ petition is not an appeal under Nevada jurisprudence.

Nevada's public policy is also in favor of finality of judgment. *Berkson v. LePome*, 126 Nev. 492, 245 P.3d 560, 566 (2010) (the Nevada judiciary has "authority to manage the litigation process… and to provide finality through the resolution of a matter on appeal"); *Peteren v. Bruen*, 106 Nev. 271, 273, 792 P.2d 18, 19 (1990) (quoting *Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944)) (the purpose of statutes of limitations is to prevent "surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses disappeared").

In this case, plaintiff chose not to request a stay[1] of the issuance of the remittitur. The Nevada Supreme Court issued its remittitur on March 18, 2014. As a result, the Nevada Supreme Court finalized the trial court's judgment against it. Plaintiff's alleged damages became certain when the remittitur was issued, and thus, stretching accrual beyond that time would be inequitable.

C. A Petition for Writ of Certiorari Is Not an "Appeal"

Regardless of the application of the rules of the U.S. Supreme Court or the effect of plaintiff's failure to stay the remittitur in its case, plaintiff neglects a simple truth: a writ of certiorari is not an appeal.

A petition for issuance of a writ of certiorari is defined as "a request for discretionary review." *People v. Quick*, 321 Ill. App. 3d 392, 396, 748 N.E.2d 1227, 1230 (Ill. App. Ct. 3d Dist. 2001) (*citing Hammerstein v. Superior Court of California*, 341 U.S. 491, (1951)); *see also* 28 U.S.C. § 1253 ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, *may be* reviewed by the Supreme Court by writ of certiorari [. . . .]").

[1] NRAP 41 expressly permits a party to "file a motion to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari." NRAP 41(b)(3)(A); *see Gonzales v. State*, 118 Nev. 590, 53 P.3d 901 (2002) (staying remittitur pending petition for writ of certiorari to U.S. Supreme Court); *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, Case No. 68435, Doc. No. 17-04543 (filed Aug. 17, 2015) (remittitur stayed pending petition for writ of certiorari with the U.S. Supreme Court). Thus, a client will not be forced simultaneously to litigate his appeal and to prosecute a claim for legal malpractice because it may request for a stay of the remittitur. Moreover, if the remittitur does not operate to begin the statute of limitations, the issuance of a remittitur would provide no finality whatsoever.

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Likewise, a petition is defined as "[a] formal written request presented to a court or other official body." *Wilson v. Comm'r*, 705 F.3d 980, 1008, fn. 12 (9th Cir. 2013) (*quoting* Black's Law Dictionary 1261 (9th ed. 2009).)

On the other hand, an "appeal" is defined as "[a] proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal." *Wilson,* 705 F.3d at 1008, fn. 12 (*quoting* Black's Law Dictionary 112 (9th ed. 2009).) "Direct appeals" to the U.S. Supreme Court originate in a narrow category of cases appealed *only* from United States District Courts or Courts of Appeal, and *only* concerning "interlocutory or permanent injunction" decisions in civil cases where an act of Congress requires it "to be heard and determined by a district court of three judges." *See* 28 U.S.C. § 125; *see also* Sup. Ct. R. 18.

Courts across the country have found that a petition for writ of certiorari and an appeal are different legal concepts. *See, e.g., Quick*, 321 Ill. App. 3d at 396, 748 N.E.2d at 1230 ("petition for writ of certiorari is not an 'appeal' within the meaning that term is given in the Supreme Court Rules."); *Damsky v. Univ. of Miami*, 152 So. 3d 789, 791-792 (Fla. Dist. Ct. App. 3d Dist. 2014) ("a petition for writ of certiorari is not an appeal."); *Muscatell v. North Dakota Real Estate Comm'n*, 546 N.W.2d 374, 378 (N.D. 1996) ("a petition for writ of certiorari for discretionary review before the United States Supreme Court is not an 'appeal.'"); *U.S. v. Snyder*, 946 F.2d 1125, 1126 n.4 (5th Cir. 1991) ("[A] petition for a writ of certiorari technically is not an appeal.")

The distinction between a petition for writ for certiorari and an appeal is more substantive than mere semantics. For example, a writ for certiorari may be rendered in some cases on the merits, but before that case has reached final judgment. *See Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (granting a petition for writ of certiorari in case concerning executive orders over funds of the government of Iran where "the issues presented here are of great significance and demand prompt resolution."); *see also* Sup. Ct. R. 11 (rule concerning a petition for a writ of certiorari to review a case pending in a United States court of appeals before judgment). However, a final judgment or order is generally a prerequisite to an appeal unless specifically

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provided for by operation of law. *See* NRAP 3A(b) (noting judgments and orders where appeals may be taken under Nevada law).

Further, state courts – such as the Nevada Supreme Court – generally have no discretion to deny review of an appeal. NRAP 3A (a) ("A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial."); *see also* Nev. Const. Art. 6, §§ 4, 8. To the contrary, and as discussed in more detail below, in the U.S. Supreme Court, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10.

Thus, as Nevada caselaw holds that malpractice causes of action accrue at the time of a final judgment from "an" adverse ruling "on appeal," (*see Semenza*, 104 Nev. at 668, 765 P.2d at 186), and since a petition for writ of certiorari is *not* an appeal, the litigation malpractice rule does not extend to a petition for writ of certiorari.

D. Even if a Petition for Writ of Certiorari Was an Appeal, the United States Supreme Court's Discretion Makes Its Review Not an Appeal "of Right"

1. The Discretionary Review of the U.S. Supreme Court Is Not a Review "of Right" that Would Trigger the Litigation Malpractice Rule

The purpose of the litigation malpractice rule is to delay accrual of the statute of limitation during the time period that "the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence." *Semenza*, 104 Nev. at 668, 765 P.2d at 186. Following an adverse appeal, a plaintiff is put on sufficient notice of harm as to remove the "speculative and remote" character of the attorney's alleged malpractice. *Id*.

However, a petition for writ of certiorari does not guarantee an "appellate" review. *See* Sup. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.") "Supreme Court review is discretionary, not an appeal of right, and Petitions for Writ of Certiorari are rarely granted." *United States v. Rivera-Moreno*, 2007 U.S. Dist. LEXIS 45192, *45 (D. Neb. 2007); *see also Ernst v. Child and Youth Servs*., 108 F.3d 486, 491(3d Cir. 1997) ("Supreme Court review is discretionary by way of a writ of certiorari and is not an appeal of right.")

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As such, whether or not the U.S. Supreme Court will grant a petition for writ of certiorari is itself a speculative and uncertain act. Thus, to extend accrual to a denial of a petition for writ of certiorari – which is uncertain, speculative, and entirely discretionary – ruins the principal that the discovery of damages should be based on certainty.

The North Carolina case *Clark v. Velsicol Chem. Corp.*, 431 S.E.2d 227, 229-231, 110 N.C. App. 803, 807-810 (N.C. Ct. App. 1993) ("*Clark*") is illustrative. There, the specific question concerned whether commencing an action in federal court tolled the statute of limitations for a state-based negligence action. *Id*. The North Carolina court allowed the statute of limitations to be tolled during the period that the federal action was active, but stopped short of allowing the tolling period to extend to the time that a petition for writ of certiorari to the U.S. Supreme Court was pending. *Id*. In so holding, the court stated the following

> A petition for writ of certiorari is not an appeal of right, and no review is guaranteed once the petition is filed. The treatment of the case after a petition is filed, including whether or not it will be heard on its merits, is uncertain. Therefore, 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. Because the federal action was not alive when plaintiff filed in state court, the statute of limitations was no longer tolled, and plaintiff's action was not timely filed.

Id.

Though the instant case concerns accrual of the statute of limitations for legal malpractice, the logic from the *Clark* case is analogous. Because a petition for writ of certiorari is 1) not an appeal and 2) not an appeal of right, the underlying litigation is not "alive while a decision to grant or deny the petition [is] pending." *Id*. If not alive during the pending petition's review, the case has only one other possible status – dead.

Moreover, the U.S. Supreme Court has ruled that a denial of a petition for writ of certiorari has no legal effect on the merits of a case. *See United States v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case[.]") The Court has time and again admonished that the granting or denial of petitions for writ of certiorari is not a reflection of the Court's positions on the merits of the issues presented. *Hamilton-Brown Shoe Co. v. Wolf Bros & Co.*, 240 U.S. 251, 258, 36 S. Ct. 269, 271

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(1916) ("It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed."); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918, 70 S. Ct. 252, 255 (1950) ("[S]uch a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review."); *Stamey v. United States*, 37 F.2d 188 (D.C. Wash. 1929) ("'certiorari denied' does not imply any affirmance or expression of the Supreme Court as to the correctness of the decision."); *Campbell River Mills Co. v. Chicago, M., S.P.&P.R. Co.*, 42 F.2d 775, 778 (D. Wash. 1930) ("the granting or refusal of the petition for the writ adds or withholds no sanction to the decision"), aff'd by 53 F.3d 69 (9th Cir. 1931). Thus, the denial of the petition is certainly not an affirmation of the lower court's decision:

> Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.
>
> The one thing that can be said with certainty about the Court's denial of Maryland's petition in this case is that it does not remotely imply approval or disapproval of what was said by the Court of Appeals of Maryland.

Baltimore Radio Show, 338 U.S. at 919.

Thus, denial of the petition for a writ of certiorari is not an affirmance of the judgment, and extending accrual to the pendency of a petition for writ of certiorari erroneously equates the denial of the petition to be an affirmance of the underlying decision.

Likewise, the U.S. Supreme Court has opined on the distinction, noting that, in the context of habeas corpus actions, that "allowing the statute of limitations to be tolled by certiorari petitions would provide incentives for state prisoners to file certiorari petitions as a delay tactic." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). The same logic is applicable to the policy underlying the statute of limitation in civil cases to prevent adjudicating stale claims "after a significant passage of time [where] both parties are hindered by the likelihood that key evidence and witnesses will no longer be available for presentation to the trier of fact." *Snow v. State*, 105 Nev. 521, 524, 779 P.2d 96, 98 (1989). Extending the litigation malpractice rule to

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writ petitions further incentivizes delay tactics that would ensure unequitable results by muddying future malpractice litigation with aged evidence and witnesses.

2. The Limits of the United States Supreme Court's Review Confirms that It Was Not Possible for Plaintiff's Petition to be Granted in Any Event

The limits placed on the review of the U.S. Supreme Court's discretionary review further damages plaintiff's argument. Specifically, 28 U.S.C. § 1257 provides that, while the U.S. Supreme Court may review, through a petition for writ of certiorari, "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had," that power is limited to the following specific circumstances:

- "where the validity of a treaty or statute of the United States is drawn in question"
- "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States," or
- "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Plaintiffs' petition for writ of certiorari in the *Murdock* Litigation did not concern any of these circumstances. Indeed, the issues identified by plaintiff for review in its appeal to the Supreme Court of the State of Nevada included strictly evidence-based questions, specifically, the following:

> 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; Exhibit AA.

These issues do not concern 1) "the validity of a treaty or statute of the United States", 2)

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"the validity of a statute of any State", or 3) "any title, right, privilege, or immunity is specially set up or claimed under the Constitution" or federal law.

Further, the U.S. Supreme Court has long rejected review of petitions concerning a state court's discretion on evidence. *See Pennsylvania R. Co. v Keystone Elevator & Warehouse Co.*, 237 US 432, 433 (1915) (Supreme Court had no jurisdiction to review writ of error concerning ruling on evidence that did not present a federal question); *see also Missouri, K. & T. R. Co. v West*, 232 US 682, 692-693 (1914) (Decision of state was not controlled by federal statute, involved no denial of any asserted federal right, and thus, was not reviewable by Supreme Court). Thus, not only was the discretionary review of the U.S. Supreme Court uncertain here (as such review is for all petitions for writ of certiorari), but it was all but guaranteed that the U.S. Supreme Court would deny certiorari in this case, given that none of the issues identified in the plaintiff's appeal concerned circumstances that prompted review of the Highest Court.

The courts in many states – even those who apply the litigation malpractice rule – hold that the date of injury for legal malpractice actions "coincides with the last possible date when the attorney's negligence becomes irreversible." *Neylan v. Moser*, 400 N.W.2d 538, 542, 1987 Iowa Sup. LEXIS 1070, *10 (Iowa 1987) (*quoting* R. Mallen and V. Levit, Legal Malpractice § 390, at 457 (1981)); *see also Amfac Distribution Corp. v. Miller*, 138 Ariz. 155, 158, 673 P.2d 795, 798 (Ariz. Ct. App. 1983) (legal malpractice action is tolled until "the time the damage has become irremedial[.]"). As the only possible outcome for plaintiff's petition for writ of certiorari was denial, plaintiff's alleged damage became "irreversible" at the moment the Nevada Supreme Court affirmed the District Court's ruling – on May 31, 2013, long before remittitur was issued on March 18, 2014. Thus, under *either* date of accrual, this action is untimely.

