IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK,

Appellant,

vs.

DUKE RENSLOW and TINA RENSLOW,

Respondents.

SUPREME COURT NO. 58283

District Court Case No. CV10-03382

REQUEST FOR JUDICIAL NOTICE

WELLS FARGO BANK, Appellant, by and through its counsel of record, the firm of SNELL & WILMER LLP, requests that the Court take judicial notice of Order in *Kuhl v. Carrington Mortgage Services, LLC*, CA 11-00325 (Washoe County District Court) (Flanagan, J.).

Under NRS 47.150, "a court must mandatorily take judicial notice if requested to do so by counsel and if provided the necessary information." *Andolino v. State*, 99 Nev. 346, 351, 662 P.2d 631, 633 (1983). Any fact not reasonably open to dispute should then be judicially noticed. *Sheriff, Clark County v. Kravetz*, 96 Nev. 919, 920, 620 P.2d 868, 869 (1980). The Court may take judicial notice of matters of public record. *See, e.g., United States v. 14.02 Acres of Land*, 547 F.3d 943, 955 (9th Cir. 2008) (the court "may take judicial notice of matters of public record") (citations and internal quotation marks omitted). When appropriate, the Court may take judicial notice of the record in another case. *Mack v. Estate of Mack*, 206 P.3d 98, 106 (Nev. 2009); *see also Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981). When the court takes judicial notice of a matter of public record, such as another court's opinion, it does so for the existence of the document, not for the truth of the facts therein. *In re Western States Wholesale Natural Gas Antitrust Litigation*, 633 F. Supp.2d 1151, 1168 -1169 (D. Nev. 2007).

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Judicial notice of the district court's Order in *Kuhl v. Carrington Mortgage Services, LLC*, CA 11-00325 is proper because it is a public record. Further, Wells Fargo does not submit the document for the truth of the facts it contains, but rather for the existence of the document and the statements contained therein.

Accordingly, this Court should take judicial notice under NRS 47.150 of the above-referenced Order.

DATED this 3rd day of October, 2011.

SNELL & WILMER, L.L.P.

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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., and I certify that I served a copy of the foregoing **REQUEST FOR JUDICIAL NOTICE** on the 3rd day of October, 2011, via electronic service through the Nevada Supreme 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:

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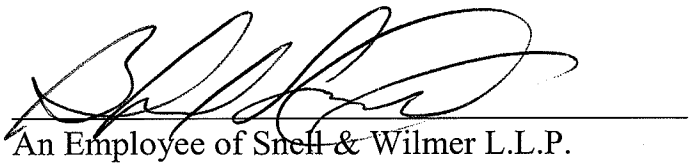

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EXHIBIT A

EXHIBIT A

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

NATHAN & DOROTHY KUHL
Petitioners,

vs.

CARRINGTON MORTGAGE SERVICES, LLC, DEUTSCHE BANK NATIONAL TRUST COMPANY, as Indenture Trustee, for NEW CENTURY HOME EQUITY LOAN TRUST 2006-1, and DOES I-X,
Respondents.

Case No.: CV11-00325

Dept. No.: 7

ORDER

Procedural History

On January 19, 2011 Petitioners NATHAN and DOROTHY KUHL and Respondent CARRINGTON MORTGAGE SERVICES, LLC attended a mediation under the auspices of the Foreclosure Mediation Program. No agreement was reached. On January 31, 2011 Petitioners filed a Petition for Judicial Review. On February 4, 2011, this Court entered its Order for Judicial Review. On February 22, 2011, Respondents filed an Answering Brief. On February 28, 2011 Petitioners filed their *Reply*. On March 3, 2011 oral arguments were held.

On March 7, 2011, this Court entered an *Order*. On March 24, 2011, Respondents filed a *Motion for Clarification of Order on Petition for Judicial Review or, Alternatively, Motion for Leave to File Motion for Reconsideration*. On April 1, 2011, Petitioner filed a *Response*. On

April 5, 2011, Petitioner filed an *Errata to Response*, making minor corrections to verbiage. On April 11, 2011, Respondents filed their *Reply*, and submitted the *Motion* for consideration.

Legal Standards

The Foreclosure Mediation Program Rules contain no specific provision authorizing or governing reconsideration or rehearing of an *Order* entered after hearing on a Petition for Judicial Review.

WDCR 12(8) governs the rehearing of motions, and states that all rehearing must be done in conformity with DCR 13(7), other than motions brought under NRCP 50(b), 52(b), 59, or 60.

DCR 13(7) also addresses rehearing of motions, and states that no motion once heard and disposed of shall be renewed unless by leave of court is granted upon the filing of a Motion for Leave to File Motion for Reconsideration.

