No. _____

In The

Supreme Court of the United States

BRANCH BANKING & TRUST COMPANY, AS SUCCESSOR IN INTEREST TO THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF COLONIAL BANK, N.A.,

Petitioner,

v.

R & S ST. ROSE LENDERS LLC, A NEVADA LIMITED LIABILITY COMPANY; COMMONWEALTH LAND TITLE INSURANCE COMPANY, AS ASSIGNEE OF ROBERT E. MURDOCK, ESQ.; AND ECKLEY M. KEACH, ESQ.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

GLENN F. MEIER, ESQ.
Counsel of Record
RACHEL DONN, ESQ.
MEIER & FINE, LLC
2300 W. Sahara Ave., Suite 1150
Las Vegas, NV 89102
(702) 673-1000
gmeier@nvbusinesslawyers.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Whether the Nevada State District Court's adjudication of substantial property rights without the property owner being named as a party violates the Due Process Clause of the Fourteenth Amendment by depriving a person of property rights without due process of law.

Whether the Nevada State District Court's interpretation of the FDIC's Purchase and Assumption Agreement as requiring a specific assignment of individual assets is sufficiently at odds with other federal decisions interpreting the Purchase and Assumption Agreement to require this Court's intervention to definitively interpret the Purchase and Assumption Agreement.

PARTIES

The Petitioner in this matter is Branch Banking & Trust Company as Successor in Interest to the Federal Deposit Insurance Corporation as Receiver of Colonial Bank, N.A. Pursuant to S. Ct. R. 29(6), Petitioner states that Branch Banking & Trust Corporation is the parent corporation of Branch Banking & Trust Company. There are no additional publicly held companies that own 10% or more of Branch Banking & Trust's Company's stock.

The respondents in this matter are R & S St. Rose Lenders, LLC, a Nevada Limited Liability Company, Commonwealth Land Title Insurance Company as Assignee of Robert E. Murdock, Esq. and Eckley M. Keach, Esq. is also a party to this case.

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The decision of the three justice panel of the Nevada Supreme Court is unpublished but is available on Westlaw as *R & S St. Rose Lenders v. BB&T*, 2013 WL 3357064. The trial court decision is unreported but is included in the appendix at App. 9. The decision of the Nevada Supreme Court denying *en banc* reconsideration of this case is unreported but is included in the appendix at App. 53.

STATEMENT OF JURISDICTION

The trial court entered judgment in this case on November 10, 2010. The trial court's decision was appealed to the Nevada Supreme Court. A three justice panel of the Nevada Supreme Court heard the appeal and issued its decision on May 31, 2013. Petitioner sought rehearing from the panel, and the panel denied that request on September 26, 2013. Petitioner then sought *en banc* reconsideration from the Nevada Supreme Court. The Nevada Supreme Court denied the request for *en banc* reconsideration on February 21, 2014 with two justices dissenting and filing a separate opinion. Jurisdiction over this petition is appropriate under 28 U.S.C. §1257(a), which grants this Court jurisdiction to review the final judgments or decrees rendered by the highest court of a state by writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS

U.S. Constitution, Amendment XIV, Section 1 – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

The core dispute in this case revolves around the respective priority of two deeds of trust encumbering approximately thirty-eight (38) acres of real property in Henderson, Nevada (the "Property") owned by R&S St. Rose, LLC ("St. Rose"). Branch Banking & Trust Company ("BB&T") holds one of these deeds of trust pursuant to an assignment from the Federal Deposit Insurance Corporation ("FDIC") as receiver for Colonial Bank, N.A. ("Colonial"). The other deed of trust is held by R&S St. Rose Lenders, LLC ("R&S Lenders").

St. Rose and R&S Lenders are each ultimately owned and controlled by the same two individuals: Saiid Forouzan Rad ("Rad") and R. Phillip Nourafchan ("Nourafchan"). Rad and Nourafchan came to own the Property as part of a land-banking

arrangement with Centex Homes ("Centex") through which Centex assigned its right to purchase the Property to St. Rose, subject to a reserved purchase option in favor of Centex. In order to purchase the Property, Rad and Nourafchan were required to raise $45,131,414.00. Rad and Nourafchan used three primary sources of funds to purchase the Property. First, St. Rose borrowed $29,305,250.00 from Colonial (the "First Loan"). The First Loan was secured by a first priority deed of trust against the Property recorded on August 26, 2005 (the "First Colonial Deed of Trust"). Second, St. Rose applied the $8,100,000.00 it received as a non-refundable deposit from Centex. Third, St. Rose "borrowed" an additional $12,300,000.00 from R&S Lenders, which Rad and Nourafchan formed for the sole purpose of "loaning" funds to St. Rose. On or about August 23, 2005, Rad and Nourafchan caused St. Rose to execute a promissory note in favor of R&S Lenders for $12,000,000.00, which was secured by a "Second Deed of Trust" recorded on September 16, 2005 (the "R&S Lenders Deed of Trust").

Rad and Nourafchan intended to hold the Property for roughly one year, after which time they expected Centex to exercise its purchase option. Centex ultimately did not exercise its purchase option. As a result, Rad and Nourafchan needed to raise additional funds in order to retain and potentially develop the Property. These additional funds came almost exclusively from Colonial. On July 27, 2007, Colonial and St. Rose entered into a loan for an

amount not to exceed $43,980,000.00 (the "Construction Loan"). The Construction Loan served two purposes: (i) to pay off Colonial's First Loan, and (ii) to provide funding for the construction of certain infrastructure improvements on the Property. The Construction Loan was secured by a deed of trust in favor of Colonial, which was recorded against the Property on July 31, 2007 (the "2007 Deed of Trust").

It is undisputed that Colonial funded the Construction Loan with the understanding that the 2007 Deed of Trust would – like the First Colonial Deed of Trust – be secured in first position against the Property. Colonial required the issuance of a title policy insuring the Construction Loan in first position against the Property as a condition precedent to funding the Construction Loan. Commonwealth Land Title Company ("Commonwealth") issued Colonial a title policy insuring the 2007 Deed of Trust in first position against the Property, and removing the R&S Lenders Deed of Trust as an exception to title. As such, when Colonial funded the Construction Loan it had no reason to believe that there were any allegedly senior deeds of trust against the Property.

Colonial obtained additional assurances of its first priority position through the 2007 Deed of Trust. In pertinent part, the 2007 Deed of Trust provides that:

> 5.03: Beneficiary [Colonial] shall be subrogated for further security to the lien, although released of record, of any and all

encumbrances paid out of the proceeds of the loan secured by the Deed of Trust.

Funds from the Construction Loan were used to fully pay off and satisfy the $29,797,628.72 owing under Colonial's First Loan. Accordingly, pursuant to the plain language of the 2007 Deed of Trust, Colonial succeeded to the priority position of the First Colonial Deed of Trust against the Property.

In July of 2008 Colonial first learned that the R&S Lenders Deed of Trust was not actually reconveyed and appeared to be in first position against the Property. St. Rose subsequently defaulted on the Construction Loan by failing to pay the amounts due under the loan. On April 3, 2009, Colonial demanded that St. Rose cure its default. When St. Rose failed to cure, Colonial recorded a Notice of Default. On July 15, 2009, R&S Lenders also recorded a Notice of Default. Both foreclosure proceedings were enjoined pending the outcome of the dispute between R&S Lenders and Colonial regarding the priority of their respective deeds of trust.

Ultimately, as discussed in more detail subsequently, the trial court erroneously determined that the R&S Lenders Deed of Trust had priority over the 2007 Deed of Trust. The trial court's judgment was not based on a legal analysis of BB&T's equitable claims for priority, but instead on a finding that BB&T had not shown that it had standing to assert claims arising from the Construction Loan.

On November 3, 2008, Robert E. Murdock ("Murdock") and Eckley M. Keach ("Keach") filed a Complaint against R&S Lenders instigating this litigation. Murdock and Keach subsequently filed both a First and Second Amended Complaint. Colonial was first named as a party in Murdock and Keach's Second Amended Complaint filed on April 3, 2009. Colonial answered and filed a Cross-Complaint against St. Rose for indemnity and contribution. On July 1, 2009, Colonial filed a separate Complaint against R&S Lenders, Forouzan Inc., RPN LLC (each owned and controlled by Rad and Nourafchan), Rad and Nourafchan (collectively, "Defendants"). On August 11, 2009, the trial court consolidated Murdock and Keach's action with that of Colonial.

Three days later, on August 14, 2009, Colonial was closed by the Alabama State Banking Department, and the FDIC was named its Receiver. Also on August 14, 2009, BB&T and the FDIC, in its capacity as Receiver of Colonial, entered into a "Purchase and Assumption Agreement, Whole Bank All Deposits" (the "PAA"), which transferred virtually all of Colonial's assets, including the Construction Loan, 2007 Deed of Trust, and all related agreements concerning the Property, to BB&T.

On October 7, 2009, BB&T, as successor-in-interest to Colonial and the FDIC with respect to the Construction Loan, filed its Second Amended Complaint. BB&T's Second Amended Complaint, which was BB&T's operative complaint at the time of the later evidentiary hearing, alleged causes of action for:

(1) declaratory relief – contractual subrogation; (2) declaratory relief/quiet title – replacement; (3) equitable/promissory estoppel; (4) unjust enrichment; (5) fraudulent misrepresentation; and (6) civil conspiracy.

On October 22, 2009, the trial court issued an order consolidating an evidentiary hearing with a trial on the merits on specific issues. The limited scope of the expedited trial on the merits was set forth in a minute order dated November 23, 2009. Pursuant to this minute order, the only matters to be addressed at the expedited trial on the merits were "the specific items listed in Plaintiff's Notice of Questions of Fact and Request for Sua Sponte Addition of Nevada Title [as a] Party, filed 11/19/09 (except items 5, 6, 11, 19-20, 22-23, 25, 28, 30, 40, 43)." ("Plaintiff's Notice of Questions of Fact"). Plaintiff's Notice of Questions of Fact did not list either BB&T's standing or BB&T's status as a real party in interest as one of the specific items to be addressed in the expedited trial on the merits.

Due to scheduling issues, the evidentiary hearing below was held over approximately ten days spanning a three month period from January 8, 2010 until April 14, 2010. After the close of BB&T's case in chief on or about March 30, 2010 (day six of the evidentiary hearing), counsel for the Defendants brought oral motions pursuant to NRCP 52(c) for judgment on partial findings arguing, for the first time, that BB&T did not have standing to assert its claims related to the Construction Loan. (10 JA 2129-2188). In essence,

the Defendants argued that the PAA did not transfer the Construction Loan from the FDIC to BB&T.

The trial court framed this issue as one of standing, stating:

> I've admitted Exhibit 183 [the PAA], if it included some reference to the particular asset or schedule that had excluded assets that didn't include this asset, might comply with NRS 111.235, which would then put your client [BB&T] in a position where it might have some remedy. Without those kinds of things I think we have a potential standing issue . . . or you know, I guess that's the best way, or successor in a true successor in interest problem.

This statement was subsequently adopted in the trial court's Findings of Fact. Following its oral ruling, the trial court ordered BB&T to attempt to obtain other documentation indicating that BB&T had standing to bring its claims.

The following day, pursuant to the trial court's request, BB&T provided the trial court with a recorded assignment from the FDIC to BB&T dated October 23, 2009 confirming that the FDIC had transferred, among other things, the Construction Loan and the 2007 Deed of Trust to BB&T. Though BB&T obtained this additional evidence of BB&T's standing at the trial court's request, the trial court refused to admit or consider the 2009 Assignment. The sole basis the trial court provided for refusing to admit or consider the 2009 Assignment was that the 2009 Assignment –

which did not exist prior to close of discovery – had not been previously disclosed pursuant to NRCP 16.1.

Following the trial court's rejection of the 2009 Assignment, BB&T offered an assignment executed on March 30, 2010 (the "2010 Assignment") for the explicit purpose of clarifying ownership of the Construction Loan. The trial court also refused to consider this assignment.

Counsel for BB&T then made an oral motion pursuant to NRCP 17, 21, and 25, to substitute in the FDIC – the only other conceivable owner of the Construction Loan – for BB&T as the real party in interest. The trial court denied BB&T's motion, stating in pertinent part that:

> Exhibit 183 [the PAA] is internally inconsistent and is incomplete. It prevents the Court from making a finding that an assignment has occurred of the loan that is at issue. The insufficient and conflicting evidence regarding this assignment is what led me to the position that we're currently in, the ruling that I began to make on the 41(b) [sic] motions at the time we had this motion presented. For that reason and given the particular procedural posture of the case, I'm going to deny the request for substitution of the real party in interest.

This statement was also incorporated into the trial court's Findings of Fact.

