IN THE SUPREME COURT OF THE STATE OF NEVADA

SELECT PORTFOLIO SERVICING, INC., Appellant, vs. JEFFREY V. DUNMIRE; and ROSALIE DUNMIRE, Respondents.	CASE NO. 77251

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APPEAL

From the Eighth Judicial District Court, State of Nevada,
Case No.: A-17-751386-C

OPENING BRIEF

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Docket 77251 Document 2019-16982

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Law firms that have appeared for Appellant Select Portfolio Servicing, Inc. ("SPS"): Matthew S. Carter, Esq. and Christina V. Miller, Esq., of the law firm Wright, Finlay & Zak, LLP; Thomas N. Beckom, Esq. and Kristin Schuler-Hintz, Esq. of the law firm McCarthy & Holthus, LLP; and Kent F. Larsen, Esq. and Katie M. Weber, Esq., of the law firm Smith Larsen & Wixom.

2. Select Portfolio Servicing is a wholly owned subsidiary of SPS Holding Corp., which is also a wholly-owned subsidiary of Credit Suisse Holdings (USA), Inc. which is jointly-owned by Credit Suisse AG and Credit Suisse Group AG. Credit Suisse AG is a wholly-owned subsidiary of Credit Suisse Group AG. ///

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The shares of Credit Suisse Group AG are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares.

Dated this 17th day of April, 2019.

WRIGHT, FINLAY & ZAK, LLP

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II. JURISDICTIONAL STATEMENT

The Findings of Fact and Conclusions of Law and Judgment are an appealable final judgment under NRAP 3A(b)(1). The Notice of Entry of Order and the Notice of Entry of Judgment, respectively, were filed and served on September 24, 2018. (IV:APP0820-28 and IV:APP0809-19, respectively) The Notice of Appeal was timely filed on October 19, 2018. (V:APP0980-94).

III. NRAP 17 ROUTING STATEMENT

This appeal raises questions that are not only of statewide public importance to both residential borrowers and lenders/loan servicers in the state of Nevada but also concern questions of first impression for this Court: (1) whether a single word in a stamp on a note can release a borrower from his or her obligation to repay over $1 million in debt, where the entire context in which that word is placed and the admissible evidence both indicate there was no such intent, and (2) whether a loan servicer can authenticate and rely upon its own business records, which include the records of a prior loan servicer, at a trial consistent with Nevada law. Accordingly, this Court should retain jurisdiction over this matter pursuant to NRAP 17(11) and (12).

IV. STATEMENT OF ISSUES PRESENTED

1. Motions for reconsideration should not be granted absent a proper legal or factual basis. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000

(2001). Also, subsequent district court judges should not overrule their predecessors' decisions, which constitute the law of the case. *Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990). Could Judge Gonzalez of the district court properly reconsider district court Judge Bell's prior entry of summary judgment in favor of SPS in the same action?

2. Where the record reflects that no legal authority or analysis was presented to or considered by the newly-assigned district court judge to support reconsideration, can reconsideration nonetheless be granted?

3. Contracts must be interpreted in favor of internal consistency and legality. *Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 501 (2003). Did the district court err by failing to consider that basic principle, misinterpreting the plain language and legal effect of the FHLBC stamp and reaching a result contrary to the circumstances surrounding its placement on the Note, including the subsequent acts and statements of the parties, thus resulting in a harsh and unreasonable result?

4. Plaintiffs in quiet title actions must affirmatively prove title in themselves at trial. *Breliant v. Preferred Equities Corp*., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996). They must also prove all elements of their claims by a preponderance of the evidence. *Pease v. Taylor*, 88 Nev. 287, 290, 496 P.2d 757, 759 (1972). Did the district court err by (1) quieting title in favor of the Dunmires,

where they provided no evidence that title should be quieted in their name, and (2) shifting the burden of proof and persuasion at trial from the Dunmires to SPS?

5. A district court's findings of fact must be supported by substantial evidence. *Grisham v. Grisham*, 128 Nev. 679, 687, 289 P.3d 230, 236 (2012). Did the district court err by quieting title in favor of the Dunmires where (1) its Final Judgment contains assumptions without evidentiary support, (2) it failed to consider the Dunmires' admissions in the record that they did not pay the Loan in full, still owed $1.25 million on the Loan and voluntarily entered into a loan modification that included express terms agreeing to repay the Loan, and (3) its findings of fact and conclusions of law were internally inconsistent?

6. Federal law provides that a mortgage or deed of trust cannot be invalidated by an inadequately documented agreement. *Fed. Sav. & Loan Ins. Corp. v. Gemini Mgmt.*, 921 F.2d 241, 245-246 (9th Cir. 1990). Did the district court err by entering judgment in favor of the Dunmires on an inadequately documented purported release of the Dunmires' repayment obligation despite federal law expressly prohibiting the use of such agreements against the FDIC as conservator of AmTrust?

7. Public records of the activities of an official or agency are not hearsay and are admissible to prove their contents. NRS 51.155. Nevada statute also provides that a party's business records are not hearsay and are admissible to prove

their contents. NRS 51.135. Did the district court err in refusing to consider SPS witness Mark Syphus to be an "other qualified witness" under Nevada law so as to admit the business record exhibits offered by SPS at trial?

8. Nevada law and public policy disfavors windfalls. *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1169, 14 P.3d 511, 514 (2000); Restatement (Third) of Proper.: Mortgages § 5.4 (1997). Did the district court err by entering quiet title in favor of the Dunmires, which resulted in an inequitable windfall to the Dunmires of $1.25 million at the expense of SPS?

V. STATEMENT OF THE CASE

After intentionally becoming delinquent on repayment of their mortgage loan (V:APP0839 at 13-14), the Dunmires elected to mediate under Nevada Foreclosure Mediation Program (V:APP0836 at 23-25). Following the mediation, SPS' predecessor-in-interest, New York Community Bank ("**NYCB**"), filed a Petition for Judicial Review with the district court, challenging the mediator's refusal to issue a certificate. *See* Case No. A-16-741289-J (the "**PJR Action**"). After a hearing held on October 6, 2016 regarding whether NYCB was the beneficiary under the Deed of Trust and holder of the Note, the district court found there was no break in the chain of title and that there was not a missing assignment (the "**PJR Order**") (II:APP0340-42). Specifically, the district court found that

> [T]he appropriate and accurate reading of NRS §104.3207 and assessment of the chain of endorsements evidenced on the original

> Promissory Note produced in open court was that the release of all interest in the written note and/or mortgage or deed of trust by Federal Home Loan Bank of Cincinnati reverted the note back to AmTrust Bank the prior holder by closed endorsement, who subsequently (through the FDIC as the receiver for AmTrust Bank) endorsed the original Promissory Note to New York Community Bank, the Petitioner herein.

(II:APP0341 at 23 – II:APP0342 at 2).

Unhappy with this outcome, the Dunmires filed the underlying Complaint on February 21, 2017, seeking to quiet title to the Property on the grounds that any obligation to repay the loan was no longer enforceable, contrary to the PJR Order. (I:APP0001-38) The Complaint also sought a declaration from the district court that the promissory note is invalid, the deed of trust is invalid, and the deed of trust "on the Property is discharged." *See id*.

On May 25, 2018, the district court granted summary judgment in favor of SPS, determining that the Dunmires' claims were barred under the doctrine of claim preclusion based on the outcome of the earlier PJR Action (the "**Summary Judgment Order**"). (III:APP0442-45)

On June 18, 2018, the Dunmires moved for reconsideration of the Summary Judgment Order. (III:APP0452-501). On July 2, 2018, the case was reassigned to a new department and judge. (V:APP1026) The Dunmires' motion for reconsideration was devoid of any legal argument or authority setting forth the legal standard for reconsideration nor were any permissible grounds presented for

the new district court judge to reconsider the prior department's ruling. (III:APP0452-501; III:APP0550-9) Indeed, as discussed in greater detail below, there were no issues of fact or law that would have allowed reconsideration – the only difference between the evidence presented at the time of the granting of SPS's motion for summary judgment and the time of the Dunmires' motion for reconsideration was the identity of the judge hearing the respective motions.

The newly assigned judge granted the motion for reconsideration by minute order entered on July 20, 2018 ("**Reconsideration Minute Order**"). (III:APP0560) Neither the Reconsideration Minute Order nor the subsequent written order ("**Reconsideration Order**") (III:APP0573-4) identified *any* ground upon which reconsideration by the newly-assigned judge was based. It simply appears that the newly-assigned judge disagreed with the prior district judge's ruling in the Summary Judgment Order. The reassigned district judge then rescheduled the parties' motions for summary judgment for hearing, and denied the previously granted motion based solely on the new district court judge's finding that the PJR Order had no preclusive effect, and that factual issues remained regarding the stamp and holders of the note. (III:APP0561; III:APP0573-4; V:APP1021 at 7-10)

On September 14, 2018, the district court conducted a one-day bench trial. (V:APP1026) At the conclusion of the bench trial, the district court took the

matter under submission. (V:APP0960 at 5-7) On September 21, 2018, the district court issued its Findings of Fact and Conclusions of Law ("**Final Judgment**") quieting title to the Property in favor of the Dunmires and holding that "no other party has rights or interest in the Property superior to that of the Dunmires." (V:APP0987-994) On September 24, 2018, the Notice of Entry of Judgment was filed and served on SPS. (V:APP0984-86) SPS filed its Notice of Appeal on October 19, 2018. (V:APP0980-994)

VI. STATEMENT OF RELEVANT FACTS[1]

A. INTRODUCTION

This action is an attempt by mortgage borrowers to avoid repaying a debt owed in excess of $1 million. Through self-serving statements, unsubstantiated by any evidence at trial, the borrowers claimed that the single word "release" contained within a stamp on an allonge to a promissory note operated to release their entire obligation to repay the debt they owed, despite the plain meaning and intent of the entire stamp and the contextual evidence showing the absurdity and unfairness of this result. After impermissibly reconsidering and overturning the prior judge's ruling in favor of SPS, despite the lack of supporting evidence, and even despite an admission from the borrowers that they did owe the debt and had

[1] These facts are gleaned from documents in the record as well as documents which SPS respectfully submits should have been admitted by the district court, as discussed *infra*.

not repaid it in full, the district court concluded that the borrowers were entirely released from any obligation to repay their mortgage.

