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Howard W. Conyers
Clerk of the Court
Transaction # 2184326

CODE: 2515
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DUKE RENSLOW and TINA RENSLOW,

Petitioners,

vs.

WELLS FARGO BANK, and DOES 1
through 10,

Respondents.

CASE NO. CV10-03382
DEPT. NO. 7

NOTICE OF APPEAL

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL

NOTICE IS GIVEN that Respondent Wells Fargo Bank appeals to the Supreme Court of Nevada from the Second Judicial District Court of the State of Nevada, from the final judgment entered in this action on March 29, 2011.

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1 *See* Order attached as Exhibit 1.

2 DATED this 26th day of April, 2011.

3 SNELL & WILMER, L.L.P.

4 /s/ Kelly H. Dove

5 CYNTHIA L. ALEXANDER

6 Nevada Bar No. 6718

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11 *Attorneys for Respondent/Appellant*

12 *Wells Fargo Bank*

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **NOTICE OF APPEAL** filed in the Second Judicial District Court:

Does not contain the social security number of any person.

- OR -

Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

- OR -

B. For the administration of a public program or for an application for a federal or state grant.

DATED this 26th day of April, 2011.

SNELL & WILMER, L.L.P.

/s/ Kelly H. Dove
CYNTHIA L. ALEXANDER
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*Attorneys for Respondent/Appellant
Wells Fargo Bank*

CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., and I certify that I served a copy of the foregoing **NOTICE OF APPEAL** on the 26th day of April, 2011, via electronic service through the Second Judicial District Court's ECF System upon each party in the case who is registered as an electronic case filing user and via U.S. First Class Mail, as follows:

Carole M. Pope, Esq.
The Law Offices of Carole M. Pope
301 Flint Street
Reno, NV 89501

Attorneys for Petitioners

/s/ Brandy L. Sanderson
An Employee of Snell & Wilmer L.L.P.

LIST OF EXHIBITS

Exhibit 1 – Order dated March 29, 2011

28 pages

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Clerk of the Court

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EXHIBIT 1

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 DUKE RENSLOW and TINA RENSLOW, Case No.: CV10-03382

10 Petitioners,

Dept. No.: 7

11 vs.

12 WELLS FARGO BANK, and DOES 1
13 through 10,

14 Respondents.
15

16 **ORDER**

17 **Procedural History**

18 On October 19, 2010, Petitioners DUKE and TINA RENSLOW ("RENSLOWS")
19 attended a mediation under the auspices of the Foreclosure Mediation Program with Respondents
20 WELLS FARGO BANK ("WELLS FARGO"), representative for FEDERAL HOME LOAN
21 BANK. No agreement was reached. The Mediator's Statement stated that WELLS FARGO did
22 not have the requisite authority to modify the loan. On November 9, 2010, Petitioners timely
23 filed a *Petition for Judicial Review*. This Court entered its *Order for Judicial Review* on
24 November 12, 2010. On December 10, 2010 WELLS FARGO filed their *Response*. On
25 December 15, 2010 Petitioners filed their *Reply*. On January 28, 2011, this Court held a hearing
26 on the *Petition* and ordered an Evidentiary Hearing held. On January 31, 2011, Petitioners filed
27 a *Supplement* containing exhibits in support of their *Petition*. On March 17, 2011 the
28 Evidentiary Hearing was held. Both parties appeared in person, and presented their case.

1 **Legal Standards**

2 The scope of Judicial Review in Foreclosure Mediation cases is to analyze the underlying
3 mediation, determine bad faith, enforce agreements between the parties, and determine sanctions
4 pursuant to NRS Chapter 107. FMPR 21(1) (Former Rule 6(1)). Mediations conducted pursuant
5 to NRS 107.086 are held to a standard of "good faith" negotiation. NRS 107.086. Petitions for
6 Judicial Review of Foreclosure Mediation are conducted using a "*de novo*" standard. FMPR
7 21(5) (Former Rule 6(5)).

8 **Findings of Fact**

9 At the conclusion of the evidentiary hearing, after careful consideration of the testimony
10 of witnesses, evidence admitted, and argument of counsel, this Court **finds** the following facts:

11 1) WELLS FARGO is the beneficiary of record of a Deed of Trust which is the
12 security instrument to the Note. [Ex.2]

13 2) WELLS FARGO was the originating lender of the home loan, and original holder
14 of the Note executed by the RENSLOWS.

15 3) Petitioners were never notified that the Deed of Trust had been assigned, or that
16 the Note had been transferred.

17 4) On some uncertain date, WELLS FARGO transferred the Note by uncertain
18 means to a certain FEDERAL HOME LOAN BANK ("FHLB").

19 5) WELLS FARGO has not recorded an assignment of the Deed of Trust.

20 6) WELLS FARGO did not provide a proper endorsement of the Note at mediation
21 or throughout the judicial review proceedings.

22 7) WELLS FARGO did not inform Petitioners that their home loan had been sold,
23 neither did FHLB contact Petitioners with such information. *See*, 15 U.S.C. 1641(g)(1)

24 8) Since the date that WELLS FARGO transferred the Note to FHLB, WELLS
25 FARGO has acted as a master servicer of the loan, and has been Petitioner's sole point of contact
26 throughout the entire life of the loan from origination through the present day.

27 9) In July 2009, Petitioners were not in default of their obligation under the Note.

28 ///

1 10) In July 2009, Petitioners contacted WELLS FARGO to request a modification of
2 their loan as Petitioners faced pay cuts and mounting medical bills for their daughter.

3 11) WELLS FARGO informed Petitioners that WELLS FARGO would only discuss
4 modification if Petitioners were sixty (60) days late, and that Petitioners were not eligible for
5 assistance unless they were sixty (60) days late.

6 12) Petitioners became sixty (60) days late in order to discuss a modification with
7 WELLS FARGO, and to be eligible for assistance.

8 13) WELLS FARGO provided Petitioners with a Home Affordable Modification
9 Program ("HAMP") application. WELLS FARGO participates in the HAMP program on loans
10 for which it is the lender.

11 14) Petitioners made their next payment so that they would not be ninety (90) days
12 late, and in default on their loan, so as to avoid foreclosure.

13 15) Petitioner completed the HAMP application and properly returned it to WELLS
14 FARGO.

15 16) On September 17, 2009 Petitioners received a letter from WELLS FARGO
16 stating, "You did it!" and accepting Petitioners into the HAMP program. [Ex.3]

17 17) The HAMP trial period began on November 1, 2009. [Ex.4]

18 18) Petitioners were informed that they did not need to make their October payment
19 by WELLS FARGO.

20 19) When Petitioners did not make their October payment, they had missed a total of
21 three payments. This put Petitioners ninety (90) days in arrears.

22 20) The HAMP Trial Period Packet states that WELLS FARGO is the "Lender".

23 21) The HAMP Trial Period Packet stated that the monthly payments during the trial
24 period would be \$1,127.06. [Ex.4 p.2]

25 22) The HAMP Trial Period Packet stated that "the last Trial Period Payment is due
26 2/1/2010" [Ex.4 p.2]

27 23) The HAMP Trial Period Packet stated that upon successful completion of the
28 Trial Period, Petitioners would (not might) receive a modification on substantially similar terms.

1 24) Nowhere in the HAMP Trial Period packet is any notice provided that WELLS
2 FARGO may not be the Lender.

3 25) Nowhere in the HAMP Trial Period packet is any notice that acceptance into
4 HAMP is contingent on a decision made by any entity other than WELLS FARGO.

5 26) Nowhere in the HAMP Trial Period packet is any notice that Petitioner's
6 eligibility may be in doubt.

7 27) After being accepted into the HAMP Trial Period, Petitioners timely made all
8 three of the stated Trial Period Payments required to secure a permanent modification.

9 28) WELLS FARGO accepted the HAMP Trial Period Payments, but did not send a
10 Modification Agreement.

11 29) At WELLS FARGO'S behest, Petitioners continued making payments to WELLS
12 FARGO in the amount of the Trial Period Payments.

13 30) Petitioners contacted WELLS FARGO to check on the status of the modification
14 and were informed that it was being processed.

15 31) On April 5, 2010 WELLS FARGO sent Petitioners a letter informing them that
16 Petitioner's "may not be eligible" for HAMP because, "[WELLS FARGO] service[s] your loan
17 on behalf of an investor or group of investors that has not given us the contractual authority to
18 modify your loan under [HAMP]." [Ex.5]

19 32) The April 5, 2010 letter disclosed that WELLS FARGO had been directed to
20 place Petitioner's "mortgage" in a review file until May 5, 2010, and instructed Petitioners to
21 continue making their Trial Period Payments.

22 33) On April 29, 2010, WELLS FARGO sent another letter informing Petitioners that
23 WELLS FARGO would not modify their loan because, "the investor on your mortgage has
24 declined the request." This letter stated that the Trial Payments would be retained by WELLS
25 FARGO and applied to the loan in accordance with the "current loan documents." WELLS
26 FARGO further instructed that the only options they could recommend would be a short sale or a
27 deed in lieu of foreclosure. [Ex.6]
28

1 34) WELLS FARGO reported Petitioners' loan as 180+ days delinquent on June
2 2010, despite the payments made pursuant to the agreement between WELLS FARGO and
3 Petitioners.

4 35) WELLS FARGO'S reporting of this delinquency has adversely impacted
5 Petitioners' credit on their credit report. [Ex. 6 of Petitioner's Supplement to Documentation.]

6 36) Petitioners have attempted to refinance the home twice, but have been rejected
7 because of an adverse credit report caused by FHLB and WELLS FARGO.

8 37) On August 6, 2010 WELLS FARGO'S trustee National Default Servicing
9 Corporation recorded a Notice of Default.

10 38) Petitioners elected to mediate under NRS 107.086.

11 39) At the mediation, WELLS FARGO submitted the original Deed of Trust
12 demonstrating that it was the beneficiary.

13 40) During the mediation, WELLS FARGO'S telephonic representative disclosed that
14 WELLS FARGO was not the owner of the loan, but rather merely the servicer. After almost two
15 (2) hours of search, the representative could not conclusively identify the owner of the loan.

16 41) The Mediator found that WELLS FARGO'S representative lacked the requisite
17 authority under NRS 107.086.

18 42) The Mediator found that WELLS FARGO acknowledged that the late fees
19 charged during Petitioners' Trial Period were wrongful, and that WELLS FARGO rescinded the
20 same after Petitioners showed they "had complied with every detail then offered by the bank."

21 43) At no time has this Court been informed how or when FHLB acquired an interest
22 in Petitioners' home loan.

23 44) At no time has this Court been informed that WELLS FARGO actually contacted
24 FHLB to request a HAMP modification, or substantively similar private modification.

25 **Discussion**

26 **Conduct Prior to Mediation Only Relevant Insofar as it Impacted Mediation**

27 At the Evidentiary Hearing, WELLS FARGO lodged numerous objections to the
28 admission of testimony and evidence of conduct prior to the mediation. This Court overruled

1 each. WELLS FARGO further argued that such evidence and testimony should only be admitted
2 for background and foundational purposes.

3 At status hearings prior to the evidentiary hearing, WELLS FARGO had argued that
4 issues of what occurred prior to the mediation are outside of the scope of this Court's authority
5 sitting in judicial review of a foreclosure mediation under FMPR Former Rule 6(1) and NRS
6 107.086(5). Essentially, even if it were true that WELLS FARGO'S conduct prior to the
7 mediation would give rise to a negligent misrepresentation claim, or a promissory estoppel
8 claim, or a breach of contract claim, or warrant an injunction against a foreclosure for some
9 violation of law, because by terms of the Trial Period Program a Modification offered by
10 WELLS FARGO without authority, a permanent Modification was mandated upon successful
11 completion of the Trial Period and the Trial Period was successfully completed by Petitioners,
12 those claims must be brought separately. This Court agrees with WELLS FARGO'S underlying
13 legal theory that review is limited to the foreclosure mediation and that other claims must be
14 brought through independent actions; but finds that the testimony and evidence introduced by
15 Petitioner of what occurred prior to the foreclosure mediation is relevant to what occurs at the
16 foreclosure mediation. While this Court cannot entertain independent legal *claims* and award
17 relief for those *claims*, this Court can, and does, find those same *facts* relevant.

18 A categorical prohibition on the admission of evidence and testimony of prior conduct
19 would deprive this Court of the ability to contextualize the mediation. When reviewing for good
20 or bad faith participation, context is everything. If this Court were deprived of context, this
21 Court would be unable to analyze whether a lender engaged in a pattern of conduct over multiple
22 mediations tended to infer that some technical violations were actually intentional flouting of the
23 law. Similarly this Court would be unable to look to a homeowner's previous conduct to
24 determine whether mediation and review procedures were merely being used as a stall tactic, or
25 to leverage a modification where none was necessary. This Court finds the entire relationship
26 between the parties may be considered, with relevancy being the crux for whether such evidence
27 and testimony is admissible.

28 ///

1 For instance, if the prior conduct at issue was a November 2009 HAMP modification that
2 was reneged upon, but at the mediation the sole point of error was inadequate production of
3 documents, then that November 2009 HAMP modification ostensibly would have had no impact
4 on the mediation, and thus would not be particularly relevant to this Court's determination.

5 But, in the present case, what occurred between the parties prior to mediation had bearing
6 on the mediation and is relevant. The November 2009 HAMP modification is directly relevant
7 to the mediation in several ways. 1) The issue of uncertain ownership calls into question
8 WELLS FARGO'S authority to mediate; 2) Prior performance or breach by a party in the
9 foreclosure mediation program sheds light on their good faith participation; 3) The prior
10 agreement shows the contours of a fair resolution.

11 Trial Period Plan/Modification Agreement Terms Read In Context With Agreement

12 The HAMP packet contained language in a separate sheet titled "Important Program
13 Info" that, "The Trial Period Program is the first step. Once we are able to confirm your income
14 and eligibility for the program, we will finalize your modified loan terms. . ." [Ex. 4] This Court
15 finds that this language is not contained within the four corners of the agreement. This
16 informational packet must be read in context with the provisions of the actual agreement which
17 unequivocally stated that if Petitioner's complied with the Trial Program that WELLS FARGO
18 would send a Modification Agreement for Petitioner's signature which would "reflect the new
19 payment amount and waive any unpaid late charges." [Ex. 4]

20 The "eligibility" language in the "Important Program Information" could not be
21 reasonably understood by an applicant to mean that there may be eligibility problems based on
22 actions taken by WELLS FARGO. Rather, the "eligibility" language gives notice to applicants
23 that if their income cannot be verified or if they do not abide by the Trial Period Program terms,
24 that they will not receive a Modification Agreement.

25 Here, Petitioners successfully made all three trial payments, and by terms of the
26 agreement executed by WELLS FARGO, Petitioners were to receive a Modification Agreement
27 to permanently modify the loan. This did not occur, and upon receipt of a Notice of Default,
28 Petitioners elected mediation.

1 Submitted "True and Certified" Documents Contradict WELLS FARGO'S Status

2 In its written *Response*, WELLS FARGO does not disclose in what capacity it attended
3 the mediation, nor its relationship to the loan. At the Evidentiary Hearing, WELLS FARGO
4 represented to this Court that it was the originator of the home loan note, and was the original
5 beneficiary of the deed of trust. WELLS FARGO also represented to this Court that it no longer
6 "owns" the note.

7 WELLS FARGO submitted "True and Certified" Documents to the Presiding Mediator
8 that it was the beneficiary of the deed of trust. WELLS FARGO submitted a certified copy of
9 the original Note showing WELLS FARGO to be the holder of the Note. WELLS FARGO did
10 not submit any assignments of the deed of trust, or any endorsements of the Note.

11 The Rules in effect at the time of the mediation required that in order for certified copies
12 to be acceptable, they must state under oath that "the person making the certification is in actual
13 possession of the original mortgage note, deed of trust, and each assignment of the mortgage
14 note and deed of trust." Former Rule 5(10)(b)

15 The documents provided to the Presiding Mediator stated that WELLS FARGO was the
16 beneficiary of the deed of trust and the holder of the note. However, at the mediation, WELLS
17 FARGO'S telephonic representative, Greg Eastman, indicated that WELLS FARGO was merely
18 the servicer, and that he could not tell who owned the Note.

19 All parties now agree that Federal Home Loan Bank, FHLB, is the owner of Petitioner's
20 loan.¹ This Court has not been informed which FHLB is the owner of Petitioner's loan. Thus,
21 even at the end of the Evidentiary Hearing, this Court does not actually know who owns
22 Petitioner's loan. It is apparent that Petitioners also still do not know who owns their loan.
23 Based on the record it is not clear that WELLS FARGO actually knows who owns the loan.
24

25 ¹ This Court notes that there are twelve Federal Home Loan Banks in the United States of America. This Court has
26 not been informed which of these entities owns Petitioner's Loan. Based on geographic region it appears likely that
27 Federal Home Loan Bank San Francisco is the owner. However, WELLS FARGO has not recorded any
28 assignments to FHLB -San Francisco; has assigned one other Deed of Trust to Federal Home Loan Bank - Chicago
[See, Corporation Assignment of Deed of Trust DOC # 3603514 of the Washoe County Records]; and has assigned
well over one hundred Deeds of Trust to FHLMC (a HAMP participant). Petitioner DUKE RENSLOW'S credit
report admitted into evidence shows that DUKE RENSLOW'S credit has been reviewed five times in 2010 by
"FEDERAL HOME LOAN BANK OF" [Ex. 10]

1 WELLS FARGO admits it no longer owns the loan. This Court has not received any
2 evidence of the manner in which the loan was transferred. WELLS FARGO has not
3 demonstrated that it properly endorsed the note to FHLB, nor assigned the Deed of Trust.

4 In the documents provided at mediation, WELLS FARGO stated under oath that "the
5 person making the certification is in actual possession of the original mortgage note, deed of
6 trust, and each assignment of the mortgage note and deed of trust." Former Rule 5(10)(b)
7 However, the evidence has not borne this statement out. This Court finds that WELLS FARGO
8 did not meet the documentary requirements of NRS 107.086(4) and Former Rule 5(10)(b).
9 Under NRS 107.086(5), this Court finds the appropriate sanction for this failure to be seven
10 thousand five hundred dollars (\$7,500.00)

11 WELLS FARGO Merely Servicer

12 This case presents a novel legal issue in that WELLS FARGO is apparently still the
13 beneficiary of the Deed of Trust of record. However, WELLS FARGO'S inability to complete
14 the November 2009 HAMP Modification, and inability to offer a HAMP Modification or
15 substantively similar private modification at mediation occurred because WELLS FARGO
16 lacked the authority to do so.² WELLS FARGO'S authority to modify the loan is acknowledged
17 to be entirely derivative of FHLB, the "owner" of the loan.

18 The language of NRS 107.086 specifies that the beneficiary of the Deed of Trust, or their
19 representative, shall attend the mediation. Implicit in the plain language of NRS 107.086 is an
20 assumption that beneficiaries of the Deed of Trust have decision making authority. Throughout
21 the Foreclosure Mediation Rules in effect at the time of the subject mediation there is again an
22 implicit assumption that the beneficiary of the Deed of Trust is the proper party to mediate
23 because that party has authority. The term "beneficiary of deed of trust" and "lender" are used in
24 an apparently interchangeable manner in the rules. See, FMPR Former Rule 1(2) "lender",
25 Former Rule 5(8)(a) "beneficiary (lender)", Former Rule 7(1)) "beneficiary".

26
27
28 ² This Court is mindful that one of the reasons for the establishment of the Foreclosure Mediation Program was that
servicers, when contacted directly by borrowers, often claimed to lack authority to make modifications. Minutes of
Joint Meeting of Senate and Assembly Committees on Commerce and Labor, at 13 (Feb. 11, 2009)

1 Former Rule 5(8)(a) and 5(10) when read together imply that Supreme Court conceived
2 of the beneficiary of the deed of trust as being the same party as the holder of the note. Former
3 Rule 4(8)(a) requires that:

4 All beneficiaries of a deed of trust . . . shall participate in the Foreclosure
5 Mediation Program, be represented at all times during a mediation by a person
6 or persons who have the authority to *negotiate and modify the loan* secured by
7 the deed of trust sought to be foreclosed In addition to the documents
8 required by Rule 8 herein, the beneficiary must bring to the mediation the
9 original or a certified copy of the deed of trust, *the mortgage note*, and each
10 assignment of the deed of trust and *the mortgage note*.³ (*emphasis added*)

11 Former Rule 5(8)(a) does not specify why the additional documents are required, but a
12 reasonable interpretation of this rule infers that those documents tend to demonstrate authority
13 and that the proper party to negotiate is present. Former Rule 5(10) mandates that the production
14 of the mortgage note is only valid when the beneficiary of the deed of trust swears under oath
15 that the note is in the possession of the person making the certification.

16 Although both NRS 107.086 and the Foreclosure Mediation Program Rules repeatedly
17 specify the beneficiary of the deed of trust, and do not use the terms "holder" or "creditor," the
18 focus throughout is on the ability to modify the loan.

19 This is supported by the legislative history of AB 149:

20 "[Borrowers] cannot get a lender on the phone. They cannot get to someone
21 willing to work with them. The reason might be that the loans have been sold so
22 many times that it is not clear who the *lender* is." (*emphasis added*)

23 Further:

24 "The other key component of this bill is that *lenders* or their representatives must
25 appear or otherwise be available throughout the mediation. They also have to
26 present a certified copy of the deed of trust and the promissory note, so that we
27 know the person who is foreclosing *actually owns the note*." (*emphasis added*)

28 Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor
February 11, 2009 p.5-7. (Comments of Assembly Speaker Barbara Buckley)

///

³ The newly amended Foreclosure Mediation Program Rules effective March 1, 2011 renumbered Rule 5(8) to Rule 10(1), and specified that "each endorsement of the mortgage note" must be provided.

1 The legislative history further indicates that the Legislature intended the party with actual
2 beneficial interest should be present at the mediation.

3 “The third amendment clarifies the term “trustee” to “beneficiary of the deed of
4 trust.” That language is more precise since we do not want the trustee to be there;
5 we want the person with the beneficial interest to be present.”

6 Assembly Committee on Commerce and Labor, March 11, 2009, p.5. (Comments of Assembly
7 Speaker Barbara Buckley)

8 The Legislature’s choice of the term “beneficiary of deed of trust” was not designed to
9 elevate form over substance. Rather, the Legislature believed that “beneficiary of the deed of
10 trust” was the term that would cause the party with actual beneficial interest to appear. In
11 circumstances such as this, where the beneficiary of record of the deed of trust appears to have
12 no actual beneficial interest, it is clear that the Legislature did not intend for the beneficiary to
13 appear, but rather for the entity possessing actual beneficial interest.

14 The Supreme Court of Nevada has not yet had occasion to declare the law of Nevada as it
15 relates to determining what entity has beneficial interest when faced with competing or imperfect
16 transfers of interest in a secured home loan. The traditional approach to transferring interest in
17 mortgages from one creditor to another has been by endorsing the note and assigning the
18 mortgage or deed of trust, usually contemporaneously. In recent years, the financial industry has
19 adopted novel methods of non-contemporaneous or incomplete or unrecorded transfers, that are
20 not particularly relevant to the case at bar other than for a determination of who has actual
21 beneficial interest sufficient to have standing to participate in the mediation program (either
22 directly or through a duly appointed representative), and whether WELLS FARGO as the
23 beneficiary of the deed of trust was empowered to attend the mediation on its own, or whether its
24 authority was solely derivative as a representative of FHLB. The two prevailing theories
25 throughout the nation are the Longan Rule and the Restatement (Third) approach.

26 In Carpenter v. Longan, 83 U.S. 271 (1872), the United States Supreme Court held that
27 mortgages and notes are inseparable. Transferring the note carries with it the mortgage by
28 operation of law. An attempt to transfer the mortgage without expressly transferring the note is a
 nullity, and the purported assignee has received nothing but worthless paper. Although Nevada

1 uses Deeds of Trusts instead of “mortgages”, the rule is still applicable.⁴ Under this approach,
2 when WELLS FARGO transferred the note to FHLB, by operation of law, WELLS FARGO
3 ceased being the mortgagee/beneficiary of the deed of trust. Instead, FHLB is the actual
4 beneficiary, but has an unrecorded beneficial interest and essentially holds a wild deed.⁵ Longan
5 has never been repudiated or overturned, although it is of venerable vintage.