E. Caselaw Cited by Plaintiff is Off-Point

1. <u>The *Semenza* Case Stands for the Proposition that Accrual for a Malpractice Action's Statute of Limitations Is Based on an Adverse Appeal</u>

Plaintiff has continuously cited to the same cases under Nevada law to invent its new and improper rule that extends the litigation malpractice rule to pending petitions for writ of certiorari. Specifically, plaintiff stretches the holdings of *Semenza*, 104 Nev. at 668, 765 P.2d at

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186, and *Kopicko v. Young*, 114 Nev. 1333, 1336, 971 P.2d 789, 791 (Nev. 1998) ("*Kopicko*") to unrealistic lengths.

The defendant in *Semenza* was an insurance company that insured a doctor sued for medical malpractice. *Semenza* 104 Nev. at 667, 765 P.2d at 185. The insurance company retained the attorney Lawrence Semenza for the defense, and the case proceeded to trial resulting in a verdict for the plaintiff. *Id*. After the verdict – but, critically, before eventually filing an appeal in that underlying litigation – the insurance company sued Semenza for malpractice, claiming he negligently prepared for trial. *Id*. That malpractice action resulted in a jury verdict for the insurance company and against Semenza. *Id*.

However, following the jury verdict on the malpractice action, the appellate court reversed the underlying litigation and set it for new trial – effectively vindicating the attorney. *Id*. Semenza appealed the malpractice verdict, claiming that – by filing the malpractice action before a ruling on appeal – the insurance company's malpractice claim had not yet accrued. *Id*. The Nevada Supreme Court agreed, holding that, "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* 104 Nev. at 668, 765 P.2d at 186.

Semenza's factual scenario shares nothing in common with the events in the *Murdock* Litigation. Plaintiff BB&T's action is not *premature*, as was the case in *Semenza* or other cases cited by plaintiff. *See id*.; *see also K.J.B., Inc. v. Drakulich*, 107 Nev. 367, 369, 811 P.2d 1305, 1306 (1991) (malpractice action was premature before trial court had resolved underlying litigation). In fact, the opposite situation occurred here, as plaintiff filed its malpractice action *too late*.

Further still, *Semenza* actually stands for the starting time period for malpractice statute of limitations to accrue, that is, whether the immediate appeal vindicates an attorney's litigation conduct, or effectively condemns it. Though defendants maintain they did nothing that amounts to legally actionable malpractice – and any allegation of malpractice is expressly denied – the fact remains that the Nevada Supreme Court affirmed the trial court's ruling based on the limited

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issues appealed by plaintiff. Thus, at that point *and not a moment later*, plaintiff was aware of potential damages amounting to malpractice to trigger the statute of limitations.

Likewise, neither *Semenza* nor any Nevada case cited by plaintiff concerns itself with the effect of a pending petition for writ of certiorari. See *Hewitt v. Allen*, 118 Nev. 216, 219, 43 P.3d 345 (2002) (analyzing statute of limitations based on voluntary dismissal); *Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. Adv. Op. 68, 333 P.3d 229, 335 (2014) (statute of limitations tolled until resolution of an appeal to the Nevada Supreme Court).

However, no other case is necessary, as *Semenza* expressly stands for the start of a malpractice accrual – the result of "an" appeal. Here, the opinion on appeal in the *Murdock* Litigation came down on May 31, 2013 (FAC at ¶ 157), and plaintiff waited until October 5, 2016 to file this action. Thus, more than two years passed between the date plaintiff discovered its damages and the date this action was filed – making this action untimely. NRS 11.207.

2. *Kopicko* Is Factually Distinguishable

Plaintiff also relies on the factually distinguishable case *Kopicko*, which involved an underlying products liability action where the Kopicko family retained the Law Offices of Richard Young. *Kopicko*, 114 Nev. at 1335, 971 P.2d at 790. Young, on behalf of the Kopickos, dismissed the original lawsuit in error on January 25, 1991, but filed a new lawsuit on May 21, 1991 against a different defendant. *Id.* That second action ended on October 12, 1993 when the court dismissed it on statute of limitations grounds. *Id.* The Kopickos filed a malpractice action against Young on October 16, 1995, but the trial court dismissed their action as filed beyond the four-year statute of limitations provided by NRS 11.207(1) based on the January 25, 1991 dismissal of the first lawsuit filed by Young. *Id.*

On appeal of a motion for reconsideration, the Nevada Supreme Court reversed, holding that the trial court had improperly found that the accrual of the statute of limitations based on the 1991 dismissal of the first lawsuit. *Kopicko*, 114 Nev. at 1336, 971 P.2d at 791. The Court reasoned that, because the Kopicko's action was based on Young's failure in allowing the statute of limitations to expire for the second action, their malpractice action against Young did not accrue until the October 12, 1993 dismissal. *Id.* Thus, unlike the instant case, *Kopicko* did not

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involve an appeal, but a distinction between two different lawsuits. *Kopicko*, 114 Nev. at 1334-1335, 971 P.2d at 789-790.

3. The Majority of States Have Never Extended the Litigation Malpractice Rule to Petitions to the United States Supreme Court

The vast majority of states have never stretched the litigation malpractice rule to the extent plaintiff requests. Most states – including neighboring California – do not follow the litigation malpractice doctrine at all. Those states find that a malpractice plaintiff "discovers" her damages based on the initial adverse judgment or order. *See, e.g., Laird v. Blacker*, 2 Cal. 4th 606, 609, 828 P.2d 691, 692 (Cal. 1992). The many states that follow this standard include: the District of Columbia (*Seed Co. Ltd v. Westerman*, 62 F. Supp. 3d 56, 63 (D.D.C. 2014)); New Mexico (*Sharts v. Natelson*, 118 N.M. 721, 724 (N.M. 1994)); Ohio (*Burdge Law Office Co., L.P.A. v. Wilson*, 2005-Ohio-3746, P17-P18 (Ohio Ct. App., Montgomery County July 22, 2005); Illinois (*Stevens v. Sharif*, 2017 U.S. Dist. LEXIS 14258, *16 (N.D. Ill. Feb. 2, 2017)); Indiana (*Johnson v. Cornett*, 474 N.E.2d 518, 519 (Ind. Ct. App. 1985)); Hawaii (*Thomas*, 129 Haw. At 294, 298 P.3d at 1058); New Jersey (*Grunwald v. Bronkesh*, 131 N.J. 483, 496-497, 621 A.2d 459, 465 (N.J. 1993)); Pennsylvania (*Robbins & Seventko Orthopedic Surgs. v. Geisenberger*, 449 Pa. Super. 367, 376, 674 A.2d 244, 248 (Pa. Super. Ct. 1996); and Alabama (*Welborn v. Shipman*, 608 So. 2d 334, 336 (Ala. 1992)). Many of these courts have limited or rejected the rule because, as stated by one court, "[d]elaying the accrual of a cause of action until the appellate process on the underlying claim has been completed undermines the principle consideration behind statutes of limitations: fairness to the defendant." *Grunwald*, 131 N.J. at 496-497, 621 A.2d at 465.

Some states, such as Louisiana, put greater emphasis on when the attorney-client relationship is terminated instead of various actions and/or rulings and appeals throughout litigation. *Olivier v. National Union Fire Ins. Co.*, 499 So. 2d 1330, 1337 (La.App. 3 Cir. 1986)

Other states find a more strict accrual standard for malpractice statutes of limitation, and base accrual on the occurrence of the malpractice or discovery of that occurrence, not discovery of damages through an adverse judgment or appeal. *See, e.g., Penn-Dutch Kitchens v. Grady*,

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651 A.2d 731, 733 (R.I. 1994); *Watson v. Dorsey*, 265 Md. 509, 513, 290 A.2d 530, 533 (Md. 1972); *Jensen v. Young*, 2010 UT 67, P19, 245 P.3d 731, 736 (Utah 2010)); *Spar Gas v. McCune*, 908 S.W.2d 400, 404 (Tenn. Ct. App. 1995).

Thus, given the wealth of states that either reject or limit the litigation malpractice rule or apply stricter rules for accrual, Nevada's standard is more than generous to plaintiffs while respecting the rights of defendants. *See Semenza*, 104 Nev. at 668, 765 P.2d at 186.

The few states that, like Nevada, follow the litigation malpractice doctrine have yet to extend it to petitions for writ of certiorari in anything other than passing references in *dicta*. *See, e.g., Barker v. Miller*, 918 S.W.2d 749, 750 (Ky. Ct. App. 1996) (referencing petitions for writ of certiorari in dicta); *Mackenzie v. Leonard*, 2009 U.S. Dist. LEXIS 66617, *6 (D. Ariz. 2009) (referencing petitions for writ of certiorari in dicta). Many such courts, like New York, hold that this accrual method is based on only when "nondiscretionary" appeals "of right" are exhausted. *Lehman Bros. v. Hughes Hubbard & Reed, L.L.P.*, 92 N.Y.2d 1014, 1016, 707 N.E.2d 433, 434 (N.Y. 1998). As previously discussed, a petition for writ of certiorari is *expressly* discretional and not an "appeal of right." *See* Sup. Ct. R. 10.

In fact, the State of Texas is the *only* state that has expressly extended the litigation malpractice rule to a denial for a petition for writ of certiorari. *See Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto, & Friend, L.L.P.,* 499 S.W.3d 169, 175 (Tex. App. Houston 14th Dist. 2016). However, all Texas cases on this subject are premised on the same erroneous ruling in *Golden v. McNeal*, 78 S.W.3d 488, 493 (Tex. Ct. App. 2002) that incorrectly held that a writ of certiorari is a "matter of right." As previously demonstrated, a petition for writ of certiorari is not "a matter of right" at all. *See* Sup. Ct. R. 10; *see also* 28 U.S. Code §§ 1254, 1257.

In sum, the only state that extends the litigation malpractice rule to petitions for writ of certiorari does so in error. This Honorable Court must not make the same mistake, and must rule that the rule in Nevada honors both the rights of defendants and plaintiffs – by limiting the litigation malpractice rule from petitions for writ of certiorari.

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III. CONCLUSION

Plaintiff's analysis of the Supreme Court's rules and the application of remittitur in Nevada is flawed, as the latest that this action could accrue was issuance of remittitur – otherwise, the entire basis for remittitur is meaningless. Moreover, the litigation malpractice rule is based on "an appeal" – something that authority across the country does not equate to petitions for writ of certiorari. Further, the applicable legal authority shows Nevada has never recognized the rule forwarded by the plaintiff, a rule recognized only by one state *and in error*, given that petitions for writ of certiorari are purely discretional and not "appeals of right" as found in those cases. As a result, no argument salvages this case, as all authority on point shows the case to be untimely pursuant to Nevada law. As 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 28th day of April 2017.

Respectfully submitted,

GORDON & REES, LLP

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CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of GORDON & REES LLP, and that on the 28th day of April, 2017, the foregoing **DEFENDANTS DOUGLAS D. GERRARD, ESQ., AND GERRARD COX & LARSEN'S SUPPLEMENTAL BRIEFING OF POINTS AND AUTHORITIES ON STATUTE OF LIMIATION ISSUES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT** was served upon those persons designated by the parties in the E-Service Master List in the Eighth Judicial District court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-1 and the Nevada Electronic Filing and Conversion Rules, upon the following:

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

vs

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

Case No.: A-16-744561-C

Department 27

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

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

NANCY L. ALLF
DISTRICT JUDGE
DEPT XXVII
LAS VEGAS, NV 89155

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

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

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

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

NANCY L. ALLF
DISTRICT JUDGE
DEPT. XXVII
LAS VEGAS, NV 89155

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

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

THE COURT FINDS after review, in Nevada, an action for legal malpractice does not begin to accrue until the "plaintiff's damages are certain and not contingent upon the outcome of an appeal." *Semenza v. Nevada Med. Liab. Ins. Co.,* 104 Nev. 666, 668, 765 P.2d 184, 186 (1988). "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." *Id.* The statute of limitations for legal malpractice claims is four years from the damages or two years from when the plaintiff discovers, or could discover, the damages, whichever is earlier. N.R.S. 11.207.