Ultimately, the trial court's Findings of Fact provide that BB&T's claims were dismissed because

"BB&T failed to establish the Colonial Bank loan, Note and Deed of Trust at issue in the case were ever assigned to BB&T." The trial court's Findings of Fact further provide that:

> BB&T has not shown the claims or causes of action against defendants being pursued by BB&T belong to BB&T and it is the successor in interest with the ability to assert these claims against defendants . . . since BB&T has not proved that it owns the actions or claims asserted herein, it does not have the ability to assert the claims in the Second Amended Complaint.

Once the trial court determined that BB&T lacked standing to assert the claims alleged in its Second Amended Complaint, the trial court's inquiry should have ended. However, the trial court did not end its inquiry after making the dispositive finding that BB&T lacked standing to assert its claims. In dicta, the trial court went on to unnecessarily and inappropriately rule on issues of lien priority. Based on its decision that BB&T could not pursue claims related to the Construction Loan, the trial court concluded that the "St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust." In essence, the trial court extrapolated its decision regarding the ownership of the Construction Loan and 2007 Deed of Trust into an unnecessary (and erroneous) conclusion regarding the priority of such loan.

Following the court's finding regarding BB&T's ownership of the Construction Loan, BB&T moved to substitute the FDIC as a party. The trial court denied this motion. In this motion, BB&T argued that the FDIC (as the only potential owner of the 2007 Construction Loan based on the trial court's findings) needed to be included as a party since the trial court was going to adjudicate substantial rights relating to the Construction Loan. This argument, although not framed in terms of the Fourteenth Amendment, first raised the issue of whether the trial court could properly resolve the claims in this case without first determining that the owner of the 2007 Construction Loan was a party to the case. BB&T first raised the issue of the trial court's interpretation of the FDIC's PAA during the trial.

BB&T appealed this decision to the Nevada Supreme Court and the appeal was heard by a three judge panel of that Court. The panel's decision upheld the trial court's decision, declining to alter the trial court's interpretation of the PAA which required that the loan in question be listed on a schedule of assets attached to the PAA, and therefore concluded that the PAA did not operate to transfer the loan to BB&T.

BB&T sought rehearing of this decision by the panel. This request was denied. BB&T then sought *en banc* reconsideration from the Nevada Supreme Court. This request was likewise denied; however, two of the Nevada Supreme Court Justices dissented from that decision and filed an opinion that was

lodged with the decision denying *en banc* reconsideration. The dissent noted, among other things, that the interpretation of the PAA approved by the panel's decision placed Nevada "at odds with uniform law established by state and federal courts across the country."

REASONS FOR GRANTING THE WRIT

I. Legal Standard for Certiorari

Sup. Ct. Rule 10(c) provides that this Court may grant a writ of certiorari when: "a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

II. By Adjudicating Lien Priority After Finding That BB&T Was Not the Lienholder, the Trial Court Deprived the Lienholder of Due Process in Violation of the Fourteenth Amendment

The United States Constitution prevents the taking of an interest in real property without due process of law. U.S. Const. Amend. XIV, §1. A mortgage holder's security interest in property is a property right that entitles the mortgage holder to due process rights. *Mennonite Board of Missions v. Adams*,

462 U.S. 791, 798, 103 S. Ct. 2706, 2711, 77 L.Ed. 2d 180, 187 (1983).

The exercise of the State's legal authority over someone's property interest is an act which requires that due process be afforded to the holder of that interest. For example, the government sale of property to satisfy a tax lien is an act which requires the state to provide due process to the property owner. *See, e.g., Jones v. Flowers,* 547 U.S. 220, 126 S. Ct. 1708, 164 L.Ed. 2d 415 (2006); *Mennonite*, 462 U.S. at 798. Even a nominally temporary adjudication of property rights entitles the property owner to due process. *See Connecticut v. Doher*, 501 U.S. 1, 111 S. Ct. 2105, 115 L.Ed. 2d 1 (1991) (prejudgment writ of attachment requires due process).

The Construction Loan and 2007 Deed of Trust have an owner. As a result of the trial court's determination that the PAA was ambiguous and that the Construction Loan had not been assigned to BB&T, the Construction Loan's owner could only be the FDIC. The FDIC's putative ownership of the Construction Loan takes on importance because of the trial court's tortured and convoluted logic in concluding that "St. Rose Lender's [sic] Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust" because BB&T had not shown that it owned the Construction Loan. Notwithstanding this error, once the trial court erroneously determined that BB&T (the only party to the case claiming ownership of the Construction Loan) was not the owner of the

Construction Loan, the trial court proceeded to adjudicate the relative priority of the R&S Lenders' Deed of Trust – whose owner was undisputedly a party to the case – and the 2007 Colonial Bank Deed of Trust – whose owner, based on the trial court's findings, was not a party to the case.

Since based on the trial court's findings – which were dicta, but were improperly relied upon by the trial court nonetheless – the only potential owner of the 2007 Colonial Bank Deed of Trust was the FDIC, BB&T filed a motion asking the trial court to substitute the FDIC as a party to the case. The trial court denied this motion and improperly proceeded to determine the relative priority of the deeds of trust. While the trial court's purported determination of the relative priority of these deeds of trust was mere dicta, this dicta deprived the owner of the 2007 Colonial Bank Deed of Trust the right to assert its claims for equitable subordination, among others. At the time these rights were adjudicated, the trial court had determined that the owner of the 2007 Colonial Bank Deed of Trust (putatively the FDIC) was not a party to the case. Thus, the trial court deprived the FDIC of a property right by determining the priority of the 2007 Deed of Trust without permitting the FDIC to be heard as the real party in interest thereto.

III. The Trial Court's Interpretation of The FDIC/BB&T Purchase and Assignment Agreement Contradicts Federal Law Necessitating Intervention by This Court

The trial court's reasoning was considered and rejected by the Northern District of Florida in *Branch Banking & Trust Co. v. Navarre 33, Inc.*, which concerned the impact of the PAA on a loan assigned from the FDIC to BB&T 2012 WL 2377851 (N.D. Fla. May 21, 2012). The borrower in *Navarre 33* argued that the PAA did not establish BB&T as the holder of a promissory note and guaranty. Rejecting this argument, the *Navarre 33* court looked first to 12 U.S.C. §§1821(c) and 1821(d)(2)(A)(i), which establish that when Colonial failed and the FDIC became its receiver, the FDIC succeeded to "all rights, titles, powers, and privileges of the insured depository institution." Id. at *6 (quoting 12 U.S.C. §1821(d)(2)(A)(i)). "This [statutory] language indicates that the FDIC as receiver 'steps into the shoes' of the failed bank, obtaining the rights of the insured depository institution that existed prior to receivership." Id. (quoting *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994)). Colonial Bank's interest in the note and guaranty were thus transferred by operation of law to the FDIC. Id.

Against that statutory background, the *Navarre 33* court then turned to the PAA. The Court noted that the PAA describes the assets purchased by BB&T, "which include all of Colonial's assets, except those expressly excluded in Section 3.5 and 3.6 of the

P & A Agreement." Id. (emphasis added to that in original). Since "[n]either of the cross-referenced sections of the P & A Agreement, 3.5 and 3.6, appears on its face to exclude the promissory note or guarantees from the assets purchased by BB&T," the *Navarre 33* court held that, "the broad language of Section 3.1 of the P & A Agreement, describing the assets purchased by BB&T, sufficiently indicates that BB&T is the current holder of the Note and Guarantees that are the subject of the instant case." Id.; *see* 12 U.S.C. §1821(d)(2)(G)(i)(II) (giving the FDIC, as receiver, authority to "transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer").

The Nevada Supreme Court Panel rejected *Navarre 33* because it addressed a note and associated guaranty rather than a note and deed of trust. This is a distinction without a difference, and the Nevada Supreme Court offered no explanation why that factual distinction affected the outcome of the case. Indeed, this factual distinction is irrelevant to the analysis. The *Navarre 33* decision rested largely on the fact that the PAA contains broad language transferring all assets except those specifically excluded. There is no indication in either the *Navarre 33* decision or in the PAA that suggests a note and guaranty would be treated differently from a note and deed of trust, and there is no logical basis for such a distinction given that both a guaranty and a deed of

trust are intended to provide security for the repayment of a note.

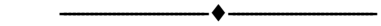
Further evidence of the flaws in the Nevada Supreme Court's analysis of *Navarre 33* is found in cases analyzing a similar Purchase & Assumption Agreement between the FDIC and J.P. Morgan Chase Bank that arose out of the failure of Washington Mutual. *Drobny v. J.P. Morgan Chase Bank, N.A.*, 929 F. Supp. 2d 839 (N.D. Ill. 2013). As with the FDIC's closure of Colonial and assignment of Colonial's assets to BB&T, the FDIC also stepped in as receiver for Washington Mutual and eventually transferred the assets of Washington Mutual to J.P. Morgan Chase. Multiple cases construing the FDIC/J.P. Morgan Chase Bank P & A Agreement have held that, under 12 U.S.C. §1821(d)(2)(G)(i)(II), the FDIC, as receiver, has authority to "transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer" and that the Purchase & Assumption Agreement effects a valid and complete transfer as authorized by this statute. Thus, courts elsewhere have specifically rejected as frivolous the argument accepted by the Nevada Supreme Court that each asset must be specifically identified in the Purchase & Assumption Agreement for the transfer described in Section 3.1 (which, notably, is identical to Section 3.1 of the PAA) to be effective. *See, Drobny,* 929 F. Supp. 2d at 845-46 (N.D. Ill. 2013); *Stehrenberger v. J.P. Morgan Chase Bank, N.A.*, 2012 WL 5389682, at *1-*2 (S.D. Ohio Nov. 2, 2012); *Jones v. J.P.*

Morgan Chase Bank, N.A., 2012 WL 4815468, at *1 (N.D. Cal. Oct. 9, 2012) (relying on the broad language in Section 3.1 of the Purchase & Assumption Agreement to reject as meritless the borrower's argument that Chase did not own the note and deed of trust because the P & A Agreement did not explicitly list them as purchased assets); *Beka Realty, LLC v. J.P. Morgan Chase Bank, N.A.*, 2013 WL 5629590, at *4 (N.Y. Sup. Ct. Sept. 25, 2013) ("it has been specifically held that there is no requirement that the FDIC as receiver, endorse or assign [a specific] note and mortgage" to Chase for Chase to be entitled to enforce them (internal quotation omitted)) (citing cases); *see also Demelo v. U.S. Bank Nat'l Ass'n*, 727 F.3d 117, 125 (1st Cir. 2013) (rejecting variation of specific-assignment argument on federal Supremacy Clause grounds); *Robinson v. Fed. Nat'l Mortg. Ass'n*, 2014 WL 258644, at *11-12 (D. Minn. Jan. 23, 2014).

The dissenting opinion to the denial of *en banc* reconsideration noted that requiring specific listing of each asset transferred in the PAA would significantly disrupt the operation of the FDIC in fulfilling its statutory function as receiver for failed banks. The FDIC requires the ability to promptly and certainly transfer a failed bank's assets to another institution with no interruption in service, and minimal disruption for customers. Thus, the decision of the Nevada Supreme Court, if left undisturbed, is potential fodder for arguments that would greatly impair the FDIC's ability to perform its functions. Borrowers could attempt to use this decision as a means to avoid

paying their just debts. Junior lienholders, like R&S Lenders, could likewise seek *en masse* to extinguish the senior obligations ahead of them. If assignees and purchasers of assets from the FDIC have to face the potential of borrowers and competing interest holders being able to extinguish their assets, the ability of the FDIC to find a market for the assets it needs to transfer will likely be severely impacted.

The dissenting justices further noted that the decision upheld by the majority would create uncertainty with Nevada business transactions because they would be at odds with commercial law elsewhere. The recent economic crisis has highlighted how the FDIC can be a stabilizing force offering reassurance to depositors that their assets are in a safe institution. The uncertainty inherent in the trial court's decision would have the opposite effect. Such uncertainty would undeniably act as a destabilizing force in difficult economic times. It is vitally important that an institution purchasing assets from the FDIC can be certain that their ownership of those assets will not be questioned. BB&T respectfully requests this Court overturn the decisions from the Nevada Supreme Court and from the trial court in order to ensure that the FDIC's ability to carry out its statutory function not be disturbed.



CONCLUSION

The trial court decision, as upheld by the Nevada Supreme Court, is severely flawed. One of the most fundamental legal principles under the U.S. Constitution is that parties will not be denied property rights without first receiving due process of law, and one of the most fundamental components of due process is notice and an opportunity to be heard. The trial court in this case extinguished the security interest claimed by BB&T and knowingly did so after finding that the owner of that interest (putatively, the FDIC) was not before the court. Thus, the trial court completely disregarded due process in moving forward with a trial after making that finding. Fortunately, this Court has the opportunity to correct this Constitutional violation by granting this petition. Petitioner, Branch Banking & Trust Company respectfully requests this Court grant its petition.

