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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

LENDER PROCESSING SERVICES, INC.; FIDELITY NATIONAL INFORMATION SERVICE, INC.; LPS DEFAULT SOLUTIONS, INC.; DOCX, LLC; DOES I-XX,

Defendants.

Case No.: A-11-653289-B
Dept. No.: XI

DEFENDANTS' MOTION TO DISMISS

Date of Hearing:

Time of Hearing:

Defendants Lender Processing Services, Inc. ("Lender Processing"), Fidelity National Information Services, Inc. ("FNIS"), LPS Default Solutions, Inc. ("Default Solutions") and DocX, LLC ("DocX"), submit their Motion to Dismiss, and respectfully request that this honorable Court enter an Order dismissing, with prejudice, Plaintiff State of Nevada's Complaint pursuant to NRCP 12(b)(5) and (6).

This motion is based on the pleadings and papers on file, the following Memorandum of Points and Authorities, and any argument that the Court may choose to entertain.

Dated: January 30, 2012

SNELL & WILMER L.L.P.

By: _____

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NOTICE OF MOTION

TO: STATE OF NEVADA; and

TO: CATHERINE CORTEZ MASTO and BINU G. PALAL, its attorneys.

PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for hearing in Department XI of the above-entitled Court on the _____ day of _____ 2012 at ____:____ a.m.

Dated: January 30, 2012

SNELL & WILMER L.L.P.

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's Complaint is both fundamentally flawed in substance and improperly pled. The alleged deceptive acts are not actionable under Chapter 598, as a matter of law. Further, Plaintiff's claims are a collection of suppositions, legal conclusions, and inflammatory labels that entirely fail to link the alleged conduct with any transaction in this state that could give rise to a claim under Chapter 598. Simply put, the Complaint should be dismissed with prejudice.

Plaintiff asserts a single claim of alleged violations of the Nevada Deceptive Trade Practices Act, NRS Chapter 598 (the "Act"), against Lender Processing, FNIS, Default Solutions, and DocX based upon allegations of robo-signing, surrogate signing and improper notarization of foreclosure-related documents which purportedly caused defective foreclosures. Complaint, ¶¶2-3, 163-172. While Plaintiff makes generalized allegations regarding "false, deceptive and deficient documents" (Complaint, ¶2), only assignments of mortgages, assignments of trust deeds, substitutions of trustees, and "default affidavits" allegedly filed with courts are discussed with any particularity.[1] Complaint, ¶¶91, 93, 96. Plaintiff also asserts that the Defendants' alleged contractual relationships with foreclosure law firms result in improper influence and control over counsel and involve improper fees characterized as "kickbacks" in violation of the Act. Complaint, ¶¶7, 15, 32, 137, 147, 158, 162. Plaintiff additionally contends that Defendants made mis-statements or omissions of material fact in connection with SEC filings or press releases, which are also alleged to violate the Act. Complaint, ¶¶105-106, 109-110, 113-114.

Plaintiff's Complaint suffers from a myriad of serious substantive defects which require dismissal. Initially, the Act does not apply to allegedly deceptive mortgage foreclosures or allegedly deceptive foreclosure related documents, but rather is limited to sales of goods and services. Because Plaintiff has failed to allege that the Defendants engaged in the sale of goods and services, the Complaint simply fails to state a claim and must be dismissed.

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[1] Plaintiff's allegations of purportedly defective default affidavits submitted to courts are puzzling because Nevada is a non-judicial foreclosure state and foreclosures generally are accomplished without court intervention. Even if such allegedly defective affidavits were submitted to Nevada courts, any claim regarding these documents would be barred by absolute litigation privilege. *See Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60-61, 657 P.2d 101, 104-105 (1983).

In addition, the Plaintiff's allegations of "robo-signing" and "surrogate signing" are simply not actionable under the Act.[2] Nevada statutory and common law are conclusive that neither activity is illegal, and legal activities are not permitted to be the basis of a consumer fraud claim. Signing of documents by an authorized agent (robo-signing) is expressly permitted. Similarly, surrogate signing is expressly permitted and, by definition, not forgery.

Moreover, affidavits submitted in connection with litigation are protected by the absolute litigation privilege. Under Nevada law, the absolute litigation privilege protects statements made by a party before, during, or after the commencement of a legal proceeding. *See, e.g.*, *Circus Circus Hotels, Inc.*, 99 Nev. at 60 (holding, "communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of controversy."). The Nevada Supreme Court has further held that "courts should apply the absolute privilege liberally, resolving any doubt 'in favor of its relevancy or pertinency.'" *Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002). Therefore, statements made in affidavits are absolutely privileged.

Conspicuously absent from Plaintiff's allegations is any contention that the contents of the documents were false. Rather, Plaintiff's sole allegation is that the documents contain defects in their execution. Notwithstanding defects in execution, recorded documents affecting real property are effective as to the parties to such documents, and, in the case of assignments, the affected parties are the assignor and assignee. Accordingly, borrowers are neither parties to an assignment nor third party beneficiaries, and, therefore, as a matter of law cannot be harmed by any defects in execution, particularly in the absence of any allegation that such borrowers were not in default.

[2] "Robo-signing" can be defined as the execution of documents in volume on behalf of a lender or loan servicer by a bank employee or third-party having express authority to sign such documents. "Surrogate signing" occurs when someone signs another person's name on a document after receiving permission to do so. These definitions are consonant with the allegations contained in Plaintiff's Complaint. Neither practice is illegal, as will be discussed herein.