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

NANCY L. ALLF
DISTRICT JUDGE
DEPT XXVII
LAS VEGAS, NV 89155

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

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

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

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

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

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NANCY L. ALLF
DISTRICT JUDGE
DEPT XXVII
LAS VEGAS, NV 89155

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

Dated: May 23, 2017

Nancy L Allf

NANCY ALLF
District Court Judge, Department 27

Certificate of Service

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

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

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

K Lawrence

Karen Lawrence
Judicial Executive Assistant

NANCY L. ALLF
DISTRICT JUDGE
DEPT XXVII
LAS VEGAS, NV 89155

NEO

CRAIG J. MARIAM, ESQ.,
Nevada Bar No. 10926
ROBERT S. LARSEN, ESQ.
Nevada Bar No. 7785
WING YAN WONG, ESQ.
Nevada Bar No. 13622
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300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101
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Direct: (702) 577-9301
Facsimile: (702) 255-2858
E-Mail: cmariam@gordonrees.com
rlarsen@gordonrees.com
wwong@gordonrees.com

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

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, Plaintiff, vs. DOUGLAS D. GERRARD, ESQ., individually; and GERRARD COX & LARSEN, a Nevada professional corporation, JOHN DOES I-X; and ROE BUSINESS ENTITIES XI-XX, Defendant.	Case No.: A-16-744561-C Dept. No.: ~~27~~ XXVII **NOTICE OF ENTRY OF DECISION AND ORDER GRANTING DEFENDANTS GERARD D. GERRARD, ESQ. AND GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT AND DENYING PLAINTIFF'S COUNTERMOTION FOR LEAVE TO AMEND**

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

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

DATED this 26th day of May, 2017.

Respectfully submitted,

GORDON & REES, LLP

/s/ Robert S. Larsen
Craig J. Mariam, Esq.
Nevada Bar No. 10926
Robert S. Larsen, Esq.
Nevada Bar No. 7785
Wing Yan Wong, Esq.
Nevada Bar No. 13622
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101

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

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

CERTIFICATE OF SERVICE

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

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

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

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

EXHIBIT “1”

DISTRICT COURT
CLARK COUNTY, NEVADA

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

vs

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

Case No.: A-16-744561-C

Department 27

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

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

NANCY L. ALLF
DISTRICT JUDGE
DEPT XXVII
LAS VEGAS, NV 89155

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

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

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DISTRICT JUDGE
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THE COURT FINDS after review, in Nevada, an action for legal malpractice does not begin to accrue until the "plaintiff's damages are certain and not contingent upon the outcome of an appeal." *Semenza v. Nevada Med. Liab. Ins. Co.,* 104 Nev. 666, 668, 765 P.2d 184, 186 (1988). "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." *Id.* The statute of limitations for legal malpractice claims is four years from the damages or two years from when the plaintiff discovers, or could discover, the damages, whichever is earlier. N.R.S. 11.207.

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NANCY L. ALLF
DISTRICT JUDGE
DEPT XXVII
LAS VEGAS, NV 89155

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

Dated: May 23, 2017

Nancy L Allf

NANCY ALLF
District Court Judge, Department 27

Certificate of Service

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

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

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

K Lawrence

Karen Lawrence
Judicial Executive Assistant

NANCY L. ALLF
DISTRICT JUDGE
DEPT XXVII
LAS VEGAS, NV 89155

MEMC
CRAIG J. MARIAM, ESQ.,
Nevada Bar No. 10926
ROBERT S. LARSEN, ESQ.
Nevada Bar No. 7785
WING YAN WONG, ESQ.
Nevada Bar No. 13622
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300 South Fourth Street, Suite 1550
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Telephone: (702) 577-9300
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E-Mail: cmariam@gordonrees.com
rlarsen@gordonrees.com
wwong@gordonrees.com

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

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, Plaintiff, vs. DOUGLAS D. GERRARD, ESQ., individually; and GERRARD COX & LARSEN, a Nevada professional corporation, JOHN DOES I-X; and ROE BUSINESS ENTITIES XI-XX, Defendant.	Case No.: A-16-744561-C Dept. No.: 27 **DEFENDANTS' MEMORANDUM OF COSTS AND DISBURSEMENTS**

LEGAL RESEARCH—PACER:	$11.60
DOCUMENT REPROGRAPHIC SERVICES.	$8,068.64
MESSENGER SERVICE:	$70.00
LOCAL TRAVEL:	$96.00
OUT OF TOWN TRAVEL:	$484.38
FILING FEES:	$35.00

OTHER[1]:	$30.66
TOTAL:	$8,769.28

DATED this 5th day of June, 2017.

Respectfully submitted,

GORDON & REES, LLP

/s/ Craig J. Mariam
Craig J. Mariam, Esq.
Nevada Bar No. 10926
Robert S. Larsen, Esq.
Nevada Bar No. 7785
Wing Yan Wong, Esq.
Nevada Bar No. 13622
300 South Fourth Street, Suite 1550
Las Vegas, Nevada 89101

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

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

[1] Other includes meals for counsel of Defendants.

CERTIFICATE OF SERVICE

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

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

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

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

STATE OF NEVADA)
) §:
COUNTY OF CLARK)

I, Robert S. Larsen, declare as follows:

1. I am a partner in my firm and am counsel for Defendants Douglas D. Gerrard and Gerrard & Cox dba Gerrard Cox & Larsen (collectively, "Defendants") in this matter. I am duly licensed and in good standing with the State Bar of Nevada, and am permitted to practice before all courts in this state.

2. I have personal, first-hand knowledge regarding the items listed above in this Memorandum of Costs and Disbursements and that they are correct, to the best of my knowledge and belief, and that the disbursements have been necessarily incurred and paid in this action. The costs included in this Memorandum of Costs and Disbursements are related to the defense of the Complaint filed by Plaintiff in this matter.

3. A summary of the costs incurred by Defendants from Gordon & Rees is attached to the Memorandum of Costs as Exhibit A.

4. Copies of invoices form Nationwide Legal related to messenger services related to pre-trial proceedings in this matter are attached as Exhibit B.

5. Copies of receipts from Wiznet E-Filing related to filing fees incurred in this matter are attached as Exhibit C.

6. A copy of the receipt from Litigation Services related to reprographic processing of 14 boxes of documents is attached as Exhibit D. This invoice was submitted directly to the clients and their insurance carrier for payment and therefore is not reflected in the summary of costs in Exhibit A.

7. Copies of receipts related to out of town travels and meals are attached as Exhibit E.

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

8. Copies of invoices related to research from PACER conducted in this matter are attached as Exhibit F.

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

Dated this 5th day of June, 2017.

Robert S. Larsen

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

EXHIBIT A

EXHIBIT A

Date	Cost Desc	Base Amt	Billed Amt	Tobill Amt	Narrative
1/15/2017	Messenger Service -	$15.00	$15.00	$15.00	VENDOR: Nationwide Legal Nevada, LLC; INVOICE#: 000137249; DATE: 1/15/2017 - Cust# 210019 Delivery services from Albright Stoddard Warnick Albright/KOwens/msf
1/17/2017	Out of Town Travel -	$141.02	$0.00	$141.02	VENDOR: Mariam, Craig J INVOICE#: CREX1603616202010218 DATE: 2/1/2017 Airfare, Attendance at hearing on motion to dismiss (Southwest airlines ticket change fee to and from San Diego, CA and Las Vegas, NV 02/06/17- 02/07/17), Southwest airlines ticket change fee to and from San Diego, CA and Las Vegas, NV 02/06/17- 02/07/17., 01/17/17/CMariam/DL4/
1/23/2017	Filing Service Fees -	$3.50	$3.50	$3.50	VENDOR: Clark County Court Draw Down Account; INVOICE#: CCDDA-012317; DATE: 1/23/2017 - Gordon & Rees LLP - Unique Identifier # EB26BB9C - Deaw Down for e-filing in Clark County District Court./RSchumacher/KOwens/sd
1/23/2017	Filing Service Fees -	$3.50	$3.50	$3.50	VENDOR: Clark County Court Draw Down Account; INVOICE#: CCDDA-012317; DATE: 1/23/2017 - Gordon & Rees LLP - Unique Identifier # EB26BB9C - Deaw Down for e-filing in Clark County District Court./RSchumacher/KOwens/sd
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1/31/2017	Filing Service Fees -	$10.00	$10.00	$10.00	VENDOR: Nationwide Legal, LLC; INVOICE#: 000141376; DATE: 1/31/2017 - Cust# 210019, Standard Filing in Clark County Justice Court/KOwens/msf
1/31/2017	Filing Service Fees -	$10.00	$10.00	$10.00	VENDOR: Nationwide Legal, LLC; INVOICE#: 000141376; DATE: 1/31/2017 - Cust# 210019, Standard filing in Eighth Judicial District Court/KOwens/msf
1/31/2017	Filing Service Fees -	$10.00	$10.00	$10.00	VENDOR: Nationwide Legal, LLC; INVOICE#: 000141376; DATE: 1/31/2017 - Cust# 210019, Standard filing in Eighth Judiicial District Courth/KOwens/msf
3/10/2017	Filing Service Fees -	$3.50	$3.50	$3.50	VENDOR: Clark County Court Draw Down Account; INVOICE#: CCDDA-031017; DATE: 3/10/2017 - Gordon & Rees LLP - Unique Identifier # EB26BB9C - Deaw Down for e-filing in Clark County District Court./RSchumacher/KOwens/sd
3/10/2017	Filing Service Fees -	$3.50	$3.50	$3.50	VENDOR: Clark County Court Draw Down Account; INVOICE#: CCDDA-031017; DATE: 3/10/2017 - Gordon & Rees LLP - Unique Identifier # EB26BB9C - Deaw Down for e-filing in Clark County District Court./RSchumacher/KOwens/sd
4/5/2017	Research -	$11.60	$0.00	$11.60	VENDOR: Pacer Service Center; INVOICE#: 4369221-Q12017; DATE: 4/5/2017 - Acct# 4369221, Usage from 1/1/17 - 3/31/17/KOwens/msf
4/17/2017	Out of Town Travel -	$127.04	$0.00	$127.04	VENDOR: Mariam, Craig J INVOICE#: CREX1745128504210043 DATE: 4/21/2017 Airfare, Attendance and travel in connection with hearing on motion to dismiss (Southwest Airline Flight Change Fee), Southwest Airline Flight Change Fee., 04/17/17/CMariam/DL4/

4/18/2017	Out of Town Travel -	$27.56	$0.00	$27.56	VENDOR: Mariam, Craig J INVOICE#: CREX1746018304280117 DATE: 4/28/2017 Taxi, Attendance and travel in connection with hearing on motion to dismiss (Taxi ride from Airport to client meeting), Taxi ride from Airport to client meeting., 04/18/17/CMariam/DV/DL4/
4/18/2017	Out of Town Travel -	$15.38	$0.00	$15.38	VENDOR: Mariam, Craig J INVOICE#: CREX1746018304280117 DATE: 4/28/2017 Taxi, Attendance and travel in connection with hearing on motion to dismiss (Taxi ride from meeting to Hotel), Taxi ride from meeting to Hotel., 04/18/17/CMariam/DV/DL4/
4/19/2017	Filing Service Fees -	$3.50	$3.50	$3.50	VENDOR: Clark County Court Draw Down Account; INVOICE#: CCDDA-041917; DATE: 4/19/2017 - Gordon & Rees LLP - Unique Identifier # EB26BB9C - Deaw Down for e-filing in Clark County District Court./RSchumacher/KOwens/sd
4/19/2017	Out of Town Travel -	$100.04	$0.00	$100.04	VENDOR: Mariam, Craig J INVOICE#: CREX1745128504210043 DATE: 4/21/2017 Airfare, Attendance and travel in connection with hearing on motion to dismiss (Southwest Airline Flight Change Fee), Southwest Airline Flight Change Fee., 04/19/17/CMariam/DL4/
4/19/2017	Out of Town Travel -	$31.06	$0.00	$31.06	VENDOR: Mariam, Craig J INVOICE#: CREX1746018304280117 DATE: 4/28/2017 Taxi, Attendance and travel in connection with hearing on motion to dismiss (Taxi ride from Hotel to Court), Taxi ride from Hotel to Court., 04/19/17/CMariam/DV/DL4/
4/19/2017	Other -	$27.30	$0.00	$27.30	VENDOR: Mariam, Craig J INVOICE#: CREX1746018304280117 DATE: 4/28/2017 Meals Other, Attendance and travel in connection with hearing on motion to dismiss (Lunch at Courthouse Bar and Grill), Lunch at Courthouse Bar and Grill., Attendees: Joe Hardy---, Craig Mariam, Robert Larsen, 04/19/17/CMariam/DV/DL4/
4/19/2017	Other -	$3.36	$0.00	$3.36	VENDOR: Mariam, Craig J INVOICE#: CREX1746018304280117 DATE: 4/28/2017 Meals Other, Attendance and travel in connection with hearing on motion to dismiss (Breakfast at Capriotti's Sandwich Shop), Breakfast at Capriotti's Sandwich Shop, 04/19/17/CMariam/DV/DL4/
4/20/2017	Out of Town Travel -	$42.28	$0.00	$42.28	VENDOR: Mariam, Craig J INVOICE#: CREX1746018304280117 DATE: 4/28/2017 Taxi, Attendance and travel in connection with hearing on motion to dismiss (Taxi ride from Court to Airport), Taxi ride from Court to Airport., 04/20/17/CMariam/DV/DL4/
4/20/2017	Local Travel -	$96.00	$0.00	$96.00	VENDOR: Mariam, Craig J INVOICE#: CREX1746018304280117 DATE: 4/28/2017 Parking - Local, Attendance and travel in connection with hearing on motion to dismiss (San Diego Airport Parking 04/18/2017-04/20/2017), San Diego Airport Parking 04/18/2017-04/20/2017., 04/20/17/CMariam/DV/DL4/
5/8/2017		$3.50	$0.00	$3.50	VENDOR: Clark County Court Draw Down Account; INVOICE#: CCDDA-050817; DATE: 5/8/2017 - Gordon & Rees LLP - Unique Identifier # EB26BB9C - Deaw Down for e-filing in Clark County District Court/KOwens/sd
5/9/2017		$25.00	$0.00	$25.00	VENDOR: Nationwide Legal, LLC; INVOICE#: 00000000617; DATE: 5/9/2017 - Customer# 210019, Order# NV71895, filing service fee, documents filed/GAngulo/KOwens/TK

