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8 Attorneys for Defendants

9  
 10 **UNITED STATES DISTRICT COURT**  
 11 **DISTRICT OF NEVADA**

12 \* \* \*

13 BRANCH BANKING AND TRUST  
 14 COMPANY, a North Carolina banking  
 corporation,

15 Plaintiff,

16 vs.

17 REGENA HOMES, LLC, a Nevada limited  
 liability company, YOEL INY, an individual;  
 18 NOAM SCHWARTZ, an individual; YOEL  
 INY, Trustee of the Y&T INY FAMILY  
 19 TRUST dated June 8, 1994; NOAM  
 SCHWARTZ, Trustee of the NOAM  
 20 SCHWARTZ TRUST dated August 19, 1999;  
 D.M.S.I., L.L.C., a Nevada limited liability  
 21 company; GREAT AMERICAN CAPITAL, a  
 Nevada corporation; and DOES 1 through 10,  
 22 inclusive,

23 Defendants.

CASE NO. 2-12-cv-00451-RCJ-GWF

ORDER  
 DEFENDANTS' MOTION TO STAY  
 PROCEEDINGS

24  
 25 Defendants REGENA HOMES, LLC; YOEL INY, individually and as Trustee of the  
 26 Y&T INY FAMILY TRUST dated June 8, 1994, as amended; NOAM SCHWARTZ,  
 27 individually and as Trustee of the NOAM SCHWARTZ TRUST dated August 19, 1999;  
 28 D.M.S.I., LLC; and GREAT AMERICAN CAPITAL (collectively "Defendants"), by and

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1 through their attorneys at the law firm of Kolesar & Leatham, respectfully move to stay the  
2 instant Action, in its entirety, for the earlier of ninety (90) days or pending the Nevada Supreme  
3 Court's resolution of appeals regarding the retroactivity of AB273 legislation and the  
4 interpretation of NRS 40.451, NRS 40.459(1)(c) and NRS 40.495.

5 DATED this 7<sup>th</sup> day of December, 2012.

6 KOLESAR & LEATHAM

7  
8 By Janet L. Rosales  
9 F. CHRISTOPHER AUSTIN, ESQ.  
10 Nevada Bar No. 006559  
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12 Nevada Bar No. 010736  
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18  
19 Attorneys for Defendants

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 Shortly after the passage of new legislation ("AB273") which added to and amended  
18 Nevada Revised Statutes Chapter 40 as to actions concerning real property and creditor/debtor  
19 rights, several Nevada state and federal trial courts issued conflicting decisions regarding the  
20 applicability and interpretation of the new legislation. Quickly thereafter, the respective  
21 appellant creditors (or appellant debtors) appealed. On October 1, 2012, the Nevada Supreme  
22 Court heard oral arguments on three key appeals and on the same day, each of these appeals was  
23 submitted for decision. Given the significance of these appeals to hundreds and hundreds of  
24 creditors and debtors and its global impact on Nevada's real estate market, it is likely the Nevada  
25 Supreme Court will issue a decision in early 2013. In fact, the Nevada Supreme Court has issued  
26 stay orders to judges handling AB 273 issues. *Infra*, Exhibit H and Exhibit I.

27 The issues in this Action are largely a matter of Nevada law and are inextricably related  
28 to the pending appeals, implicating NRS 40.451, NRS 40.459(1)(c) and NRS 40.495. The

1 Nevada Supreme Court's pending decisions will lend crucial direction and clarity to the disputed  
2 matters herein. A stay pending these decisions serves the interests of both parties narrowing the  
3 issues for trial, minimizing attorneys' fees/costs and clarifying the scope of discovery. Notably,  
4 Plaintiff Branch Banking and Trust Company ("BB&T") filed an Amicus Brief in one of the  
5 appeals stating that it had a "tremendous interest" and "large stake" in the pending decision  
6 because it would impact it's entire portfolio of loans (and which includes the instant Loan).  
7 *Infra*, Exhibit C.

