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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

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

Plaintiff,

v.

SMOKE RANCH DEVELOPMENT, LLC, a  
Nevada limited liability company, YOEL INY,  
an individual; NOAM SCHWARTZ, nan  
individual; YOEL INY, Trustee of the Y & T  
INY FAMILY TRUST dated June 8, 1994, as  
amended; NOAM SCWARTZ, Trustee of the  
NOAM SCHWARTZ TRUST dated August  
19, 1999; D.M.S.I., LLC, a Nevada limited  
liability company; and DOES 1 through 10,  
inclusive,

Defendants.

Case No. 2:12-cv-00453-APG-NJK

**Order Granting Partial Summary Judgment  
in Favor of Plaintiff**

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

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

Defendants have filed two motions for summary judgment. In the first (Dkt. #79), Defendants allege that BB&T lacks standing to enforce the Promissory Note and the Deed of Trust. In the second (Dkt. #82), Defendants allege that BB&T has not complied with NRS §

1 40.459(1)(c), which caps the amount of a deficiency judgment a creditor may receive when it has  
2 purchased enforcement rights from someone else. Defendants also have asked me to certify  
3 questions of law to the Nevada Supreme Court regarding the proper interpretation of NRS §  
4 40.459(1)(c). (Dkt. #106.)

5  
6 BB&T also filed two motions, the first of which (Dkt. #80) seeks summary judgment as to  
7 liability against the Defendants for breaches of the Promissory Note and the Guaranties. BB&T's  
8 second motion (Dkt. #81) requests a deficiency judgment hearing to determine the amount of its  
9 expected judgment. Because all of the pending motions derive from the same facts, I will address  
10 all of them in this Order. The following facts are undisputed, except where noted:

11  
12 1. On September 26, 2005, Smoke Ranch executed a Promissory Note in favor of  
13 Colonial Bank, N.A. in the principal amount of \$800,000, which had a maturity date of  
14 April 1, 2007. (Dkt. 79-3.)

15  
16 2. As security for the Promissory Note, Smoke Ranch executed a Deed of Trust  
17 encumbering the Smoke Ranch Property; the Deed of Trust was recorded on October 21,  
18 2005. (Dkt. #79-4.)

19  
20 3. On October 6, 2005, Defendants Yoel Iny, Noam Schwartz, Y & T Family Trust,  
21 Noam Schwartz Trust, and DMSI LLC executed Guaranties regarding payment of the  
22 Promissory Note. (Dkt. #86 at 46-72.)

23  
24 4. The parties to the Promissory Note amended it through an unrecorded Change in  
25 Terms Agreement dated May 9, 2008, which extended the maturity date to April 1, 2010.  
26 (Dkt. #86 at 67.)

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

4           6.       On October 23, 2009, Tamara Stidham,<sup>2</sup> Karen Lugan, and Teresa Griswold  
5 executed a Bulk Assignment of Colonial Bank’s assets from the FDIC to BB&T, but  
6 back-dated the Bulk Assignment’s effective date to August 14, 2009. (*Id.* at 72.) Under  
7 the Bulk Assignment, the FDIC assigned all of its  
8

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

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

20           7.       BB&T has submitted an Allonge that it asserts was “executed by the FDIC thereby  
21 assigning all rights, title and interest to BB&T.” (Harms Declaration, Dkt. #86-3 at 54  
22 (“Harms Dec.”).) The Allonge states that it is to be attached to the Promissory Note; it  
23 references Colonial Bank N.A. and Smoke Ranch Development, LLC., the May 9, 2008  
24 date of the Change in Terms Agreement, the Loan account number and the principal  
25 amount of \$800,000. (Dkt. #86-1 at 9.) The Allonge also states that it became effective as

26 \_\_\_\_\_  
27 <sup>2</sup> Colonial Bank employed Ms. Stidham as assistant general counsel during the two-year period  
28 preceding the FDIC receivership. (Stidham Depo. Dkt. #79-13 at 12.) She then became BB&T’s  
associate general counsel.

1 of August 14, 2009, although there is no date of execution. (*Id.*) Only Tamara Stidham’s  
2 signature is on the signature block. (*Id.*) The Allonge is not attached to any other  
3 document, such as the Promissory Note or Change in Terms Agreement.

4  
5 8. Defendants point to a December 11, 2009 FDIC Limited Power of Attorney  
6 naming Tamara Stidham, among others, as its attorney-in-fact. (Dkt. # 79-16 at 2-3).  
7 Defendants emphasize that because that document was not executed until December 2009,  
8 Tamara Stidham was not authorized to execute the Allonge at the time of the Bulk  
9 Assignment notwithstanding the fact that this Limited Power of Attorney states that it  
10 shall be effective as of August 14, 2009 (the date of the Bulk Assignment). (Dkt. #79 at  
11 16.)

12  
13 9. BB&T also has produced a document entitled Purchase and Assumption  
14 Agreement Whole Bank All Deposits Among FDIC and BB&T (“PAA”), dated  
15 August 14, 2009. (Dkt. #86-1 at 65.) The PAA includes provisions structuring the  
16 asset purchase. Section 3.1 states that, subject to express exclusions in Sections  
17 3.5 and 3.6, BB&T purchased all of the FDIC’s rights, title, and interest in all of  
18 Colonial Bank’s  
19

20 Assets (real, personal and mixed, wherever located and however  
21 acquired) . . . . [The attached and incorporated] Schedules 3.1<sup>4</sup> and  
22 3.1a<sup>5</sup> sets [sic] forth certain categories of [the] Assets [purchased  
23 under the PAA]. Such schedule is based upon the best information  
24 available to [FDIC] and may be adjusted as provided in Article VIII  
25 . . . . [BB&T] specifically purchases all mortgage servicing rights  
26 and obligations of [Colonial Bank].