This harsh and unreasonable outcome, which flies in the face of Nevada's public policy against inequitable results and unjustified windfalls, must be reversed. To leave this judgment intact would have a chilling effect on lenders' decisions to loan money within this state, a concern which reaches further than the four corners of this action.

B. IT IS UNDISPUTED THAT THE DUNMIRES BORROWED AND NEVER REPAID A LOAN AGAINST THE PROPERTY IN THE AMOUNT OF $1.3 MILLION.

Respondents Jeffrey and Rosalie Dunmire (the "**Dunmires**") owned residential real property commonly known as 2599 San Giorgio Circle, Henderson, Nevada 89052 (the "**Property**"). (V:APP0834 at 9-11) The Dunmires admit that in 2008 they borrowed $1.3 million to refinance the Property. As part of a refinance, on or about March 4, 2008, the Dunmires executed a $1.3 million promissory note (the "**Note**") (III:APP0591-95; IV:APP0784-88) in favor of CCSF, LLC dba Greystone Financial Group ("**CCSF**"). The loan was evidenced by the Note and secured by a deed of trust, executed on March 5, 2008 (the "**Deed of Trust**") (IV:APP0596-612). The Deed of Trust was recorded in the official records of the Clark County Recorder on March 12, 2008. (IV:APP0596-612) The Note and Deed of Trust are collectively referred to herein as the "**Loan**"

Section 1 of the Note states, "[t]he Lender or anyone who takes this Note by transfer and who is entitled to receive payments is the Note Holder." (III:APP0591)

Mortgage Electronic Registration Systems, Inc. ("**MERS**") is identified as the "beneficiary" of the Deed of Trust. (IV:APP0597) CCSF subsequently endorsed the Note to AmTrust Bank ("**AmTrust**"). (III:APP0594)

At some point, AmTrust "pledged, negotiated, endorsed and assigned" "various promissory notes" to the Federal Home Loan Bank of Cincinnati ("**FHLBC**"), as security for a loan from FHLBC to AmTrust. (IV:APP0617-18) An allonge to the Note contains an endorsement from AmTrust to FHLBC. (III:APP0594)

At some point thereafter, a stamp, upon which this case turns, was placed on the Note stating: "[t]he undersigned hereby releases all ***its*** interest in the written note and/or mortgage or deed of trust, without recourse." (emphasis added) (the "**FHLBC Stamp**") (III:APP0594). The plain language of the FHLBC Stamp reflects FHLBC's intent to release its interest in the Loan back to AmTrust. The following facts support the plain language of the FHLBC Stamp and AmTrust's repossession of the Loan.

On December 4, 2009, the Office of Thrift Supervision closed AmTrust and appointed the Federal Deposit Insurance Corporation ("**FDIC**") as receiver.

(IV:APP0768-70) On the same date, New York Community Bank ("**NYCB**") purchased the Loan and the whole bank assets of AmTrust from the FDIC, as receiver for AmTrust. (IV:APP0619-748) A second allonge to the Note identifies a special endorsement from the FDIC, as Receiver of AmTrust, to the order of NYCB, as well as an endorsement in blank by NYCB. (IV:APP0788)

On February 3, 2012, prior to the time the Dunmires entered into the Loan Modification with NYCB (IV:APP0793-97), MERS assigned the Deed of Trust to NYCB via Corporate Assignment of Deed of Trust, which was recorded in the official records of the Clark County Recorder on April 3, 2012. (IV:APP0613-15)

On January 26, 2018, NYCB assigned the Deed of Trust to U.S. Bank Trust National Association, as trustee for Towd Point Master Funding Trust 2017-PM13 (the "**Trust**"), via Corporate Assignment of Deed of Trust, which was recorded in the official records of the Clark County Recorder on March 5, 2018. (IV:APP0791-92) SPS is the loan servicer on behalf of the Trust.[2] (IV:APP0781)

On or about August 1, 2013, the Dunmires entered into a Loan Modification Agreement (the "**Loan Modification**") with NYCB, who was the owner of the Loan at that time. (IV:APP0793-97) The Loan Modification includes certain express terms whereby the Dunmires acknowledged their obligation to make

[2] It was undisputed at trial that SPS is in actual possession of the Note. (V:APP0924 at 5-7) ("Q. Okay. And in this specific case, SPS does have actual possession of Mr. Dunmire's note? A. Correct.").

repayment of the Loan to NYCB, its successors and assigns. Even beyond acknowledging the obligation, the Dunmires expressly agreed to assume liability for repayment and extend the lien on the Property going forward:

- "***Borrower, <u>if not presently primarily liable for the payment of the Note</u>, does hereby expressly assume the payment of said Note***" (IV:APP0793) (emphasis added);
- "***Borrowers, Jeffrey S. Dunmire and Rosalie Dunmire, now desire to extend or rearrange the time and manner of repayment of the Note and to extend <u>and carry forward the lien(s) on the Property whether created by the Security Instrument or otherwise</u>***" (IV:APP0794) (emphasis added);
- "***All covenants, agreements, stipulations, and conditions in the Note and Security Instrument shall be and remain in full force and effect***, except as herein modified, and ***none of the Borrower's obligations or liabilities under the Note and Security Instrument shall be diminished or released by any provisions hereof***" (IV:APP0795) (emphasis added.)

The Dunmires admit that they have not made payment on the Loan since beginning the foreclosure mediation program [in or about 2016] (V:APP0839 at 11-14) and admit that neither they nor any other person has paid the Loan in full. (V:APP0938 at 19 – V:APP0939 at 2; V:APP939 at 6-14; 19; V:APP0940 at 2-8)

Currently the principal balance of the Loan is approximately $1.25 million, not including interest, late fees, and other expenses advanced by SPS for the direct benefit of the Dunmires for the payment of property taxes, homeowners association dues and homeowners' insurance (V:APP0894 at lines 14-19; V:APP895 at lines 6-9) and charged to the Loan (as provided by the Deed of Trust). (V:APP0894 at 4-6)

VII. SUMMARY OF ARGUMENT

1. The district court abused its discretion by reconsidering the prior district court judge's entry of summary judgment in favor of SPS where no legal authority or argument in support of reconsideration was presented to or considered by the district court to justify reconsidering a co-equal judge's determination that the PJR Action precluded the subsequent quiet title action on the same basis - the word "release" in the FHLBC Stamp.

2. The district court committed reversible error by:

(a) shifting the burden of proof and persuasion to SPS at trial to prove the intent behind placing the FHLBC Stamp on the Note;

(b) entering quiet title in favor of the Dunmires despite the Dunmires failing to provide any evidentiary support for the conclusions that the FHLBC Stamp released their repayment obligation under the Loan;

(c) entering the Final Judgment which contained assumptions regarding the timing and intent behind placing the FHLBC Stamp on the Note unsupported by any evidence offered by the Dunmires;

(d) entering conclusions of law that the FHLBC Stamp manifested an intention to release the Dunmires from their repayment obligations, which were inconsistent with the district court's findings of fact that there was no evidence presented during trial regarding the intent of FHLBC in releasing its interest in the Note;

(e) failing to properly consider and apply the plain meaning of, and circumstances surrounding, the FHLBC Stamp, as well as the subsequent acts and declarations of the parties (including but not limited to the FDIC receivership of AmTrust, AmTrust, NYCB and the Trust's continued assertion that the Loan remained unpaid, collection and foreclosure efforts, and assignments of the Deed of Trust) in accordance with basic principles of contract law to reach a result that was fair and reasonable to the parties;

(f) failing to consider the Dunmires' admissions in the record that they had not paid the Loan in full, still owed $1.25 million on the Loan and voluntarily entered into a loan modification agreement with NYCB; and

(g) determining that the FHLBC Stamp was a release of the Dunmires repayment obligation despite the D'Oench Doctrine, defined *infra*,

precluding enforcement of purported, inadequately documented agreements from being enforced against the FDIC.

3. The district court abused its discretion by refusing to admit: (1) Proposed Exhibits 7 and 9 as public records of the FDIC, admissible under NRS 51.155, and of which the district court could also have taken judicial notice of, pursuant to NRS 47.130(2)(b); and (2) Proposed Exhibits 6 and 13 despite witness Mark Syphus being an "other qualified witness" under NRS 51.135 to discuss those records, which are incorporated into SPS's business records and upon which SPS relies in its day-to-day loan servicing operations, and to which no objection or evidence alleging the untrustworthiness of the exhibit was offered at trial by the Dunmires.

4. The district court erred by using its equitable powers to give the Dunmires a windfall of $1.25 million, in contravention of Nevada's policy against unjustified windfalls, despite the Dunmires' admissions during trial that neither they nor anyone else has paid the Loan in full and the district court's own acknowledgement in the record that it would be giving the Dunmires a windfall.

VIII. STANDARD OF REVIEW

Reconsideration of a prior judge's ruling in the same case is reviewed for an abuse of discretion. *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976); *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 606 P.3d

1095 (1980). "An abuse of discretion occurs if the district court's decision is arbitrary and capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001); *State v. Hambright*, 388 P.3d 13, 619 (Kan. Ct. App. 2017) ("A judicial action constituted an abuse of discretion if the action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.").

