No. _____

In The
Supreme Court of the United States

WILLIAM SOUSA and JUDY SOUSA,

Petitioners,

vs.

BRANCH BANKING AND TRUST COMPANY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition concerns Federal preemption of a state statute, and a decision that same statute is unconstitutional as a violation of the Contract Clause of the U.S. Constitution.

Nevada Revised Statute ("NRS") §40.459(1)(c)[1] (the "Statute") was added to Nevada's law to prevent profiteering and encourage creditors to negotiate with borrowers. To accomplish these twin objectives, the Statute: (1) greatly limits the amount of a deficiency judgment that a person seeking the deficiency judgment can recover, if that person acquired the right to obtain the deficiency judgment from a person who had that right,[2] thereby discouraging such persons from purchasing notes or mortgages "for pennies on the dollar,"[3] and (2) became effective upon passage and approval.[4]

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[1] Section 40.459 was amended and reorganized in May 2015. See, 2015 Nev. Stat., Ch. 149, §1 (Westlaw) (codified as amended at NRS §40.459). Subsection (1)(c) now appears in NRS §40.459(3)(c), which limits a successor creditor's recovery after obtaining a deficiency judgment on a "property upon which the debtor, guarantor or surety maintains his or her principal residence." NRS §40.459(3)(c). The version of the statute relevant to this case is reprinted in the *Appendix* at App. 23-24.

[2] For ease of reference, a "person who acquired the right to obtain the deficiency judgment from a person who had that right" will be referred to as a "Third Party Purchaser."

[3] Hearing on A.B. 273 before the Senate Judiciary Comm., 76th Leg. (Nev., May 3, 2011).

[4] 2011 Nev. Stat., Ch. 311, §§5, 7, at 1743, 1748.

QUESTIONS PRESENTED – Continued

Since its passage and despite these laudable goals, NRS §40.459(1)(c) has been emasculated by the Nevada judiciary on the grounds the Statute is not only preempted by the Financial Institutions and Recovery Act of 1989 ("FIRREA"),[5] but also unconstitutional because it violates the Contract Clause of the United States Constitution in cases where the notes or mortgages were acquired by a Third Party Purchaser prior to the effective date of the Statute.

The questions presented are:

1. Is NRS §40.459(1)(c) preempted by FIRREA because the notes or mortgages in question were acquired by a Third Party Purchaser from the Federal Deposit and Insurance Corporation ("FDIC")?

2. Do the NRS §40.459(1)(c) limitations on deficiency claims violate the Contract Clause of the U.S. and/or Nevada Constitutions when the notes or mortgages in question were acquired by a Third Party Purchaser prior to the effective date of the Statute?

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[5] Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") 2 Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended in scattered sections of 12 U.S.C.).

PARTIES AND RULE 29.6 DISCLOSURE

Petitioners William Sousa and Judy Sousa (the "Sousas") are individuals and thus have no parent corporations and no publicly-held company that owns 10% or more of any of those individuals' stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners WILLIAM SOUSA and JUDY SOUSA respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The opinions below were not published. They are:

1. Order of Affirmance from the Nevada Supreme Court (App. 1-2).

2. Findings of Fact, Conclusions of Law on Plaintiff's Motion for Summary Judgment from the State of Nevada Eighth Judicial District Court, Clark County ("District Court") (App. 3-22).

JURISDICTION

The Nevada Supreme Court entered the Order of Affirmance on February 12, 2016. The time for filing a petition for rehearing lapsed 18 days later, on March 1, 2016. (Nevada Rule of Appellate Procedure 40(a)) This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The version of NRS §40.459(1)(c) applicable to this Petition is reproduced at App. 23-24.

Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") 2 Pub. L. No. 101-73, 103 Stat. 183 (1989), codified as amended in scattered sections of 12 U.S.C.

Article I, §10 of the United States Constitution, known as the "Contract Clause", provides in relevant part that: "[n]o State shall . . . pass any law . . . impairing the obligation of contracts."

STATEMENT OF THE CASE

1. Loan Transactions

William Sousa and Judy Sousa are the non-managing members of Tropicana Partners 2, LLC ("Tropicana"), a now defunct Nevada domestic limited liability company. Tropicana borrowed a total of $15,727,000.00 from Colonial Bank between May 2004 and April 2005 in three separate loan transactions (the "Loans") to purchase three commercial properties in Las Vegas, NV (the "Properties"). The Loans were secured by the Properties and personally guaranteed by the Sousas.[6]

[6] The managing members of Tropicana also guaranteed the Loans but are not parties to this Petition.

2. Acquisition of the Loans by BB&T, Tropicana Default and BB&T Complaint

On August 14, 2009, Colonial Bank was closed by the Alabama State Banking Department, and the Federal Deposit Insurance Corporation ("FDIC") was named Receiver. On that same day, Respondent Branch Banking & Trust ("BB&T") became a Third Party Purchaser as the successor in interest to Colonial by acquisition of assets (including the Loans) from the FDIC.

Tropicana defaulted on the Loans, and on April 27, 2011 BB&T filed its initial Complaints against the Sousas in the District Court.

3. The Enactment of NRS §40.459(1)(c) as Part of Assembly Bill 273

Subsection (1)(c) was added to NRS §40.459 in 2011 by Assembly Bill 273. The amendment became effective on or about June 10, 2011.

4. BB&T Forecloses on the Properties, the Parties Agree on the Fair Market Value of the Properties, and the District Court Enters a Deficiency Judgment

BB&T foreclosed on the Properties between May and June, 2012. On August 1, 2012, BB&T filed its Consolidated First Amended Complaint ("FAC") against the Sousas seeking a deficiency judgment following the foreclosures. The Sousas answered and

raised both affirmative defenses and conditional affirmative defenses, asserting their rights under NRS §40.459(1)(c), et seq.

BB&T prevailed on a motion for summary judgment on the ground NRS §40.459(1)(c) violated the Contract Clause of the U.S. Constitution ("Contract Clause"), because BB&T acquired the rights to obtain a deficiency judgment against the Sousas prior to the effective date of the Statute. The District Court did not rule on BB&T's other arguments, including the argument that the Statute was preempted by FIRREA. (Findings of Fact, Conclusions of Law on Plaintiff's Motion for Summary Judgment from the District Court (App. 3-22).

The parties subsequently agreed the fair market value of the Properties was $6,855,000.00, leading to a deficiency judgment against the Sousas in the amount of $9,159,646.80 plus attorneys' fees and costs. Judgment was entered against the Sousas on March 24, 2015. (App. 37-41). The Sousas filed their Notice of Appeal to the Nevada Supreme Court on April 13, 2015. (App. 36-42).

5. The Nevada Supreme Court Issues a Decision in *Munoz v. Branch Banking & Trust Co.* After the Sousas' Appeal from the District Court Judgment

The Nevada Supreme Court filed the decision in *Munoz v. Branch Banking & Trust Co*.[7] ("*Munoz*") on April 30, 2015, which held that NRS §40.459(1)(c) was preempted by FIRREA. The Nevada Supreme Court later affirmed the Judgment against the Sousas solely on the basis of FIRREA preemption under *Munoz* in the Order of Affirmance. (App. 1-2). As a result, the Nevada Supreme Court never considered the District Court's decision that NRS §40.459(1)(c) violated the Contract Clause.

REASONS FOR GRANTING THE PETITION

I. The Boundaries of FIRREA's Implied Conflict Preemption Are a Matter of National Importance

Congress enacted FIRREA in the era of the savings and loan crisis of the 1980s. Under Section 212 of FIRREA, when a bank insured by the FDIC becomes insolvent, the FDIC may be appointed the receiver for the bank and take control of its assets and liabilities.[8] As relevant here, the FDIC as receiver is authorized to enter into a purchase and assumption agreement with an assuming institution (defined herein as a "Third Party Purchaser", see ante, Fn. 2) under which certain

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[7] 348 P.3d 689 (Nev. 2015), App. 25-34.

[8] See, 12 U.S.C. §§1813(c)(2), 1821(c)(1), (d)(2)(A) and (B).

assets and liabilities of the failed bank are transferred to the Third Party Purchaser.[9]

This Petition concerns the tension between a state's exercise of its police power through legislation designed to protect the borrower/guarantor of a real estate secured loan, and the rights of a Third Party Purchaser under a purchase and assumption agreement from the FDIC. It provides this Court with an opportunity to draw the outer boundaries of FIRREA's implied conflict preemption.

A. This Court Needs to Draw the Outer Boundaries of FIRREA's Implied Conflict Preemption to Provide Guidance to State Legislatures

The Supreme Court has held preemptive intent of a Federal statute may be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995).

Implied conflict preemption comes in two forms: (1) where it is impossible for a private party to comply with both state and federal requirements, or (2) where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 85

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[9] 12 U.S.C. §1821(d)(2)(G)(i)(II).

L. Ed. 581, 61 S. Ct. 399 (1941), cited in *Freightliner Corp. v. Myrick*, id. at 287. This Petition concerns the second form of implied conflict preemption by FIRREA.