8 This Court has inherent power to grant a stay and based upon the current AB273  
9 landscape, good cause exists for issuance of a stay of the instant Action.

## 10 II. STATEMENT OF FACTS IN SUPPORT OF STAY

### 11 A. Procedural History

12 On June 8, 2012, BB&T filed an Amended Complaint against Defendants asserting three  
13 causes of action, Deficiency, Breach of Guaranty and Breach of the Covenant of Good Faith and  
14 Fair Dealing. *See* Docket No. 6. Then, on July 2, 2012, Defendants filed an Answer to the  
15 Amended Complaint. *See* Docket No. 24.

16 A Scheduling Order was issued on August 7, 2012. *See* Docket No. 30. Since such time,  
17 the parties have stipulated to an extension of time for discovery and a new Scheduling Order was  
18 recently issued on December 4, 2012. *See* Docket No. 36. Given the recent appearance of  
19 undersigned counsel, additional time is necessary to, among other matters, retain and designate  
20 an expert to calculate the fair market value of the collateral.

21 However, until the Nevada Supreme Court issues its decisions interpreting AB273, the  
22 full scope of the issues that will need to be addressed during discovery in this case cannot be  
23 determined, and for that reason, Defendants have brought the instant Motion to Stay. There is  
24 no proximate risk of unreasonable delay in the adjudication of this matter.

### 25 B. Key Issues and Defenses

26 Defendants have asserted numerous affirmative defenses which mirror the issues  
27 currently on appeal, including without limitation:

- 28 • Defendants state that they are entitled to exoneration under the alleged agreements by virtue of Plaintiffs conduct, including but not limited to, its

1 breaches and fraud, and the failure of consideration. See Docket No. 24,  
2 Answer, at p.6, ¶ 4;

- 3 • Defendants state that Plaintiffs claims are barred in whole or in part  
4 because Plaintiff is not a proper holder in due course. *Id.*, at p. 6, ¶ 5;
- 5 • Defendants state that Plaintiffs claims are barred for failure of  
6 consideration. *Id.*, at p. 7, ¶ 13;
- 7 • Defendants assert all defenses available to them under NRS Chapter 40,  
8 including but not limited to, that to the extent Answering Defendants are  
9 determined liable to Plaintiff for any deficiency (which is expressly  
10 denied), such liability is limited to the amount of consideration Plaintiff  
11 paid to acquire the loan at issue pursuant to NRS 40.459. *Id.*, at p. 7-8, ¶  
12 25;

9 Defendants' affirmative defenses (in particular, the failure of consideration) are directly at issue  
10 in the pending appeals with the Nevada Supreme Court. As discussed in detail below, one trial  
11 court held that BB&T's failure to evidence consideration paid for the assignment was fatal to  
12 BB&T's claims and thus, summary judgment in favor of Defendants was warranted.

### 13 C. Background of AB273 Appeals

14 The issues raised by Defendants in their Answer are directly related to matters currently  
15 on appeal with the Nevada Supreme Court. The outcome of three different, but related  
16 appeals—*Sandpointe Apt. 's LLC v. Dist. Ct.*, Case No. 59507 (“Sandpointe Appeal”), *Branch*  
17 *Banking and Trust Co. v. Nielsen*, Case No. 60256, 59823 and 61092 (“Nielsen Appeal”) and  
18 *Lavi v. Dist. Ct.*, Case No. 58968 (“Lavi Appeal”)<sup>1</sup> (collectively “AB273 Appeals”)—each  
19 revolve around disputes regarding AB273 and will directly affect adjudication of key issues and  
20 defenses in the instant Action.<sup>2</sup> Of particular note, BB&T is directly involved the Nielsen  
21 Appeal and Lavi Appeal as the real party in interest of certain real estate loans issued by  
22 Colonial Bank and which were thereafter seized by the FDIC and allegedly purchased by BB&T.  
23 BB&T sought and obtained amicus status in the third appeal, the Sandpointe Appeal. *Infra*,  
24 Exhibit C.

