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JUN 11 2012
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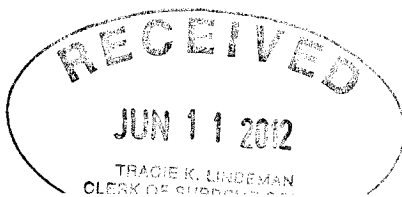
Re: Public Comments regarding proposed new AB149 rules

I take this opportunity to comment on the proposed new rules to implement AB149. The most important thing to consider, in my opinion, is whether the program should be expanded to encompass Judicial Foreclosures. [The assumption, of course, is that such rule making is legally permissible.] At present the FPM welcomes referrals from various courts, and a procedure for this should be formalized.

With the advent of AB284, the non-judicial foreclosure route is being taken less and less frequently by mortgage companies. While this law 'sunset' in 2013, it may present substantial issues until then. Banks are filing lawsuits for foreclosure instead using Notices of Default and Elections to Sell. The reasons for this are two fold; first, AB284 is too difficult to implement, given the way the industry has constituted itself, and second; the mortgage servicers are frustrated with the delay that is occasioned in obtaining certificates from the FMP. It is the unfortunate fact that the system is being "gamed" by both sides, at this point, resulting in needless delay in many cases. As a consequence of this, banks are turning to the old style Judicial Foreclosures, which went out of vogue in 1927.

This is potentially devastating for homeowners, because these complaints will usually contain a cause of action for a deficiency. In non-judicial foreclosures, the six (6) month statute of limitations almost always expires without action by the bank, thus letting the homeowner off the hook for the deficiency. Thus, homeowners that simply ignore the foreclosure paperwork, like they are entitled to do in non-judicial foreclosures, wind up losing their homes and suffering a deficiency judgment.

Any possible rule drawing judicial foreclosures into the AB149 mediation process, would have to have a provision to report to the District Court, instead of the FMP at the conclusion of the mediation. The issuance of a certificate would be irrelevant. I don't know what District Courts ought do with the Mediation Statement, as I suspect judges



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will probably act on a case by case basis, in any event. The 'recommendation of sanctions' portion of the form report will probably be irrelevant.

I think it is critically important that the rules address this issue immediately, because the trickle of judicial foreclosures will inevitably become a flood. In the cases I have become involved with, I move the District Court to stay the suit, and refer it to the FMP, on general, equitable grounds. So far this kind of motion has been met with considerable resistance as one can see from the enclosed opposition I recently received in one of my cases, which is a matter of public record. Thus, I see a need for the rules to address this issue, if Judicial Foreclosures are to be addressed under AB149.

I believe that this Honorable Court should get out in front of this issue, before it becomes a problem, with a hodge-podge of differing decisions in various courts. Indeed, the rule could be as simple as; "District Courts shall consider whether or not to refer the suit to the FMP at an early time after service of the complaint". It could possibly be done in conjunction with the 16.1 conference, which involves a face-to-face meeting under existing rules. Thank you for taking the time to hear me on this. I remain....

Yours truly,



Geoffrey Giles

GG:gg

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7 **THIRD JUDICIAL DISTRICT COURT**
8 **LYON COUNTY, NEVADA**

9 VANDERBILT MORTGAGE AND
10 FINANCE, INC.,

Case No. : CI 22115
Dept. No. : I

11 Plaintiff,

12 v.

13 WILLIAM L. ADAMSON, JR., individually,
and DOES I through V; and ROES VI through
14 X, inclusive,

15 Defendants.

16
17 **OPPOSITION TO DEFENDANT'S MOTION TO STAY CASE AND REFER MATTER**
18 **TO THE FORECLOSURE MEDIATION PROGRAM UNDER AB 149**

19 COMES NOW Plaintiff, Vanderbilt Mortgage and Finance, Inc. ("Vanderbilt"), and
20 opposes Defendant William L. Adamson, Jr.'s request to refer this matter to the Nevada's
21 Foreclosure Mediation Program on the grounds that Borrower's request is jurisdictionally
22 improper.

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JUN 11 2012

1 This Opposition is supported by the following Memorandum of Points and Authorities,
2 the papers and pleadings on file herein, and any oral argument this Court wishes to hear on this
3 matter.

4 DATED this 6th day of June, 2012.

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1 I.