6 The competing theory is set forth in the Restatement (Third) of Property – Mortgages §
7 5.4, which specifically repudiates Carpenter v. Longan as archaic and founded on a now
8 discarded theory of mortgages. Under the Restatement, the transfer of either the mortgage or the
9 note carries the other with it, unless there is intent to sever the two. In analyzing the state of
10 Nevada Common Law as it relates to real property, this Court finds that the Nevada Supreme
11 Court has adopted the Restatement (Third) of Property – Mortgages on a consistent basis. This
12 Court finds then that the Restatement (Third) approach is the proper approach for Nevada
13 Courts. On the facts here, there is no indication that WELLS FARGO intended to sever the
14 Deed of Trust from the Note. Therefore, by transferring the Note to FHLB, WELLS FARGO
15 also transferred all beneficial interest in the Deed of Trust.

16 Under either approach, on the facts here, WELLS FARGO, although the beneficiary of
17 record, had no beneficial interest in the Deed of Trust, and no right to proceeds from the Note.
18 Therefore, at most, WELLS FARGO was a servicer for FHLB, and notwithstanding the language
19 of NRS 107.086 and the Foreclosure Mediation Program Rules, had no independent standing to
20 negotiate or appear at the mediation in any capacity other than as a “representative” of FHLB.

21 Servicer Representatives Amenable to Sanctions

22 Servicers do not have *independent* standing to participate in the Foreclosure Mediation
23 Program. NRS 107.086 evidences a clear Legislative intent to have the party holding beneficial
24 interest in the property at the mediation table. Rather, this Court has found that servicers may
25

26 ⁴ See, Sims v. Grubb, 75 Nev. 173, 178 (1959); 59 C.J.S. Mortgages § 6; Restatement (Third) Trusts § 5 comment k

27 ⁵ The Supreme Court of Massachusetts, analyzing non-contemporaneous transfers of the note and mortgage, has
28 held that “[T]he holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an
equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and
obtaining an equitable order of assignment” U.S. Bank National Association v. Ibanez, *Slip Copy* SJC 10694 at 11
(Mass. 2011) (*rejecting* transfer of mortgage by operation of law when note is transferred without mortgage.)

1 qualify as a "representative" for the beneficiary of the deed of trust within the meaning of NRS
2 107.086(4)'s requirement that, "The beneficiary of the deed of trust or a representative shall
3 attend the mediation." *See, Order in Navarro v. Wells Fargo Bank, NA.*, CV10-00941 at pp. 2,3.

4 NRS 107.086(3) requires the trustee to notify the present beneficiary of the deed of trust
5 and "every other person with an interest as defined in NRS 107.090. . ."⁶ No evidence or
6 testimony from WELLS FARGO tended to show that FHLB was in fact properly noticed. Given
7 the oddities of the manner in which WELLS FARGO remains the beneficiary or record, this
8 Court is troubled that whichever FHLB actually owns the loan may not have received notice that
9 a mediation was scheduled to occur.

10 However, in other contexts, this Court has found that when a master servicer acting as a
11 representative exceeds its authority in reaching an agreement at mediation, that the homeowner
12 shall retain the benefit of the bargain, and that the lender shall have recourse only against the
13 servicer. *See, Order in Navarro v. Wells Fargo Bank, NA.*, CV10-00941 at pp. 2,3. This seems a
14 fitting rule for situations in which a master servicer may have essentially usurped the lender's
15 place at the mediation table. If sanctions issue based on the conduct of the servicer that
16 materially impact a right of the lender, then the lender shall have cause solely against the
17 servicer. An innocent homeowner shall not suffer because a servicer's conduct has resulted in
18 harm to the lender.

19 Here, Petitioners had an awareness prior to mediation that WELLS FARGO was not the
20 owner of their loan, based on the April 29, 2010 termination letter. However, Petitioners were
21 entitled to negotiate in good faith with the servicer of their loan acting as a representative for
22 FHLB. Petitioners participated but had the purposes of the mediations frustrated by WELLS
23 FARGO'S actions.

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28 ⁶ NRS 107.090(1) defines a "person with an interest" as "any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated."

1 This Court finds that the language of NRS 107.086(5) and Former Rule 6(1) is broad
2 enough to sanction the servicer representative when the servicer appears at the mediation, and
3 the deficiencies or violations are attributable to the representative and not the underlying lender.

4 Here, the violations are attributable to WELLS FARGO. WELLS FARGO submitted
5 "true and certified" documents that conflicted with their representations as to ownership of the
6 loan. WELLS FARGO could not identify the owner of the loan. WELLS FARGO's actions
7 necessitated a mediation. It was WELLS FARGO that lacked authority. Thus, it is WELLS
8 FARGO who should bear the burden of any sanctions.

9 Bank Representative's Lack of Experience No Excuse

10 WELLS FARGO'S telephonic representative, Greg Eastman, did not know who owned
11 the note. [Ex.1] At the evidentiary hearing, representative Eastman did not appear. Rather
12 another individual, Phillip CARGIOLI from WELLS FARGO who serves as a telephonic
13 representative in other mediations, appeared and testified that at the time of the mediation Mr.
14 Eastman had been a loan adjustment officer for a mere four months.

15 Lack of experience is no excuse. Servicers have no independent authority in the
16 Foreclosure Mediation Program. They are mere representatives. A new employee of a servicer
17 acting as representative is held to the same standards under NRS 107.086 and the Foreclosure
18 Mediation Rules as the most experienced hand. The failure of a representative to know who they
19 represent is unacceptable. The testimony and evidence introduced demonstrates that well over
20 an hour and a half of the mediation was spent trying to determine the identity of the lender.
21 Petitioners had to leave the room for some time while this occurred. This clearly had a negative
22 impact on the mediation.

23 Representatives must have full authority, or have access at all times to full authority.
24 NRS 107.086(4); Former Rule 5(8)(a) It is clear that Mr. Eastman did not know what his
25 authority was or even from whom it was derived "at all times". This Court finds that one cannot
26 have access to an unknown entity. This is a violation of Former Rule 5(8)(a) which had a
27 material and negative impact on the mediation. It is also a violation of NRS 107.086(4) which
28 the Legislature has expressly authorized this Court to sanction for even mere technical violations.

1 In this instance, these violations had a detrimental impact and led to a finding by the
2 mediator that the representative of the lender did not have the requisite authority. Under this
3 Court's *de novo* review, this Court finds that the lender did not appear directly at the mediation.
4 The lender only appeared through a representative, as authorized by NRS 107.086(4). However,
5 that representative did not have sufficient authority to negotiate and modify the loan, and did not
6 have access to such a person with authority "at all times." This Court finds the appropriate
7 sanction for lack of authority in this case to be a monetary sanction in the amount of ten thousand
8 dollars (\$10,000.00) and an equitable sanction discussed *infra*.⁷

9 Petitioner Clearly Qualified for a Modification

10 Respondent contended that, "[P]etitioner did not qualify for a modification and therefore
11 no agreement was reached." [Resp. at p.2] However, during the evidentiary hearing,
12 Respondent's counsel asked a question that intimated that Petitioner had been offered a
13 modification that would reduce the payment by \$268.00 per month.⁸ Further, WELLS
14 FARGO'S witness, CARGIOLI testified that an offer reducing the payment by \$268.00 per
15 month had been made by Mr. Eastman. However, CARGIOLI had no personal knowledge that
16 this offer was made. CARGIOLI was not involved in the RENSLOW'S mediation. CARGIOLI
17 testified that he had "briefly reviewed . . . Mr. Eastman's notes from the mediation." [Trans. at
18 58] These notes were not introduced into evidence. The actual terms of this purported
19 modification offer were not addressed. This Court does not have any information whether the
20 \$268.00 was a permanent modification, whether it created a balloon payment, whether it was a
21 temporary modification, whether there were any fees and penalties associated with this purported
22 offer. No testimony or evidence was given as to the source of authority for making this
23 purported offer. The record is bereft of competent evidence for this Court to make a finding that
24 a particular offer was in fact made. The record does not contain competent evidence of the terms

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26 ⁷ Were equitable sanctions unavailable, this Court would increase the monetary sanctions.

27 ⁸ Questions of counsel are not testimony. Here, the questions of Respondent's counsel elicited an answer that
28 Petitioner's representative Alsasua did not recall the terms of an offered modification. [Trans. at p.11] Petitioner
also did not recall the terms of any specific modification being offered [Trans. at p.28] No one actually present at
the mediation testified as to the terms of this purported offer, and the offer was not reflected on the Mediator's
Statement.

1 of any such purported modification such that this Court could analyze the offer for its impact on
2 good faith participation.

3 However, although this Court does not have sufficient evidence before it to find that a
4 particular offer was made, or that that offer was a good faith offer, the testimony of WELLS
5 FARGO is sufficient for the purpose of analyzing WELLS FARGO'S contention that,
6 "[P]etitioner did not *qualify* for a modification and therefore no agreement was reached. Just
7 because the [P]etitioner did not *qualify* for a modification does not mean that the [R]espondent
8 did not have the required authority." [Resp. at p.2] The statement in the Response is directly
9 contradicted by the testimony of WELLS FARGO'S representative CARGIOLI at the
10 evidentiary hearing; they cannot both be true. No argument was made in support of the
11 statement in the Response under NRCP Rule 11(b)(2) and (3).⁹

12 Respondent's representative witness CARGIOLI further admitted that the refusal to offer
13 a specific modification, the HAMP modification previously agreed to, was based not on
14 Petitioners' qualifications or lack thereof but rather on the fact that the underlying lender did not
15 participate in HAMP and thus had not authorized the servicer to enter into a HAMP
16 modification.¹⁰

17 Therefore, this Court finds that Petitioners did qualify for a modification; that Petitioners
18 qualified for the HAMP modification offered in November 2009; and that the inability to enter
19 into a modification at mediation stemmed from WELLS FARGO'S lack of authority to offer a
20 HAMP modification.

21 Respondent's Conduct Impaired Petitioner's Ability to Obtain a Refinance

22 Respondent contends that loan modifications "are primarily for individuals who are
23 unable to refinance their house. . ." and that "Petitioner would be in a better position to have
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26 ⁹ This Court does not find a need to *sua sponte* enter an order to show cause under Rule 11(c)(1)(b).

27 ¹⁰ This Court professes a certain shock at the fact that a FHLB, as a federal GSE, does not participate in HAMP,
28 which is required for loans owned by FNMA and FHLMC, two other federal GSE's. The fact that the Federal
Home Loan Mortgage Corporation authorizes HAMP modifications while the Federal Home Loan Bank does not,
that WELLS FARGO has sold mortgages in the past to both of these entities, and that the election to sell to one over
the other is completely outside of the borrower's control has a certain Kafkaesque quality. Had WELLS FARGO
simply chosen FHLMC instead of FHLB, this entire matter would have been averted.

1 refinanced their loan rather than allow it to go into default. In fact, if the [P]etitioners have as
2 much equity as they claim, then they are still in a position to refinance the loan. . ." [Resp. at p.2]

3 Here, Petitioners are in fact presently unable to secure a refinance of their home, due to
4 the actions of WELLS FARGO. They have made several attempts to do so, both through
5 WELLS FARGO itself, and through U.S. Bank. However, because WELLS FARGO placed
6 negative reports on Petitioners' credit reports, Petitioners are unable to obtain a refinance.

7 [Ex.10]

8 Respondent's statement that Petitioners would have been better off refinancing rather
9 than defaulting is tempered by the fact that Petitioners contacted WELLS FARGO prior to
10 defaulting to work out arrangements regarding their loan and were instructed by WELLS
11 FARGO that they could not be helped until they were sixty (60) days late.

12 This Court does not appreciate WELLS FARGO'S Monday morning quarterbacking
13 regarding what Petitioner ought to have done when WELLS FARGO'S actions both precipitated
14 Petitioners' default and impaired Petitioner's ability to obtain a refinance. These comments in
15 WELLS FARGO'S written *Response*, when compared to the evidence in record, demonstrate
16 either a complete lack of knowledge or outright disregard of the facts of this matter. These
17 comments are nothing short of shameful.

18 Respondent's Admission That Late Fees Were Properly Rescinded Stands

19 At the mediation, WELLS FARGO explained that the November 2009 modification had
20 been withdrawn because WELLS FARGO lacked the authority to offer it. Petitioners
21 demonstrated to the Mediator and to WELLS FARGO'S representative that they had been
22 charged penalties and late fees despite the fact that they had complied with all terms of the
23 November 2009 modification and with "every detail then offered by the bank." Upon this
24 showing, WELLS FARGO rescinded the fees and penalties. [Ex.1]

25 The plain language of the Mediator's Statement shows that WELLS FARGO'S rescission
26 was not contingent, conditional, or part of an agreement. The rescission was an admission that
27 the fees and penalties were improper. WELLS FARGO is estopped from reneging on that
28 admission made by their representative. All fees and penalties incurred during, or as a result of,

1 the November 2009 modification have been RESCINDED and WAIVED. WELLS FARGO
2 may not in any way attempt to collect on the same.

3 Mediation Fee Not Chargeable

4 When the Legislature enacted AB 149 implementing NRS 107.086, the Legislature made
5 expressly clear that the mediation fee was to be evenly distributed between homeowners and
6 lenders. NRS 107.086(8)(e); FMPR 5(1) (Former Rule 16(1))

7 WELLS FARGO has ignored this completely. WELLS FARGO has sought to recover
8 the mediation fee, in direct contravention of the Legislature's express desire to evenly apportion
9 the costs between homeowners and lenders.¹¹ [Petition Exh. 3] Even more shocking to this
10 Court is that WELLS FARGO attempts to charge \$500.00 as a "Mediation Fee", well in excess
11 of the \$200.00 that WELLS FARGO paid. Homeowners are legally entitled to seek a mediation.
12 Each party bears their own cost of mediation. To shift the burden from an even division to
13 resting solely on the homeowner is contrary to the spirit and letter of the law. To charge more
14 than the fee paid, in essence to attempt to profit from the homeowner's election, is outrageous.

15 While this Court would certainly impose sanctions for the bare attempt to recover the
16 mediation fee alone, when confronted with uncontroverted evidence that Lender is seeking to
17 recover 250% of its statutory burden, this Court finds that harsh sanctions must be issued to deter
18 such unscrupulous conduct in the future. This Court finds that the attempt to recover 250% of
19 the mediation fee is appropriately assessed a 250% sanction. Accordingly, for this egregious and
20 intentional violation, WELLS FARGO is SANCTIONED \$1,250.00 (one thousand two hundred
21 and fifty dollars).

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25 ¹¹ The Mediation Fee is included on a reinstatement letter from National Default Servicing Corporation, which is
26 WELLS FARGO'S foreclosure trustee. Foreclosure trustees are agents of the trustor and beneficiary of the deed of
27 trust. See, Hendrickson v. Popular Mortg. Servicing, Inc. 2009 WL 1455491 (N.D. Cal 2009) at *7 (citations
28 omitted) (cited with approval by Nieto v. Litton Loan Servicing, LP, 2011 WL 797496 (D. Nev 2011) at *5); see
also 54A Am. Jur. 2d Mortgages § 123 – Relationship of trustees to other parties in interest; Restatement (Third)
Trusts § 5 comment k; Bogert's Trusts and Trustees §29 Mortgages and Trust Deeds (2010). Therefore, the actions
of the trustee are imputed to WELLS FARGO. If the trustee's assessment of the fee exceeded their agreement with
WELLS FARGO, then WELLS FARGO may seek to recover sanctions from the trustee.

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2 Testimony and Evidence Lead to Competent Finding of Lack of Good Faith

3 This Court finds that WELLS FARGO'S conduct in this mediation falls well below the
4 threshold of "good faith" negotiations. Thus, WELLS FARGO has failed to meet its burden to
5 show why sanctions should not lie pursuant to NRS 107.086(4) which authorizes this Court to
6 issue sanctions, without limitation, including modifications

7 Here, Petitioners were in a mediation with a representative servicer for a lender.
8 Petitioners were only there because the servicer had executed an agreement to modify the loan,
9 and after Petitioners had satisfied the terms, the servicer terminated the agreement.

10 The question of why a mediation occurs shapes the contours of what a good faith result
11 will look like. Where a homeowner is in a mediation because they are attempting to receive a
12 principal reduction despite the fact that the homeowner is more than capable of affording all
13 obligations at their present rate, a good faith result may very well be that a lender offers
14 reinstatement only. However, here, Petitioners were in a mediation because they were
15 attempting to receive the modification previously promised and denied them, or one
16 substantively similar.

17 It is in analyzing the good faith participation that this Court finds relevance in prior
18 conduct. Good faith is not merely *pro forma* lip service to the rules. This Court has found that
19 although good faith and bad faith escape precise definition, they are capable of description such
20 that this Court may adequately determine their presence or absence. This Court adopts as a
21 useful reference the descriptions of both concepts as follows:

22
23 **Good Faith:** Good faith is an intangible and abstract quality with no
24 technical meaning or statutory definition, and it encompasses, among other
25 things, an honest belief, the absence of malice and the absence of design to
26 defraud or to seek an unconscionable advantage, and an individual's personal
27 good faith is concept of his own mind and inner spirit and, therefore, may not
28 conclusively be determined by his protestations alone. Doyle v. Gordon 158
N.Y.S.2d 248, 259 . . . In common usage this term is ordinarily used to
describe that state of mind denoting honest of purpose, freedom of intention to
defraud, and generally speaking, means being faithful to one's duty or
obligation Efron v. Kalmanovitz, 57 Cal.Rptr. 248

1 **Bad Faith:** The opposite of “good faith”, generally implying or involving
2 actual or constructive fraud, or a design to mislead or deceive another, or a
3 neglect or refusal to fulfill some duty or some contractual obligation, not
4 prompted by an honest mistake as to one’s rights or duties, but by some
5 interested or sinister motive. Term “Bad faith” is not simply bad judgment or
6 negligence, but rather it implies the conscious doing of a wrong because of
7 dishonest purpose or moral obliquity; it is different from the negative idea of
8 negligence in that it contemplates a state of mind affirmatively operating with
9 furtive design or ill will. Stath v. Williams 367 N.E.2d 1120, 1124.

10 BLACK’S LAW DICTIONARY (5th ed. 1979)¹²

11 Although good faith is presumed, each party bears the onus of demonstrating that they
12 are there to negotiate in good faith,¹³ because good faith is typically adduced through the conduct
13 of a party. This Court finds that conduct prior to the mediation has bearing on adducing good
14 faith at the mediation.

15 Having made certain findings of fact *ante*, this Court concludes that WELLS FARGO has
16 not demonstrated good faith participation. This Court concludes that the parties were unable to
17 have meaningful good faith negotiations due to WELLS FARGO’S conduct at the mediation,
18 including its failure to know who controlled the loan.

19 Equity regards as done which ought to be done. 30A C.J.S. Equity § 131. The basis of
20 the maxim is the existence of a duty and it can only be invoked against a party who has failed or
21 refused to perform a duty imposed on the party. The maxim only operates in favor of party
22 holding an equitable right to performance, against a party with a duty to perform. *Id.* (citations
23 omitted) Here, based on all of the evidence shown to this Court, what ought to be done is a
24 modification of Petitioners’ loan on the terms previously agreed to between Petitioners and
25 WELLS FARGO.

26 ¹² This Court specifically adopts the definition from the Fifth Edition. The most recent Black’s Law definition is of
27 no assistance to this Court.

28 ¹³ This Court has adopted these working definitions because there are no Supreme Court rulings yet on point. This
 Court notes that the Supreme Court recently heard oral arguments in Leyva v. National Default Servicing Corp.,
 Supreme Court Docket No. 55216 in which the definition of good and bad faith were issues. This Court has found
 that bad faith is not the mere absence of good faith, but the active opposite and that it requires an independent
 showing. See, *Order in Navarro v. Wells Fargo Bank, NA.*, CV10-00941 at pp. 9,10. This Court anticipates
 guidance from the Supreme Court in the near future.

1 By its conduct prior to mediation, WELLS FARGO took upon itself a duty to offer a
2 HAMP modification to Petitioners. It refused and failed to do so at mediation. A modification
3 on the parameters offered to Petitioners in November 2009 ought to be done.

4 Modification is a Permissible Sanction

5 WELLS FARGO did not present argument that modification of the loan is an
6 impermissible sanction, nor cite authority for that proposition. Thus, WELLS FARGO has
7 WAIVED such arguments.¹⁴ However, because this is the first instance in which this Court has
8 imposed a modification on the loan pursuant to NRS 107.086, and it appears that this may be the
9 first such modification in the State of Nevada, it is prudent to discuss this Court's understanding
10 of the legal grounds for modification of a home loan as a sanction.

11 This Court finds that NRS 107.086 is not an impermissible impairment of contracts by
12 the Legislature. U.S.C.A. Const. art.1 §10 Rather, NRS 107.086 merely serves as an affirmation
13 that the Legislature intended for the District Courts of the State of Nevada to have full access to
14 the vast inherent powers the District Courts possess in equity. NRS 107.086 does not mandate
15 modification, nor even express a particular legislative preference for modification. NRS
16 107.086 does not create a power of modification in this Court. Were the word "modification"
17 omitted from NRS 107.086(5), the District Courts of the State of Nevada would possess the
18 exact same equitable power to modify the terms of a note. Thus, NRS 107.086 does not even
19 rise to the level of the legislation upheld by the United States Supreme Court in Home Bldg. &
20 Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)

21 Foreclosure is both a legal and an equitable construct. Actions involving real property
22 are inherently equitable actions because real property is unique. Non-judicial foreclosures
23 authorized by statute do not lose their equitable nature. Therefore, in these actions, this Court
24 possesses its full array of equitable powers.

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28 ¹⁴ Indeed, WELLS FARGO concedes the power of this Court to modify loans, "The sanction of a court ordered
modification of the loan as requested by the petitioner should only be utilized (if at all) when there is a finding of
bad faith by the respondent." [Resp. at p.4]

1 When the Court imposes a modification of a home loan, it bears some similarity to
2 reforming the note. Reformation of a written instrument is an equitable act. 66 Am. Jur. 2d
3 Reformation of Instruments § 3.

4 NRS 107.086 merely confirms that a District Court *may* impose a modification and
5 reform the note. This greatly comports with the Nevada Supreme Court's ruling in Tropicana
6 Pizza, Inc. v. Advo, Inc., 238 P.3d 861 (Nev. 2008) adopting Restatement (Second) of Contracts
7 § 166. "This Section. . . only states the circumstances in which a court "may" grant reformation,
8 and, since the remedy is equitable, a court has the discretion to withhold it, even if it would
9 otherwise be appropriate, on grounds traditionally considered by courts of equity in exercising
10 their discretion." Restatement (Second) of Contracts § 166, cmt. a (1981).

11 The power of a court to impose sanctions is equitable in nature, and sanctions may be
12 monetary or equitable. For example, a court may strike a pleading as a sanction or parts thereof
13 under NRCP 37 *See, Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592 (2010)

14 The exercise of a court's equitable power to sanction has been found to not violate due
15 process even when it terminates a case. *See, Skeen v. Valley Bank of Nevada*, 89 Nev. 301
16 (1973); Societe International v. Rogerts, 357 U.S. 197 (1958) (*holding* default judgment proper
17 sanction for willful discovery violation.) ; Hammond Packing co. v. Arkansas, 212 U.S. 322
18 (1909) (*holding* striking an answer and entering default judgment valid sanction). Thus, failure
19 to abide by procedural elements of the law can result in a Court providing substantive equitable
20 relief. There appears little difference between that proposition and the proposition that failure to
21 obey the law as reflected in NRS 107.086 during a mediation can result in a Court granting
22 substantive equitable relief.