The Supreme Court has never squarely addressed the elusive outer boundaries of FIRREA's implied conflict preemption of a state statute, although the question was discussed in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) ("*O'Melveny & Myers*") in the context of FIRREA's implied conflict preemption of a common law issue. In *O'Melveny & Myers*, the FDIC urged the Supreme Court to create a new federal common law rule to govern the imputation of knowledge to the FDIC. (*O'Melveny & Myers*, id. at 83). In declining the FDIC's invitation, the Supreme Court explained that, by statute, California, rather than federal common law, governed imputation of corporate officers' knowledge to the FDIC. The Supreme Court noted that 12 U.S.C. §1821(d)(2)(A)(i), as amended by FIRREA, "places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law except where some provision in the extensive framework of FIRREA provides otherwise." (Id. at 87).

But FIRREA was enacted into law in 1989, after the FDIC took over as receiver for the failed bank, and the Supreme Court in *O'Melveny & Myers* chose not to resolve the preemption issue under FIRREA, leaving this an open question.

O'Melveny & Myers did however offer some important guideposts on FDIC preemption of state common law that can be applied to the analysis of FIRREA's preemption of a state statute: (1) "[a]ny defense good against the original party is good against the receiver[,]" (Id. at 512 U.S. 79, 86 (1994)), and (2) "[d]epletion of the insurance fund" is not a valid basis for federal preemption: "[t]here is no federal policy that the fund should always win. Our cases have previously rejected 'more money' arguments remarkably similar to the one made here." (Id. at 512 U.S. 87-89).

This Petition offers this Court the opportunity to answer the question left open in *O'Melveny & Myers* and provide guidance on the outer boundaries of FIRREA's implied conflict preemption of a state law.

B. The Nevada Supreme Court Decides *Munoz* and Inadvertently Buys into a Version of the "More Money" Argument, and In So Doing Extends FIRREA's Preemption to a Nevada Statute that Deals with Deficiency Judgments after Real Estate Foreclosures

In *Munoz*, the Nevada Supreme Court addressed a FIRREA preemption challenge to NRS §40.459(1)(c), and adopted a variation of the "more money" argument. Absent specific guidance from the Supreme Court, the Nevada Supreme Court in *Munoz* turned to Circuit Court decisions. Relying on a series of cases from the Fifth Circuit, the *Munoz* decision noted that FIRREA has been held to provide:

> "[s]pecial status to the FDIC's assignees so as to maintain the value of the assets they receive from the FDIC. See, e.g., *FDIC v. Bledsoe*, 989 F.2d 805, 809-11 (5th Cir. 1993) (providing that FDIC assignees share the FDIC's statutory "super" holder-in-due-course status and are entitled to the benefit of a six-year statute of limitations under FIRREA rather than any shorter state statute of limitations); see also *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1249 (5th Cir. 1990) (holding that "the FDIC and subsequent note holders enjoy holder in due course status whether or not they satisfy the technical requirements of state law"); *Bell & Murphy & Assocs., Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 754 5th Cir. (1990) (holding that protections provided to the FDIC from claims or defenses based on unrecorded side agreements extend to private assignees of the FDIC)." (*Munoz*, id. at 692).

Extrapolating from this narrow list, the Nevada Supreme Court in *Munoz* found that "[I]f a state statute limits the market for assets transferred by the FDIC, it conflicts with FIRREA because it 'would have a deleterious effect on the FDIC's ability to protect the assets of failed banks.' Thus, state laws that limit the private market for assets of failed banks held by the FDIC conflict with FIRREA and are preempted." (*Munoz*, id. at 692).

The danger with the Nevada Supreme Court's rationale in *Munoz* is how effortlessly it extended the outer boundaries of FIRREA's preemptive reach to

benefit the Third Party Purchaser of the Loans from the FDIC. Viewed objectively, almost any state statute that provides defenses to borrowers/guarantors also necessarily limits the private market for assets of failed banks held by the FDIC, because the loans become less valuable; there really is no outer boundary at all.

C. *Munoz* Conflicts with Decisions from Other Circuits and States on the Scope of FIRREA's Implied Conflict Preemption

Most of the cases that deal with FIRREA's implied conflict preemption concern state law contract (as opposed to statutory) rights. For example, in *Bank of Manhattan, N.A. v. FDIC*, 778 F.3d 1133, 1136 (9th Cir. 2015) ("*Bank of Manhattan*"), the Ninth Circuit reviewed a district court decision concerning two contractual limitations in a pre-receivership participation agreement that restricted the transfer of a loan without consent, and also provided a right of first refusal. These contractual limitations conflicted with a section of FIRREA[10] that provides that the FDIC, acting as receiver, may "transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer[.]" Conceding that its actions otherwise constituted a breach of the Agreement, the FDIC asserted that FIRREA freed the

[10] 12 U.S.C. §1821(d)(2)(G)(i)(II).

agency from complying with any pre-receivership contractual provisions related to the transfer of assets from a failed bank.

Affirming the district court, the Ninth Circuit held FIRREA did not immunize the FDIC from breach of pre-receivership contract claims, and concluded that the district court did not err in rejecting the FDIC's statutory defense and entering judgment against the FDIC for its breach of a participation agreement. The Ninth Circuit recognized that to rule otherwise would permit the FDIC to succeed to powers greater than those held by the insolvent bank, an implausible result when FIRREA provides that the FDIC, as receiver, "shall . . . succeed to all rights, titles, powers, and privileges of the insured depository institution." Yet that is precisely the result in *Munoz*, which fundamentally conflicts with *Bank of Manhattan*.

Looking at *Bank of Manhattan* another way, suppose the FDIC assigned the participation agreement to a Third Party Purchaser, who then raised the same argument as the FDIC. Would that permit the Third Party Purchaser to succeed to powers greater than those held by the insolvent bank? Under the reasoning of *Munoz* the answer is yes; the breach of contract claim would limit the market for assets transferred by the FDIC, and therefore conflict with FIRREA because it would have a deleterious effect on the FDIC's ability to protect the assets of failed banks. But there should be no difference between the assets of a failed financial institution in the hands of the FDIC and those same

assets in the hands of a Third Party Purchaser from the FDIC, absent express language in FIRREA itself.

In *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 675 (2d Cir. 1995), cert. denied, 515 U.S. 1158, 115 S. Ct. 2609, 132 L. Ed. 2d 853 (1995) ("*RTC v. Diamond*"), the Second Circuit dealt with FIRREA preemption in the context of the Resolution Trust Corporation's ("RTC")[11] power to abrogate valid contracts and leases where the agency had determined they were burdensome. Acknowledging the Supreme Court's holding in *O'Melveny & Meyers*, the Second Circuit confirmed that unless the RTC repudiates a burdensome contract or lease, the law of each state will furnish the contract principles that govern the relationship:

> "[t]he RTC, like the FDIC in O'Melveny, steps into the shoes of another entity having claims, rights, powers and causes of action defined and limited by state law. However, when the RTC does exercise its federally-granted power to repudiate a contract or lease, its power to do so is not subordinated to state statutes or regulations. Section 1821(e)(1) is an express grant of federal power exercisable in derogation of all contrary state law, and it therefore supersedes – or preempts – volumes of state law. This distinction is drawn in O'Melveny,

[11] FIRREA made the RTC a limited life entity (five years) that would manage and resolve all formerly Federal Savings and Loan Insurance Corporation insured institutions placed under conservatorship or receivership from January 1, 1989 through August 9, 1992.

> where 'the FDIC was asserting . . . causes of action created by [state] law,' 114 S. Ct. at 2052, and confirms the result in Diamond." *RTC v. Diamond*, 45 F.3d 665, 670-671 (2d Cir. N.Y. 1995).

RTC v. Diamond dealt with the non-eviction aspect of New York State's rent-regulation scheme in the context of leases repudiated by the RTC, and held New York State's rent-regulation scheme directly interfered with the accomplishment and execution of the full purposes and objectives of Congress, because:

> "[T]he tenancies at issue are rooted in contract; RTC has the power to repudiate the contracts, and therefore the underlying tenancies. If the state anti-eviction law were to govern, the repudiation would be fruitless. We therefore hold that, to the extent that the anti-eviction provisions of New York's rent regulations interfere with the operation of §1821(e), the state regulations and laws are preempted by FIRREA." *Resolution Trust Corp. v. Diamond*, 45 F.3d 665, 674-675 (2d Cir. 1995).

RTC v. Diamond therefore also stands in conflict with *Munoz*, because in *Munoz* the FDIC didn't repudiate the Loans, it chose to transfer them to a Third Party Purchaser. As such, Nevada law should have furnished the contract principles that govern the relationship between the Third Party Purchaser and the borrower/guarantor.

The First Circuit, in *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 8 (1st Cir. 2011), cited the

Supreme Court's decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995) for the proposition that conflict preemption requires a direct conflict or something very close to it, and stated an awkward fit, without more, will not support a claim of conflict preemption. This too conflicts with *Munoz*, because NRS §40.459(1)(c) does not raise a direct conflict with FIRREA.