NRCP 60(a) provides that a party may seek relief from "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

NRCP 52(b) permits a party to move the Court to amend the findings contained in a judgment, which pursuant NRCP 54(a) can be liberally construed as any final order.

Motions for reconsideration are to be denied with the exception of "very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached" by the court. Moore v. City of Las Vegas, 92 Nev. 402, 405 (1976). A decision may be reconsidered "if substantially different evidence is subsequently introduced or the decision is clearly erroneous." Masonry and Title Contractors Association of Southern Nevada v. Jolley, Urga & Wirth, 113 Nev. 737, 741 (1997). A motion for rehearing and reconsideration is appropriate to avoid manifest injustice. 56 Am. Jur. 2d Motions, Rules, and Orders § 40 (2010).

Discussion

Nevada has a longstanding policy of adjudication on the merits, rather than on procedural grounds. In the context of the Foreclosure Mediation Program, this Court does not find that a Petition for Judicial review is a "motion" such that DCR 13(7) is directly applicable. However,

in the interest of justice, and consistent with the longstanding public policy of Nevada, this Court shall address Respondent's *Motion* on its merits under the standards of DCR 13(7) and WDCR 12(8) as requested by Respondent.

Motion for Clarification – Measure of "Indebtedness" for Deficiency Judgment

Measure of NRS 40.451

Respondents request this Court declare this Court's interpretation of the meaning of NRS 40.451's limitation clause which limits the amount of "indebtedness" to the amount the lienholder paid for the lien.

Respondents contend that NRS 40.451's limitation clause "contemplates the amount paid by the original lienholder at the time the lien was created." [Mot. at p.4] This Court disagrees. If Respondent's interpretation was correct, then there would be no meaning to the clause, "Such amount constituting a lien is limited to the amount of the consideration paid by the lienholder" NRS 40.451. The plain language of NRS 40.451 controls.

Respondents contend, and it is true, that, "The district court is . . . required to consider the underlying public policy of deciding a case on the merits *whenever possible.*" *Moseley v. Eighth Judicial District Court ex rel. County of Clark*, 188 P.3d 1136 (Nev. 2008). (*emphasis added*)

However, not all decisions are amenable to a district court independently assessing the best practices and public policy and ruling accordingly. When the Legislature uses clear and unambiguous language, the Courts cannot lend a statute different construction, even if the application of the literal language of the statute results in an impractical or inequitable result. *Union Plaza Hotel v. Jackson*, 101 Nev. 733, 736 (1985); *Randono v. CUNA Mutual Ins. Group*, 106 Nev. 371, 374 (1990); *Barrios-Lomeli v. State*, 114 Nev. 779, 780 (1998).

Respondents contend that this Court's March 7 Order may have been entered without this Court's full recognition of the unintended consequences of the ruling. [Mot. at p.7] As above, in the face of clear and unambiguous language from the Legislature expressly stating that the amount of indebtedness is limited to the amount the lienholder paid for the lien, this Court is not empowered to arrive at a contrary construction.

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Furthermore, this situation highlights many of the unintended consequences of the MERS system.[1] Where the deed and note are transferred as one, with the deed a mere appendage to the note as was the traditional practice,[2] then the amount paid for the lien is naturally the amount paid for *both* the deed and the note. However, when a deed and note have been severed and independently transferred and assigned, then the amount paid for the lien is the amount paid for the assignment of the deed of trust, because the deed of trust is the lien.

Respondent is absolutely correct in stating that the operation of modern mortgage practices, when placed against the statutory scheme of Nevada, and other states, creates a host of unintended consequences. However, these consequences were caused by the novel innovations of the finance industry. When MERS was devised in the 1990s, the proponents of MERS operating in Nevada had notice that NRS 40.451 existed and limited recovery to the amount paid for the lien. Their decision to depart from traditional mortgage practices was taken at their own peril. Mistakes were made, and here CARRINGTON may have to bear the burden of the decision to depart from traditional practices. Such innovation allowed a great number of mortgages to be originated and serviced, this volume is a benefit of the innovation of MERS. It is not inequitable for place the burden for the consequences of MERS on the same entities who benefited. To be certain, homeowners benefitted from MERS as well, with increasing availability of mortgages. However, the creators of a system that alters centuries of practice and ignores centuries of law cannot reasonably expect the courts to declare the law to be other than what it is in order to provide maximum benefit to the financial industry, even if such a decision would encourage more lending within the State of Nevada, which is undoubtedly beneficial public policy.