23 Neither is the equitable imposition of a modification a regulatory taking. Mere delay in
24 receiving investment backed expectations do not constitute a taking.¹⁵ As to the principal,
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27 ¹⁵ In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) the United
28 States Supreme Court commented positively on the Ninth Circuit's determination that temporariness is a factor in
determining whether a taking has occurred under Penn Central's *ad hoc* test. The United States Supreme Court
rejected the view of Chief Justice Rehnquist that a delay of a set term could constitute a categorical taking. *See, id.*
at n.34.

1 imposing a modification that extends the term of a loan merely delays the investor's expected
2 return. The note is still worth the exact same principal balance, and is still freely assignable. As
3 to the interest, investors in home loans have no reasonable investment backed expectation that
4 they will realize the fully amortized value of the interest because there is no pre-payment
5 penalty.¹⁶ Were Petitioners to obtain a loan from another source and pay the home loan in its
6 entirety, the investor would receive no further returns on interest. Thus, imposition of a new
7 interest rate does not deprive the investor of anything that the investor has or could reasonably
8 expect to have in the future.

9 Therefore this Court concludes that there is no impediment to the exercise of the
10 equitable authority to impose a modification when the equities of a certain matter reveal that
11 modification is proper. Here, those equities exist.

12 Equity and the Legislative History of NRS 107.086 Militate for Strong Sanctions

13 Beyond the technical violations of law discussed *supra*, this Court is compelled to take
14 note that the facts present in this case are archetypal of the systemic problems that lead to the
15 enactment of NRS 107.086.

16 Petitioners are hard working individuals who obtained a standard mortgage. Petitioners
17 found themselves whipsawed by mounting medical expenses and decreased pay caused by the
18 economic downturn colloquially referred to as the Great Recession. The economic downturn not
19 only impaired Petitioners' income making their current mortgage difficult to afford, but also
20 decreased the value of their home making a new mortgage through a refinance difficult to obtain.

21 Petitioners turned to their "lender," WELLS FARGO, seeking assistance. WELLS
22 FARGO instructed them that it would not help unless they were further in arrears.¹⁷ When
23 Petitioners skipped their next payment to qualify for WELLS FARGO'S assistance, WELLS
24 FARGO did offer them help. Unfortunately, unknown to Petitioners, and apparently unknown to
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26 ¹⁶ "[T]he test must be whether the deprivation is contrary to reasonable, investment-backed expectations" Lucas v. South
27 Carolina Coastal Council, 505 U.S. 1003, 1034 (Justice Kennedy concurring) (citing Kaiser Aetna v. United States, 444
28 U.S. 164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); W.B. Worthen Co.
v. Kavanaugh, 295 U.S. 56 (1935))

¹⁷ This Court cannot help but wonder at the fiduciary implications of a mere servicer inviting default on a loan that it does not own.

1 WELLS FARGO itself, WELLS FARGO did not actually own the loan. WELLS FARGO did
2 not actually have authority to offer Petitioners such a modification. Nevertheless, WELLS
3 FARGO accepted payments for seven months, well in excess of the agreed upon three month
4 trial period. Throughout this time, WELLS FARGO could not tell Petitioner why the trial period
5 was extended beyond the specified time. WELLS FARGO provided conflicting information on
6 who actually had authority to a HUD counselor. Petitioners had no way of knowing who owned
7 their mortgage, and had no way of knowing what options were available to them. WELLS
8 FARGO gave them misinformation when it instructed them on how to qualify for a HAMP loan.
9 WELLS FARGO did not record or disclose its transfer of the loan. WELLS FARGO eventually
10 terminated the modification, despite Petitioners compliance, because of WELLS FARGO'S own
11 error. WELLS FARGO did not provide Petitioners with any recourse, or with any information
12 that there could be someone else to speak to.

13 In response to similar situations around the State, the Legislature passed AB 149,
14 enacting NRS 107.086. The Legislative history makes it clear that homeowners were receiving
15 conflicting statements from their lenders, and that homeowners often could not find a person
16 with whom to speak to discuss options to avoid foreclosure, and that often homeowners did not
17 know who owned their loan. Assembly Committee on Commerce and Labor Senate Committee
18 on Commerce and Labor February 11, 2009 p.5-7.

19 The Legislature intended to create a forum where homeowners could finally talk,
20 preferably in person, to an individual who had actual control over the loan and who could, if not
21 grant relief, at least discuss options. The Legislative history makes it abundantly clear that
22 representatives for lenders had no independent authority, but were to have the full array of
23 authority available to the lender itself. Assembly Committee on Commerce and Labor, March
24 11, 2009, p.5; *see also*, Assembly Committee on Commerce and Labor Senate Committee on
25 Commerce and Labor February 11, 2009 Page 22-24.

26 By statute, Petitioners were entitled to speak to FHLB. FHLB was certainly permitted to
27 send a representative. WELLS FARGO is certainly a viable representative for FHLB to send.
28 At the evidentiary hearing, WELLS FARGO had every opportunity to introduce evidence that

1 the trustee validly contacted both FHLB and WELLS FARGO, that pursuant to a servicing
2 agreement or after discussions between FHLB and WELLS FARGO that WELLS FARGO
3 appeared at the mediation as a representative, and that WELLS FARGO had knowledge of the
4 full array of options that FHLB could offer Petitioners, and negotiated in good faith with
5 authority to make those offers. No such evidence was introduced.

6 At the mediation WELLS FARGO submitted certified documents that directly contradict
7 its representations as to ownership of the loan. WELLS FARGO'S representative could not
8 identify the owner of the loan. It is difficult to imagine that a representative could attend a
9 proceeding without knowing who they represented. The lion's share of the mediation was spent
10 determining who WELLS FARGO represented. Phrased differently, a significant portion of the
11 mediation was spent trying to determine why WELLS FARGO was present. As a result,
12 Petitioners were never able to speak to FHLB, or to a legitimate representative of FHLB. This
13 falls woefully below the standard required for good faith participation under NRS 107.086.
14 WELLS FARGO failed to participate in good faith as a representative of FHLB. This Court
15 finds the appropriate sanctions to be both equitable sanctions and monetary sanctions in the
16 amount of ten thousand (\$10,000).¹⁸

17 Here, Petitioners have done everything that WELLS FARGO has told them to do and
18 find themselves in worse position for it. When this process began Petitioners were thirty days
19 late on their mortgage. After following every instruction by WELLS FARGO, and attending
20 state mandated foreclosure mediation, Petitioners find themselves reportedly 180+ days
21 delinquent, on the precipice of foreclosure, and facing additional charges and fees for
22 participating in a modification program wrongfully offered to them by a servicer and facing fees
23 for their proper and rightful decision to elect mediation. After all of this, WELLS FARGO
24 contends that it has met its burden to comply with NRS 107.086 and asks for a certificate to
25 foreclose and asks for attorney's fees. [Opp. at p.4] This cannot be the law. And so it is not.

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¹⁸ If equitable sanctions were unavailable, the monetary sanctions would be increased.

1 This Court has found that the equitable imposition of a modification pursuant to NRS
2 107.086(5) would require extraordinary facts.¹⁹ This Court had not thought it would see such
3 facts. This Court was wrong.

4 **Conclusion**

5 **THEREFORE**, and good cause appearing, this Court **ORDERS** that:

6 1) WELLS FARGO is SANCTIONED in the amount of \$30,000.00 (Thirty
7 thousand dollars) for violations of NRS 107.086 and the Foreclosure Mediation Program Rules
8 payable to Petitioners within thirty (30) days of entry of this Order;

9 2) WELLS FARGO shall pay Petitioners' costs and attorneys' fees for the
10 mediation, the Petition for Judicial Review and the Evidentiary Hearing subject to the filing of a
11 verified request for attorneys' fees and memorandum of costs to be filed by Petitioners within
12 thirty (30) days of entry of this Order;

13 3) WELLS FARGO shall abide by its admission that late fees and penalties related
14 to the November 2009 modification were improper and immediately and forever cease and desist
15 any attempts to collect the same. However, penalties and late fees incurred prior to November
16 2009 are still valid;

17 4) Pursuant to NRS 107.086(5), on this Court's *de novo* finding that WELLS
18 FARGO failed to participate in good faith negotiations and lacked authority to negotiate and
19 modify the loan,²⁰ the subject note is **MODIFIED** as follows:

- 20 a) The current principal shall be re-amortized;
21 a) The payment is set at \$1145.00;
22 b) The interest rate is reduced to 2% (two percent) for the life of the note;
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26 ¹⁹ This Court has used the rules of Olympic fencing as a useful framework, dividing penalties into yellow cards, red
27 cards, and black cards. USA Fencing, RULES FOR COMPETITION (Omar Bhutta ed., 2010) Book 1, Part V, Ch. 3
28 Penalties t.114 – t.126 *See, Order in Navarro v. Wells Fargo Bank, NA.*, CV10-00941 at pp. 5,6; *Order in Jones v.*
National Default Servicing Corporation (Wells Fargo Bank), CV09-03551 at p.5.

²⁰ This Court has specifically found that modification is warranted for either 1) lack of good faith negotiations or 2)
lack of authority. Here, both have occurred, but this Court cannot modify the same note twice. If either finding
were reversed on appeal, the modification would stand on the basis of the other finding.

1 c) The term of the note is set at ten (10) years commencing May 1, 2011 and
2 ending on May 1, 2021.²¹

3 d) There shall be no pre-payment penalty.

4 5) The Foreclosure Mediation Program shall not issue a Certificate of Completion
5 based on the presently recorded Notice of Default absent further Order from this Court.

6 **IT IS SO ORDERED.**

7 **DATED** this 29 day of March, 2011.

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9 PATRICK FLANAGAN
10 District Judge

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28 ²¹ It is the intent of this Court to amortize out the present principal with no reduction to the principal to generate a payment of \$1145.00 at an interest rate of 2%. If the term specified by this Court is of insufficient length to result in the complete payment of the note within ten (10) years, then the length shall be extended.

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CERTIFICATE OF SERVICE

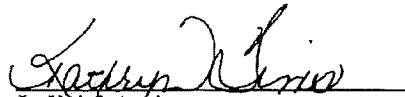
Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 29 day of March, 2011, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Carole M. Pope, Esq. for Duke and Tina Renslow;

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Gregory Wilde, Esq.
Matthew Schreiber, Esq.
Wilde & Associates
208 South Jones Blvd.
Las Vegas, Nevada 89107

Stephen Wassner, Esq.
206 S. Division Street, Suite 2
Carson City, Nevada 89703


Judicial Assistant

CODE: 1310
CYNTHIA L. ALEXANDER
Nevada Bar No. 6718
KELLY H. DOVE
Nevada Bar No. 10569
SNELL & WILMER LLP
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252
Email: calexander@swlaw.com
kdove@swlaw.com

*Attorneys for Respondent/Appellant
Wells Fargo Bank*

DUKE RENSLOW and TINA RENSLOW,

Petitioners,

vs.

WELLS FARGO BANK, and DOES 1
through 10,

Respondents.

CASE NO. CV10-03382
DEPT. NO. 7

CASE APPEAL STATEMENT

Respondent/Appellant, WELLS FARGO BANK, hereby submits the following Case
Appeal Statement:

1. NAME OF APPELLANT FILING THIS CASE APPEAL STATEMENT:

Wells Fargo Bank

2. JUDGE ISSUING THE JUDGMENT OR ORDER APPEALED FROM:

Judge Patrick Flanagan

3. ALL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT:

Petitioners: Duke and Tina Renslow; *Respondent:* Wells Fargo Bank

4. ALL PARTIES TO THE APPEAL: *Appellant:* Wells Fargo Bank;

Respondents: Duke and Tina Renslow

///

5. **NAME OF COUNSEL AND WHOM THEY REPRESENT:**

COUNSEL FOR RESPONDENT/APPELLANT:

Cynthia L. Alexander
Kelly H. Dove
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169

COUNSEL FOR PETITIONERS/RESPONDENTS:

Carole M. Pope
The Law Office of Carole M. Pope
301 Flint Street
Reno, Nevada 89501

6. **WHETHER APPELLANT WAS REPRESENTED BY APPOINTED OR
RETAINED COUNSEL IN THE DISTRICT COURT:** Appellant was represented by retained
counsel in the Second Judicial District Court action.

7. **RETAINED COUNSEL ON APPEAL:** Appellant is represented by retained
counsel, the law firm of Snell & Wilmer L.L.P., on appeal.

8. **WHETHER APPELLANT WAS GRANTED LEAVE TO PROCEED *IN
FORMA PAUPERIS*, AND THE DATE OF ENTRY OF THE DISTRICT COURT ORDER
GRANTING SUCH LEAVE:** Appellant has not moved for leave to file an appeal *in forma
pauperis*.

9. **INDICATE THE DATE THE PROCEEDINGS COMMENCED IN THE
DISTRICT COURT:** The Complaint in this matter was filed with the Second Judicial District
Court on November 9, 2010.

10. **BRIEF DESCRIPTION OF THE NATURE OF THE ACTION AND
RESULT:** The Renslows filed a Petition for Judicial Review with the district court, claiming
that Wells Fargo participated in the mediation in bad faith and requesting, *inter alia*, a loan
modification and sanctions. The district court found that Wells Fargo had not demonstrated
good-faith participation in the mediation program. The district court ordered sanctions in the
amount of \$30,000.00, and, *inter alia*, modified the Renslows' loan so as to reduce the principal
and set the interest rate to 2% for the life of the note.

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11. **PREVIOUS APPEAL OR WRIT PROCEEDING:** This case has not been the subject of an appeal to the Supreme Court or an original writ proceeding.

12. **CHILD CUSTODY:** This appeal does not involve child custody or visitation.

13. **POSSIBILITY OF SETTLEMENT:** Settlement is possible, but unlikely.

DATED this 26th day of April, 2011.

SNELL & WILMER, L.L.P.

/s/ Kelly H. Dove
CYNTHIA L. ALEXANDER
Nevada Bar No. 6718
KELLY H. DOVE
Nevada Bar No. 10569
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

*Attorneys for Appellant/Respondent
Wells Fargo Bank*

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **CASE APPEAL STATEMENT** filed in the Second Judicial District Court:

Does not contain the social security number of any person.

- OR -

Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

- OR -

B. For the administration of a public program or for an application for a federal or state grant.

DATED this 26th day of April, 2011.

SNELL & WILMER, L.L.P.

/s/ Kelly H. Dove

CYNTHIA L. ALEXANDER

Nevada Bar No. 6718

KELLY H. DOVE

Nevada Bar No. 10569

3883 Howard Hughes Parkway, Suite 1100

Las Vegas, NV 89169

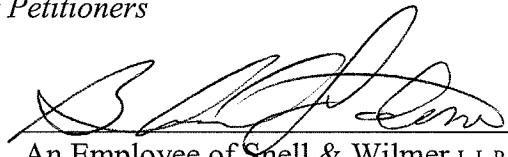
*Attorneys for Appellant/Respondent
Wells Fargo Bank*

CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer LLP., and I certify that I served a copy of the foregoing **CASE APPEAL STATEMENT** on the 26th day of April, 2011, via electronic service through the Second Judicial District Court's ECF System upon each party in the case who is registered as an electronic case filing user and via U.S. First Class Mail, as follows:

Carole M. Pope, Esq.
The Law Offices of Carole M. Pope
301 Flint Street
Reno, NV 89501

Attorneys for Petitioners



An Employee of Snell & Wilmer LLP.

**SECOND JUDICIAL DISTRICT COURT
STATE OF NEVADA
COUNTY OF WASHOE**

Case History - CV10-03382

Case Description: DUKE & TINA RENSLOW VS. WELLS FARGO BANK ETAL (D7)

Case Number: CV10-03382 Case Type: FORECLOSURE MEDIATION - Initially Filed On: 11/9/2010

Parties

<u>Party Type & Name</u>	<u>Party Status</u>
JUDG - PATRICK FLANAGAN - D7	Active
ATTY - Gregory L. Wilde, Esq. - 4417	Active
ATTY - Matthew K. Schriever, Esq. - 10745	Active
ATTY - Cynthia L. Alexander, Esq. - 6718	Active
ATTY - Kelly H. Dove, Esq. - 10569	Active
ATTY - Carole Marie Pope, Esq. - 3779	Active
NFMP - NV Foreclosure Mediation Prgm - NFMP	Active
PETR - TINA RENSLOW - @1193637	Active
PETR - DUKE RENSLOW - @1193636	Active
RESP - WELLS FARGO BANK, N.A. - @12601	Active

Disposed Hearings

- 1 Department: D7 -- Event: STATUS CONFERENCE -- Scheduled Date & Time: 12/28/2010 at 16:00:00

Event Disposition: D843 - 12/22/2010
- 2 Department: D7 -- Event: ORDER TO SHOW CAUSE -- Scheduled Date & Time: 1/28/2011 at 16:00:00

Event Disposition: D840 - 1/28/2011
- 3 Department: D7 -- Event: EVIDENTIARY HEARING -- Scheduled Date & Time: 3/17/2011 at 14:00:00
Extra Event Text: ORIGINALLY SET FOR 03.18.11 - RESCH'D TO 03.17.11 DUE TO CONFLICT W/JUDGE'S CALENDAR - ks
Event Disposition: D840 - 3/17/2011
- 4 Department: D7 -- Event: EVIDENTIARY HEARING -- Scheduled Date & Time: 3/18/2011 at 14:00:00

Event Disposition: D844 - 3/2/2011

Actions

- | | <u>Filing Date</u> | <u>-</u> | <u>Docket Code & Description</u> |
|---|--------------------|----------|--|
| 1 | 11/9/2010 | - | COV - **Civil Cover Sheet

<i>No additional text exists for this entry.</i> |
| 2 | 11/9/2010 | - | \$3550 - \$Pet for Judicial Review
Additional Text: DUKE RENSLOW |
| 3 | 11/9/2010 | - | \$PLTF - \$Addl Plaintiff/Complaint
Additional Text: TINA RENSLOW |
| 4 | 11/9/2010 | - | PAYRC - **Payment Receipted
Additional Text: A Payment of -\$290.00 was made on receipt DCDC293381. |

Report Does Not Contain Sealed Cases or Confidential Information

- 5 11/12/2010 - 3370 - Order ...
Additional Text: FOR JUDICIAL REVIEW - Transaction 1843664 - Approved By: NOREVIEW : 11-12-2010:13:06:23
- 6 11/12/2010 - NEF - Proof of Electronic Service
Additional Text: Transaction 1843667 - Approved By: NOREVIEW : 11-12-2010:13:07:35
- 7 11/16/2010 - 1040 - Affidavit of Mailing
No additional text exists for this entry.
- 8 12/10/2010 - 3880 - Response...
Additional Text: RESPONSE TO ORDER TO SHOW CAUSE WHY SANCTIONS SHOULD NOT BE IMPOSED - Transaction 1894471 - Approved By: MBEST : 12-10-2010:11:41:59
- 9 12/10/2010 - NEF - Proof of Electronic Service
Additional Text: Transaction 1894777 - Approved By: NOREVIEW : 12-10-2010:11:46:19
- 10 12/15/2010 - 3795 - Reply...
Additional Text: REPLY TO RESPONSE TO PETITION FOR JUDICIAL REVIEW
- 11 1/11/2011 - 4025 - Stip & Ord to Continue
Additional Text: HEARING - Transaction 1958493 - Approved By: NOREVIEW : 01-11-2011:10:48:09
- 12 1/11/2011 - NEF - Proof of Electronic Service
Additional Text: Transaction 1958507 - Approved By: NOREVIEW : 01-11-2011:10:49:57
- 13 1/28/2011 - 1695 - ** Exhibit(s) ...
Additional Text: PETITIONERS EXHIBIT 1: ADMITTED, ADMITTED ON 1-28-11 - ORDER TO SHOW CAUSE
- 14 1/31/2011 - 4105 - Supplemental ...
Additional Text: SUPPLEMENT TO DOCUMENTATION PRESENTED TO COURT IN SUPPORT OF PETITION FOR JUDICIAL REVIEW
- 15 2/2/2011 - 3370 - Order ...
Additional Text: FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - Transaction 2009342 - Approved By: NOREVIEW : 02-02-2011:15:57:45
- 16 2/2/2011 - NEF - Proof of Electronic Service
Additional Text: Transaction 2009349 - Approved By: NOREVIEW : 02-02-2011:15:59:23
- 17 2/8/2011 - MIN - ***Minutes
Additional Text: FMP ORDER TO SHOW CAUSE 1-28-11 - Transaction 2020609 - Approved By: NOREVIEW : 02-08-2011:11:38:05
- 18 2/8/2011 - NEF - Proof of Electronic Service
Additional Text: Transaction 2020614 - Approved By: NOREVIEW : 02-08-2011:11:39:31
- 19 2/9/2011 - 1120 - Amended ...
Additional Text: AMENDED CERTIFICATE OF SERVICE - Transaction 2024729 - Approved By: MCHOLICO : 02-09-2011:15:35:51
- 20 2/9/2011 - NEF - Proof of Electronic Service
Additional Text: Transaction 2024766 - Approved By: NOREVIEW : 02-09-2011:15:37:18
- 21 2/10/2011 - 2545 - Notice of Entry ...
Additional Text: NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
- 22 3/29/2011 - 3370 - Order ...

Additional Text: [WELLS FARGO SANCTIONED \$30,000.00 FOR VIOLATIONS; WELLS FARGO SHALL PAY PETITIONERS' ATTYS FEES AND COSTS SUBJECT TO VERIFIED REQUEST FILED WITHIN 30 DAYS BY PETITIONERS' ATTY; WELLS FARGO SHALL CEASE AND DESIST ANY ATTEMPTS TO COLLECT LATE FEES; MODIFICATION OF NOTE OUTLINED IN ORDER; AND NO CERT OF COMPLETION SHALL ISSUE. ks]

Transaction 2123198 - Approved By: NOREVIEW : 03-29-2011:12:13:36

23 3/29/2011 - NEF - Proof of Electronic Service

Additional Text: Transaction 2123205 - Approved By: NOREVIEW : 03-29-2011:12:15:09

24 3/30/2011 - 2540 - Notice of Entry of Ord

No additional text exists for this entry.

25 4/18/2011 - MIN - ***Minutes

Additional Text: FMP EVIDENTIARY HEARING 3-17-11 - Transaction 2164185 - Approved By: NOREVIEW : 04-18-2011:09:38:24

26 4/18/2011 - NEF - Proof of Electronic Service

Additional Text: Transaction 2164190 - Approved By: NOREVIEW : 04-18-2011:09:39:48

27 4/20/2011 - 4185 - Transcript ...

Additional Text: FORECLOSURE MEDIATION ORDER TO SHOW CAUSE - JANUARY 28, 2011 - Transaction 2171918 - Approved By: NOREVIEW : 04-20-2011:16:01:13

28 4/20/2011 - 4185 - Transcript ...

Additional Text: FORECLOSURE MEDIATION EVIDENTIARY HEARING - MARCH 17, 2011 - Transaction 2171923 - Approved By: NOREVIEW : 04-20-2011:16:01:56

29 4/20/2011 - NEF - Proof of Electronic Service

Additional Text: Transaction 2171939 - Approved By: NOREVIEW : 04-20-2011:16:03:44

30 4/20/2011 - NEF - Proof of Electronic Service

Additional Text: Transaction 2171941 - Approved By: NOREVIEW : 04-20-2011:16:04:16

31 4/26/2011 - 2520 - Notice of Appearance

Additional Text: CYNTHIA ALEXANDER & KELLY DOVE - WELLS FARGO BANK - Transaction 2184323 - Approved By: AZION : 04-26-2011:13:34:05

32 4/26/2011 - \$2515 - \$Notice/Appeal Supreme Court

Additional Text: APPELLANT, WELLS FARGO BANK Transaction 2184326 - Approved By: AZION : 04-26-2011:13:32:39

33 4/26/2011 - 1310 - Case Appeal Statement

Additional Text: Transaction 2184329 - Approved By: AZION : 04-26-2011:13:32:57

34 4/26/2011 - PAYRC - **Payment Receipted

Additional Text: A Payment of \$34.00 was made on receipt DCDC311866.