EXHIBIT B

EXHIBIT B

NATIONWIDE LEGAL LLC

PHONE (213) 249-9999

INVOICE

Invoice No.	Customer No.
000137249	210019
INVOICE DATE:	Total Due
1/15/2017	$ 477.35

PLEASE MAKE REMITTANCE TO:

GORDON & REES LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101
T (702) 577-9300

Nationwide Legal, LLC
1609 James M Wood Blvd
Los Angeles, CA 90015
TAX ID # 20-8284527

Customer No.	Invoice No.	Period Ending	Amount Due	Page
210019	000137249	1/15/2017	$ 477.35	11

Date / Type	Service Detail		Charges	Total
1/12/2017 Delivery Services 010 - STANDARD DELIVERY - 4 HRS NV56020	Albright Stoddard Warnick Albright 801 S. Rancho Dr., Building D Las Vegas, NV 89106 Caller: Gayle Angulo Matter: NEW	GORDON & REES SCULLY MANSUKHANI LLP 300 S. 4th Street, Suite 1550 Las Vegas, NV 89101 Case #: Signed by: KELLY	Base Charge : $ 15.00	15.00
	Pick up signed Stip and Order to Continue Hearing on Motion to Dismiss and bring t			
	Total Charges for reference: NEW: $ 15.00			

Amount $15.00
Client CGPROF
Billing Code 1128848
Approval Gayle Angulo
Sent to SF

INVOICE PAYMENT DUE UPON RECEIPT

NATIONWIDE LEGAL LLC

PHONE (213) 249-9999

INVOICE

Invoice No.	Customer No.
000141376	210019
INVOICE DATE:	Total Due
1/31/2017	$ 1,378.82

PLEASE MAKE REMITTANCE TO:

GORDON & REES LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101
T (702) 577-9300

Nationwide Legal, LLC
1609 James M Wood Blvd
Los Angeles, CA 90015
TAX ID # 20-8284527

Customer No.	Invoice No.	Period Ending	Amount Due	Page
210019	000141376	1/31/2017	$ 1,378.82	7

Date	Type	Service Detail		Charges	Total
1/12/2017	Court Services	GORDON & REES SCULLY MANSUKHANI LLP	CLARK COUNTY JUSTICE COURT	BASE CHARGE : $ 10.00	10.00
020 - STANDARD FILING -4 HRS		300 S. 4th Street, Suite 1550	200 LEWIS AVE, 2ND FLOOR		
NV56106		Las Vegas, NV 89101	LAS VEGAS, NV 89101		
		Caller: Gayle Angulo	Case #:		
		Matter: CGPROF 1122848	DOCS: Stip and Order to Cont Hearing		
		Take Stipulation to Dept. 31 for Judge's signature, return when signed.			
		Total Charges for reference: CGPROF 1122848: $ 10.00			

RECEIVED
FEB 13 2016
ACCOUNTS PAYABLE

Amount $10.00
Client CGPROF
Billing Code 1122848
Approval Gayle Angulo
Sent to SF

INVOICE PAYMENT DUE UPON RECEIPT

NATIONWIDE LEGAL LLC

PHONE (213) 249-9999

INVOICE

Invoice No.	Customer No.
000141376	210019
INVOICE DATE	Total Due
1/31/2017	$ 1,378.82

PLEASE MAKE REMITTANCE TO:

GORDON & REES LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101
T (702) 577-9300

Nationwide Legal, LLC
1609 James M Wood Blvd
Los Angeles, CA 90015
TAX ID # 20-8284527

Customer No.	Invoice No.	Period Ending	Amount Due	Page
210019	000141376	1/31/2017	$ 1,378.82	8

Date	Type	Service Detail	Charges	Totals
1/26/2017	Court Services	GORDON & REES SCULLY MANSUKHANI LLP EIGHTH JUDICIAL DISTRICT COURT 300 S. 4th Street, Suite 1550 200 LEWIS AVENUE Las Vegas, NV 89101 LAS VEGAS, NV 89101 Caller: Gayle Angulo Case #: A744561 Matter: CGPROF 1128848 DOCS: Hearing Binder for Feb. 7, 201 Take Hearing Binder to Dept. 31.	BASE CHARGE : $ 10.00	10.00
020 - STANDARD FILING -4 HRS				
NV58237				
1/27/2017	Court Services	GORDON & REES SCULLY MANSUKHANI LLP EIGHTH JUDICIAL DISTRICT COURT 300 S. 4th Street, Suite 1550 200 LEWIS AVENUE Las Vegas, NV 89101 LAS VEGAS, NV 89101 Caller: Gayle Angulo Case #: A744561 Matter: CGPROF 1128848 DOCS: Courtesy Copy of Plaintiff's P Print attached pleading and take this courtesy copy to Dept. 31	BASE CHARGE : $ 10.00	10.00
020 - STANDARD FILING -4 HRS				
NV58368				
		Total Charges for reference: CGPROF 1128848: $ 20.00		

RECEIVED
FEB 13 2016
ACCOUNTS PAYABLE

Amount $20.00
Client CGPROF
Billing Code 1128848
Approval Gayle Angulo
Sent to SF

INVOICE PAYMENT DUE UPON RECEIPT

NATIONWIDE LEGAL LLC

PHONE (213) 249-9999

INVOICE

Invoice No.	Customer No.
00000000993	210019
INVOICE DATE:	Total Due:
5/15/2017	$ 2,586.56

PLEASE MAKE REMITTANCE TO:

GORDON & REES LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101
T (702) 577-9300

Nationwide Legal, LLC
1609 James M Wood Blvd
Los Angeles, CA 90015
TAX ID # 20-8284527

Customer No.	Invoice No.	Period Ending	Amount Due	Page
210019	00000000993	5/15/2017	$ 2,586.56	10

Date / Type	Service Detail		Charges	Total
5/9/2017 NV71011 001 - NEXT DAY COURT RUN	GORDON & REES SCULLY MANSUKHANI LLP 300 S. 4th Street, Suite 1550 Las Vegas, NV 89101 Caller: Gayle Angulo Case Number: A744561 Case Title: Branch Banking vs. Douglas D.	IN THE EIGHT JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA Run : 200 LEWIS AVENUE LAS VEGAS, NV 89101 Client/Matter: CGPROF 1128848 Comments: Take hearing binder to Dept. 27	$ 5.00	$ 5.00
5/15/2017 NV74537 020 - STANDARD FILING -4 HRS	GORDON & REES SCULLY MANSUKHANI LLP 300 S. 4th Street, Suite 1550 Las Vegas, NV 89101 Caller: Gayle Angulo Case Number: A744561 Case Title: Branch Banking vs. Douglas D.	IN THE EIGHT JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA Charge : 200 LEWIS AVENUE LAS VEGAS, NV 89101 Client/Matter: CGPROF 1128848 Comments: Take courtesy copy to Dept. 27	$ 10.00	$ 10.00
		CGPROF 1128848 Total:		$ 15.00

AMOUNT: $15.00

CLIENT: CGPROF

BILLING CODE: 1128848

APPROVAL: Gayle Angulo

SENT TO SF: _____

INVOICE PAYMENT DUE UPON RECEIPT

EXHIBIT C

EXHIBIT C

5)

Details of filing: *Notice of Entry of Stipulation and Order to Continue Hearing on Motion to Dismiss*
Filed in Case Number: A-16-744561-C

E-File ID:	8990738
Lead File Size:	10843 bytes
Date Filed:	2017-01-18 16:19:39.0
Case Title:	A-16-744561-C
Case Name:	Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESC
Filing Title:	Notice of Entry of Stipulation and Order to Continue Hearing on Motion
Filing Type:	EFS
Filer's Name:	Robert Schumacher
Filer's Email:	kxowens@gordonrees.com
Account Name:	Gordon & Rees LLP
Filing Code:	NTSO
Amount:	$3.50
Court Fee:	$ 0.00
Card Fee:	$ 0.00
Payment:	Processing complete. Payment not yet captured.
Comments:	
Courtesy Copies:	
Firm Name:	Gordon & Rees LLP
Your File Number:	CGR[illegible]128648
Status:	Accepted(A)
Date Accepted:	2017-01-18 16:30:57.0
Review Comments:	
Reviewer:	Dreanna Owens
File Stamped Copy:	A-16-744561-C-8990738 NTSO Notice of Entry of Stipulation and Order to Contin

Documents:

Cover Document:		
Lead Document:	170118 NEO SAO to Cont Hrg on MTD.pdf	10843
Attachment # 1:	Exhibit 1.pdf	2488
Attachment # 2:	SAO to Cont Hearing on MTD 2nd.pdf	1574(

Data Reference ID:	
Credit Card Response:	System Response: 0 Reference:

Details of filing: *Stipulation and Order to Continue Hearing on Motion to Dismiss*
Filed in Case Number: A-16-744561-C

E-File ID:	[redacted]
Lead File Size:	710113 bytes
Date Filed:	[redacted]
Case Title:	A-16-744561-C
Case Name:	Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESC
Filing Title:	Stipulation and Order to Continue Hearing on Motion to Dismiss
Filing Type:	EFS
Filer's Name:	Robert Schumacher
Filer's Email:	lbowens@gordonrees.com
Account Name:	Gordon & Rees LLP
Filing Code:	SAO
Amount:	[redacted]
Court Fee:	$ 0.00
Card Fee:	$ 0.00
Payment:	Processing complete. Payment not yet captured.
Comments:	
Courtesy Copies:	
Firm Name:	Gordon & Rees LLP
Your File Number:	[redacted]
Status:	[redacted]
Date Accepted:	2017-01-18 16:00:27.0
Review Comments:	
Reviewer:	Michelle McCarthy
File Stamped Copy:	A-16-744561-C-8989468_SAO_Stipulation_and_Order_to_Continue_Hearing_on_Motio
Documents:	Cover Document: Lead Document: SAO to Cont Hearing on MTD 2nd.pdf 710113 byt
Data Reference ID:	
Credit Card Response:	System Response: 0 Reference:

Details of filing: *Response And Partial Objection To Plaintiff Branch Banking & Trust Company's Request For Judicial Notice*
Filed in Case Number: A-16-744561-C

E-File ID:	8984983
Lead File Size:	56506 bytes
Date Filed:	2017-01-17 15:34:30:0
Case Title:	A-16-744561-C
Case Name:	Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESC
Filing Title:	Response And Partial Objection To Plaintiff Branch Banking & Trust Co
Filing Type:	EFS
Filer's Name:	Robert Schumacher
Filer's Email:	kxowens@gordonrees.com
Account Name:	Gordon & Rees LLP
Filing Code:	RSPN
Amount:	$3.50
Court Fee:	$ 0.00
Card Fee:	$ 0.00
Payment:	Processing complete. Payment not yet captured.
Comments:	
Courtesy Copies:	
Firm Name:	Gordon & Rees LLP
Your File Number:	CGPROF#128848
Status:	Accepted (A)
Date Accepted:	2017-01-19 07:10:12 0
Review Comments:	
Reviewer:	Heather Lofquist
File Stamped Copy:	A-16-744561-C-8984983_RSPN_Response_And_Partial_Objection_To_Plaintiff_Branch
Documents:	Cover Document:
	Lead Document: 4_Resp and Partial Obj to Pltf's RFJN.pdf 56506 b
Data Reference ID:	
Credit Card Response:	System Response: 0 Reference:

Details of filing: *Reply In Support Of Request For Judicial Notice In Support Of Defendants Douglas D. Gerrard, Esq., And Gerrard Cox & Larsen's Motion To Dismiss Complaint*
Filed In Case Number: A-16-744561-C

E-File ID:	[redacted]
Lead File Size:	64420 bytes
Date Filed:	[redacted] 2017-01-17 15:33:33.0
Case Title:	A-16-744561-C
Case Name:	Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESC
Filing Title:	Reply In Support Of Request For Judicial Notice In Support Of Defenda Cox & Larsen's Motion To Dismiss Complaint
Filing Type:	EFS
Filer's Name:	Robert Schumacher
Filer's Email:	lxowens@gordonrees.com
Account Name:	Gordon & Rees LLP
Filing Code:	RIS
Amount:	[redacted] $ 3.50
Court Fee:	$ 0.00
Card Fee:	$ 0.00
Payment:	Processing complete. Payment not yet captured.
Comments:	
Courtesy Copies:	
Firm Name:	Gordon & Rees LLP
Your File Number:	[redacted]
Status:	[redacted]
Date Accepted:	2017-01-18 08:31:31.0
Review Comments:	
Reviewer:	Adeline Belsey
File Stamped Copy:	A-16-744561-C-8964972_RIS_Reply_In_Support_Of_Request_For_Judicial_Notice_In_;
Documents:	Cover Document Lead Document: 3. RISO RFJN ISO MTD Complaint.pdf 64420 byte
Data Reference ID:	
Credit Card Response:	System Response: 0 Reference:

Details of filing: *Request for Judicial Notice In Support Of Reply In Support Of Defendants Douglas D. Gerrard, Esq., And Gerrard Cox & Larsen's Motion To Dismiss Complaint*
Filed in Case Number: A-16-744561-C

E-File ID:	8984949
Lead File Size:	38854 bytes
Date Filed:	2017-01-18 09:15:13 -08:00
Case Title:	A-16-744561-C
Case Name:	Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESC
Filing Title:	Request for Judicial Notice In Support Of Reply In Support Of Defenda Cox & Larsen's Motion To Dismiss Complaint
Filing Type:	EFS
Filer's Name:	Robert Schumacher
Filer's Email:	kxowens@gordonrees.com
Account Name:	Gordon & Rees LLP
Filing Code:	RFJN
Amount:	$3.50
Court Fee:	$ 0.00
Card Fee:	$ 0.00
Payment:	Processing complete. Payment not yet captured.
Comments:	
Courtesy Copies:	
Firm Name:	Gordon & Rees LLP
Your File Number:	CGPROF 1128848
Status:	Accepted - (A)
Date Accepted:	2017-01-18 09:57:50 -08:00
Review Comments:	
Reviewer:	Judit Angyalne Kiss
File Stamped Copy:	A-16-744561-C-8984949 RFJN Request for Judicial Notice In Support Of Reply In
Documents:	Cover Document:
	Lead Document: 2. RFJN ISO MTD Complaint.pdf
	Attachment # 1: Tab H.pdf
	Attachment # 2: 2 - Exhibit H - 2009.11.23 Status Check Hearing Tr
	Attachment # 3: Tab I.pdf
	Attachment # 4: 2 - Exhibit I - 2010.07.23 Final Judgment.pdf
	Attachment # 5: Tab J.pdf
	Attachment # 6: 3 - Exhibit J - 2010.07.30 Memorandum of Costs and Disbursements Memo
Data Reference ID:	
Credit Card Response:	System Response: 0 Reference:

Details of filing: *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*
Filed in Case Number: A-16-744561-C

E-File ID:	8984902
Lead File Size:	100193 bytes
Date Filed:	2017-01-17 15:27:11:0
Case Title:	A-16-744561-C
Case Name:	Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESC
Filing Title:	Reply In Support Of Defendants Douglas D. Gerrard, Esq., And Gerrarc And Opposition To Alternative Countermotion For Leave To Amend
Filing Type:	EFS
Filer's Name:	Robert Schumacher
Filer's Email:	kxowens@gordonrees.com
Account Name:	Gordon & Rees LLP
Filing Code:	RIS
Amount:	$ 3.50
Court Fee:	$ 0.00
Card Fee:	$ 0.00
Payment:	Processing complete. Payment not yet captured.
Comments:	
Courtesy Copies:	
Firm Name:	Gordon & Rees LLP
Your File Number:	GGRROG 1128848
Status:	Accepted (A)
Date Accepted:	2017-01-17 23:51:39.0
Review Comments:	
Reviewer:	Ivonne Hernandez
File Stamped Copy:	A-16-744561-C-8984902_RIS_Reply_In_Support_Of_Defendants_Douglas_D._Gerrard
Documents:	Cover Document: Lead Document: 1_RISO MTD Complaint and Opp to CM for Leave t
Data Reference ID:	
Credit Card Response:	System Response: 0 Reference:

Details of filing: *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*
Filed in Case Number: A-16-744561-C

E-File ID:	9270095
Lead File Size:	94668 bytes
Date Filed:	2017-04-07 16:35:16.0
Case Title:	A-16-744561-C
Case Name:	Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESC
Filing Title:	Reply in Support of Defendants Douglas D. Gerrard, Esq., and Gerrard Amended Complaint and Opposition to Alternative Countermotion for L
Filing Type:	EFS
Filer's Name:	Robert Schumacher
Filer's Email:	kxowens@gordonrees.com
Account Name:	Gordon & Rees LLP
Filing Code:	RPLY
Amount:	$ 3.50
Court Fee:	$ 0.00
Card Fee:	$ 0.00
Payment:	Processing complete. Payment not yet captured.
Comments:	
Courtesy Copies:	
Firm Name:	Gordon & Rees LLP
Your File Number:	CGPROF 1128848
Status:	Accepted (A)
Date Accepted:	2017-04-10 11:19:02.0
Review Comments:	
Reviewer:	Lisamarie Vaquero
File Stamped Copy:	A-16-744561-C-9270095_RPLY_Reply_in_Support_of_Defendants_Douglas_D._Gerran
Documents:	Cover Document: Lead Document: Reply ISO MTD FAC - FINAL - DDG cmt.pdf 9466
Data Reference ID:	
Credit Card Response:	System Response: 0 Reference:

Details of filing: *Notice of Motion and Motion to Dismiss First Amended Complaint; Memorandum of Points and Authorities*
Filed in Case Number: A-16-744561-C

E-File ID: 9158250

Lead File Size: 115641 bytes

Date Filed: 2017-03-08 12:03:15.0

Case Title: A-16-744561-C

Case Name: Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESQ, Defendant(s)

Filing Title: Notice of Motion and Motion to Dismiss First Amended Complaint; Memorandum of Points and Authorities

Filing Type: EFS

Filer's Name: Robert Schumacher

Filer's Email: kxowens@gordonrees.com

Account Name: Gordon & Rees LLP

Filing Code: MDSM

Amount: $ 3.50

Court Fee: $ 0.00

Card Fee: $ 0.00

Payment: Processing complete. Payment not yet captured.

Comments:

Courtesy Copies:

Firm Name: Gordon & Rees LLP

Your File Number: CGPROF 1128848

Status: Accepted - (A)

Date Accepted: 2017-03-08 14:22:47.0

Review Comments:

Reviewer: Irish Lapira

File Stamped Copy: A-16-744561-C-9158250_MDSM_Notice_of_Motion_and_Motion_to_Dismiss_First_Amended_Complaint__Memorandum_of_Point.pdf

Documents:
Cover Document:
Lead Document: Motion to Dismiss First Amended Complaint.pdf 115641 bytes

Data Reference ID:

Credit Card Response: System Response: 0
Reference:

Details of filing: *Request for Judicial Notice in Support of Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint*
Filed in Case Number: A-16-744561-C

E-File ID:	9158263
Lead File Size:	3006270 bytes
Date Filed:	2017-03-08 12:04:41.0
Case Title:	A-16-744561-C
Case Name:	Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESQ, Defendant(s)
Filing Title:	Request for Judicial Notice in Support of Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint
Filing Type:	EFS
Filer's Name:	Robert Schumacher
Filer's Email:	kxowens@gordonrees.com
Account Name:	Gordon & Rees LLP
Filing Code:	RFJN
Amount:	$ 3.50
Court Fee:	$ 0.00
Card Fee:	$ 0.00
Payment:	Processing complete. Payment not yet captured.
Comments:	
Courtesy Copies:	
Firm Name:	Gordon & Rees LLP
Your File Number:	CGPROF 1128848
Status:	Accepted - (A)
Date Accepted:	2017-03-08 14:29:37.0
Review Comments:	See Notice of Motion for Hearing
Reviewer:	Irish Lapira
File Stamped Copy:	A-16-744561-C-9158263_RFJN_Request_for_Judicial_Notice_in_Support_of_Defendants_Douglas_D__Gerrard__Esq__and_G.pdf
Documents:	Cover Document: Lead Document: Request for Judicial Notice.pdf 3006270 bytes
Data Reference ID:	
Credit Card Response:	System Response: 0 Reference:

Details of filing: *Supplemental Briefing of Points and Authorities on Statute of Limitation Issues in Support of Motion to Dismiss First Amended Complaint*
Filed in Case Number: A-16-744561-C

E-File ID:	9329999
Lead File Size:	90489 bytes
Date Filed:	2017-04-28 16:05:56.0
Case Title:	A-16-744561-C
Case Name:	Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESC
Filing Title:	Supplemental Briefing of Points and Authorities on Statute of Limitation Dismiss First Amended Complaint
Filing Type:	EFS
Filer's Name:	Robert Schumacher
Filer's Email:	kxowens@gordonrees.com
Account Name:	Gordon & Rees LLP
Filing Code:	SB
Amount:	$ 3.50
Court Fee:	$ 0.00
Card Fee:	$ 0.00
Payment:	Processing complete. Payment not yet captured.
Comments:	
Courtesy Copies:	
Firm Name:	Gordon & Rees LLP
Your File Number:	CGPROF 1128848
Status:	Accepted (A)
Date Accepted:	2017-05-01 07:56:13.0
Review Comments:	
Reviewer:	Judit Angyalne Kiss
File Stamped Copy:	A-16-744561-C-9329999_SB_Supplemental_Briefing_of_Points_and_Authorities_on_St
Documents:	Cover Document: Lead Document: Supp Briefing of P&A on Statute of Limitation Issue:
Data Reference ID:	
Credit Card Response:	System Response: 0 Reference:

EXHIBIT D

EXHIBIT D

INVOICE

Litigation SERVICES
3770 Howard Hughes Prkwy.
Suite 300
Las Vegas, NV 89169
Phone: 800.330.1112
LitigationServices.com

Invoice No.	Invoice Date	Job No.
1112135	11/23/2016	350648
Job Date	**Case No.**	
10/31/2016		
Case Name		
Branch Banking & Trust Co. vs. Gerrard Cox		
Payment Terms		
Due upon receipt		

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

Reprographics Order	8,068.64
TOTAL DUE >>>	**$8,068.64**
AFTER 12/23/2016 PAY	$8,875.50

14 original boxes containing file folders, redwell and loose documents, B/W; scanned to PDF; OCR documents; import 7 discs; all documents placed onto DVD; imported datea from discs, catalogued.

Please note, disputes or refunds will not be honored or issued after 30 days.

Tax ID: 27-5114755

Phone: (702) 577-9300 Fax:702-255-2858

Please detach bottom portion and return with payment.