2 INTRODUCTION

3 In his Motion to Stay Case and Refer Matter to the Foreclosure Mediation Program Under
4 AB 149 (the "Motion"), Defendant William L. Adamson, Jr. ("Borrower") admits that his Motion
5 to refer this matter to Nevada's Foreclosure Mediation Program (the "FMP") cannot succeed because
6 such a request is jurisdictionally improper. In Borrower's own words:

7 *"Unfortunately, there is no statutory provision under AB 149 that*
8 *includes judicial foreclosures, like this one."*

9 Motion, pg. 2, lns. 9-10.

10 Borrower appears to understand the jurisdictional limitations of the FMP. However, he has
11 filed a Motion based upon AB 149, even though he expressly concedes that AB 149 is inapplicable.
12 Borrower chose to ignore the law, instead opting to file a Motion devoid of any legal basis.
13 Accordingly, Borrower's Motion must be denied. This Opposition is not an indicative of
14 Vanderbilt's stance on settlement discussions - in fact, Vanderbilt hopes to continue fruitful
15 discussions to resolve Borrower's default. Notwithstanding, the FMP is not the proper venue for
16 such discussions to occur in conjunction with the instant litigation.

17 II.

18 LEGAL STANDARD

19 Assembly Bill 149 (codified, in part, as NRS 107.086) created Nevada's Foreclosure
20 Mediation Program. NRS 107.086 states, in pertinent excerpt, that "the exercise of the power of sale
21 pursuant to NRS 107.080 with respect to any trust agreement which concerns owner-occupied
22 housing is subject to the provisions of this section." NRS 107.086(1). The language of NRS 107.080
23 contemplates a trustee's power of sale through the mechanism of a non-judicial foreclosure.
24 Accordingly, NRS 107.086 provides for an election into the foreclosure mediation program only in
25 the context of a non-judicial foreclosure, commenced by the recordation of a Notice of Default by a
26 trustee. NRS 107.080, 107.086. When the FMP is vested with jurisdiction, the Foreclosure
27 Mediation Rules ("FMR") "are enacted to apply to the mediation of any owner-occupied residential

1 foreclosure arising from the recording of a notice of default and election to sell..." FMR 1(1).

2 **III.**

3 **LEGAL ANALYSIS**

4 **A) The Foreclosure Mediation Program does not hold jurisdiction in the absence of a**
5 **Notice of Default.**

6 Borrower effectively makes the correct argument on Vanderbilt's behalf: "there is no
7 statutory provision under AB 149 that includes judicial foreclosures, like this one." Motion, pg. 2,
8 Ins. 9-10. Similarly, there is no such provision in NRS 107.086 or the Foreclosure Mediation Rules
9 that includes judicial foreclosures. In fact, the Supreme Court of Nevada has articulated the
10 limitations on the FMP's jurisdiction: "NRS 107.086 adds mediation and procurement of an FMP
11 mediation certificate to the statutory prerequisites for a valid nonjudicial foreclosure sale under
12 NRS 107.080..." *Holt v. Reg'l Tr. Serv. Corp.*, 127 Nev. __, __, 266 P.3d 602, 606 (2011)
13 (emphasis added).

14 The FMP sits as a gate-keeper to non-judicial foreclosure in the State of Nevada. See
15 generally, AB 149; see also, NRS 107.086; see also, FMR 1, 7, 8. Borrower has not presented a legal
16 basis to submit a judicial foreclosure into the FMP. Instead, Borrower relies upon speculation of the
17 FMP's intent and a purported "informal policy" of the federal district courts. Borrower has not
18 provided any evidence to substantiate this reliance. In fact, it is a substantial certainty that the federal
19 court cases that Borrower alludes to all concern non-judicial foreclosures, in which a Notice of
20 Default vests the FMP with jurisdiction.¹ Accordingly, his Motion must be denied.

21 **B) This action is inherently exempt from required arbitration.**

22 Nevada Arbitration Rule 3 provides that all civil cases are subject to the Court Annexed
23 Arbitration Program except "...actions concerning title to real estate." NAR 3.

24 As required by Nevada Arbitration Rule 5, Vanderbilt identified the exemption from
25 arbitration on the Complaint initiating this action. Accordingly, this matter will not be referred into

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27 ¹ By way of example, see: *Fitzgerald v. Clarion Mortg. Capital*, 3:10-CV-766-RCJ-RAM, 2011 WL 2633502, at *1
(D. Nev. July 5, 2011).