"The district courts of this state have equal and coextensive jurisdiction; therefore, the various district courts lack jurisdiction to review the acts of other district courts." *Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990) (citing Nev. Const. art. 6, § 6, NRS 3.220; *Warden v. Owens*, 93 Nev. 255, 563 P.2d 81 (1977)). "Generally, a district court judge's decision in a case becomes the "law of the case" and cannot be overruled by a coequal, successor judge." *Regent at Town Center Homeowners' Association v. Oxboq Construction, LLC*, 419 P.3d 702, 2018 WL 2431690 (Nev. May 24, 2018) (unpub.) (citing *Sittner v. Big Horn Tar Sands & Oil, Inc.*, 692 P.2d 735, 736 (Utah 1984) ("[T]he doctrine of 'law of the case' has evolved to avoid the delays and difficulties that arise when one judge is presented with an issue identical to one which has already been passed upon by a coordinate judge in the same case"); *see also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (explaining that 'law of the

case' "merely expresses the practice of courts generally to refuse to reopen what has been decided").

This Court reviews questions of law *de novo*. *Grand Hotel Gift Shop v. Granite St. Ins.*, 108 Nev. 811, 815, 839 P.2d 599, 602 (1992). This Court "defer[s] to the district court's findings regarding questions of fact unless they are clearly erroneous or not based on substantial evidence." *Grisham v. Grisham*, 128 Nev. 679, 687, 289 P.3d 230, 236 (2012) (internal quotes omitted). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008).

"Mixed questions of law and fact are those in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Khan v. Holder*, 584 F.3d 773, 780 (9th Cir. 2009) (internal quotes omitted). Questions of law and fact require *de novo* review. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 7-8 (2003). "[A] district court's interpretation of a contractual term is a question of law" and so should be reviewed de novo. *Whitemaine*, 124 Nev. at 308, 183 P.3d at 141. The issues raised in this appeal concerning the district court's actions during trial and resulting findings of fact and conclusions of law require de novo review because they involve pure questions of law and mixed questions of law and fact.

The standard of review for admission or exclusion of exhibits at trial is for an abuse of discretion where the district court failed to apply the correct evidentiary standard to justify its exclusion of the exhibits. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (the Nevada Supreme Court "review[s] a district court's decision to admit or exclude evidence for an abuse of discretion.") (citing *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006), *cert. denied*, 552 U.S. 1140, 128 S.Ct. 1061 (2008)); *Harkins v. State*, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006).

IX. LEGAL ARGUMENT

A. THIS ACTION SHOULD NEVER HAVE REACHED TRIAL BECAUSE THE DISTRICT COURT IMPERMISSIBLY RECONSIDERED THE PRIOR JUDGE'S RULING.

The district court abused its discretion by reconsidering and overturning summary judgment in favor of SPS where the record reflects that no grounds for reconsideration were presented to or considered by the Court.

Pursuant to N.R.C.P. 59(e), a court may grant relief through reconsideration where "(1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening change in controlling law." *See Turner v. Burlington Northern Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir.

2003)(emphasis added);[3] *see also AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 245 P.3d 1190 (2010) ("Among the "basic grounds" for a Rule 59(e) motion are "correct[ing] manifest errors of law or fact," "newly discovered or previously unavailable evidence," the need "to prevent manifest injustice," or a "change in controlling law" (emphasis added) (*citing Coury v. Robison*, 115 Nev. 84, 124-127, 976 P.2d 518) (1999)). "A motion to alter or amend judgment under Rule 59(e) is an extraordinary remedy which should be used sparingly." *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013) (internal quotation marks and citation omitted). Although the district court has considerable discretion in deciding whether to grant such a motion, the Rule 59(e) motion may not be used to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Id.* This warning is repeated in applicable local rules. *See* D.C.R. 13(7) ("No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon

[3] "The Nevada Supreme Court considers federal law interpreting the Federal Rules of Civil Procedure, 'because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" *Barbara Ann Hollier Trust v. Shack*, 356 P.3d 1085, 1089 (Nev. Aug. 6, 2015) (quoting *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 782, 786 (2002)); *Nelson v. Heer*, 121 Nev. 832, 833, 122 P.3d 1252, 1253 (Nev. 2005) ("[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules.").

motion therefor, after notice of such motion to the adverse parties."); EDCR 2.24(a) (same).

Here, the district court (via Judge Bell, the original district court judge in this matter) entered its order granting SPS's motion for summary judgment and denying the Dunmires' motion for summary judgment on May 25, 2018, concluding that the October 2016 Order entered by the district court in the earlier PJR Action "stands under the doctrine of claim preclusion." (III:APP0444 at line 25.) Notice of Entry of the Summary Judgment Order was filed on May 31, 2018. (III:APP0446-0451). The Dunmires then filed their Motion for Reconsideration, which was heard by Judge Gonzalez instead of Judge Bell, on June 18, 2018. (III:APP0452-501.) Although the Motion for Reconsideration includes a section titled "Standard for Reconsideration" (III:APP0458 at lines 7-15), it fails to identify *any* legal standard or authority for reconsideration. In fact, no discussion of or citation to the standard for reconsideration is present anywhere in the Dunmires' motion. The Dunmires' reply is equally void of any discussion of or citation to the standard for reconsideration. (III:APP0550-59) Judge Gonzalez's July 20, 2018, minute order states that no hearing on the Motion for Reconsideration was held but that the district court "having reviewed and [sic] the related briefing and being fully informed, GRANTS the motion to reconsider." (III:APP0560.) Further, the resulting order granting reconsideration (III:APP0573-

74) was similarly vague and unsupported by any substantive analysis or conclusion for reconsideration of the prior judge's ruling other than a blanket statement that "Plaintiff's Motion for Reconsideration is hereby GRANTED based on the Court's review (sic) Motion for Reconsideration and review of the summary judgment pleadings filed by the parties." (III:APP0574 at lines 1-3.)

The record reflects that no newly discovered or previously unavailable evidence was presented to the district court after entry of the Summary Judgment Order. *AA Primo Builders, LLC*, 126 Nev. 578, 245 P.3d 1190. The Dunmires did not identify any applicable change in controlling law after entry of the Summary Judgment Order. (III:APP0452-501; III:APP0550-59) Nor did the Dunmires argue at any point that reconsideration was necessary to correct a manifest error of law by Judge Bell or to prevent a manifest injustice. *Id*. Where no such argument or supporting authority was presented to Judge Gonzalez, the decision to grant reconsideration was necessarily an arbitrary and capricious act without any legal or factual basis.

The district court therefore abused its discretion in granting reconsideration, overturning summary judgment in favor of SPS and deciding the merits of the Dunmires' claims after trial. Judge Gonzalez, the co-equal successor to Judge Bell, had no authority to reconsider the Summary Judgment Order. Accordingly, SPS respectfully requests that this Court reverse the Final Judgment and remand

the action to the district court to reinstate the Summary Judgment Order in favor of SPS.

B. THE DISTRICT COURT'S CONCLUSION THAT THE DUNMIRES' OBLIGATION UNDER THE LOAN WAS RELEASED WAS ERRONEOUS BECAUSE IT (1) MISINTERPRETED THE FHLBC STAMP AS A RELEASE OF THE ENTIRE LOAN AS A MATTER OF LAW, (2) IMPROPERLY SHIFTED EVIDENTIARY BURDENS, AND (3) WAS THE RESULT OF THE DISTRICT COURT'S FAILURE TO ADMIT CRITICAL EVIDENCE AS REQUIRED BY NEVADA LAW.

The Final Judgment in favor of the Dunmires should be reversed because it is clearly erroneous and not based on substantial evidence presented to the district court during trial. First, the district court misread the FHLBC Stamp to conclude that it released the Dunmires from their repayment obligation under the Loan without any evidentiary support and contrary to longstanding principles of contract law and the plain language of the Stamp itself. Second, the district court erroneously shifted the burden of proof from the Dunmires to SPS. Third, the district court disregarded admissions in the record that the Dunmires assumed the Note with an agreement that the Deed of Trust remains a valid lien on the Property. And fourth, the district court refused to admit exhibits presented by SPS during trial based on an incorrect conclusion that SPS' corporate designee witness was not an "otherwise qualified" person to testify regarding those records, and with due consideration for the admissibility of those documents under Nevada law. Any one

of these actions by the district court is sufficient for this Court to reverse the Final Judgment.

i. The Final Judgment is not supported by evidence in the record, is internally inconsistent, and fails to consider basic principles of contract law.

The district court quieted title in favor of the Dunmires and against SPS (invalidating the Note and Deed of Trust) based ***solely*** on the language in the FHLBC Stamp. (IV:APP0807 at ¶¶11-13) Yet, in reaching its conclusion on the language of the FHLBC Stamp, the district court failed to apply basic contract principles in interpreting the "release" language. Instead, the Court reached an illogical and inequitable conclusion, providing the Dunmires with a $1,250,000 financial windfall. The district court's findings of fact and conclusions of law regarding the language in the FHLBC Stamp are inconsistent, clearly erroneous, and ***not*** supported by substantial evidence.

First, the district court found that "[t]he FHLBC release was prior to the FDIC approval." (IV:APP0804 at ¶17) However, the Dunmires failed to bring anyone from FHLBC to trial to confirm when the Stamp was placed on the allonge to the Note.[4] Moreover, Mr. Dunmire testified that he was not aware of the

[4] Although no evidence was presented to the district court by the Dunmires concerning when the FHLBC Stamp was placed on the Note, SPS submits that the district court's conclusion is the most logical conclusion to reach. The FHLBC Stamp was likely placed on the Note after the endorsement from AmTrust to FHLBC but before the endorsement from FDIC, as receiver for AmTrust, to

language in the FHLBC Stamp until 2016 when he and his wife were going through the foreclosure mediation program. (V:APP0837 at 24 – V:APP0838 at 2) ("Q. Were you aware of that particular stamp on any document related to this loan before the foreclosure mediation in 2006? A. Not until I was sitting at the table."). There simply was no evidence presented at trial by the Dunmires to establish when the FHLBC Stamp was placed on the allonge to the Note. Yet, evidence to the contrary was presented by SPS, which the Court wrongfully refused to admit into evidence during trial. As such, the district court's Finding of Fact No. 17 was pure speculation, unsupported by any evidence (let alone substantial evidence) and was therefore clearly erroneous.