35 4/26/2011 - NEF - Proof of Electronic Service

Additional Text: Transaction 2184408 - Approved By: NOREVIEW : 04-26-2011:13:45:56

36 4/26/2011 - NEF - Proof of Electronic Service

Additional Text: Transaction 2184411 - Approved By: NOREVIEW : 04-26-2011:13:46:39

37 4/26/2011 - NEF - Proof of Electronic Service

Additional Text: Transaction 2184443 - Approved By: NOREVIEW : 04-26-2011:13:51:58

38 4/26/2011 - 2010 - Mtn for Attorney's Fee

Additional Text: PETITIONERS' MOTION FOR AN AWARD OF ATTORNEY'S FEES AND COSTS

39 4/26/2011 - 1950 - Memorandum of Costs

No additional text exists for this entry.

40 5/4/2011 - 1350 - Certificate of Clerk

Additional Text: CERTIFICATE OF CLERK AND TRANSMITTAL - NOTICE OF APPEAL - Transaction 2202123 - Approved By:
NOREVIEW : 05-04-2011:10:14:21

41 5/4/2011 - NEF - Proof of Electronic Service

Additional Text: Transaction 2202208 - Approved By: NOREVIEW : 05-04-2011:10:25:12

1 **Legal Standards**

2 The scope of Judicial Review in Foreclosure Mediation cases is to analyze the underlying
3 mediation, determine bad faith, enforce agreements between the parties, and determine sanctions
4 pursuant to NRS Chapter 107. FMPR 21(1) (Former Rule 6(1)). Mediations conducted pursuant
5 to NRS 107.086 are held to a standard of “good faith” negotiation. NRS 107.086. Petitions for
6 Judicial Review of Foreclosure Mediation are conducted using a “*de novo*” standard. FMPR
7 21(5) (Former Rule 6(5)).

8 **Findings of Fact**

9 At the conclusion of the evidentiary hearing, after careful consideration of the testimony
10 of witnesses, evidence admitted, and argument of counsel, this Court **finds** the following facts:

11 1) WELLS FARGO is the beneficiary of record of a Deed of Trust which is the
12 security instrument to the Note. [Ex.2]

13 2) WELLS FARGO was the originating lender of the home loan, and original holder
14 of the Note executed by the RENSLOWS.

15 3) Petitioners were never notified that the Deed of Trust had been assigned, or that
16 the Note had been transferred.

17 4) On some uncertain date, WELLS FARGO transferred the Note by uncertain
18 means to a certain FEDERAL HOME LOAN BANK (“FHLB”).

19 5) WELLS FARGO has not recorded an assignment of the Deed of Trust.

20 6) WELLS FARGO did not provide a proper endorsement of the Note at mediation
21 or throughout the judicial review proceedings.

22 7) WELLS FARGO did not inform Petitioners that their home loan had been sold,
23 neither did FHLB contact Petitioners with such information. *See*, 15 U.S.C. 1641(g)(1)

24 8) Since the date that WELLS FARGO transferred the Note to FHLB, WELLS
25 FARGO has acted as a master servicer of the loan, and has been Petitioner’s sole point of contact
26 throughout the entire life of the loan from origination through the present day.

27 9) In July 2009, Petitioners were not in default of their obligation under the Note.

28 ///

1 10) In July 2009, Petitioners contacted WELLS FARGO to request a modification of
2 their loan as Petitioners faced pay cuts and mounting medical bills for their daughter.

3 11) WELLS FARGO informed Petitioners that WELLS FARGO would only discuss
4 modification if Petitioners were sixty (60) days late, and that Petitioners were not eligible for
5 assistance unless they were sixty (60) days late.

6 12) Petitioners became sixty (60) days late in order to discuss a modification with
7 WELLS FARGO, and to be eligible for assistance.

8 13) WELLS FARGO provided Petitioners with a Home Affordable Modification
9 Program ("HAMP") application. WELLS FARGO participates in the HAMP program on loans
10 for which it is the lender.

11 14) Petitioners made their next payment so that they would not be ninety (90) days
12 late, and in default on their loan, so as to avoid foreclosure.

13 15) Petitioner completed the HAMP application and properly returned it to WELLS
14 FARGO.

15 16) On September 17, 2009 Petitioners received a letter from WELLS FARGO
16 stating, "You did it!" and accepting Petitioners into the HAMP program. [Ex.3]

17 17) The HAMP trial period began on November 1, 2009. [Ex.4]

18 18) Petitioners were informed that they did not need to make their October payment
19 by WELLS FARGO.

20 19) When Petitioners did not make their October payment, they had missed a total of
21 three payments. This put Petitioners ninety (90) days in arrears.

22 20) The HAMP Trial Period Packet states that WELLS FARGO is the "Lender".

23 21) The HAMP Trial Period Packet stated that the monthly payments during the trial
24 period would be \$1,127.06. [Ex.4 p.2]

25 22) The HAMP Trial Period Packet stated that "the last Trial Period Payment is due
26 2/1/2010" [Ex.4 p.2]

27 23) The HAMP Trial Period Packet stated that upon successful completion of the
28 Trial Period, Petitioners would (not might) receive a modification on substantially similar terms.

1 24) Nowhere in the HAMP Trial Period packet is any notice provided that WELLS
2 FARGO may not be the Lender.

3 25) Nowhere in the HAMP Trial Period packet is any notice that acceptance into
4 HAMP is contingent on a decision made by any entity other than WELLS FARGO.

5 26) Nowhere in the HAMP Trial Period packet is any notice that Petitioner's
6 eligibility may be in doubt.

7 27) After being accepted into the HAMP Trial Period, Petitioners timely made all
8 three of the stated Trial Period Payments required to secure a permanent modification.

9 28) WELLS FARGO accepted the HAMP Trial Period Payments, but did not send a
10 Modification Agreement.

11 29) At WELLS FARGO'S behest, Petitioners continued making payments to WELLS
12 FARGO in the amount of the Trial Period Payments.

13 30) Petitioners contacted WELLS FARGO to check on the status of the modification
14 and were informed that it was being processed.

15 31) On April 5, 2010 WELLS FARGO sent Petitioners a letter informing them that
16 Petitioner's "may not be eligible" for HAMP because, "[WELLS FARGO] service[s] your loan
17 on behalf of an investor or group of investors that has not given us the contractual authority to
18 modify your loan under [HAMP]." [Ex.5]

19 32) The April 5, 2010 letter disclosed that WELLS FARGO had been directed to
20 place Petitioner's "mortgage" in a review file until May 5, 2010, and instructed Petitioners to
21 continue making their Trial Period Payments.

22 33) On April 29, 2010, WELLS FARGO sent another letter informing Petitioners that
23 WELLS FARGO would not modify their loan because, "the investor on your mortgage has
24 declined the request." This letter stated that the Trial Payments would be retained by WELLS
25 FARGO and applied to the loan in accordance with the "current loan documents." WELLS
26 FARGO further instructed that the only options they could recommend would be a short sale or a
27 deed in lieu of foreclosure. [Ex.6]

28

1 34) WELLS FARGO reported Petitioners' loan as 180+ days delinquent on June
2 2010, despite the payments made pursuant to the agreement between WELLS FARGO and
3 Petitioners.

4 35) WELLS FARGO'S reporting of this delinquency has adversely impacted
5 Petitioners' credit on their credit report. [Ex. 6 of Petitioner's Supplement to Documentation.]

6 36) Petitioners have attempted to refinance the home twice, but have been rejected
7 because of an adverse credit report caused by FHLB and WELLS FARGO.

8 37) On August 6, 2010 WELLS FARGO'S trustee National Default Servicing
9 Corporation recorded a Notice of Default.

10 38) Petitioners elected to mediate under NRS 107.086.

11 39) At the mediation, WELLS FARGO submitted the original Deed of Trust
12 demonstrating that it was the beneficiary.

13 40) During the mediation, WELLS FARGO'S telephonic representative disclosed that
14 WELLS FARGO was not the owner of the loan, but rather merely the servicer. After almost two
15 (2) hours of search, the representative could not conclusively identify the owner of the loan.

16 41) The Mediator found that WELLS FARGO'S representative lacked the requisite
17 authority under NRS 107.086.

18 42) The Mediator found that WELLS FARGO acknowledged that the late fees
19 charged during Petitioners' Trial Period were wrongful, and that WELLS FARGO rescinded the
20 same after Petitioners showed they "had complied with every detail then offered by the bank."

21 43) At no time has this Court been informed how or when FHLB acquired an interest
22 in Petitioners' home loan.

23 44) At no time has this Court been informed that WELLS FARGO actually contacted
24 FHLB to request a HAMP modification, or substantively similar private modification.

25 **Discussion**

26 **Conduct Prior to Mediation Only Relevant Insofar as it Impacted Mediation**

27 At the Evidentiary Hearing, WELLS FARGO lodged numerous objections to the
28 admission of testimony and evidence of conduct prior to the mediation. This Court overruled

1 each. WELLS FARGO further argued that such evidence and testimony should only be admitted
2 for background and foundational purposes.

3 At status hearings prior to the evidentiary hearing, WELLS FARGO had argued that
4 issues of what occurred prior to the mediation are outside of the scope of this Court's authority
5 sitting in judicial review of a foreclosure mediation under FMPR Former Rule 6(1) and NRS
6 107.086(5). Essentially, even if it were true that WELLS FARGO'S conduct prior to the
7 mediation would give rise to a negligent misrepresentation claim, or a promissory estoppel
8 claim, or a breach of contract claim, or warrant an injunction against a foreclosure for some
9 violation of law, because by terms of the Trial Period Program a Modification offered by
10 WELLS FARGO without authority, a permanent Modification was mandated upon successful
11 completion of the Trial Period and the Trial Period was successfully completed by Petitioners,
12 those claims must be brought separately. This Court agrees with WELLS FARGO'S underlying
13 legal theory that review is limited to the foreclosure mediation and that other claims must be
14 brought through independent actions; but finds that the testimony and evidence introduced by
15 Petitioner of what occurred prior to the foreclosure mediation is relevant to what occurs at the
16 foreclosure mediation. While this Court cannot entertain independent legal *claims* and award
17 relief for those *claims*, this Court can, and does, find those same *facts* relevant.

18 A categorical prohibition on the admission of evidence and testimony of prior conduct
19 would deprive this Court of the ability to contextualize the mediation. When reviewing for good
20 or bad faith participation, context is everything. If this Court were deprived of context, this
21 Court would be unable to analyze whether a lender engaged in a pattern of conduct over multiple
22 mediations tended to infer that some technical violations were actually intentional flouting of the
23 law. Similarly this Court would be unable to look to a homeowner's previous conduct to
24 determine whether mediation and review procedures were merely being used as a stall tactic, or
25 to leverage a modification where none was necessary. This Court finds the entire relationship
26 between the parties may be considered, with relevancy being the crux for whether such evidence
27 and testimony is admissible.

28 ///

1 For instance, if the prior conduct at issue was a November 2009 HAMP modification that
2 was reneged upon, but at the mediation the sole point of error was inadequate production of
3 documents, then that November 2009 HAMP modification ostensibly would have had no impact
4 on the mediation, and thus would not be particularly relevant to this Court's determination.

5 But, in the present case, what occurred between the parties prior to mediation had bearing
6 on the mediation and is relevant. The November 2009 HAMP modification is directly relevant
7 to the mediation in several ways. 1) The issue of uncertain ownership calls into question
8 WELLS FARGO'S authority to mediate; 2) Prior performance or breach by a party in the
9 foreclosure mediation program sheds light on their good faith participation; 3) The prior
10 agreement shows the contours of a fair resolution.

11 Trial Period Plan/Modification Agreement Terms Read In Context With Agreement

12 The HAMP packet contained language in a separate sheet titled "Important Program
13 Info" that, "The Trial Period Program is the first step. Once we are able to confirm your income
14 and eligibility for the program, we will finalize your modified loan terms. . ." [Ex. 4] This Court
15 finds that this language is not contained within the four corners of the agreement. This
16 informational packet must be read in context with the provisions of the actual agreement which
17 unequivocally stated that if Petitioner's complied with the Trial Program that WELLS FARGO
18 would send a Modification Agreement for Petitioner's signature which would "reflect the new
19 payment amount and waive any unpaid late charges." [Ex. 4]

20 The "eligibility" language in the "Important Program Information" could not be
21 reasonably understood by an applicant to mean that there may be eligibility problems based on
22 actions taken by WELLS FARGO. Rather, the "eligibility" language gives notice to applicants
23 that if their income cannot be verified or if they do not abide by the Trial Period Program terms,
24 that they will not receive a Modification Agreement.

25 Here, Petitioners successfully made all three trial payments, and by terms of the
26 agreement executed by WELLS FARGO, Petitioners were to receive a Modification Agreement
27 to permanently modify the loan. This did not occur, and upon receipt of a Notice of Default,
28 Petitioners elected mediation.

1 Submitted "True and Certified" Documents Contradict WELLS FARGO'S Status

2 In its written *Response*, WELLS FARGO does not disclose in what capacity it attended
3 the mediation, nor its relationship to the loan. At the Evidentiary Hearing, WELLS FARGO
4 represented to this Court that it was the originator of the home loan note, and was the original
5 beneficiary of the deed of trust. WELLS FARGO also represented to this Court that it no longer
6 "owns" the note.

7 WELLS FARGO submitted "True and Certified" Documents to the Presiding Mediator
8 that it was the beneficiary of the deed of trust. WELLS FARGO submitted a certified copy of
9 the original Note showing WELLS FARGO to be the holder of the Note. WELLS FARGO did
10 not submit any assignments of the deed of trust, or any endorsements of the Note.

11 The Rules in effect at the time of the mediation required that in order for certified copies
12 to be acceptable, they must state under oath that "the person making the certification is in actual
13 possession of the original mortgage note, deed of trust, and each assignment of the mortgage
14 note and deed of trust." Former Rule 5(10)(b)

15 The documents provided to the Presiding Mediator stated that WELLS FARGO was the
16 beneficiary of the deed of trust and the holder of the note. However, at the mediation, WELLS
17 FARGO'S telephonic representative, Greg Eastman, indicated that WELLS FARGO was merely
18 the servicer, and that he could not tell who owned the Note.

19 All parties now agree that Federal Home Loan Bank, FHLB, is the owner of Petitioner's
20 loan.¹ This Court has not been informed which FHLB is the owner of Petitioner's loan. Thus,
21 even at the end of the Evidentiary Hearing, this Court does not actually know who owns
22 Petitioner's loan. It is apparent that Petitioners also still do not know who owns their loan.
23 Based on the record it is not clear that WELLS FARGO actually knows who owns the loan.

24
25 ¹ This Court notes that there are twelve Federal Home Loan Banks in the United States of America. This Court has
26 not been informed which of these entities owns Petitioner's Loan. Based on geographic region it appears likely that
27 Federal Home Loan Bank San Francisco is the owner. However, WELLS FARGO has not recorded any
28 assignments to FHLB -San Francisco; has assigned one other Deed of Trust to Federal Home Loan Bank - Chicago
[See, Corporation Assignment of Deed of Trust DOC # 3603514 of the Washoe County Records]; and has assigned
well over one hundred Deeds of Trust to FHLMC (a HAMP participant). Petitioner DUKE RENSLOW'S credit
report admitted into evidence shows that DUKE RENSLOW'S credit has been reviewed five times in 2010 by
"FEDERAL HOME LOAN BANK OF" [Ex. 10]

1 WELLS FARGO admits it no longer owns the loan. This Court has not received any
2 evidence of the manner in which the loan was transferred. WELLS FARGO has not
3 demonstrated that it properly endorsed the note to FHLB, nor assigned the Deed of Trust.

4 In the documents provided at mediation, WELLS FARGO stated under oath that “the
5 person making the certification is in actual possession of the original mortgage note, deed of
6 trust, and each assignment of the mortgage note and deed of trust.” Former Rule 5(10)(b)
7 However, the evidence has not borne this statement out. This Court finds that WELLS FARGO
8 did not meet the documentary requirements of NRS 107.086(4) and Former Rule 5(10)(b).
9 Under NRS 107.086(5), this Court finds the appropriate sanction for this failure to be seven
10 thousand five hundred dollars (\$7,500.00)

11 WELLS FARGO Merely Servicer

12 This case presents a novel legal issue in that WELLS FARGO is apparently still the
13 beneficiary of the Deed of Trust of record. However, WELLS FARGO’S inability to complete
14 the November 2009 HAMP Modification, and inability to offer a HAMP Modification or
15 substantively similar private modification at mediation occurred because WELLS FARGO
16 lacked the authority to do so.² WELLS FARGO’S authority to modify the loan is acknowledged
17 to be entirely derivative of FHLB, the “owner” of the loan.

18 The language of NRS 107.086 specifies that the beneficiary of the Deed of Trust, or their
19 representative, shall attend the mediation. Implicit in the plain language of NRS 107.086 is an
20 assumption that beneficiaries of the Deed of Trust have decision making authority. Throughout
21 the Foreclosure Mediation Rules in effect at the time of the subject mediation there is again an
22 implicit assumption that the beneficiary of the Deed of Trust is the proper party to mediate
23 because that party has authority. The term “beneficiary of deed of trust” and “lender” are used in
24 an apparently interchangeable manner in the rules. *See*, FMPR Former Rule 1(2) “lender”,
25 Former Rule 5(8)(a) “beneficiary (lender)”, Former Rule 7(1)) “beneficiary”.

26
27
28 ² This Court is mindful that one of the reasons for the establishment of the Foreclosure Mediation Program was that
servicers, when contacted directly by borrowers, often claimed to lack authority to make modifications. Minutes of
Joint Meeting of Senate and Assembly Committees on Commerce and Labor, at 13 (Feb. 11, 2009)

1 Former Rule 5(8)(a) and 5(10) when read together imply that Supreme Court conceived
2 of the beneficiary of the deed of trust as being the same party as the holder of the note. Former
3 Rule 4(8)(a) requires that:

4 All beneficiaries of a deed of trust . . . shall participate in the Foreclosure
5 Mediation Program, be represented at all times during a mediation by a person
6 or persons who have the authority to *negotiate and modify the loan* secured by
7 the deed of trust sought to be foreclosed In addition to the documents
8 required by Rule 8 herein, the beneficiary must bring to the mediation the
9 original or a certified copy of the deed of trust, *the mortgage note*, and each
10 assignment of the deed of trust and *the mortgage note*.³ (*emphasis added*)

11 Former Rule 5(8)(a) does not specify why the additional documents are required, but a
12 reasonable interpretation of this rule infers that those documents tend to demonstrate authority
13 and that the proper party to negotiate is present. Former Rule 5(10) mandates that the production
14 of the mortgage note is only valid when the beneficiary of the deed of trust swears under oath
15 that the note is in the possession of the person making the certification.

16 Although both NRS 107.086 and the Foreclosure Mediation Program Rules repeatedly
17 specify the beneficiary of the deed of trust, and do not use the terms “holder” or “creditor,” the
18 focus throughout is on the ability to modify the loan.

19 This is supported by the legislative history of AB 149:

20 “[Borrowers] cannot get a lender on the phone. They cannot get to someone
21 willing to work with them. The reason might be that the loans have been sold so
22 many times that it is not clear who the *lender* is.” (*emphasis added*)

23 Further:

24 “The other key component of this bill is that *lenders* or their representatives must
25 appear or otherwise be available throughout the mediation. They also have to
26 present a certified copy of the deed of trust and the promissory note, so that we
27 know the person who is foreclosing *actually owns the note*.” (*emphasis added*)

28 Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor
February 11, 2009 p.5-7. (Comments of Assembly Speaker Barbara Buckley)

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³ The newly amended Foreclosure Mediation Program Rules effective March 1, 2011 renumbered Rule 5(8) to Rule 10(1), and specified that “each endorsement of the mortgage note” must be provided.

1 The legislative history further indicates that the Legislature intended the party with actual
2 beneficial interest should be present at the mediation.

3 “The third amendment clarifies the term "trustee" to "beneficiary of the deed of
4 trust." That language is more precise since we do not want the trustee to be there;
5 we want the person with the beneficial interest to be present.”

6 Assembly Committee on Commerce and Labor, March 11, 2009, p.5. (Comments of Assembly
7 Speaker Barbara Buckley)

8 The Legislature’s choice of the term “beneficiary of deed of trust” was not designed to
9 elevate form over substance. Rather, the Legislature believed that “beneficiary of the deed of
10 trust” was the term that would cause the party with actual beneficial interest to appear. In
11 circumstances such as this, where the beneficiary of record of the deed of trust appears to have
12 no actual beneficial interest, it is clear that the Legislature did not intend for the beneficiary to
13 appear, but rather for the entity possessing actual beneficial interest.

14 The Supreme Court of Nevada has not yet had occasion to declare the law of Nevada as it
15 relates to determining what entity has beneficial interest when faced with competing or imperfect
16 transfers of interest in a secured home loan. The traditional approach to transferring interest in
17 mortgages from one creditor to another has been by endorsing the note and assigning the
18 mortgage or deed of trust, usually contemporaneously. In recent years, the financial industry has
19 adopted novel methods of non-contemporaneous or incomplete or unrecorded transfers, that are
20 not particularly relevant to the case at bar other than for a determination of who has actual
21 beneficial interest sufficient to have standing to participate in the mediation program (either
22 directly or through a duly appointed representative), and whether WELLS FARGO as the
23 beneficiary of the deed of trust was empowered to attend the mediation on its own, or whether its
24 authority was solely derivative as a representative of FHLB. The two prevailing theories
25 throughout the nation are the Longan Rule and the Restatement (Third) approach.

26 In Carpenter v. Longan, 83 U.S. 271 (1872), the United States Supreme Court held that
27 mortgages and notes are inseparable. Transferring the note carries with it the mortgage by
28 operation of law. An attempt to transfer the mortgage without expressly transferring the note is a
nullity, and the purported assignee has received nothing but worthless paper. Although Nevada

1 uses Deeds of Trusts instead of “mortgages”, the rule is still applicable.⁴ Under this approach,
2 when WELLS FARGO transferred the note to FHLB, by operation of law, WELLS FARGO
3 ceased being the mortgagee/beneficiary of the deed of trust. Instead, FHLB is the actual
4 beneficiary, but has an unrecorded beneficial interest and essentially holds a wild deed.⁵ Longan
5 has never been repudiated or overturned, although it is of venerable vintage.

6 The competing theory is set forth in the Restatement (Third) of Property – Mortgages §
7 5.4, which specifically repudiates Carpenter v. Longan as archaic and founded on a now
8 discarded theory of mortgages. Under the Restatement, the transfer of either the mortgage or the
9 note carries the other with it, unless there is intent to sever the two. In analyzing the state of
10 Nevada Common Law as it relates to real property, this Court finds that the Nevada Supreme
11 Court has adopted the Restatement (Third) of Property – Mortgages on a consistent basis. This
12 Court finds then that the Restatement (Third) approach is the proper approach for Nevada
13 Courts. On the facts here, there is no indication that WELLS FARGO intended to sever the
14 Deed of Trust from the Note. Therefore, by transferring the Note to FHLB, WELLS FARGO
15 also transferred all beneficial interest in the Deed of Trust.

16 Under either approach, on the facts here, WELLS FARGO, although the beneficiary of
17 record, had no beneficial interest in the Deed of Trust, and no right to proceeds from the Note.
18 Therefore, at most, WELLS FARGO was a servicer for FHLB, and notwithstanding the language
19 of NRS 107.086 and the Foreclosure Mediation Program Rules, had no independent standing to
20 negotiate or appear at the mediation in any capacity other than as a “representative” of FHLB.

21 Servicer Representatives Amenable to Sanctions

22 Servicers do not have *independent* standing to participate in the Foreclosure Mediation
23 Program. NRS 107.086 evidences a clear Legislative intent to have the party holding beneficial
24 interest in the property at the mediation table. Rather, this Court has found that servicers may
25

26 ⁴ See, Sims v. Grubb, 75 Nev. 173, 178 (1959); 59 C.J.S. Mortgages § 6; Restatement (Third) Trusts § 5 comment k

27 ⁵ The Supreme Court of Massachusetts, analyzing non-contemporaneous transfers of the note and mortgage, has
28 held that “[T]he holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an
equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and
obtaining an equitable order of assignment” U.S. Bank National Association v. Ibanez, *Slip Copy* SJC 10694 at 11
(Mass. 2011) (*rejecting* transfer of mortgage by operation of law when note is transferred without mortgage.)