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In an attempt to throw as many claims as possible against Defendants without regard to their merit or applicability under the statute, Plaintiff accuses "LPS" of securities-related violations under the Act. As an initial matter, Plaintiff intentionally avoids any reference to the plain language of the statute which requires statements to constitute an advertisement or offer to sell a security. Plaintiff merely attempts to characterize statements contained in federal filings and press releases, which described errors in notarization and errors in business processes, as deceptive. But there is no tortured analysis that can transform a public company's statutory obligation to disclose relevant matters in its SEC filings into an advertisement, prospectus or marketing material. Further, because robo-signing and surrogate signing are not improper as a matter of law, the statements themselves were accurate and cannot, therefore, be construed as deceptive.

Setting aside the myriad of substantive defects of the Complaint, Plaintiff has, as a basic premise, failed to even properly plead its claims. Plaintiff's 39 page, 177 paragraph Complaint asserts a single count against all Defendants for violations of the Act. Contrary to pleading requirements, Plaintiff consistently refers to the Defendants collectively as "LPS", based primarily upon generalized allegations of improper technical execution of "foreclosure-related documents." Complaint, ¶¶2-3. In doing so, Plaintiff has employed the tactic of improperly conflating the Defendants together, without alleging with particularity which Defendant has committed what purportedly improper action. Plaintiff makes no attempt at all to identify what alleged wrongful acts were committed by either Lender Processing or FNIS, other than that FNIS was once the parent company of Lender Processing, (Complaint, ¶19) and that Default Solutions and DocX are subsidiaries of Lender Processing (Complaint, ¶21).[3] Even when making allegations regarding misconduct of DocX at its Georgia offices (Complaint, ¶¶ 34-79) and Default Solutions at its Minnesota offices (Complaint, ¶¶80-97), Plaintiff glibly begins by referring to the individual subsidiaries and then shifts to conflated references to "LPS" generally, without distinguishing between the Defendants. This improper tactic alone mandates dismissal.

[3] Plaintiff makes no allegations that Default Solutions or DocX are alter egos of either Lender Processing or FNIS, that any conspiracy existed between the companies to violate the Act, or any other theory upon which Lender Processing or FNIS could be held responsible for those actions of their former or present subsidiaries.

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Plaintiff also labels as deceptive Default Solutions' contracts to provide administrative services to the counsel for lenders and loan servicers in connection with judicial foreclosure proceedings, alleging that such agreements provide for "kickbacks"[4], and improper influence upon foreclosure counsel. Defendants find these allegations anomalous because Nevada is a non-judicial foreclosure state. This aside, in order for these allegations to constitute a valid claim they must involve a misrepresentation between the parties. However, these allegations cannot, as a matter of law, involve a misrepresentation because they are the subject of an express agreement. Further, to the extent that the legality of the agreements is being challenged by Plaintiff, it has failed to join indispensible parties, the law firms that are parties to the agreements.

In general, there is simply no rational explanation for Plaintiff's failure to plead with the requisite specificity and such pleading deficiencies cannot be overcome. Plaintiff acknowledges that it conducted an "extensive" investigation spanning a full year prior to the filing of its Complaint, including the service of subpoenas, interviews of former employees and clients, and an examination of this state's foreclosure records. Complaint, ¶¶14-15. Yet, the Complaint makes no differentiation between the separately organized corporate entities, does not plead violations of the Act with any particularity, relies solely upon inflammatory labels such as "robo-signing" and "surrogate signing," all combined with the patently incorrect legal conclusion that such activities constitute "forgery." Even when attempting to recite some details regarding the alleged activities of Default Solutions and DocX, Plaintiff fails to link such activities to specific mortgage-related documents filed or recorded in Nevada, other than to attach as exhibits a mere total of three mortgage-related documents[5] that are vaguely alleged to be "examples" of improper documents.

[4] Black's Law Dictionary defines a "kickback" as "[a] return of portion of a monetary sum received, esp. as a result of coercion or a secret agreement." *Black's Law Dictionary*, Second Pocket Edition (2001). Plaintiff alleges neither coercion nor a secret agreement, and concedes that an express agreement exists.

[5] Moreover, Plaintiff fails to allege that any document executed by Default Solutions or DocX employees contains errors or is incorrect. Plaintiff only discusses with any detail assignments of mortgages, assignments of trust deeds, substitutions of trustee, and affidavits. However, notably absent from Plaintiff's allegations, despite its "extensive" investigation is any allegation that the assignors did not intend to assign to any assignees, that the beneficiary did not intend to substitute a new trustee, or that the factual averments in any affidavit were incorrect.

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The weakness of Plaintiff's allegations is further highlighted by its lack of reference to specific mortgage-related documents, particularly in light of Plaintiff's own acknowledgement of its review of "thousands" of allegedly flawed documents being prepared by Default Solutions and DocX. Pleading under the Act is not permitted to be based upon suppositions, labels and legal conclusions; such allegations must be pled with particularity including specific allegations of the time, place and identities of the parties to each purported misrepresentation. There is no question that Plaintiff has failed to even meet this basic requirement, even after a full year of extensive investigation.

II. ARGUMENT

A. Motion to Dismiss Standard

A defendant is entitled to dismissal when a plaintiff fails "to state a claim upon which relief can be granted." NRCP 12(b)(5). The Nevada Supreme Court historically interpreted NRCP 12(b)(5) as allowing dismissal only if a plaintiff could prove no set of facts which would entitle him to relief. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008); *Bergmann v. Boyce*, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993). However, the United States Supreme Court, interpreting the federal counterparts to Nevada's pleading and dismissal standards, ruled that the "no set of facts" language has "earned its retirement" and has been replaced with a "plausibility" requirement. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-63, 567 (2007).[6]

Under *Twombly*, to withstand dismissal, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." 550 U.S. at 555-56. To state a valid claim, a plaintiff must allege either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory. *Id.* at 562. Thus, "a complaint must be dismissed if it does not plead 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* at 570.