Second, the district court held that the FHLBC Stamp "***manifested*** an intention to discharge the Dunmires from an existing duty, in this case, repayment of the Note." (IV:APP0807 at ¶12) (Emphasis added.) However, the district court's Finding of Fact No. 23 states, in relevant part, "***[n]o evidence was presented during trial regarding the intent of FHLBC*** in releasing ***its*** interest in the Note." (IV:APP0805 at ¶23) (Emphasis added.) This Finding of Fact is telling for at least two reasons: (1) it reveals that the Dunmires, as the plaintiffs with the

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NYCB. Placing the FHLBC Stamp on the Note prior to the FDIC endorsement supports a finding that the plain meaning of the FHLBC Stamp was to release FHLBC's interest back to AmTrust such that its receiver, FDIC, could then endorse the Note over to NYCB as part of the whole bank sale of AmTrust's assets to NYCB. (IV:APP0619-748)

burden of production and persuasion, did ***not*** present any evidence as to the intent of FHLBC; and (2) it highlights the actual language of the Stamp, which states that the FHLBC was releasing ***its*** *interest* in the "written note and/or mortgage or deed of trust"—*i.e.* back to AmTrust. Nothing in the Stamp signifies an intention to release ***the Dunmires*** from their $1.3 million obligation under that instrument. Therefore, the district court's conclusion that the Stamp released them from repayment of the Loan was clearly erroneous and not supported by any (let alone substantial) evidence.

Third, the district court held that "[w]hen FHLBC placed its stamp on the Allonge … the only conclusion that can be drawn from the plain language of the stamp is that a release occurred." (IV:APP0807 at ¶11) This conclusion is refuted by basic principles of contract law.

"Contract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015) (quoting *Redrock Valley Ranch, LLC v. Washoe Cnty*, 127 Nev. 451, 460, 254 P.3d 641, 648-49 (2011)). The objective of interpreting contracts "is to discern the intent of the contracting parties. Traditional rules of contract interpretation are employed to accomplish that result." *Id*. (quoting *Davis v. Beling*, 128 Nev. 301, 278 P.3d 501 (2012))

(internal citations omitted). "A contract is ambiguous if it is reasonably susceptible to more than one interpretation." *Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 501 (2003) (quoting *Margrave v. Dermody Properties*, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994)). "The best approach for interpreting an ambiguous contract is to delve beyond its express terms and "examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties." *Id*. (quoting *Hilton Hotels v. Butch Lewis Productions*, 107 Nev. 226, 231, 808 P.2d 919, 921 (1991)). "This examination includes not only the circumstances surrounding the contract's execution, but also subsequent acts and declarations of the parties." *Id*. (citing *Trans Western Leasing v. Corrao Constr. Co.*, 98 Nev. 445, 447, 652 P.2d 1181, 1183 (1982)). Most importantly, "**[a]n interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract**." *Id*. (quoting *Dickenson v. State, Dep't of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994)). *See also Trans Western Leasing*, 98 Nev. at 447, 652 P.2d at 1183 ("This examination includes not only the circumstances surrounding the contract's execution, but also subsequent acts and declarations of the parties."); *Mohr Park Manor, Inc. v. Mohr*, 83 Nev. 107, 424 P.2d 101 (1967) (interpretations which render the contract valid or its performance possible are preferred to those which render it invalid or its performance impossible); *United Rentals Hwy. Techs*

v. Wells Cargo, 128 Nev. 666, 676, 289 P.3d 221, 229 (2012) ("Every word [in a contract] must be given effect is at all possible.") (citing *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966); *Ellison v. C.S.A.A.*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)); *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 365 (2013) ("A basic rule of contract interpretation is that '[e]very word must be given effect if at all possible.'").

The language and timing of the FHLBC Stamp is clear: that FHLBC released its interest in the Note only. But the district court reached the opposite conclusion, that the Dunmires repayment obligation was released in full, by finding that the Dunmires had met their burden of proof by a preponderance of the evidence.[5] The Dunmires ***did not*** prove that it was "more likely than not" that the Stamp released the Dunmires from their repayment obligation under the Note. *See Caraveo v. Perez (In re Estate of Bethurem*), 129 Nev. 869, 876, 313 P.3d 237, 242 (2013). At best, it is only apparent from the express language of the FHLBC Stamp that FHLBC was releasing ***its own interest in the Note, not the Dunmires' repayment obligation***. If the language had been intended to release the Dunmires from their repayment obligation, there would not be a stamp on an allonge rather the face of the Note would have been marked "VOID" or "CANCELLED" or the

[5] *See Pease v. Taylor*, 88 Nev. 287, 290, 496 P.2d 757, 759 (1972) ("A great number of jurisdictions require the usual standard of proof in civil matters, *i.e.*, 'preponderance of the evidence,' which we now adopt.").

Note would have been returned to the Dunmires. *See, e.g.* NRS 104.3604(1) and (2), the latter of which specifically states that: "Cancellation or striking out of an endorsement pursuant to subsection 1 does not affect the status and rights of a party derived from the endorsement."[6]

The Dunmires failed to provide the district court with any evidence (let alone substantial evidence) about the intention of FHLBC. The district court stated as much: "***No evidence was presented during trial regarding the intent of FHLBC*** in releasing its interest in the Note." (IV:APP0805 at ¶23) Thus, the district court erred as a matter of law in interpreting the language of the Stamp to be a release of the Dunmires' obligation to repay the Loan rather than just a release of FHLBC's own interest back to AmTrust. That would be the only sensible interpretation of the FHLBC Stamp, based on the surrounding circumstances (*Soro*, 359 P.3d at 106; *Redrock Valley Ranch, LLC*, 127 Nev. at 460, 254 P.3d at 648-49). The actions of the parties to the Note, i.e. the transfer of the Loan as collateral to secure a loan from FHLBC to AmTrust (IV:APP0617-18), placement of AmTrust under FDIC receivership (IV:APP0768-70), sale of AmTrust's whole bank assets to NYCB (IV:APP0619-748) and corresponding endorsements (III:A{{0591-95; IV:APP0784-88) support such a conclusion, as do the Dunmires'

[6] The language "without recourse" on the stamp is equally unavailing of an intent to Dunmires' repayment obligation. NRS 104.3415(2) ("If an endorsement states that it is made "without recourse" or otherwise disclaims liability of the endorser, the endorser is not liable under subsection 1 to pay the instrument.").

admissions that they did not know about the FHLBC Stamp (V:APP0837 at 13-15), entered into a loan modification assuming all obligations due under the Loan (IV:APP0793), and did not repay the Loan (V:APP0835 at 21-25), as well as the endorsements to the Note and subsequent actions of AmTrust, FDIC, NYCB and SPS after the FHLBC Stamp was allegedly placed on the allonge. *See* Assignment of Deed of Trust (IV:APP0613-16); Special Power of Attorney (IV:APP617-18); Purchase and Assumption Agreement (IV:APP0619-748); FDIC Annual Report to Congress Merger Decisions 2009 (IV:APP0749-767); FDIC Press Release regarding AmTrust (IV:APP0768-70); FDIC Failed Bank Information regarding AmTrust (IV:APP0771-75); Servicing Transfer letter from SPS to the Dunmires (IV:APP0776-80); Limited Power of Attorney (IV:APP0781-83); Note, with endorsement from NYCB in blank (IV:APP0784-88); Recorded Corporate Assignment of Deed of Trust (IV:APP0791-92); Loan Modification Agreement (IV:APP793-97); and Goodbye Letter from NYCB to the Dunmires (IV:APP0798-99). All parties to the Note believed that the Loan remained a valid debt and servicing and collection efforts continued in the regular course of business. *Id*.

Lastly, despite this Court's caution to lower courts to seek to avoid doing so, the district court reached a conclusion which resulted in a harsh and unreasonable outcome: a financial windfall to the Dunmires and loss of SPS secured interest

worth approximately $1.3 million. *Shelton*, 119 Nev. at 497, 78 P.3d at 501; *Dickenson*, 110 Nev. at 937, 877 P.2d at 1061. *See also*, section B, *infra*.

Given the Dunmires' failure to prove when the FHLBC Stamp was placed on the Note, the intent, or the meaning of the Stamp, and the district court's failure to apply basic contract principles in reaching its conclusion, the district court's Final Judgment quieting title in favor of the Dunmires and holding that the Dunmires' repayment obligations under the Note and Deed of Trust were released was clear error, not supported by substantial evidence, and should be reversed.

ii. The district court improperly shifted the burden of production and persuasion to SPS.