Further, as noted above, the trial court adopted an interpretation of the PAA that substantially departs from other federal decisions regarding both the identical, and other comparable, Purchase & Assumption Agreements used by the FDIC. The FDIC, by its very nature, becomes active in times of crisis and acts as an important stabilizing force in times of financial trouble. One of the FDIC's key tasks in times like these is to transfer assets from a failed institution to a healthy one, and in order for the FDIC to perform this task effectively it often needs to move quickly and efficiently. The broad language used by the FDIC

in Purchase & Assumption Agreements is an important tool in performing this function, and it is necessary for this Court to grant certiorari to correct the improper interpretation of the PAA rendered by the trial court and upheld by the Nevada Supreme Court.

Respectfully submitted,

GLENN F. MEIER, ESQ.
Counsel of Record
RACHEL DONN, ESQ.
MEIER & FINE, LLC
2300 W. Sahara Ave., Suite 1150
Las Vegas, NV 89102
(702) 673-1000
gmeier@nvbusinesslawyers.com

IN THE SUPREME COURT
OF THE STATE OF NEVADA

R & S ST. ROSE LENDERS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant/Cross-Respondent, vs. BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN INTEREST TO FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF COLONIAL BANK, N.A., Respondent/Cross-Appellant, and COMMONWEALTH LAND TITLE INSURANCE COMPANY, AS ASSIGNEE OF ROBERT E. MURDOCK, ESQ.; AND ECKLEY M. KEACH, ESQ., Respondent.	No. 56640

ORDER OF AFFIRMANCE

(Filed May 31, 2013)

This is an appeal and cross-appeal from a final district court judgment and order determining lien priority in consolidated contract actions. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

In August of 2005, R. Phillip Nourafchan and Saiid Forouzan Rad formed R&S St. Rose Lenders, LLC (R&S Lenders) to fund the purchase of undeveloped real property on the corner of St. Rose Parkway and Spencer Road in Henderson, Nevada (the Property). R&S St. Rose LLC (St. Rose), also managed by Nourafchan and Rad, was formed to enter into a land-banking arrangement with developer Centex Homes. Under the arrangement, St. Rose would purchase the Property for $45 million and hold it for a year. During that time, Centex could exercise its purchase option and buy the Property from St. Rose for $54 million.

St. Rose's acquisition money came from three sources: (1) a promissory note payable to Colonial Bank, N.A. (Colonial) in the amount of $29 million secured by a first-priority deed of trust against the Property (the Purchase Loan); (2) nonrefundable deposits in the amount of $8 million from Centex; and (3) a promissory note payable to R&S Lenders in the amount of $12 million secured by a deed of trust against the Property that was recorded after the Colonial Bank deed of trust (R&S Lenders Deed of Trust).

Rad and Nourafchan obtained the financial backing for R&S Lenders by soliciting funds from private investors, including Eckley M. Keach and Robert E. Murdock. Keach agreed to loan $500,000, and Murdock agreed to loan $100,000. Keach and Murdock obtained individual promissory notes to secure their loans. Both promissory notes required St. Rose to pay monthly interest on the principal

amounts at a rate of 12.5% per annum, due on the first day of each month, and contained late-fee provisions. However, these notes were not secured by a beneficial interest in a deed of trust.[1]

When Centex decided not to exercise its purchase option, St. Rose needed additional money to hold and develop the Property. In 2007, St. Rose obtained an additional loan from Colonial not exceeding $43 million (the Construction Loan). The Construction Loan was intended to pay off the Purchase Loan and provide funding for improvements on the Property. A deed of trust in favor of Colonial secured the Construction Loan (the 2007 Deed of Trust). As part of the Construction Loan transaction, Nevada Title Company issued Colonial a title insurance policy for $44 million. This title policy insured that the 2007 Deed of Trust was in first priority position against the Property and that the R&S Lenders Deed of Trust was removed as an exception to marketable title. Funds from the Construction Loan were used to pay off the amount due under the Purchase Loan. However, Nevada Title did not obtain a release, reconveyance, or a subordination agreement for the R&S Lenders Deed of Trust.

When St. Rose defaulted on the Construction Loan and stopped making payments to R&S Lenders,

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[1] Keach and Murdock subsequently assigned their judgment against R&S Lenders to respondent Commonwealth Title Insurance Company.

Colonial and R&S Lenders recorded notices of default. Both foreclosure proceedings were enjoined pending the outcome of this dispute between R&S Lenders and Colonial regarding the priority of the deeds of trust. During the litigation, the Alabama State Banking Department closed Colonial and named the Federal Deposit Insurance Corporation (FDIC) as receiver. The same day, Branch Banking and Trust (BB&T) and the FDIC entered into a "Purchase and Assumption Agreement, Whole Bank All Deposits" (the PAA) to transfer Colonial's assets to BB&T.

R&S Lenders appeals from a district court order granting summary judgment in favor of Murdock and Keach on their claims for breach of the promissory notes. R&S Lenders alleges that the district court erred when it calculated the interest due under Murdock and Keach's promissory notes. BB&T appeals the district court's determination that the R&S Lenders Deed of Trust had priority over the 2007 Deed of Trust because BB&T did not prove that it received a valid assignment of the Construction Loan from the FDIC. BB&T alleges that the district court improperly analyzed its ownership of the Construction Loan.

The district court did not err in its interest calculations on Murdock and Keach's promissory notes

We review an order granting a motion for summary judgment de novo. *Wood v. Safeway, Inc.,* 121

Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Prejudgment interest awards are reviewed for error. *Schiff v. Winchell,* 126 Nev. ___, ___, 237 P.3d 99, 100 (2010).

On appeal, R&S Lenders challenges the district court's calculation of interest in its order granting Murdock and Keach's motion for summary judgment. Specifically, R&S Lenders argues that allowing a 5% monthly late fee to accrue on the total amount owed after the maturity date was not provided for in the notes and is contrary to law. R&S Lenders also argues that the imposition of the 25% default rate on the entire prejudgment amount owed to Murdock and Keach is improper compound interest.

We conclude that the district court did not err when it determined that the calculations attached to Murdock and Keach's motion for summary judgment accurately set forth the amount owed by R&S Lenders under the promissory notes. The plain language of the promissory notes allows a 5% monthly charge as liquidated damages in two amounts: first, on delinquent monthly interest payments, and second, on the entire amount due under the promissory notes if not paid by the maturity date. Further, we conclude that the district court's provision for a 25% default rate does not equate with ordering compound interest because the interest is not being added back into the principal. *See* 44B Am. Jur. 3d *Interest and Usury* § 54 (2007) (compound interest occurs when "accrued interest is added periodically to the principal, and interest is then computed upon the new principal

thus formed," and is not the mere "allowance of interest on overdue installments of interest").

The district court's conclusion that BB&T did not prove ownership of the loan was supported by substantial evidence

On cross-appeal, BB&T challenges the district court's rulings relating to its claims against St. Rose for failure to pay under the Construction Loan and the respective priorities of the 2007 Deed of Trust and the R&S Lenders Deed of Trust. Specifically, BB&T argues that the district court erred in determining that it lacked standing to assert the claims it raised in its complaint. BB&T further contends that the district court should not have concluded that the R&S Lenders Deed of Trust had priority over the 2007 Deed of Trust. R&S Lenders responds that the district court properly granted its NRCP 52(c) motion because BB&T failed to prove that it owned the Construction Loan, which was an implied element of its claim.

We will not set aside a district court's findings of fact and conclusions of law unless clearly erroneous. *Sheehan & Sheehan v. Nelson Malley & Co.,* 121 Nev. 481, 486, 117 P.3d 219, 223 (2005). Generally, a merger transfers all assets and liabilities, while in an asset purchase, assets and liabilities are not assumed unless otherwise specified. *See Vill. Builders 96, L.P. v. U.S. Labs., Inc.,* 121 Nev. 261, 268, 112 P.3d 1082, 1087 (2005); *Caires v. JP Morgan Chase Bank,* 745

F. Supp. 2d 40, 48-49 (D. Conn. 2010) ("the FDIC [has the] ability to designate specific assets and liabilities for purchase and assumption . . . [and] a Court should look to the purchase and assumption agreement governing the transfer of assets between the FDIC and a subsequent purchaser of assets of a failed bank to determine which assets and corresponding liabilities are being assumed").

The PAA was an asset purchase and therefore the district court looked to its language in order to determine which assets and corresponding liabilities were transferred to BB&T. However, due to the omission of the schedules of assets, the district court found that PAA did not transfer the Construction Loan to BB&T. We agree, and therefore conclude that the district court's decision to grant R&S Lenders' NRCP 52(c) motion after BB&T failed to carry its evidentiary burden to prove its ownership of the Construction Loan was not clearly erroneous.[2]

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[2] BB&T urges us to adopt the reasoning in *Branch Banking & Trust Co. v. Navarre 33, Inc.,* No. 3:10CV10/MCR/EMT, 2012 WL 2377851 (N.D. Fla. May 21, 2012), but we conclude the reasoning of that case is unpersuasive. Although *Navarre* involved the same PAA between the FDIC and BB&T, the case concerned a breach of contract relating to a promissory note. *Id.* at *1. The Federal District Court for the Northern District of Florida concluded that the no genuine issues of material fact existed regarding whether the PAA excluded the promissory note at issue. *Id.* at *5-6. Therefore, not only did *Navarre* deal with a different procedural posture, it also involved the negotiation of a promissory note, not the assignment of a deed of trust.

Further, we conclude that the district court's decision to exclude two documents relating to BB&T's interest in the Construction Loan was not an abuse of discretion because the documents were not properly produced in accordance with the disclosure requirements of NRCP 16.1(a)(1) or NRCP 26(3)(a). *See M.C. Multi-Family Dev. v. Crestdale Assocs.,* 124 Nev. 901, 913, 193 P.3d 536, 544 (2008) (we review a district court's decision to deny admission of evidence for abuse of discretion).

We have considered the parties' remaining arguments and conclude they are without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

/s/ Gibbons, J.
Gibbons

/s/ Douglas, J.
Douglas

/s/ Saitta, J.
Saitta

cc: Elizabeth Goff Gonzalez, District Court Judge
Larry J. Cohen, Settlement Judge
David J. Merrill, P.C.
Early Sullivan Wright Gizer & McRae, LLP
Gerrard Cox & Larsen
Meier & Fine, LLC
Eighth District Court Clerk

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT E. MURDOCK and ECKLEY M. KEACH, Plaintiffs, v. SAIID FOROUZAN RAD, an individual; R. PHILLIP NOURAFCHAN, an individual; FOROUZAN, INC., a Nevada corporation; RPN LLC, a Nevada limited liability company; R & S ST. ROSE LLC, a Nevada limited liability company; R & S ST. ROSE LENDERS, LLC a Nevada limited liability company; COLONIAL BANCGROUP INC.; R & S INVESTMENT GROUP LLC, a Nevada limited liability company; and DOES I through X, inclusive, Defendants.	Case No.: A574852 Dept. No.: XI (Consolidated with 09-A-594512-C) **Hearing Dates: January 8, 11, 12 & 15, 2010 March 29-April 2, 2010 and April 8, 2010**
AND ALL RELATED CLAIMS AND ACTIONS	

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

(Filed Jun. 23, 2013)

This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez on January 8, 2010, and continuing day to day, based upon the availability of the Court, witnesses, and Counsel, until its completion on April 8, 2010[2] in these consolidated proceedings; pertaining to priority and all related issues intertwined with the priority of liens found upon the real property at issue; Cross-Complainant Branch Banking and Trust Company, as successor in interest to Federal Deposit insurance Corporation, as receiver of Colonial Bank N.A. ("BB&T" or "Colonial"), having been represented by

[1] The Court has delayed issuing this Order due to BB&T's filing of a Petition for Involuntary bankruptcy against R & S St. Rose, LLC on May 13, 2010 in case number Case 10-1 8827 pending a motion for stay before this Court by BB&T. Although the Court on May 27, 2010, requested BB&T file a motion to stay if they intended to take the position that this Court should stay these proceedings, no motion for stay has been received. The Nevada Supreme Court has ruled that the bankruptcy automatic stay does not apply to nondebtor defendants. *Edwards v. Ghandour*, 123 Nev. 105, 159 P.3d 1086 (2007). Accordingly the Court enters this Order. It is not the intention of this Court to violate the automatic stay and any application of this Order will not be effective against the Debtor in Bankruptcy until the stay is lifted or the Petition dismissed.