D. *Munoz* Conflicts with Supreme Court Precedent Regarding the Preemption of the State's Historic Police Powers

In *Munoz*, the Nevada Supreme Court found that one of the purposes of FIRREA is "to facilitate the purchase and assumption of failed banks as opposed to their liquidation." (*Munoz*, id. at 348 P.3d at 690). And citing *Boyle v. United Techs. Corp*., 487 U.S. 500, 504, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988), the Nevada Supreme Court in *Munoz* also found one situation in which federal law can preempt a state law is where a direct conflict between federal and state law exists, and this occurs when the state law "frustrates the purpose of the national legislation, or impairs the efficiencies of [the] agencies of the Federal government to discharge the duties for the performance of which they were created." *McClellan v. Chipman*, 164 U.S. 347, 357, 17 S. Ct. 85, 41 L. Ed. 461 (1896) (internal quotations omitted) (*Munoz*, id. at 691).

Where the Nevada Supreme Court went astray in *Munoz* was its failure to recognize "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981). And when addressing questions of express or implied pre-emption, Supreme Court precedent holds the analysis always begins "[w]ith the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the states. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-542 (2001), cited in *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008).

NRS §40.459(1)(c) is just such an exercise Nevada's police power[12] in an area traditionally occupied by the states. *Munoz* therefore conflicts with Supreme Court precedent in preempting the Statute under FIRREA.

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[12] When dealing with emergency conditions, a state may exercise its police power to promote the wealth and prosperity, the comfort, convenience, and happiness – in short, the general welfare – of the state. *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 415 (1934).

II. Although the Contract Clause of the U.S. Constitution[13] was Not Considered by the Nevada Supreme Court in the Order of Affirmance, it was the Basis of the District Court's Decision and Merits Review, because the Ability of State Legislatures to Modify Contract Remedies Is a Matter of National Importance Dating Back to Shay's Rebellion of 1786 and the Enactment of the Constitution in 1789

The Nevada Supreme Court in the Order of Affirmance (App. 1-2) relied solely on FIRREA preemption and never reached the Contract Clause issue. Nevertheless, the District Court's decision that NRS §40.459(1)(c) violated the Contract Clause concerns an issue of national importance and also merits review.

The Supreme Court recently considered the Contract Clause in *Evenwel v. Abbott*, 194 L. Ed. 2d 291 (2016), and reminded us of an uprising in 1786 that became known as Shays' Rebellion, where armed debtors in Massachusetts attempted to block legal actions by creditors to recover debts:

> "Although that rebellion was ultimately put down, debtors sought relief from state legislatures "under the auspices of Constitutional forms." Letter from James Madison to Thomas Jefferson (Apr. 23, 1787), in 11 The Papers of

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[13] Because the wording of the Nevada Constitution and the United States Constitution are substantially the same, Nevada Courts generally look to Federal law on the subject. See, *Holloway v. Barrett*, 87 Nev. 385, 487 P.2d 501, 504 (1971).

> Thomas Jefferson 307 (J. Boyd ed. 1955); see Wood 412-413. With no structural political checks on democratic lawmaking, creditors found their rights jeopardized by state laws relieving debtors of their obligation to pay and authorizing forms of payment that devalued the contracts. McConnell, Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structures, 76 Cal. L. Rev. 267, 280-281 (1988); see also Fletcher v. Peck, 10 U.S. 87, 6 Cranch 87, 137-138, 3 L. Ed. 162 (1810) (Marshall, C. J.) (explaining that the Contract Clause came from the Framers' desire to "shield themselves and their property from the effects of those sudden and strong passions to which men are exposed")." *Evenwel v. Abbott*, 194 L. Ed. 2d 291, 311-12 (2016).

More than 200 years after Shay's Rebellion and the enactment of the U.S. Constitution with the inclusion of the Contract Clause, the struggle between preserving creditors' rights and the ability of states to exercise their police power to protect debtors continues. Supreme Court precedent during that passage of time offers the following:

1. "It must be remembered that if the Contract Clause were read literally, it would effectively prevent the state from enacting any legislation at all." *Home Bldg. & Loan Assoc. v. Blaisdell* ("*Blaisdell*"), 290 U.S. 398, 428-29 (1934); and,

2. "The Contract Clause is no barrier to otherwise legitimate legislation concerning the public welfare that incidentally abrogates private contracts, so long as such legislation adjusting the rights and responsibilities of contracting parties is based on reasonable conditions and of a character appropriate to the public purpose justifying its adoption. The Contract Clause also does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17, 21-23, 97 S. Ct. 1505 (1977).

The District Court's decision in this case cannot be harmonized with the foregoing Supreme Court precedent.

A. The District Court Failed to Account for Supreme Court Precedent that States Have the Inherent Power to Modify, Alter, or Limit Contractual Remedies After Contracts Have Been Entered into Without Violating the Contract Clause

Although NRS §40.459(1)(c) deals solely with the remedy of a Third Party Purchaser's deficiency judgment after foreclosure, the District Court nevertheless found the Statute violated the Contract Clause. In doing so the District Court failed to heed Supreme Court precedent that states have the inherent power to modify, alter, or limit contractual remedies after contracts

have been entered into without violating the Contract Clause. *Honeyman v. Jacobs*, 306 U.S. 539, 542 (1939).

In *East New York Sav. Bank v. Hahn*, 326 U.S. 230, 231-232 (1945) ("*East New York Sav. Bank*"), Justice Frankfurter considered the State of New York's moratorium on foreclosures through the lens of the *Blaisdell* case and decisions rendered since (e.g., *Honeyman v. Jacobs*, 306 U.S. 539 (1939); *Veix v. Sixth Ward Assn.*, 310 U.S. 32 (1940); *Gelfert v. National City Bank*, 313 U.S. 221 (1941); *Faitoute Co. v. Asbury Park*, 316 U.S. 502 (1942)), and observed the following:

> "[W]hen a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State 'to safeguard the vital interests of its people,' 290 U.S. at 434, is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment."

Just as the New York's moratorium on foreclosures was an effort to address the victims of the Great Depression and held not to violate the Contract Clause in *East New York Sav. Bank* (Id. at 326 U.S. 230), NRS §40.459(1)(c) was an effort by the State of Nevada to address the victims of the Great Recession by imposing new limitations on deficiency judgments, a remedy that is not "constitutionally immune from impairment."

B. NRS §40.459(1)(c) Does Not Apply Retroactively Because the Possibility of a Deficiency Judgment after Foreclosure is not A Vested Right Entitled to Constitutional Protection

In *Sandpointe Apts., LLC v. Eighth Judicial Dist. Court of State*, 313 P.3d 849, 852-853 (2013) ("*Sandpointe*"), the Nevada Supreme Court held that NRS §40.459(1)(c) cannot be applied retroactively, and, therefore, the limitations in NRS §40.459(1)(c) apply only to cases (such as this one), where the foreclosure or trustee's sales occurred on or after the effective date of the statute. *Sandpointe*, id. at 859.

The *Sandpointe* majority chose the foreclosure sale as the critical event in the context of retroactive versus prospective application, not the date the loan was made, or the date the party acquired the right to a deficiency judgment, citing *Holloway v. Barrett*, 87 Nev. 385, 487 P.2d 501, 504 (1971) ("*Holloway*"):

> "There is no attempt upon the part of the trial court to give [the statute] retrospective effect. It is being applied to a deficiency occurring as a result of a trustee's sale held after the effective date of the statute. The only retrospective aspect arises from the fact that the promissory note and the deed of trust were executed prior to the effective date of the statute and may for that reason affect rights already in existence." *Id.* 390–91, 487 P.2d at 504 (emphasis added).

Expanding on the decision in *Holloway*, the Nevada Supreme Court in *Farmers Home Mutual Insurance Co. v. Fiscus*, 102 Nev. 371, 376, 725 P.2d 234, 237 (1986) characterized *Holloway* as concluding that "the trial court's order did not constitute retroactive application of a statute but rather, that the deficiency judgment in question arose after the effective date of the Statute." Thus, *Holloway* and *Farmers*, read together, demonstrate that statutes affecting deficiency judgments operate prospectively, when the sale (whether by judicial foreclosure or trustee's sale), occurs after the enactment of the statute. Consequently, NRS §40.459(1)(c) did not operate retroactively under established Nevada precedent.

Under Nevada law, before a final deficiency judgment can be obtained, a creditor must comply with the various requirements of Nevada's deficiency legislation and overcome any defenses asserted by the borrower and/or the guarantor. (See, *Lavi v. Eighth Judicial Dist. Court*, 2014 Nev. LEXIS 52, 7 (2014)). Until such a judgment has been obtained, a creditor merely has a contingent remedy for a potential deficiency, not a vested right to a deficiency judgment. *Sandpointe* held:

> "Accordingly, we conclude that the right to deficiency vests upon the sale pursuant to a judicial foreclosure or trustee's sale, and thus, applying NRS §40.459(1)(c) to deficiencies arising from sales that took place before that provision was enacted would affect vested rights." *Sandpointe*, id. at 313 P.3d 856.