It is well-established under Nevada law that "[i]n a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself." *Breliant v. Preferred Equities Corp*., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996). While it is likely that the Dunmires will argue that there is a presumption in favor of the record titleholder (*i.e.* the Dunmires), *see id*., that presumption, if any, has been overcome by the undisputed facts that (i) the Dunmires borrowed the money (V:APP0835 at 13-17), (ii) the Dunmires have not paid back the money (*Id*. at 21-25), (iii) SPS has demonstrated that it is the note holder for the Trust (V:APP0870 at 18-25; V:APP0891 at 11-13; V:APP0892 at 3-5; V:APP0896 at 21-24; V:APP0924 at 5-7; V:APP0930 at 20-23), (iv) the Trust is the beneficiary of the Deed of Trust (IV:APP0791-92), and (v) no other entity is seeking repayment of

the Loan from the Dunmires. (V:APP0838 at 3-6)

Unfortunately, at trial, the district court improperly shifted the burden of proof to SPS. The district court found that "[n]o evidence was presented during trial regarding the intent of FHLBC in releasing its interest in the Note." (IV:APP0805 at ¶23) Yet, despite this finding, the district court concluded that the Stamp operated to release the Dunmires' repayment obligation in full. (IV:APP0807 at ¶12) Moreover, despite the district court's erroneous finding about the timing of when the FHLBC Stamp was placed on the Note, it is undisputed that no evidence was presented about that issue either. Yet the district court somehow found the "manifested" intention of the FHLBC through the "plain language" of the Stamp. (*Id*. at ¶11)

The problem is that the district court wrongfully shifted the burden to SPS to prove the intent of the Stamp instead of requiring the Dunmires to do so. The language of the Stamp is "plain," as FHLBC expressly set forth that it was a release of "its" interest, not the Dunmires', and it certainly does not support a finding that the Dunmires were released from their repayment obligation despite not repaying the Loan or providing other consideration. The district court erred by relying solely on the language of the Stamp in quieting title. The Dunmires did not present any evidence in their case-in-chief to make a *prima facie* showing that the word "release" was intended to and did operate as a release of all repayment

obligations under the Deed of Trust. The Dunmires admitted that they were unaware of the Stamp at any time prior to the Foreclosure Mediation. (V:APP0837 at 13-18) Instead, they admitted that they considered the Loan was still valid and enforceable and obtained a loan modification, evidencing their intent to repay the debt. (IV:APP0793-797)

Accordingly, SPS requests that this Court reverse the Final Judgment and remand to the district court with instructions for judgment to be entered in favor of SPS either pursuant to the original Summary Judgment Order or, at least, under the renewed motion for summary judgment following the grant of the motion for reconsideration.

iii. The Dunmires expressly acknowledged that the Note and Deed of Trust remained valid.

Even though the district court was aware of the existence of the Loan Modification, and admitted it into evidence (V:APP0842 at 12), it disregarded the effect of the Loan Modification as a reaffirmation of the Dunmires' debt. The express language of the Loan Modification constituted an admission by Dunmires that they were indebted to NYCB (and now SPS) and that the Property was still security for the Loan under the Deed of Trust. By disregarding the effect of the Loan Modification, the district court committed clear, reversible error.

SPS maintains its position that there is no evidence in the record to support a finding that the debt was ever released. However, even if the FHLBC Stamp is

considered to be a release of the repayment debt, then FHLBC's use of the "release" stamp language, instead of other language clarifying its intent to transfer the Loan back to AmTrust, is simply a mistake and reinstatement of the Loan is required in accordance with the terms of the Loan Modification. In Nevada, principles of law and equity, including the law relative to mistake supplement NRS Chapter 104, the Uniform Commercial Code. NRS 104.1103(2). "Equity affords relief where an encumbrance has been discharged through a mistake." *Alliance Funding Co. v. Stahl*, 829 A.2d 1179 (Pa. 2003) (citing *St. Clement's Building & Loan Ass'n v. McCann*, 126 Pa.Super. 20, 190 A. 393, 394 (1937)); *U.S. Bank Nat. Ass'n v. Oliverio*, 109 Wash.App. 68, 73, 33 P.3d 1104, 1106 (2001) ("The law will not relieve a party of an obligation due to another's mistake."); *NationsBanc Mortg. Corp. v. Eisenhauer*, 49 Mass. App. Ct. 727, 733 N.E.2d 557 (2000) (when a mortgage is discharged by mistake, equity will set the discharge aside, and reinstate the mortgage in the position the parties intended it to occupy).

Because contract interpretation is a matter of law, this Court must review the district court's decision de novo and without any deference to the district court's findings regarding the Loan Modification. *Whitemaine*, 124 Nev. at 308, 183 P.3d at 141. On page 1 of the Loan Modification, it states in relevant part:

> This Loan Modification Agreement … between Jeffrey S. Dunmire and Rosalie Dunmire, Husband and Wife as Joint Tenants ("Borrower") and New York Community Bank ("Lender"), amends and supplements (1) the Deed of Trust (the "Security Instrument") …

> dated March 4, 2008 and granted and assigned to CCSF … and (2) the Note, bearing the same date as and secured by, the Security Instrument …payable to the order of the Lender in accordance with the terms set forth therein. ***Borrower, <u>if not presently primarily liable for the payment of the Note</u>, does hereby expressly assume the payment of said Note.*** Borrower acknowledges that Lender is the holder and owner of the Note and understands that Lender may transfer the Note … and anyone who takes the Note by transfer and is entitled to receive payments under the Note is called the "Lender" in this agreement.

(IV:APP0793) (Emphasis added.) Although SPS disputes the district court's finding regarding the effect of the FHLBC Stamp, it is clear from the foregoing language that even if the Dunmires had been previously "released" from their payment obligations arising under the Note, the Dunmires "expressly" acknowledged and agreed to "assume payment of said Note" anyway.

Additionally, on page 2 of the Loan Modification, it states as follows in relevant part:

> ***Borrowers, Jeffrey S. Dunmire and Rosalie Dunmire, now desire to extend or rearrange the time and manner of repayment of the Note and to extend <u>and carry forward the lien(s) on the Property whether created by the Security Instrument or otherwise</u>***. Lender, the legal holder and owner of the Note and of the lien(s) securing the same has agreed at the request of Borrower to extend or rearrange the time and manner of repayment.

(IV:APP0794) (Emphasis added.) In case the foregoing was not clear enough, on page 3 of the Loan Modification it states in relevant part:

> ***All covenants, agreements, stipulations, and conditions in the Note and Security Instrument shall be and remain in full force and effect***, except as herein modified, and ***none of the Borrower's obligations or***

> ***liabilities under the Note and Security Instrument shall be diminished or released by any provisions hereof***, nor shall this Agreement in any way impair, diminish, or affect any of Lender's rights under or remedies on the Note and Security Instrument, whether such rights arise thereunder or by operation of law.

(IV:APP0795) (Emphasis added.) Finally, it is undisputed that the Dunmires signed the Loan Modification, which was notarized. *See id*.; *see also* (V:APP0841 at 23 – V:APP0842 at 1).

In the Final Judgment, the district court failed to address or acknowledge any of the foregoing contractual agreements by the Dunmires. However, it is irrefutable that even if the district court were correct about the timing and effect of the FHLBC Stamp, ***the Dunmires' actions reflect their express agreement to affirm the debt evidenced by the Note and desire that the Deed of Trust*** "extend and carry forward" as a lien on the Property. *Shelton*, 119 Nev. at 497, 78 P.3d at 501; *Margrave*, 110 Nev. at 827, 878 P.2d at 293.

Thus, the district court committed clear, reversible error by failing to even consider and effectuate the express promises in the Loan Modification, despite admitting the Loan Modification into evidence at trial.

iv. The district court abused its discretion in refusing to admit certain evidence proffered by SPS at trial.

During trial, the district court refused to admit (or even view) Proposed Exhibits 6, 7, 9, and 13. (IV:APP0617-18, IV:APP0619-748, IV:APP0768-70 and IV:APP0784-88, respectively). Proposed Exhibits 7 and 9 (IV:APP0619-748,

IV:APP0768-70, respectively) were relevant and should have been admitted under Nevada statute and the public records exception to the hearsay rule. Proposed Exhibits 6 and 13 (IV:APP0617-18 and IV:APP0784-88, respectively) were relevant and should have been admitted under Nevada law, including the business records exception to the hearsay rule. Although SPS did not bear the burden of proof at trial, the district court's refusal to admit the foregoing records prevented SPS from presenting a full picture of the Loan and the Dunmires' continuing repayment obligation. This was important given the district court's improper shift of the evidentiary burden to SPS. If the district court would have admitted the foregoing documents, it would have understood why the FHLBC Stamp was placed on the Note and the full history of the ownership of the Loan.

a. Proposed Exhibit 7 was admissible under the public records exception to hearsay.

Proposed Exhibit 7 is a copy of the Purchase and Assumption Agreement Whole Bank between the FDIC, receiver of AmTrust, and NYCB (the "**PAA**"). (IV:APP0619-748) When the PAA was offered for admission into evidence at trial, the Dunmires objected based on lack of foundation, hearsay, and relevance. (V:APP0928 at 20-21) The Dunmires did not object on the basis that the source of information indicated a lack of trustworthiness. SPS' trial counsel argued that the PAA was relevant to show that NYCB acquired all of AmTrust's mortgages. *See*

id. at 17-18. However, the district court sustained the objection "because this is not a report of a public agency as part of their work." *Id*. at 23-24.

The district court's ruling was erroneous as a matter of law and an abuse of discretion for failing to apply applicable law because the public records exception to hearsay is not limited to "reports" of public agencies.

NRS 51.155 states:

> Public records and reports. **Records**, reports, statements or data compilations, **in any form**, of public officials or agencies are not inadmissible under the hearsay rule if they set forth:
>
> 1. **The activities of the official or agency**;
> 2. Matters observed pursuant to duty imposed by law; or
> 3. In civil cases and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law,
>
> unless the sources of information or the method or circumstances of the investigation indicate lack of trustworthiness.

(Emphasis added).