[2] It should be noted that counsel originally indicated the hearing would be a one week trial. This estimate was not accurate and contributed to the non-sequential days required for completion.

and through its attorneys of record, GERRARD, COX & LARSEN; Defendant R & S ST. ROSE LENDERS, LLC ("R&S Lenders"), having been represented by and through its attorneys of record, DAVID J. MERRILL, P.C.; Defendant R & S ST. ROSE, LLC ("R&S"), having been represented by and through its attorneys of record, BAILUS, COOK & KELESIS, LTD.; Defendants SAIID FOROUZAN RAD ("Rad"), R. PHILLIP NOURAFCHAN ("Nourafchan"), FOROUZAN, INC. ("Forouzan), RPN, LLC ("RPN"), and R & S INVESTMENT GROUP, LLC ("R&S Investment"), having been represented by and through their attorneys of record, SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY & THOMPSON; Plaintiffs ROBERT E. MURDOCK, ESQ. ("Murdock") and ECKLEY M. KEACH, ESQ. ("Keach") having represented themselves in proper person; the Court having read and considered all pleadings and papers on file in the above-captioned case, including all other claims; having reviewed the documents admitted into evidence during the trial and briefs and points and authorities filed by the parties; and having heard and carefully considered the testimony of the witnesses called to testify; the Court with the intention of resolving evidentiary issues pertaining to priority of liens found upon the real property at issue hereby enters the following facts and states the following conclusions of law:

INTRODUCTION

This action was initiated on November 3, 2008 when Plaintiffs Murdock and Keach filed a Complaint against Defendants, Rad, Nourafchan, Forouzan, RPN, R&S, and R&S Lenders. On April 3, 2009, Plaintiffs filed a Second Amended Complaint adding claims against Colonial Bancgroup, LLC, and R&S Investment.

Thereafter, on July 1, 2009, Colonial Bank, N.A. ("Colonial Bank") filed Case No. 09-A-594512-C in which Colonial Bank alleged that its July 31, 2007 Deed of Trust relating to the $43,980,000 construction loan (sometimes "Construction Loan" or "2007 Colonial Bank Deed of Trust") had priority over the September 16, 2005 St. Rose Lenders Deed of Trust relating to its $12,000,000 loan. An Amended Complaint was filed by Branch Banking and Trust ("BB&T") in place of Colonial Bank in which BB&T alleged it was successor in interest to the FDIC as receiver for Colonial Bank. BB&T asserted theories of contractual subrogation, equitable subrogation, replacement, equitable/promissory estoppel, unjust enrichment, misrepresentation and civil conspiracy to seek priority of the 2007 Colonial Bank Deed of Trust over the 2005 St. Rose Lenders Deed of Trust, St. Rose Lenders filed a Counterclaim on October 27, 2009 seeking a declaration that the 2005 St. Rose Lenders Deed of Trust has priority over the 2007 Colonial Bank Deed of Trust. All actions were consolidated on October 22, 2009.

Both St. Rose Lenders and BB&T sought injunctive relief to prevent the other from moving forward with a foreclosure on the property pending a determination of priority of the deeds of trust. The Court granted a mutual Temporary Restraining Order preventing either party from moving forward with foreclosure until the issue of priority was resolved. With the consent of the parties, the Court consolidated the Preliminary Injunction Hearing with a trial on the merits regarding BB&T's claims for relief for contractual subrogation, equitable subrogation, replacement, equitable/promissory estoppel, and unjust enrichment. The parties also consented to an extension of the Temporary Restraining Order until the conclusion of the trial and evidentiary hearing.

The trial commenced on January 8, 2010 with the initiation of BB&T's case in chief. The trial continued over the ensuing four (4) months for a total of ten days[3] until April 14, 2010 when the Court granted a Rule 52 motion brought by Plaintiffs Murdock and Keach and Defendants Rad, Nourafchan, Forouzan, RPN, St. Rose Lenders, and R&S Investment (sometimes "moving parties").

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[3] On March 30, 2010, BB&T disclosed that its last witness Brad Burns, formerly of Centex, was not available to testify until April 8, 2010. The Court requested that Plaintiff rest with the exception of that testimony on March 30, 2010. As a result, the motions pursuant to Rule 52 were made at that time. BB&T's last witness Brad Burns, formerly of Centex, testified on April 8, 2010 completing BB&T's presentation of evidence.

The primary issue raised in the Rule 52 motion was whether BB&T had met its evidentiary burden of proof to demonstrate it received an assignment of Colonial Bank's interest in the 2007 Colonial Bank Deed of Trust. Over objection, the Court admitted into evidence Exhibit 183, a Purchase and Assumption Agreement entered into on August 14, 2009 between the FDIC and BB&T which purported to sell assets of Colonial Bank to BB&T. The Court found that there was no competent, admissible evidence offered by BB&T to establish whether the loan, note and deed of trust at issue were excluded pursuant to Sections 3.5 and/or 3.6 or purchased by BB&T pursuant to Section 3.1 of Exhibit 183.

As the finder of fact, the Court found that the Purchase and Assumption Agreement did not clearly transfer the loan, note and deed of trust at issue and called into question BB&T's ability to assert its claims of priority. Specifically, the Court stated:

> I've admitted Exhibit 183. I think Exhibit 183, if it included some reference to this particular asset or a schedule that had excluded assets that didn't include this asset, might comply with NRS 111.235, which would then put your client in a position where it might have some remedy. Without those kinds of things I think we have a potential standing issue, as Mr. Keach has framed it, or you know, I guess that's the best way, or successor in – a true successor in interest problem.

(Transcript of hearing Day 6, March 30, 2010, page 56-57, lines 24-7.) The Court then asked BB&T to return the following day with documentary evidence in addition to Exhibit 183 to alleviate the Court's concern as to BB&T's ability to assert its claims of contractual subrogation and replacement.

Upon returning to Court the following day, BB&T argued that standing was not one of the issues that the Court identified in its November 23, 2009 minute order to be advanced as part of the expedited hearing on the priority issues. Nevertheless, BB&T reported to the Court that after speaking with the FDIC it found a bulk assignment of security instruments and loan documents recorded on November 3, 2009 in Clark County, which was read into the record pursuant to NRS 111.155 and offered as an exhibit. BB&T also offered into evidence an executed although unrecorded assignment, counsel had prepared with respect to the loan at issue. The Court denied admission of both the bulk assignment as well as the unrecorded assignment into evidence on the basis that neither had been previously disclosed.

After the Court denied admission of the above assignments, BB&T moved the Court to reopen evidence. The Court denied BB&T's request. BB&T then moved the Court to substitute in the real party in interest, Colonial Bank and/or the FDIC as receiver of Colonial Bank under Rule 25(c), Rule (21), or Rule 17(a). After briefing on substitution/joinder of the real party in interest, the Court denied BB&T's motion, stating:

> Exhibit 183 is internally inconsistent and is incomplete. It prevents the Court from making a finding that an assignment has occurred of the loan that is at issue. The insufficient and conflicting evidence regarding this assignment is what led me to the position that we're currently in, the ruling that I began to make on the 41(b) motions at the time we had this motion presented. For that reason and given the particular procedural posture of this case, I'm going to deny the request for substitution of the real party in interest.

(Transcript of hearing Day 9, April 13, 2010, page 25, lines 16-25.)

Counsel for BB&T conceded that if Exhibit 183, the Purchase and Assumption Agreement, was not sufficient evidence, on its face, to establish that BB&T was entitled to priority on the note and deed of trust, then all of its claims must fail:

> So, again, if it's the position of the Court that Exhibit 183 does not effect an assignment of that loan, and that's what you said yesterday, then I don't know why we're even having these discussions about any of the other issues in the case. Because if we don't own the loan, we have no rights to make any of these arguments, equitable subrogation, we don't have the right –
>
> THE COURT: So while you don't agree that I'm right, but you recognize that if that is my ruling and I'm going to be consistent,

that I have to do the same thing with contractual subrogation.

MR. GERRARD: And replacement and equitable subrogation; right?

THE COURT: I'm just – if you want to skip ahead – I'm just giving you the opportunity to make –

MR. GERRARD: I don't know how it can come out any other way. If my –

THE COURT: – any other position to me known so I have the opportunity to consider anything else that you think might cause those particular claims to be treated differently given my ruling regarding the effect, the evidentiary effect of Exhibit 183.

MR. GERRARD: Well, again, Your Honor – you know, we went over this the other day, but let's be clear about this. If Exhibit 183 does not effect an assignment, if you can't find that that effects an assignment of the loan at issue in this case to BB&T, then there's not one more thing for us to talk about.

THE COURT: Okay.

MR. GERRARD: Because the minute that you rule that this – that you cannot find that this document effected an assignment to my client, then we don't have the right, we have no standing to make the equitable subrogation claim, to make the –

> THE COURT: It's not a standing issue, Mr. Gerrard.

(Transcript of hearing Day 10, April 14, 2010, page 25, lines 9-25, page 26, lines 1-18.)

Counsel for BB&T continued:

> "And I told Your Honor yesterday and I told you on the 30th and I told you on the 31st that this is the only document that exists pursuant to which any rights to this loan were transferred. If this agreement doesn't transfer it, then nothing else has any legal effect, because this is the – this is the operative document"

(Transcript of hearing Day 10, April 14, 2010, page 27, lines 7-12.)

Although BB&T repeatedly attempted to couch the issue as one of standing, it is not a standing issue. Rather, the defect which prompts the dismissal of BB&T's claims is evidentiary. BB&T failed to meets its burden of proof to establish that the Colonial Bank loan, note and deed of trust at issue in this case were ever assigned to BB&T. The Court has given BB&T ample opportunity to submit proper admissible evidence that the Colonial Bank loan, note and deed of trust at issue in this case were one of the assets acquired by BB&T when it purchased some of the Colonial Bank assets. BB&T instead relied upon the language of the Purchase and Assumption Agreement, and no other admissible evidence, documentary or testimonial. The Court hereby finds that Exhibit

183, the Purchase and Assumption Agreement, was not sufficient evidence, on its face, to establish that BB&T was assigned the 2007 Colonial Bank Deed of Trust.

Based upon the testimony and documentary evidence presented during the hearing and for good cause appearing, pursuant to Rules 50 and 52, the Court finds, concludes, orders, adjudges and decrees as follows:

FINDINGS OF FACT

1. R&S was formed in August 2005 to land-bank thirty-eight acres of real property located at St. Rose Parkway and Spencer Road in Henderson, Nevada (the "Property") for Centex Homes ("Centex").

2. St. Rose Lenders was formed for the purpose of borrowing funds from individual lenders and then loaning those same funds to R&S and securing the loans with a deed of trust on the Property.

3. On August 26, 2005, R&S purchased the Property for $45,131,414.11 with the intention of flipping it to Centex Homes a year later.

4. Centex Homes acquired an option to purchase the Property for $54,102,000.00 from R&S by making a series of non-refundable deposits to R&S that totaled approximately $8,110,700.00.

5. To purchase the Property, R&S obtained funds from three different sources: (1) Colonial Bank;

(2) Centex non-refundable deposits; and (3) St. Rose Lenders, who obtained the funds from private lenders, including the plaintiffs, Murdock and Keach.

6. R&S applied $8,100,000 from the non-refundable earnest money deposits from Centex towards the purchase price for the Property.

7. R&S also borrowed $12,300,000 from St. Rose Lenders.

8. R&S obtained funds from Colonial Bank to finance the purchase of the Property: first, R&S obtained a $29,350,250.00 loan from Colonial (the "First Colonial Loan");

9. R&S and R&S Lenders are each comprised of the same two members and the same two managers, those being Forouzan and RPN. The owner and/or president of Forouzan is Rad. The owner and/or manager of RPN is Nourafchan.

10. Rad and Nourafchan (individually and in their representative capacities) were/are the decision-makers and at all times herein they owned and/or controlled Forouzan, RPN, R&S, and R&S Lenders, respectively.

11. In connection with the First Colonial Loan, Rad and Nourafchan (individually, and in their representative capacities) signed a promissory note in favor of Colonial for $29,305,250 (the "First Colonial Note") as well as a first position deed of trust in that amount that recorded on August 26, 2005 as Document No. 05282 in Book 20050826 of the Official

Records, Clark County, Nevada (the "First Colonial DOT") all of which are dated August 16, 2005.

12. The loan was for a period of twelve months with an option to extend the loan for an additional six months.

13. Prior to the First Colonial Loan, Rad and Nourafchan, through various entities they owned and controlled, had taken out eleven (11) different land loans from Colonial between 2001 and 2005. Each and every one of the eleven previous land loans, as well as the First Colonial Loan, had been secured by a first position deed of trust as collateral. Colonial did not make land loans unless secured by a first priority deed of trust. This was confirmed with testimony of Richard Yach ("Yach"), Marty Singer ("Singer") and Stephen Novacek ("Novacek").