Simply put, in creating MERS the banks got ahead of the law. They did so at their own risk. Asking this Court to declare that NRS 40.451 allows a successor in interest to use the

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[1] The legitimacy of the MERS system is not at issue, and this Court makes no findings thereon. However, even assuming *arguendo* that the MERS system is permissible, that system and its member banks must comply with Nevada statutes. Thus, even assuming that MERS is a *bona fide* beneficiary of record in its capacity as nominee for a lender, the note and deed have been severed because they presently belong to separate entities. MERS, if it indeed is permissible, can only operate if splitting can occur and is not fatal to the security instrument. *See*, Restatement (Third) Property – Mortgages § 5.4

[2] *See*, Carpenter v. Longan, 83 U.S. 271 (1872)

original amount of the note as the amount of indebtedness; in spite of the clear language that the indebtedness is limited to the amount the lienholder paid for the lien, is a request that this Court provide cover for the unintended consequences that innovation has wrought. This the courts cannot do. It would be inequitable to ignore the plain language of the law to permit financial institutions to obtain the benefits of securitization while retaining the benefits of seeking a deficiency judgment as if the note and deed had not been split for purposes of securitization.[3]

Amount Specified by NRS 40.451 is Amount Paid for Lien by Current Lienholder

Therefore, this Court finds that whatever amount has been paid by the current lienholder for the lien they possess is the amount specified by NRS 40.451. Where the deed and the note have been continuously assigned and transferred together as a unit as per the traditional method, then the amount paid for both of them together is the NRS 40.451 amount because they are interconnected, the assignment of one is the assignment of the other, the amount paid for one is the amount paid for the other. *See*, Restatement (Third) Property – Mortgages § 5.4 (a)&(b).

However, where the deed and note have been split,[4] and each have been separately transferred, as in the MERS system, then the amount paid for the lien is the amount of consideration paid for the assignment of the deed of trust alone. *See*, Restatement (Third) Property – Mortgages § 5.4 (c).[5]

Motion for Reconsideration

Respondent requests leave to file a motion for reconsideration under DCR 13(7) and WDCR 12(8) if this Court's *Order* in response to the *Motion for Clarification* results in a finding that the amount specified in NRS 40.451 is the amount paid for the assignment of the deed of trust. Although this Court does not find that a Petition for Judicial Review is a "motion" within the meaning of DCR 13(7), this Court **GRANTS** leave to file a *Motion for Reconsideration* under WDCR 12(8) to address the complex and novel issues raised.

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[3] To avoid any confusion, a "secured note" is a promissory note secured by a deed of trust, a "securitized note" is a note which has been bundled and resold as a "mortgaged back security". It is somewhat ironic that a key dispute in modern mortgage practice is whether "securitization" renders a note practically "unsecured".

[4] This Court makes no finding as to whether splitting a note and deed is fatal to the security interest in the property.

[5] The issue of how to calculate the NRS 40.451 value if the deed and note have been split, subsequently assigned and transferred to the same entity, and then later assigned as a unit to another entity is not before this Court.

Value of Assignment Raised at Mediation Places NRS 40.451 Fairly in Play

Respondent contends that NRS 40.451 was not discussed on the mediator's statement, and was not raised specifically by Petitioner. This Court has found that if the NRS 40.451 issue is not raised at the mediation, then it certainly did not have an impact on the mediation and thus would not impact "good faith negotiation". However, Respondent does concede that the counsel for Petitioner, "made an innocuous request for the amount paid for the assignment without reference to the statute." [Mot. at p.13] This Court finds that the issue was fairly raised.

Constitutionality of March 7 Order

Respondents allege that "The Constitution of the State of Nevada prohibits the judiciary from exercising functions designated to the legislature, including rulemaking. Can this Court create a rule requiring Carrington to disclose the deficiency judgment liability?" [Mot at p.10]

Respondents appear to misapprehend the nature of this Court's March 7 Order. This Court is tasked with determining the presence of bad faith, and imposing sanctions pursuant to NRS 107.086 which incorporates a good faith standard. This Court found that in this action the refusal to disclose the NRS 40.451 information had a material adverse impact on the homeowner and thus fell below the threshold of good faith negotiation. This Court explained the basis for that finding such the parties would have a firm understanding going forward of when this Court would find the refusal to disclose NRS 40.451 information to fall below the good faith threshold.

If this Court's March 7 Order finding that failure to disclose information sought by a homeowner when that information was relevant and material to the homeowner's ability to make an informed decision fell below the threshold of good faith negotiation constitutes the exercise of "legislative powers", then Respondent's contention appears to be that the Courts of Nevada lack authority to interpret law and advance the Common Law of this State. That contention is absurd.