1 qualify as a “representative” for the beneficiary of the deed of trust within the meaning of NRS
2 107.086(4)’s requirement that, “The beneficiary of the deed of trust or a representative shall
3 attend the mediation.” *See, Order in Navarro v. Wells Fargo Bank, NA.*, CV10-00941 at pp. 2,3.

4 NRS 107.086(3) requires the trustee to notify the present beneficiary of the deed of trust
5 and “every other person with an interest as defined in NRS 107.090. . .”⁶ No evidence or
6 testimony from WELLS FARGO tended to show that FHLB was in fact properly noticed. Given
7 the oddities of the manner in which WELLS FARGO remains the beneficiary or record, this
8 Court is troubled that whichever FHLB actually owns the loan may not have received notice that
9 a mediation was scheduled to occur.

10 However, in other contexts, this Court has found that when a master servicer acting as a
11 representative exceeds its authority in reaching an agreement at mediation, that the homeowner
12 shall retain the benefit of the bargain, and that the lender shall have recourse only against the
13 servicer. *See, Order in Navarro v. Wells Fargo Bank, NA.*, CV10-00941 at pp. 2,3. This seems a
14 fitting rule for situations in which a master servicer may have essentially usurped the lender’s
15 place at the mediation table. If sanctions issue based on the conduct of the servicer that
16 materially impact a right of the lender, then the lender shall have cause solely against the
17 servicer. An innocent homeowner shall not suffer because a servicer’s conduct has resulted in
18 harm to the lender.

19 Here, Petitioners had an awareness prior to mediation that WELLS FARGO was not the
20 owner of their loan, based on the April 29, 2010 termination letter. However, Petitioners were
21 entitled to negotiate in good faith with the servicer of their loan acting as a representative for
22 FHLB. Petitioners participated but had the purposes of the mediations frustrated by WELLS
23 FARGO’S actions.

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27
28 ⁶ NRS 107.090(1) defines a “person with an interest” as “any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated.”

1 This Court finds that the language of NRS 107.086(5) and Former Rule 6(1) is broad
2 enough to sanction the servicer representative when the servicer appears at the mediation, and
3 the deficiencies or violations are attributable to the representative and not the underlying lender.

4 Here, the violations are attributable to WELLS FARGO. WELLS FARGO submitted
5 “true and certified” documents that conflicted with their representations as to ownership of the
6 loan. WELLS FARGO could not identify the owner of the loan. WELLS FARGO’s actions
7 necessitated a mediation. It was WELLS FARGO that lacked authority. Thus, it is WELLS
8 FARGO who should be bear the burden of any sanctions.

9 Bank Representative’s Lack of Experience No Excuse

10 WELLS FARGO’S telephonic representative, Greg Eastman, did not know who owned
11 the note. [Ex.1] At the evidentiary hearing, representative Eastman did not appear. Rather
12 another individual, Phillip CARGIOLI from WELLS FARGO who serves as a telephonic
13 representative in other mediations, appeared and testified that at the time of the mediation Mr.
14 Eastman had been a loan adjustment officer for a mere four months.

15 Lack of experience is no excuse. Servicers have no independent authority in the
16 Foreclosure Mediation Program. They are mere representatives. A new employee of a servicer
17 acting as representative is held to the same standards under NRS 107.086 and the Foreclosure
18 Mediation Rules as the most experienced hand. The failure of a representative to know who they
19 represent is unacceptable. The testimony and evidence introduced demonstrates that well over
20 an hour and a half of the mediation was spent trying to determine the identity of the lender.
21 Petitioners had to leave the room for some time while this occurred. This clearly had a negative
22 impact on the mediation.

23 Representatives must have full authority, or have access at all times to full authority.
24 NRS 107.086(4); Former Rule 5(8)(a) It is clear that Mr. Eastman did not know what his
25 authority was or even from whom it was derived “at all times”. This Court finds that one cannot
26 have access to an unknown entity. This is a violation of Former Rule 5(8)(a) which had a
27 material and negative impact on the mediation. It is also a violation of NRS 107.086(4) which
28 the Legislature has expressly authorized this Court to sanction for even mere technical violations.

1 In this instance, these violations had a detrimental impact and led to a finding by the
2 mediator that the representative of the lender did not have the requisite authority. Under this
3 Court's *de novo* review, this Court finds that the lender did not appear directly at the mediation.
4 The lender only appeared through a representative, as authorized by NRS 107.086(4). However,
5 that representative did not have sufficient authority to negotiate and modify the loan, and did not
6 have access to such a person with authority "at all times." This Court finds the appropriate
7 sanction for lack of authority in this case to be a monetary sanction in the amount of ten thousand
8 dollars (\$10,000.00) and an equitable sanction discussed *infra*.⁷

9 Petitioner Clearly Qualified for a Modification

10 Respondent contended that, "[P]etitioner did not qualify for a modification and therefore
11 no agreement was reached." [Resp. at p.2] However, during the evidentiary hearing,
12 Respondent's counsel asked a question that intimated that Petitioner had been offered a
13 modification that would reduce the payment by \$268.00 per month.⁸ Further, WELLS
14 FARGO'S witness, CARGIOLI testified that an offer reducing the payment by \$268.00 per
15 month had been made by Mr. Eastman. However, CARGIOLI had no personal knowledge that
16 this offer was made. CARGIOLI was not involved in the RENSLOW'S mediation. CARGIOLI
17 testified that he had "briefly reviewed . . . Mr. Eastman's notes from the mediation." [Trans. at
18 58] These notes were not introduced into evidence. The actual terms of this purported
19 modification offer were not addressed. This Court does not have any information whether the
20 \$268.00 was a permanent modification, whether it created a balloon payment, whether it was a
21 temporary modification, whether there were any fees and penalties associated with this purported
22 offer. No testimony or evidence was given as to the source of authority for making this
23 purported offer. The record is bereft of competent evidence for this Court to make a finding that
24 a particular offer was in fact made. The record does not contain competent evidence of the terms

25
26 ⁷ Were equitable sanctions unavailable, this Court would increase the monetary sanctions.

27 ⁸ Questions of counsel are not testimony. Here, the questions of Respondent's counsel elicited an answer that
28 Petitioner's representative Alsasua did not recall the terms of an offered modification. [Trans. at p.11] Petitioner
also did not recall the terms of any specific modification being offered [Trans. at p.28] No one actually present at
the mediation testified as to the terms of this purported offer, and the offer was not reflected on the Mediator's
Statement.

1 of any such purported modification such that this Court could analyze the offer for its impact on
2 good faith participation.

3 However, although this Court does not have sufficient evidence before it to find that a
4 particular offer was made, or that that offer was a good faith offer, the testimony of WELLS
5 FARGO is sufficient for the purpose of analyzing WELLS FARGO'S contention that,
6 "[P]etitioner did not *qualify* for a modification and therefore no agreement was reached. Just
7 because the [P]etitioner did not *qualify* for a modification does not mean that the [R]espondent
8 did not have the required authority." [Resp. at p.2] The statement in the Response is directly
9 contradicted by the testimony of WELLS FARGO'S representative CARGIOLI at the
10 evidentiary hearing; they cannot both be true. No argument was made in support of the
11 statement in the Response under NRCP Rule 11(b)(2) and (3).⁹

12 Respondent's representative witness CARGIOLI further admitted that the refusal to offer
13 a specific modification, the HAMP modification previously agreed to, was based not on
14 Petitioners' qualifications or lack thereof but rather on the fact that the underlying lender did not
15 participate in HAMP and thus had not authorized the servicer to enter into a HAMP
16 modification.¹⁰

17 Therefore, this Court finds that Petitioners did qualify for a modification; that Petitioners
18 qualified for the HAMP modification offered in November 2009; and that the inability to enter
19 into a modification at mediation stemmed from WELLS FARGO'S lack of authority to offer a
20 HAMP modification.

21 Respondent's Conduct Impaired Petitioner's Ability to Obtain a Refinance

22 Respondent contends that loan modifications "are primarily for individuals who are
23 unable to refinance their house. . ." and that "Petitioner would be in a better position to have
24

25 _____
⁹ This Court does not find a need to *sua sponte* enter an order to show cause under Rule 11(c)(1)(b).

26 ¹⁰ This Court professes a certain shock at the fact that a FHLB, as a federal GSE, does not participate in HAMP,
27 which is required for loans owned by FNMA and FHLMC, two other federal GSE's. The fact that the Federal
28 Home Loan Mortgage Corporation authorizes HAMP modifications while the Federal Home Loan Bank does not,
that WELLS FARGO has sold mortgages in the past to both of these entities, and that the election to sell to one over
the other is completely outside of the borrower's control has a certain Kafkaesque quality. Had WELLS FARGO
simply chosen FHLMC instead of FHLB, this entire matter would have been averted.

1 refinanced their loan rather than allow it to go into default. In fact, if the [P]etitioners have as
2 much equity as they claim, then they are still in a position to refinance the loan. . .” [Resp. at p.2]

3 Here, Petitioners are in fact presently unable to secure a refinance of their home, due to
4 the actions of WELLS FARGO. They have made several attempts to do so, both through
5 WELLS FARGO itself, and through U.S. Bank. However, because WELLS FARGO placed
6 negative reports on Petitioners’ credit reports, Petitioners are unable to obtain a refinance.
7 [Ex.10]

8 Respondent’s statement that Petitioners would have been better off refinancing rather
9 than defaulting is tempered by the fact that Petitioners contacted WELLS FARGO prior to
10 defaulting to work out arrangements regarding their loan and were instructed by WELLS
11 FARGO that they could not be helped until they were sixty (60) days late.

12 This Court does not appreciate WELLS FARGO’S Monday morning quarterbacking
13 regarding what Petitioner ought to have done when WELLS FARGO’S actions both precipitated
14 Petitioners’ default and impaired Petitioner’s ability to obtain a refinance. These comments in
15 WELLS FARGO’S written *Response*, when compared to the evidence in record, demonstrate
16 either a complete lack of knowledge or outright disregard of the facts of this matter. These
17 comments are nothing short of shameful.

18 Respondent’s Admission That Late Fees Were Properly Rescinded Stands

19 At the mediation, WELLS FARGO explained that the November 2009 modification had
20 been withdrawn because WELLS FARGO lacked the authority to offer it. Petitioners
21 demonstrated to the Mediator and to WELLS FARGO’S representative that they had been
22 charged penalties and late fees despite the fact that they had complied with all terms of the
23 November 2009 modification and with “every detail then offered by the bank.” Upon this
24 showing, WELLS FARGO rescinded the fees and penalties. [Ex.1]

25 The plain language of the Mediator’s Statement shows that WELLS FARGO’S rescission
26 was not contingent, conditional, or part of an agreement. The rescission was an admission that
27 the fees and penalties were improper. WELLS FARGO is estopped from reneging on that
28 admission made by their representative. All fees and penalties incurred during, or as a result of,

1 the November 2009 modification have been RESCINDED and WAIVED. WELLS FARGO
2 may not in any way attempt to collect on the same.

3 Mediation Fee Not Chargeable

4 When the Legislature enacted AB 149 implementing NRS 107.086, the Legislature made
5 expressly clear that the mediation fee was to be evenly distributed between homeowners and
6 lenders. NRS 107.086(8)(e); FMPR 5(1) (Former Rule 16(1))

7 WELLS FARGO has ignored this completely. WELLS FARGO has sought to recover
8 the mediation fee, in direct contravention of the Legislature's express desire to evenly apportion
9 the costs between homeowners and lenders.¹¹ [Petition Exh. 3] Even more shocking to this
10 Court is that WELLS FARGO attempts to charge \$500.00 as a "Mediation Fee", well in excess
11 of the \$200.00 that WELLS FARGO paid. Homeowners are legally entitled to seek a mediation.
12 Each party bears their own cost of mediation. To shift the burden from an even division to
13 resting solely on the homeowner is contrary to the spirit and letter of the law. To charge more
14 than the fee paid, in essence to attempt to profit from the homeowner's election, is outrageous.

15 While this Court would certainly impose sanctions for the bare attempt to recover the
16 mediation fee alone, when confronted with uncontroverted evidence that Lender is seeking to
17 recover 250% of its statutory burden, this Court finds that harsh sanctions must be issued to deter
18 such unscrupulous conduct in the future. This Court finds that the attempt to recover 250% of
19 the mediation fee is appropriately assessed a 250% sanction. Accordingly, for this egregious and
20 intentional violation, WELLS FARGO is SANCTIONED \$1,250.00 (one thousand two hundred
21 and fifty dollars).

22 ///

23 ///

24

25 ¹¹ The Mediation Fee is included on a reinstatement letter from National Default Servicing Corporation, which is
26 WELLS FARGO'S foreclosure trustee. Foreclosure trustees are agents of the trustor and beneficiary of the deed of
27 trust. See, Hendrickson v. Popular Mortg. Servicing, Inc., 2009 WL 1455491 (N.D. Cal 2009) at *7 (citations
28 omitted) (cited with approval by Nieto v. Litton Loan Servicing, LP, 2011 WL 797496 (D. Nev 2011) at *5); see
also 54A Am. Jur. 2d Mortgages § 123 – Relationship of trustees to other parties in interest; Restatement (Third)
Trusts § 5 comment k; Bogert's Trusts and Trustees §29 Mortgages and Trust Deeds (2010). Therefore, the actions
of the trustee are imputed to WELLS FARGO. If the trustee's assessment of the fee exceeded their agreement with
WELLS FARGO, then WELLS FARGO may seek to recover sanctions from the trustee.

1
2 Testimony and Evidence Lead to Competent Finding of Lack of Good Faith

3 This Court finds that WELLS FARGO'S conduct in this mediation falls well below the
4 threshold of "good faith" negotiations. Thus, WELLS FARGO has failed to meet its burden to
5 show why sanctions should not lie pursuant to NRS 107.086(4) which authorizes this Court to
6 issue sanctions, without limitation, including modifications

7 Here, Petitioners were in a mediation with a representative servicer for a lender.
8 Petitioners were only there because the servicer had executed an agreement to modify the loan,
9 and after Petitioners had satisfied the terms, the servicer terminated the agreement.

10 The question of why a mediation occurs shapes the contours of what a good faith result
11 will look like. Where a homeowner is in a mediation because they are attempting to receive a
12 principal reduction despite the fact that the homeowner is more than capable of affording all
13 obligations at their present rate, a good faith result may very well be that a lender offers
14 reinstatement only. However, here, Petitioners were in a mediation because they were
15 attempting to receive the modification previously promised and denied them, or one
16 substantively similar.

17 It is in analyzing the good faith participation that this Court finds relevance in prior
18 conduct. Good faith is not merely *pro forma* lip service to the rules. This Court has found that
19 although good faith and bad faith escape precise definition, they are capable of description such
20 that this Court may adequately determine their presence or absence. This Court adopts as a
21 useful reference the descriptions of both concepts as follows:

22
23 **Good Faith:** Good faith is an intangible and abstract quality with no
24 technical meaning or statutory definition, and it encompasses, among other
25 things, an honest belief, the absence of malice and the absence of design to
26 defraud or to seek an unconscionable advantage, and an individual's personal
27 good faith is concept of his own mind and inner spirit and, therefore, may not
28 conclusively be determined by his protestations alone. Doyle v. Gordon 158
N.Y.S.2d 248, 259 . . . In common usage this term is ordinarily used to
describe that state of mind denoting honest of purpose, freedom of intention to
defraud, and generally speaking, means being faithful to one's duty or
obligation Efron v. Kalmanovitz, 57 Cal.Rptr. 248

1 **Bad Faith:** The opposite of “good faith”, generally implying or involving
2 actual or constructive fraud, or a design to mislead or deceive another, or a
3 neglect or refusal to fulfill some duty or some contractual obligation, not
4 prompted by an honest mistake as to one’s rights or duties, but by some
5 interested or sinister motive. Term “Bad faith” is not simply bad judgment or
6 negligence, but rather it implies the conscious doing of a wrong because of
dishonest purpose or moral obliquity; it is different from the negative idea of
negligence in that it contemplates a state of mind affirmatively operating with
furtive design or ill will. Stath v. Williams 367 N.E.2d 1120, 1124.

7 BLACK’S LAW DICTIONARY (5th ed. 1979)¹²

8 Although good faith is presumed, each party bears the onus of demonstrating that they
9 are there to negotiate in good faith,¹³ because good faith is typically adduced through the conduct
10 of a party. This Court finds that conduct prior to the mediation has bearing on adducing good
11 faith at the mediation.

12 Having made certain findings of fact *ante*, this Court concludes that WELLS FARGO has
13 not demonstrated good faith participation. This Court concludes that the parties were unable to
14 have meaningful good faith negotiations due to WELLS FARGO’S conduct at the mediation,
15 including its failure to know who controlled the loan.

16 Equity regards as done which ought to be done. 30A C.J.S. Equity § 131. The basis of
17 the maxim is the existence of a duty and it can only be invoked against a party who has failed or
18 refused to perform a duty imposed on the party. The maxim only operates in favor of party
19 holding an equitable right to performance, against a party with a duty to perform. *Id.* (citations
20 omitted) Here, based on all of the evidence shown to this Court, what ought to be done is a
21 modification of Petitioners’ loan on the terms previously agreed to between Petitioners and
22 WELLS FARGO.

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25 ¹² This Court specifically adopts the definition from the Fifth Edition. The most recent Black’s Law definition is of
no assistance to this Court.

26 ¹³ This Court has adopted these working definitions because there are no Supreme Court rulings yet on point. This
27 Court notes that the Supreme Court recently heard oral arguments in Leyva v. National Default Servicing Corp.,
Supreme Court Docket No. 55216 in which the definition of good and bad faith were issues. This Court has found
28 that bad faith is not the mere absence of good faith, but the active opposite and that it requires an independent
showing. *See, Order in Navarro v. Wells Fargo Bank, NA.*, CV10-00941 at pp. 9,10. This Court anticipates
guidance from the Supreme Court in the near future.

1 By its conduct prior to mediation, WELLS FARGO took upon itself a duty to offer a
2 HAMP modification to Petitioners. It refused and failed to do so at mediation. A modification
3 on the parameters offered to Petitioners in November 2009 ought to be done.

4 Modification is a Permissible Sanction

5 WELLS FARGO did not present argument that modification of the loan is an
6 impermissible sanction, nor cite authority for that proposition. Thus, WELLS FARGO has
7 WAIVED such arguments.¹⁴ However, because this is the first instance in which this Court has
8 imposed a modification on the loan pursuant to NRS 107.086, and it appears that this may be the
9 first such modification in the State of Nevada, it is prudent to discuss this Court's understanding
10 of the legal grounds for modification of a home loan as a sanction.

11 This Court finds that NRS 107.086 is not an impermissible impairment of contracts by
12 the Legislature. U.S.C.A. Const. art.1 §10 Rather, NRS 107.086 merely serves as an affirmation
13 that the Legislature intended for the District Courts of the State of Nevada to have full access to
14 the vast inherent powers the District Courts possess in equity. NRS 107.086 does not mandate
15 modification, nor even express a particular legislative preference for modification. NRS
16 107.086 does not create a power of modification in this Court. Were the word "modification"
17 omitted from NRS 107.086(5), the District Courts of the State of Nevada would possess the
18 exact same equitable power to modify the terms of a note. Thus, NRS 107.086 does not even
19 rise to the level of the legislation upheld by the United States Supreme Court in Home Bldg. &
20 Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)

21 Foreclosure is both a legal and an equitable construct. Actions involving real property
22 are inherently equitable actions because real property is unique. Non-judicial foreclosures
23 authorized by statute do not lose their equitable nature. Therefore, in these actions, this Court
24 possesses its full array of equitable powers.

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28 ¹⁴ Indeed, WELLS FARGO concedes the power of this Court to modify loans, "The sanction of a court ordered
modification of the loan as requested by the petitioner should only be utilized (if at all) when there is a finding of
bad faith by the respondent." [Resp. at p.4]

1 When the Court imposes a modification of a home loan, it bears some similarity to
2 reforming the note. Reformation of a written instrument is an equitable act. 66 Am. Jur. 2d
3 Reformation of Instruments § 3.

4 NRS 107.086 merely confirms that a District Court *may* impose a modification and
5 reform the note. This greatly comports with the Nevada Supreme Court's ruling in Tropicana
6 Pizza, Inc. v. Advo, Inc., 238 P.3d 861 (Nev. 2008) adopting Restatement (Second) of Contracts
7 § 166. "This Section. . . only states the circumstances in which a court "may" grant reformation,
8 and, since the remedy is equitable, a court has the discretion to withhold it, even if it would
9 otherwise be appropriate, on grounds traditionally considered by courts of equity in exercising
10 their discretion." Restatement (Second) of Contracts § 166, cmt. a (1981).

11 The power of a court to impose sanctions is equitable in nature, and sanctions may be
12 monetary or equitable. For example, a court may strike a pleading as a sanction or parts thereof
13 under NRCP 37 *See, Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592 (2010)

14 The exercise of a court's equitable power to sanction has been found to not violate due
15 process even when it terminates a case. *See, Skeen v. Valley Bank of Nevada*, 89 Nev. 301
16 (1973); Societe International v. Rogerts, 357 U.S. 197 (1958) (*holding* default judgment proper
17 sanction for willful discovery violation.) ; Hammond Packing co. v. Arkansas, 212 U.S. 322
18 (1909) (*holding* striking an answer and entering default judgment valid sanction). Thus, failure
19 to abide by procedural elements of the law can result in a Court providing substantive equitable
20 relief. There appears little difference between that proposition and the proposition that failure to
21 obey the law as reflected in NRS 107.086 during a mediation can result in a Court granting
22 substantive equitable relief.

23 Neither is the equitable imposition of a modification a regulatory taking. Mere delay in
24 receiving investment backed expectations do not constitute a taking.¹⁵ As to the principal,
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27 ¹⁵ In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) the United
28 States Supreme Court commented positively on the Ninth Circuit's determination that temporariness is a factor in
determining whether a taking has occurred under Penn Central's *ad hoc* test. The United States Supreme Court
rejected the view of Chief Justice Rehnquist that a delay of a set term could constitute a categorical taking. *See, id.*
at n.34.

1 imposing a modification that extends the term of a loan merely delays the investor's expected
2 return. The note is still worth the exact same principal balance, and is still freely assignable. As
3 to the interest, investors in home loans have no reasonable investment backed expectation that
4 they will realize the fully amortized value of the interest because there is no pre-payment
5 penalty.¹⁶ Were Petitioners to obtain a loan from another source and pay the home loan in its
6 entirety, the investor would receive no further returns on interest. Thus, imposition of a new
7 interest rate does not deprive the investor of anything that the investor has or could reasonably
8 expect to have in the future.

9 Therefore this Court concludes that there is no impediment to the exercise of the
10 equitable authority to impose a modification when the equities of a certain matter reveal that
11 modification is proper. Here, those equities exist.

12 Equity and the Legislative History of NRS 107.086 Militate for Strong Sanctions

13 Beyond the technical violations of law discussed *supra*, this Court is compelled to take
14 note that the facts present in this case are archetypal of the systemic problems that lead to the
15 enactment of NRS 107.086.

16 Petitioners are hard working individuals who obtained a standard mortgage. Petitioners
17 found themselves whipsawed by mounting medical expenses and decreased pay caused by the
18 economic downturn colloquially referred to as the Great Recession. The economic downturn not
19 only impaired Petitioners' income making their current mortgage difficult to afford, but also
20 decreased the value of their home making a new mortgage through a refinance difficult to obtain.

21 Petitioners turned to their "lender," WELLS FARGO, seeking assistance. WELLS
22 FARGO instructed them that it would not help unless they were further in arrears.¹⁷ When
23 Petitioners skipped their next payment to qualify for WELLS FARGO'S assistance, WELLS
24 FARGO did offer them help. Unfortunately, unknown to Petitioners, and apparently unknown to

26 ¹⁶ "[T]he test must be whether the deprivation is contrary to reasonable, investment-backed expectations" Lucas v. South
27 Carolina Coastal Council, 505 U.S. 1003, 1034 (Justice Kennedy concurring) (citing Kaiser Aetna v. United States, 444
28 U.S. 164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); W.B. Worthen Co.
v. Kavanaugh, 295 U.S. 56 (1935))

¹⁷ This Court cannot help but wonder at the fiduciary implications of a mere servicer inviting default on a loan that it does not own.