This squares with the Nevada Supreme Court's 1898 decision in *Kennedy v. Adams*, 24 Nev. 217, 221 (1898):

> "The right to a particular remedy is not a vested right. This is the general rule, and the exceptions are of those peculiar cases in which the remedy is part of the right itself. As a general rule every state has complete control over the remedies which it offers to suitors in its courts. It may abolish one class of courts and make another. It may give a new and additional remedy for a right or equity already in existence. And it may abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains. If a statute providing a remedy is repealed while proceedings are pending, such proceedings will be thereby determined, unless the legislature shall otherwise provide; and if it be amended, instead of repealed, the judgment pronounced in such proceedings must be according to the law, as it then stands. And any rule or regulation in regard to the remedy which does not, under pretense of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation." (internal citations omitted).

As a result, the application of NRS §40.459(1)(c) in cases such as this, where a deficiency judgment had not yet been obtained by the Statute's effective date, cannot be viewed as having a retroactive effect on a Third Party Purchaser's right to recover.

C. The Statute Was a Valid Exercise of Nevada's Power to Safeguard the Vital Interest of its People, Which Includes Their Economic Needs

In *Blaisdell* the Supreme Court considered and affirmed the authority retained by the state over contracts "to safeguard the vital interests of its people" (*Blaisdell*, id. at 290 U.S. 398, 434-435 (1934)), and that all contracts are made subject to this paramount authority:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Blaisdell*, id. at 290 U.S. 435.

Such authority is not limited to health, morals and safety. It extends to economic needs as well. See, *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U.S. 32 (1940).

Economic interests of a state may justify the exercise of its protective power notwithstanding interference with contracts. The power "which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the . . . general welfare of the people, and is paramount to any rights under contracts between individuals." *Manigault v. Springs*, 199 U.S. 473, 480 (1905). And once we are in this domain of the reserve power of a state we must respect the "wide discretion on the part

of the legislature in determining what is and what is not necessary." Ibid.

This is an issue of nationwide importance, because this Court can confirm the formula a state legislature may adopt in the future for determining the amount of a deficiency judgment is not set in stone because of the Contract Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 11, 2016

IN THE SUPREME COURT OF THE
STATE OF NEVADA

WILLIAM SOUSA, AN INDIVIDUAL; AND JUDY SOUSA, AN INDIVIDUAL, Appellants, vs. BRANCH BANKING AND TRUST COMPANY, SUCCESSOR-IN-INTEREST TO COLONIAL BANK BY ACQUISITION OF ASSETS FROM THE FDIC AS RECEIVER FOR COLONIAL BANK, A NORTH CAROLINA BANKING CORPORATION ORGANIZED AND IN GOOD STANDING UNDER THE LAWS OF THE STATE OF NORTH CAROLINA, Respondent.	No. 67811

ORDER OF AFFIRMANCE

(Filed Feb. 12, 2016)

This is an appeal from a district court judgment in a deficiency action. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Appellants acknowledge that *Munoz v. Branch Banking and Trust Co.*, 131 Nev., Adv. Op. 23, 348 P.3d 689 (2015), controls the resolution of this appeal. Having considered appellants' arguments that this court should reconsider the propriety of the *Munoz* decision, we are not persuaded that reconsideration is warranted. We therefore

ORDER the judgment of the district court AFFIRMED.[1]

/s/ Parraguirre, C.J.
Parraguirre

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

cc: Hon. Joanna Kishner, District Judge
Stephen E. Haberfeld, Settlement Judge
Foley & Oakes, PC
Wayne A. Silver
Sylvester & Polednak, Ltd.
Law Office of Timothy P. Thomas, LLC
Eighth District Court Clerk

[1] Respondent's request for NRAP 38 sanctions is denied.

FFCL

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DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING AND TRUST COMPANY, successor-in-interest to COLONIAL BANK by acquisition of assets from the FDIC as Receiver for Colonial Bank, a North Carolina banking corporation organized and in good standing under the laws of the State of North Carolina,

Plaintiffs,

v.

BARRY A. FORD, an individual; PATRICIA A. FORD, an individual; WILLIAM SOUSA, an individual; JUDY SOUSA, an individual; TROPICANA PARTNERS 2,

Case No. A-11-640113-C
Dept. No. XXXI

FINDINGS OF FACT, CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Nov. 12, 2014)

Date: October 7, 2014
Time: 11:00 a.m.

LLC, a Nevada limited liability corporation; and DOES I through X and ROE Corporations, I through X, inclusive, Defendants.	
CONSOLIDATED WITH:	
BRANCH BANKING AND TRUST COMPANY, successor-in-interest to COLONIAL BANK by acquisition of assets from the FDIC as Receiver for Colonial Bank, a North Carolina banking corporation organized and in good standing under the laws of the State of North Carolina, Plaintiffs, v. BARRY A. FORD, an individual; PATRICIA A. FORD, an individual; WILLIAM SOUSA, an individual; JUDY SOUSA, an individual; and DOES I through X and ROE corporations, I through X, inclusive, Defendants.	Case No. A-11-640116-C Dept. No. XXV

BRANCH BANKING AND TRUST COMPANY, successor-in-interest to COLONIAL BANK by acquisition of assets from the FDIC as Receiver for Colonial Bank, a North. Carolina banking corporation organized and in good standing under the laws of the State of North Carolina, Plaintiffs, v. BARRY A. FORD, an individual; PATRICIA A. FORD, an individual; WILLIAM SOUSA, an individual; JUDY SOUSA, an individual; and DOES I through X and ROE Corporations, I through X, inclusive, Defendants.	Case No. A-11-640117-C Dept. No. XV

FINDINGS OF FACT, CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter having come before this Court pursuant to Plaintiff, BRANCH BANKING AND TRUST COMPANY, successor-in-interest to COLONIAL BANK by acquisition of assets from the FDIC as Receiver for Colonial Bank's "MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR 40.457 HEARING ON DAMAGES" on the 7th day of October, 2014, at 11:00

a.m., the Court having considered the papers and pleadings on file herein and the oral argument of counsel, and with good cause appearing, pursuant to MRCP 56(c), makes the following findings of fact and conclusions of law as follows:

I.

FINDING OF FACTS

1. On or about December 20, 2012, this court found the following facts as follows:[1]

A. THE PARTIES

2. Plaintiff Branch Banking and Trust Company is the successor-in-interest to Colonial Bank by acquisition of assets from the FDIC as Receiver for Colonial Bank (***"Plaintiff" or "BB&T"***) and is a North Carolina banking corporation organized and in good standing under the laws of the State of North Carolina, authorized to do and doing business in Clark County, Nevada.

3. Defendant Barry A. Ford (***"Mr. Ford"***) is, and at all relevant times mentioned herein was, an individual residing in the State of Nevada, and the founder and managing member of Tropicana Partners

[1] The Court's December 20, 2012 Findings of Fact, Conclusions of Law and Order As To Liability Against All Defendants shall be dispositive in the event of any inconsistencies between that Order and these Findings of Fact and Conclusions of Law.

2, LLC (***"Borrower"***) in the loan transactions referenced below.

4. Defendant Patricia A. Ford (***"Mrs. Ford"***) is, and at all relevant times mentioned herein was, an individual residing in the State of Nevada, and a member of Borrower.

5. Defendant William Sousa (***"Mr. Sousa"***) is, and at all relevant times mentioned herein, was, an individual residing in the State of California, and a member of Borrower.

6. Defendant Judy Sousa (***"Mrs. Sousa"***) is, and at all relevant times mentioned herein, was, an individual residing in the State of California, and a member of Borrower. (Mr. Ford, Mrs. Ford, Mr. Sousa and Mrs. Sousa are sometimes referred to collectively herein as the ***"Guarantors"***).

B. <u>LOAN 1</u>

7. On or about April 12, 2005, Tropicana Partners 2, LLC, as Borrower, executed a Loan Agreement (the ***"Jones Agreement"***) wherein Colonial Bank, i.e., Plaintiff's predecessor-in-interest, agreed to lend Borrower the sum of Five Million, Seven Hundred Eighty-Nine Thousand, Five Hundred Dollars ($5,789,500.00), Loan No. 8037091710 (the ***"Jones Loan"***) to purchase the property and improvements located at 5693 South Jones Blvd., Las Vegas, Nevada, 89118 (the ***"Jones Subject Property"***).

8. Pursuant to the terms and conditions of the Jones Agreement, Borrower's obligation to repay the Loan was evidenced by a Promissory Note (the ***"Jones Note"***).

9. On or about April 12, 2005, Borrower executed and delivered the Note in the principal sum of Five Million, Seven Hundred Eighty-Nine Thousand, Five Hundred Dollars ($5,789,500.00).

10. Repayment of the Note was secured by a Deed of Trust, Assignment of Rents and Leases, Security Agreement and Fixture Filing (the ***"Jones Deed of Trust"***). The Jones Agreement, the Jones Note, and the Jones Deed of Trust are collectively referred to herein as the ***"Jones Loan Documents"***).