[6] The Nevada Supreme Court has recently reiterated that "federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when [a Nevada Court] examines its rules." *Rocker v. KMPG LLP*, 122 Nev. 1185, 1193 n.15, 148 P.3d 703, 709 (2006) (citations omitted). Indeed, "the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 n.24, P.3d 872, 876-877 (2002) (citation omitted).

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Even if *Twombly* does not apply, the Court should dismiss all claims because Plaintiff can prove no set of facts which, if accepted by the trier of fact as true, would entitle it to relief. *Buzz Stew*, 124 Nev. at 228; *Bergmann*, 109 Nev. at 675. Regardless of which standard is applied, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986); *see also George v. Morton*, No. 2:06-cv-1112-PMP-GWF, 2007 U.S. Dist. LEXIS 15981, at *17 (D. Nev. March 1, 2007).

B. The Complaint Must be Pled with Particularity

Plaintiff's Complaint is based exclusively upon Nevada's Deceptive Trade Practices Act, NRS Chapter 598. Claims brought under the Act must be pled with particularity. *See Thomas v. Wachovia Mortg. FSB*, No. 10-cv-1819-ECR-GWF, 2011 U.S. Dist. LEXIS 81758, at *3 (D. Nev. July 25, 2011); *Tucker v. JP Morgan Chase Bank, N.A.*, No. 10-cv-959-JCM-LRL, 2011 U.S. Dist. LEXIS 7179, at *6 (D. Nev. Jan. 25, 2011); *Weinstein v. Home American Mortg. Corp.*, No. 10-cv-1552-PMP-LRL, 2010 U.S. Dist. LEXIS 139093, at *7-8 (D. Nev. Dec. 29, 2010); *Patterson v. Grimm*, No. 10-cv-1292-JCM-RJJ, 2010 U.S. Dist. LEXIS 120901, at *10 (D. Nev. Nov. 1, 2010); *Simon*, 2010 U.S. Dist. LEXIS 63480 at *22-23 (D. Nev. June 23, 2010); *Windisch v. Hometown Health Plan, Inc.*, No. 3:08-cv-00664-RCJ-RAM, 2010 U.S. Dist. LEXIS 20989, at *21 (D. Nev. Mar. 5, 2010); *George v. Morton*, No. 06-cv-1112-PMP-GWF, 2007 U.S. Dist. LEXIS 15932, at *35 (D. Nev. Mar. 1, 2007).[7]

[7] Like its federal counterpart, under NRCP 9(b), a plaintiff must plead the circumstances constituting ***fraud*** with particularity. This is required "in order to afford adequate notice to the opposing part[ies]." *Ivory Ranch v. Quinn River Ranch*, 101 Nev. 471, 472-73, 705 P.2d 673, 675 (1985). This is "'so that they can defend against the charge and not just deny that they have done anything wrong.'" *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (quoting *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)). Because Nevada's Rules are based upon the federal rules, decisions interpreting the Federal Rules of Civil Procedure are deemed persuasive authority when the Nevada Rules of Civil Procedure are examined. *See Executive Mgmt,* 118 Nev. at 53.

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To state a claim under the Act, a plaintiff must at a minimum, allege (1) an act of consumer fraud by the defendant (2) caused (3) damage to the plaintiff. *See Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev. 2009); *see also Simon v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 63480, *22-23 (D. Nev. June 23, 2010). The consumer fraud element further requires that a plaintiff allege reasonable reliance on the alleged misrepresentation. *See Sylver v. Executive Jet Management, Inc.*, No. 2:10-cv-01028-RLH-RJJ, 2011 U.S. Dist. LEXIS 255, at *8 (D. Nev. Jan. 3, 2011) (citing *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 657-58 (D. Nev. 2009)). Some species of false, misleading or deceptive representation is an element of every enumerated "deceptive trade practice" in NRS 598.0915 and must also be pled.

In order to sufficiently plead with particularity pursuant to NRCP 9(b), a plaintiff is required to identify the parties to, and the time and place of, the misrepresentation, as well as the specific nature of the act. *See Brown v. Kellar,* 97 Nev. 582, 583-584, 636 P.2d 874, 874 (1981).

C. Nevada's Deceptive Trade Practices Act is Inapplicable to Alleged Flaws in Mortgage Foreclosures

As recently as December 23, 2011, the United States District Courts in Nevada have held that the Act does not support a viable cause of action to redress alleged harm to consumers in conjunction with mortgage foreclosures and home loans. *See Archer v. Bank of America Corp.*, No. 2:11-cv-1264 JCM-RJJ, 2011 U.S. Dist. LEXIS 148159, at *6-7 (D. Nev. Dec. 23, 2011) (holding that the Act is inapplicable to claims based upon allegedly defective or wrongful mortgage foreclosures) (citing *Reyna v. Wells Fargo Bank, N.A.*, No. 2:10-cv-01730-KJD-RJJ, 2011 U.S. Dist. LEXIS 74456, at *23 (D. Nev. July 11, 2011)); *Alexander v. Aurora Loan Services*, No. 2:09-cv-1790-KJD-LRL, 2010 U.S. Dist. LEXIS 68172, at *5 (D. Nev. July 8, 2010) (only NRS 598D, not NRS 598, applies to mortgage loans); *Parker v. Greenpoint Mortgage Funding*, No. 3:11-cv-00039-ECR-RAM, 2011 U.S. Dist. LEXIS 78037, at *15-16 (D. Nev. July 15, 2011) (the Act does not apply to foreclosures); *see also Lee v. BAC Home Loans Servicing, L.P.*, No. 2:11-cv-1583 JCM-PAL, 2011 U.S. Dist. LEXIS 133697, at *6-7 (D. Nev. Nov. 18, 2011) (the Act does not apply to foreclosures); *Lalwani v. Wells Fargo Bank, N.A.*, No. 2:11-cv-0084-KJD-PAL, 2011 U.S. Dist. LEXIS 113389, at *5 (D. Nev. Sept. 30, 2011).