27 (PPA, Dkt. #86-1 at 25.) Schedule 3.1 refers to an “Attached List” and states:

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26 <sup>4</sup> Schedule 3.1 relates to “Certain Assets Purchased.” (Dkt. #86-1 at 58.)

27 <sup>5</sup> Schedule 3.1(a) relates to “Subsidiary and Other Business Combination Entities Acquired.”  
28 (Dkt. #86-1 at 59.)

1 THE LIST(S) ATTACHED TO THIS SCHEDULE (OR  
2 SUBSCHEDULE(S)) AND THE INFORMATION THEREIN, IS  
3 AS OF THE DATE OF THE MOST RECENT PERTINENT  
4 DATA MADE AVAILABLE TO THE ASSUMING BANK AS  
5 PART OF THE INFORMATION PACKAGE. IT WILL BE  
6 ADJUSTED TO REFLECT THE COMPOSITION AND BOOK  
7 VALUE OF THE LOANS AND ASSETS AS OF THE DATE OF  
8 BANK CLOSING. THE LIST(S) MAY NOT INCLUDE ALL  
9 LOANS AND ASSETS (E.G., CHARGED OFF LOANS). THE  
10 LIST MAY BE REPLACED WITH A MORE ACCURATE LIST  
11 POST CLOSING.

12 (*Id.* at 58.) Despite this reference, no list is attached to the PAA. BB&T asserts that the  
13 “Note was listed in Schedule 4.15(B) of the [PAA,] establishing that the Note was among  
14 the commercial loans acquired.” (Dkt. #86 at 10 (citing Exhibit 8 to BB&T’s Response,  
15 Dkt. #86-2 at 60-61).) Exhibit 8 bears the heading “Non-Single Family Asset Detail for  
16 10103 – Colonial Bank,” indicates that it is found on “Page 61 of 273,” and identifies the  
17 Smoke Ranch Loan.

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

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

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

1 Ranch Loan was subject to any investigation or any legal proceedings as of the date the  
2 Bulk Assignment and PAA were executed.

3 10. On November 15, 2012, the FDIC and BB&T executed an Assignment of Deed of  
4 Trust, Loan Documents and Other Claims, which was recorded against the Smoke Ranch  
5 Property, dated (“2012 Assignment”). (Dkt. #79-12.) That document states: “THIS  
6 ASSIGNMENT OF DEED OF TRUST, LOAN DOCUMENTS AND OTHER CLAIMS  
7 (“Assignment”) is executed as of November 13, 2012, but is made effective as of August  
8 14, 2009 (“Effective Date”)....” (*Id.*) It further provides:

9  
10  
11 1. Assignment of Loan Documents. As of the Effective Date, [the  
12 FDIC] hereby assigns, sets over and transfers to [BB&T] all of its  
13 right, title and interest in, to and under the Loan and all the Loan  
14 Documents set forth on Exhibit “A”<sup>6</sup> . . . together with all  
15 amendments, extensions, renewals and modifications thereto,  
including all of [the FDIC’s] claims, demands, rights, remedies and  
interests therein, to have and to hold the same unto [BB&T], its  
successors and assigns.

16 (*Id.* at 3-4.)

## 17 ANALYSIS

### 18 19 I. Defendants’ Motion for Summary Judgment (Dkt. #79.)

20 Defendants contend that BB&T lacks standing to bring its claims because the Bulk  
21 Assignment did not specifically describe the Deed of Trust and was not recorded against the  
22 Smoke Ranch Property. (Dkt. #79 at 14-16.) Defendants argue the 2012 Assignment and the  
23 Allonge do not cure the Bulk Assignment’s defects because a party must have standing at the  
24 outset of litigation, and a defect in standing at the outset cannot be cured. (*Id.* at 12.) Finally,  
25 Defendants assert that BB&T is collaterally estopped from relying on the PAA because the  
26

27  
28 <sup>6</sup> Exhibit “A” lists each of the documents that form the Smoke Ranch Loan. (*Id.* at 6.)

1 Nevada state court has already determined that BB&T Is not the proper successor to Colonial  
2 Bank (although Defendants improperly raise this argument only in their Reply). (Dkt. #94 at 10.)

3  
4 **1. UCC Art. 3 challenge**

5 “The proper method of transferring the right to payment under a mortgage note is  
6 governed by Article 3 of the Uniform Commercial Code—Negotiable Instruments, because a  
7 mortgage note is a negotiable instrument.” *Leyva v. Nat’l Default Servicing Corp.*, 255 P.3d 1275,  
8 1279 (Nev. 2011). UCC § 3-301 provides three methods by which a person can become entitled  
9 to enforce a note, two of which are relevant here: a person must either be a “holder” of the note,  
10 or attain the status of a “nonholder in possession of the [note] who has the rights of holder.”  
11 UCC § 3-301(a)(1)-(2).  
12

13 **(i) BB&T has failed to establish that it has attained the status of “holder.”**