14. In these prior transactions, Colonial informed Rad and Nourafchan[4] that Colonial required a first priority deed of trust as collateral on all loans secured by land. In addition to Colonial's first deed of trust requirement, Rad and Nourafchan had also

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[4] Rad testified that Colonial Bank had told him the bank required a first deed of trust on all land loans. *See* Transcript of Proceedings, Day 4 (Testimony of Rad) at pages 15:2-4 (Q. "They told you that that was a requirement on land loans, that they have a first deed of trust, didn't they?" A. "Yes, sir."); 28:18-21 (Q. "And at the time that loan was made you understood that the bank had a requirement that it would only loan money if it's secured by a first deed of trust; correct?" A. "Yes, sir. They mentioned it.")

been told by Colonial, I and understood, that Colonial used a loan to value ratio to determine the amount Colonial was willing to lend on a land loan. Rad and Nourafchan understood that the loan to value ratio was determined by comparing all debt, including the proposed loan, against the appraised fair market value of the land being financed ("loan to value ratio")[5], and that using this loan to value ratio Colonial would lend a maximum of 65% for unimproved land and 75% for land to be improved using the loan proceeds.

15. In each of the eleven loans obtained by Rad and Nourafchan from Colonial Bank between 2001 and 2005, Colonial Bank (i) required a first priority deed of trust, and (ii) would only allow total debt against the property of 65% of the fair market value of the property being financed.

16. In these prior transactions, Colonial Bank was aware that Rad and Nourafchan would bring in other private investors to participate in the transactions.

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[5] *See* Transcript of Proceedings, Day 4 (Testimony of Rad) at pages 72:22 -73:1(Q. "Well, you've already testified four separate times in your testimony that the way that you arrive at the loan-to-value ratio was to add up all the debt against the property and compare it to the value of the property, haven't you?" A. "That's correct". . . . .Q. "That's what I said. You have to add up all the debt against the property and compare it against the appraised value of the property to arrive at your loan-to-value ratio; correct?" A. "Yes, sir.")

17. Nearly one month later and without the knowledge of Colonial, Rad and Nourafchan (individually, and in their representative capacities) signed a promissory note in favor of R&S Lenders for $12,000,000.00 (the "R&S Lenders Note") as well as a second position deed of trust in that amount that recorded on September 16, 2006 as Document No. 02881 in Book 20050916 of the Official Records, Clark County, Nevada (the "R&S Lenders DOT").

18. At that time, the First Colonial DOT was in a first position on the Property and the R&S Lenders DOT was in a second position lien on the Property.

19. Rad, Nourafchan, and/or their agents raised the $12,000,000 that R&S Lenders loaned R&S to purchase the Property by soliciting private investors that included, among others, family members, friends, acquaintances, including Murdock and Keach (collectively referred to as "investors"). Each of the investors were told that they were investing in a second priority loan, subject to the First Colonial Loan.[6]

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[6] While each investor apparently received a promissory note in the amount that R&S Lenders borrowed, each investor did not receive an individual deed of trust securing their interest against the Property. The R&S Lenders DOT only names R&S Lenders as the secured party. Rad and/or Nourafchan believe that the R&S Lenders DOT is a "collective" deed of trust that secures all of the investors that contributed funds for a second trust deed.

20. In late August 2005 Murdock loaned Rad and Nourafchan $100,000.00 towards the purchase of the Property for which he received a note titled "Promissory Note Secured by Deed of Trust" dated September 1, 2005 executed by R&S Lenders.

21. In late August 2005 Keach loaned Rad and Nourafchan $500,000.00 toward the purchase of the Property for which he received a Promissory Note Secured by Deed of Trust dated September 1, 2005 executed by R&S Lenders.

22. The Promissory Notes Secured by Deed of Trust were executed by R&S Lenders by its managers, Defendants Forouzan and RPN, by their managers, Defendants Rad and Nourafchan.

23. Neither Murdock nor Keach ever received evidence that their Promissory Notes were secured by a Deed of Trust.

24. According to Rad, Murdock and Keach's Notes for a total of $600,000 are within that $12,300,000 Deed of Trust.

25. St. Rose Lenders recorded the St. Rose Lenders Deed of Trust on September 16, 2005.

26. In August of 2006, Centex Homes unexpectedly walked away from its option to purchase the Property and forfeited its $8.1 million in non-refundable deposits to R&S.

27. On March 19, 2007, R&S St. Rose and Colonial Bank entered into a Modification to Deed of

Trust and Security Agreement and Fixture Filing with Assignment of Rents (the "Modification") and an Amendment to Promissory Note Secured by Deed of Trust (the "Amendment"), in which R&S and Colonial Bank agreed to extend the maturity date of the Note for a few months, until August 25, 2007.

28. R&S was able to avoid foreclosure of the First Colonial DOT by extending the maturity date of the First Colonial Note until August of 2007.[7]

29. Nevada Title handled the Modification closing transaction and required both R&S, as the owner, and St. Rose Lenders, as the beneficiary, to execute an agreement subordinating the St. Rose Lenders Deed of Trust.

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[7] Red and Nourafchan extended the maturity date by exercising a one-time six (6) month extension as set forth in the First Colonial Note. Colonial agreed to a second extension through a Modification executed by Rad and Nourafchan in March of 2007. It is important to note that while the Modification was executed in March of 2007, the Subordination Agreement Colonial required in connection with the Modification was not executed by Rad and Nourafchan until almost two months later in May of 2007. Rad and Nourafchan's execution of the Subordination Agreement post-closing of the Modification is consistent with Brenda Burns' testimony that in her past dealings with Rad and Nourafchan they would execute documents post-closing as needed. Specifically, their execution of the Subordination Agreement post-closing supports Ms. Burns' testimony that Rad and/or Nourafchan agreed to release the R&S Lenders DOT in connection with obtaining the construction loan.

30. On May 17, 2007, R&S and St. Rose Lenders executed a Subordination Agreement.

31. Nevada Title recorded both the Modification and the Subordination Agreement on June 4, 2007.

32. Prior to expiration of the extended maturity date for the Modification, Colonial Bank and R&S agreed to the terms of a new construction loan for the development of the Property ("Construction Loan").

33. By the Spring of 2007, it was apparent to Rad and Nourafchan that they would be unable to close a sale or refinance the Property prior to the August, 2007 maturity date of the First Colonial Loan.

34. In late May or early June of 2007, Rad and Nourafchan approached Colonial with a request for a new loan to be used to repay the First Colonial Loan and for additional development funding to improve the Property. Rad and Nourafchan believed that by selling improved lots rather than raw land, R&S could more easily sell the Property, repay the loans and make a return on their investment.

35. At the time, Yach, testified he knew Rad and Nourafchan were land investors and land speculators, not developers.

36. Yach also testified that if the 2005 loan had gone into default and the Construction Loan Agreement had not been entered into, it would likely have affected Colonial Bank's reserve requirements and its ability to extend further loans.

37. After considering Rad and Nourafchan's proposed plan to develop the Property, Yach, informed Rad and Nourafchan that Colonial's loan to value ratio for a construction land loan on the Property would be 75% by comparing all debt to the value of the Property. Red testified that he understood the total of all debt against the property could not exceed 75% of the Property's appraised value in order to obtain the new loan he was seeking from Colonial.[8] Since the R&S Lenders DOT was recorded debt against the Property, Rad and Nourafchan would not possess the 25% equity to qualify for the new construction loan unless the R&S Lenders DOT was released.[9]

38. On June 20, 2007, Singer sent the Loan Approval Request and a preliminary title report (which discloses the R&S Lenders DOT as exception 37) to Novacek, an outside attorney used by Colonial to draft loan documents. As the Loan Approval Request indicated that Colonial required a first position deed of trust on the Property as collateral for the new loan, Novacek prepared loan documents intended to create and secure a first position deed of trust on the Property.

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[8] *See* Transcript of Proceedings, Day 4 (Testimony of Rad) at pages 61:15-19, 73:20-24; 78:19-22.

[9] *See* Transcript of Proceedings, Day 4 (Testimony of Rad) at pages 77:24-78:22.

39. At Colonial's request, an appraisal of the Property was performed on or about June 25, 2007. At that time, the Property had an "as is" market value of $45,530,000 and a "upon completion of site improvements" bulk value of $58,640,000. Taking into consideration the appraised bulk value of $58,640,000 and based upon Colonial's 75% loan to value maximum and Colonial's understanding that the R&S Lenders DOT was to be released, the amount of the new loan was reduced from $47,740,000 to $43,980,000.

40. Cheryl Fricker, the Portfolio Manager of the Commercial Real Estate Department and assistant to Yach, prepared a Loan Commitment letter dated July 24, 2007, which indicated that the security for the loan is a "First deed of trust on the subject property generally located at Seven Hills and St. Rose Parkway."

41. Singer testified she sent the Loan Commitment letter to Rad and Nourafchan by facsimile transmission.

42. Rad and Nourafchan denied receiving the Loan Commitment letter.

43. Singer testified she did not keep a copy of the fax confirmation.

44. Both Yach and Singer testified they remembered seeing a copy of the Loan Commitment letter

signed by Rad and Nourafchan; however, Colonial could not locate the signed copy.[10]

45. Rad and Nourafchan denied signing the Loan Commitment letter.

46. At trial, although BB&T presented an unsigned Loan Commitment Letter dated July 24, 2007 which purports to indicate Rad and Nourafchan understood Colonial Bank wanted to have a First Deed of Trust on the property, there is no credible evidence to indicate the Loan Commitment Letter was seen or executed by Rad or Nourafchan.

47. Neither BB&T nor Colonial Bank produced a Loan Commitment Letter executed by Rad and/or Nourafchan.

48. While Singer testified that she saw a signed Loan Commitment Letter (a faxed copy) executed by Rad and Nourafchan, the Court finds the testimony to not be credible.

49. No credible evidence exists that the document was sent to Rad and/or Nourafchan.

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[10] Colonial's loan file is missing the signed copy of the Loan Commitment letter as well as a signed copy of the lender's escrow instructions signed by Nevada Title. Nevada Title's escrow file contains the latter and Brenda Burns acknowledges her receipt of the same. Not surprisingly, Rad and Nourafchan deny ever receiving the Loan Commitment letter that indicates Colonial required a first position deed of trust on the Property as collateral for the new $43,980,000 construction loan.

50. Yach and Singer testified that the Construction Loan documents governed the understanding of the parties involved in the transaction and therefore the Loan Commitment Letter was superseded by the Construction Loan Documents.

51. As a condition to the Construction Loan, Colonial Bank did not request that St. Rose Lenders reconvey or subordinate the St. Rose Lenders Deed of Trust or convert the same to equity.

52. The Construction Loan was for eighteen months with an option to extend the term for an additional six months.

53. The terms of the Construction Loan were evidenced by a Construction Loan Agreement, Promissory Note Secured by Deed of Trust, and the Colonial Bank Deed of Trust (collectively "Construction Loan Documents"), all of which are dated July 27, 2007.

54. Novacek prepared July 27, 2007 escrow instructions to Nevada Title that stated that Nevada Title could close the transaction when it could issue a title policy to the bank showing only certain exceptions and St. Rose Lenders' $12,300,000 Deed of Trust was not one of the permitted exceptions.

55. Colonial Bank's counsel testified he intended the escrow instructions to mean that the title company could not record and close the transaction if it could not issue a title policy subject to allowed exceptions only.

56. Novacek further testified that in order for Nevada Title to comply with his escrow instructions, it had to issue a title policy without showing the St. Rose Lenders Deed of Trust as an exception.

57. Although Colonial Bank instructed Nevada Title Company that the title policy could only be subject to certain exceptions, how that was accomplished was left to the discretion of the title company.

58. Colonial Bank relied on the title company to issue the title policy as instructed by Novacek.

59. As long as Colonial Bank was provided with a title policy that did not include the St. Rose Lenders Deed of Trust as an exception, Yach testified he did not care how it was accomplished.

60. Brenda Burns also agreed Colonial Bank did not specify how Nevada Title was supposed to accomplish or satisfy the requirements.

61. The witnesses confirmed that Nevada Title satisfied the title policy parameters required by Colonial Bank.

62. Nevada Title insured the deed of trust as instructed, without St. Rose Lenders' Deed of Trust as an exception.

63. Colonial Bank's attorney testified that the bank wanted a title insurance policy insuring the 2007 Colonial Bank Deed of Trust without showing the St. Rose Lenders Deed of Trust as an exception, and that is what it received.

64. On July 27, 2007, Colonial Bank and R&S entered into the Construction Loan.

65. On or about July 31, 2007, Colonial Bank closed the transaction in the approximate amount of $43,000,000 with the security of its Second Deed of Trust.

66. At the closing on July 31, 2007, the Construction Loan proceeds paid for the following: (1) a $439,800.00 loan fee to Colonial Bank; (2) the payoff of Colonial Bank's 2005 loan in the amount of $29,779,628.72; (3) a reconveyance fee of $45.00; (4) $3,000.00 for the appraisal; (5) $500.00 for an appraisal review fee; (6) $900.00 for an underwriting fee; and (7) $2,808,000.00 as an interest reserve.

67. The total encumbrance added to the Property at the time of closing was $33,031,873.72, nearly $4 million more in additional debt than agreed to by R&S and Colonial Bank in 2005.

68. By reason of its collection of additional funds in the nature of the loan fee, payoff of the 2005 loan, reconveyance fee, appraisal fee, underwriting fee and interest reserve sums, Colonial Bank was the recipient of and beneficiary of the majority of the additional debt.