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Each of the foregoing decisions was based upon the reasoning that deceptive acts enumerated in NRS 598.0915 are limited to transactions involving the sale of goods or services. This reasoning is further supported by the history of the Act. Nevada has declined to include undefined "deceptive" activities as actionable conduct, in favor of specific statutory definitions of deceptive acts. *See, e.g.*, NRS 598.0915, 0923. Thus, an actionable claim must be based upon an enumerated deceptive act. In this case, the Plaintiff cannot sustain a claim against the Defendants under any enumerated act.

The Nevada Supreme Court's sole pronouncement on the Act's applicability in the area of real property transactions is that Chapter 598 applies to deceptive acts in connection with a *sale* of real estate in the nature of a bait and switch. *See Betsinger v. D.R. Horton, Inc.*, 126 Nev. Adv. Rep. 17, 232 P.3d 433, 436 n. 4 (2010) (involving allegations of deceptively inducing a consumer to deposit earnest money based upon a promise of a low interest rate and then switching to a higher interest rate). Critically, a mortgage foreclosure is not a sale. Accordingly, *Betsinger* is consonant with the decisions of Nevada's U.S. District Courts, which also require a "sale" as a component of a deceptive trade practice.

Here, Plaintiff's claim is founded solely upon allegations regarding flaws in the execution of documents relating to foreclosures that Plaintiff alleges render the foreclosures themselves defective. Complaint, ¶¶1-2. Assuming, *arguendo*, that mortgage foreclosures involving documents that were purportedly improperly executed by Default Solutions or DocX were defective is correct, borrowers would potentially possess recourse via means of a claim for wrongful foreclosure. However, as discussed herein, this position is untenable; flaws in the formalities of execution or notarization do not render mortgage-related assignments invalid. Because the Act does not apply to purportedly defective foreclosures, Plaintiff's claim should be dismissed with prejudice.

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D. Robo-Signing, Surrogate Signing, or Defects in Notarization are Not Deceptive Trade Practices under the Act

Plaintiff relies heavily upon its allegations of robo-signing, surrogate signing (defined in n. 2 above) and defects in the notarization process to support its claim under the Act. However, Plaintiff candidly concedes that both Default Solutions and DocX were provided express written authority from lenders or loan servicers to execute documents on their behalf, and that Default Solutions and DocX employees were specifically designated officers of lenders, loan servicers, and their clients for this purpose.[8] Complaint, ¶38. This fact alone destroys Plaintiff's claim.

The Act expressly does not apply to acts "in compliance with orders or rules of, or a statute administered by, a federal, state or local governmental agency." NRS 598.0955(1)(a). Thus, activities that are declared legal by statute or rule are not actionable under the Act. Plaintiff's characterization of the practice of robo-signing in paragraph 38 of the Complaint, the practice of authorizing another to execute a document on one's behalf, is one such activity. While the perception may be that this grant of authority is not a best practice, Nevada law is clear on the legality of authorizing another to execute a document and expressly permits the execution of real estate related documents by agents. As such, Plaintiff's claim simply fails.

NRS 111.205(1) expressly permits the assignment or conveyance of a "trust or power over or concerning lands, or in any manner relating thereto" to be executed by a "party's authorized agent thereunto authorized in writing." *See also* NRS 104.3402 (permits a negotiable instrument to be executed by a representative of another). Thus, an assignment can be executed by an authorized agent. There is no question that DocX and Default Solutions were authorized to execute the assignments, and the Plaintiff so acknowledges. Therefore, this signing practice is expressly permitted by Nevada law and not actionable under the Act.

[8] Plaintiff's sole contention that some assignments were executed without authority is asserted improperly against the cumulative "LPS" and is made only "upon information and belief" based upon a news service report contending that documents were executed on behalf of "defunct" entities. Complaint, ¶¶98-103. No copies of such assignments are attached to the Complaint, none are identified with particularity, and Plaintiff is unable to even allege that such documents related to property in Nevada.

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Knowing this deficiency, Plaintiff takes exception to DocX's alleged surrogate signing activities[9] as well, which Plaintiff repeatedly mischaracterizes as "forgery." Surrogate signing, however, is when someone signs another person's name on a document after receiving permission to do so. This description is entirely consonant with the allegations of Plaintiff. Complaint, ¶¶38, 51. But Nevada law expressly permits a person to authorize another person to sign their name on documents, including negotiable instruments. *See* NRS 104.3402; *see also* NRS 111.205(1). Because surrogate signing is permitted by both statutory and common law, it is not actionable under the Act. *See* NRS 598.0955(1)(a).

Moreover, despite the Plaintiff's attempt to cast the practices in an illegal light, surrogate signing, by definition, cannot constitute "forgery." An essential element of forgery is the lack of authority of the signor to sign the document. *See Matthews v. Lamb*, 84 Nev. 649, 650, 446 P.2d 651, 652 (1968) (citing *Owen v. People*, 118 Colo. 415, 421, 195 P.2d 953, 957 (Col. 1948)). Importantly, "a signature may be made for a person by the hand of another, unless a statute provides otherwise" and that "signature so made becomes the signature of the person for whom it is made, and it has the same validity as though written by him." *See Lukey v. Smith*, 77 Nev. 402, 405-406, 365 P.2d 487, 488-489 (1961) (this rule, known as the *Amanuensis Rule*, finds approval in virtually every jurisdiction of the United States, including Nevada).