14 A person is a “holder” if the person possesses the note and either (1) the note has been  
15 made payable to the person in possession, or (2) the note is payable to the bearer of the note. UCC  
16 § 1-201(b)(21)(A). This inquiry requires examination of the face of the note and any  
17 endorsements. An endorsement means a signature, other than that of the maker, made for the  
18 purpose of negotiating the instrument. UCC § 3-204(a). This inquiry also includes determining  
19 whether any purported allonge was sufficiently affixed. *Id.*; *In re Weisband*, 427 B.R. 13, 19  
20 (Bankr. D. Ariz. 2010) (assignee failed to demonstrate it was the holder of the note because while  
21 it was in possession of the note, it provided no evidence that the endorsement was stapled or  
22 otherwise attached to the rest of the note); *In re Shapoval*, 441 B.R. 392, 394 (Bankr. D. Mass.  
23 2010) (same).  
24  
25

26 Here, the Promissory Note was payable to Colonial Bank. (Dkt. #86 at 23.) The Allonge  
27 includes Tamara Stidham’s endorsement (in her capacity as FDIC’s attorney-in-fact), and states  
28

1 that it is to be affixed to the Note. While the copy of the Promissory Note attached to BB&T's  
2 Response includes the Allonge, the copy attached as an exhibit to BB&T's Motion for Summary  
3 Judgment does not include the Allonge. (Dkt. #80-1 at 2.) This is not sufficient to establish that  
4 the Allonge was affixed to the Note. Thus, BB&T has not established that it is the holder of the  
5 Promissory Note. In order to enforce the Promissory Note, BB&T instead must prove it became a  
6 "nonholder in possession of the instrument who has the rights of a holder" under UCC § 3-  
7 301(a)(2).  
8

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

11 "An instrument is transferred when it is delivered by a person other than its issuer for the  
12 purpose of giving to the person receiving delivery the right to enforce the instrument." UCC § 3-  
13 203(a). "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the  
14 transferee any right of the transferor to enforce the instrument. . . ." UCC § 3-203(b). While the  
15 failure to obtain the endorsement of the payee or other holder does not prevent a person in  
16 possession from being the "person entitled to enforce" the note, the possessor does not have the  
17 presumption of a right to enforce. Rather, the possessor of the note must demonstrate both the  
18 fact and the purpose of the delivery of the note to the transferee in order to qualify as the "person  
19 entitled to enforce." *Leyva*, 255 P.3d at 1281.  
20

21 Here, the Bulk Assignment is sufficient to demonstrate the purpose of delivery: transfer to  
22 BB&T of all of the FDIC's "rights, title and interests in and to all those certain Mortgages,  
23 Security Deeds, Deeds to Secure Debt, Deeds of Trust, . . . , and all such other instruments and  
24 security agreements securing loans owned . . . and held of record by Colonial Bank or any of its  
25 predecessors as of August 14, 2009." (Dkt. #81 at 65.) Attached to BB&T's supplemental brief  
26  
27  
28



1 (Dkt. #114-1 at 29) is Dennis Harm’s Declaration, which confirms the delivery of the Promissory  
2 Note to BB&T.

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

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

13  
14 **2. Defendants may not rely on Nevada’s foreclosure statute, statute of frauds, or**  
15 **recording statutes to challenge BB&T’s entitlement to enforce the Promissory Note.**

16 On February 29, 2012, BB&T foreclosed on the property secured by the Deed of Trust.  
17 (Trustee’s Deed Upon Sale, Dkt. #81-1 at 31.) Defendants assert that BB&T’s foreclosure was  
18 invalid because it failed to comply with Nevada’s recording statutes and statute of frauds. (Dkt.  
19 #79 at 14-16.) BB&T responds that the Bulk Assignment and the PAA, taken together, satisfy the  
20 statute of frauds. (Dkt. #86 at 12.) BB&T further asserts that the recording statutes are  
21 inapplicable because they do not provide a remedy in the foreclosure context. (*Id.*)

22 Defendants rely on NRS § 106.210, which requires that an assignee properly record the  
23 assignment of a deed of trust before it can foreclose on the real property encumbered by that deed  
24 of trust.<sup>7</sup> But this provision is inapplicable here because the statutory language at issue was added  
25

26  
27 \_\_\_\_\_  
28 <sup>7</sup> NRS 106.210 is made applicable to deeds of trust by NRS 107.070, which states that “[t]he  
provisions of NRS 106.210 . . . apply to deeds of trust as therein specified.”

1 on July 1, 2011, well after the Bulk Assignment was executed (October 23, 2009, back-dated to  
2 August 14, 2009). Prior to July 1, 2011, the statute read:

3 1. Any assignment of a mortgage of real property, or of a mortgage  
4 of personal property or crops recorded prior to March 27, 1935, and  
5 *any assignment of the beneficial interest under a deed of trust may*  
6 *be recorded*, and from the time any of the same are so filed for  
7 record shall operate as constructive notice of the contents thereof to  
8 all persons.

9 2. Each such filing or recording shall be properly indexed by the  
10 recorder.

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

13 1. *Any . . . assignment of the beneficial interest under a deed of*  
14 *trust must be recorded* in the office of the recorder of the county in  
15 which the property is located, and from the time any of the same are  
16 so filed for record shall operate as constructive notice of the  
17 contents thereof to all persons. . . . *If the beneficial interest under a*  
18 *deed of trust has been assigned, the trustee under the deed of trust*  
19 *may not exercise the power of sale pursuant to NRS 107.080 unless*  
20 *and until the assignment is recorded* pursuant to this subsection.

21 2. Each such filing or recording must be properly indexed by the  
22 recorder.