The function of the Court is to interpret the law, and apply facts of a particular case to the law, and to reach findings and conclusions on how those facts comport with the law. This Court interpreted "good faith" from NRS 107.086 as requiring the disclosure of relevant and material information that impacts a parties ability to negotiate. This Court found that providing relevant and material information that enables a party to properly value proposals during negotiation

meets the threshold of good faith negotiation, and that withholding such information falls below the threshold of good faith negotiation. This Court found that NRS 40.451 information constitutes such information in certain situations, illustrated by the March 7 Order. This Court found that this case was such a situation. This Court concluded that, in this action, good faith negotiation had been prevented due to the refusal to reveal NRS 40.451 information or release the KUHL'S from liability which would have rendered such information moot.

Simply put, it may be said that the role of the Court is to answer questions. Here, the Court was asked whether failure to provide NRS 40.451 violated the good faith requirement of NRS 107.086. Petitioner contended such refusal did, Respondent contended it did not. This Court answered, stating that in certain instances such as the present action, the failure to provide NRS 40.451 information combined with the refusal to release a homeowner from liability failed to meet the threshold of good faith negotiation. This is not "legislative action." This is judging whether a party's actions met the legislative imperative that good faith negotiations occur, and a finding that such good faith negotiations did not occur. Thus the Nevada Constitution's stringent separation of powers clause was not offended. Nev. Const. art. 3 §1.

Good Faith, Bad Faith, Technical Compliance and Violation All Different Inquiries

Respondents correctly state that this Court did not find that CARRINGTON had committed any technical violations of the Rules or NRS 107.086(4) [Mot. at p.11]

This Court does not find that technical compliance or technical violations are synonymous with good faith or bad faith participation. The two comprise separate inquiries. This Court has found that a party who violates one of the Foreclosure Mediation Program Rules through some technical deficiency, such as a sixty-one day old appraisal, who nonetheless appeared with authority and negotiated in good faith may not be amenable to sanctions where the violation had no negative impact on the mediation. This Court has found that "substantial compliance" with the Foreclosure Mediation Program Rules is often sufficient, although the dictates of NRS 107.086(4) must be strictly adhered to.

Conversely, as here, a party may meet all of the technical document production requirements of the Foreclosure Mediation Program Rules and NRS 107.086(4), yet still fall

below the threshold of "good faith" negotiation where their conduct does have a negative impact on the mediation.

Respondent also contends that this Court expressly found that CARRINGTON did not act in "bad faith". This is true, however, this Court has ruled numerous times that "bad faith" is not the mere absence of "good faith". If the two were binary constructs, and "bad faith" was found whenever "good faith" was not found, then this Court would find that CARRINGTON acted in bad faith. However, absent further guidance from the Supreme Court, this Court does not conceive of those two concepts as binary in the context of foreclosure mediation. Thus, it is not inconsistent to find that CARRINGTON satisfied the technical production requirements of NRS 107.086 and the Foreclosure Mediation Program Rules, did not act in "bad faith" under the Foreclosure Mediation Program Rules, and yet nevertheless failed to satisfy the "good faith negotiation" requirement of NRS 107.086.

Statute and Rules Do Not Conflict

Respondent alleges that the Foreclosure Mediation Rules contemplate *de novo* review on Petition for Judicial Review. Respondent contends that, "such a standard conflicts with the scope of review set forth by statute. As a result, the question then becomes simply, which controls: the statute or the FMP Rules?"

As a preliminary matter, if a conflict between the FMP Rules and NRS 107.086 arises, then NRS 107.086 trumps. However, courts are directed to first attempt to harmonize statutes with each other, and to harmonize statutes with rules if possible. For instance, the Foreclosure Mediation Program Rules contemplate review of "bad faith", where NRS 107.086 mandates review of "good faith". This Court, rather than finding a conflict between those two terms, has adopted definitions of each that allow this Court to analyze each independently.[6]

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[6] Counsel to this action are familiar with the definitions used by this Court as laid out in Navarro v. Wells Fargo, CV10-00941, pp.9,10

Respondent contends that the full and exhaustive scope of this Court's authority is laid out in NRS 107.086(5)

> If the beneficiary of the deed of trust or the representative fails to attend the mediation, fails to participate in the mediation in good faith or does not bring to the mediation each document required by subsection 4 or does not have the authority or access to a person with the authority required by subsection 4, the mediator shall prepare and submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions against the beneficiary of the deed of trust or the representative. The court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate, including, without limitation, requiring a loan modification in the manner determined proper by the court.