Similarly, and citing to *Lukey*, the California Supreme Court has found a species of surrogate signing to be a perfectly acceptable practice. *In re Stephens v. Williams*, 28 Cal. 4th 665, 49 P.3d 1093 (Cal. 2002). Specifically, that court approved the practice when it explained that a daughter, who was told by her father over the phone to sign his name on a deed of trust, was authorized to do so, and the resulting instrument was valid and legally binding. *Id.* at 672, 1097. Because her signature was a mere mechanical act, and not in exercise of judgment or discretion, the father's oral instruction was sufficient. *Id.* at 678, 1101. Consequently, "the person signing the grantor's name is not deemed an agent but is instead regarded as a mere instrument or amanuensis of the grantor, and that signature is deemed to be that of the grantor." *Id.* at 671, 1096.

[9] Plaintiff makes no allegation that Default Solutions engaged in surrogate signing other than its frequent improper allegations as to the collective "LPS".

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Georgia, where DocX's offices were located, expressly permits one to sign the name of another with consent. *See Happ Bros. Co. v. Hunter Mfg. & Com. Co.*, 145 Ga. 836, 836, 90 S.E. 61, 61 (Ga. 1916); *see, e.g., Brock v. Yale Mortg. Corp.*, 287 Ga. 849, 854, 700 S.E.2d 583, 588 (Ga. 2010) (stating "[u]nder Georgia law, a forged signature is nonetheless binding if ratified by the person whose name was signed.") (quoting *Ferguson v. Golf Course Consultants*, 242 Ga. 112, 113, 252 S.W.2d 907, 908 (Ga. 1979)). Therefore, Plaintiff's repeated references that surrogate signing is forgery are nothing more than misguided legal conclusions and inflammatory rhetoric; surrogate signing is *not* forgery.

The State of Florida has reached an identical conclusion regarding DocX's surrogate signed documents. Two assistant attorneys general involved in that state's investigation of the mortgage crisis, including DocX, prepared an informal power point presentation in which surrogate signing was characterized as "forgery." The two attorneys were subsequently terminated for alleged flawed, deficient and improper investigatory practices which triggered a formal review by the Inspector General of Florida. In a recently issued official report, the propriety of the termination of the attorneys was confirmed, and, specifically, the power point characterization of surrogate signing as "forgery" was determined to be unsupported by the legal definition of forgery. Report of Inquiry Number 12312, at p. 78 (facts "did not support a violation of the legal definition of forgery").[10]

Once Plaintiff's empty rhetoric regarding robo-signing and surrogate signing are stripped away, Plaintiff is left with allegations that assignments executed by Default Solutions and DocX were not properly notarized. Plaintiff alleges that both entities improperly notarized assignments because the persons executing the documents were not physically before the notary and, in the case of DocX, the notary may have been notarizing a surrogate signed signature. Complaint, ¶¶ 68, 71, 88-89. Plaintiff's allegations of improper notarization also do not, as a matter of law, support a finding of violations of the Act.

[10] The Report, which is a public record of the State of Florida, can be found at: http://miamiherald.typepad.com/files/cfo-ig-report-on-bondi.pdf

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Plaintiff's claims of improper notarization, again, focus upon assignments. The parties to an assignment are the assignor and assignee. Under Nevada law, in order to provide constructive notice to third parties, any document affecting real property must be proved, acknowledged, certified and recorded, but failure to strictly comply with these requirements has no effect as to the parties to the instrument; as between the parties, the document is "valid and binding." NRS 111.315. Thus, by statute, an assignment bearing a purportedly defective notarization remains valid and binding as to the assignor and assignee, the only parties to the instrument.

Nevada's Supreme Court has held similarly. In an action between the parties to a real property instrument that was allegedly notarized improperly, the Court held that "statutory provisions relating to the acknowledgement and recordation of [instruments affecting real property] are for the protection and security of creditors and purchasers. Such provisions do not prevent the passing of title by the grantor to the grantee." *Allen v. Hernon*, 74 Nev. 238, 242, 328 P.2d 301, 304 (1958). The Court concluded that "[a]s between the parties a defective acknowledgement, however, does not invalidate the instrument." *Id.*

NRS 111.315 and the Nevada Supreme Court decisions therefore establish that an assignment is legal and enforceable despite alleged improper notarization. As a result, no claim under the Act can be based upon the improper notarization of an assignment. *See* NRS 598.0955(1)(a). The foregoing also vitiates Plaintiff's contentions of defective foreclosures and harm to borrowers. A borrower is not a party to the assignment; only the assignor and assignee are parties. Nor is a borrower a third party beneficiary of an assignment.

Under Nevada law, only an intended beneficiary can attain rights as a third-party beneficiary under an agreement or instrument. *See Olson v. Iacometti,* 91 Nev. 241, 245-246, 533 P.2d 1360, 1364 (1975) (citing *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 307 (1927)). A borrower is not a third party beneficiary of an assignment. *Id.* at 1360. Because an assignment, whether surrogate signed, robo-signed or bearing a defective notarization, confers no actionable rights upon a borrower, foreclosures based upon such an assignment are not, as Plaintiff contends, flawed or defective and the borrower cannot have suffered harm.