1 WELLS FARGO itself, WELLS FARGO did not actually own the loan. WELLS FARGO did
2 not actually have authority to offer Petitioners such a modification. Nevertheless, WELLS
3 FARGO accepted payments for seven months, well in excess of the agreed upon three month
4 trial period. Throughout this time, WELLS FARGO could not tell Petitioner why the trial period
5 was extended beyond the specified time. WELLS FARGO provided conflicting information on
6 who actually had authority to a HUD counselor. Petitioners had no way of knowing who owned
7 their mortgage, and had no way of knowing what options were available to them. WELLS
8 FARGO gave them misinformation when it instructed them on how to qualify for a HAMP loan.
9 WELLS FARGO did not record or disclose its transfer of the loan. WELLS FARGO eventually
10 terminated the modification, despite Petitioners compliance, because of WELLS FARGO'S own
11 error. WELLS FARGO did not provide Petitioners with any recourse, or with any information
12 that there could be someone else to speak to.

13 In response to similar situations around the State, the Legislature passed AB 149,
14 enacting NRS 107.086. The Legislative history makes it clear that homeowners were receiving
15 conflicting statements from their lenders, and that homeowners often could not find a person
16 with whom to speak to discuss options to avoid foreclosure, and that often homeowners did not
17 know who owned their loan. Assembly Committee on Commerce and Labor Senate Committee
18 on Commerce and Labor February 11, 2009 p.5-7.

19 The Legislature intended to create a forum where homeowners could finally talk,
20 preferably in person, to an individual who had actual control over the loan and who could, if not
21 grant relief, at least discuss options. The Legislative history makes it abundantly clear that
22 representatives for lenders had no independent authority, but were to have the full array of
23 authority available to the lender itself. Assembly Committee on Commerce and Labor, March
24 11, 2009, p.5; *see also*, Assembly Committee on Commerce and Labor Senate Committee on
25 Commerce and Labor February 11, 2009 Page 22-24.

26 By statute, Petitioners were entitled to speak to FHLB. FHLB was certainly permitted to
27 send a representative. WELLS FARGO is certainly a viable representative for FHLB to send.
28 At the evidentiary hearing, WELLS FARGO had every opportunity to introduce evidence that

1 the trustee validly contacted both FHLB and WELLS FARGO, that pursuant to a servicing
2 agreement or after discussions between FHLB and WELLS FARGO that WELLS FARGO
3 appeared at the mediation as a representative, and that WELLS FARGO had knowledge of the
4 full array of options that FHLB could offer Petitioners, and negotiated in good faith with
5 authority to make those offers. No such evidence was introduced.

6 At the mediation WELLS FARGO submitted certified documents that directly contradict
7 its representations as to ownership of the loan. WELLS FARGO'S representative could not
8 identify the owner of the loan. It is difficult to imagine that a representative could attend a
9 proceeding without knowing who they represented. The lion's share of the mediation was spent
10 determining who WELLS FARGO represented. Phrased differently, a significant portion of the
11 mediation was spent trying to determine why WELLS FARGO was present. As a result,
12 Petitioners were never able to speak to FHLB, or to a legitimate representative of FHLB. This
13 falls woefully below the standard required for good faith participation under NRS 107.086.
14 WELLS FARGO failed to participate in good faith as a representative of FHLB. This Court
15 finds the appropriate sanctions to be both equitable sanctions and monetary sanctions in the
16 amount of ten thousand (\$10,000).¹⁸

17 Here, Petitioners have done everything that WELLS FARGO has told them to do and
18 find themselves in worse position for it. When this process began Petitioners were thirty days
19 late on their mortgage. After following every instruction by WELLS FARGO, and attending
20 state mandated foreclosure mediation, Petitioners find themselves reportedly 180+ days
21 delinquent, on the precipice of foreclosure, and facing additional charges and fees for
22 participating in a modification program wrongfully offered to them by a servicer and facing fees
23 for their proper and rightful decision to elect mediation. After all of this, WELLS FARGO
24 contends that it has met its burden to comply with NRS 107.086 and asks for a certificate to
25 foreclose and asks for attorney's fees. [Opp. at p.4] This cannot be the law. And so it is not.

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¹⁸ If equitable sanctions were unavailable, the monetary sanctions would be increased.

1 This Court has found that the equitable imposition of a modification pursuant to NRS
2 107.086(5) would require extraordinary facts.¹⁹ This Court had not thought it would see such
3 facts. This Court was wrong.

4 **Conclusion**

5 **THEREFORE**, and good cause appearing, this Court **ORDERS** that:

6 1) WELLS FARGO is SANCTIONED in the amount of \$30,000.00 (Thirty
7 thousand dollars) for violations of NRS 107.086 and the Foreclosure Mediation Program Rules
8 payable to Petitioners within thirty (30) days of entry of this Order;

9 2) WELLS FARGO shall pay Petitioners' costs and attorneys' fees for the
10 mediation, the Petition for Judicial Review and the Evidentiary Hearing subject to the filing of a
11 verified request for attorneys' fees and memorandum of costs to be filed by Petitioners within
12 thirty (30) days of entry of this Order;

13 3) WELLS FARGO shall abide by its admission that late fees and penalties related
14 to the November 2009 modification were improper and immediately and forever cease and desist
15 any attempts to collect the same. However, penalties and late fees incurred prior to November
16 2009 are still valid;

17 4) Pursuant to NRS 107.086(5), on this Court's *de novo* finding that WELLS
18 FARGO failed to participate in good faith negotiations and lacked authority to negotiate and
19 modify the loan,²⁰ the subject note is **MODIFIED** as follows:

20 a) The current principal shall be re-amortized;

21 a) The payment is set at \$1145.00;

22 b) The interest rate is reduced to 2% (two percent) for the life of the note;

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26 ¹⁹ This Court has used the rules of Olympic fencing as a useful framework, dividing penalties into yellow cards, red
27 cards, and black cards. USA Fencing, RULES FOR COMPETITION (Omar Bhutta ed., 2010) Book 1, Part V, Ch. 3
28 Penalties t.114 – t.126 *See, Order in Navarro v. Wells Fargo Bank, NA.*, CV10-00941 at pp. 5,6; *Order in Jones v.*
National Default Servicing Corporation (Wells Fargo Bank), CV09-03551 at p.5.

²⁰ This Court has specifically found that modification is warranted for either 1) lack of good faith negotiations or 2)
lack of authority. Here, both have occurred, but this Court cannot modify the same note twice. If either finding
were reversed on appeal, the modification would stand on the basis of the other finding.

1 c) The term of the note is set at ten (10) years commencing May 1, 2011 and
2 ending on May 1, 2021.²¹

3 d) There shall be no pre-payment penalty.

4 5) The Foreclosure Mediation Program shall not issue a Certificate of Completion
5 based on the presently recorded Notice of Default absent further Order from this Court.

6 **IT IS SO ORDERED.**

7 **DATED** this 29 day of March, 2011.

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9 PATRICK FLANAGAN
10 District Judge

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28 ²¹ It is the intent of this Court to amortize out the present principal with no reduction to the principal to generate a payment of \$1145.00 at an interest rate of 2%. If the term specified by this Court is of insufficient length to result in the complete payment of the note within ten (10) years, then the length shall be extended.

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CV10-03382
DUKE & TINA RENSLOW VS. MEL 31 Pages
District Court 03/30/2011 04:38 PM
Washoe County
2540
MCH01 TCR

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FILED
2011 MAR 30 PM 4:38
HOWARD H. CONYERS
BY *[Signature]*
DEPUTY

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7
8 IN AND FOR THE COUNTY OF WASHOE

9 * * *

10 DUKE RENSLOW and TINA
11 RENSLOW,
12
13 Petitioners,

14 vs.

CASE NO. CV10-03382

13 WELLS FARGO BANK, and DOES
14 1 through 10,

DEPT. NO. 7

15 Respondents.
16 _____/

17 **NOTICE OF ENTRY OF ORDER**

18 TO: ALL PARTIES TO THE ABOVE-ENTITLED ACTION.

19 NOTICE IS HEREBY GIVEN that this Court entered an Order in
20 the above-entitled matter on March 29, 2011. A true and correct
21 copy of the Order is attached hereto and incorporated by
22 reference.

23 * * *

24 **AFFIRMATION**

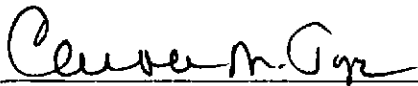
25 **Pursuant to NRS 239B.030**

26 The undersigned does hereby affirm that the preceding
27 document does not contain the social security number of any
28

1 person.

2 DATED this 30th day of March, 2011.

3 The law office of
4 CAROLE M. POPE,
5 a professional corporation

6 
7 CAROLE M. POPE

8 Attorney for Petitioners
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am over 21 years of age, not a party to nor interested in the herein matter, and that on this date, I deposited for mailing, a true and correct copy of the foregoing **Notice of Entry of Order** in Reno, Nevada, postage fully prepaid, addressed to the following:

Gregory L. Wilde, Esq.
Matthew K. Schriever, Esq.
Wilde & Associates
212 S. Jones Blvd.
Las Vegas, Nevada 89107

National Default Servicing Corporation
7720 N. 16th Street, Suite 300
Phoenix, Arizona 85020

Stephen R. Wassner, Esq.
206 South Division Street, Suite 2
Carson City, Nevada 89703-4276

DATED this 30th day of March, 2011.

Deanna McInnes

On October 19, 2010, Petitioners DUKE and TINA RENSLOW (“RENSLOWS”) attended a mediation under the auspices of the Foreclosure Mediation Program with Respondents WELLS FARGO BANK (“WELLS FARGO”), representative for FEDERAL HOME LOAN BANK. No agreement was reached. The Mediator’s Statement stated that WELLS FARGO did not have the requisite authority to modify the loan. On November 9, 2010, Petitioners timely filed a *Petition for Judicial Review*. This Court entered its *Order for Judicial Review* on November 12, 2010. On December 10, 2010 WELLS FARGO filed their *Response*. On December 15, 2010 Petitioners filed their *Reply*. On January 28, 2011, this Court held a hearing on the *Petition* and ordered an Evidentiary Hearing held. On January 31, 2011, Petitioners filed a *Supplement* containing exhibits in support of their *Petition*. On March 17, 2011 the Evidentiary Hearing was held. Both parties appeared in person, and presented their case.

1 Legal Standards

2 The scope of Judicial Review in Foreclosure Mediation cases is to analyze the underlying
3 mediation, determine bad faith, enforce agreements between the parties, and determine sanctions
4 pursuant to NRS Chapter 107. FMPR 21(1) (Former Rule 6(1)). Mediations conducted pursuant
5 to NRS 107.086 are held to a standard of "good faith" negotiation. NRS 107.086. Petitions for
6 Judicial Review of Foreclosure Mediation are conducted using a "*de novo*" standard. FMPR
7 21(5) (Former Rule 6(5)).

8 Findings of Fact

9 At the conclusion of the evidentiary hearing, after careful consideration of the testimony
10 of witnesses, evidence admitted, and argument of counsel, this Court **finds** the following facts:

11 1) WELLS FARGO is the beneficiary of record of a Deed of Trust which is the
12 security instrument to the Note. [Ex.2]

13 2) WELLS FARGO was the originating lender of the home loan, and original holder
14 of the Note executed by the RENSLOWS.

15 3) Petitioners were never notified that the Deed of Trust had been assigned, or that
16 the Note had been transferred.

17 4) On some uncertain date, WELLS FARGO transferred the Note by uncertain
18 means to a certain FEDERAL HOME LOAN BANK ("FHLB").

19 5) WELLS FARGO has not recorded an assignment of the Deed of Trust.

20 6) WELLS FARGO did not provide a proper endorsement of the Note at mediation
21 or throughout the judicial review proceedings.

22 7) WELLS FARGO did not inform Petitioners that their home loan had been sold,
23 neither did FHLB contact Petitioners with such information. *See*, 15 U.S.C. 1641(g)(1)

24 8) Since the date that WELLS FARGO transferred the Note to FHLB, WELLS
25 FARGO has acted as a master servicer of the loan, and has been Petitioner's sole point of contact
26 throughout the entire life of the loan from origination through the present day.

27 9) In July 2009, Petitioners were not in default of their obligation under the Note.

28 ///

1 10) In July 2009, Petitioners contacted WELLS FARGO to request a modification of
2 their loan as Petitioners faced pay cuts and mounting medical bills for their daughter.

3 11) WELLS FARGO informed Petitioners that WELLS FARGO would only discuss
4 modification if Petitioners were sixty (60) days late, and that Petitioners were not eligible for
5 assistance unless they were sixty (60) days late.

6 12) Petitioners became sixty (60) days late in order to discuss a modification with
7 WELLS FARGO, and to be eligible for assistance.

8 13) WELLS FARGO provided Petitioners with a Home Affordable Modification
9 Program ("HAMP") application. WELLS FARGO participates in the HAMP program on loans
10 for which it is the lender.

11 14) Petitioners made their next payment so that they would not be ninety (90) days
12 late, and in default on their loan, so as to avoid foreclosure.

13 15) Petitioner completed the HAMP application and properly returned it to WELLS
14 FARGO.

15 16) On September 17, 2009 Petitioners received a letter from WELLS FARGO
16 stating, "You did it!" and accepting Petitioners into the HAMP program. [Ex.3]

17 17) The HAMP trial period began on November 1, 2009. [Ex.4]

18 18) Petitioners were informed that they did not need to make their October payment
19 by WELLS FARGO.

20 19) When Petitioners did not make their October payment, they had missed a total of
21 three payments. This put Petitioners ninety (90) days in arrears.

22 20) The HAMP Trial Period Packet states that WELLS FARGO is the "Lender".

23 21) The HAMP Trial Period Packet stated that the monthly payments during the trial
24 period would be \$1,127.06. [Ex.4 p.2]

25 22) The HAMP Trial Period Packet stated that "the last Trial Period Payment is due
26 2/1/2010" [Ex.4 p.2]

27 23) The HAMP Trial Period Packet stated that upon successful completion of the
28 Trial Period, Petitioners would (not might) receive a modification on substantially similar terms.

1 24) Nowhere in the HAMP Trial Period packet is any notice provided that WELLS
2 FARGO may not be the Lender.

3 25) Nowhere in the HAMP Trial Period packet is any notice that acceptance into
4 HAMP is contingent on a decision made by any entity other than WELLS FARGO.

5 26) Nowhere in the HAMP Trial Period packet is any notice that Petitioner's
6 eligibility may be in doubt.

7 27) After being accepted into the HAMP Trial Period, Petitioners timely made all
8 three of the stated Trial Period Payments required to secure a permanent modification.

9 28) WELLS FARGO accepted the HAMP Trial Period Payments, but did not send a
10 Modification Agreement.

11 29) At WELLS FARGO'S behest, Petitioners continued making payments to WELLS
12 FARGO in the amount of the Trial Period Payments.

13 30) Petitioners contacted WELLS FARGO to check on the status of the modification
14 and were informed that it was being processed.

15 31) On April 5, 2010 WELLS FARGO sent Petitioners a letter informing them that
16 Petitioner's "may not be eligible" for HAMP because, "[WELLS FARGO] service[s] your loan
17 on behalf of an investor or group of investors that has not given us the contractual authority to
18 modify your loan under [HAMP]." [Ex.5]

19 32) The April 5, 2010 letter disclosed that WELLS FARGO had been directed to
20 place Petitioner's "mortgage" in a review file until May 5, 2010, and instructed Petitioners to
21 continue making their Trial Period Payments.

22 33) On April 29, 2010, WELLS FARGO sent another letter informing Petitioners that
23 WELLS FARGO would not modify their loan because, "the investor on your mortgage has
24 declined the request." This letter stated that the Trial Payments would be retained by WELLS
25 FARGO and applied to the loan in accordance with the "current loan documents." WELLS
26 FARGO further instructed that the only options they could recommend would be a short sale or a
27 deed in lieu of foreclosure. [Ex.6]
28

1 34) WELLS FARGO reported Petitioners' loan as 180+ days delinquent on June
2 2010, despite the payments made pursuant to the agreement between WELLS FARGO and
3 Petitioners.

4 35) WELLS FARGO'S reporting of this delinquency has adversely impacted
5 Petitioners' credit on their credit report. [Ex. 6 of Petitioner's Supplement to Documentation.]

6 36) Petitioners have attempted to refinance the home twice, but have been rejected
7 because of an adverse credit report caused by FHLB and WELLS FARGO.

8 37) On August 6, 2010 WELLS FARGO'S trustee National Default Servicing
9 Corporation recorded a Notice of Default.

10 38) Petitioners elected to mediate under NRS 107.086.

11 39) At the mediation, WELLS FARGO submitted the original Deed of Trust
12 demonstrating that it was the beneficiary.

13 40) During the mediation, WELLS FARGO'S telephonic representative disclosed that
14 WELLS FARGO was not the owner of the loan, but rather merely the servicer. After almost two
15 (2) hours of search, the representative could not conclusively identify the owner of the loan.

16 41) The Mediator found that WELLS FARGO'S representative lacked the requisite
17 authority under NRS 107.086.

18 42) The Mediator found that WELLS FARGO acknowledged that the late fees
19 charged during Petitioners' Trial Period were wrongful, and that WELLS FARGO rescinded the
20 same after Petitioners showed they "had complied with every detail then offered by the bank."

21 43) At no time has this Court been informed how or when FHLB acquired an interest
22 in Petitioners' home loan.

23 44) At no time has this Court been informed that WELLS FARGO actually contacted
24 FHLB to request a HAMP modification, or substantively similar private modification.

25 **Discussion**

26 **Conduct Prior to Mediation Only Relevant Insofar as it Impacted Mediation**

27 At the Evidentiary Hearing, WELLS FARGO lodged numerous objections to the
28 admission of testimony and evidence of conduct prior to the mediation. This Court overruled

1 each. WELLS FARGO further argued that such evidence and testimony should only be admitted
2 for background and foundational purposes.

3 At status hearings prior to the evidentiary hearing, WELLS FARGO had argued that
4 issues of what occurred prior to the mediation are outside of the scope of this Court's authority
5 sitting in judicial review of a foreclosure mediation under FMPR Former Rule 6(1) and NRS
6 107.086(5). Essentially, even if it were true that WELLS FARGO'S conduct prior to the
7 mediation would give rise to a negligent misrepresentation claim, or a promissory estoppel
8 claim, or a breach of contract claim, or warrant an injunction against a foreclosure for some
9 violation of law, because by terms of the Trial Period Program a Modification offered by
10 WELLS FARGO without authority, a permanent Modification was mandated upon successful
11 completion of the Trial Period and the Trial Period was successfully completed by Petitioners,
12 those claims must be brought separately. This Court agrees with WELLS FARGO'S underlying
13 legal theory that review is limited to the foreclosure mediation and that other claims must be
14 brought through independent actions; but finds that the testimony and evidence introduced by
15 Petitioner of what occurred prior to the foreclosure mediation is relevant to what occurs at the
16 foreclosure mediation. While this Court cannot entertain independent legal *claims* and award
17 relief for those *claims*, this Court can, and does, find those same *facts* relevant.

18 A categorical prohibition on the admission of evidence and testimony of prior conduct
19 would deprive this Court of the ability to contextualize the mediation. When reviewing for good
20 or bad faith participation, context is everything. If this Court were deprived of context, this
21 Court would be unable to analyze whether a lender engaged in a pattern of conduct over multiple
22 mediations tended to infer that some technical violations were actually intentional flouting of the
23 law. Similarly this Court would be unable to look to a homeowner's previous conduct to
24 determine whether mediation and review procedures were merely being used as a stall tactic, or
25 to leverage a modification where none was necessary. This Court finds the entire relationship
26 between the parties may be considered, with relevancy being the crux for whether such evidence
27 and testimony is admissible.

28 ///

1 For instance, if the prior conduct at issue was a November 2009 HAMP modification that
2 was reneged upon, but at the mediation the sole point of error was inadequate production of
3 documents, then that November 2009 HAMP modification ostensibly would have had no impact
4 on the mediation, and thus would not be particularly relevant to this Court's determination.

5 But, in the present case, what occurred between the parties prior to mediation had bearing
6 on the mediation and is relevant. The November 2009 HAMP modification is directly relevant
7 to the mediation in several ways. 1) The issue of uncertain ownership calls into question
8 WELLS FARGO'S authority to mediate; 2) Prior performance or breach by a party in the
9 foreclosure mediation program sheds light on their good faith participation; 3) The prior
10 agreement shows the contours of a fair resolution.

11 Trial Period Plan/Modification Agreement Terms Read In Context With Agreement

12 The HAMP packet contained language in a separate sheet titled "Important Program
13 Info" that, "The Trial Period Program is the first step. Once we are able to confirm your income
14 and eligibility for the program, we will finalize your modified loan terms. . ." [Ex. 4] This Court
15 finds that this language is not contained within the four corners of the agreement. This
16 informational packet must be read in context with the provisions of the actual agreement which
17 unequivocally stated that if Petitioner's complied with the Trial Program that WELLS FARGO
18 would send a Modification Agreement for Petitioner's signature which would "reflect the new
19 payment amount and waive any unpaid late charges." [Ex. 4]

20 The "eligibility" language in the "Important Program Information" could not be
21 reasonably understood by an applicant to mean that there may be eligibility problems based on
22 actions taken by WELLS FARGO. Rather, the "eligibility" language gives notice to applicants
23 that if their income cannot be verified or if they do not abide by the Trial Period Program terms,
24 that they will not receive a Modification Agreement.

25 Here, Petitioners successfully made all three trial payments, and by terms of the
26 agreement executed by WELLS FARGO, Petitioners were to receive a Modification Agreement
27 to permanently modify the loan. This did not occur, and upon receipt of a Notice of Default,
28 Petitioners elected mediation.

1 Submitted "True and Certified" Documents Contradict WELLS FARGO'S Status

2 In its written *Response*, WELLS FARGO does not disclose in what capacity it attended
3 the mediation, nor its relationship to the loan. At the Evidentiary Hearing, WELLS FARGO
4 represented to this Court that it was the originator of the home loan note, and was the original
5 beneficiary of the deed of trust. WELLS FARGO also represented to this Court that it no longer
6 "owns" the note.

7 WELLS FARGO submitted "True and Certified" Documents to the Presiding Mediator
8 that it was the beneficiary of the deed of trust. WELLS FARGO submitted a certified copy of
9 the original Note showing WELLS FARGO to be the holder of the Note. WELLS FARGO did
10 not submit any assignments of the deed of trust, or any endorsements of the Note.

11 The Rules in effect at the time of the mediation required that in order for certified copies
12 to be acceptable, they must state under oath that "the person making the certification is in actual
13 possession of the original mortgage note, deed of trust, and each assignment of the mortgage
14 note and deed of trust." Former Rule 5(10)(b)

15 The documents provided to the Presiding Mediator stated that WELLS FARGO was the
16 beneficiary of the deed of trust and the holder of the note. However, at the mediation, WELLS
17 FARGO'S telephonic representative, Greg Eastman, indicated that WELLS FARGO was merely
18 the servicer, and that he could not tell who owned the Note.

19 All parties now agree that Federal Home Loan Bank, FHLB, is the owner of Petitioner's
20 loan.¹ This Court has not been informed which FHLB is the owner of Petitioner's loan. Thus,
21 even at the end of the Evidentiary Hearing, this Court does not actually know who owns
22 Petitioner's loan. It is apparent that Petitioners also still do not know who owns their loan.
23 Based on the record it is not clear that WELLS FARGO actually knows who owns the loan.