In reviewing NRS 107.086(5) to ascertain the intention of the legislature,[7] this Court finds that the Legislature clearly granted the Court discretion to impose sanctions as the Court "determines appropriate." NRS 107.086(5). This is a plain and unambiguous grant of discretion. This Court finds that this discretion encompasses both the nature of sanctions and the nature of sanctionable conduct. Nowhere in the language of NRS 107.086(5) are there words of limitation that state or infer that the Court is limited to reviewing solely those matters contained on the Mediator's Statement. Neither does NRS 107.086(5) specify a standard of review. Further, NRS 107.086(8) specifically mandates the enactment of the Foreclosure Mediation Program Rules. This Court finds that NRS 107.086(5) is not the exhaustive source of authority of this District Court, rather NRS 107.086(5) and (8) provide the authority for this Court's actions

Were the Foreclosure Mediation Program Rules to excuse the production of a document required by NRS 107.086(4), that would be a conflict and the statute would prevail. However, the use of *de novo* review is merely a specification of the administration of review in the Foreclosure Mediation Program, which is clearly authorized by NRS 107.086(8), and does not contradict NRS 107.086(5).

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[7] *Ex Parte Smith*, 33 Nev. 466 (1910)

Thus, there is no conflict between the Foreclosure Mediation Program Rules which specifies a *de novo* review and the language of NRS 107.086(5) and (8).

Petition for Judicial Review under NRS 107.086 Not the Same as in NRS Chapter 233B

Judicial Review of an administrative act is governed by NRS 233B.130. While the Foreclosure Mediation Program is certainly an Administrative Agency, the Petitions for Judicial Review commonly filed in these actions do not challenge any action by the FMP itself. This matter is not a case wherein the administrative actions of the FMP were challenged. Thus, NRS Chapter 233B is not applicable. NRS 107.086(5) does not create a system wherein a mediation occurs, and then a certificate is or is not issued and then the decision of the Foreclosure Mediation Program Administrator is reviewed under NRS 233B.130. Rather, the term Petition for Judicial Review is the name given to the device available to each party to the Foreclosure Mediation to seek review of the *parties* conduct within the mediation.

The use of the phrase Petition for Judicial Review has caused some consternation. This is not the first action in which a Chapter 233B argument has been raised. Therefore, this Court takes the opportunity to state that, absent further guidance from the Nevada Supreme Court, this Court does not find Chapter 233B to be relevant to the Petitions for Judicial Review under NRS 107.086 and the Foreclosure Mediation Program Rules.

If a party seeks to challenge the actions of the Foreclosure Mediation Program itself, then a Chapter 233B Petition would be the appropriate vehicle. However, that is not the case here.

Respondent cites to an unpublished Nevada Supreme Court decision which states that for purposes of service of process of the Petition itself, a Petition for Judicial Review under NRS 107.086 is treated similarly to a Petition for Judicial Review under the Nevada Administrative Procedures Act allowing for service by way of NRCP 5 instead of NRCP 4.[8] However, this does not mean that the Nevada Supreme Court *applied* the NAPA to Petitions for Judicial Review

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[8] SCR 123 provides that unpublished orders shall not be regarded as precedent. However, in the absence of [illegible] authority, this Court looks to this unpublished order as persuasive.

under NRS 107.086. Indeed, the Nevada Supreme Court highlighted a difference between the two forms of Petitions regarding appropriate parties thereto.

> Petitions for judicial review for a determination of bad faith participation in the foreclosure mediation program, however, involve ongoing proceedings and only parties to those proceedings may be named as respondents. *Cf.* NRS 233B.130(2)(a) (stating that a petition for judicial review of a final decision in an administrative proceeding must "[n]ame as respondents the agency and all parties of record to the administrative proceeding").

BAC Home Loans Servicing, LP v. Eighth Judicial Dist. Court ex rel. County of Clark 2010 WL 3410604, 1 (Nev.,2010)

This Court does not find that Chapter 233B and attending case law controls, as this is not a Petition for Judicial Review of an administrative agency's actions. The sole scope of binding authority governing such mediations and review thereof at this point is NRS 107.086 and the Foreclosure Mediation Program Rules.

Respondent does point out that NRS 107.086(5) provides that a mediator shall prepare and submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions. [Mot. at p.12] This directive is handled by way of the FMP Mediator's Statement, the Mediator's Statement is the NRS 107.086(5) "petition and recommendation" prepared by the Mediator and submitted to the Mediation Administrator. The Petitions for Judicial Review filed in the District Courts by parties to the mediation concerning the conduct of parties at the mediation are different. These Petitions are authorized by the Foreclosure Mediation Program Rule 21 [Former Rule 6], which is itself authorized by NRS 107.086(8)(d) which mandates that the Supreme Court enact such rules to competently administer the program.

Accordingly, while NRS 107.086(5) governs the nature of sanctions that may be issued, it is truly NRS 107.086(8) the Foreclosure Mediation Program Rules specifically authorized and mandated by NRS 107.086(8) that govern the procedure and standards of Judicial Review of foreclosure mediations.