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The *Olson* decision is in line with a growing trend in other jurisdictions which also hold that a borrower lacks standing to contest an assignment of mortgage or trust deed. *See Liu v. T&H Machine, Inc.*, 191 F.3d 790, 797 (7th Cir. 1999) (party to underlying contract lacks standing to "attack any problems with the reassignment" of that contract); *Livonia Props. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings*, 717 F. Supp. 2d 724, 747 (E.D. Mich. 2010) (plaintiff borrower did not have standing to dispute the validity of an assignment between assignor and assignee because plaintiff was a "non party to those documents"); *In re Mortgage Electronic Registration Systems (MERS) Litigation*, MDL No. 09-2119-JAT, 2011 U.S. Dist. LEXIS 117107, at *42-43 (D. Ariz. October 3, 2011); *Bridge v. Ames Capital Corp.*, No. 09-cv-2947, 2010 U.S. Dist. LEXIS 103154, at *8-12 (N.D. Ohio Sept. 29, 2010); *Wolf v. Federal Nat. Mortg. Ass'n*, No. 3:11-cv-00025, 2011 U.S. Dist. LEXIS 135259, at *17-18 (W.D. Va. Nov 23, 2011); *Fryzel v. Mortgage Elec. Registration Sys., et al*, No. 10-352M, 2011 U.S. Dist. LEXIS 95114, at *41-42 (D. R.I. June 10, 2011); *Peterson v. GMAC Mortg. LLC.*, No. 11-11115-RWZ, 2011 U.S. Dist. LEXIS 123216, at *10 (D. Mass. 2011); *Rogan v. Bank One*, 457 F.3d 561, 566 (6th Cir. 2006); *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90, 91 (8th Cir. 1900); 29 Williston on Contracts, §74:50 (4th Ed.) ("the debtor has no legal defense [based on the invalidity of the assignment] . . . for it cannot be assumed that the assignee is desirous of avoiding the assignment."). These decisions reflect national judicial recognition of the need to prevent the derailment of the foreclosure process by claims and defenses based upon technical matters such as flaws in the execution of secondary documents.

Further establishing that a technically flawed assignment does not harm a borrower is the well-established principle that a borrower cannot bring a claim for wrongful foreclosure if a default exists. *See Collins v. Union Federal Sav. & Loan Ass'n,* 99 Nev. 284, 304, 662 P.2d 610, 623 (1983); *Joyner v. Bank of America Home Loans*, No. 09-cv-2406-RCJ-RJJ, 2010 U.S. Dist. LEXIS 75936, at *12 (D. Nev. 2010) (holding that borrower cannot allege lack of authority to foreclose if borrower was in default).

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Similarly, a trustor can only challenge a foreclosure for faulty notice practices under NRS 107 if the trustor has suffered ***actual prejudice*** from the alleged flaw in the notice (i.e., he did not know about the foreclosure sale and could have prevented it had he known). In *Turner v. Dewco Services, Inc.*, the Nevada Supreme Court rejected a technical challenge to an NRS 107.080 notice of default in part because the plaintiff had actual notice of the foreclosure and was not prejudiced. 87 Nev. 14, 16, 479 P.2d 462, 464 (1971). As *Turner* noted, Nevada's "[d]efault rites are not that picayune." *Id.*

The Ninth Circuit, following *Turner*, rejected a challenge to an NRS 107.080 notice of default where there was "nothing in the complaint to indicate that there was the slightest prejudice from the defective notice . . . ." *Abbott Bldg. Corp., Inc. v. U.S.*, 951 F. 2d 191, 196 (9th Cir. 1991). This position was codified in 2005 when the legislature amended NRS 107.080(5) to make trustee's sales voidable ***only*** if the notice requirements were not substantially complied with. *See* NRS 107.080(5). The legislative history is illuminating: NRS 107.080(5) is meant to protect the trustor when he claims that he "didn't receive any notification at all." *Minutes of the Meeting of the Assembly Committee on Judiciary*, 73rd Sess., at *4 (Nev. May 13, 2005) (statement of Cheryl Blomstrom, legislative advocate representing the Nevada Consumer Finance Association, made while introducing and explaining the mechanics of the amendment to the Assembly Committee on Judiciary).

As Plaintiff concedes, the assignors expressly authorized Default Solutions and DocX employees to execute documents. Plaintiff does not, and apparently cannot, allege that any assignments recorded in Nevada were in fact false, i.e. that assignments of rights were recorded where the assignor did not actually intend to convey any interest to the assignee. Therefore, it goes without saying that no misrepresentation has taken place and there has been no reliance. In the absence of these elements of a claim under the Act, Plaintiff's Complaint does not state a cause of action.

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As a matter of law, Plaintiff's claim under the Act fails. Both robo-signing and surrogate signing are permitted under Nevada statutory and common law. Surrogate signing does not constitute forgery. Nor do Plaintiff's allegations of improper notarization support a claim under the Act. Plaintiff also cannot establish the existence of a misrepresentation, reliance or harm. Plaintiff's claim under the Act based upon allegedly flawed assignments must be dismissed with prejudice.

E. Plaintiff's Claim Based upon Defendants' Alleged Contract With Law Firms Fails to State a Claim Under the Act

Plaintiff's claim based upon Defendants' contractual relationship with foreclosure law firms is tainted by the same pleading deficiencies as all other aspects of its claim; Defendants are improperly conflated together under the collective "LPS" label and the parties to the contracts at issue are not identified. This pleading deficiency aside, Plaintiff's allegations of improper influence or control over counsel, and alleged "kickbacks" all in connection with the firm's alleged participation in foreclosure proceedings, do not support a claim under the Act as a matter of law.