First, the PAA reflects an activity of the FDIC (the sale of AmTrust while under conservatorship of the FDIC to NYCB) maintained by the FDIC on its website and is accessible to the public.[7] Additionally, the district court should have taken judicial notice of the PAA as a fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

[7] https://www.fdic.gov/bank/individual/failed/amtrust-p-and-a.pdf, last visited February 4, 2019.

questioned. NRS 47.130(2)(b). Indeed, this court and numerous other courts have taken judicial notice of substantially similar asset purchase agreements available on the FDIC's website. *See, e.g.*, *R&S St. Rose Lenders, LLC v. Branch Banking & Trust Co.*, No. 56640, 2013 WL 3357064, at *5 n.1 (Nev. Feb. 21, 2014) (Justice Pickering, dissenting) (citing *Jaimes v. JP Morgan Chase Bank NA*, No. 12 C 3162, 2013 WL 677740, at *1 n.2 (N.D. Ill. Feb. 25, 2013) (taking judicial notice of an FDIC P & A Agreement "because it is a public record and not the subject of reasonable dispute" and collecting cases in which other courts also took judicial notice of the P & A Agreement and its provisions) and *Allen v. United Fin. Mortg. Corp.*, 660 F.Supp.2d 1089, 1093-94 (N.D. Cal. 2009) (consulting web version of P & A Agreement to clarify exhibit)); *Scott v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 743, 752-55 (Cal. Ct. App. 2013) (the FDIC's official act of transferring certain WaMu assets to JP Morgan as evinced by the P & A Agreement is an official act subject to judicial notice and the P & A Agreement posted on the official FDIC website is subject to judicial notice).

Second, the PAA is a "record" under any definition. Black's Law Dictionary (10th ed. 2014) (defining "record" as "[a] documentary account of past events, usually designed to memorialize those events" or "[i]nformation that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form."). Third, the PAA undisputedly sets forth the

activities of the FDIC in its capacity as conservator of AmTrust: the PAA records the FDIC's whole bank sale of AmTrust to NYCB. (IV:APP0619-748)

Thus, the district court should have admitted the PAA at trial pursuant to the public records exception to hearsay or, alternatively, should have taken judicial notice thereof. Had the district court admitted the PAA, it would have known that all of AmTrust's assets (including the Dunmires' Loan, discussed *infra*) had been purchased by NYCB. (IV:APP0633 at Section 3.1) The district court's failure to do so, relying on an incorrect evidentiary standard and application of NRS 51.155, amounts to an abuse of discretion.

b. Proposed Exhibit 9 was admissible under the public records exception to hearsay

Proposed Exhibit 9 is a copy of the FDIC's Press Release (the "Press Release") announcing that the FDIC closed AmTrust and entered into the PAA with NYCB. (IV:APP0768-70) When the Press Release was offered for admission, the Dunmires first objected that it lacked foundation and the district court sustained the objection. (V:APP0915 at 12-13) After SPS' witness, Mark Syphus, testified that it was a publicly-available press release from the FDIC, a federal agency, the Press Release was again offered for admission, but the Dunmires objected based on lack of foundation and hearsay, which the district court then sustained. (V:APP0916 at 14-16)

Although SPS argued that the Press Release should be admitted under the public records exception to the hearsay rule, the district court held "[i]t's hearsay. It's a press release not by a party to this litigation. So it can't be a party admission, and while it may be allegedly issued by the FDIC, that doesn't mean that the contents of the press release are admissible." *Id.* at 21-25. The court further held that the Press Release is "not a record of a public agency. It's a press release." (V:APP0917 at 4-5) The district court's erroneous application of NRS 51.155 and refusal to admit the Press Release into evidence at trial was an abuse of its discretion.

First, a public statement on a government website is subject to judicial notice. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010)[8]; *Fannie Mae v. KK Real Estate Inv. Fund, LLC*, No. 2:17-cv-1289-JCM-CWH, 2018 WL 525297, at *2 & n.3 (D. Nev. Jan. 23, 2018) (taking judicial notice of FHFA's statement in related case); *Eagle SPE NV 1, Inc. v. S. Highlands Dev. Corp.*, 36 F. Supp. 3d 981, 985, 988 n.6 (D. Nev. 2014) (taking judicial notice of document on FDIC website).

Second, the Press Release is certainly a "statement," as it informs the world of the PAA and other items related to the FDIC's closure of AmTrust and sale of

[8] The bottom portion of the Press Release shows the FDIC's web address from which the Press Release was obtained. (IV:APP0768-70)

assets to NYCB. *See* NRS 51.155; *see also* Black's Law Dictionary (10th ed. 2014) (defining "statement" as "[a] formal and exact presentation of facts.").

Third, the Press Release is a statement of the FDIC's activities as it expressly states,

> AmTrust Bank, Cleveland, Ohio, was closed today by the Office of Thrift Supervision, which appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. To protect the depositors, the FDIC entered into a purchased and assumption agreement with New York Community Bank, Westbury, New York, to assume all of the deposits of AmTrust Bank.

(APP0768). *See also DeRosa v. First Judicial Dist. Court*, 115 Nev. 225, 232, 985 P.2d 157, 161 (1999) (overruled on other grounds) ("To qualify as a public record in both a traditional sense and pursuant to Nevada's statutory codification of that exception, the record must have been prepared by a public official or agency.").

Based on the public records exception, the Press Release was authenticated and should have been admitted by the district court when offered at trial.[9] As with the PAA, had the Press Release been admitted into evidence, the district court would have known how NYCB ended up owning the Note.

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[9] Although the district court did not inquire about the relevance of the Press Release, it was clearly being offered to demonstrate that NYCB acquired the assets (including mortgage loan documents) of AmTrust, which explains how NYCB was entitled to possess the Note and own the Deed of Trust.

c. Proposed Exhibit 6 was admissible under the business records exception to hearsay.

The district court's refusal to admit Proposed Exhibit 6 into evidence at trial was erroneous as a matter of law and an abuse of discretion for failing to apply applicable law because the district court failed to apply the business records exception to hearsay.

The business records exception to hearsay, NRS 51.135, states,

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Courts routinely permit a loan servicer witness to testify to and authenticate records created by a prior loan servicer. *See U.S. Bank Trust, N.A. v. Jones*, 330 F.Supp.3d 530 (D. Me. 2018) (noting that current servicer relies on other servicers' records in its day-to-day business once it believes they are correct, and current servicer then treats the records as party of its own business records. Noting that,

> [m]ost other circuit courts have applied the business records exception flexibly to admit records created by a different business entity once incorporated and relief upon by the business entity producing the witness to testify about the other requirements of [the business records exception].

See, e.g., U.S. v. Adefehinti, 510 F.3d 319, 326 (D.C. Cir. 2007); *Air Land Forwarders, Inc. v. U.S.*, 172 F.3d 1338, 1344 (Fed. Cir. 1999); *U.S. v. Childs*, 5 F.3d 1328, 1333 (9th Cir. 1993); *Matter of Ollag Constr. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir. 1981)."); *Mason v. Midland Funding LLC*, No. 1:16-cv-02867-LMM-RGV, 2018 WL 3702462, at *81 (N.D. Ga. May 25, 2018) (overruled on other grounds) (applying the business records exception under Fed. R. Evid. 803(6)[10] to records which were not created by the business, but rather gathered by the business and kept in the course of its business).

Proposed Exhibit 6 is a copy of the Special Power of Attorney between FHLBC and NYCB, as successor in interest to AmTrust (the "**POA**"). (IV:APP0617-18) It references a lending relationship between FHLBC and the failed AmTrust, and that the Note had been FHLBC's collateral for that lending facility.[11] Mr. Syphus explained at trial that while he is not the custodian of records for SPS (V:APP0851 at 22-24), he is an "other qualified person," pursuant to NRS 51.135.

[10] Fed. R. Evid. 803(6) is substantially similar to NRS 51.135. This Court may look to federal law "discussing an analogous federal rule of evidence" for guidance in interpreting its own evidence rules. *Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Ct.*, 130 Nev. Adv. Rep. 37, 325 P.3d 1259, 1265 (2014).

[11] It is SPS' position that the FHLBC Stamp was really an indication that the collateral interest of the FHLBC was "released" by the placement of the Stamp – not that the Note was in any way satisfied by the Dunmires.

It is unclear exactly why the district court rejected Mr. Syphus as a "qualified person." But in *Thomas v. State*, this Court held that the term "'qualified person' … ***has been broadly interpreted***" and the proponent of the record "need only make a prima facie showing of [its] authenticity so that a reasonable juror could find that the [record] is what it purports to be." 114 Nev. 1127, 1148, 967 P.2d 1111, 1124 (1998) (emphasis added); *see also Cager v. State*, 124 Nev. 1455, 238 P.3d 799 (2008) (unpub.) (The term "qualified person" is broadly interpreted to include anyone who knows that the documents were kept in the ordinary course of business and understands the record-keeping system that was involved) (citing *Thomas*, 114 Nev. at 1148, 967 P.2d at 1124). The Ninth Circuit has set a low bar for what constitutes "other qualified witness." "The phrase 'other qualified witness' is broadly interpreted to require only that the witness understand the record-keeping system." *U.S. v. Ray*, 930 F.2d 1368, 1370 (9th Cir. 1990) (finding that welfare fraud investigator familiar with the reporting and filing requirements for public assistance benefits was an "other qualified witness" although she was not a custodian of record); *U.S. v. Basey*, 613 F.2d 198, 201 n.1 (9th Cir. 1979) (college records properly admitted to establish defendant's address even though custodian did not record the information herself nor knew who did).

Here, sufficient testimony was elicited from Mr. Syphus during trial for the district court to have deemed Mr. Syphus a qualified person to testify about the POA. Mr. Syphus explained multiple times how SPS obtains loans and loan information, boards loan information into its systems, the systems SPS uses for these functions, and the strict vetting process the information goes through during the boarding process. (V:APP0863-64; V:APP0866-67; V:APP0870; V:APP0881; V:APP0831 at 18-32 at 1) Mr. Syphus' testimony was based on his 19 years as an SPS employee and his familiarity with SPS' systems. (V:APP0864 at 9-14; 17) The foundational requirements for admission of the POA as a business record were met.

