Thomas J. Holthus	CA NE NV
Kevin R. McCarthy	CA
Matthew E. Podmenik	CA
JaVonne M. Phillips	CA
Kristin Schuler-Hintz	CA NV
Paul M. Levine**	AZ CA
Matthew Silverman**	AZ NM
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Angela M. Michael	AK ID OR PA WA
Seth Harris	CA
Charles E. Bell	CA
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Andrew E. Hall	CA WA
Seth J. Adams	NV
Melissa Robbins Coutts*	AZ CA
Kristin Zilberstein	CA
Merdaud Jafamia	CA
Thomas J. Ruhrup	CA
Rebecca L. Lang	CA
Mary Stearns	CA WA
Christelle N. Ramseyer	CA
Ashley Hennessee	CA
Christopher Hunter	FL NV
Sherry A. Moore	NV
Janice Jacovino	NV

McCarthy ◆ Holthus

A Limited Liability Partnership

9510 West Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone (702) 685-0329
Facsimile (866) 339-5691
www.McCarthyHolthus.com
Email to all personnel:
First initial and last name@mccarthyholthus.com

AZ CA	**Lakshmi Jagannath
CA IL WA	Anne M. Barker
CA	Andrew Boylan
WA	Joseph McIntosh
WA	Mathew LaCroix
CA	Julie Corriveau
CA WA	Robert McDonald
AZ	**Christopher J. Dylla
NV	Inku Nam
OR	Robert B. Hakari
CA	Lila Zhao
AZ CA	Alison Lienau
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AZ OR	Brady Godbout
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November 27, 2013

FILED

DEC 04 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY _____
CHIEF DEPUTY CLERK

Supreme Court of the State of Nevada
201 South Carson Street
Carson City, NV 89701

RE: In the Matter of the Adoption of Rules for Foreclosure Mediation
ADKT 0435

Honorable Chief Justice and Justices:

I am an attorney representing, Lenders, Servicers, Deed of Trust Beneficiaries and foreclosure trustees and have been admitted to the bars of Nevada (1999) and California (2000) and have been engaged primarily in this area of practice since my admission. I have been an active participant in the foreclosure mediation program since its inception and work closely with my client to set up practices, policies and procedures with the goal of having a successful mediation program. I am also a long-time resident of the State of Nevada and a homeowner so I have a substantial stake in the restoration of the Nevada economy and housing market.

For your consideration I submit the following commentary on the proposed rule changes:

Rule 9 – ADKT 435 Exhibit A – Page 11, sub 2.

The Rule as written provides that the grantor has 30 days after service of the complaint to elect into mediation. This conflicts with the time in Nevada to respond to complaint. As such a Grantor could be defaulted on the complaint prior to electing to mediate. Grantor's could claim confusion with the different time periods contained in the summons and the election to mediate. It would be more practical to require the election to mediate be made within the same time frame

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as the answer to a complaint. This should lead to more stipulations regarding time-frames and permitting the necessary litigation steps to resolve other parties' claims and/or status (completion of service, service via publication, defaults, etc. on junior, judgment and HOA liens); while the mediation with the Grantor proceeds.

Rule 9 – ADKT 435 Exhibit A – Page 11, sub 4.

The Rule as written requires the Mediator to file with the Court a Mediator's statement. Mediations as noted by this Court in *Civil Rights for Seniors v. AOC*, 129 Nev., Adv. Op. 80 (Oct 31, 2013) are confidential except for a requested review by the either party to the court. Requiring a mediation statement to be filed with the Court destroys the confidentiality of the process, unnecessarily, in cases where agreements may be reached, or the parties may agree to disagree. As in any settlement, the parties should be free to either put the terms of any settlement on the record before the court, or merely report the matter was settled. Additionally, if mediator's statements are filed with the court, parties my commence fishing expeditions to discover all settlement terms and then demand comparable terms, thereby impeding the settlement process. As the action is already before the Court there is no need to create a court forum or pleading to involve the Court as is the case with a non-judicial foreclosure. As such the Rule should be

> 4. At the conclusion of the mediation, the mediator shall file with the Administrator or designee and the Court, a report indicating the mediation is concluded; the report may contain any terms agreed upon by all parties to be made part of the public record.

Rule 8 – ADKT 435 Exhibit A – Page 15, sub (a)

The current Rule provides that the required document certification must be

> A statement under oath signed before a notary public pursuant to the provisions of NRS 240.1655(2), which includes:

Because NRS 249.1655(2) has 5 subparts, there has been confusion over which parts are applicable to the notarization of the document certification. Additionally, while there is some uniformity in notarization from state to state to state and many of the requirements are similar, most of the document certifications are notarized out of state and accordingly, do, and should comply with the applicable state law, not Nevada. As such any confusion regarding the application of subparts, along with correctly allowing the notary to comply with the law of the state in which they are a notary would be cleared up if the Rule were amended as follows:

> A statement under oath signed before a notary public pursuant to the provisions of applicable state for the taking of an acknowledgement, or administering an oath or affirmation and executing a jurat, which includes:

This would correctly require the notary to comply with the laws of the state in which they are admitted as a Notary.

Rule 8 – ADKT 435 Exhibit A – Page 16, sub 9

If the proposed amendment to Rule 8(b) is adopted which permits the use of certified copies of recorded documents obtained from the appropriate county recorder it would appear to be appropriate to strike the language referring to deeds of trust or assignments. The provisions of NRS 104.3309 refer to negotiable instruments, not recorded documents, as certified copies can be obtained from the recorder there would not be lost originals as such the appropriate language could be revised to:

> In the event of the loss or destruction of the original mortgage note or endorsement or assignment of the mortgage note, the mediator shall recognize a judicial order entered pursuant to NRS 104.3309 providing for the enforcement of a lost, destroyed, or stolen instrument.

Rule 22 - ADKT 435 Exhibit A – Page 24, sub 10

This provision seems unnecessary. In a judicial foreclosure the matter is already before the Court, there is no need to bring an action to bring it back before the court. In addition, the mediator has the weight of the judiciary with them from the time of the inception of the mediation. In any current settlement or mediation program, either party is capable of bringing a motion before the court to terminate mediation if the other party is non-cooperative, or request any other order from the court, such as a motion requiring the borrower to be reviewed for a modification as a condition to the entry of judgment. No special procedures are required to involve the court in the mediation process in a judicial foreclosure. The Court should not create new unnecessary process to further overburden the Court and add an additional forum for appeal during the middle of the action.

Thank you for your time and consideration of these suggestions.

Very truly yours,

McCarthy & Holthus, LLP

Kristin A. Schuler-Hintz, Esq.
Partner, Managing Attorney, Nevada