69. St. Rose Lenders was not a party to the Construction Loan Documents. Moreover, St. Rose Lenders was not a guarantor.

70. The Construction Loan was personally guaranteed by both Rad and Nourafchan.

71. Colonial Bank never communicated to Rad, Nourafchan, R&S or St. Rose Lenders that it required a first priority deed of trust for the Construction Loan.

72. The Closing Instructions were never transmitted or communicated to Rad, Nourafchan, R&S or St. Rose Lenders.

73. Brenda Burns, the Nevada Title escrow officer who closed the loan transaction, never transmitted, communicated or discussed the Closing Instructions with Rad, Nourafchan, R&S or St. Rose Lenders.

74. At no time prior to the closing of the Construction Loan did Brenda Burns discuss with Rad, Nourafchan, R&S or St. Rose Lenders that reconveyance of the St. Rose Lenders Deed of Trust was a condition to closing of the loan transaction.

75. At no time prior to the closing of the Construction Loan did Colonial Bank discuss with Rad, Nourafchan, R&S or St. Rose Lenders that reconveyance of the St. Rose Lenders Deed of Trust was a condition to closing of the loan transaction.

76. Yach testified he did not recall telling Rad or Nourafchan that Colonial Bank required a First Deed of Trust as a condition to providing the Construction Loan.

77. Yach also testified Rad never told him the St. Rose Lenders Deed of Trust would be converted to

equity and neither Rad nor Nourafchan said that the St. Rose Lenders Deed of Trust would be released.

78. Brenda Burns testified she could not specifically remember what words either she or Rad used to allegedly discuss what was going to happen with the St. Rose Lenders Deed of Trust prior to closing the Construction Loan Agreement.

79. Rad testified that he was never told by anyone on behalf of Colonial Bank or Nevada Title that the St. Rose Lenders Deed of Trust would have to be reconveyed, subordinated or converted to equity.

80. There is no evidence that Colonial Bank or BB&T informed Nourafchan that the St. Rose Lenders Deed of Trust would have to be reconveyed, subordinated or converted to equity.

81. The Escrow Instructions were not given or shown to Rad, Nourafchan, R&S or St. Rose Lenders.

82. At the time of closing the Construction Loan, Nevada Title was an agent for Old Republic Title Insurance Company.

83. Neither Rad, Nourafchan, R&S, nor St. Rose Lenders ever represented or agreed to a reconveyance of the St. Rose Lenders' Deed of Trust.

84. The evidence demonstrates no agreement was reached for R&S or St. Rose Lenders to reconvey the St. Rose Lenders deed of trust.

85. Principals from St. Rose Lenders and R&S St. Rose testified that the entities did not agree, and

could not have agreed, to a reconveyance of the St. Rose Lenders Deed of Trust and there is no signed document indicating otherwise.

86. Colonial Bank did not condition its extension of the Construction Loan on its receipt of a first deed of trust.

87. Colonial Bank did not convey any intent to receive a first deed of trust to either R&S, St. Rose, Lenders, Rad, or Nourafchan.

88. Although loan documents for the 2005 loan and the modification stated Colonial Bank would have a first lien, the Construction Loan Agreement did not.

89. Colonial Bank did not negotiate the requirement for a first deed of trust in the Construction Loan Agreement, Deed of Trust or Promissory Note Secured by Deed of Trust.

90. Colonial Bank relied on the issuance of an ALTA lender's policy of title insurance in the amount of $43,980,000.00 insuring the Deed of Trust as a lien on the property, which did not show as an exception the $12,300,000.00 St. Rose Lenders Deed of Trust.

91. Colonial Bank received such a policy from Commonwealth Land Title Insurance Company on July 31, 2007 as Policy No. 562-Z093126.

92. The ALTA lender's policy of title insurance was purchased by R&S for the benefit of Colonial Bank.

93. R&S paid $35,184.00 for the policy of title insurance for the benefit of Colonial Bank.

94. Following closing, Colonial Bank did not request confirmation that a reconveyance had been obtained; it checked only to verify the title insurance policy did not include the St. Rose Lenders Deed of Trust as an exception.

95. Singer relied upon the title policy to insure the St. Rose Lenders Deed of Trust was not identified as an exception. Singer did nothing to determine whether Colonial Bank had a first position Deed of Trust.

96. Counsel for Colonial Bank did nothing to determine that Colonial Bank had a first Deed of Trust other than review the title insurance policy. He did not ask for copies of any reconveyance after closing because he relied on the title insurance policy.

97. When money was released to R&S for construction, the only thing Singer did to determine whether Colonial Bank was in a first position was read the title policy.

98. When funds were disbursed, Colonial Bank did not get an endorsement from the title company insuring the lien was still in position.

99. Yach testified he relied on the title policy to determine whether Colonial Bank was in first position.

100. Reconveyance of the St. Rose Lenders Deed of Trust was not a condition for closing the Construction Loan transaction.

101. If reconveyance of the St. Rose Lenders Deed of Trust had been a condition of the Construction Loan, it would have been stated as such in the loan documents.

102. If reconveyance had been a material term, Colonial Bank should have obtained a separate agreement from St. Rose Lenders prior to closing.

103. There is no proof of any executed agreement or consent by St. Rose Lenders to reconvey.

104. Nevada Title closed its Construction Loan file without a reconveyance from St. Rose Lenders.

105. Nevada Title never had anything from St. Rose Lenders in writing stating it would provide a reconveyance or release.

106. A July 9, 2008 email was the first written communication from Nevada Title with Rad regarding reconveyance of the St. Rose Lenders Deed of Trust when Nevada Title learned the St. Rose Lenders Deed of Trust was still a first Deed of Trust.

107. On July 9, 2008, Brenda Burns contacted Rad and asked Rad to reconvey the St. Rose Lenders Deed of Trust.

108. Rad refused to reconvey the St. Rose Lenders Deed of Trust.

109. Prior to that time, Brenda Burns testified she thought St. Rose Lenders would prepare a reconveyance of the St. Rose Lenders Deed of Trust because it was the beneficiary.

110. In July 2008, Nevada Title prepared a reconveyance even though it was not the beneficiary of the Deed of Trust.

111. Subordination was brought up for the first time in June or July 2009 when it was proposed by Nevada Title.

112. Subordination of St. Rose Lenders' Deed of Trust would have been inconsistent with Novacek's escrow instructions.

113. Novacek testified that Nevada Title assumed the risk by closing without a reconveyance.

114. Nevada Title assumed the risk of closing the Construction Loan transaction without a reconveyance from St. Rose Lenders.

115. The St. Rose Lenders Deed of Trust was never reconveyed or subordinated.

116. The St. Rose Lenders Deed of Trust, which was recorded on September 2005, has priority over Colonial Bank's 2007 Deed of Trust, which was recorded nearly two (2) years later in July 2007.

117. On September 5, 2008, Nevada Tide confirmed that St. Rose Lenders Deed of Trust had priority over Colonial Bank's 2007 Deed of Trust.

118. There was no showing by BB&T that because the managing officers of Forouzan and RPM, and the managing members of R&S and St Rose Lenders were the same, that they can be treated as the same entity.

119. A uniformity of owners or interest alone is insufficient to demonstrate that entities are anything other than valid, separate or independent corporate entities.

120. Colonial Bank and Nevada Title previously recognized that R&S and St. Rose, Lenders were distinct and separate entities in dealing with modification of the first Colonial Bank loan when St. Rose Lenders was required to agree to and execute the Subordination Agreement.

121. Since St. Rose Lenders, was not a party to either the 2007 Colonial Bank Deed of Trust or the Construction Loan Agreement, it is not required to subrogate its Deed of Trust

122. An agreement which prejudices lien holders or impairs their security requires their consent.

123. St. Rose Lenders did not consent to subrogate its Deed of Trust.

124. On September 22, 2008, Colonial Bank obtained a new appraisal of the Property. The "as is" value of the Property at that time was $37,860,000.00.

125. R&S was unable to complete the development of the Property and on April 28, 2009, Colonial Bank recorded a Notice of Default and Election to Sell.

126. Colonial Bank's Notice of Default and Election to Sell only indicated failure to pay under the terms of the promissory note as the reason for default.

127. In or about August 2009, the FDIC took over Colonial Bank as receiver.

128. An October 20, 2009 appraisal of the Property listed its value at $23,555,000.00 resulting in an over-leveraged amount of roughly $22,000,000.

129. The FDIC provided a Purchase and Assumption Agreement to BB&T on August 14, 2009.

130. BB&T's rights to assert claims against the Defendants would have to arise from the August 14, 2009 Purchase and Assumption Agreement

131. The Purchase and Assumption Agreement provides the following with respect to the purchase of Colonial Bank assets by BB&T:

> 3.1 Assets Purchased by Assuming Bank. With the exception of certain assets expressly excluded in Sections 3.5 and 3.6, the Assuming Bank hereby purchases from the Receiver, and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank, all right, title, and interest of the Receiver in and to all of the

> assets (real, personal and mixed, wherever located and however acquired) including all subsidiaries, joint ventures, partnerships, and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated, of the Failed Bank whether or not reflected on the books of the Failed Bank as of Bank Closing. Schedules 3.1 and 3.1a attached hereto and incorporated herein sets forth certain categories of Assets purchased hereunder. Such schedule is based upon the best information available to the Receiver and may be adjusted as provided in Article VIII. Assets are purchased hereunder by the Assuming Bank subject to all liabilities for indebtedness collateralized by Liens affecting such Assets to the extent provided in Section 2.1. . . .

132. Although the Purchase and Assumption Agreement states that there are schedules attached showing the assets purchased, BB&T indicated at the time of trial that no schedules had been prepared or existed.

133. The purchased Assets were sold in an "as is" condition:

> 3.3 Manner of Conveyance; Limited Warranty; Nonrecourse; Etc. THE CONVEYANCE OF ALL ASSETS, INCLUDING REAL AND PERSONAL PROPERTY INTERESTS, PURCHASED BY THE ASSUMING BANK UNDER THIS AGREEMENT SHALL BE MADE, AS NECESSARY, BY RECEIVER'S DEED OR RECEIVER'S BILL

> OF SALE, "AS IS", "WHERE IS", WITHOUT RECOURSE AND, EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED IN THIS AGREEMENT, WITHOUT ANY WARRANTIES WHATSOEVER WITH RESPECT TO SUCH ASSETS, EXPRESS OR IMPLIED, WITH RESPECT TO TITLE, ENFORCEABILITY, COLLECTIBILITY, DOCUMENTATION OR FREEDOM FROM LIENS OR ENCUMBRANCES (IN WHOLE OR IN PART), OR ANY OTHER MATTERS.

134. The Purchase and Assumption Agreement states that certain types of assets were excluded from the sale of assets to BB&T and the types of excluded assets are identified in Sections 3.5 and 3.6:

> 3.5. Assets Not Purchased by Assuming Bank. This Assuming Bank does not purchase, acquire or assume, or (except as otherwise expressly provided in this Agreement) obtain an option to purchase, acquire or assume under this Agreement:
>
> . . .
>
> (b) any interest, right, action, claim, or judgment against . . . (iv) any other Person whose action or inaction may be related any loss (exclusive of any loss resulting from such Person's failure to pay on a Loan made by the Failed Bank) incurred by the Failed Bank; provided, that for the purposes hereof, the acts, omissions or other events giving rise to any such claim shall have occurred on or before Bank Closing, regardless of when

any such claim is discovered and regardless of whether any such claim is made with respect to a financial institution bond, banker's blanket bond, or any other insurance policy of the Failed Bank in force as of Bank Closing.

. . .

3.6 Retention or Repurchase of Assets Essential to Receiver.

(a) The Receiver may refuse to sell to the Assuming Bank, or the Assuming Bank agrees, at the request of the receiver set forth in a written notice to the Assuming Bank, to assign, transfer, convey, and deliver to the Receiver all of the Assuming Bank's right, title and interest in and to, any Asset or by the Receiver in its discretion (together with all Credit Documents evidencing or pertaining thereto), which may include any Asset or asset that the Receiver determines to be:

. . .

(ii) 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;

135. The Purchase and Assumption Agreement does not indicate whether the 2007 Colonial Bank Deed of Trust, that was the subject of pending litigation involving allegations of fraud, was included as an excluded asset.

136. Based upon the fact that legal proceedings were pending which included allegations of fraud at the time the Purchase and Assumption Agreement was entered into, the 2007 Colonial Bank Deed of Trust may fall into the category of assets which may be excluded from the FDIC sale to BB&T as defined in Sections 3.5 and 3.6.

137. BB&T presented no witness who could competently testify about the Purchase and Assumption Agreement.

138. The Purchase and Assumption Agreement is internally inconsistent and incomplete, and prevents the Court from making a finding as to whether an assignment of the loan at issue has occurred.