Sufficiency of Conditional Waiver of Deficiency To Avoid Disclosure of NRS 40.451 Amount

Respondents offered a "HAFA" short sale, which was rejected by Petitioners. Had Petitioner's accepted this particular exit strategy, any deficiency liability would have been

waived. Respondent contends that this offer satisfies this Court's analysis that lenders must "reveal or release" the potential deficiency liability. This is an attractive argument, but it suffers from the same essential problem that exists when the NRS 40.451 information is withheld.

This Court perceives a difference between agreeing to waive deficiency liability and offering one option which includes such a waiver. Indeed, as stated in this Court's March 7 Order, this Court finds that the inability to properly compare options is one of the key reasons why NRS 40.451 information is relevant and why the failure to provide such information may fall below the threshold of good faith negotiation. Thus, although Respondents had offered one exit strategy that included a waiver, Petitioners had no way of *valuing* that waiver. Therefore, Petitioners were unable to make a truly informed decision on whether a HAFA short sale with a deficiency waiver was preferable to some other exit strategy with no deficiency waiver.

After all, if there were no recoverable deficiency, then the HAFA deficiency waiver feature is of no value. Perhaps other exit strategies would be preferable under those terms.

Potential deficiency liability hangs over the head of a homeowner like the sword of Damocles. Respondents offer of a HAFA short sale would allow Petitioner to avoid having the sword crash down upon her head if she would only accept this certain offer. In determining whether Respondents' HAFA offer was attractive, it is relevant to Petitioner whether the sword above her head is a claymore or cocktail skewer.

To be clear, the NRS 40.451 information need not be disclosed in *all* mediations. If a homeowner does not ask for the information, then the absence of that information had no impact on the mediation and is not a matter of faith, good or bad. If the homeowner and lender agree to a modification, then no deficiency judgment will occur, and the NRS 40.451 information is irrelevant. Where the lender at the mediation is the originator, then the face value of the note controls and that information is knowable by all parties. Further, this Court finds that it is absolutely permissible for a lender to withhold the NRS 40.451 information if they grant an *unequivocal* release. The release must be unequivocal because only an unequivocal, non-conditional release renders the NRS 40.451 information irrelevant. Phrased another way,

homeowners are not entitled to know information that *will* not impact them, they are entitled to know information that only *may* not impact them.

NRS 40.451 Acts As a Limitation On Amount That May Be Sought In Deficiency Action

Respondents cite to NRS 104.3203 for the prospect that an assignee obtains all the rights of the assignor. Respondents contend that in order to harmonize NRS 40.451 with NRS 104.3203, the best solution is to construe the language of NRS 40.451 as referring to the amount of consideration paid by the originator in making the note.

There are several novel legal issues raised by this contention. First, NRS 40.451 focuses on the "lien", which this Court finds to be the deed of trust or mortgage. However, NRS 104.3203 is concerned with actual promissory notes. Both statutes were written at a time where the transfer of one included the transfer of the other.

Respondent's citation to *Giorgi v. Pioneer Title Ins. Co.*, 85 Nev. 319 (1969) highlights the tension between the laws regarding notes and the laws regarding deeds. In *Giorgi*, the Nevada Supreme Court held that recording statutes did not provide notice such that a trustee was liable for disbursement according to the note when an assignment of the deed had been recorded.

Tellingly, even in the era prior to mass securitization, the Nevada Supreme Court recognized, "Admittedly, the problem of harmonizing the effect of our recording statutes with the rules of negotiable instruments so as not to interfere with the commercial mobility of the debt is a troublesome one." *Id.* at 322.

Notably, the Nevada Supreme Court did not hold that all rights, direct and indirect, in a mortgage or deed of trust are governed by the UCC. Rather, the Nevada Supreme Court held that issues concerning *payments* of a note concerning a home loan secured by mortgage or deed of trust are so governed. "*In the case of a payment of a mortgage or deed of trust securing a negotiable instrument*, the rule suggested by the great weight of authority is that the rights of the parties thereto, as well as third persons, are governed by rules relating to negotiable paper." *Id.* at 321 (*emphasis added*). *Giorgi* was concerned with the interplay between the recording statutes of Nevada concerning the deed of trust and payment obligations on the note. The very

language used in *Giorgi* reflects a time when the mortgage or deed of trust was conceived as part and parcel of the note, with reference to making a "*payment* of a mortgage or deed of trust." *Id.*

In modern mortgage practice, it is undisputed that notes and their security instruments, whether mortgage or deed of trust, are separate things. If they were the same, then MERS would not work. Every transfer of the note would be a *de facto* transfer of the deed of trust, resulting in a wild deed situation unless each transfer was recorded. This Court finds that MERS is only tenable under the Restatement (Third) of Property – Mortgages § 5.4, treating the note and deed as two distinct things which may be separately transferred and assigned.