Unfortunately, despite the undisputed fact that Mr. Syphus was qualified to testify about SPS' business records, the district court refused to admit the POA based on hearsay and foundation. (V:APP0932 at 14-16) The district court did not conclude that the source of the POA or the method or circumstance of its preparation indicated a lack of trustworthiness. In fact, there was no objection from the Dunmires claiming the POA lacked trustworthiness. Not only was Mr. Syphus an "other qualified person," but he testified that the POA was the type of document that SPS receives from other servicers ***and*** relies on as part of SPS's business in servicing loans. In fact, the POA is maintained in SPS's business records. (V:APP0932 at 2-11) While the POA may not have originated from SPS,

the standard for admissibility is not that the entity offering the document created it. *Supra.* Instead, the document need only be kept and maintained in the offering party's regularly conducted business, which Mr. Syphus confirmed was the case, and which Mr. Syphus also confirmed was part of the transfer of records to SPS related to the Loan. (V:APP0932 at 8-11) Moreover, the POA is not lacking in trustworthiness, as it was signed and notarized. (IV:APP0618) There simply was no reason for the district court to believe that the POA was anything other than what it purports to be.

The importance of the POA is that it demonstrated that FHLBC did not intend to release the Dunmires' obligations when it put the FHLBC Stamp on the Note.[12] Although it is not SPS' burden to prove why the Stamp was on the Note or the meaning of the Stamp, this business record, if admitted, would have provided the district court with an explanation for the Stamp (*i.e.* that FHLBC had taken loan documents from AmTrust as collateral and then those collateral documents were transferred to NYCB as part of the FDIC sale of AmTrust's assets to NYCB), which was more than the Dunmires did.

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[12] The POA also supports SPS' trial argument that the FHLBC Stamp was an endorsement under Nevada law, *see* NRS 104.3204(1), and entitled to protection under the Shelter Rule found in NRS 104.3207, because it was actually negotiating the Note back to AmTrust (as part of the collateral assignment) and then NYCB, as described in the POA. (V:APP0945-57)

d. Proposed Exhibit 13 was admissible under the business records exception to hearsay.

Proposed Exhibit 13 is a copy of the Note, which had already been admitted into evidence (*see* Trial Exhibit 1, III:APP0591-93, Trial Exhibit 2, III:APP0594, and Trial Exhibit 3, III:APP0595) but contained one additional endorsement – which is an endorsement in blank from NYCB. (IV:APP0784-88). Frankly, it is unclear why the court denied the admission of this document when it had already admitted the same document per stipulation of the parties. (V:APP0833 at 13-18)

With regard to the authenticity of Proposed Exhibit 13, Mr. Syphus testified, without dispute, that he had seen Proposed Exhibit 13 in SPS's business records. (V:APP0868 at 19-23) He also testified that he has no reason to believe that Proposed Exhibit 13 is anything other than what it purports to be. (V:APP0869 at 6-12) In fact, Mr. Dunmire himself testified that the Note bears his signature and that of his wife. (V:APP0835 at 15-17)

Thus, the only apparent problem with Proposed Exhibit 13 from the district court's point of view was that the blank endorsement stamp by NYCB is hearsay. *Id*. at 16-22. The Dunmires argued that the blank endorsement was being offered for the truth of the matter asserted (*i.e.* "to demonstrate the transfer of the interest from New York Community Bank to SPS."). *Id*. at 18-19. On that basis, the district court sustained the objection and refused to admit Proposed Exhibit 13. *Id*. at 22. However, the district court's ruling was erroneous for at least three reasons.

First, the blank endorsement does not say that a "transfer of interest" from NYCB to SPS occurred. (IV:APP0788) In fact, if it did, that would not be a "blank" endorsement. *See* NRS 104.3205(2) (describing a blank endorsement as ***not*** specifying the payee).

Second, nowhere on Proposed Exhibit 13 does it mention SPS or the Trust. (IV:APP0784-88)

Third, SPS never specified, and was never given a chance to specify, the reason it was offering Proposed Exhibit 13. (V:APP0869) It appears that the district court assumed that Proposed Exhibit 13 was being offered for the truth of the matter asserted rather than its legal effect.

Proposed Exhibit 13 should have been admitted as evidence that NYCB had endorsed the Note in blank, making it bearer paper (*i.e.* demonstrating the legal effect of the endorsement, not a transfer or negotiation to SPS). *See* NRS 104.3205(2). However, because the district court did not give SPS a chance to provide those reasons (V:APP0869 at 18-19), the district court abused its discretion in refusing to admit Proposed Exhibit 13.

As a result, the district court unfairly prevented SPS from defending itself in this matter.

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C. THE DISTRICT COURT ABUSED ITS EQUITABLE POWERS BY GIVING THE DUNMIRES AN UNJUSTIFIED AND INEQUITABLE WINDFALL.

It is undisputed that, despite receiving a $1.3 million loan in 2008, the Dunmires still owe more than $1.25 million on the Loan. (IV:APP0805 at ¶22) Mr. Dunmire testified multiple times at trial that neither he, nor his wife, nor anyone on their behalf, has paid off the Loan. (V:APP0835 at 21-25) Mr. Dunmire also admitted at trial that he is not aware of any other party besides himself, his wife, or SPS claiming right or entitlement to this particular loan. (V:APP0838 at 3-6)

Despite these undisputed facts, the district court quieted title in favor of the Dunmires, providing them with ownership of the Property free and clear of their obligation to repay $1.3 million, without any evidentiary basis that this was the intended outcome by any of the parties to the Loan. (IV:APP0807) The district court acknowledged at trial that if it granted the Dunmires' requested relief, it would be "***giving a windfall of a million, three, on a quiet title case***." (V:APP0958 at 8-9) (Emphasis added.) However, despite its own acknowledgment, the district court ignored Nevada's strong public policy providing that an unjustified windfall is profoundly inequitable.

"A "windfall" describes a situation in which the recipient receives some benefit undeserved or unmerited." *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev.

1165, 1169, 14 P.3d 511, 514 (2000). "For example, a windfall occurs when a developer purchases several separate parcels, that, when combined, result in land worth far more than the sum paid for the individual parcels." *County of Clark v. Sun State Properties, Ltd.*, 119 Nev. 329, 72 P.3d 954 (2003) (citing *County of Los Angeles v. American Savings & Loan Ass'n*, 26 Cal.App.3d 7, 102 Cal.Reptr. 439, 443 (1972) (*citing* Mike Talley, Note, The Undivided Fee Rule in California, 20 Hastings L.J. 717, 721 (1969)). *See generally Ellison v. California State Auto. Ass'n*, 106 Nev. 601, 797 P.2d 975 (1990); *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 245 P.3d 535 (2010) (citing *Houston v. Bank of Am. Fed. Sav. Bank*, 119 Nev. 485, 489, 78 P.3d 71, 74 (2003)). *See also Countrywide Home Loans, Inc. v. Sheets*, 160 Idaho 268, 371 P.3d 322 (2016) (attorney's fees awarded to Bank of America where borrower "failed to pay on his loan for six years, apparently hoping to obtain a windfall due to Bank of America's error[.]"); *Oliverio*, 109 Wash.App. at 73, 33 P.3d at 1106 ("leaving the Bank without security for its loan would create an inequitable windfall for the Oliverios.") (citing *Duley v. Westinghouse Elec. Corp.*, 97 Cal.App.3d 430, 158 Cal.Rptr. 668, 669 (1979)).

The case of *Beazie v. Amerifund Financial, Inc.*, 2011 WL 2457725, Case No. 09-00562 JMS/KSC (D. Haw. June 16, 2011), presented a factual situation very similar to the one before this Court. The *Beazie* court held that merely voiding

a mortgage transaction is not an appropriate remedy because the mortgagor **"would receive a windfall of holding title to the subject property free and clear of any mortgage, as well as taking benefit of the $1.26 million that was originally loaned by [the mortgagee]**." *Id*. (*citing Davis v. Wholesale Motors, Inc.*, 86 Hawai'i 405, 949 P.2d 1026 (1997) ("while a plaintiff should be compensated for loss suffered, he or she should not be permitted to reap a benefit received from the defendant under the contract.")). *See also Ichimura v. Deutsche Bank Nat. Trust Co.*, 2013 WL 2149737, Case No. 11-00318 SOM/RLP (D. Haw. May 16, 2013) ("This court has recognized that, although a bank may not have done anything in violation of applicable law, a mortgagor can seek to have his or her mortgage documents declared void pursuant to that law as long as the mortgagor is able to place the parties in as close a position as they held prior to the mortgage transaction…This means that the mortgagor must be able to tender the loan proceeds back to the current mortgagee to avoid giving the mortgagor a windfall.") (*citing Beazie*, 2011 WL 2457725).

Here, releasing the Dunmires from their acknowledged repayment obligations under the Loan would result in a windfall to the Dunmires of $1.3 million, unduly burdening SPS and the Trust with a loss of over $1.25 million through no fault of their own. There is no evidence in the record that the Dunmires repaid or tendered the debt owed; in fact, Mr. Dunmire openly acknowledged the

debt was still owed in his trial testimony. (V:APP0835 at 21-25). Mr. Dunmire further admitted that the Dunmires have never paid off their $1.3 million debt:

> Q. At any point in time, have you ever paid off your mortgage loan in full?
>
> A. …No.
>
> Q. Okay. So at no point in time have you ever paid on it?
>
> A. Me personally, no.
>
> Q. Tendered $1.2 million to any entity to satisfy this debt?
>
> A. Correct.
>
> …
>
> Q. Has your wife tendered any funds to pay off this mortgage loan?
>
> A. No.
>
> Q. Okay. Are you aware of anyone under any circumstances that has tendered the full balance of the mortgage to any entity at any point?
>
> A. No.
>
> Q. Okay. So the - - so you can agree with me that there is money still owed on that loan - -
>
> …
>
> A. I think that's why we're here.
>
> …

Q. But do you contend that you have paid off the funds - -

A. No.

Q. - - at all?

A. No.

Q. And no one has done it on your behalf?

A. Correct.

(V:APP0938 at 19 – V:APP0939 at 2; V:APP939 at 6-14; 19; V:APP0940 at 2-8, respectively)

There was no explanation or evidence proffered by the Dunmires at trial sufficient for the district court to justify, and this Court to uphold, an undeserved and unmerited benefit of $1.25 million to the Dunmires. *Salas*, 116 Nev. at 1169, 14 P.3d at 514.