Defendants confess to some confusion regarding this claim. As is well known, Nevada is a non-judicial foreclosure state. The overwhelming majority of foreclosures proceed in the absence of court intervention through the exercise of powers of sale in connection with trust deeds. Foreclosing trustees typically perform non-judicial foreclosures without the assistance of outside counsel. There simply are not many judicial foreclosures. Plaintiff's allegations of improper conduct by Defendants in connection with judicial foreclosure proceedings brought by law firms are, therefore, puzzling at best. Nonetheless, this claim is addressed herein.

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A claim under the Act must include allegations of a misrepresentation. *See Picus* 256 F.R.D. at 658; *see also Simon*, 2010 U.S. Dist. LEXIS 63480, at *22-23. Despite generalized allegations of harm, as a matter of law, no misrepresentation can be based upon the express terms of a contract. *See Sylver*, 2011 U.S. Dist. LEXIS 255, at *9. Where the contract between "LPS" and the law firms expressly provides for administrative fees to be paid (improperly referred to by Plaintiff as "kickbacks), and governs how the parties are to conduct themselves, there can be no misrepresentation between the parties. *Id.*

Even were this not the case, while not expressly stating so, Plaintiff is contesting the legality of the contracts with foreclosure law firms, and, indeed, as part of the injunctive relief sought, effectively seeks to restrain performance of such agreements. As such, the law firms are indispensible parties to this litigation. Pursuant to Nevada Rule of Civil Procedure 19(a), a necessary party is one who claims an interest in the outcome of the matter whose interests will not sufficiently be protected. A party to a contract that may be affected by the determination of an action is necessary and potentially indispensible. *See Blaine Equip. Co. v. State*, 122 Nev. 860, 865, 138 P.3d 820, 823 (2006);*Wright v. Incline Village General Imp. Dist.,* 597 F.Supp. 2d 1191, 1207 (D. Nev. 2009). A party is indispensible and a claim should be dismissed pursuant to Rule 12(b)(6) if its joinder is not feasible. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 US 102, 118-119, 88 S.Ct. 733 (1968). Here, the foreclosure firms are indispensible parties that cannot properly be joined, requiring dismissal under NRCP 12(b)(6).

In any event, Plaintiff's claims of improper influence or control over counsel, and alleged "kickbacks" do not constitute private causes of action and merely amount to allegations of ethical violations against the law firms. Allegations of "violations of Nevada's professional conduct rules do not give rise to a private right of action." *In re Jane Tiffany Living Trust 2001,* 124 Nev. 74, 76, 177 P.3d 1060, 1061 (2008); *Flynn v. Liner Grode Stein Yabkelevitz Sunshine Regenstreif & Taylor LLP.*, No. 09-cv-00422-PMP-RAM, 2010 U.S. Dist. LEXIS 110458, at *27-29 (D. Nev. 2010).

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The exclusive jurisdiction to determine allegations of purported ethics violations is with the Nevada Supreme Court and the disciplinary boards and hearing panels created by the Supreme Court's Rules. *See* SCR 99(1). Alleged violations of ethics rules that are not brought in a disciplinary complaint cannot be adjudicated by even the Supreme Court, let alone a trial court. *In re Discipline of Schaefer*, 117 Nev. 496, 516, 25 P.3d 191, 204 (2001) modified on denial of rehearing 31 P.3d 365, cert. denied 122 S.Ct. 1072, 534 U.S. 1131.

Because an express contract exists governing the rights and obligations of the parties to the Network Agreements, there can as a matter of law, be no actionable misrepresentation, and this claim should be dismissed.[11] Complaint, ¶¶ 154-158 and its Ex. J. Similarly, in a weak attempt to salvage the Plaintiff's allegations of misconduct, Plaintiff has improperly confused alleged practices in judicial foreclosure states with those in Nevada, a non-judicial foreclosure state. Purported practices in other jurisdictions have no bearing in this Action, and as a matter of law, subject such allegations to dismissal by this Court. In addition, no private right of action exists against the Defendants based upon alleged ethical violations of foreclosure firms, who Plaintiff has failed to join in this Action. Even if named, this Court does not possess jurisdiction over such alleged violations. For all the foregoing reasons, this claim must be dismissed.

F. Plaintiff's Claim of Investment Fraud Fails to State a Claim Under the Act

In a desperate attempt to conjure up some viable claim, Plaintiff contends that "LPS" committed actionable investment-related fraud under the Act by stating in reports filed with the federal government that DocX's robo-signing and surrogate signing activities were errors in notarization or business process errors, and by stating in a press release that Default Solutions' business processes were subject to appropriate controls. As an initial matter, as addressed above, neither robo-signing nor surrogate signing are in and of themselves improper, so the statements in reports to the SEC regarding notarization or business process errors are not false or misleading. Further, Plaintiff fails entirely to allege that the statements were made in connection with an advertisement or solicitation or that any Nevada investor was harmed by these statements.

[11] To the extent that Plaintiff implies that the representation alleged here is directed at the underlying lender or loan servicer clients, Plaintiff does not allege that they are residents of Nevada, and such alleged representations are not reached by this state's statutes.

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More importantly, Plaintiff's claim based upon NRS 598.092(5)(c) fails as a matter of law because Plaintiff cannot satisfy the requirements of that statute. Again, Plaintiff attempts to use inflammatory accusations with disregard to the basic premises and application of the law. While Plaintiff contends that the statements made by "LPS" were misleading or involved omissions of material facts necessary to make them not misleading, Plaintiff conveniently avoids the statute's requirement that any alleged statements were part of an advertisement or offer of an investment opportunity. *See* NRS 598.092(5)(c). Plaintiff simply ignores the circumstances under which the statements were made.

