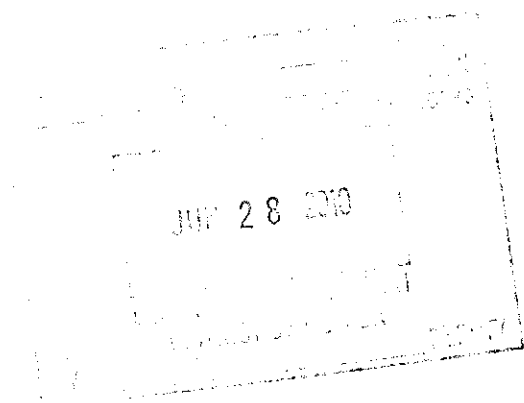


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10

11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

13 BEAZER HOMES HOLDING CORP.,

) Case No. 2:09-cv-02089-RCJ-LRL

14 Plaintiff,

15 vs.

) MOTION TO SUBSTITUTE FDIC,
) AS RECEIVER FOR NEW SOUTH
) FEDERAL SAVINGS BANK

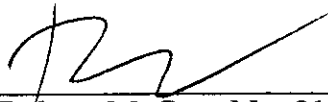
16 CW CAPITAL FUND ONE, LLC;
17 CORONADO WEST, INC.; and NEW
SOUTH FEDERAL SAVINGS BANK,

18 Defendants.
19

20 The Federal Deposit Insurance Corporation ("FDIC"), in its capacity
21 as Receiver for defendant New South Federal Savings Bank ("New South"), moves
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1 to substitute the FDIC as defendant for and in the place of New South. This
2 motion is made pursuant to Nev. R. Civ. P. 25(c) and 12 U.S.C. § 1821(d).

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15 New South Federal Savings Bank

16 **POINTS AND AUTHORITIES**

17 **I. INTRODUCTION**

18 On December 18, 2009, the Office of Thrift Supervision¹ closed
19 defendant New South Federal Savings Bank ("New South") and appointed the
20 FDIC as Receiver for it. The FDIC accepted the appointment that same day. A
21 copy of the Office of Thrift Supervision's letter appointing the FDIC as Receiver is
22 attached as Exhibit A, and a copy of the FDIC's acceptance of the appointment is
23 attached as Exhibit B. As a result of this appointment, the FDIC has, as a matter of
24 federal law, succeeded to "all rights, titles, powers, and privileges" of the failed
25 institution and may "take over the assets of and operate" the failed institution
26 with all the powers thereof. 12 U.S.C. §§ 1821(d)(2)(A)(i) and 1821(d)(2)(B)(i).
27 This includes the resolution of outstanding claims against the institution in
28 receivership. 12 U.S.C. § 1821(d)(3). Accordingly, the FDIC is the party against

¹ The Office of Thrift Supervision, an office within the United States Department of the Treasury, is the United States' federal bank regulator.

1 whom the claims sought by the plaintiff must be asserted and the party who may
2 assert counterclaims or other affirmative claims against the parties in this case.

3 **II. ARGUMENT**

4 **A. This Court Should Enter an Order Substituting the FDIC as a**
5 **Defendant for New South Federal Savings Bank.**

6 Because the FDIC is the proper defendant with regard to plaintiff's
7 claims, the FDIC should be substituted as a defendant in the place of New South.
8 *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994) ("[T]he FDIC as receiver
9 'steps into the shoes' of the failed [bank] obtaining the rights of the insured
10 depository institution that existed prior to receivership.") (internal citations
11 omitted).

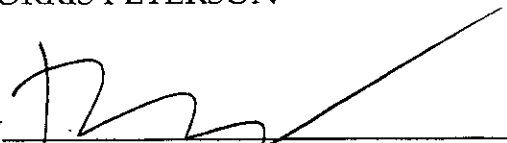
12 Courts routinely enter orders substituting the FDIC in cases such as
13 this one. *See, e.g., Yeomalakis v. FDIC*, 562 F.3d 53, 58 (1st Cir. 2009) (appellate
14 court granted motion of FDIC to be substituted for failed institution and stayed
15 case for 90 days); *In re Community Bank of Northern Virginia*, 418 F.3d 277, 293 n.6
16 (3rd Cir. 2005) ("FDIC succeeded to all 'rights, titles, powers, and privileges of . . .
17 insured depository institution'" and was ordered substituted "as the true party in
18 interest"); *Amerifirst Properties, Inc. v. FDIC*, 880 F.2d 821, 823 n.2 (5th Cir. 1989)
19 (following appointment of FDIC as receiver for insolvent bank, court granted
20 motion to substitute FDIC "as the real party in interest"); *Buczowski v. FDIC*, 415
21 F.3d 594, 597 (7th Cir. 2005) ("Any litigant, or the court on its own motion, can
22 substitute the FDIC for the failed bank as a party."); *Phipps v. FDIC*, 417 F.3d 1006,
23 1009 (8th Cir. 2005) (after briefing, FDIC was appointed Receiver and was granted
24 leave to substitute itself for failed institution as appellee); *see also Village of*
25 *Oakwood v. State Bank & Trust Co.*, 481 F.3d 364, 368 (6th Cir. 2007) ("Even if a claim
26 arises under state law between a bank and nondiverse plaintiffs, the district court
27 could still exercise jurisdiction if the FDIC, in its capacity as receiver, is
28 substituted as a party for that bank under Fed. R. Civ. P. 25(c).").

1 Thus, by virtue of the FDIC's acceptance of the appointment as
2 Receiver for New South, the FDIC has succeeded to "all rights, titles, powers, and
3 privileges" of the failed institution, and it is the proper party to defend against the
4 claims asserted by the plaintiffs in this matter against New South. The Court
5 should therefore enter an order substituting the FDIC in place of New South.

6 **III. CONCLUSION**

7 For these reasons, the FDIC respectfully requests that the Court enter
8 an order substituting the FDIC as a defendant in the place of New South Federal
9 Savings Bank.


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Insurance Corporation, as Receiver for
New South Federal Savings Bank

19 ORDER

20 IT IS SO ORDERED.
21 Dated: June 28, 2010.

22 
23 Robert C. Jones
24 United States District Judge
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