11. Pursuant to the terms and conditions of the Jones Note, Borrower was to make equal monthly installments of principal and interest, commencing on the fifteenth day of the first calendar month after the Jones Deed of Trust was recorded, and continuing monthly thereafter. The total outstanding principal balance due under the Jones Note, and all accrued and unpaid interest, was due and payable in full no later than sixty (60) months from the date of the Jones Note or from the date of the recording of the Jones Deed of Trust, whichever was later (the ***"Jones Maturity Date"***).

12. Interest under the Jones Note accrued at a fixed rate equal to six and eighty-two hundredths percent (6.82%).

13. To the extent Borrower failed to make any payment provided for under the terms of the Jones Note, when due, after the expiration of all applicable cure periods, the total of the unpaid balance of principal and then accrued and unpaid interest would then begin accruing interest at the rate stated above, plus five percent (5%) (the ***"Jones Default Rate"***), until such time as the event of default in question was cured.

14. In addition to the Jones Default Rate, and all other fees due thereunder, for each payment not made within ten (10) days of the due date thereof, Borrower agreed to pay a late fee equal to five percent (5%) of the past due payment.

15. On or about April 12, 2005, Guarantors executed and delivered to Colonial Bank a certain document styled "Payment Guaranty" (the ***"Jones Guaranty"***) wherein Guarantors absolutely and unconditionally guaranteed full repayment of the Loan, and unconditionally agreed to pay the full amount of the Jones Loan. If Borrower defaulted in repayment of the Jones Loan, Guarantors agreed to pay, on demand, all sums due and owing on the Jones Loan, including all interest, charges, fees and other sums, costs and expenses.

16. Pursuant to the terms of the Jones Guaranty, Guarantors knowingly waived and relinquished all rights and remedies accorded by applicable law, and agreed not to assert or take advantage of any such rights or remedies, including but not limited to, any

right provided by NRS 40.430, or any other statute or decision to require Colonial Bank or its heirs, legal representatives, successors and assigns to proceed against Borrower, or to proceed against or exhaust any security held by same, or to pursue any other remedy before proceeding against Guarantors.

17. Borrower defaulted on the Jones Loan by failing to make its required payment due under the Jones Loan Documents.

18. Pursuant to its rights under the Jones Loan Documents, as successor-in-interest to Colonial Bank by acquisition of assets from the FDIC as Receiver for Colonial Bank, Plaintiff declared the entire balance of not less than Five Million, Six Hundred Twelve Thousand, Five Hundred Twenty-Eight Dollars and 29/100 Cents ($5,612,528.29) due and owing. This amount consists of an outstanding principal balance of Five Million, Three Hundred Nine Thousand, Eight Hundred Thirty-Two Dollars and 57/100 Cents ($5,309,832.57). Also due and owing is interest in the amount of at least Three Hundred Two Thousand, Two Hundred Forty-Five Dollars and 72/100 Cents ($302,245.72), which continues to accrue daily at the default rate from the date of default forward, and attorney's fees, which also continue to accrue.

19. Plaintiff performed faithfully pursuant to the terms and conditions of the Jones Loan Documents.

20. On or about June 19, 2012, Chicago Title of Nevada, Inc., a Nevada corporation, as duly appointed or substituted Trustee under and pursuant to the Deed of Trust, conducted a trustee's sale whereupon Eagle SPE NV I, Inc. purchased the Jones Subject Property with a winning bid of Two Million Four Hundred Twenty Thousand and 00/100 Dollars ($2,420,000.00) (the ***"Jones Sale Price"***).

C. LOAN 2

21. On or about May 5, 2004, Tropicana Partners 2, LLC, as Borrower (***"Borrower"***) executed a Loan Agreement (the ***"Tropicana Agreement"***) wherein Colonial Bank, i.e., Plaintiff s predecessor-in-interest, agreed to lend Borrower the sum of Four Million, Two Hundred Thousand Dollars ($4,200,000.00), Loan No. 8037012070 (the ***"Tropicana Loan"***), to purchase the property and improvements located at 9837 West Tropicana Ave, Las Vegas, Nevada, 89147 (the ***"Tropicana Subject Property"***).

22. Pursuant to the terms and conditions of the Tropicana Agreement, Borrower's obligation to repay the Tropicana Loan was evidenced by a Promissory Note (the ***"Tropicana Note"***).

23. On or about May 5, 2004, Borrower executed and delivered the Tropicana Note in the principal sum of Four Million, Two Hundred Thousand Dollars ($4,200,000.00).

24. Repayment of the Tropicana Note was secured by a Deed of Trust, Assignment of Rents and Leases, Security Agreement and Fixture Filing (the ***"Tropicana Deed of Trust"***). (The Tropicana Agreement, the Tropicana Note, and the Tropicana Deed of Trust are collectively referred to herein as the ***"Tropicana Loan Documents"***).

25. Pursuant to the terms and conditions of the Tropicana Note, Borrower was to make equal monthly installments of principal and interest, commencing on the fifteenth day of the first calendar month after the Tropicana Deed of Trust was recorded, and continuing monthly thereafter. The total outstanding principal balance due under the Note, and all accrued and unpaid interest, was due and payable in full no later than sixty (60) months from the date of the Tropicana Note or from the date of the recording of the Deed of Trust, whichever was later (the ***"Tropicana Maturity Date"***).

26. Interest under the Tropicana Note accrues at a fixed rate equal to six and thirty-one hundredths percent (6.31%).

27. To the extent Borrower failed to make any payment provided for under the terms of the Tropicana Note, when due, after the expiration of all applicable cure periods, the total of the unpaid balance of principal and then accrued and unpaid interest shall then begin accruing interest at the rate stated above, plus five percent (5%) (the ***"Tropicana***

Default Rate"), until such time as the event of default in question has been cured.

28. In addition to the Tropicana Default Rate, and all other fees due thereunder, for each payment not made within ten (10) days of the due date thereof, Borrower agreed to pay a late fee equal to five percent (5%) of the past due payment.

29. On June 16, 2009, the Tropicana Note was amended pursuant to the First Amendment to Promissory Note, which extended the Maturity Date to July 5, 2009 (the ***"First Tropicana Amendment"***).

30. On or about May 5, 2004, Guarantors executed and delivered a certain document styled "Payment Guaranty" (the ***"Tropicana Guaranty"***) wherein Guarantors absolutely and unconditionally guaranteed full repayment of the Loan, and unconditionally agreed to pay the full amount of the Tropicana Loan. If Borrower defaulted in the payment when due or any part of the Tropicana Loan, Guarantors agreed to pay, on demand, all sums due and owing on the Tropicana Loan, including all interest, charges, fees and other sums, costs and expenses.

31. Pursuant to the terms of the Tropicana Guaranty, Guarantors knowingly waived and relinquished all rights and remedies accorded by applicable law, and agreed not to assert or take advantage of any such rights or remedies, including but not limited to, any right provided by NRS 40.430, or any other statute or decision to require Colonial Bank or its heirs, legal representatives, successors and assigns to

proceed against Borrower, or to proceed against or exhaust any security held by same, or to pursue any other remedy before proceeding against Guarantors.

32. Borrower defaulted on the Tropicana Loan by failing to make its required payment due under the Tropicana Loan Documents.

33. Pursuant to its rights under the Tropicana Loan Documents, as successor-in-interest to Colonial Bank by acquisition of assets from the FDIC as Receiver for Colonial Bank, Plaintiff has declared the entire balance of not less than Four Million, One Hundred Eighty Three Thousand, Eight Hundred Seventy-Four Dollars and 12/100 Cents ($4,183,874.12) due and owing. This amount consists of an outstanding principal balance of Three Million, Seven Hundred Eighty-Eight Thousand, Seven Hundred Sixty-Three Dollars and 36/100 Cents ($3,788,763.36). Also due and owing is interest in the amount of Three Hundred Ninety-One Thousand, Eight Hundred Ten Dollars and 76/100 Cents ($391,810.76), which continues to accrue daily at the default rate from the date of default forward, and attorney's fees, to be immediately due and payable.

34. Plaintiff performed faithfully pursuant to the terms and conditions of the Tropicana Loan Documents.

35. On or about May 30, 2012, Chicago Title of Nevada, Inc., a Nevada corporation, as duly appointed or substituted Trustee under and pursuant to the Tropicana Deed of Trust, conducted a trustee's sale

whereupon J & S Sons, LP purchased the Tropicana Subject Property with a winning bid of Two Million One Hundred Fifty Five Thousand and 00/100 Dollars ($2,155,000,00) (***the "Sale Price"***).