Even if NRS 104.3203 were held to govern all rights of a bare deed of trust, this Court, in weighing NRS 40.451 against NRS 104.3203 finds that NRS 40.451's limitation clause acts as a limitation on the amount that may be sought by a successor in interest pursuant to the rights obtained by that successor in interest through NRS 104.3203. This is a limitation on remedy, not on right. CARRINGTON may seek a deficiency judgment if a deficiency exists. They obtained that right through the assignment. However, the amount they may seek is limited to the amount they paid in consideration for the lien. Thus, here, CARRINGTON assumed all rights under the Deed of Trust through the Assignment from New Century Mortgages, but these rights are defined according to statute. NRS 104.3203 upholds and assured CARRINGTON the right to seek a deficiency judgment. NRS 40.451 defines what amounts limit CARRINGTON'S potential recovery.

Resopndent's contention, "Upon any transfer of the deed of trust, NRS 104.3203(2) commands that all rights of the original lienholder will pass by assignment to the successor beneficiary – including the right to obtain a full deficiency judgment." [Mot. at pp.14-15] Respondent's contention is that the right to obtain a full deficiency judgment means the right to obtain a deficiency judgment at the same amount that the assignor could have sought.

The ultimate question is, "What is the measure of deficiency?" Respondent contends that the measure is always the difference between the outstanding loan measured at face value of the note and the amount recovered at a trustee's sale. This Court finds that the Nevada Legislature specifically limited the amount to the consideration paid by the current lienholder. Thus, the

measure is the difference between the amount paid by the lienholder and the amount recovered at the trustee's sale. A lienholder can seek a deficiency judgment only if they have realized a loss on their investment. The only way for them to realize a loss is to have the fair market value sale of the home result in less money than the lienholder paid for their interest in the property. If the trustee's sale returns more money than the lienholder paid, the lienholder has suffered no loss which may be compensated through damages sought by a deficiency judgment action.

This Court finds that this is the only reading that gives effect to the plain language of the final sentence of NRS 40.451. Respondent's preferred construction ignores the plain language of NRS 40.451 which focuses on the present lien and the current lienholder. The Legislature did not say that "lien is limited to the amount of the original note, " in the final sentence. Thus, this Court finds itself unable to apply the construction favored by Respondents.

This Court notes that NRS 104.3203(2) states that the "transferee cannot acquire rights of a holder . . . if the transferee engaged in . . . illegality affecting the instrument." This Court finds that this very issue is an open question regarding the validity of MERS assignments, as set forth by Petitioners in their *Response*. Such a question, however, is not before the Court by way of the instant *Motion for Reconsideration*, and this Court finds that substantive questions regarding the validity of a note and transfer thereof, or deed of trust and assignment thereof, exceed the scope of inquiry in actions for judicial review of foreclosure mediations.

The March 7 Order Does Not Conflict With Supreme Court Jurisprudence

Respondent contends that this Court's March 7 Order conflicts with Nevada Supreme Court jurisprudence on the subject of deficiency judgment. [Mot. at p.15] Specifically, Respondent cites to *First Interstate Bank v. Shields*, 102 Nev. 616 (1986). However, *Shields* does not deal with a situation wherein a lender has assigned a deed of trust and note, let alone assigned a bare deed of trust away from the note.

Further, although Shields cites to NRS 40.451 as a component of the deficiency judgment statutes, *Shields* does not analyze NRS 40.451, rather the focus is on NRS 40.457 and 40.459 concerning the fair market value hearing. Shields does not provide guidance on the state

of the law concerning the valuation of indebtedness in the face of an assignment of a bare deeds of trust.

Tellingly, in *Shields*, the Nevada Supreme Court founds that the protective clauses of the deficiency judgment statutes to encompass guarantee contracts. This Court thusly finds that the most recent opinion of the Nevada Supreme Court liberally construes the protective clauses of the deficiency judgment statutes.

Thus, the March 7 Order does not conflict with *Shields*. Were this a case where Respondents were the originators of the loan, then the inquiry into the amount of consideration paid for the lien would be irrelevant, as it would be the face value of the note. However, that is not the case at issue here.