Upholding the Final Judgment and the district court's erroneous and unsubstantiated reading of the word "release" in the FHLBC Stamp on appeal would also abandon the purpose of Restatement (Third) of Proper.: Mortgages § 5.4 (1997), which this Court confirmed is part of Nevada law. *See In re Montierth*, 131 Nev. Adv. Op. 55, 354 P.3d 648, 650-51 (2015); *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 286 P.3d 249, 257-58 (2012). Section 5.4 of the Restatement emphasizes the need for courts to "be vigorous in seeking to find such a relationship" in which the loan owner maintains a secured property interest,

"since the result is otherwise likely to be a windfall for the mortgagor and the frustration of [the loan owner's] expectation of security." Restatement § 5.4 cmt. e. Moreover, Section 5.4 stated objectives emphasize practicality over formalistic technicalities: **even if "mortgagees fail to document their transfers," to properly reflect that the owner of the loan also has a secured property interest (something that happens with "fair frequency"), the parties will "achieve the same result even if one of the two aspects of the transfer is omitted."** *Id*. cmt.a. Section 5.4 thus seeks to "carry out the parties' intention," even if that intention is "not fully documented." *Id*. cmt. c. Here, the intention *was* documented, as demonstrated by the trial testimony and evidence, but the district court nevertheless chose an inequitable result at odds with that intention.

Further, the district court also ignored SPS's closing argument that emphasized this Court's multiple, recent references to *Miller v. Provost*, 26 Cal. App. 4th 1703, 1707 (1994), which highlights the "***equitable principle that a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee***." (emphasis added). *See* (V:APP0945 at 9-18); *see also Penrose v. Quality Loan Serv. Corp*., No. 68946, 2016 WL 1567517 (Nev. Apr. 15, 2016) (unpub.) (citing *Miller*); *Piazza v. U.S. Bank, N.A.*, No. 70628, 2017 WL 3996819 (Nev. Sept. 11, 2017) (unpub.) (same).

Even though *Penrose* and *Piazza* were addressing statute of limitation challenges to foreclosures, this Court was clearly concerned, as it should be, in each case that the borrower was seeking to gain a financial windfall by precluding foreclosure, even though in each case the borrower had not paid off his debt. Here, the district court recognized the same issue (V:APP0958 at 8-9), but nevertheless exercised its equitable powers to grant quiet title and provide the Dunmires with an unwarranted, unjustified and exorbitant windfall. No explanation was given for this unprecedented departure from established Nevada law.

The Dunmires are not entitled to have the entire Loan discharged based on the misinterpretation of the meaning and intent of the FHLBC Stamp. Mr. Dunmire's trial testimony acknowledging the Dunmires' debt demonstrates the manifest unfairness of this result, which violates Nevada's policy against unjust windfalls. The district court's decision should therefore be rejected by this Court.

D. FEDERAL LAW PRECLUDES THIS COURT FROM ENFORCING THE PURPORTED RELEASE OF THE DUNMIRES' OBLIGATION TO REPAY THE LOAN.

Even if this Court upholds the Final Judgment and concludes that the FHLBC Stamp operated as a release of the Dunmires' repayment obligation, federal law operates to avoid this inadequately documented release once AmTrust was placed under FDIC conservatorship.

In its simplest terms, the *D'Oench Duhme Doctrine* ("D'Oench Doctrine"), as codified under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), applies to bar defenses to a lender's collection of a debt based on an alleged inadequately documented or unrecorded agreement between borrowers and the failed banks placed under conservatorship or receiverships administered by federal insurers, such as the FDIC. The D'Oench Doctrine encompasses inadequately documented agreements that would tend to mislead the FDIC charged with administering the failed bank's assets. *See Fed. Sav. & Loan Ins. Corp. v. Gemini Mgmt.*, 921 F.2d 241, 245-246 (9th Cir. 1990). The fundamental purpose behind the D'Oench Doctrine is "to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets," and the Ninth Circuit has long subjected agreements that are "not clearly evidenced in the bank's records…[and] would not be apparent to bank examiners" to D'Oench scrutiny. *Gemini Mgmt.*, 921 F.2d at 245-46 (citing *Langley v. FDIC*, 484 U.S. 86, 93, 108 S.Ct. 396, 402 (1988); *see also Newton v. Uniwest Fin. Corp.*, 967 F.2d 340, 345 (9th Cir. 1992) (rejecting appellant's argument that "although not immediately evident from the face of USB's records, sufficient evidence existed to notify bank examiners of the tying agreement…Unless some clear statement of the agreement itself is accessible

to the examiners, the agreement is "secret" for purposes of the D'Oench doctrine.").

For an agreement to be valid it must be: (A) in writing; (B) executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the FDIC; (C) approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee; and (D) has been, continuously, from the time of its execution, an official record of the depository institution. 12 U.S.C. § 1823(e). If it does not comply with these requirements, it is not an enforceable agreement against the FDIC and cannot be used as the basis to defend against a repayment obligation. 12 U.S.C. § 1821(d)(9)(A).

The release of the Dunmires' obligation, if that is how the FHLBC Stamp was intended to operate, was inadequately documented to withstand D'Oench scrutiny. The D'Oench Doctrine "favor[s] the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can." *Below the Rim, LLC v. Fed. Deposit Inc. Corp. for Silver State Bank*, No. 2:09-cv-01909-RLH-LRL, 2010 WL 11579639, at *2 (D. Nev. Feb. 26, 2010) (quoting *Bell & Murphy & Assoc. v. Interfirst Bank*

Gateway, N.A., 894 F.2d 750, 754 (5th Cir. 1990), *cert. denied*, 498 U.S. 895 (1990).

> The D'Oench doctrine and the statutory provisions embody a public policy designed to protect diligent creditors and innocent depositors from bearing the losses that would result if claims and defenses based on undocumented agreements could be enforced against a failed institution.

FDIC Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, dated February 4, 1997.[13]

Here, the actions of AmTrust and the FDIC, as conservator of AmTrust, evidence that the Loan remained an asset of AmTrust after the assumed release of FHLBC's interest back to AmTrust, so that FDIC could transfer the Loan to NYCB, as part of the whole bank sale of AmTrust, and endorse the Note from FDIC to NYCB. (IV:APP0613-788; V:APP0791-99) Conversely, assuming that the FHLBC Stamp was intended to release the Dunmires' repayment obligation and essentially cancel the debt, the FHLBC Stamp is the only evidence of this theory and the FHLBC Stamp is inadequate to meet the requirements under D'Oench; specifically, the FHLBC Stamp was not executed by AmTrust and any

[13] Publicly- available on the FDIC's website at https://www.fdic.gov/regulations/laws/rules/5000-4300.html#fdic5000statementop12.

person claiming an adverse interest thereunder, including the Dunmires, contemporaneously with the acquisition of the asset by the FDIC, and was not approved by the board of directors of AmTrust or its loan committee, which approval shall be reflected in the minutes of said board or committee. 12 U.S.C. § 1823(e). The Dunmires admit that the FHLBC Stamp was unknown to them prior to the foreclosure mediation. (V:APP0837 at 24 – V:APP838 at 2) They did not disclose during discovery, or seek to admit during trial, any documentation showing why their repayment obligations would suddenly be released where the Loan remained outstanding or that they had executed any documentation evidencing a release of the repayment obligation. Had the Loan been released, discharged or otherwise cancelled, some record of this charge off would have to be present in the Loan records.

The Dunmires cannot identify any written document which they signed along with FHLBC and/or AmTrust confirming an agreement to consider the Loan satisfied or cancelled to justify its "release" such that the Loan did not revert (or release) back to AmTrust and was not sold by the FDIC as part of the whole bank sale of AmTrust to NYCB. The Dunmires have simply interpreted the word "release" appearing in the FHLBC Stamp in the most self-serving fashion, without explanation or evidence. Their conclusion is unsupported by the evidence in the record, the context, circumstances and actions of the parties surrounding the

FHLBC Stamp and federal law. To the contrary, the evidence in the record evidences the continuing intent and belief among all financial institutions involved, that the Loan remained intact. *See* Assignment of Deed of Trust, Special Power of Attorney, Purchase and Assumption Agreement, FDIC Annual Report to Congress Merger Decisions 2009, FDIC Press Release regarding AmTrust, FDIC Failed Bank Information regarding AmTrust, Servicing Transfer letters from SPS and NYCB to the Dunmires, Limited Power of Attorney, Note, recorded Corporate Assignment of Deed of Trust and Loan Modification Agreement. (IV:APP0613-88; IV:APP0791-99). The Dunmires' position does not pass common-sense scrutiny and certainly does not comport with D'Oench. Accordingly, reversal of the Final Judgment and entry of judgment in favor of SPS is necessary.

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X. CONCLUSION

Based upon the foregoing, SPS respectfully requests that this Honorable Court reverse the Judgment and remand with instructions for the district court to enter judgment in favor of SPS on both of the Dunmires' claims for relief.

Dated this 17th day of April, 2019.

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XI. ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

(a) This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is

(a) Proportionately spaced, has a typeface of 14 points or more, and contains 13,808 words.

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3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on the 17th day of April, 2019, the foregoing **OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[ ] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

Service via electronic notification will be sent to the following:

Jamie Cogburn
Shane Gale
Erik-Anthony Fox
Kathleen Wilde
Micah Echols
Kristin Schuler-Hintz

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Faith Harris
An Employee of WRIGHT, FINLAY & ZAK, LLP