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1 the Arbitration Program. In that vein, Borrower's request to refer this matter into the FMP is an
2 attempt to subject this matter to comparable dispute resolution. Such requirement would be a
3 constructive violation of Nevada Arbitration Rules.

4 **C) Participation in the Foreclosure Mediation Program would be futile.**

5 In practical effect, the underlying purpose of the FMP is to determine whether an agreement
6 was reached at mediation and whether a foreclosure certificate may issue to allow the setting of a
7 trustee's sale under NRS 107.080. NRS 107.086(7). Specifically, when a lender initiates a non-
8 judicial foreclosure by way of the trustee's recordation of the Notice of Default, the FMP reviews the
9 mediation proceedings for the purpose of determining whether the parties complied with the
10 Supreme Court's Foreclosure Mediation Rules and whether a foreclosure certificate should issue.
11 See, Holt 266 P.3d at 606; see also, Pasillas v. HSBC Bank USA, 127 Nev. __, __, 255 P.3d 1281,
12 1286-87 (2011).

13 But in the context of a *judicial* foreclosure, a foreclosure certificate is ineffectual because a
14 trustee's sale does not occur. In fact, a trustee is not a party to a judicial foreclosure action. Rather,
15 upon receiving a judgment for judicial foreclosure due to Borrower's breach of his contractual
16 obligation, the proper mechanism for enforcement of the judgment is a writ executed by the sheriff
17 pursuant to NRS Chapter 21.

18 Moreover, the formality of the Foreclosure Mediation is futile, as Vanderbilt has and will
19 continue to engage in settlement discussions with Borrower. However, such discussions do not
20 belong under the auspices of the Foreclosure Mediation Program, because the function of the FMP
21 does not overlay with a judicial foreclosure proceeding.

22 **D) Proceedings from Foreclosure Mediation are not admissible before this Court.**

23 The Foreclosure Mediation Rules provide, in pertinent part, that "[a]ll documents and
24 discussions presented during the mediation shall be deemed confidential and inadmissible in any
25 subsequent actions or proceedings, except in an action for judicial review according to these rules."
26 FMR 19(1) (bold emphasis in original, underline emphasis added).

27 Here, Borrower attempts to place this matter under the auspices of Nevada's Foreclosure

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1 Mediation Program. However, such a referral is problematic because the mediation proceedings are
2 expressly inadmissible in this matter. See, FMR 19(1). Accordingly, the documents and discussions
3 from the mediation remain outside the scope of this Court's jurisdiction.

4 **E) This matter may be appropriate for a Settlement Conference.**

5 The Supreme Court of Nevada has a mechanism to promote resolution of civil actions, such
6 as this one: "At any time in any civil case, the parties may request or the court may order that the
7 parties and their attorneys meet in person with a judge other than the judge assigned to preside over
8 the trial and attempt to settle the case." Supreme Court Rule 252.

9 Borrower concedes that there is no legal basis to place this matter into the Foreclosure
10 Mediation Program. Specifically, the FMP obtains jurisdiction when the trustee records a Notice of
11 Default, but the trustee is not a party to a judicial foreclosure action. The mechanisms of the FMP
12 simply do not fit the circumstance.

13 What Borrower's Motion apparently seeks is an opportunity to meet with Vanderbilt to
14 discuss potential resolutions to the default of his mortgage obligation. Vanderbilt is not opposed to
15 the discussion of resolutions, but such discussions must occur in the proper format and context. At
16 the appropriate time, Vanderbilt does not object to this Court ordering a Settlement Conference in
17 accordance with SCR 252. Such a conference would constructively provide the referral sought in
18 Borrower's Motion without creating the jurisdictional and administrative obstacles presented by the
19 Foreclosure Mediation Program.

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IV.

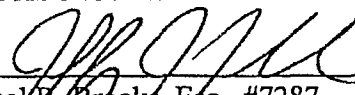
CONCLUSION

Borrower has presented this Court with a Motion in which he concedes defeat. There is no statutory basis for a referral of a judicial foreclosure to the Foreclosure Mediation Program.

WHEREFORE, Vanderbilt requests that this Court deny Borrower's Motion in its entirety. Further, Vanderbilt requests that this Court award Vanderbilt its attorneys' fees and costs incurred in the defense of Borrower's admittedly baseless Motion. Lastly, Vanderbilt requests such further relief as this Court deems appropriate.

DATED this 6 day of June, 2012.

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