D. LOAN 3

36. On or about August 16, 2004, Tropicana Partners 2, LLC, as Borrower (***"Borrower"***) executed a Loan Agreement (the ***"Stephanie Agreement"*** wherein Colonial Bank, i.e., Plaintiff's predecessor-in-interest, agreed to lend Borrower the sum of Five Million, Seven Hundred Thirty-Seven Thousand, Five Hundred Dollars ($5,737,500.00), Loan No. 8037012930 (the ***"Stephanie Loan"***), to purchase the property and improvements located at 594 North Stephanie Street, Henderson, Nevada, 89014 (the ***"Stephanie Subject Property"***).

37. Pursuant to the terms and conditions of the Stephanie Agreement, Borrower's obligation to repay the loan was evidenced by a Promissory Note (the ***"Stephanie Note"***).

38. On or about August, 2004, Borrower executed and delivered the Note in the principal sum of Five Million, Seven Hundred Thirty-Seven Thousand, Five Hundred Dollars ($5,737,500.00).

39. Repayment of the Note was secured by a Deed of Trust, Assignment of Rents and Leases, Security Agreement and Fixture Filing (the ***"Stephanie Deed of Trust"***). (The Stephanie Agreement,

the Stephanie Note, and the Stephanie Deed of Trust are collectively referred to herein as the ***"Stephanie Loan Documents"***).

40. Pursuant to the terms and conditions of the Stephanie Note, Borrower was to make equal monthly installments of principal and interest, commencing on the first day of the first calendar month after the Stephanie Deed of Trust was recorded, and continuing on the first day of each successive calendar month thereafter. The total outstanding principal balance due under the Stephanie Note, and all accrued and unpaid interest, was due and payable in full no later than sixty (60) months from the date of the Note or from the date of recording of the Stephanie Deed of Trust, whichever was later (the ***"Stephanie Maturity Date"***).

41. Interest under the Stephanie Note accrued at a fixed rate equal to six and nine hundredths percent (6.09%).

42. To the extent Borrower failed to make any payment provided for under the terms of the Stephanie Note, when due, after the expiration of all applicable cure periods, the total of the unpaid balance of principal and then accrued and unpaid interest shall then begin accruing interest at the rate stated above, plus five percent (5%) (the ***"Stephanie Default Rate"***), until such time as the event of default in question has been cured.

43. In addition to the Stephanie Default Rate, and all other fees due thereunder, for each payment

not made within ten (10) days of the due date thereof, Borrower agreed to pay Plaintiff a late fee equal to five percent (5%) of the past due payment.

44. On or about August 16, 2004, Guarantors executed and delivered a certain document styled "Payment Guaranty" (the ***"Stephanie Guaranty"***) wherein Guarantors absolutely and unconditionally guaranteed full repayment of the Stephanie Loan, and unconditionally agreed to pay the full amount of the Loan. If Borrower defaulted in the payment when due or any part of the Stephanie Loan, Guarantors agreed to pay, on demand, all sums due and owing on the Loan, including all interest, charges, fees and other sums, costs and expenses.

45. Pursuant to the terms of the Stephanie Guaranty, Guarantors knowingly waived and relinquished all rights and remedies accorded by applicable law, and agreed not to assert or take advantage of any such rights or remedies, including but not limited to, any right provided by NRS 40.430, or any other statute or decision to require Colonial Bank or its heirs, legal representatives, successors and assigns to proceed against Borrower, or to proceed against or exhaust any security held by same, or to pursue any other remedy before proceeding against Guarantors.

46. Borrower defaulted on the Stephanie Loan by failing to make its required payment due under the Stephanie Loan Documents.

47. Pursuant to its rights under the Stephanie Loan Documents, as successor-in-interest to Colonial

Bank by acquisition of assets from the FDIC as Receiver for Colonial Bank, Plaintiff has declared the entire balance of not less than Five Million, Six Hundred Fifteen Thousand, Nine Hundred Forty Dollars and 85/100 Cents ($5,615,940.85) due and owing. This amount consists of an outstanding principal balance of Five Million, One Hundred Ninety-Five Thousand, Six Hundred Eighty-Two Dollars and 44/100 Cents ($5,195,682.44). Also due and owing is interest in the amount of Four Hundred Twenty Thousand, One Hundred Eight Dollars and 41/100 Cents ($420,108.41), which continues to accrue daily at the default rate from the date of default forward, and attorney's fees, to be immediately due and payable.

48. Plaintiff performed faithfully pursuant to the terms and conditions of the Stephanie Loan Documents.

49. On or about May 30, 2012, Chicago Title of Nevada, Inc., a Nevada corporation, as duly appointed or substituted Trustee under and pursuant to the Deed of Trust, conducted a trustee's sale whereupon Eagle SPE NV I, Inc. purchased the Stephanie Subject Property with a winning bid of One Million Four Hundred Eighty Two Thousand and 00/100 Dollars ($1,482,000.00) (***the "Stephanie Sale Price"***).

50. On or about December 20, 2012, this court found that Plaintiffs were entitled to summary judgment as to liability on its Breach of Guaranty and Deficiency claims against the Guarantors.

51. However, the deficiency was never calculated because the Nevada Supreme Court, in *Sandpointe Apts. v. Eighth Judicial Dist. Court*, was in the process of considering the deficiency statute, NRS § 40.459, and the parties stayed the lawsuit to see if the high court's decisions would affect their calculations.

52. After *Sandpointe*, Plaintiffs filed a Motion for Summary Judgment arguing that NRS § 40.459 (1)(c) was unconstitutional and should not affect the calculation of Defendants' deficiency. [Plaintiff provided notice to the Attorney General's office pursuant to NRS 30.130, on August 19, 2014. The Attorney General indicated, in correspondence dated September 26, 2014, that they did not intend to appear.] JSK

CONCLUSIONS OF LAW

53. This court agrees with the Plaintiff's argument that "NRS 40.459(1)(c) applies only where the assignment at issue occurred on or after the effective date of that statute. A contrary application would violate the Contract Clause." *Eagle SPE NV I Inc. v. Kiley Ranch Communities et al*. 2014 WL 1199595 (D.Nev.).

54. When a legislature enacts laws that affect contracts, parties can challenge the law's constitutionality by demonstrating that (1) the law has substantially impaired a contractual relationship; (2) the impairment is not justified by a "significant and legitimate public purpse;" or if so justified, then (3)

the impairment is not based upon reasonable conditions or is not "of a character appropriate to the public purpose justifying [the legislation's] adoption." *Ross v. City of Berkeley*, 655 F. Supp. 820, 827 (N.D. Cal. 1987) (citations and internal quotation marks omitted.) NRS 40.459(1)(c) violates the Contract Clause because each of the factors above weigh against its constitutionality.

55. NRS 40.459(1)(c) substantially impairs the contract Plaintiff entered with the FDIC because it would limit Plaintiff's deficiency judgment by the amount Plaintiff paid the FDIC for its contractual rights and not Defendant's indebtedness. When the defendants unconditionally guaranteed the full payment of the Loan, they transferred to Plaintiff a right to the full payment of the loan, not to an amount that NRS 40.459(1)(c) would establish. Thus, by so limiting Defendants' deficiency, NRS 40.459(1)(c) impairs Plaintiff's contract with the FDIC.

56. Further, NRS 40.459(1)(c)'s impairment of the Plaintiff's contract is not justified by a "significant and legitimate public purpose," The stated purpose of NRS 40.459 (1)(c) is to encourage creditors to negotiate with borrowers, but if it were applied retroactively it would repudiate the borrowers' debts. This court therefore concludes that the second factor weighs against the statute's constitutionality.

57. In addition, NRS 40.459(1)(c)'s impairment is not based upon reasonable conditions and is not "of a character appropriate to the public purpose justifying

[its] adoption." There are no emergency conditions necessitating NRS 40.459(1)(c)'s impairment of contracts, the statute is not temporary, and there are less restrictive alternatives to applying NRS 40.459(1)(c) retroactively.

58. Because retroactively applying NRS 40.459(1)(c) to this case violates the Contract Clause of the US Constitution, this court did not determine whether the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) preempts NRS 40.459(1)(c), or whether the Nevada Revised Statutes excludes the FDIC from transactions involving NRS 40.459(1)(c).

III.

ORDER

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff 's Motion for Summary Judgment as to calculation of Defendants' deficiency and request for a 40.457 hearing on damages IS HEREBY GRANTED, A Fair Market Value hearing is set for December 12, 2014 at 9:00 a.m.

DATED this 7th day of ~~October~~ November, 2014.

s/ JSK JOANNA S. KISHNER
DISTRICT COURT JUDGE

Prepared and Submitted by:

SYLVESTER & POLEDNAK, LTD.

By /s/ Allyson Noto
Allyson R. Noto, Esq.
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Approved as to Form ~~and Content~~ [WAS]:

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NRS 40.459 Limitations on amount of money judgment.

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

(a) The amount by which the amount of the indebtedness which was secured exceeds the fair market value of the property sold at the time of the sale, with interest from the date of the sale;

(b) The amount which is the difference between the amount for which the property was actually sold and the amount of the indebtedness which was secured, with interest from the date of sale; or

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

➥whichever is the lesser amount.