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

Defendants try to distinguish *Edelstein* by pointing out that, unlike the individual  
assignment of the deed of trust at issue in *Edelstein*, here the Bulk Assignment does not

1 specifically identify the Promissory Note or Deed of Trust. Defendants also point to the 2012  
2 Assignment as an indication that BB&T “did not have a valid assignment of the Promissory Note  
3 in dispute until November 13, 2012.” (Dkt. #79 at 12.) But these arguments are of no moment.  
4 The Bulk Assignment assigned all notes and deeds of trust owned or held by Colonial Bank that  
5 were not specifically excluded from assignment. Defendants have provided no evidence that the  
6 subject loan was excluded from the Bulk Assignment. Moreover, the 2012 Assignment is more  
7 akin to “belt and suspenders”: it was not needed to assign the Promissory Note and Deed of Trust  
8 because they had already been transferred through the Bulk Assignment. And although the 2013  
9 Assignment was executed November 13, 2012, it was specifically made effective as of August 14,  
10 2009, the date the FDIC took control of Colonial Bank. (Dkt. #79-12 at 2.) This further reflects  
11 the parties’ intent that the Promissory Note and Deed of Trust were transferred from Colonial  
12 Bank to the FDIC and then to BB&T through the Bulk Assignment.  
13

14  
15 Similarly, Defendants’ reliance on Nevada’s statute of frauds is misplaced. NRS  
16 111.205(1) provides that real property interests shall be assigned only in writing, subscribed by  
17 either the assigning party or by that party’s lawful agent. “The purpose of the statute of frauds is  
18 to prevent a contracting party from creating a triable issue concerning the terms of the contract—  
19 or for that matter concerning whether a contract even exists—on the basis of his say-so alone.”  
20 *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 296 (7th Cir. 2002). Here, the documents, taken as a  
21 whole, confirm that the Promissory Note and Deed of Trust were assigned to BB&T in writing.  
22 Thus, the statute of frauds is satisfied.  
23

24 The Bulk Assignment is sufficient evidence of the assignment of the Promissory Note and  
25 Deed of Trust from the FDIC to BB&T. Because the Bulk Assignment occurred prior to the  
26 amendment to NRS 106.210, the statute’s earlier language controls. BB&T was not required to  
27  
28

1 record an individual assignment against the subject property before foreclosing on it, and thus it  
2 properly foreclosed.

3 **3. Plaintiffs are not collaterally estopped from relying on the PAA.**  
4

5 Defendants also assert that the doctrine of issue preclusion requires dismissal of BB&T's  
6 claims because the Nevada state court has previously ruled that BB&T was not the proper  
7 successor in interest to Colonial Bank. *See Murdock v. Rad, et. al.*, 10-A-574852 (Decided June  
8 18, 2010), *affirmed by R & S St. Rose Lenders, LLC v. Branch Banking & Trust Co.*, 56640, 2013  
9 WL 3357064 (Nev. May 31, 2013)). (Dkt. #94 at 7.) That case arose from a priority fight  
10 between BB&T and Saint Rose Lenders, LLC. The issue central to determining priority was  
11 whether BB&T had met its burden of proving that it received an assignment of Colonial Bank's  
12 interest in a 2007 Deed of Trust relating to a \$43 million construction loan. (Dkt. #79-15 at 5.)

13  
14 The trial court refused to admit into evidence two previously undisclosed documents: the  
15 Bulk Assignment (the same one at issue here) and an unrecorded assignment specifically prepared  
16 in connection with the loan at issue. (*Id.* at 6.) The court also denied BB&T's request to reopen  
17 discovery. "The court found that there was no competent, admissible evidence offered by BB&T  
18 to establish whether the loan, note and deed of trust were excluded pursuant to [the PAA's]  
19 Sections 3.5 and/or 3.6 or purchased by BB&T pursuant to Section 3.1." (*Id.*) Thus, the deed of  
20 trust might fall into one of the PAA's exclusion categories. In the absence of evidence to the  
21 contrary, the court found that BB&T held a second priority lien position behind the St. Rose  
22 Lender's Deed of Trust. (*Id.* at 28.)  
23

24 Although BB&T repeatedly attempted to couch the issue as one of  
25 standing, it is not a standing issue. Rather, the defect which  
26 prompts the dismissal of BB&T's claims is evidentiary. BB&T  
27 failed to meet its burden of proof to establish that the Colonial Bank  
28 loan, note and deed of trust at issue in this case were ever assigned  
to BB&T. The court has given BB&T ample opportunity to submit  
proper evidence that the Colonial Bank loan, note and deed of trust

1 at issue in this case were one of the assets acquired by BB&T when  
2 it purchased some of the Colonial Bank assets. BB&T instead  
3 relied upon the language of the [PAA], and no other admissible  
4 evidence, documentary or testimonial. The Court hereby finds that  
5 [the PAA] was not sufficient evidence, on its face, to establish that  
6 BB&T was assigned the 2007 Colonial Bank Deed of Trust.

7 (*Id.* at 6-7.)

8 On appeal, the Nevada Supreme Court noted that:

9 “the FDIC [has the] ability to designate specific assets and  
10 liabilities for purchase and assumption . . . [and] a Court should  
11 look to the purchase and assumption agreement governing the  
12 transfer of assets between the FDIC and a subsequent purchaser of  
13 assets of a failed bank to determine which assets and  
14 corresponding liabilities are being assumed.”

15 (Dkt. 94-2 at 6 quoting *Caires v. JP Morgan Chase Bank*, 745 F.Supp.2d 40, 48-49 (D. Conn.  
16 2010).) The court agreed with the district court:

17 The PAA was an asset purchase and therefore the district court  
18 looked to its language in order to determine which assets and  
19 corresponding liabilities were transferred to BB&T. However, due  
20 to the omission of the schedules of assets, the district court found  
21 that PAA did not transfer the Construction Loan to BB&T. We  
22 agree. . . .