25  
26 <sup>1</sup> For purposes of judicial economy, undersigned does not provide detail regarding the Lavi Appeal. However, the  
27 Nevada Supreme Court considered it related to the Sandpointe and Nielsen Appeals and heard oral argument in  
28 conjunction with those.

<sup>2</sup> The Nevada Supreme Court provided synopses of the oral arguments for each of the three appeals and which is  
available at:

<http://www.nevadajudiciary.us/index.php/oralarguments/1654-monday-october-1-2012-las-vegas-full-court>

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1 In 2011, the Nevada Legislature passed AB273 in direct response to the real estate  
2 collapse and in efforts to prevent assignee creditors from obtaining windfalls after paying only  
3 limited consideration to enforce promissory notes. AB273 served to revise and add numerous  
4 provisions in Chapter 40 including, without limitation:

5 The addition of 40.459(1)(c) which reads:

6 If the person seeking the judgment acquired the right to obtain the  
7 judgment from a person who previously held that right, the amount by  
8 which the **amount of the consideration paid** for that right exceeds the  
9 fair market value of the property sold at the time of sale or the amount for  
10 which the property was actually sold, whichever is greater, with interest  
11 from the date of sale and reasonable costs...

12 (emphasis added). AB273 also included the addition of 40.459(2) which reads:

13 For the purposes of this section, the "amount of the indebtedness" does not  
14 include any amount received by, or payable to, the judgment creditor or  
15 beneficiary of the deed of trust pursuant to an **insurance policy** to  
16 compensate the judgment creditor or beneficiary for any losses incurred  
17 with respect to the property or the default on the debt.

18 Since these new provisions have been added, both Nevada state trial courts and Nevada federal  
19 trial courts, sitting in diversity, have issued inconsistent interpretations of these provisions.

20 By way of example, on February 23, 2012, Honorable Elissa Cadish issued Amended  
21 Findings of Facts, Conclusions of Law and Amended Order on Defendants' Motion for  
22 Summary Judgment attached hereto as **Exhibit A** ("Nielsen FFCL"). BB&T (like here) was the  
23 purported assignee creditor attempting to enforce a note and guaranty. Defendants filed a  
24 Motion for Summary Judgment asking that BB&T take nothing because BB&T had failed to  
25 prove the fair market value of the property and failed to prove the amount of its indebtedness  
26 which included in its calculation the amount of consideration paid.

27 In granting Defendants' summary judgment motion, the Court held, among other matters,  
28 that the definition of indebtedness in NRS 40.451 applies to the particular action and served to  
limit the amount of indebtedness to "the amount of the consideration paid by the lien holder."  
Nielsen FFCL, at Conclusions ¶ 1. In addition, the Court found that the newly enacted NRS  
40.459(1)(c) applied to the particular action and likewise requires evidence of consideration paid.  
*Id.*, at ¶ 2. Further, the Court held that AB273 was not impermissibly retroactive and did not

1 violate federal or state statute or constitutional law. *Id.*, at ¶¶ 4 to 6. Finally, the Court declined  
2 to reach whether the loss sharing agreement constitutes an insurance policy under NRS  
3 40.459(2). *Id.*, at ¶ 7. This decision was appealed by BB&T and is Nevada Supreme Court Case  
4 No. 60256.<sup>3</sup>

