Mark Mausert
Henry Sotelo
Robert E. Hager
930 Evans Avenue
Reno, Nevada 89512

July 12, 2012

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

RE: Proposed Rule Changes to the FMRs

ADKT 0435

Dear Supreme Court:

Thank you for the opportunity to speak on July 9, 2012. Mark Mausert addressed the proposed Rule 11.7(f) – the requirement to disclose the amount paid for acquisition of the beneficial interest. Robert E. Hager directed his remarks at problems which arise from biased valuations – proposed Rule 12. There was no intent to address any pending case. As a matter of course, a number of cases before the Court implicate the substance of the proposed changes, i.e., the proposed changes arise from repetition of problems at mediation, which are the genesis of the pending cases. Hence the overlap. It is impossible to discuss the proposed changes without obliquely implicating pending cases. I should have stated this circumstance at the outset of my remarks and apologize for any misunderstanding.

The following addition to Rule 11 has been proposed.

11.7(f) Except where the beneficiary of the deed of trust is the originator of the loan and there have been no assignments, the beneficiary of the deed of trust shall disclose to the homeowner the amount which it paid for the assignment. The beneficiary of the deed of trust shall also disclose a good faith estimate of any potential deficiency judgment on the note pursuant to NRS 40.451 et seq.

Robert E. Hager primarily addressed the proposed change to Rule 12:

12.6, The beneficiary of the deed of trust or its representative shall produce an appraisal done no more than 60 days before the commencement date of the mediation with respect to the real property that is the subject of the notice of default and shall prepare an estimate of the "short sale" value of the residence that it may be willing to consider as a part of the negotiation if loan modification is not agreed upon, *and shall submit any conditions that must be met in order for a short sale to be approved. The beneficiary of the deed of trust must also be able to negotiate the following: (i) the listing price, (ii) the date by which the property will be listed for sale, (iii) a period of time in which the property will be marketed, (iv) a specified period in which the beneficiary of the deed of trust has to determine whether*

12-22391

to accept an offer to purchase the property, and (v) the maximum length of time escrow may last in order to complete the sale. All short sale agreements must state whether the deficiency is waived. All appraisals or BPOs must be performed by a third party, independent appraiser.

The basis for Robert Hager's support of the new Rule 12 is the appearance of impropriety of an appraisals or broker's price opinions prepared by lenders. Borrowers are compelled to rely upon these documents, but are aware of the conflict of interest. One of the circumstances which gave rise to creation of a bubble, which contributed to the mortgage crisis, was inflated appraisals. Lenders and servicers have a built-in motivation to convince homeowners to affirm underwater mortgages. Less distance between the amount owed and the value translates into diminished motivation to repudiate. A homeowner is more likely to affirm a debt which is only $50,000 underwater, as opposed to $150,000.

Examination of the statutes which govern preparation of appraisals and BPOs evidences an intent by the Legislature to build a proverbial firewall. Bank of America has often used appraisals prepared by LandSafe. Bank of America owns LandSafe. This fact was not disclosed . . . although it is subject to discovery via use of the internet. Be that as it may, disclosure does not cure the problem. The conflict remains, as does the lack of appearance of trustworthiness/propriety.

Non-judicial foreclosure is not an honor system. The motivation for the Nevada Foreclosure Mediation Program was, in part, widespread abuse by lenders and servicers of Nevada's non-judicial foreclosure process. Homeowners are suspicious of valuations by persons in the employ of lenders and servicers. They should be. The value of the asset is as important as the amount paid by the current lienholder. Without crunching these numbers, and thereby estimating deficiency exposure, we cannot properly advise our clients.

Since the amendment of NRS 205.372 & 205.395 foreclosures have markedly declined. Whether those statutes were the catalyst for the diminution is known only to the lenders. However, the inference is obvious. So too, the impropriety of using a bogus threat of deficiency exposure to compel affirmance of an underwater mortgage is apparent.

After the initiation of the Nevada Foreclosure Mediation Program, Notices of Default numbered between 410 and approximately 1,000 in Washoe County per month. After the October 1, 2011 amendments, foreclosures declined to an average of about 50. The number is increasing, slowly. In June, 2012, there were 83 Notices filed in Washoe County. These include Notices issued by homeowners associations.

The number of persons ceasing payment has not diminished to a comparable extent. The number is unknown, but a build-up is apparent. There is a shadow within a shadow. In addition to a large number of "REO" properties (real-estate-owned, i.e., bank-owned but unlisted on the MLS as such), there probably are approximately 5,000 homes in Washoe County which have gone into default since October 1, 2011, but which have not been subject to Notices of Default. The artificial diminishment of Notices of Default should not be mistaken as a lessening of the

problem. Lenders, who obviously coordinated the tempo of foreclosure post-October 1, 2011, may ratchet up the crisis at their whim.

A good approach to the problem is to increase options for homeowners. If there is no deficiency exposure a homeowner may lean into an underwater mortgage . . . and allow foreclosure. A modest apartment may be rented; money saved; and a smaller home purchased in a couple of years. Such an approach, albeit temporarily painful, will result in home ownership. Those who own property have a natural propensity to maintain a high level of interest and involvement in their community.

Provision of accurate information is consistent with good faith. Provision of an independent appraisal or BPO is an integral part of the mediation process. Refusal to disclose basic information results in distrust, which is exacerbated by untrustworthy valuations. Frustration of the goals of mediation is predictable. Worse, a homeowner cannot make an informed decision to allow foreclosure. An impasse results. If a Certificate will issue absent a Petition for Judicial Review, the homeowner acquires a strong motivation to file a Petition. Unnecessary litigation is the end product. Lenders complain of litigation, but ignore the causes – refusal to provide basic information and provision of untrustworthy information.

Lenders are, in effect, engineering long-term, mandatory rental agreements . . . accompanied by huge debt. That is an accurate description of a profoundly underwater mortgage. Absent sizeable principal reductions, accurate information as to exit strategies is essential. Just as lenders have made business decisions to refuse to grant principal reductions, or to release from deficiency exposure (after they have had the benefit of copious and detailed information provided by homeowners), citizens should be provided with information which allows informed decisions. An exchange of information is just that. The process is intended to inform both parties and facilitate informed decisions. Withholding vital information, while producing biased valuations, does not facilitate sustainable, negotiated resolutions. Kicking the proverbial can down the road will prolong the crisis.

Sincerely,

Robert E. Hager

Henry Sotelo

Mark Mausert