139. At the time that BB&T entered into the Purchase and Assumption Agreement, substantial actual and constructive notice information regarding the disputed priority status of the 2007 Colonial Bank Deed of Trust existed: (1) the actions by both Colonial Bank and Murdock and Keach were pending, for which public information exists was already available; and (2) a check of the recorded records for the property would have indicated the first position R&S St. Rose Lenders' Deed of Trust.

140. "Person" is defined in the Assumption Agreement as any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof, excluding the Corporation.

141. At the time of the execution of the Purchase and Assumption Agreement, there were legal proceedings and claims pending in the Eighth Judicial District Court by both Colonial Bank and Murdock and Keach regarding the [sic]

142. The specific rights to "actions or claims" which were mentioned in Section 3.5(b) are absent from the listing of purchased assets.

143. BB&T has not shown that the claims or causes of action against the Defendants being pursued by BB&T belong to BB&T and it is the successor in interest with the ability to assert these claims against the Defendants.

144. Since BB&T has not proved that it owns the actions or claims asserted herein, it does not have the ability to assert the claims set forth in its Second Amended Complaint.

145. Any of the foregoing Findings of Fact which constitute Conclusions of Law shall be deemed as Conclusions of Law.

CONCLUSIONS OF LAW

The Court concludes as follows:

1. The Court has jurisdiction over the parties and venue is proper in this Court.

2. BB&T has failed to meet its burden of proof to establish that the Second Deed of Trust was transferred or assigned by the FDIC to BB&T.

3. BB&T is not entitled to relief on its claim for equitable subrogation since it has not demonstrated it is a successor in interest.

4. BB&T is not entitled to relief on its claim for contractual or conventional subrogation since it has not demonstrated it is a successor in interest.

5. BB&T is not entitled to relief on its claim for equitable replacement since it has not demonstrated it is a successor in interest.

6. NRS 111.320 recognizes the preference given to documents recorded earlier in time which possess superior rights over those that follow.

7. R & S St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust since BB&T has not demonstrated it is a successor in interest with the ability to assert these claims.

8. BB&T has not demonstrated that it has been assigned the interest in the 2007 Colonial Bank Deed of Trust at issue and therefore has not shown it has the ability to assert the claims presented in the Second Amended Complaint filed by Colonial Bank on October 7, 2009.

9. BB&T's ability to assert claims against the Defendants would have to arise from the rights it acquired as an asset purchaser pursuant to the August 14, 2009 Purchase and Assumption Agreement.

10. The Purchase and Assumption Agreement specifically excluded actions and claims against any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof, from the Colonial Bank assets purchased from the FDIC.

11. BB&T has not demonstrated that the claims or causes of action against the Defendants being pursued by BB&T herein belong to BB&T and it is the real party in interest with the ability to assert equitable claims against the Defendants.

12. NRS 111.205 states, "No estate or interest in lands, other than for leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared after December 2, 1861, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by the party's lawful agent thereunto authorized in writing."

13. NRS 111.235 states, "Every grant or assignment of any existing trust in lands, goods or things in action, unless the same shall be in writing, subscribed by the person making the same, or by his or her agent lawfully authorized, shall be void."

14. NRS 111.205 and/or NRS 111.235 apply to the purchase, transfer and assignment, if any, of the 2007 Colonial Bank Deed of Trust from the FDIC to BB&T.

15. BB&T was required to establish with competent, admissible evidence that the purchase, transfer and assignment, if any, of the 2007 Colonial Bank Deed of Trust from the FDIC to BB&T was in writing and signed by the FDIC.

16. BB&T failed to meet its burden of proof and presented no evidence, written, oral or otherwise, that the 2007 Colonial Bank Deed of Trust was assigned by the FDIC to BB&T in the Purchase and Assumption Agreement.

17. The Purchase and Assumption Agreement, Exhibit 183, does not comply with the requirements of either NRS 111.205 or NRS 111.235 as to the 2007 Colonial Bank Deed of Trust.

18. NRS 111.320 recognizes the preference given to documents recorded earlier in time which possess superior rights over those that follow.

19. A party must invoke equity to obtain relief from the established order dictated by a recording system.

20. Recording statutes provide 'constructive notice' of the existence of an outstanding interest in land, thereby putting a prospective purchaser on notice that he may not be getting all he expected.

21. Constructive notice is that which is imparted to a person upon strictly legal inference of matters which he necessarily ought to know, or which, by the exercise of ordinary diligence, he might know.

22. Colonial Bank did not have a reasonable expectation that it would receive a reconveyance of the St. Rose Lenders Deed of Trust following the closing of the Construction Loan transaction only that it would receive a policy of title insurance, which it did receive.

23. Nevada Title insured the 2007 Colonial Bank Deed of Trust as instructed, without St. Rose Lenders' Deed of Trust as an exception.

24. Reconveyance of the St. Rose Lenders Deed of Trust was not a condition for closing the Construction Loan transaction.

25. If reconveyance of the St. Rose Lenders Deed of Trust had been a condition of the Construction Loan, it would have been stated as such in the loan documents.

26. If reconveyance had been a material term, Colonial Bank would have obtained a separate agreement from St. Rose Lenders prior to closing.

27. There is no proof of any executed agreement or consent by St. Rose Lenders to reconvey.

28. The Court will grant the declaratory relief requested in St. Rose Lenders' First Cause of Action.

29. St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust.

30. The Mutual Temporary Restraining Orders issued on November 23, 2009 shall be dissolved and

St. Rose Lenders may proceed with its foreclosure sale of the Property.

31. If any conclusions of law are properly findings of fact, they shall be treated as if appropriately identified and designated.

DATED this 18th day of June, 2010.

/s/ Elizabeth Gonzalez
DISTRICT COURT JUDGE

Certificate of Service

I hereby certify that on or about the date filed, this document was copied through e-mail, or a copy of this Order was placed in the attorney's folder in the Clerk's Office or mailed to the proper party as follows:

Julie L Sanpei, Esq. (Bailus Cook & Kelesis)

Eckley M Keach, Esq. (Eckley M. Keach, Chtd.)

Douglas D Gerrard, Esq. (Gerrard Cox & Larsen)
dgerrard@gerrard-cox.com

David J. Merrill, Esq. (David J Merrill, PC)
david@djmerrillpc.com

Robert B. Murdock, Esq. (Murdock & Assocs)
lasvegasjustice@aol.com

Richard F. Holley, Esq. (Santoro, Driggs, et al)
rholley@nevadafirm.com

/s/ JB
Jonathan Burdette

IN THE SUPREME COURT
OF THE STATE OF NEVADA

R & S ST. ROSE LENDERS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant/Cross-Respondent, vs. BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN INTEREST TO FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF COLONIAL BANK, N.A., Respondent/Cross-Appellant, and COMMONWEALTH LAND TITLE INSURANCE COMPANY, AS ASSIGNEE OF ROBERT E. MURDOCK, ESQ. AND ECKLEY M. KEACH, ESQ., Respondents.	No. 56640

ORDER DENYING REHEARING

(Filed Sep. 26, 2013)

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Gibbons, J.
Gibbons

/s/ Douglas, J.
Douglas

/s/ Saitta, J.
Saitta

cc: Hon. Elizabeth Goff Gonzalez, District Judge
David J. Merrill, P.C.
Early Sullivan Wright Gizer & McRae, LLP
Gerrard Cox & Larsen
Meier & Fine, LLC
Eighth District Court Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

R & S ST. ROSE LENDERS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant/Cross-Respondent, vs. BRANCH BANKING AND TRUST COMPANY, SUCCESSOR IN INTEREST TO FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OF COLONIAL BANK, N.A., Respondent/Cross-Appellant, and COMMONWEALTH LAND TITLE INSURANCE COMPANY, AS ASSIGNEE OF ROBERT E. MURDOCK, ESQ. AND ECKLEY M. KEACH, ESQ., Respondents.	No. 56640

ORDER DENYING EN BANC RECONSIDERATION

(Filed Feb. 21, 2014)

En banc reconsideration under NRAP 4024

En banc reconsideration is disfavored and will only be ordered (1) to maintain uniformity of this court's decisions, or (2) when "the proceeding involves

a substantial precedential, constitutional or public policy issue." NRAP 40A(a). A petition for en banc reconsideration will not be considered when it raises a point for the first time, or when it merely reargues matters presented in the appeal. NRAP 40A(c).

The argument that this court's order will cast doubt on thousands of assets that have been transferred to other lending institutions is a new argument raised here for the first time, and is therefore not a proper basis for en banc reconsideration

Branch Banking & Trust Company (BB&T) argues that the Purchase and Assumption Agreement (PAA) in this case was "not an aberration, but is consistent with numerous other [PAAs] the [Federal Deposit Insurance Corporation (FDIC)] has used to transfer bulk assets to other lending institutions." BB&T argues that because the FDIC uses this practice for "numerous other purchase and assumption agreements," this court's order potentially casts doubt on the validity of "the hundreds of thousands of loans transferred by the FDIC under other purchase and assumption agreements virtually identical to the one at hand that do not provide lists as part of their schedules."

This is argument has not been previously raised and is therefore improper. NRAP 40A(c). In its briefs, BB&T argued that the district court had an obligation to substitute the FDIC as a real party in interest pursuant to NRCP 17(a) or to add the FDIC as an indispensable party under NRCP 19. BB&T argued

that when the district court "erroneous[ly] determin[ed] that BB&T lacked standing[,]. . . . [t]here [was] no question that the only other possible owner of the Construction Loan and the right to enforce same is the FDIC." However, BB&T failed to make the public policy argument that the FDIC practice was so prevalent that thousands of other FDIC asset transfers would be cast into doubt. Thus, this is a new argument that was not previously raised and is not a proper basis for en banc reconsideration. NRAP 40A(c).

Additionally, in response to the dissenting justices' concerns, we note that the underlying order is supported by both Nevada case law and the Nevada Rules of Civil Procedure. In an asset purchase, assets and liabilities are not assumed to be transferred unless specified. *See Vill. Builders 96, L.P. v. U.S. Labs., Inc.,* 121 Nev. 261, 268, 112 P.3d 1082, 1087 (2005); *Caires v. JP Morgan Chase Bank,* 745 F. Supp. 2d 40, 48-49 (D. Conn. 2010) ("the FDIC [has the] ability to designate specific assets and liabilities for purchase and assumption. . . . [and] a Court should look to the purchase and assumption agreement governing the transfer of assets between the FDIC and a subsequent purchaser of assets of a failed bank to determine which assets and corresponding liabilities are being assumed"). Here, the PAA was an asset purchase, and therefore, the district court properly looked to its language in order to determine which assets and corresponding liabilities were transferred to BB&T. This decision was not clearly erroneous

because BB&T failed to satisfy its evidentiary burden to prove its ownership of the Construction Loan. It was consistent with established Nevada law,[1] and is therefore not a proper basis for en banc reconsideration.

Further, while the dissenting justices note that a written, notarized assignment can be sufficient evidence to demonstrate an assignment of assets, a conclusion which we do not dispute, the district court excluded these documents because they were not properly produced in accordance with NRCP 16.1(a)(1) or NRCP 26(3)(a). *See M.C. Multi-Family Dev. v. Crestdale Assocs.,* 124 Nev. 901, 913, 193 P.3d 536, 544 (2008) (we review a district court's decision to deny admission of evidence for abuse of discretion). Nothing in the record suggests that this was an abuse of discretion or at odds with existing Nevada law. Finally, we review a district court's denial of a motion for substitution or joinder of the real party in interest under NRCP 17 for an abuse of discretion. *See NAD, Inc. v. Eighth Judicial Dist. Court,* 115 Nev. 71, 76, 976 P.2d 994, 997 (1999). Nothing in the record demonstrates that the district court abused its discretion in denying the motion for substitution because (1) the evidence did not demonstrate that the FDIC

[1] Additionally, we are unpersuaded that *Branch Banking & Trust Co. v. Navarre 33, Inc.,* 2012 WL 2377851 (N.D. Fla. May 21, 2012), an unpublished federal case that is factually distinguishable from this situation, provides such a comprehensive national consensus so as to warrant reconsideration.

was the actual owner of the Construction Loan, and (2) the motion to substitute the FDIC was made at such a late date in the district court proceedings.

Thus, having considered the petition, we conclude that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

/s/ Gibbons, C.J.
Gibbons

/s/ Parraguirre, J.
Parraguirre

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

/s/ Saitta, J.
Saitta

cc: Hon. Elizabeth Goff Gonzalez, District Judge
David J. Merrill, P.C.
Early Sullivan Wright Gizer & McRae, LLP
Gerrard Cox & Larsen
Meier & Fine, LLC
Eighth District Court Clerk

PICKERING, J., with whom HARDESTY, J., agrees, dissenting:

This case merits en banc reconsideration for two reasons. First, the district court and panel decisions in this case place Nevada at odds with uniform law established by state and federal courts across the country. Second, in their procedural aspect, the decisions conflict with settled Nevada law.