5 In a separate matter, BB&T sued Frank Nielsen on a different loan and in that case,  
6 Honorable Douglas Smith denied a similar Motion for Summary Judgment brought by the  
7 Nielsen Defendants. After the Court's denial of the dispositive Motion, the Nielsen Defendants  
8 filed a Petition for Extraordinary Writ Relief as Nevada Supreme Court Case No. 59823.<sup>4</sup>  
9 Petitioners requested grant of their Petition because 1.) the newly enacted NRS 40.459(1)(c) is an  
10 important issue of law that requires clarification; 2.) the issue is one that presents an urgency and  
11 necessity of sufficient magnitude to warrant the Court's consideration, as evidenced by the  
12 Nevada Legislature's decision to provide that NRS 40.459 (1)( c) shall be effective immediately;  
13 3.) due to the lack of any controlling authority, there have been inconsistent decisions from the  
14 lower courts relative to this issue; and 4.) there have been inconsistent decisions in cases  
15 involving these very same parties, and the interests of judicial economy, sound judicial  
16 administration, and the desire to avoid inconsistent verdicts on identical facts, militate in favor of  
17 writ review. The Nevada Supreme Court granted the petition. Oral argument was heard on  
18 October 1, 2012 and the matter has been submitted for decision.

19 For many of these same reasons, the Nevada Supreme Court took *en banc* review of  
20 Honorable Elizabeth Gonzalez' ruling in *CML-NV Sandpointe, LLC v. Sandpointe Apartments,*  
21 *LLC*, Case No. 59507.<sup>5</sup> In *Sandpointe*, Honorable Elizabeth Gonzalez held the opposite of  
22 Honorable Elissa Cadish in *Nielsen*. Compare **Exhibit A** to Order Denying Defendant's Motion  
23 for Partial Summary Judgment and Granting Plaintiff's Countermotion for Partial Summary  
24 Judgment attached hereto as **Exhibit B**. Honorable Cadish ruled that the new legislation was

25 \_\_\_\_\_  
26 <sup>3</sup> The docket and all filings for Case No. 60256 are available at:  
<http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=28420>.

27 <sup>4</sup> The docket and all filings for Case No. 59823 are available at:  
<http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=27984>.

28 <sup>5</sup> The docket and all filings for Case No. 59507 are available at:  
<http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=27667>.

1 applicable to judgments sought following June 2011 while Honorable Gonzalez held such would  
2 constitute impermissible retroactive applicable in cases where the operative contract was  
3 executed prior to June 2011.

4 Honorable Gonzalez concluded “the amendments to NRS 40.459 [i.e. subsection (1)(c)]  
5 contained in AB 273 are not to be applied retroactively, meaning that these aforementioned  
6 amendments only apply to contracts entered into after June 10, 2011.” *Id.*, p. 7:15 to 17. In  
7 other words, the Court rejected Defendants’ assertions that the assignee creditor had to prove the  
8 amount of consideration paid for the loan transaction.

9 Clearly, there is a split among Nevada state trial courts as to the applicability and  
10 interpretation of AB 273, leading to inconsistent results.

11 **III. LEGAL ARGUMENT**

12 **A. Legal Standard**

13 A district court has the inherent power to control its docket, including broad discretion to  
14 stay proceedings. *Landis v. N.A. Co.*, 299 U.S. 248, 254–55 (1936); *see also Clinton v. Jones*,  
15 520 U.S. 681, 706 (1997); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005). To be  
16 sure, “the power to stay proceedings is incidental to the power inherent in every court to control  
17 the disposition of the causes on its docket with economy of time and effort for itself, for counsel,  
18 and for litigants.” *Landis*, 299 U.S. at 254. “How this can best be done calls for the exercise of  
19 judgment, which must weigh competing interests and maintain an even balance.” *Id.*, at 254-55.  
20 “A trial court may, with propriety, find it is efficient for its own docket and the fairest course for  
21 the parties to enter a stay of an action before it, *pending resolution of independent proceedings*  
22 *which bear upon the case.*” *Pate v. DePuy Orthopaedics, Inc.*, 2012 WL 3532780, at \*2 (D.  
23 Nev. Aug. 14, 2012) (citing to *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th  
24 Cir. 1979)) (emphasis added).

25 Accordingly, this Court has the inherent authority to grant Defendants’ Motion for Stay  
26 because adjudication of the pending AB273 appeals will directly impact this Action.