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

Job No. : 350648 BU ID : LV-PROD
Case No. :
Case Name : Branch Banking & Trust Co. vs. Gerrard Cox

Invoice No. : 1112135 Invoice Date : 11/23/2016
Total Due : $8,068.64
AFTER 12/23/2016 PAY $8,875.50

PAYMENT WITH CREDIT CARD

Cardholder's Name:
Card Number:
Exp. Date: Phone#:
Billing Address:
Zip: Card Security Code:
Amount to Charge:
Cardholder's Signature:
Email:

Remit To: **Litigation Services and Technologies of Nevada, LLC**
P.O. Box 98813
Las Vegas, NV 89193-8813

AA0888

EXHIBIT E

EXHIBIT E

CGPROF 1128848
20415585(costs)

Expense Report

Report ID: 0100-1603-6162

Report Name	BB&T v. Gerard Cox
Expense Owner	Craig Mariam
Expense Owner ID	cmariam / 02014
Created By	Fatima Ansary
Submit Date	Jan 25, 2017
To Be Paid In	USD

Please place this cover sheet in front of hardcopy receipt pages and then scan or fax to:
Email: expense@chromefile.com Fax: (214) 540-1162

Financial Summary

	Amount (USD)
Total Expenses Reported	141.02
Less Company Paid Expenses	0.00
Amount Due Expense Owner	141.02

Expense Summary

Expense Type	Amount (USD)
Airfare	141.02
Total	141.02

Allocation Summary

Allocations Charged			Amount (USD)
CGPROF-1128848	Chubb Group of Insurance Companies - Pro	BB&T v. Gerrard Esq, Gerrard Cox& Larsen	141.02
Total			141.02

Expense Report

BB&T v. Gerard Cox

Item	Date	Alert	Cost Code	Type	Disb Amt	Pay Me Amt
1	01/17/2017		2015	Airfare	141.02 USD	141.02 USD

Business Purpose	Attendance at hearing on motion to dismiss (Southwest airlines ticket change fee to and from San Diego, CA and Las Vegas, NV 02/06/17- 02/07/17)			
Description	Southwest airlines ticket change fee to and from San Diego, CA and Las Vegas, NV 02/06/17- 02/07/17.			
	Receipt Attached: Yes Firm Paid: No			
Allocations	CGPROF-11288	Chubb Group of 48	BB&T v. Gerrard Esq,	141.02 USD

Fatima Ansary CGPROF - 1128848

From: Craig Mariam
Sent: Tuesday, January 17, 2017 7:55 PM
To: Fatima Ansary
Subject: FW: UPDATED flight reservation (BVAVXN) | 06FEB17 | SAN-LAS | Mariam/Craig

$141.02
ticket change fee re attendance at hearing on motion to dismiss
CGPROF (BB&T v. Gerrard Cox)

From: Southwest Airlines [SouthwestAirlines@luv.southwest.com]
Sent: Tuesday, January 17, 2017 7:52 PM
To: Craig Mariam
Subject: UPDATED flight reservation (BVAVXN) | 06FEB17 | SAN-LAS | Mariam/Craig

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Check In Online | Check Flight Status | Change Flight | Special Offers | Hotel Offers | Car Offers

Ready for takeoff!

Thanks for choosing Southwest® for your trip. You'll find everything you need to know about your reservation below. Happy travels!

Upcoming Trip: 01/23/17 - Las Vegas

Air itinerary

AIR Confirmation: BVAVXN Confirmation Date: 01/17/2017

Passenger(s)	Rapid Rewards #	Ticket #	Expiration	Est. Points Earned
MARIAM/CRAIG	279476341	5262480138034	Dec 31, 2017	1343

Date	Flight	Departure/Arrival
Mon Feb 6	1792	Depart **SAN DIEGO, CA** (SAN) on Southwest Airlines at **11:40 AM** Arrive in **LAS VEGAS, NV** (LAS) at **12:50 PM** Travel Time 1 hrs 10 mins Wanna Get Away
Tue Feb 7	187	Depart **LAS VEGAS, NV** (LAS) on Southwest Airlines at **1:40 PM** Arrive in **SAN DIEGO, CA** (SAN) at **2:45 PM** Travel Time 1 hrs 5 mins Wanna Get Away

AA0892

Check in for your flight(s): 24 hours before your trip on Southwest.com or your mobile device to secure your boarding position. You'll be assigned a boarding position based on your check-in time. The earlier you check in within 24 hours of your flight, the earlier you get to board.

Bags fly free®: First and second checked bags. Weight and size limits apply. One small bag and one personal item are permitted as carryon items, free of charge.

30 minutes before departure: We encourage you to arrive in the gate area no later than 30 minutes prior to your flight's scheduled departure as we may begin boarding as early as 30 minutes before your flight.

10 minutes before departure: You must obtain your boarding pass(es) and be in the gate area for boarding at least 10 minutes prior to your flight's scheduled departure time. If not, Southwest may cancel your reserved space and you will not be eligible for denied boarding compensation.

If you do not plan to travel on your flight: In accordance with Southwest's No Show Policy, you must notify Southwest at least 10 minutes prior to your flight's scheduled departure if you do not plan to travel on the flight. If not, Southwest will cancel your reservation and all funds will be forfeited.

Air Cost: 268.90

Fare Rule(s): 5262480138034: NONREF/NONTRANSFERABLE/STANDBY REQ UPGRADE TO Y.
Valid only on Southwest Airlines. All travel involving funds from this Confirmation Number must be completed by the expiration date. Unused travel funds may only be applied toward the purchase of future travel for the individual named on the ticket. Any changes to this itinerary may result in a fare increase. Failure to cancel reservations for a Wanna Get Away fare segment at least 10 minutes prior to travel will result in the forfeiture of all remaining unused funds.

Learn about our boarding process

Learn about inflight WiFi & entertainment

Cost and Payment Summary

AIR - BVAVXN

Base Fare	$ 223.73
Excise Taxes	$ 16.77
Segment Fee	$ 8.20
Passenger Facility Charge	$ 9.00
September 11th Security Fee	$ 11.20
Total Air Cost	**$ 268.90**

Payment Information
Payment Type: Visa XXXXXXXXXXXX0830
Date: Jan 17, 2016
Payment Amount: $141.02

Payment Type: Ticket Exchange
Date: Jan 17, 2017
Payment Amount: $127.88

Exchange Detail
Jan 13, 2017 From ticket # 5262478917198 to ticket # 5262480138034

AA0893

CGPROF 1128848
20437053(costs)

Expense Report

Report ID: 0100-1745-1285

Report Name	BB&T v. Douglas D. Gerrard, Esq
Expense Owner	Craig Mariam
Expense Owner ID	cmariam / 02014
Created By	Fatima Ansary
Submit Date	Apr 20, 2017
To Be Paid In	USD

Please place this cover sheet in front of hardcopy receipt pages and then scan or fax to:
Email: expense@chromefile.com Fax: (214) 540-1162

Financial Summary

	Amount (USD)
Total Expenses Reported	227.08
Less Company Paid Expenses	0.00
Amount Due Expense Owner	227.08

Expense Summary

Expense Type	Amount (USD)
Airfare	227.08
Total	227.08

Allocation Summary

Allocations Charged			Amount (USD)
CGPROF-1128848	Chubb Group of Insurance Companies - Pro	BB&T v. Gerrard Esq, Gerrard Cox& Larsen	227.08
Total			227.08

Expense Report

BB&T v. Douglas D. Gerrard, Esq

Item	Date	Alert	Cost Code	Type	Disb Amt	Pay Me Amt
2	04/19/2017		2015	Airfare	100.04 USD	100.04 USD
Business Purpose		Attendance and travel in connection with hearing on motion to dismiss (Southwest Airline Flight Change Fee)				
Description		Southwest Airline Flight Change Fee.				
		Receipt Attached: Yes Firm Paid: No				
Allocations		CGPROF-11288 Chubb Group of 48		BB&T v. Gerrard Esq,		100.04 USD
1	04/17/2017		2015	Airfare	127.04 USD	127.04 USD
Business Purpose		Attendance and travel in connection with hearing on motion to dismiss (Southwest Airline Flight Change Fee)				
Description		Southwest Airline Flight Change Fee.				
		Receipt Attached: Yes Firm Paid: No				
Allocations		CGPROF-11288 Chubb Group of 48		BB&T v. Gerrard Esq,		127.04 USD

Fatima Ansary

From: Craig Mariam
Sent: Monday, April 17, 2017 9:53 AM
To: Fatima Ansary
Subject: Fwd: UPDATED flight reservation (5DJT4K) | 18APR17 | SAN-LAS | Mariam/Craig

$127.04
Flight change fee re hearing on motion to dismiss
CGPROF (BB&T)

Sent from my iPad

Begin forwarded message:

From: Southwest Airlines <SouthwestAirlines@luv.southwest.com>
Date: April 17, 2017 at 9:52:37 AM PDT
To: <cmariam@gordonrees.com>
Subject: UPDATED flight reservation (5DJT4K) | 18APR17 | SAN-LAS | Mariam/Craig
Reply-To: Southwest Airlines <reply@wnco.com>

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dollar.
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Air itinerary

AIR Confirmation: 5DJT4K

Confirmation Date: 04/17/2017

Passenger(s)	Rapid Rewards #	Ticket #	Expiration	Est. Points Earned
MARIAM/CRAIG	279476341	5262101058338	Mar 26, 2018	2832

Date	Flight	Departure/Arrival
Tue Apr 18	650	Depart **SAN DIEGO, CA** (SAN) on Southwest Airlines at **12:50 PM** Arrive in **LAS VEGAS, NV** (LAS) at **2:00 PM** Travel Time 1 hrs 10 mins Anytime

Date	Flight	Departure/Arrival

Add a hotel
✓ Earn Rapid Rewards® points
✓ Best rate guarantee
✓ Free cancellation
Book a hotel >

AA0896

Thu Apr 20	4616	Depart **LAS VEGAS, NV** (LAS) on Southwest Airlines at **09:10 AM** Arrive in **SAN DIEGO, CA** (SAN) at **10:15 AM** Travel Time 1 hrs 5 mins Wanna Get Away

Check in for your flight(s): 24 hours before your trip on Southwest.com or your mobile device to secure your boarding position. You'll be assigned a boarding position based on your check-in time. The earlier you check in within 24 hours of your flight, the earlier you get to board.

Bags fly free®: First and second checked bags. Weight and size limits apply. One small bag and one personal item are permitted as carryon items, free of charge.

30 minutes before departure: We encourage you to arrive in the gate area no later than 30 minutes prior to your flight's scheduled departure as we may begin boarding as early as 30 minutes before your flight.

10 minutes before departure: You must obtain your boarding pass(es) and be in the gate area for boarding at least 10 minutes prior to your flight's scheduled departure time. If not, Southwest may cancel your reserved space and you will not be eligible for denied boarding compensation.

If you do not plan to travel on your flight: In accordance with Southwest's No Show Policy, you must notify Southwest at least 10 minutes prior to your flight's scheduled departure if you do not plan to travel on the flight. If not, Southwest will cancel your reservation and all funds will be forfeited.

Customers calling Southwest to request a refund or to research travel funds for a specific ticket must provide their confirmation number, ticket number or flight information (date, origin and destination).

Air Cost: 383.92

Fare Rule(s): 5262101058338: NONTRANSFERABLE.
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Learn about our boarding process

Learn about inflight WiFi & entertainment

Cost and Payment Summary

AIR - 5DJT4K

Base Fare	$ 330.72	**Payment Information**
Excise Taxes	$ 24.80	Payment Type: Mastercard XXXXXXXXXXXX6751
Segment Fee	$ 8.20	Date: Apr 17, 2017

AA0897

Passenger Facility Charge	$ 9.00	Payment Amount: $127.04
September 11th Security Fee	$ 11.20	
Total Air Cost	**$ 383.92**	Payment Type: Ticket Exchange
		Date: Apr 17, 2017
		Payment Amount: $256.88

Exchange Detail
Mar 26, 2017 From ticket # 5262497374706 to ticket # 5262101058338

Useful Tools

Check In Online
Early Bird Check-In
View/Share Itinerary
Change Air Reservation
Cancel Air Reservation
Check Flight Status
Flight Status Notification
Book a Car
Book a Hotel

Know Before You Go

In the Airport
Baggage Policies
Suggested Airport Arrival Times
Security Procedures
Customers of Size
In the Air
Purchasing and Refunds

Special Travel Needs

Traveling with Children
Traveling with Pets
Unaccompanied Minors
Baby on Board
Customers with Disabilities

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[2] Security Fee is the government-imposed September 11th Security Fee

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See **Southwest Airlines Limit of Liability**

Southwest Airlines
P.O. Box 36647-1CR
Dallas, TX 75235

Contact Us

AA0898

Fatima Ansary

From: Craig Mariam
Sent: Wednesday, April 19, 2017 5:36 PM
To: Fatima Ansary
Subject: Fwd: UPDATED flight reservation (5DJT4K) | 20APR17 | LAS-SAN | Mariam/Craig

Flight change fee
$100.04

Thank you,
Craig

Sent from my iPhone

Begin forwarded message:

From: Southwest Airlines <SouthwestAirlines@luv2.southwest.com>
Date: April 19, 2017 at 5:35:17 PM PDT
To: <cmariam@gordonrees.com>
Subject: UPDATED flight reservation (5DJT4K) | 20APR17 | LAS-SAN | Mariam/Craig
Reply-To: Southwest Airlines <reply@wnco.com>

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Air itinerary

AIR Confirmation: 5DJT4K

Confirmation Date: 04/19/2017

Passenger(s)	Rapid Rewards #	Ticket #	Expiration	Est. Points Earned
MARIAM/CRAIG	279476341	5262101444975	Mar 26, 2018	2119

Date	Flight	Departure/Arrival
Thu Apr 20	325	Depart **LAS VEGAS, NV** (LAS) on Southwest Airlines at **11:30 AM** Arrive in **SAN DIEGO, CA** (SAN) at **12:35 PM** Travel Time 1 hrs 5 mins Anytime

AA0899

Check in for your flight(s): 24 hours before your trip on Southwest.com or your mobile device to secure your boarding position. You'll be assigned a boarding position based on your check-in time. The earlier you check in within 24 hours of your flight, the earlier you get to board.