24
25 ¹ This Court notes that there are twelve Federal Home Loan Banks in the United States of America. This Court has
26 not been informed which of these entities owns Petitioner's Loan. Based on geographic region it appears likely that
27 Federal Home Loan Bank San Francisco is the owner. However, WELLS FARGO has not recorded any
28 assignments to FHLB -San Francisco; has assigned one other Deed of Trust to Federal Home Loan Bank - Chicago
[See, Corporation Assignment of Deed of Trust DOC # 3603514 of the Washoe County Records]; and has assigned
well over one hundred Deeds of Trust to FHLMC (a HAMP participant). Petitioner DUKE RENSLOW'S credit
report admitted into evidence shows that DUKE RENSLOW'S credit has been reviewed five times in 2010 by
"FEDERAL HOME LOAN BANK OF" [Ex. 10]

1 WELLS FARGO admits it no longer owns the loan. This Court has not received any
2 evidence of the manner in which the loan was transferred. WELLS FARGO has not
3 demonstrated that it properly endorsed the note to FHLB, nor assigned the Deed of Trust.

4 In the documents provided at mediation, WELLS FARGO stated under oath that "the
5 person making the certification is in actual possession of the original mortgage note, deed of
6 trust, and each assignment of the mortgage note and deed of trust." Former Rule 5(10)(b)
7 However, the evidence has not borne this statement out. This Court finds that WELLS FARGO
8 did not meet the documentary requirements of NRS 107.086(4) and Former Rule 5(10)(b).
9 Under NRS 107.086(5), this Court finds the appropriate sanction for this failure to be seven
10 thousand five hundred dollars (\$7,500.00)

11 WELLS FARGO Merely Servicer

12 This case presents a novel legal issue in that WELLS FARGO is apparently still the
13 beneficiary of the Deed of Trust of record. However, WELLS FARGO'S inability to complete
14 the November 2009 HAMP Modification, and inability to offer a HAMP Modification or
15 substantively similar private modification at mediation occurred because WELLS FARGO
16 lacked the authority to do so.² WELLS FARGO'S authority to modify the loan is acknowledged
17 to be entirely derivative of FHLB, the "owner" of the loan.

18 The language of NRS 107.086 specifies that the beneficiary of the Deed of Trust, or their
19 representative, shall attend the mediation. Implicit in the plain language of NRS 107.086 is an
20 assumption that beneficiaries of the Deed of Trust have decision making authority. Throughout
21 the Foreclosure Mediation Rules in effect at the time of the subject mediation there is again an
22 implicit assumption that the beneficiary of the Deed of Trust is the proper party to mediate
23 because that party has authority. The term "beneficiary of deed of trust" and "lender" are used in
24 an apparently interchangeable manner in the rules. *See*, FMPR Former Rule 1(2) "lender",
25 Former Rule 5(8)(a) "beneficiary (lender)", Former Rule 7(1)) "beneficiary".

26
27
28 ² This Court is mindful that one of the reasons for the establishment of the Foreclosure Mediation Program was that
servicers, when contacted directly by borrowers, often claimed to lack authority to make modifications. Minutes of
Joint Meeting of Senate and Assembly Committees on Commerce and Labor, at 13 (Feb. 11, 2009)

1 Former Rule 5(8)(a) and 5(10) when read together imply that Supreme Court conceived
2 of the beneficiary of the deed of trust as being the same party as the holder of the note. Former
3 Rule 4(8)(a) requires that:

4 All beneficiaries of a deed of trust . . . shall participate in the Foreclosure
5 Mediation Program, be represented at all times during a mediation by a person
6 or persons who have the authority to *negotiate and modify the loan* secured by
7 the deed of trust sought to be foreclosed In addition to the documents
8 required by Rule 8 herein, the beneficiary must bring to the mediation the
9 original or a certified copy of the deed of trust, *the mortgage note*, and each
10 assignment of the deed of trust and *the mortgage note*.³ (*emphasis added*)

11 Former Rule 5(8)(a) does not specify why the additional documents are required, but a
12 reasonable interpretation of this rule infers that those documents tend to demonstrate authority
13 and that the proper party to negotiate is present. Former Rule 5(10) mandates that the production
14 of the mortgage note is only valid when the beneficiary of the deed of trust swears under oath
15 that the note is in the possession of the person making the certification.

16 Although both NRS 107.086 and the Foreclosure Mediation Program Rules repeatedly
17 specify the beneficiary of the deed of trust, and do not use the terms "holder" or "creditor," the
18 focus throughout is on the ability to modify the loan.

19 This is supported by the legislative history of AB 149:

20 "[Borrowers] cannot get a lender on the phone. They cannot get to someone
21 willing to work with them. The reason might be that the loans have been sold so
22 many times that it is *not clear who the lender is*." (*emphasis added*)

23 Further:

24 "The other key component of this bill is that *lenders* or their representatives must
25 appear or otherwise be available throughout the mediation. They also have to
26 present a certified copy of the deed of trust and the promissory note, so that we
27 know the person who is foreclosing *actually owns the note*." (*emphasis added*)

28 Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor
February 11, 2009 p.5-7. (Comments of Assembly Speaker Barbara Buckley)

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³ The newly amended Foreclosure Mediation Program Rules effective March 1, 2011 renumbered Rule 5(8) to Rule 10(1), and specified that "each endorsement of the mortgage note" must be provided.

1 The legislative history further indicates that the Legislature intended the party with actual
2 beneficial interest should be present at the mediation.

3 "The third amendment clarifies the term "trustee" to "beneficiary of the deed of
4 trust." That language is more precise since we do not want the trustee to be there;
5 we want the person with the beneficial interest to be present."

6 Assembly Committee on Commerce and Labor, March 11, 2009, p.5. (Comments of Assembly
7 Speaker Barbara Buckley)

8 The Legislature's choice of the term "beneficiary of deed of trust" was not designed to
9 elevate form over substance. Rather, the Legislature believed that "beneficiary of the deed of
10 trust" was the term that would cause the party with actual beneficial interest to appear. In
11 circumstances such as this, where the beneficiary of record of the deed of trust appears to have
12 no actual beneficial interest, it is clear that the Legislature did not intend for the beneficiary to
13 appear, but rather for the entity possessing actual beneficial interest.

14 The Supreme Court of Nevada has not yet had occasion to declare the law of Nevada as it
15 relates to determining what entity has beneficial interest when faced with competing or imperfect
16 transfers of interest in a secured home loan. The traditional approach to transferring interest in
17 mortgages from one creditor to another has been by endorsing the note and assigning the
18 mortgage or deed of trust, usually contemporaneously. In recent years, the financial industry has
19 adopted novel methods of non-contemporaneous or incomplete or unrecorded transfers, that are
20 not particularly relevant to the case at bar other than for a determination of who has actual
21 beneficial interest sufficient to have standing to participate in the mediation program (either
22 directly or through a duly appointed representative), and whether WELLS FARGO as the
23 beneficiary of the deed of trust was empowered to attend the mediation on its own, or whether its
24 authority was solely derivative as a representative of FHLB. The two prevailing theories
25 throughout the nation are the Longan Rule and the Restatement (Third) approach.

26 In Carpenter v. Longan, 83 U.S. 271 (1872), the United States Supreme Court held that
27 mortgages and notes are inseparable. Transferring the note carries with it the mortgage by
28 operation of law. An attempt to transfer the mortgage without expressly transferring the note is a
nullity, and the purported assignee has received nothing but worthless paper. Although Nevada

1 uses Deeds of Trusts instead of "mortgages", the rule is still applicable.⁴ Under this approach,
2 when WELLS FARGO transferred the note to FHLB, by operation of law, WELLS FARGO
3 ceased being the mortgagee/beneficiary of the deed of trust. Instead, FHLB is the actual
4 beneficiary, but has an unrecorded beneficial interest and essentially holds a wild deed.⁵ Longan
5 has never been repudiated or overturned, although it is of venerable vintage.

6 The competing theory is set forth in the Restatement (Third) of Property – Mortgages §
7 5.4, which specifically repudiates Carpenter v. Longan as archaic and founded on a now
8 discarded theory of mortgages. Under the Restatement, the transfer of either the mortgage or the
9 note carries the other with it, unless there is intent to sever the two. In analyzing the state of
10 Nevada Common Law as it relates to real property, this Court finds that the Nevada Supreme
11 Court has adopted the Restatement (Third) of Property – Mortgages on a consistent basis. This
12 Court finds then that the Restatement (Third) approach is the proper approach for Nevada
13 Courts. On the facts here, there is no indication that WELLS FARGO intended to sever the
14 Deed of Trust from the Note. Therefore, by transferring the Note to FHLB, WELLS FARGO
15 also transferred all beneficial interest in the Deed of Trust.

16 Under either approach, on the facts here, WELLS FARGO, although the beneficiary of
17 record, had no beneficial interest in the Deed of Trust, and no right to proceeds from the Note.
18 Therefore, at most, WELLS FARGO was a servicer for FHLB, and notwithstanding the language
19 of NRS 107.086 and the Foreclosure Mediation Program Rules, had no independent standing to
20 negotiate or appear at the mediation in any capacity other than as a "representative" of FHLB.

21 Servicer Representatives Amenable to Sanctions

22 Servicers do not have *independent* standing to participate in the Foreclosure Mediation
23 Program. NRS 107.086 evidences a clear Legislative intent to have the party holding beneficial
24 interest in the property at the mediation table. Rather, this Court has found that servicers may
25

26 ⁴ See, Sims v. Grubb, 75 Nev. 173, 178 (1959); 59 C.J.S. Mortgages § 6; Restatement (Third) Trusts § 5 comment k
27 ⁵ The Supreme Court of Massachusetts, analyzing non-contemporaneous transfers of the note and mortgage, has
28 held that "[T]he holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an
equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and
obtaining an equitable order of assignment" U.S. Bank National Association v. Ibanez, Slip Copy SJC 10694 at 11
(Mass. 2011) (rejecting transfer of mortgage by operation of law when note is transferred without mortgage.)

1 qualify as a "representative" for the beneficiary of the deed of trust within the meaning of NRS
2 107.086(4)'s requirement that, "The beneficiary of the deed of trust or a representative shall
3 attend the mediation." *See, Order in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 2,3.*

4 NRS 107.086(3) requires the trustee to notify the present beneficiary of the deed of trust
5 and "every other person with an interest as defined in NRS 107.090. . ."⁶ No evidence or
6 testimony from WELLS FARGO tended to show that FHLB was in fact properly noticed. Given
7 the oddities of the manner in which WELLS FARGO remains the beneficiary or record, this
8 Court is troubled that whichever FHLB actually owns the loan may not have received notice that
9 a mediation was scheduled to occur.

10 However, in other contexts, this Court has found that when a master servicer acting as a
11 representative exceeds its authority in reaching an agreement at mediation, that the homeowner
12 shall retain the benefit of the bargain, and that the lender shall have recourse only against the
13 servicer. *See, Order in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 2,3.* This seems a
14 fitting rule for situations in which a master servicer may have essentially usurped the lender's
15 place at the mediation table. If sanctions issue based on the conduct of the servicer that
16 materially impact a right of the lender, then the lender shall have cause solely against the
17 servicer. An innocent homeowner shall not suffer because a servicer's conduct has resulted in
18 harm to the lender.

19 Here, Petitioners had an awareness prior to mediation that WELLS FARGO was not the
20 owner of their loan, based on the April 29, 2010 termination letter. However, Petitioners were
21 entitled to negotiate in good faith with the servicer of their loan acting as a representative for
22 FHLB. Petitioners participated but had the purposes of the mediations frustrated by WELLS
23 FARGO'S actions.

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27
28 ⁶ NRS 107.090(1) defines a "person with an interest" as "any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated."

1 This Court finds that the language of NRS 107.086(5) and Former Rule 6(1) is broad
2 enough to sanction the servicer representative when the servicer appears at the mediation, and
3 the deficiencies or violations are attributable to the representative and not the underlying lender.

4 Here, the violations are attributable to WELLS FARGO. WELLS FARGO submitted
5 "true and certified" documents that conflicted with their representations as to ownership of the
6 loan. WELLS FARGO could not identify the owner of the loan. WELLS FARGO's actions
7 necessitated a mediation. It was WELLS FARGO that lacked authority. Thus, it is WELLS
8 FARGO who should be bear the burden of any sanctions.

9 Bank Representative's Lack of Experience No Excuse

10 WELLS FARGO'S telephonic representative, Greg Eastman, did not know who owned
11 the note. [Ex.1] At the evidentiary hearing, representative Eastman did not appear. Rather
12 another individual, Phillip CARGIOLI from WELLS FARGO who serves as a telephonic
13 representative in other mediations, appeared and testified that at the time of the mediation Mr.
14 Eastman had been a loan adjustment officer for a mere four months.

15 Lack of experience is no excuse. Servicers have no independent authority in the
16 Foreclosure Mediation Program. They are mere representatives. A new employee of a servicer
17 acting as representative is held to the same standards under NRS 107.086 and the Foreclosure
18 Mediation Rules as the most experienced hand. The failure of a representative to know who they
19 represent is unacceptable. The testimony and evidence introduced demonstrates that well over
20 an hour and a half of the mediation was spent trying to determine the identity of the lender.
21 Petitioners had to leave the room for some time while this occurred. This clearly had a negative
22 impact on the mediation.

23 Representatives must have full authority, or have access at all times to full authority.
24 NRS 107.086(4); Former Rule 5(8)(a) It is clear that Mr. Eastman did not know what his
25 authority was or even from whom it was derived "at all times". This Court finds that one cannot
26 have access to an unknown entity. This is a violation of Former Rule 5(8)(a) which had a
27 material and negative impact on the mediation. It is also a violation of NRS 107.086(4) which
28 the Legislature has expressly authorized this Court to sanction for even mere technical violations.

1 In this instance, these violations had a detrimental impact and led to a finding by the
2 mediator that the representative of the lender did not have the requisite authority. Under this
3 Court's *de novo* review, this Court finds that the lender did not appear directly at the mediation.
4 The lender only appeared through a representative, as authorized by NRS 107.086(4). However,
5 that representative did not have sufficient authority to negotiate and modify the loan, and did not
6 have access to such a person with authority "at all times." This Court finds the appropriate
7 sanction for lack of authority in this case to be a monetary sanction in the amount of ten thousand
8 dollars (\$10,000.00) and an equitable sanction discussed *infra*.⁷

9 Petitioner Clearly Qualified for a Modification

10 Respondent contended that, "[P]etitioner did not qualify for a modification and therefore
11 no agreement was reached." [Resp. at p.2] However, during the evidentiary hearing,
12 Respondent's counsel asked a question that intimated that Petitioner had been offered a
13 modification that would reduce the payment by \$268.00 per month.⁸ Further, WELLS
14 FARGO'S witness, CARGIOLI testified that an offer reducing the payment by \$268.00 per
15 month had been made by Mr. Eastman. However, CARGIOLI had no personal knowledge that
16 this offer was made. CARGIOLI was not involved in the RENSLOW'S mediation. CARGIOLI
17 testified that he had "briefly reviewed . . . Mr. Eastman's notes from the mediation." [Trans. at
18 58] These notes were not introduced into evidence. The actual terms of this purported
19 modification offer were not addressed. This Court does not have any information whether the
20 \$268.00 was a permanent modification, whether it created a balloon payment, whether it was a
21 temporary modification, whether there were any fees and penalties associated with this purported
22 offer. No testimony or evidence was given as to the source of authority for making this
23 purported offer. The record is bereft of competent evidence for this Court to make a finding that
24 a particular offer was in fact made. The record does not contain competent evidence of the terms

25
26 ⁷ Were equitable sanctions unavailable, this Court would increase the monetary sanctions.

27 ⁸ Questions of counsel are not testimony. Here, the questions of Respondent's counsel elicited an answer that
28 Petitioner's representative Alsasua did not recall the terms of an offered modification. [Trans. at p.11] Petitioner
also did not recall the terms of any specific modification being offered [Trans. at p.28] No one actually present at
the mediation testified as to the terms of this purported offer, and the offer was not reflected on the Mediator's
Statement.

1 of any such purported modification such that this Court could analyze the offer for its impact on
2 good faith participation.

3 However, although this Court does not have sufficient evidence before it to find that a
4 particular offer was made, or that that offer was a good faith offer, the testimony of WELLS
5 FARGO is sufficient for the purpose of analyzing WELLS FARGO'S contention that,
6 "[P]etitioner did not *qualify* for a modification and therefore no agreement was reached. Just
7 because the [P]etitioner did not *qualify* for a modification does not mean that the [R]espondent
8 did not have the required authority." [Resp. at p.2] The statement in the Response is directly
9 contradicted by the testimony of WELLS FARGO'S representative CARGIOLI at the
10 evidentiary hearing; they cannot both be true. No argument was made in support of the
11 statement in the Response under NRCP Rule 11(b)(2) and (3).⁹

12 Respondent's representative witness CARGIOLI further admitted that the refusal to offer
13 a specific modification, the HAMP modification previously agreed to, was based not on
14 Petitioners' qualifications or lack thereof but rather on the fact that the underlying lender did not
15 participate in HAMP and thus had not authorized the servicer to enter into a HAMP
16 modification.¹⁰

17 Therefore, this Court finds that Petitioners did qualify for a modification; that Petitioners
18 qualified for the HAMP modification offered in November 2009; and that the inability to enter
19 into a modification at mediation stemmed from WELLS FARGO'S lack of authority to offer a
20 HAMP modification.

21 Respondent's Conduct Impaired Petitioner's Ability to Obtain a Refinance

22 Respondent contends that loan modifications "are primarily for individuals who are
23 unable to refinance their house. . ." and that "Petitioner would be in a better position to have
24

25
26 ⁹ This Court does not find a need to *sua sponte* enter an order to show cause under Rule 11(c)(1)(b).

27 ¹⁰ This Court professes a certain shock at the fact that a FHLB, as a federal GSE, does not participate in HAMP,
28 which is required for loans owned by FNMA and FHLMC, two other federal GSE's. The fact that the Federal
Home Loan Mortgage Corporation authorizes HAMP modifications while the Federal Home Loan Bank does not,
that WELLS FARGO has sold mortgages in the past to both of these entities, and that the election to sell to one over
the other is completely outside of the borrower's control has a certain Kafkaesque quality. Had WELLS FARGO
simply chosen FHLMC instead of FHLB, this entire matter would have been averted.

1 refinanced their loan rather than allow it to go into default. In fact, if the [P]etitioners have as
2 much equity as they claim, then they are still in a position to refinance the loan. . ." [Resp. at p.2]

3 Here, Petitioners are in fact presently unable to secure a refinance of their home, due to
4 the actions of WELLS FARGO. They have made several attempts to do so, both through
5 WELLS FARGO itself, and through U.S. Bank. However, because WELLS FARGO placed
6 negative reports on Petitioners' credit reports, Petitioners are unable to obtain a refinance.
7 [Ex.10]

8 Respondent's statement that Petitioners would have been better off refinancing rather
9 than defaulting is tempered by the fact that Petitioners contacted WELLS FARGO prior to
10 defaulting to work out arrangements regarding their loan and were instructed by WELLS
11 FARGO that they could not be helped until they were sixty (60) days late.

12 This Court does not appreciate WELLS FARGO'S Monday morning quarterbacking
13 regarding what Petitioner ought to have done when WELLS FARGO'S actions both precipitated
14 Petitioners' default and impaired Petitioner's ability to obtain a refinance. These comments in
15 WELLS FARGO'S written *Response*, when compared to the evidence in record, demonstrate
16 either a complete lack of knowledge or outright disregard of the facts of this matter. These
17 comments are nothing short of shameful.

18 Respondent's Admission That Late Fees Were Properly Rescinded Stands

19 At the mediation, WELLS FARGO explained that the November 2009 modification had
20 been withdrawn because WELLS FARGO lacked the authority to offer it. Petitioners
21 demonstrated to the Mediator and to WELLS FARGO'S representative that they had been
22 charged penalties and late fees despite the fact that they had complied with all terms of the
23 November 2009 modification and with "every detail then offered by the bank." Upon this
24 showing, WELLS FARGO rescinded the fees and penalties. [Ex.1]

25 The plain language of the Mediator's Statement shows that WELLS FARGO'S rescission
26 was not contingent, conditional, or part of an agreement. The rescission was an admission that
27 the fees and penalties were improper. WELLS FARGO is estopped from renegeing on that
28 admission made by their representative. All fees and penalties incurred during, or as a result of,

1 the November 2009 modification have been RESCINDED and WAIVED. WELLS FARGO
2 may not in any way attempt to collect on the same.

3 Mediation Fee Not Chargeable

4 When the Legislature enacted AB 149 implementing NRS 107.086, the Legislature made
5 expressly clear that the mediation fee was to be evenly distributed between homeowners and
6 lenders. NRS 107.086(8)(e); FMPR 5(1) (Former Rule 16(1))

7 WELLS FARGO has ignored this completely. WELLS FARGO has sought to recover
8 the mediation fee, in direct contravention of the Legislature's express desire to evenly apportion
9 the costs between homeowners and lenders.¹¹ [Petition Exh. 3] Even more shocking to this
10 Court is that WELLS FARGO attempts to charge \$500.00 as a "Mediation Fee", well in excess
11 of the \$200.00 that WELLS FARGO paid. Homeowners are legally entitled to seek a mediation.
12 Each party bears their own cost of mediation. To shift the burden from an even division to
13 resting solely on the homeowner is contrary to the spirit and letter of the law. To charge more
14 than the fee paid, in essence to attempt to profit from the homeowner's election, is outrageous.

15 While this Court would certainly impose sanctions for the bare attempt to recover the
16 mediation fee alone, when confronted with uncontroverted evidence that Lender is seeking to
17 recover 250% of its statutory burden, this Court finds that harsh sanctions must be issued to deter
18 such unscrupulous conduct in the future. This Court finds that the attempt to recover 250% of
19 the mediation fee is appropriately assessed a 250% sanction. Accordingly, for this egregious and
20 intentional violation, WELLS FARGO is SANCTIONED \$1,250.00 (one thousand two hundred
21 and fifty dollars).

22 ///

23 ///

24
25 ¹¹ The Mediation Fee is included on a reinstatement letter from National Default Servicing Corporation, which is
26 WELLS FARGO'S foreclosure trustee. Foreclosure trustees are agents of the trustor and beneficiary of the deed of
27 trust. See, Hendrickson v. Popular Mortg. Servicing, Inc. 2009 WL 1455491 (N.D. Cal 2009) at *7 (citations
28 omitted) (cited with approval by Nieto v. Litton Loan Servicing, LP, 2011 WL 797496 (D. Nev 2011) at *5); see
also 54A Am. Jur. 2d Mortgages § 123 – Relationship of trustees to other parties in interest; Restatement (Third)
Trusts § 5 comment k; Bogert's Trusts and Trustees §29 Mortgages and Trust Deeds (2010). Therefore, the actions
of the trustee are imputed to WELLS FARGO. If the trustee's assessment of the fee exceeded their agreement with
WELLS FARGO, then WELLS FARGO may seek to recover sanctions from the trustee.

1
2 Testimony and Evidence Lead to Competent Finding of Lack of Good Faith

3 This Court finds that WELLS FARGO'S conduct in this mediation falls well below the
4 threshold of "good faith" negotiations. Thus, WELLS FARGO has failed to meet its burden to
5 show why sanctions should not lie pursuant to NRS 107.086(4) which authorizes this Court to
6 issue sanctions, without limitation, including modifications

7 Here, Petitioners were in a mediation with a representative servicer for a lender.
8 Petitioners were only there because the servicer had executed an agreement to modify the loan,
9 and after Petitioners had satisfied the terms, the servicer terminated the agreement.

10 The question of why a mediation occurs shapes the contours of what a good faith result
11 will look like. Where a homeowner is in a mediation because they are attempting to receive a
12 principal reduction despite the fact that the homeowner is more than capable of affording all
13 obligations at their present rate, a good faith result may very well be that a lender offers
14 reinstatement only. However, here, Petitioners were in a mediation because they were
15 attempting to receive the modification previously promised and denied them, or one
16 substantively similar.