2. For the purposes of this section, the "amount of the indebtedness" does not include any amount received by, or payable to, the judgment creditor or beneficiary of the deed of trust pursuant to an insurance policy to compensate the judgment creditor or

beneficiary for any losses incurred with respect to the property or the default on the debt.

(Added to NRS by 1969, 573; A 1985, 371; 1987, 1644; 1989, 1770; 1993, 152; 2011, 1743)

131 Nev., Advance Opinion [23]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL A. MUNOZ
AND SHERRY L. MUNOZ,
HUSBAND AND WIFE,
Appellants,
vs.
BRANCH BANKING AND
TRUST COMPANY, INC.,
A NORTH CAROLINA
CORPORATION,
Respondent.

No. 63747

Appeal from a post-judgment deficiency judgment in a judicial foreclosure action. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.

Affirmed.

Law Offices of John J. Gezelin and John J. Gezelin, Reno,
for Appellants.

Sylvester & Polednak, Ltd., and Jeffrey R. Sylvester and Allyson R. Noto, Las Vegas,
for Respondent.

BEFORE THE COURT EN BANC.

OPINION

(Filed Apr. 30, 2015)

By the Court, SAITTA, J.:

Pursuant to the Supremacy Clause of the United States Constitution, "state laws that conflict with federal law are without effect." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal quotations omitted). One of the purposes of the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.), is "to facilitate the purchase and assumption of failed banks as opposed to their liquidation." *FDIC v. Newhart*, 892 F.2d 47, 49 (8th Cir. 1989).

At issue here is whether NRS 40.459(1)(c)'s limitation on the amount of a deficiency judgment that a successor creditor can recover conflicts with FIRREA's purpose of facilitating the transfer of the assets of failed banks to other institutions. Because NRS 40.459(1)(c) limits the value that a successor creditor can recover on a deficiency judgment, its application to assets transferred by the Federal Deposit Insurance Corporation (FDIC) frustrates the purpose of FIRREA. Therefore, we hold that NRS 40.459(1)(c) is preempted by FIRREA to the extent that NRS 40.459(1)(c) limits deficiency judgments that may be obtained from loans transferred by the FDIC.

FACTUAL AND PROCEDURAL HISTORY

In 2007, appellants Michael A. and Sherry L. Munoz borrowed money from Colonial Bank and granted Colonial Bank a security interest in their real property. In 2009, the FDIC placed Colonial into receivership and assigned the Munozes' loan to respondent Branch Banking and Trust Company, Inc. (BB&T). In 2011, NRS 40.459(1)(c), which implements certain limitations on the amount of a deficiency judgment that can be recovered by an assignee creditor, became effective. 2011 Nev. Stat., ch. 311, §§ 5, 7, at 1743, 1748. In 2012, after the Munozes had defaulted on their loan, BB&T instituted an action for a judicial foreclosure of the secured property, which the Munozes did not oppose. The property was sold for less than the value of the outstanding loan at a sheriff's sale in 2013. BB&T then filed a motion seeking a deficiency judgment against the Munozes for the remaining balance of the loan. Reasoning that NRS 40.459(1)(c) did not apply retroactively to the Munozes' loan, which was originated and assigned before the statute's effective date, the district court awarded a deficiency judgment to BB&T for the full deficiency amount sought. In its order, the district court did not address whether NRS 40.459(1)(c)'s present application was preempted by federal law. The Munozes then filed the present appeal.

DISCUSSION

In addition to addressing whether NRS 40.459(1)(c)'s application in the present case was impermissibly retroactive, the parties briefed several other issues, including whether this statute was preempted by fedral law. The Munozes argue that NRS 40.459(1)(c) is not preempted by a conflict with federal law because it does not impair the FDIC's ability to act as the receiver for a failed bank or to transfer a failed bank's assets.

BB&T argues that the application of NRS 40.459(1)(c) to loans acquired from the FDIC is preempted by FIRREA because NRS 40.459(1)(c) interferes with the FDIC's ability to assume and dispose of a failed bank's assets.

Standard of review

"Whether state law is preempted by a federal statute or regulation is a question of law, subject to our de novo review." *Nanopierce Techs., Inc. v. Depository Trust & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) (citation omitted). When reviewing a question of law, "[we] will affirm the order of the district court if it reached the correct result, albeit for different reasons." *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

A state law that conflicts with federal law is preempted and without effect

The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Thus, "state laws that conflict with federal law are without effect." *Altria Grp.*, 555 U.S. at 76 (internal quotations omitted).

One situation in which federal law can preempt a state law is where a direct conflict between federal and state law exists. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988). This occurs when the state law "frustrates the purpose of the national legislation, or impairs the efficiencies of [the] agencies of the Federal government to discharge the duties for the performance of which they were created." *McClellan v. Chipman*, 164 U.S. 347, 357 (1896) (internal quotations omitted); *see also Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (observing that state and local laws which frustrate federal law are preempted); *Nanopierce Techs.*, 123 Nev. at 375, 168 P.3d at 82 (holding that conflict preemption occurs when a state law frustrates a federal law's purpose).

FIRREA serves to facilitate the sale of a failed bank's assets

"'Congress enacted [FIRREA] to enable the federal government to respond swiftly and effectively to the declining financial condition of the nation's banks and savings institutions.'" *Schettler v. RalRon Capital Corp.*, 128 Nev. Adv. Op. No. 20, 275 P.3d 933, 936 (2012) (alteration in original) (quoting *Henderson v. Bank of New England*, 986 F.2d 319, 320 (9th Cir. 1993)). Under FIRREA, "[w]hen the FDIC is appointed receiver of a failed financial institution, it immediately becomes the receiver of all of that institution's assets, including promissory notes that are in default." James J. Boteler, *Protecting the American Taxpayers: Assigning the FDIC's Six Year Statute of Limitations to Third Party Purchasers*, 24 Tex. Tech L. Rev. 1169, 1172 (1993) (citation omitted). When acting as a receiver for a failed bank, "[t]he FDIC's essential duty is to convert all of the institution's assets to cash to cover the insured depositors." *Id.* One method of this is a purchase and assumption agreement, where "the FDIC tries to arrange for a solvent bank to purchase the assets of the failed bank so as to avoid any interruption and loss to the depositors." *Id.*; *see also Newhart*, 892 F.2d at 49 (observing that one of FIRREA's purposes "is to facilitate the purchase and assumption of failed banks as opposed to their liquidation").

To assist the FDIC in carrying out this duty, federal law provides special status to the FDIC's assignees so as to maintain the value of the assets they receive from the FDIC. *See, e.g.*, *FDIC v. Bledsoe*, 989

F.2d 805, 809-11 (5th Cir. 1993) (providing that FDIC assignees share the FDIC's statutory "super" holder-in-due-course status and are entitled to the benefit of a six-year statute of limitations under FIRREA rather than any shorter state statute of limitations); *see also Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1249 (5th Cir. 1990) (holding that "the FDIC and subsequent note holders enjoy holder in due course status whether or not they satisfy the technical requirements of state law"); *Bell & Murphy & Assocs., Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 754 (5th Cir. 1990) (holding that protections provided to the FDIC from claims or defenses based on unrecorded side agreements extend to private assignees of the FDIC).

If a state statute limits the market for assets transferred by the FDIC, it conflicts with FIRREA because it "would have a deleterious effect on the FDIC's ability to protect the assets of failed banks." *Newhart*, 892 F.2d at 50; *see also Bledsoe*, 989 F.2d at 811 (holding that FDIC assignees are afforded a six-year statute of limitations under FIRREA rather than any shorter state statute of limitations, because the shorter state statute of limitations would limit the value of the assets the FDIC is to assign); *Fall v. Keasler*, No. C 90 20643 SW (ARB), 1991 WL 340182, at *4 (N.D. Cal. Dec. 18, 1991) ("The FDIC can only make full use of the market in discharging its statutory responsibilities if the market purchasers have the same rights to pursue actions against recalcitrant debtors as does the FDIC."). Thus, state laws that limit

the private market for assets of failed banks held by the FDIC conflict with FIRREA and are preempted.

NRS 40.459(1)(c) is preempted by its conflict with FIRREA

NRS 40.459(1)(c) limits the amount an assignee creditor may recover on a deficiency judgment to the amount that it paid to acquire the interest in the secured debt less the amount of the secured property's actual value. Specifically, the statute provides that

> the amount by which the amount of the consideration paid for that right [to obtain the deficiency judgment] exceeds the fair market value of the property sold at the time of sale or the amount for which the property was actually sold, whichever is greater, with interest from the date of sale and reasonable costs,

shall be the amount of a deficiency judgment. NRS 40.459(1)(c).

Since the statute limits a successor creditor's recovery to no more than it paid for a loan, NRS 40.459(1)(c) prevents a creditor from realizing a profit on its purchase of a debt from an assignor creditor. *See id*. This statute makes it less likely that a rational creditor would purchase such a loan. Therefore, NRS 40.459(1)(c)'s application to failed banks' assets held by the FDIC would limit the private market for such assets by making it more difficult for the FDIC to dispose of these assets. Thus, the application of

NRS 40.459(1)(c) to assets transferred by the FDIC would frustrate the purpose of FIRREA and directly conflict with this federal statutory scheme. Consequently, NRS 40.459(1)(c) is preempted by FIRREA as to assets transferred by the FDIC and is without effect in this case. *See Altria Grp.*, 555 U.S. at 76.