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1           **B.     This Action Should be Stayed Until the Nevada Supreme Court Rules on the**  
2           **AB273 Appeals**

3           As discussed above, Nevada state and federal courts are challenged with crucial questions  
4 regarding the applicability and scope of AB273. Unfortunately, there have been inconsistent  
5 results. Because of these conflicting trial court decisions, a stay should be entered in this Action.

6           To-date, BB&T has not proven the consideration paid in its purported assignment of the  
7 note and guarantees from the FDIC; rather BB&T seemingly avoids this issue by altogether  
8 ignoring NRS 40.459(1)(c). See Docket No. 6, First Amended Complaint, at ¶¶ 37 and 41 (citing  
9 only to subsections (a) and (b)). The failure to evidence the amount of consideration paid was  
10 fatal to BB&T's recovery in the Nielsen action wherein Honorable Cadish granted Defendants'  
11 Motion for Summary Judgment in its entirety. See Exhibit A. Rather than re-litigate these  
12 matters herein, it is both prudent and logical to stay this Action to determine if the Nevada  
13 Supreme Court will affirm Honorable Cadish's decision. The dispute regarding retroactivity of  
14 the new legislation is a threshold question which permeates throughout the instant Action. The  
15 threshold question affects the scope of discovery as well as any potential liability and damages.  
16 The outcome of the AB273 Appeals will significantly impact both the factual and legal disputes  
17 at the heart of this Action. There is simply no reason to re-hash these same issues now,  
18 especially since the AB273 Appeals were submitted for decision two and half months ago and  
19 decisions should be available in early 2013. This Court could revisit the stay as needed in  
20 ninety (90) days.

21           **C.     BB&T Has Affirmatively Stated its Tremendous Interest in the Pending**  
22           **Nevada Supreme Court Decisions and Thus, BB&T will Benefit From a Stay**

23           On February 22, 2012, BB&T filed an Amicus Curiae Brief in the *Sandpointe* Appeal  
24 which is attached hereto as **Exhibit C**. To obtain amicus status, BB&T underscores its  
25 "tremendous interest" and "large stake" in the upcoming AB273 Appeals. *Id.*, at 5:6 and 3:5. A  
26 header reads: "BB&T's LARGE STAKE IN THE RESOLUTION OF THIS WRIT." *Id.*, at  
27 3:4-6. BB&T explains to the Nevada Supreme Court how the AB273 Appeals will affect  
28 "hundreds of Nevada-based mortgage-backed commercial loans" and more than a dozen



1 different litigation matters, both those for which foreclosures have been completed and those  
2 with pending foreclosures. *Id.*, at 4:17-18; *see also* Declaration of Frank LaForge attached  
3 hereto as **Exhibit D**, at ¶¶ 3 to 5.

4 BB&T states, “[T]he Court’s decision in this case will affect the hundreds of millions of  
5 dollars worth of Nevada-based assets that BB&T inherited from Colonial Bank through the  
6 FDIC. Indeed, BB&T has already litigated various issues related to NRS 40.459(1)(c), including  
7 retroactivity, in four different cases.” *See id.*, at 4:23-26. BB&T continues, “[A]lthough it is  
8 not an actual party to this writ, BB&T has a tremendous interest in the Court’s resolution of this  
9 matter as its ability to recover on hundreds of millions of commercial loans is at stake.” *Id.*, at  
10 5:5-7. In other words, BB&T specifically recognizes that the AB273 Appeals do not solely  
11 impact those in the appellate process, but also impacts BB&T’s entire portfolio of Colonial Bank  
12 loans. The loan in dispute here is allegedly one of the loans in the portfolio referenced by BB&T  
13 in its Amicus Brief. *See* Docket No. 6, First Amended Complaint, at ¶¶ 22 to 23; *compare* to  
14 Exhibit C, at 1:2 to 6; 1; 14 to 17; 3:15 to 18 and 4:13 to 22.