The Act generally defines "advertisement" as "the attempt by publication, dissemination, solicitation or circulation to induce, directly or indirectly, any person to enter into any obligation to lease or to acquire any title or interest in any property." NRS 598.0905; *see also Sobel v. Hertz Corp.*, 698 F. Supp. 2d 1218, 1230 (D. Nev. 2010). An "offer" is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contract § 24 (1981); *see also* Nevada Pattern Jury Instr. 13CN.6 ("An offer is a promise to do or not do something on specified terms that is communicated to another party under circumstances justifying the other party in concluding that acceptance of the offer will result in an enforceable contract.").

Additionally, NRS 90.280(1) defines "offer to sell" to include "every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value." NRS 90.280(1). Thus, NRS 598.092(5)(c) is aimed at marketing materials, prospectuses, and other promotional materials, which would be part of an effort to obtain new investors. There can be no interpretation of a public company's obligation to file disclosures in SEC filings as marketing or promotional materials. SEC filings are simply required by applicable laws and regulations as a retrospective reporting obligation. *See* 15 USC 78m, 78o(d); 17 CFR 240, *et seq.* Since Lender Processing's statements made in SEC disclosures are required by federal law, they are clearly exempt from the Act as acts in "compliance with orders or rules of, or a statute administered by, a federal... governmental agency." NRS 598.0955(1)(a).

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The disclosures in the SEC filings were simply required by applicable laws and regulations and the press releases were not part of any advertisement targeted at investors or an offer soliciting an investment opportunity. Because Plaintiff's allegations of investment-related misrepresentations do not satisfy the statutory requirements of constituting either an advertisement or offer for investment opportunities, this claim should properly be dismissed with prejudice.

G. Plaintiff Has Failed to Plead Its Claim with Particularity

It is patently evident that Plaintiff has fallen woefully short of pleading claims with particularity under the Act. First, Plaintiff has improperly conflated the Defendants, collapsing independently organized corporate entities, without alleging with particularity which Defendant has committed what purportedly improper action. Instead of identifying what each individual Defendant has allegedly done wrong, Plaintiff simply defines the Defendants cumulatively as "LPS." This tactic is particularly improper with respect to Lender Processing and FNIS. In their case, Plaintiff simply alleges the existence of a present or prior parent-subsidiary relationship with Default Solutions and DocX, without attributing any specific wrongful act to either or stating any legal theory upon which their liability for acts of the subsidiaries could be based.[12]

Where, as here, a plaintiff, in asserting a claim under the Act "groups all Defendants together, along with unnamed parties, without identifying which Defendant or non-party engaged in what conduct" and further fails to identify the specific representations – when, how and to whom they were made, and why they were false – that plaintiff has failed to state a claim. *Weinstein v. Mortgage Capital Associates, Inc.*, No. 10-cv-01551-PMP-PAL, 2011 U.S. Dist. LEXIS 2770, at *13 (D. Nev. Jan. 11, 2011). In the instant action, Plaintiff begins to attribute certain conduct to Default Solutions and DocX, but then in mid-stream changes direction and directs its allegations at the collective "LPS."

[12] Plaintiff does not attempt to pierce the corporate veil between parent and subsidiary, allege conspiracy or advance any other claim to support its attempt to hold Lender Processing and FNIS responsible for the alleged actions of Default Solutions or DocX.

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Nor does Plaintiff even attempt to allege with specificity what alleged conduct of Default Solutions and DocX comprises the basis for its claim, even after its year long investigation. Plaintiff still fails to identify which of the "thousands" of documents executed by Default Solutions and DocX, and reviewed by Plaintiff, are alleged to be faulty, who the parties to those documents were, who the recipient of each alleged misrepresentation was, when the representation was made and what the specific false statement was. Plaintiff does, however, affirmatively state that it conducted an extensive investigation spanning over a year and specifically contends that it "reviewed extensive discovery related to LPS' business practices, interviewed former LPS employees and LPS' servicer clients, and examined Nevada foreclosure records affected by LPS' deceptive conduct." Complaint, ¶15.

Yet, it attached to its Complaint as exhibits a total of three documents filed in Nevada that it alleges were flawed. The only conclusion is that Plaintiff has not attempted to plead its case with specificity because Plaintiff, even after extensive discovery, simply cannot. Surely Plaintiff can identify the flawed documents and explain why they were allegedly false and who the representation was made to as required by Rule 9(b) and *Weinstein, Brown* and other caselaw?

Plaintiff is well aware that the bulk of its claim is based upon assignments of mortgage, assignments of trust deeds and substitutions of trustee. Plaintiff also is aware that the parties to these documents, the assignors and assignees and the trusts, in fact intended that their rights be assigned or transferred and had, in fact, authorized Default Solutions and DocX to execute documents to effect such assignments and transfers. Stated otherwise, the documents are not false and, as has been discussed herein, are effective notwithstanding the alleged flaws in execution as a matter of law. Simply put, there was no misrepresentation and none can be alleged.[13] Because Plaintiff has failed to plead its claim with particularity as required by Rule 9(b), its Complaint should properly be dismissed.

[13] To the best knowledge of Defendants, not a single assignor has attempted to repudiate or set aside any assignment executed by Default Solutions or DocX. Even the *AHMSI* Complaint, filed in Dallas, Texas and cited extensively by Plaintiff (Complaint, ¶¶41-45, 108) does not attempt to do so, but rather attempts to recoup expenses relating to litigation involving such documents.

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III. CONCLUSION

For all of the reasons stated above, Defendants respectfully request that this honorable Court enter an Order dismissing, with prejudice, Plaintiff State of Nevada's Complaint, pursuant to NRCP 12(b)(5) and (6).

Dated: January 30, 2012

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On January 31, 2012, I caused to be served a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS** by the method indicated:

☒ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).

☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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