CONCLUSION

Although the district court found that NRS 40.459(1)(c) does not apply to BB&T's application for a deficiency judgment for a different reason than the one stated above, it reached the correct result in concluding that NRS 40.459(1)(c) did not shield the Munozes from deficiency judgment liability. Since "[we] will affirm the order of the district court if it reached the correct result, albeit for different reasons," *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987), we affirm the district court's order on the grounds that conflict preemption prevents NRS 40.459(1)(c)'s application in the present case.[1]

/s/ Saitta, J.
Saitta

[1] Since NRS 40.459(1)(c)'s application in the present case is preempted by its conflict with FIRREA, we do not reach the other issues raised, including whether: (1) NRS 40.459(1)(c)'s application in the present case would be retroactive, (2) this statute's application in the present case violates the Contracts Clause of the United States or Nevada Constitutions, or (3) the FDIC is a person within the meaning of NRS 40.459(1)(c).

/s/ Hardesty, C.J.
Hardesty

/s/ Parraguirre, J.
Parraguirre

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

/s/ Gibbons, J.
Gibbons

/s/ Pickering, J.
Pickering

NOTC

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Attorneys for Defendants and Appellants,
WILLIAM SOUSA and JUDY SOUSA

DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING AND TRUST COMPANY, successor-in-interest to COLONIAL BANK by acquisition of assets from the FDIC as Receiver for Colonial Bank, a North Carolina banking corporation organized and in good	Lead Case No. A-11-640113-C Dept. No. XXXI **NOTICE OF APPEAL**

standing under the laws of the State of North Carolina, Plaintiffs, v. BARRY A. FORD, et al, Defendants.	[Consolidated with Case No. A-11-640116-C Dept. No. XXV, and Case No. A-11-640117-C, Dept. No. XV] (Filed Apr. 13, 2015)

Notice is hereby given that WILLIAM SOUSA and JUDY SOUSA, defendants in the above-captioned consolidated civil actions, hereby appeal to the Supreme Court of Nevada from the final judgment entered in these actions on the 24th day of March, 2015, a copy of which is appended hereto.

Dated: April 13, 2015

/s/ Wayne A. Silver

Wayne A. Silver, Esq.
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Attorneys for Defendants/ Appellants William Sousa and Judy Sousa

JUDG

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING AND TRUST COMPANY, successor-in-interest to COLONIAL BANK by acquisition of assets from the FDIC as Receiver for Colonial Bank, a North Carolina banking corporation organized and in good standing under the laws of the State of North Carolina, Plaintiffs, v. BARRY A, FORD, an individual; PATRICIA. A. FORD, an individual; WILLIAM SOUSA, an individual; JUDY SOUSA, an individual; and DOES I through	Case No. A-11-640113-C Dept. No. XXXI **JUDGMENT**

X and ROE Corporations, I through X, inclusive, Defendants.	
CONSOLIDATED WITH:	
BRANCH BANKING AND TRUST COMPANY, successor-in-interest to COLONIAL BANK by acquisition of assets from the FDIC as Receiver for Colonial Bank, a North Carolina banking corporation organized and in good standing under the laws of the State of North Carolina, Plaintiffs, v. BARRY A, FORD, an individual; PATRICIA. A, FORD, an individual; WILLIAM I. SOUSA, an individual; JUDY SOUSA, an individual; and DOES I through X and ROE Corporations, I through X, inclusive, Defendants.	Case No. A-11-640116-C Dept. No. XXV
BRANCH BANKING AND TRUST COMPANY, successor-in-interest to COLONIAL BANK by acquisition of assets from the FDIC as Receiver for Colonial Bank, a North	Case No. A-11-640117-C Dept. No. XV

Carolina banking corporation organized and in good standing under the laws of the State of North Carolina,

Plaintiffs,

v.

BARRY A, FORD, an individual; PATRICIA A. FORD, an individual; WILLIAM SOUSA, an individual; JUDY SOUSA, an individual; and DOES I through X and ROE Corporations, I through X, inclusive,

Defendants.

JUDGMENT

(Filed Mar. 24, 2015)

Pursuant to the Stipulation and Order Regarding Fair Market Value of Properties entered into by and between the parties on December 10, 2014, having considered the papers and pleadings on file herein, and good cause appearing, it is hereby:

ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of Plaintiff, BRANCH BANKING AND TRUST COMPANY, successor-in-interest to COLONIAL BANK by acquisition of assets from the FDIC as Receiver for Colonial Bank, a North Carolina banking corporation organized and in good standing under the laws of the State of North Carolina, against Defendants BARRY FORD, PATRICIA A.

FORD, WILLIAM SOUSA, and JUDY SOUSA, individually, jointly and severally, for debts owed in the total amount of **Nine Million One Hundred Fifty Nine Thousand Six Hundred Forty Six Dollars and 80/100 ($9,159,646,80)**. This Judgment is comprised of the following:

1. $2,979,601.46 for the Subject Property located at 5693 South Jones Blvd., Las Vegas, Nevada, 89118 (the "Jones Property") which consists of the following:

a.	Principal:	$5,309,832.57
	Payment:	$ 195,218.94
	Monies received pursuant to receivership:	$ 51,377.78
	Fair Market Value:	$2,800,000.00
	Final Principal:	$2,263,235.85
	Interest at 6.82%	$ 716,365.61
	Total Indebtedness	**$2,979,601.46**

2. $2,032,063.32 for the Subject Property located at 9837 West Tropicana Ave, Las Vegas, Nevada, 89147 (the "Tropicana Property") which consists of the following:

a.	Principal:	$3,788,763.36
	Monies Received after foreclosure:	$ 15,000.00
	Payment:	$ 119,501.94
	Fair Market Value:	$2,140,000.00
	Final Principal:	$1,514,261.42
	Interest at 6.31%	$ 517,801.90
	Total Indebtedness	**$2,032,063.32**

3. $4,147,982.02 for the Subject Property located at 594 North Stephanie Street, Henderson, Nevada,

89014 (the "Stephanie Property") which consists of the following:

a.	Principal:	$5,195,682.44
	Payment:	$ 127,551.30
	Fair Market Value:	$1,915,000.00
	Final Principal:	$3,153,131.14
	Interest at 6.09%	$ 994,850.88
	Total Indebtedness	**$4,147,982.02**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment may be supplemented with attorney's fees and costs incurred by Plaintiff as permitted by law and/or contract after notice and a hearing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this is a Final Judgment pursuant to NRCP Rule 54 and NRCP Rule 58.

DATED this 19th day of ~~February~~ March, 2015.

/s/ Joanna S. Kishner JOANNA S. KISHNER
[jsp] DISTRICT COURT JUDGE

Respectfully submitted by:

SYLVESTER & POLEDNAK, LTD.

By: /s/ Allyson R. Noto
Allyson R. Noto, Esq.
1731 Village Center Circle

Approved as to form:

LAW OFFICE OF TIMOTHY P. THOMAS

By: /s/ Timothy P. Thomas
Timothy P Thomas, Esq.
8670 W. Cheyenne Ave., Ste. 120

Las Vegas,
Nevada 89134
Attorneys for Plaintiff

Las Vegas, Nevada
89128
Attorneys for Barry & Patricia Ford

Approved as to form only, with full reservation of all post judgment and appellate rights and remedies:

LAW OFFICE OF WAYNE A. SILVER

By /s/ Wayne A. Silver
Wayne A. Silver, Esq.
333 W. El Camino Real, Ste. 310
Sunnyvale, CA 94087
Attorney for William & Judy Sousa

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am the attorney for Defendants/Appellants WILLIAM SOUSA and JUDY SOUSA, and that on the 13th day of April, 2015, I served the foregoing document:

NOTICE OF APPEAL

by the following means to the person(s) as listed below:

[ ] **By ECF System** (or the "Notice of Electronic Filing" to all addresses):

[x] **By United States Mail**, postage fully pre-paid to person(s) and addresses as follows:

Attorneys for Plaintiff/ Appellee, Branch Banking and Trust Company	Attorneys for the Ford Defendants
Allyson R. Noto, Esq. SYLVESTER & POLEDNAK 1731 Village Center Circle Las Vegas, Nevada 89134	Timothy P. Thomas, Esq. Law Office of Timothy P. Thomas, LLC 8670 W. Cheyenne Ave., Suite 120 Las Vegas, NV 89128

[ ] **By Direct Email** (as opposed to through the ECF system (list persons and email addresses). Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[ ] **By Facsimile Transmission** to person(s) and addresses as follows: Based upon the written agreement of the parties to accept service by fax transmission or a court order, I faced the document(s) to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on April 13, 2015 at Sunnyvale, California.

/s/ Wayne A. Silver
Wayne A. Silver