Bags fly free®: First and second checked bags. Weight and size limits apply. One small bag and one personal item are permitted as carryon items, free of charge.

30 minutes before departure: We encourage you to arrive in the gate area no later than 30 minutes prior to your flight's scheduled departure as we may begin boarding as early as 30 minutes before your flight.

10 minutes before departure: You must obtain your boarding pass(es) and be in the gate area for boarding at least 10 minutes prior to your flight's scheduled departure time. If not, Southwest may cancel your reserved space and you will not be eligible for denied boarding compensation.

If you do not plan to travel on your flight: In accordance with Southwest's No Show Policy, you must notify Southwest at least 10 minutes prior to your flight's scheduled departure if you do not plan to travel on the flight. If not, Southwest will cancel your reservation and all funds will be forfeited.

Customers calling Southwest to request a refund or to research travel funds for a specific ticket must provide their confirmation number, ticket number or flight information (date, origin and destination).

Air Cost: 241.98

Fare Rule(s): Valid only on Southwest Airlines. All travel involving funds from this Confirmation Number must be completed by the expiration date. Unused travel funds may only be applied toward the purchase of future travel for the individual named on the ticket. Any changes to this itinerary may result in a fare increase.

Learn about our boarding process

Learn about inflight WiFi & entertainment

Cost and Payment Summary

AIR - 5DJT4K

Base Fare	$ 211.89
Excise Taxes	$ 15.89
Segment Fee	$ 4.10
Passenger Facility Charge	$ 4.50
September 11th Security Fee	$ 5.60
Total Air Cost	**$ 241.98**

Payment Information
Payment Type: Visa XXXXXXXXXXXX9213
Date: Apr 19, 2017
Payment Amount: $100.04

Payment Type: Ticket Exchange
Date: Apr 19, 2017
Payment Amount: $141.94

AA0900

Exchange Detail
Apr 18, 2017 From ticket # 5262101198617 to ticket # 5262101444975
Apr 17, 2017 From ticket # 5262101058338 to ticket # 5262101444975

Useful Tools	Know Before You Go	Special Travel Needs
Check In Online	In the Airport	Traveling with Children
Early Bird Check-In	Baggage Policies	Traveling with Pets
View/Share Itinerary	Suggested Airport Arrival Times	Unaccompanied Minors
Change Air Reservation	Security Procedures	Baby on Board
Cancel Air Reservation	Customers of Size	Customers with Disabilities
Check Flight Status	In the Air	
Flight Status Notification	Purchasing and Refunds	
Book a Car		
Book a Hotel		

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Notice of Incorporated Terms	FAQs	

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[1] All travel involving funds from this Confirmation Number must be completed by the expiration date
[2] Security Fee is the government-imposed September 11th Security Fee

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See **Southwest Airlines Limit of Liability**

Southwest Airlines
P.O. Box 36647-1CR
Dallas, TX 75235

Contact Us

Expense Report Report ID: 0100-1746-0183

Report Name	BB&T v. Douglas D. Gerrard, Esq.
Expense Owner	Craig Mariam
Expense Owner ID	cmariam / 02014
Created By	Fatima Ansary
Submit Date	Apr 25, 2017
To Be Paid In	USD

Please place this cover sheet in front of hardcopy receipt pages and then scan or fax to:
Email: expense@chromefile.com Fax: (214) 540-1162

Financial Summary

	Amount (USD)
Total Expenses Reported	242.94
Less Company Paid Expenses	0.00
Amount Due Expense Owner	242.94

Expense Summary

Expense Type	Amount (USD)
Meals Other	30.66
Parking - Local	96.00
Taxi	116.28
Total	242.94

Allocation Summary

Allocations Charged			Amount (USD)
CGPROF-1128848	Chubb Group of Insurance Companies - Pro	BB&T v. Gerrard Esq, Gerrard Cox& Larsen	242.94
Total			242.94

Expense Report

BB&T v. Douglas D. Gerrard, Esq.

Item	Date	Alert	Cost Code	Type	Disb Amt	Pay Me Amt
1	04/18/2017		2015	Taxi	27.56 USD	27.56 USD
Business Purpose		Attendance and travel in connection with hearing on motion to dismiss (Taxi ride from Airport to client meeting)				
Description		Taxi ride from Airport to client meeting.				
		Receipt Attached: Yes Firm Paid: No				
Allocations		CGPROF-11288 Chubb Group of 48		BB&T v. Gerrard Esq,		27.56 USD
5	04/19/2017		2014	Meals Other	3.36 USD	3.36 USD
Business Purpose		Attendance and travel in connection with hearing on motion to dismiss (Breakfast at Capriotti's Sandwich Shop)				
Description		Breakfast at Capriotti's Sandwich Shop				
		Receipt Attached: Yes Firm Paid: No				
Allocations		CGPROF-11288 Chubb Group of 48		BB&T v. Gerrard Esq,		3.36 USD
4	04/19/2017		2014	Meals Other	27.30 USD	27.30 USD
Business Purpose		Attendance and travel in connection with hearing on motion to dismiss (Lunch at Courthouse Bar and Grill)				
Description		Lunch at Courthouse Bar and Grill.				
		Receipt Attached: Yes Firm Paid: No				
Allocations		CGPROF-11288 Chubb Group of 48		BB&T v. Gerrard Esq,		27.30 USD

External Guests	Joe	Hardy	--	Judge	9.10
Internal Guests	Craig	Mariam	Gordon Rees	Proprietary Partner	9.10
	Robert	Larsen	Gordon Rees	Non-Proprietary Partner	9.10

2	04/18/2017		2015	Taxi	15.38 USD	15.38 USD
Business Purpose		Attendance and travel in connection with hearing on motion to dismiss (Taxi ride from meeting to Hotel)				
Description		Taxi ride from meeting to Hotel.				
		Receipt Attached: Yes Firm Paid: No				

Expense Report

BB&T v. Douglas D. Gerrard, Esq.

Item	Date	Alert	Cost Code	Type	Disb Amt	Pay Me Amt
Allocations		CGPROF-11288	Chubb Group of 48	BB&T v. Gerrard Esq,		15.38 USD
7	04/20/2017	2012		Parking - Local	96.00 USD	96.00 USD
Business Purpose		Attendance and travel in connection with hearing on motion to dismiss (San Diego Airport Parking 04/18/2017-04/20/2017)				
Description		San Diego Airport Parking 04/18/2017-04/20/2017.				
		Receipt Attached: Yes Firm Paid: No				
Allocations		CGPROF-11288	Chubb Group of 48	BB&T v. Gerrard Esq,		96.00 USD
3	04/19/2017	2015		Taxi	31.06 USD	31.06 USD
Business Purpose		Attendance and travel in connection with hearing on motion to dismiss (Taxi ride from Hotel to Court)				
Description		Taxi ride from Hotel to Court.				
		Receipt Attached: Yes Firm Paid: No				
Allocations		CGPROF-11288	Chubb Group of 48	BB&T v. Gerrard Esq,		31.06 USD
6	04/20/2017	2015		Taxi	42.28 USD	42.28 USD
Business Purpose		Attendance and travel in connection with hearing on motion to dismiss (Taxi ride from Court to Airport)				
Description		Taxi ride from Court to Airport.				
		Receipt Attached: Yes Firm Paid: No				
Allocations		CGPROF-11288	Chubb Group of 48	BB&T v. Gerrard Esq,		42.28 USD

Driver ID: 110279
Name: AKLILU WOLDEGIORGI S CHOFFA

4/18/17 9:57 PM

Receipt N. 7757
Start 4/18/17 9:49 PM
End 4/18/17 9:57 PM

Fare	$9.02
Voucher	$3.00
Subtotal	$12.02
Excise Tax	$0.36
Tip	$3.00
Total	$15.38

CREDIT CARD $15.38
**********6751
Authoriz. N. 01649Z
Method: Chip
AID: A0000000041010
Appl. Name
MASTERCARD
ATC: 0021
AC: AA36D74961EF147D
TERMINAL ID: T285071907
MERCHANT ID:
00720000262694

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DRIVER COPY
CARD RECEIPT
MERCHANT ID:
00720000290562
TERMINAL ID: C288563846
DRIVER ID: 00031943
CABNUMBER: 523
DATE: 04/18/2017
START TIME: 10:36
END TIME: 10:49
PASSNUMBER: 1
TRIPNUMBER: 11883
DISTANCE: 4.10 mi
RATE 1
FARE: $ 17.30
EXTRA: $ 2.00
EXCISE TAX
RECOVERY: $ 0.67
TIP: $ 4.59
SUBTOTAL: $ 24.56
VOUCHER: $ 3.00
TOTAL: $ 27.56
CARD NUMBER: ****6751
AUTHNUMBER: 00533Z
ENTRY METHOD: CONTACT
CHIP
AID: A0000000041010
APPL. NAME: MASTERCARD
ATC: 0020
ets.com

Vehicle: 5031
Driver ID: 28911

4/19/17 9:11 AM

Receipt N. 3522
Start 4/19/17 8:59 AM
End 4/19/17 9:11 AM

Fare	$22.13
Voucher	$3.00
Subtotal	$25.13
Excise Tax	$0.75
Tip	$5.18
Total	$31.06

CREDIT CARD $31.06
**********6751
Authoriz. N. 04163Z
Method: Chip
AID: A0000000041010
Appl. Name
MASTERCARD
ATC: 0022
AC: 5BBD23E7FAADDA9A
TERMINAL ID: T289343202
MERCHANT ID:
00720000290745

*******DUPLICATE********

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AA0905

Capriotti's Sandwich Shop
200 Lewis Ave.
Las Vegas, NV 89101
(702) 631-1112

205

Host: Doneinique
205

04/19/2017
9:16 AM
30105

Capriotti's Water	1.25
Coffee Small	1.85

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USE CODE:

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Free sub expires in 30 days
Valid at this Capriotti's

Subtotal	3.10
Tax	0.26
Here Total	**3.36**
M/C #XXXXXXXXXXXX6751	3.36
Auth:08357Z	

Courthouse Bar and Grill
330 3rd Street
Las Vegas, NV 89101
702-388-8222

Server: Felipe
Table 20/1
Guests: 1

04/19/2017
1:01 PM

#20016

Reprint #: 1

French Fries	3.00
Chicken Fingers	6.50
Fish'n Chips	6.50
Mr Pib Jumbo	3.00
Small Coffee	2.00

5 Items

Subtotal	21.00
Tax	1.30
Total	22.30
M/C #XXXXXXXXXXXX6751	22.30
Auth:04413Z	
+ Tip::	5-
= Total:	27.30

X _____

Balance Due 0.00

Thank You and Come Again!

--- Check Closed ---

AA0906

Vehicle: 5500
Driver ID: 115535

4/20/17 9:49 AM

.....

Receipt N. 4556
Start 4/20/17 9:15 AM
End 4/20/17 9:49 AM

Fare $28.57
Voucher $3.00

Subtotal $31.57
Excise Tax $0.95
Tip $9.76

Total $42.28

.....