17 It is in analyzing the good faith participation that this Court finds relevance in prior
18 conduct. Good faith is not merely *pro forma* lip service to the rules. This Court has found that
19 although good faith and bad faith escape precise definition, they are capable of description such
20 that this Court may adequately determine their presence or absence. This Court adopts as a
21 useful reference the descriptions of both concepts as follows:

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23 **Good Faith:** Good faith is an intangible and abstract quality with no
24 technical meaning or statutory definition, and it encompasses, among other
25 things, an honest belief, the absence of malice and the absence of design to
26 defraud or to seek an unconscionable advantage, and an individual's personal
27 good faith is concept of his own mind and inner spirit and, therefore, may not
28 conclusively be determined by his protestations alone. Doyle v. Gordon 158
N.Y.S.2d 248, 259 . . . In common usage this term is ordinarily used to
describe that state of mind denoting honest of purpose, freedom of intention to
defraud, and generally speaking, means being faithful to one's duty or
obligation Efron v. Kalmanovitz, 57 Cal.Rptr. 248

1 **Bad Faith:** The opposite of "good faith", generally implying or involving
2 actual or constructive fraud, or a design to mislead or deceive another, or a
3 neglect or refusal to fulfill some duty or some contractual obligation, not
4 prompted by an honest mistake as to one's rights or duties, but by some
5 interested or sinister motive. Term "Bad faith" is not simply bad judgment or
6 negligence, but rather it implies the conscious doing of a wrong because of
dishonest purpose or moral obliquity; it is different from the negative idea of
negligence in that it contemplates a state of mind affirmatively operating with
furtive design or ill will. Stath v. Williams 367 N.E.2d 1120, 1124.

7 BLACK'S LAW DICTIONARY (5th ed. 1979)¹²

8 Although good faith is presumed, each party bears the onus of demonstrating that they
9 are there to negotiate in good faith,¹³ because good faith is typically adduced through the conduct
10 of a party. This Court finds that conduct prior to the mediation has bearing on adducing good
11 faith at the mediation.

12 Having made certain findings of fact *ante*, this Court concludes that WELLS FARGO has
13 not demonstrated good faith participation. This Court concludes that the parties were unable to
14 have meaningful good faith negotiations due to WELLS FARGO'S conduct at the mediation,
15 including its failure to know who controlled the loan.

16 Equity regards as done which ought to be done. 30A C.J.S. Equity § 131. The basis of
17 the maxim is the existence of a duty and it can only be invoked against a party who has failed or
18 refused to perform a duty imposed on the party. The maxim only operates in favor of party
19 holding an equitable right to performance, against a party with a duty to perform. *Id.* (citations
20 omitted) Here, based on all of the evidence shown to this Court, what ought to be done is a
21 modification of Petitioners' loan on the terms previously agreed to between Petitioners and
22 WELLS FARGO.

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25 ¹² This Court specifically adopts the definition from the Fifth Edition. The most recent Black's Law definition is of
no assistance to this Court.

26 ¹³ This Court has adopted these working definitions because there are no Supreme Court rulings yet on point. This
27 Court notes that the Supreme Court recently heard oral arguments in Leyva v. National Default Servicing Corp.,
28 Supreme Court Docket No. 55216 in which the definition of good and bad faith were issues. This Court has found
that bad faith is not the mere absence of good faith, but the active opposite and that it requires an independent
showing. See, *Order in Navarro v. Wells Fargo Bank, NA.*, CV10-00941 at pp. 9,10. This Court anticipates
guidance from the Supreme Court in the near future.

1 By its conduct prior to mediation, WELLS FARGO took upon itself a duty to offer a
2 HAMP modification to Petitioners. It refused and failed to do so at mediation. A modification
3 on the parameters offered to Petitioners in November 2009 ought to be done.

4 Modification is a Permissible Sanction

5 WELLS FARGO did not present argument that modification of the loan is an
6 impermissible sanction, nor cite authority for that proposition. Thus, WELLS FARGO has
7 WAIVED such arguments.¹⁴ However, because this is the first instance in which this Court has
8 imposed a modification on the loan pursuant to NRS 107.086, and it appears that this may be the
9 first such modification in the State of Nevada, it is prudent to discuss this Court's understanding
10 of the legal grounds for modification of a home loan as a sanction.

11 This Court finds that NRS 107.086 is not an impermissible impairment of contracts by
12 the Legislature. U.S.C.A. Const. art.1 §10 Rather, NRS 107.086 merely serves as an affirmation
13 that the Legislature intended for the District Courts of the State of Nevada to have full access to
14 the vast inherent powers the District Courts possess in equity. NRS 107.086 does not mandate
15 modification, nor even express a particular legislative preference for modification. NRS
16 107.086 does not create a power of modification in this Court. Were the word "modification"
17 omitted from NRS 107.086(5), the District Courts of the State of Nevada would possess the
18 exact same equitable power to modify the terms of a note. Thus, NRS 107.086 does not even
19 rise to the level of the legislation upheld by the United States Supreme Court in Home Bldg. &
20 Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)

21 Foreclosure is both a legal and an equitable construct. Actions involving real property
22 are inherently equitable actions because real property is unique. Non-judicial foreclosures
23 authorized by statute do not lose their equitable nature. Therefore, in these actions, this Court
24 possesses its full array of equitable powers.

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28 ¹⁴ Indeed, WELLS FARGO concedes the power of this Court to modify loans, "The sanction of a court ordered modification of the loan as requested by the petitioner should only be utilized (if at all) when there is a finding of bad faith by the respondent." [Resp. at p.4]

1 When the Court imposes a modification of a home loan, it bears some similarity to
2 reforming the note. Reformation of a written instrument is an equitable act. 66 Am. Jur. 2d
3 Reformation of Instruments § 3.

4 NRS 107.086 merely confirms that a District Court *may* impose a modification and
5 reform the note. This greatly comports with the Nevada Supreme Court's ruling in Tropicana
6 Pizza, Inc. v. Advo, Inc., 238 P.3d 861 (Nev. 2008) adopting Restatement (Second) of Contracts
7 § 166. "This Section. . . only states the circumstances in which a court "may" grant reformation,
8 and, since the remedy is equitable, a court has the discretion to withhold it, even if it would
9 otherwise be appropriate, on grounds traditionally considered by courts of equity in exercising
10 their discretion." Restatement (Second) of Contracts § 166, cmt. a (1981).

11 The power of a court to impose sanctions is equitable in nature, and sanctions may be
12 monetary or equitable. For example, a court may strike a pleading as a sanction or parts thereof
13 under NRCP 37 *See, Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592 (2010)

14 The exercise of a court's equitable power to sanction has been found to not violate due
15 process even when it terminates a case. *See, Skeen v. Valley Bank of Nevada*, 89 Nev. 301
16 (1973); Societe International v. Rogerts, 357 U.S. 197 (1958) (*holding* default judgment proper
17 sanction for willful discovery violation.) ; Hammond Packing co. v. Arkansas, 212 U.S. 322
18 (1909) (*holding* striking an answer and entering default judgment valid sanction). Thus, failure
19 to abide by procedural elements of the law can result in a Court providing substantive equitable
20 relief. There appears little difference between that proposition and the proposition that failure to
21 obey the law as reflected in NRS 107.086 during a mediation can result in a Court granting
22 substantive equitable relief.

23 Neither is the equitable imposition of a modification a regulatory taking. Mere delay in
24 receiving investment backed expectations do not constitute a taking.¹⁵ As to the principal,

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27 ¹⁵ In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) the United
28 States Supreme Court commented positively on the Ninth Circuit's determination that temporariness is a factor in
determining whether a taking has occurred under Penn Central's ad hoc test. The United States Supreme Court
rejected the view of Chief Justice Rehnquist that a delay of a set term could constitute a categorical taking. *See, id.*
at n.34.

1 imposing a modification that extends the term of a loan merely delays the investor's expected
2 return. The note is still worth the exact same principal balance, and is still freely assignable. As
3 to the interest, investors in home loans have no reasonable investment backed expectation that
4 they will realize the fully amortized value of the interest because there is no pre-payment
5 penalty.¹⁶ Were Petitioners to obtain a loan from another source and pay the home loan in its
6 entirety, the investor would receive no further returns on interest. Thus, imposition of a new
7 interest rate does not deprive the investor of anything that the investor has or could reasonably
8 expect to have in the future.

9 Therefore this Court concludes that there is no impediment to the exercise of the
10 equitable authority to impose a modification when the equities of a certain matter reveal that
11 modification is proper. Here, those equities exist.

12 Equity and the Legislative History of NRS 107.086 Militate for Strong Sanctions

13 Beyond the technical violations of law discussed *supra*, this Court is compelled to take
14 note that the facts present in this case are archetypal of the systemic problems that lead to the
15 enactment of NRS 107.086.

16 Petitioners are hard working individuals who obtained a standard mortgage. Petitioners
17 found themselves whipsawed by mounting medical expenses and decreased pay caused by the
18 economic downturn colloquially referred to as the Great Recession. The economic downturn not
19 only impaired Petitioners' income making *their current mortgage* difficult to afford, but also
20 decreased the value of their home making a new mortgage through a refinance difficult to obtain.

21 Petitioners turned to their "lender," WELLS FARGO, seeking assistance. WELLS
22 FARGO instructed them that it would not help unless they were further in arrears.¹⁷ When
23 Petitioners skipped their next payment to qualify for WELLS FARGO'S assistance, WELLS
24 FARGO did offer them help. Unfortunately, unknown to Petitioners, and apparently unknown to
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26 ¹⁶ "[T]he test must be whether the deprivation is contrary to reasonable, investment-backed expectations" Lucas v. South
27 Carolina Coastal Council, 505 U.S. 1003, 1034 (Justice Kennedy concurring) (citing Kaiser Aetna v. United States, 444
U.S. 164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); W.B. Worthen Co.
v. Kavanaugh, 295 U.S. 56 (1935))

28 ¹⁷ This Court cannot help but wonder at the fiduciary implications of a mere servicer inviting default on a loan that it
does not own.

1 WELLS FARGO itself, WELLS FARGO did not actually own the loan. WELLS FARGO did
2 not actually have authority to offer Petitioners such a modification. Nevertheless, WELLS
3 FARGO accepted payments for seven months, well in excess of the agreed upon three month
4 trial period. Throughout this time, WELLS FARGO could not tell Petitioner why the trial period
5 was extended beyond the specified time. WELLS FARGO provided conflicting information on
6 who actually had authority to a HUD counselor. Petitioners had no way of knowing who owned
7 their mortgage, and had no way of knowing what options were available to them. WELLS
8 FARGO gave them misinformation when it instructed them on how to qualify for a HAMP loan.
9 WELLS FARGO did not record or disclose its transfer of the loan. WELLS FARGO eventually
10 terminated the modification, despite Petitioners compliance, because of WELLS FARGO'S own
11 error. WELLS FARGO did not provide Petitioners with any recourse, or with any information
12 that there could be someone else to speak to.

13 In response to similar situations around the State, the Legislature passed AB 149,
14 enacting NRS 107.086. The Legislative history makes it clear that homeowners were receiving
15 conflicting statements from their lenders, and that homeowners often could not find a person
16 with whom to speak to discuss options to avoid foreclosure, and that often homeowners did not
17 know who owned their loan. Assembly Committee on Commerce and Labor Senate Committee
18 on Commerce and Labor February 11, 2009 p.5-7.

19 The Legislature intended to create a forum where homeowners could finally talk,
20 preferably in person, to an individual who had actual control over the loan and who could, if not
21 grant relief, at least discuss options. The Legislative history makes it abundantly clear that
22 representatives for lenders had no independent authority, but were to have the full array of
23 authority available to the lender itself. Assembly Committee on Commerce and Labor, March
24 11, 2009, p.5; *see also*, Assembly Committee on Commerce and Labor Senate Committee on
25 Commerce and Labor February 11, 2009 Page 22-24.

26 By statute, Petitioners were entitled to speak to FHLB. FHLB was certainly permitted to
27 send a representative. WELLS FARGO is certainly a viable representative for FHLB to send.
28 At the evidentiary hearing, WELLS FARGO had every opportunity to introduce evidence that

1 the trustee validly contacted both FHLB and WELLS FARGO, that pursuant to a servicing
2 agreement or after discussions between FHLB and WELLS FARGO that WELLS FARGO
3 appeared at the mediation as a representative, and that WELLS FARGO had knowledge of the
4 full array of options that FHLB could offer Petitioners, and negotiated in good faith with
5 authority to make those offers. No such evidence was introduced.

6 At the mediation WELLS FARGO submitted certified documents that directly contradict
7 its representations as to ownership of the loan. WELLS FARGO'S representative could not
8 identify the owner of the loan. It is difficult to imagine that a representative could attend a
9 proceeding without knowing who they represented. The lion's share of the mediation was spent
10 determining who WELLS FARGO represented. Phrased differently, a significant portion of the
11 mediation was spent trying to determine why WELLS FARGO was present. As a result,
12 Petitioners were never able to speak to FHLB, or to a legitimate representative of FHLB. This
13 falls woefully below the standard required for good faith participation under NRS 107.086.
14 WELLS FARGO failed to participate in good faith as a representative of FHLB. This Court
15 finds the appropriate sanctions to be both equitable sanctions and monetary sanctions in the
16 amount of ten thousand (\$10,000).¹⁸

17 Here, Petitioners have done everything that WELLS FARGO has told them to do and
18 find themselves in worse position for it. When this process began Petitioners were thirty days
19 late on their mortgage. After following every instruction by WELLS FARGO, and attending
20 state mandated foreclosure mediation, Petitioners find themselves reportedly 180+ days
21 delinquent, on the precipice of foreclosure, and facing additional charges and fees for
22 participating in a modification program wrongfully offered to them by a servicer and facing fees
23 for their proper and rightful decision to elect mediation. After all of this, WELLS FARGO
24 contends that it has met its burden to comply with NRS 107.086 and asks for a certificate to
25 foreclose and asks for attorney's fees. [Opp. at p.4] This cannot be the law. And so it is not.

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¹⁸ If equitable sanctions were unavailable, the monetary sanctions would be increased.

1 This Court has found that the equitable imposition of a modification pursuant to NRS
2 107.086(5) would require extraordinary facts.¹⁹ This Court had not thought it would see such
3 facts. This Court was wrong.

4 **Conclusion**

5 **THEREFORE**, and good cause appearing, this Court **ORDERS** that:

6 1) **WELLS FARGO** is **SANCTIONED** in the amount of \$30,000.00 (Thirty
7 thousand dollars) for violations of NRS 107.086 and the Foreclosure Mediation Program Rules
8 payable to Petitioners within thirty (30) days of entry of this Order;

9 2) **WELLS FARGO** shall pay Petitioners' costs and attorneys' fees for the
10 mediation, the Petition for Judicial Review and the Evidentiary Hearing subject to the filing of a
11 verified request for attorneys' fees and memorandum of costs to be filed by Petitioners within
12 thirty (30) days of entry of this Order;

13 3) **WELLS FARGO** shall abide by its admission that late fees and penalties related
14 to the November 2009 modification were improper and immediately and forever cease and desist
15 any attempts to collect the same. However, penalties and late fees incurred prior to November
16 2009 are still valid;

17 4) Pursuant to NRS 107.086(5), on this Court's *de novo* finding that **WELLS**
18 **FARGO** failed to participate in good faith negotiations and lacked authority to negotiate and
19 modify the loan,²⁰ the subject note is **MODIFIED** as follows:

- 20 a) The current principal shall be re-amortized;
21 a) The payment is set at \$1145.00;
22 b) The interest rate is reduced to 2% (two percent) for the life of the note;

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26 ¹⁹ This Court has used the rules of Olympic fencing as a useful framework, dividing penalties into yellow cards, red
cards, and black cards. USA Fencing, *RULES FOR COMPETITION* (Omar Bhutta ed., 2010) Book 1, Part V, Ch. 3
27 *Penalties* t.114 – t.126. See, *Order in Navarro v. Wells Fargo Bank, NA.*, CV10-00941 at pp. 5,6; *Order in Jones v.*
National Default Servicing Corporation (Wells Fargo Bank), CV09-03551 at p.5.

28 ²⁰ This Court has specifically found that modification is warranted for either 1) lack of good faith negotiations or 2)
lack of authority. Here, both have occurred, but this Court cannot modify the same note twice. If either finding
were reversed on appeal, the modification would stand on the basis of the other finding.

1 c) The term of the note is set at ten (10) years commencing May 1, 2011 and
2 ending on May 1, 2021.²¹

3 d) There shall be no pre-payment penalty.

4 5) The Foreclosure Mediation Program shall not issue a Certificate of Completion
5 based on the presently recorded Notice of Default absent further Order from this Court.

6 **IT IS SO ORDERED.**

7 **DATED** this 29 day of March, 2011.

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9 PATRICK FLANAGAN
10 District Judge

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28 ²¹ It is the intent of this Court to amortize out the present principal with no reduction to the principal to generate a payment of \$1145.00 at an interest rate of 2%. If the term specified by this Court is of insufficient length to result in the complete payment of the note within ten (10) years, then the length shall be extended.

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CERTIFICATE OF SERVICE


Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 29 day of March, 2011, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Carole M. Pope, Esq. for Duke and Tina Renslow;

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Gregory Wilde, Esq.
Matthew Schreiber, Esq.
Wilde & Associates
208 South Jones Blvd.
Las Vegas, Nevada 89107

Stephen Wassner, Esq.
206 S. Division Street, Suite 2
Carson City, Nevada 89703


Judicial Assistant

CASE NO. CV10-03382

DUKE & TINA RENSLOW VS WELLS FARGO BANK

DATE, JUDGE
OFFICERS OF
COURT PRESENT

APPEARANCES-HEARING

1/28/11
HONORABLE
PATRICK
FLANAGAN
DEPT. NO. 7
M. Conway
(Clerk)
S. Koetting
(Reporter)

FORECLOSURE MEDIATION STATUS HEARING

Carole Pope, Esq. was present in Court on behalf of the Petitioners, who were present. Stephen Wassner, Esq. was present in Court on behalf of the Respondent, who was not present.

3:52 p.m. – Court convened.

Counsel Pope addressed the Court and argued in support of the Petition for Judicial Review. Counsel Pope argued that a loan modification was reached prior to mediation, the Petitioners made payments but that when mediation was held Respondent Wells Fargo indicated that it did not have the authority to modify the loan, as the investors did not participate in the federal H.A.M.P. program. Counsel Pope argued this was clear violation of good faith participation.

Counsel Wassner addressed the Court, argued that the Deed of Trust and certification were provided at mediation and further addressed estoppels arguments.

Counsel Pope marked for identification and offered exhibit 1; no objection.

COURT ORDERED: Exhibit 1 **ADMITTED**. Counsel Pope further argued in support of enforcing the loan modification given to the Petitioner prior to mediation.

Counsel Wassner presented further argument that the Respondent did not participate in bad faith.

COURT ORDERED: Counsel Pope to provide the Court with copies of letters and credit report documentation.

COURT ORDERED: Under taken under submission.

4:20 p.m. – Court stood in recess.

Trial Exhibits

Petitioners: Duke and Tina Renslow

PATY: Carole Pope, Esq.

Respondent: Wells Fargo Bank

RATY: Stephen Wassner, Esq.

Case No: CV10-03382

Dept. No: 7

Clerk: M. Conway

Date: 00/00/00

Exhibit No.	Party	Description	Marked	Offered	Admitted
1	Petitioner	Affidavit of Benjamin Alsasua	1-28-11	No objection	1-28-11

CASE NO. CV10-03382

DUKE & TINA RENSLOW
VS.
WELLS FARGO BANK et al

DATE, JUDGE
OFFICERS OF
COURT PRESENT

APPEARANCES-HEARING

3/17/11
HONORABLE
PATRICK
FLANAGAN
DEPT. NO. 7
M. Conway
(Clerk)
S. Koetting
(Reporter)

FORECLOSURE MEDIATION EVIDENTIARY HEARING

Carole Pope, Esq. was present in Court on behalf of the Petitioners, who were present. Stephen Wassner, Esq. was present in Court on behalf of the Respondent, with Wells Fargo loan adjuster Phillip Cargioli present.

2:00 p.m. – Court convened.

Counsel Pope addressed the Court and called **Benjamin Alsasua** who was sworn and direct examined. Counsel marked and offered exhibit 1; no objection. COURT ORDERED exhibit 1 ADMITTED. Cross-examination conducted, re-direct examination conducted, re-cross examination conducted. The witness was excused.

Counsel Pope called **Duke Renslow** who was sworn and direct examined. Counsel Pope marked for identification exhibit 2; no objection. COURT ORDERED exhibit 2 ADMITTED. Counsel Pope marked for identification exhibit 3; objection, overruled. COURT ORDERED: exhibit 3 ADMITTED. Counsel Pope marked for identification exhibit 4; no objection. COURT ORDERED: exhibit 4 ADMITTED. Counsel Pope marked for identification exhibit 5 & 6. Counsel Pope marked for identification exhibit 7; objections to exhibit 5, 6, 7; overruled. COURT ORDERED: exhibits 5, 6, 7 ADMITTED. Counsel Pope marked for identification exhibit 8; no objection. COURT ORDERED: exhibit 8 ADMITTED. Counsel Pope marked for identification exhibit 9; no objection. COURT ORDERED exhibit 9 ADMITTED. Counsel Pope marked for identification exhibit 10; objection, overruled. COURT ORDERED exhibit 10 ADMITTED.

Counsel Wassner conducted cross examination, re-direct examination conducted. Counsel Pope rested.

Counsel Wassner called **Phillip Cargioli**, who was sworn and direct examined. Cross-examination conducted. The witness was released.

Counsel Pope presented closing argument. Counsel Wassner presented his closing argument. Counsel Pope presented further closing argument.

COURT ORDERED: Matter taken under ADVISEMENT.

4:08 p.m. – Court stood in recess.

Evidentiary Hearing Exhibits

Petitioner: Duke & Tina Renslow
Respondent: Wells Fargo Bank et al.

PATY: Carole Marie Pope, Esq.
DATY: Stephen Wassner, Esq.

Case No: CV10-03382

Dept. No: 7

Clerk: M. Conway

Date: 3/17/11

Exhibit No.	Party	Description	Marked	Offered	Admitted
1	Petitioner	Mediator Statement	3-17-11	No objection	3-17-11
2	Petitioner	Copy of Deed of Trust Parcel number 086-225-04	3-17-11	No objection	3-17-11
3	Petitioner	Copy of Letter from Wells Fargo to Duke and Tina Renslow dated 9-17-09	3-17-11	Objection overruled	3-17-11
4	Petitioner	Copy of Home Affordable Modification Program Loan Trial Period	3-17-11	No objection	3-17-11
5	Petitioner	Copy of Letter from Wells Fargo to Duke and Tina Renslow dated 4-5-10	3-17-11	Objection overruled	3-17-11
6	Petitioner	Copy of Letter from Wells Fargo to Duke and Tina Renslow dated 4-29-10	3-17-11	Objection overruled	3-17-11
7	Petitioner	Copy of Letter from Wells Fargo to Duke and Tina Renslow dated 8-5-10	3-17-11	Objection overruled	3-17-11
8	Petitioner	Copy of Notice of Default and Election to Sell under Deed of Trust	3-17-11	No objection	3-17-11
9	Petitioner	Mortgage Interest Statement	3-17-11	No objection	3-17-11
10	Petitioner	Equifax Credit Report for Duke A. Renslow	3-17-11	Objection Overruled	3-17-11

1 **Code 1350**

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF WASHOE**
8

9 **DUKE RENSOLOW and TINA RENSLOW,**

10 **Plaintiffs,**

Case No. CV10-03382

11 **vs.**

Dept. No. 7

12 **WELLS FARGO BANK, and DOES 1**
13 **through 10,**

14 **Defendants.**
15 _____/

16 **CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL**

17 I certify that I am an employee of the Second Judicial District Court of the State of
18 Nevada, County of Washoe; that on the 3rd day of May, 2011, I electronically filed the
19 Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

20 I further certify that the transmitted record is a copy of the original pleadings on file
21 with the Second Judicial District Court.

22 Dated this 3rd day of May, 2011.

23 **HOWARD W. CONYERS**
24 **CLERK OF THE COURT**

25
26 By /s/Lori Matheus
27 Lori Matheus
28 Deputy Clerk