15 A stay in the instant Action, therefore, is advantageous not solely to Defendants, but also  
16 to BB&T. A stay will allow BB&T to avoid yet more re-litigation of disputes regarding the  
17 retroactivity of AB273 and “consideration paid” of NRS 40.451 and 40.459(1)(c). Indeed, a  
18 stay is entirely consistent with BB&T’s Amicus Curiae Brief.

19 Further, a stay will save BB&T litigation expenses and costs. The wise course is to stay  
20 these matters for resolution of the AB273 Appeals. Importantly, a stay is not prejudicial to  
21 BB&T, but rather provides BB&T with significant benefits.

22 **D. The Nevada Supreme Court And Nevada State Trial Courts Have Stayed**  
23 **Litigation Matters Similar to the Instant Action**

24 As this Court is well aware, diversity cases in federal court are governed by the  
25 substantive law of the forum state. *See Ins. Co. of the State of Penn. v. Assoc’d. Int’l. Ins. Co.*,  
26 922 F.2d 516, 520 (9th Cir. 1990). Federal courts, sitting in diversity, are required to  
27 “‘approximate state law as closely as possible’ and are bound by the pronouncements of the  
28 state’s highest court.” *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1092 (9th Cir. 2009)

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1 (quoting *Ticknor v. Choice Hotels Int'l., Inc.*, 265 F.3d 931, 939 (9th Cir. 2001)).

2 Notably, both the Nevada Supreme Court as well as several different Nevada state trial  
3 courts have used their inherent power under *Landis* to issue complete stays on litigation matters  
4 which raise issues similar to the AB273 Appeals. *See e.g. Branch Banking & Trust Co. v. Vernal*  
5 *Towne Ctr. Partners, LLC*, Case No. A617555 (Eighth Judicial District, Dept. XVI, Honorable  
6 Timothy Williams), Stay Order dated March 23, 2012 attached hereto as **Exhibit E**; *AmT CADC*  
7 *Venture, LLC adv. Pacific Southwest Investments, et al.*, Case No. A642270 (Eighth Judicial  
8 District, Dept. XXIX, Honorable Susan Scann), Stay Order dated August 22, 2012 attached  
9 hereto as **Exhibit F**; *CML-NV Grand Day, LLC v. Grand Day, LLC*, Case No. A644054, (Eighth  
10 Judicial District, Dept. XXIX, Honorable Susan Scann), Stay Order dated July 26, 2012 attached  
11 hereto as **Exhibit G**.

12 In the instances when a particular Nevada state trial court has denied a party's request for  
13 stay pending the outcome of the AB273 decisions, the Nevada Supreme Court issued the  
14 requested stays. *See e.g.* Nevada Supreme Court decision, *BH Family Partners Sunset Pad v.*  
15 *Dist. Ct.*, Case No. 61123, Order Granting Stay and Directing Answer dated August 7, 2012  
16 attached hereto as **Exhibit H**; *see also* Nevada Supreme Court decision, *CK West, LLC v. Dist.*  
17 *Ct.*, Order Granting Stay, dated June 22, 2012 attached hereto as **Exhibit I**. In other words, the  
18 Nevada Supreme Court clearly recognizes the need to stay trial court litigation during the  
19 pendency of its adjudication of the AB273 Appeals.

20 Defendants respectfully ask this Court to look to the Nevada Supreme Court's issuance of  
21 stays as a pronouncement of Nevada state law and to follow suit. *Chalk*, 560 F.3d at 1092.

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1 IV. CONCLUSION

2 For the reasons stated above, Defendants respectfully request that this Court stay this  
3 action for ninety (90) days or pending decision on the AB273 Appeals.

4 DATED this 7<sup>th</sup> day of December, 2012.

5 KOLESAR & LEATHAM

6  
7 By Janet L. Rosales  
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16 Las Vegas, Nevada 89145

Attorneys for Defendants

17 ORDER

18 IT IS SO ORDERED.

19  
20 R. Jones  
21 ROBERT C. JONES  
22 Chief Judge  
23 Dated: January 15, 2013.  
24  
25  
26  
27  
28