23 (*Id.* at 7.)

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

1           These cases do not support the conclusion that BB&T is precluded from bringing this  
2 action. To the contrary, it appears that BB&T may have learned its evidentiary lesson from  
3 *Murdock*. In Nevada, the elements necessary for application of issue preclusion are: (1) the issue  
4 decided in the prior litigation must be identical to the issue presented in the current action; (2) the  
5 initial ruling must have been on the merits and have become final; (3) the party against whom the  
6 judgment is asserted must have been a party or in privity with a party to the prior litigation; and  
7 (4) the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby*, 194 P.3d  
8 709, 713 (Nev. 2008). I need look no further than the first prong.  
9

10           As quoted above, the decision in *Murdock* was based on the BB&T's lack of evidence.  
11 (Dkt. #79-15 at 6 (“[T]he defect which prompts the dismissal of BB&T's claims is  
12 evidentiary.”).) The court either excluded from evidence or simply did not consider the Bulk  
13 Assignment and other relevant documents. Here, however, the Bulk Assignment is in evidence,  
14 as are several related documents. Accordingly, *Murdock* is not controlling here, and BB&T is not  
15 issue precluded from enforcing its rights under the Promissory Note.  
16

17           For the reasons discussed above, Defendants' Motion for Summary Judgment (Dkt. #79)  
18 is denied.  
19

20       **II.     BB&T's Motion for Summary Judgment (Dkt. #80) and Defendants' Motion for**  
21 **Summary Judgment (Dkt. #82)**  
22

23           BB&T moves for summary judgment on its breach of the Promissory Note and  
24 Guaranties. (Dkt. #80.) Defendants respond that BB&T cannot prove the consideration it paid for  
25 the right to enforce the debt as required under NRS § 40.459(1)(c). (Dkt. #89 at 4.) Defendants  
26 also assert that because BB&T did not timely comply with NRS §163.120, which establishes  
27  
28

1 procedures for asserting contract claims against a trust, BB&T cannot assert its claims against the  
2 defendant trusts. (*Id.* at 4-5.)

3 **1. Defendants’ objection to the Harms Declaration is overruled.**

4  
5 As an initial matter, Defendants object to the Declaration of Dennis Harms (BB&T’s  
6 custodian of records), which authenticates 11 documents including the Promissory Note,  
7 Guaranties, Deed of Trust, Bulk Assignment, and 2012 Assignment. (Dkt. #89 at 5-6.)  
8 Defendants argue that Harms has no personal knowledge of the documents. (*Id.* at 7.) The  
9 objection is overruled. “A witness does not have to be the custodian of documents offered into  
10 evidence to establish Rule 803(6)’s foundational requirements.” *United States v. Childs*, 5 F.3d  
11 1328, 1334 (9th Cir. 1993) (citing *United States v. Ray*, 930 F.2d 1368, 1370 (9th Cir.1991)); *see*  
12 *also Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1353 (9th Cir.1987), *modified on other grounds*,  
13 866 F.2d 318 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989). “The phrase ‘other qualified witness’  
14 is broadly interpreted to require only that the witness understand the record-keeping system.”  
15 *Ray*, 930 F.2d at 1370.  
16

17  
18 Harms’ Declaration states that he is familiar with the books, records, and files, and that  
19 those items were maintained in the ordinary course of business of Colonial Bank, the FDIC, and  
20 BB&T. There is no requirement that BB&T establish when and by whom the documents were  
21 prepared. *Id.* (citing *United States v. Huber*, 772 F.2d 585, 591 (9th Cir.1985) (“there is no  
22 requirement that the government show precisely when the [record] was compiled”); *United States*  
23 *v. Basey*, 613 F.2d 198, 201 n. 1 (9th Cir.1979) (college records properly admitted to establish  
24 defendant’s address even though the custodian did not herself record the information and did not  
25 know who did), *cert. denied*, 446 U.S. 919 (1980)).  
26

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

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

7  
8 1. After the hearing, the court shall award a money judgment  
9 against the debtor, guarantor or surety who is personally liable for  
10 the debt. The court shall not render judgment for more than:

11 . . . .

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

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

19  
20 After the hearing, the court shall award a money judgment against  
21 the debtor, guarantor or surety who is personally liable for the debt.  
22 The court shall not render judgment for more than:

23 1. The amount by which *the amount of the indebtedness which was*  
24 *secured* exceeds the fair market value of the property sold at the  
25 time of the sale, with interest from the date of the sale; or

26 2. The amount which is the difference between the amount for  
27 which the property was actually sold and *the amount of the*  
28 *indebtedness which was secured*, with interest from the date of sale,  
whichever is the lesser amount. (Emphasis added.)



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

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

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

15  
16 The Nevada Supreme Court held last year that the new language of NRS § 40.459(1)(c)  
17 applies only to *foreclosures* that were completed after it went into effect. *Sandpointe*, 129 Nev.  
18 Adv. Op. 87, 313 P.3d 849, 857 (Nev. 2013). Judge Jones of this Court recently went further and  
19 held that the new statutory language would violate the Contract Clause of the United States  
20 Constitution if it applied to *assignments* that were completed before the statute’s effective date.  
21 *Eagle SPE NV I, Inc. v. Kiley Ranch Communities*, 3:12-CV-00245-RCJ, 2014 WL 1199595 (D.  
22 Nev. Mar. 24, 2014).