This Court's Interpretation of the Plain Language Of The Statute Satisfies The Statute's Purpose

Respondent contends that this Court's reading of the plain and unambiguous language of NRS 40.451 "does not serve the policy objective of the statute." This Court disagrees. The policy objective of the clause, "Such amount constituting a lien is limited to the amount of the consideration paid by the lienholder," is apparent on its face. The purpose of that clause is to limit the amount of the "lien", which acts as a cap on the amount of the "indebtedness". The Nevada Supreme Court has taken an expansive view on the anti-deficiency protections afforded in NRS 40.451. *See*, First Interatate Bank of Nevada v. Shields, 102 Nev. 616 (1986) (expanding anti-deficiency protections to a guarantor)

To be certain, at the time that NRS 40.451 was drafted, prior to the emergence of securitization and MERS, the Legislature was most likely acting under the impression that the deed and the note were unified, and thus the consideration paid would be the consideration paid for the note. Thus, it is likely that the Legislature intended to avoid a situation where one company, acting as a successor lienholder, could pay $20,000 for a distressed note worth $40,000, secured by a $30,000 piece of property, conduct a foreclosure for $30,000 and seek an additional $10,000. This is prudent policy because it discourages profiteering from the loss of homeownership. In the case outlined above, the successor lienholder has already profited by obtaining a security worth $30,000 for the price of $20,000. This rule strikes a good balance

between the rights of homeowners and lenders, discouraging profiteering while permitting a lender or successor to recover the amount that they have actually paid so as to avoid any loss.

This Court absolutely agrees that the Legislature in 1969 did not conceive of a situation wherein the "lien" component of a home loan, the mortgage or deed of trust, would be separately assigned for separate consideration. However, the Legislature chose plain and unambiguous language, and this Court is not empowered to substitute its own conceptions of what would be prudent in the face of such a clear and unambiguous languages. The Legislature chose to focus on the "lien" and not the note. Thus, when the two have been severed, it is the consideration of the "lien" that is relevant to NRS 40.451. Even if this Court were to find such a result unbalanced or imprudent, the plain language of the statute controls. This Court is not empowered to replace the word "lien" with "loan", or "mortgage" with "note". *Union Plaza Hotel v. Jackson*, 101 Nev. 733, 736 (1985); *Randono v. CUNA Mutual Ins. Group*, 106 Nev. 371, 374 (1990); *Barrios-Lomeli v. State*, 114 Nev. 779, 780 (1998).

Requiring Disclosure Does Not Restrict Right of Beneficiary To Obtain Deficiency Judgment

Respondent contends that this Court's March 7 Order "reduces Borrowers' exposure to a deficiency judgment, thus providing a benefit to the Borrowers for defaulting on their mortgage payments." [Mot at p.17] This Court disagrees. Insofar as Respondents contend that the finding that a lender must reveal the NRS 40.451 information or release homeowners from liability in order to satisfy the requirement of "good faith negotiation", that does not "reduce" any exposure that Borrowers face. It merely mandates that Borrowers be informed of the maximum exposure they may face so that they may make informed decisions.

Insofar as Respondents contend that this Court has in some way "reduced" exposure through this Court's interpretation of NRS 40.451's limitation clause, this Court disagrees. This Court has done no more than read the plain language of the statute which states that the amount of indebtedness is limited to the amount of consideration paid by the lienholder for the lien. The plain and unambiguous language of that statute is what controls the exposure that may Borrowers face. If a lender has caused the lien to be severed from the loan, and independently transferred

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the lien for separate consideration then any purported "windfall" has occurred because of lender's improvident actions. There is no inequity in holding parties to the consequences of their actions.

In their *Reply*, Respondents illustrate a scenario in which a successor in interest could buy an interest in the property at an inflated amount resulting in profiteering. [Reply at pp.3,4] This Court does not find this to be possible, as the first sentence of NRS 40.451 limits the indebtedness to the original amount, plus certain allowed interest and fees. NRS 40.451's last sentence does not say that indebtedness is whatever the lienholder has paid. Rather the last sentence is a limit on the first sentence. NRS 40.451's value is the original price of the note, plus certain allowed fees and interest or the consideration paid by the current lienholder, whichever is lower. This Court does find that if a $40,000 lien was sold for $20,000 and then for $30,000 that the $30,000 figure would control, as it would be the amount paid for the lien by the current lienholder, but would not exceed the amount specified by the first sentence of NRS 40.451.

Conclusion and Order

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

1) The term, "a lien is limited to the amount of consideration paid by the lienholder," is hereby clarified consistent with the above discussion;

2) The *Alternative Motion for Leave To File Motion for Reconsideration* is **GRANTED;**

3) The *Motion for Reconsideration* is **DENIED.**

IT IS SO ORDERED.

DATED this 6 day of May, 2011.

Patrick Flanagan

PATRICK FLANAGAN
District Judge

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 10 day of May, 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:

Michael Brooks, Esq. for OneWest Bank, FSB; and

Mark Mausert, Esq. for Robert and Mary K. Peterson

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:

Judicial Assistant