At issue is the proper interpretation of the Purchase and Assumption Agreement (P & A Agreement) that the Federal Deposit Insurance Corporation (FDIC) entered into with respondent/cross-appellant Branch Banking and Trust Co. (BB&T) on August 14, 2009, after Colonial Bank failed and the FDIC became its receiver.[1] Subparagraph 3.1 of the P & A

[1] The P & A Agreement, as well as other information related to Colonial's failure and the FDIC's appointment as receiver, is publicly available on the FDIC's official website. *See* http://www.fdic.gov/bank/individual/failed/colonial-al.html. A copy of the P & A agreement was in evidence in district court as exhibit 183 and is reprinted in volume 18 of the joint appendix to this appeal at pages 3539 – 3666. Comparison of exhibit 183, 18 JA 3539, with the P & A Agreement on the FDIC website demonstrates that the two are identical. And even if they weren't, judicial notice of the web version is appropriate, as numerous courts have held. *See, e.g., Jaimes v. JPMorgan 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); *Allen v. United Fin. Mortg. Corp.,* 660 F. Supp. 2d 1089, 1093-94 (N.D.

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Agreement, entitled "Assets Purchased by Assuming Bank," provides:

> With the exception of certain assets expressly excluded in Sections 3.5 and 3.6, *the Assuming Bank [BB&T] hereby purchases from the Receiver [FDIC], and the Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank, all right, title, and interest of the Receiver in and to all of the assets (real, personal and mixed, wherever located and however acquired)* including all subsidiaries, joint ventures, partnerships, and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated, *of the Failed Bank [Colonial] whether or not reflected on the books of the Failed Bank as of Bank Closing*. Schedules 3.1 and 3.1a attached hereto and incorporated herein sets forth certain categories of Assets purchased hereunder. Such schedule is based upon the best information available to the Receiver and may be adjusted as provided in Article VIII. . . . The subsidiaries, joint ventures, partnerships, and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated being purchased by the Assuming Bank includes, but is not limited to, the entities listed on Schedule 3.1a. Notwithstanding Section 4.8, the Assuming

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Cal. 2009) (consulting web version of P & A Agreement to clarify exhibit).

> Bank specifically purchases all mortgage servicing rights and obligations of the Failed Bank.

(Emphasis added.)

The underlying dispute concerns competing claims to priority between BB&T, as successor-in-interest to the FDIC as receiver for Colonial Bank, on a $43,980,000 construction loan secured by a deed of trust on 38 acres of commercial property, and appellant/cross-respondent R&S St. Rose Lenders, who held a $12,300,000 note, also secured by a deed of trust on the property. Following an expedited evidentiary hearing, the district court ruled in favor of R & S St. Rose Lenders. It did so based on its determination that the P & A Agreement did not give BB&T standing to assert rights under the Colonial note and deed of trust. Specifically, the district court opined that the P & A Agreement is "internally inconsistent and . . . incomplete, and prevents the Court from making a finding as to whether an assignment of the loan at issue has occurred." The flaw, in the district court's view, lay in the schedules to the P & A Agreement that, insofar as relevant to this dispute, were either not attached or included headings only, no lists.

The panel affirmed. Its decision, although designated unpublished (more accurately, non-precedential), is available on Westlaw, a national legal database. *R & S St. Rose Lenders, LLC v. Branch Banking & Trust Co.,* No 56640, 2013 WL 3357064 (Nev. May 31, 2013). The panel decision holds that, "[t]he district

court's conclusion that BB&T did not prove ownership of the loan was supported by substantial evidence." *Id.* at *2. It affirms the district court's holding that "[BB&T] lacked standing to assert the claims it raised in its complaint," *id.,* because the schedules attached to the P & A Agreement did not explicitly reference the particular loan and deed of trust being contested in this case. The panel order states the point this way:

> The PAA was an asset purchase and therefore the district court looked to its language in order to determine which assets and corresponding liabilities were transferred to BB&T. *However, due to the omission of the schedules of assets, the district court found that [the] PAA did not transfer the Construction Loan to BB&T. We agree,* and therefore conclude that the district court's decision to grant R & S Lenders' NRCP 52(c) motion after BB&T failed to carry its evidentiary burden to prove its ownership of the Construction Loan was not clearly erroneous.

Id. at *3.

This line of reasoning, concerning the identical. P & A Agreement, *see* note 1, *supra,* was considered and rejected in *Branch Banking & Trust Co. v. Navarre 33, Inc.,* No. 3:10cv10/MCR/EMT, 2012 WL 2377851 (N.D. Fla. May 21, 2012). The borrower in *Navarre 33* argued that the P & A Agreement did not establish BB&T as the holder of the promissory note and guaranty sought to be enforced. Rejecting this

argument, the district court looked first to 12 U.S.C. §§ 1821(c) and 1821(d)(2)(A)(i), which establish that when Colonial Bank failed and the FDIC became its receiver, the FDIC succeeded to "'all rights, titles, powers, and privileges of the insured depository institution.'" *Id.* at *6 (quoting 12 U.S.C. § 1821(d)(2)(A)(i)). "This [statutory] language indicates that the FDIC as receiver 'steps into the shoes' of the failed bank, obtaining the rights 'of the insured depository institution' that existed prior to receivership." *Id.* (quoting *O'Melveny & Myers v. FDIC,* 512 U.S. 79, 86 (1994)). Colonial Bank's interest in the note and guaranty were thus transferred "by operation of law" to the FDIC. *Id.*

The *Navarre 33* court then turned to the P & A Agreement that the FDIC, having stepped into Colonial Bank's shoes as receiver, entered into with BB&T. "Section 3.1 of the P & A Agreement [reprinted above]," the court wrote, "describes the assets purchased by BB&T, which include *all* of Colonial's assets, *except those expressly excluded in Section 3.5 and 3.6 of the P & A Agreement*." *Id.* (emphasis added to that in original). Since "[n]either of the cross-referenced sections of the P & A Agreement, 3.5 and 3.6, appears on its face to exclude the promissory note or guarantees from the assets purchased by BB & T," the *Navarre 33* court held that, "the broad language of Section 3.1 of the P & A Agreement, describing the assets purchased by BB&T, sufficiently indicates that BB&T is the current holder of the Note and Guarantees that are the subject of the instant case." *Id.*; *see*

12 U.S.C. § 1821(d)(2)(G)(i)(II) (giving the FDIC, as receiver, authority to "'transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer").

The panel rejected *Navarre 33* on the basis that it addressed a note and associated guaranty rather than, as here, a note and deed of trust. *R & S St. Rose Lenders,* 2013 WL 3357064 at *3 n.2. But this is a distinction without a difference. The FDIC used a form of P & A Agreement much like the one at issue here and in *Navarre 33* when Washington Mutual collapsed and the FDIC stepped in as receiver and transferred WaMu's assets and liabilities to J.P. Morgan Chase Bank. *See* www.fdic.gov/about/freedom/Washington_Mutual_P_and_A.pdf. Case after case construing the FDIC/J.P. Morgan Chase Bank P & A Agreements has held that, under 12 U.S.C. § 1821(d)(2)(G)(i)(II), the FDIC, as receiver, has authority to "'transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer'" and that the P & A Agreement effects a valid and complete "transfer" as authorized by this statute. Thus, courts elsewhere have rejected as "frivolous" the "argument that each Washington Mutual Bank mortgage loan acquired by Chase from the FDIC had to be 'individually identified'" in a schedule to the P & A Agreement for the transfer described in Section 3.1 to be effective. *Drobny v. JP Morgan Chase Bank, N.A.,* 929 F. Supp. 2d 839, 845-46 (N.D. Ill.

2013) (quoting 12 U.S.C. § 1821(d)(2)(G)(i)(II) and *Stehrenberger v. JP Morgan Chase Bank, N.A.,* No. 2:12-cv-874, 2012 WL 5389682, at *1-*2 (S.D. Ohio Nov. 2, 2012)); *Jones v. JP Morgan Chase Bank, N.A.,* No. 12-cv-00488-LHK, 2012 WL 4815468, at *1 (N.D. Cal. Oct. 9, 2012) (relying on the broad language in Section 3.1 of the P & A Agreement to reject as meritless the borrower's argument that Chase did not own the note and deed of trust because the P & A Agreement did not explicitly list them as purchased assets); *Beka Realty, LLC v. JP Morgan Chase Bank,* N.A., No. 503666/12, 2013 WL 5629590, at *4 (N.Y. Sup. Ct. Sept. 25, 2013) ("it has been specifically held that there is no requirement that the FDIC as receiver, endorse or assign [a specific] note and mortgage" to Chase for Chase to be entitled to enforce them (internal quotation omitted)) (citing cases); *see also Demelo v. U.S. Bank Nat'l Ass'n,* 727 F.3d 117, 125 (1st Cir. 2013) (rejecting variation of specific-assignment argument on federal Supremacy Clause grounds); *Robinson v. Fed. Nat'l Mortg. Ass'n,* No. 13-1868 (JNE/JSM), 2014 WL 258644, at *11-12 (D. Minn. Jan. 23, 2014) (to similar effect). To require specific listing of each asset transferred in the P & A Agreement would significantly disrupt the operation of the FDIC in stepping in as receiver for failed banks and immediately transferring the failed bank's operations to another healthy bank with no interruption in service.

It is true, as the majority notes, that BB&T did not specifically argue on direct appeal that the

district court decision, if upheld, puts Nevada at odds with established national law. But BB&T did cite, and the panel rejected, *Navarre 33*. That a panel decision creates substantial uncertainty with respect to Nevada business transactions because it is at odds with commercial law elsewhere – much of it decided in the past two years – is a legitimate basis for en banc reconsideration. *See* NRAP 40A(a) (en banc reconsideration may be appropriate when "the proceeding involves a substantial precedential . . . or public policy issue"). The occasion to make a national-precedent and policy-based argument for en banc consideration arose when the panel affirmed and thereafter denied panel rehearing. I thus disagree that the policy concerns articulated by BB&T in its petition for en banc reconsideration have been waived.

Finally, the procedural aspects of this case also merit reconsideration. This appeal grew out of an expedited evidentiary hearing the district court ordered to decide the relative priority of the notes and deeds of trust held by BB&T and R&S St. Rose Lenders on a piece of commercial property. The order setting the hearing adopted a list of issues to be tried that several parties submitted. That list, did not challenge BB&T's status as successor-in-interest to Colonial via the P & A Agreement. Thus, it is not surprising that BB&T did not focus its evidence on the FDIC's acquisition and transfer of Colonial's assets to BB&T. When, as the hearing neared completion, the district court rejected the P & A Agreement as insufficient to establish BB&T's standing to

enforce the Colonial note and deed of trust – a seemingly singular position under caselaw elsewhere – BB&T sought leave to admit documents specifically assigning the note and deed of trust in issue. The district court excluded these documents on the grounds they were not disclosed before discovery closed. But of course they were not – they did not exist before discovery concluded; indeed, one was created overnight, specifically to allay the district court's stated concern that BB&T lacked standing. So, accepting *arguendo* that the P & A Agreement did not effect a valid transfer – though cases elsewhere reject this conclusion – the specific assignment later recorded against the property established it and should have been accepted as proof of that fact, *see Einhorn v. BAC Home Loans Servicing, Inc.,* 128 Nev. ___, ___, 290 P.3d 249, 254 (2012) (absent evidence to controvert authenticity, a notarized, recorded assignment "carries a presumption of authenticity, NRS 52.165, that makes it self-authenticating" (internal quotation omitted)); *Edelstein v. Bank of N.Y. Mellon,* 128 Nev. ___, ___, 286 P.3d 249, 260 (2012) ("To prove that a previous beneficiary properly assigned its beneficial interest in the deed of trust, the new beneficiary can demonstrate the assignment by means of a signed writing.").

The holding that the P & A Agreement did not establish BB&T as Colonial's successor-in-interest for purposes of the priority contest between it and R & S St. Rose Lenders, moreover, did not establish the absolute priority of R & S St. Rose Lenders' note and

deed of trust. On the contrary, it represented, at best, a decision that BB&T was not the real party in interest entitled to maintain this action. NRCP 17(a) declares that, "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." After the P & A Agreement's sufficiency became an issue, BB&T sought relief under NRCP 17(a), which the district court denied. And, rather than hold simply that BB&T failed to prove its case and denying its claim without prejudice, the district court proceeded to declare R & S St. Rose Lenders the victor, with priority over the Colonial note and deed of trust. This, too, was error and had the effect of awarding R & S St. Rose Lenders a $12,300,000 victory on the merits to which it did not prove its entitlement.

For these reasons, I respectfully dissent from the denial of en banc reconsideration in this case.

/s/ Pickering, J.
Pickering

I concur:

/s/ Hardesty, J.
Hardesty