23  
24 In *Sandpointe*, the FDIC became the receiver of Silver State Bank in 2008. 313 P.3d at  
25 851. In 2009, the debtor, Sandpointe, defaulted on its loan. *Id.* In 2010, the FDIC sold the  
26 Sandpoint loan and guaranty to Multibank pursuant to a large structured sale. *Id.* In turn,  
27 Multibank transferred its interest in the loan and guaranty to its subsidiary CML-NV, whose sole  
28

1 purpose was to pursue collections. *Id.* In early 2011, before enactment of AB 273, CML-NV  
2 foreclosed on the property. *Id.* at 851-52. After the June 10, 2011 enactment of AB 273, CML-  
3 NV filed a complaint for breach of contract and deficiency. *Id.* at 852. Sandpointe moved for  
4 partial summary judgment, seeking application of the “consideration paid” requirement newly  
5 added to NRS § 40.459(1)(c). *Id.* CML-NV filed a countermotion for summary judgment arguing  
6 that the new statutory language could not apply retroactively. *Id.* The district court granted the  
7 countermotion, holding that NRS § 40.459(1)(c) could apply only to loans entered into after June  
8 10, 2011. The Nevada Supreme Court agreed.  
9

10 In Nevada, the sale of the secured property is the event that vests  
11 the right to deficiency. Following the trustee's sale, the amount of a  
12 deficiency is crystalized because that is the subject date for  
13 determining both the fair market value and trustee's sale price of  
14 the property securing the loan. *See* NRS 40.459(1); *In re Filippini*,  
15 66 Nev. 17, 22, 202 P.2d 535, 537 (1949) (defining a “vested right[  
16 ],” in relevant part, as “some interest in the property that has  
17 become fixed and established”).) “In other words, the fair market  
18 value of the property is determined on the day of the trustee's sale,  
19 and that value can be used in a future deficiency action.” *Id.*  
20 Further, NRS 40.462(1), which governs the distribution of  
foreclosure sale proceeds, provides that the right to receive  
proceeds from the sale vests at the time of the foreclosure sale; it is  
logical that the right to a judgment for the amount not received in a  
foreclosure sale would arise on the same date as the right to receive  
amounts received from the sale. The trustee's sale marks the first  
point in time that an action for deficiency can be maintained and  
commences the applicable six-month limitations period.

21 *Id.* at 856. Thus, the court held that if the trustee's sale occurred before the effective date of NRS  
22 § 40.459(1)(c), application of the statute would impermissibly impact rights that had already  
23 vested in the foreclosing party. *Id.* at 859. The court emphasized the presumption against  
24 retroactivity. *Id.* at 857-58 (citing *U.S. Fid. & Guar. Co. v. United States ex rel. Struthers Wells*  
25 *Co.*, 209 U.S. 306, 314 (1908) (“The presumption is very strong that a statute was not meant to  
26 act retrospectively, and it ought never to receive such a construction if it is susceptible of any  
27 other.”)).  
28

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

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

11 *Eagle SPE*, 2014 WL 1199595 \*5. *See also Royston v. Miller*, 76 F. 50, 53-54 (C.C.D. Nev.  
12 1896) (“A vested right is property arising from contract or from the principles of the common  
13 law, which cannot be destroyed, divested, or impaired by legislation.”).

14  
15 [NRS § 40.459 (1)(c)] speaks to the time that an assignee acquires  
16 the *right* to obtain a deficiency judgment, not the time that an  
assignee actually obtains the deficiency judgment itself. The “right”  
17 referred to in the statute, i.e., the right “acquired” by the assignee, is  
the contingent right to obtain a deficiency judgment upon  
18 foreclosure, because it is a right “*to obtain* the judgment” in the  
future. This reading is further supported by the fact that the statute  
19 notes that the assignee obtains this right “from a person who  
previously held that right,” i.e., the assignor. And the statute clearly  
20 does not contemplate that the assignor already had a deficiency  
judgment, because the statute begins, “If the person *seeking* the  
21 judgment acquired the right to obtain the judgment from a person  
who previously held that right.” Plaintiff interprets the statute as if  
22 it read, “If the person seeking *to enforce* the judgment acquired the  
judgment from a person who previously held that *judgment*, the  
23 amount by which the amount of the consideration paid for that  
*judgment* exceeds the fair market value of the property. . . .” The  
24 statute does not so read.  
25  
26  
27  
28

1 *Eagle SPE*, 2014 WL 1199595 at \*6 (emphasis and omission of internal citations in original).<sup>8</sup>

2 Judge Jones then examined whether the retroactive application of NRS § 40.459 (1)(c) would  
3 violate the Contract Clause of Article 1, § 10 of the United States Constitution, which provides  
4 that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” Determining  
5 whether a state law violates the Contract Clause involves a three-step inquiry:

6  
7 The threshold inquiry is whether the state law has, in fact, operated as a substantial  
8 impairment of a contractual relationship. If this threshold inquiry is met, the court  
9 must inquire whether the State, in justification, [has] a significant and legitimate  
10 public purpose behind the regulation, such as the remedying of a broad and general  
11 social or economic problem, to guarantee that the State is exercising its police  
12 power, rather than providing a benefit to special interests. Finally, the court must  
13 inquire whether the adjustment of the rights and responsibilities of contracting  
14 parties is based upon reasonable conditions and is of a character appropriate to the  
15 public purpose justifying the legislation's adoption. Unless the State itself is a  
16 contracting party, as is customary in reviewing economic and social regulation, . . .  
17 courts properly defer to legislative judgment as to the necessity and reasonableness  
18 of a particular measure.