CREDIT CARD $42.28
**********6751
Authoriz. N. 077682
Method: Chip
AID: A0000000041010
Appl. Name
MASTERCARD
ATC: 0023
AC: 927B2ADBF26DA6A2
TERMINAL ID: T281955709
MERCHANT ID:
00720000290745

CARDHOLDER ACKNOWLEDGES RECEIPT OF FUNDS IN THE AMOUNT OF THE TOTAL INDICATED AND AGREES TO PERFORM THE OBLIGATIONS NOTED IN THE

INSERT
THIS END UP

SAN DIEGO AIRPORT
RECEIPT H4
ENTRY TIME:
04/18/17 07:36
EXIT TIME:
04/20/17 12:48
PARK-DUR.: HRS:MIN
IN LOT: 2:05:12
AMOUNT:
$ 96.00
KIND OF PAYMENT
VISA
XXXXXXXXXXXX9213
XXXXX 201
AUTH. CODE 040161

AA0907

EXHIBIT F

EXHIBIT F

PACER
Public Access to Court Electronic Records

INVOICE

Invoice Date: 04/05/2017
Usage From: 01/01/2017 to: 03/31/2017

Account Summary

PACE

Pages:	3,965
Rate:	$0.10
Subtotal:	$396.50
Audio Files:	0
Rate:	$2.40
Subtotal:	$0.00
Current Billed Usage:	$396.50
Previous Balance:	$0.00
Current Balance:	**$396.50**

RECEIVED
APR 28 2017
ACCOUNTS PAYABLE

Total Amount Due: $396.50

Account #:	[redacted]221
Invoice #:	4369221-Q12017
Due Date:	05/10/2017
Amount Due:	$396.50

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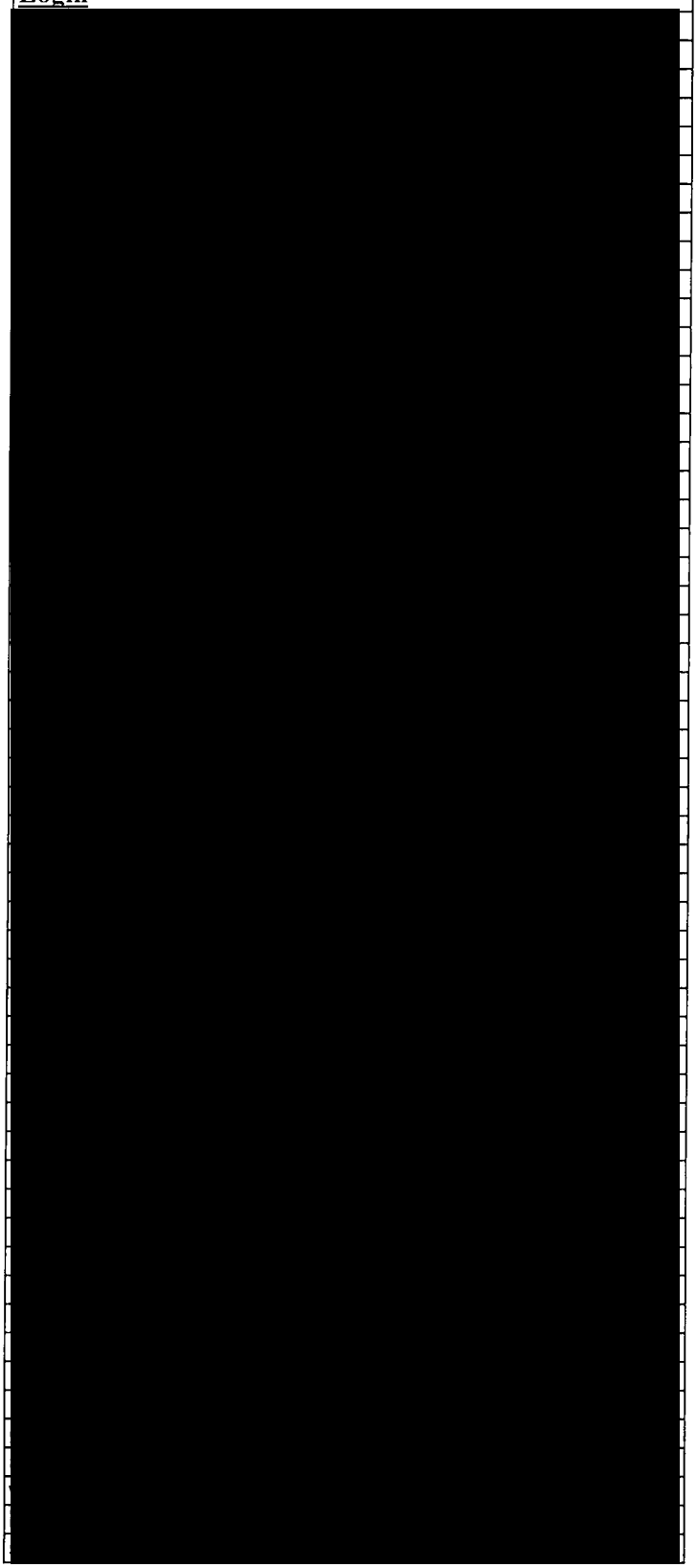

TOTAL	$396.50

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DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, Plaintiff, vs. DOUGLAS D. GERRARD, ESQ., individually; and GERRARD & COX, a Nevada professional corporation, d/b/a GERRARD COX & LARSEN; JOHN DOE INDIVIDUALS I-X; and ROE BUSINESS ENTITIES XI-XX, Defendants.	CASE NO.: A-16-744561-C DEPT. NO.: XXVII **MOTION TO ALTER OR AMEND, BY VACATING, ORDER OF DISMISSAL, PURSUANT TO NRCP 59(e)** **DATE OF HEARING:** **TIME OF HEARING:**

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

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

DATED this 5th day of June, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES; and

TO: ALL COUNSEL OF RECORD

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

DATED this 5th day of June, 2017.

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POINTS AND AUTHORITIES

A. Introduction.

The Court is familiar with the factual basis of this lawsuit, which alleges legal malpractice against Defendants, stemming from their representation of Plaintiff in certain prior underlying litigation. The Defendants moved to dismiss Plaintiff's First Amended Complaint on a variety of grounds, only one of which seemed compelling to this Court, the statute of limitations. After a hearing and a request for further briefing on the statute of limitations defense raised in the Motion, this Court entered its Order granting the Motion to Dismiss Plaintiff's First Amended Complaint, on May 25, 2017. Said Order relied on the fact that a remittitur of all State court appeals in the underlying litigation had issued without stay on March 18, 2014. This Court ruled that the statute of limitations for a legal malpractice action was therefore not tolled by (and pending the outcome of) a subsequent petition for writ of certiorari which was timely filed with the U.S. Supreme Court. Based thereon, this Court ruled that the Statute of Limitations began to run on May 13, 2013.[1] This Motion seeks to have this Court reconsider and alter and amend (by vacating) its Order.

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

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

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

---

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

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

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

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

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

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

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

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

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P.2d 1095, 1097 (1980).

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

D. <u>The Decision and Order Relied on an Analysis which Omitted the Key Question</u>.

(i) The Decision and Order of Dismissal.

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

> **THE COURT FURTHER FINDS** after review, that Nevada Rules of Appellate procedure 41(a)(3)(A) provides that "[a] party may file a motion to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari."
>
> **THE COURT FURTHER FINDS** after review, that a writ of certiorari is separate and distinct from an appeal. While an appeal to an appellate court is a matter of right, a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10.
>
> **THE COURT FURTHER FINDS** after review that because BBT did not have a right to a writ of certiorari to the United States Supreme Court, and because BBT failed to file a motion to stay the remittitur under NRAP 41(a)(3)(A),[2] the Nevada Supreme Court's May 31, 2013 decision to affirm the district court's ruling and its remittitur to the district court, constitutes an final adverse ruling for BBT. Therefore, the statute of limitations was not tolled when BBT filed a petition for a writ of certiorari to the United States Supreme Court. Accordingly, the statute of limitations began to run on or about May 31, 2013, making BBT's deadline under the statute of limitations for its legal malpractice claim two years later on or about May 31, 2015.
>
> **THE COURT FURTHER FINDS** after review BBT filed its Complaint in this case on October 5, 2016, some 493 days past the expiration of the statute of limitations.
>
> **THEREFORE, THE COURT ORDERS** for good cause appearing and for the reasons stated above, Defendants Motion to Dismiss First Amended Complaint is **GRANTED** as the statute of limitations ran on or about May 31, 2015.

---

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

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

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

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

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

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

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

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

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

Supreme Court Rule 13.2 provides:

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

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

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

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

Id. [Emphasis added.]

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

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

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

Id. [Emphasis added.]

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

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

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

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

---

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

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

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

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

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

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

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

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

Id.

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

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

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

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

CONCLUSION

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

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

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

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

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

DATED this 5th day of June, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

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CERTIFICATE OF SERVICE

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

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

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

An employee of Albright, Stoddard, Warnick & Albright

EXHIBIT "A"

B1 (Official Form 1)(4/10)

United States Bankruptcy Court
District of Nevada

Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
R & S ST. ROSE, LLC	
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all): 75-3196203	Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all)
Street Address of Debtor (No. and Street, City, and State): 3110 S. DURANGO DRIVE #203 LAS VEGAS, NV ZIP Code 89117	Street Address of Joint Debtor (No. and Street, City, and State): ZIP Code
County of Residence or of the Principal Place of Business: CLARK	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): ZIP Code	Mailing Address of Joint Debtor (if different from street address): ZIP Code
Location of Principal Assets of Business Debtor (if different from street address above): 38+ ACRES OF RAW LAND LOCATED IN HENDERSON, NV (APN 177-26-814-001, 177-26-701-019, 177-26-801-011, AND 177-26-801-016) HENDERSON, NV	

Type of Debtor (Form of Organization) (Check one box)

- ☐ Individual (includes Joint Debtors) *See Exhibit D on page 2 of this form.*
- ■ Corporation (includes LLC and LLP)
- ☐ Partnership
- ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)

Nature of Business (Check one box)

- ☐ Health Care Business
- ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101 (51B)
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Clearing Bank
- ■ Other

Tax-Exempt Entity (Check box, if applicable)

- ☐ Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).

Chapter of Bankruptcy Code Under Which the Petition is Filed (Check one box)

- ☐ Chapter 7
- ☐ Chapter 9
- ■ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
- ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Nature of Debts (Check one box)

- ☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- ■ Debts are primarily business debts.

Filing Fee (Check one box)

- ■ Full Filing Fee attached
- ☐ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.
- ☐ Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.

Chapter 11 Debtors

Check one box:

- ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
- ■ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

Check if:

- ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,343,300 *(amount subject to adjustment on 4/01/13 and every three years thereafter).*

Check all applicable boxes:

- ☐ A plan is being filed with this petition.
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

Statistical/Administrative Information

- ■ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors

■ 1-49	☐ 50-99	☐ 100-199	☐ 200-999	☐ 1,000-5,000	☐ 5,001-10,000	☐ 10,001-25,000	☐ 25,001-50,000	☐ 50,001-100,000	☐ OVER 100,000

Estimated Assets

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	■ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Estimated Liabilities

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	■ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Voluntary Petition *(This page must be completed and filed in every case)*	Name of Debtor(s): R & S ST. ROSE, LLC	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet)		
Location Where Filed: - None -	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet)		
Name of Debtor: R & S ST. ROSE LENDERS, LLC	Case Number: PENDING	Date Filed:
District: DISTRICT OF NEVADA	Relationship: SISTER LLC	Judge:

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I delivered to the debtor the notice required by 11 U.S.C. §342(b).

X _____
Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

■ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D completed and signed by the debtor is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.

Information Regarding the Debtor - Venue

(Check any applicable box)

■ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Certification by a Debtor Who Resides as a Tenant of Residential Property

(Check all applicable boxes)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____
(Name of landlord that obtained judgment)

_____
(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

☐ Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

Voluntary Petition

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

Name of Debtor(s):
R & S ST. ROSE, LLC

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

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

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

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (If not represented by attorney)

_____
Date

Signature of Attorney*

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

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

LARSON & STEPHENS, LLC
Firm Name

810 S. CASINO CENTER BLVD.
SUITE 104
LAS VEGAS, NV 89101

Address

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

April 4, 2011
Date

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

Signature of Debtor (Corporation/Partnership)

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

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

X **/s/ SAIID FOROUZAN RAD**
Signature of Authorized Individual

SAIID FOROUZAN RAD
Printed Name of Authorized Individual

PRESIDENT OF FOROUZAN, INC.
Title of Authorized Individual

April 4, 2011
Date

Signature of a Foreign Representative

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

(Check only one box.)

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

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

X _____
Signature of Foreign Representative

_____
Printed Name of Foreign Representative

_____
Date

Signature of Non-Attorney Bankruptcy Petition Preparer

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

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

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

_____
Address

X _____

_____
Date

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

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

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

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