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

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

25 <sup>8</sup> *Eagle SPE* addressed four loans that Colonial Bank made to the defendants between April  
26 2007 and February 2008. *Id.* at \*1. Following Colonial Bank’s failure, the FDIC assigned those  
27 loans to BB&T in the same August 14, 2009 Bulk Assignment at issue in the present case. *Id.*  
28 BB&T assigned its rights in those four loans to Eagle SPE in August 2010. *Id.* On November 8,  
2011, Eagle SPE foreclosed on the property and brought a deficiency action against the  
defendants. *Id.* at \*1-2.

1 As to the second step, the court found that while the amendment had a legitimate public  
2 purpose (remedying the broad social and economic problems flowing from widespread real estate  
3 foreclosures), retroactive application to pre-enactment assignments would benefit special  
4 interests. Specifically, the statute provides “a windfall to a particular class (mortgagors) that  
5 could not have been reasonably expected under the mortgage and assignment when made, to the  
6 detriment of another distinct class (mortgage assignees).” *Id.* at \*8. While contractual rights may  
7 be impaired “where reasonably necessary to prevent unexpected windfalls,” here the statute  
8 “creates an unexpected windfall as opposed to avoiding one.” *Id.* (emphasis in original, citations  
9 omitted.)  
10

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

15 *Id.*

16 As to the third step, the court held that if the statute was applied to pre-enactment  
17 assignments, the resulting adjustment to the contracting parties’ rights and responsibilities would  
18 be based on unreasonable conditions. *Id.* The statute would impair the value of the asset (the  
19 right to collect the debt), and this result cannot withstand scrutiny. *Id.* at 11 (citing *Home Bldg. &*  
20 *Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934) (conditions reasonable where the “integrity of  
21 the mortgage indebtedness is not impaired” and the “right of a mortgagee-purchaser to title or to  
22 obtain a deficiency judgment . . . are maintained”)). Judge Jones explained:  
23  
24

25 [A]n assignee's reliance upon the ability to collect the full amount  
26 owed under the mortgage is vital. An assignee who purchases a  
27 defaulted mortgage under the amended statute can only profit  
28 thereby if the value of the security is greater than the price of the  
assignment plus the costs of foreclosure. And this will almost never  
be the case in practice, because where the value of the security

1 minus the costs of foreclosure is greater than the price of a  
2 prospective assignment, no rational lender will sell the mortgage at  
3 such a price in the first place. The lender is better off foreclosing  
4 himself and realizing a smaller loss than he is selling the mortgage  
5 for less than he can get through foreclosure. This, of course, was the  
entire purpose of the statute: to eliminate the economic incentive  
for banks to sell defaulted mortgages rather than negotiate directly  
with homeowners.

6 2014 WL 1199595 at \*11. Moreover, less restrictive alternatives were available to serve the  
7 purposes of the law:

8 The Nevada Legislature could simply have prohibited outright the  
9 assignment of defaulted mortgages on Nevada real property, or  
10 permitted them only for a fixed percentage of the amount due on  
11 the loan. In either case, no assignee would face the unexpected,  
12 retroactive destruction of the value of his contract that Plaintiff  
13 faces here, because the law affecting any assignment contract  
14 would be known at the time of assignment, and not only afterwards.  
That option would also have prevented the sale of mortgages at  
discount rates. Similarly, the Nevada Legislature could have  
provided additional pre-foreclosure safeguards to encourage  
foreclosure alternatives.

15 *Id.* at \*12. Further, the application of the statute to pre-enactment assignments does nothing to  
16 advance the Legislature's stated purpose of encouraging negotiation between mortgagees and  
17 mortgagors; assignees had no reason to think that the value of their contracts would be limited  
18 when they purchased mortgages before the law took effect. *Id.* Thus, the statute, if applied  
19 retroactively, would adjust the contracting parties' rights and responsibilities based on  
20 unreasonable conditions, and therefore would violate the Contract Clause.  
21

22 The holding and rationale of *Eagle SPE* apply with equal force in this case. The Bulk  
23 Assignment and PAA were executed on August 14, 2009, so BB&T acquired the asset well  
24 before NRS § 40.459(1)(c) became effective. Retroactively applying that statute to the facts of  
25  
26  
27  
28

1 this case would violate of the Contract Clause. Accordingly, BB&T is entitled to judgment as to  
2 liability for breach of contract and breach of guaranty.<sup>9</sup>

3 **3. NRS § 163.120**

4 The Trust Defendants assert that BB&T failed to comply with NRS § 163.120(2), which  
5 sets forth notice requirements for a plaintiff suing a trust for breach of a contract entered into by a  
6 trustee. (Dkt. #89 at 5-6.) The statute provides as follows:  
7

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

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

---

26 <sup>9</sup> Because NRS § 40.459(1)(c) cannot apply retroactively to pre-enactment assignments such as  
27 the one at issue here, I do not need to reach BB&T's remaining arguments regarding that statute.  
28 Nor do I need to certify to the Nevada Supreme Court any questions of law arising from the  
proper interpretation of "consideration" under the statute. Accordingly, Defendants' Motion to  
Certify Questions of Law to the Nevada Supreme Court (Dkt. #106) is denied.

1 BB&T contends (and the Defendants do not contradict) that Yoel Iny and Tikva Iny “are  
2 designated as lifetime beneficiaries” of the Y&T Iny Family Trust, and that “Noam Schwartz is  
3 the lifetime beneficiary” of the Noam Schwartz Trust. (Dkt. #128 at 4, 5, 16, 17.) BB&T also  
4 contends (and the Defendants do not contradict) that these three individuals received proper  
5 notice of the claims asserted in this lawsuit. (*Id.* at 5-6.) Based on the supplemental briefs and  
6 attached exhibits, I conclude that Yoel Iny, Tikva Iny and Noam Schwartz received proper notice  
7 under NRS § 163.120(2). Thus, the only issue is whether the “Trust Remaindermen” should have  
8 received notice.  
9

10 Defendants identify the Inys’ five children as Trust Remaindermen of the Y&T Iny  
11 Family Trust, and five other individuals as Trust Remaindermen of the Noam Schwartz Trust. (*Id.*  
12 at pp. 13-14.) Previously, however, the Defendants represented that the present beneficiaries  
13 (Yoel Iny, Tikva Iny and Noam Schwartz) are the “exclusive beneficiaries” of their respective  
14 trusts during their lifetimes, and that the Trust Remaindermen become beneficiaries only upon the  
15 death of the respective present beneficiaries. (*Id.* at 4-6.) NRS § 163.120(2) requires only that  
16 notice be given to “each of the beneficiaries . . . who then had a present interest. . . .” On its face,  
17 this applies to the present beneficiaries, not the Trust Remaindermen. Defendants argue that,  
18 because “present interest” is not defined, the spirit and purpose of the statute dictate that the Trust  
19 Remaindermen should be entitled to notice and an opportunity to participate in the litigation.  
20 (Dkt. #129 at 4-7.) That interpretation is not supported by the statute’s plain language and could  
21 easily be taken to an extreme to also require notice to the future heirs or beneficiaries of the Trust  
22 Remaindermen. Such an interpretation could greatly expand the scope of the litigation into an  
23 unwieldy process. The statute is clearly designed to afford notice to the present beneficiaries of a  
24 trust so they can determine whether they should intervene in the lawsuit to protect their interests  
25  
26  
27  
28



1 in the trust property. The notice provided in this case to Yoel Iny, Tikva Iny and Noam Schwartz  
2 satisfied the requirements of NRS § 163.120(2).

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

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

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

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

23 As to the second matter, BB&T is not bound to the allegation in its Amended Complaint  
24 that "[o]n the date of the trustee's sale of the Property, the fair market value of the Property was  
25 approximately \$545,000." (Dkt. #5 at 6:12-13.) Defendants contend that this allegation  
26 constitutes a judicial admission, thus barring BB&T from offering expert testimony that the value  
27  
28

1 was anything less. (Dkt. #84 at 9.) BB&T responds that its allegation is simply an approximation,  
2 not an unequivocal statement of fact, and therefore is not binding as a judicial admission. (Dkt.  
3 #90.)

4 ““Judicial admissions are formal admissions in the pleadings which have the effect of  
5 withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.”” *Am.*  
6 *Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (quoting *In re Fordson*  
7 *Engineering Corp.*, 25 B.R. 506, 509 (Bankr.E.D.Mich.1982)). Factual assertions in pleadings,  
8 unless amended, are considered judicial admissions conclusively binding on the party who made  
9 them. *Id.* (citing *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir.1983)); *Fordson*, 25  
10 B.R. at 509. To qualify as a judicial admission, the admission must be deliberate, clear, and  
11 unequivocal. *Estate of Strickland v. Strickland*, CV-12-433-TUC-JGZ, 2013 WL 673513 (D.  
12 Ariz. Feb. 25, 2013) (“The Estate's admission that Jacaruso was the sole beneficiary before and  
13 after her marriage to Strickland was deliberate, clear, and unequivocal. It therefore constitutes a  
14 judicial admission which the Estate cannot now retract.”). “Where . . . the party making an  
15 ostensible judicial admission explains the error in a subsequent pleading or by amendment, the  
16 trial court must accord the explanation due weight.” *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-  
17 60 (9th Cir.1995).

18  
19  
20  
21 Here, BB&T alleged in its Amended Complaint that the fair market value was  
22 “approximately \$545,000.” (Dkt. #5 at 6:12-13.) This is not an unequivocal statement of fact, but  
23 rather an approximation, an estimate. The fair market value of the subject property is “a disputed  
24 and critical issue in the litigation.” (Dkt. #90 at 4.) The parties have retained experts to appraise  
25 the value of the subject property as of the date of foreclosure. That will be the primary focus of  
26 the deficiency hearing. Accordingly, BB&T is not bound to the allegation in the Amended  
27 Complaint about the approximate value of the property at the time of foreclosure.  
28

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

3 **CONCLUSION**

4  
5 **IT IS HEREBY ORDERED THAT** Defendants' Motions for Summary Judgment (Dkt.  
6 ##79 and 82) are **DENIED**.

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

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

13  
14 **IT IS FURTHER ORDERED THAT** Plaintiff's Application for Deficiency Judgment  
15 Hearing Pursuant to NRS § 40.457 (Dkt. #81) is **GRANTED**. **A status check is set for October**  
16 **16, 2014 at 2:00 p.m.** to discuss the amount of time needed for that hearing, and the parties',  
17 counsels', and witnesses' schedules.

18  
19 DATED this 26th day of September, 2014.

20  
21 

22 \_\_\_\_\_  
23 ANDREW P. GORDON  
24 UNITED STATES DISTRICT JUDGE  
25  
26  
27  
28