IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK, *Appellant*, v. DUKE RENSLOW and TINA RENSLOW, *Respondents*.	Case No.: 58283 District Court Case No.: CV 10-03382

Appeal from the Eighth Judicial District Court, Clark County
THE HONORABLE PATRICK FLANAGAN, District Judge
District Court Case Number CV 10-03382

BRIEF OF *AMICUS CURIAE*
UNITED TRUSTEES ASSOCIATION
(Brief Supports Reversal)

By: _____

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

CASES

United States Supreme Court Cases

Nevada Supreme Court Cases

United States Federal District Court Cases, District of Nevada

Ninth Circuit Court Of Appeals Cases

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae, United Trustees Association ("UTA"), is an organization comprised of those acting as foreclosure trustees executing powers of sale contained in deeds of trust in accordance with the provisions of Nevada Revised Statute 107.080. Members include employees of title companies, financial institutions, independent companies, attorneys, and allied and support organizations. UTA hosts advanced courses, certifications, and an annual educational conference taught by experts in the field of foreclosure law, as well as a trade show that is widely considered one of the best in the industry. Most importantly, with respect to this litigation, UTA and its members have actively participated in the Foreclosure Mediation Program, and have been scrupulous in adhering to its mandate and rules. Additionally, UTA believes that the outcome of this litigation may directly affect the way that UTA members conduct their business. Therefore, UTA petitions the court for leave to file, and respectfully submits this *amicus curiae* brief in support of the Appellant.

STATEMENT OF THE CASE

UTA adopts the Statement of Facts set forth in the Opening Brief filed by Appellant. UTA also adopts the references in Appellant's brief to the parties' Joint Appendix.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

UTA addresses Wells Fargo Bank's challenge to the District Court Judge's Order modifying the subject mortgage, as the Order is an unconstitutional exercise of judicial authority that impinges upon a trustee's contractual power to perform a trustee's sale. UTA respectfully submits that Assembly Bill 149, creating the Nevada Foreclosure Mediation Program, constitutes an assumption of executive authority by the Nevada Supreme Court that violates separation of powers pursuant to Article 3, Section 1 of the Nevada Constitution.

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Specifically, this Court has long maintained that judicial authority requires the existence of a justiciable case or controversy that is ripe for adjudication. In fact, this Court has issued numerous decisions defining and sculpting the precise reach of judicial authority.

In the context of this brief, the judiciary has taken the lead role in administering, creating rules for, and sitting in review of the Nevada Foreclosure Mediation Program. However, the extensive case law on judicial authority leaves the UTA with one simple, unanswered question: *Where is the case or controversy in the context of the Nevada Foreclosure Mediation Program that provides for the exercise of judicial authority?*

Through this brief, UTA will demonstrate that judicial authority hinges upon this simple question. However, the law is clear that neither non-judicial foreclosures nor mediation programs are inherently judicial functions. By permitting the judiciary to exercise authority outside of its inherent scope, UTA contends that Nevada is addressing the foreclosure crisis by creating a Constitutional crisis.

In light of devastated housing market in Nevada, UTA appreciates and agrees with the underlying objective of having a mediation program. However, such a program cannot be run by the judiciary unless a justiciable case or controversy can be identified.

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I.

ARGUMENT

A) The Nevada Constitution Requires That All Judicial Authority Be Derived From the Existence of a Justiciable Case or Controversy that is Ripe for Adjudication.

The reach of judicial authority in Nevada is well documented. From the framing of the Nevada Constitution to a litany of case law, the judiciary's jurisdiction has been clearly defined. A detailed analysis of the history of judicial authority can be pared down to one simple question: Is there a justiciable case or controversy ripe for adjudication that gives rise to the exercise of judicial authority?

Nevada's Constitution is unique in that it expressly outlines the separation of powers doctrine. Article 3, Section 1 of the Nevada Constitution reads as follows:

> Art. 3 Section 1. Three separate departments; separation of powers; legislative review of administrative regulations.
>
> 1. The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.
>
> Nev. Const. art. 3, § 1.

The importance of the Constitutional principle of the separation of powers cannot be taken lightly. In fact, this Court has held that "[t]he division of power is probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Galloway v. Truesdale*, 83 Nev. 13 (1967).

However, the broad language of the Nevada Constitution gives only a general understanding of the meaning of judicial authority. In *Galloway*, the Supreme Court defined judicial authority as "the authority to hear and determine judiciable controversies." *See Galloway*, 83 Nev. at 20-21. Through well-developed case law, we know that a justiciable case or controversy is one in which the courts can provide relief.

See Personhood Nev. v. Bristol, No. 55429, 2010 WL 5423718, at *1, 126 Nev. Ad. Op. 56 (Nov. 30, 2010). "This court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment." *Id.* at *2; *see also, NCAA v. Univ. of Nev.*, 97 Nev. 56, 57 (1981) (precluding review for mootness); *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877 (2006) (precluding review for ripeness); *Doe v. Bryan*, 102 Nev. 523 (1986) (precluding review for standing); *Landreth v. Malik*, 221 P.3d 1265 (Nev. 2010) (Supreme Court does not exercise its authority absent subject matter and personal jurisdiction); *Morrison v. Beach City LLC*, 116 Nev. 34 (2000) (same).

To determining whether a justiciable case or controversy exists, the Supreme Court has provided a four-prong definition that can be applied to any circumstance in which the judiciary may wield authority:

1) There must be a justiciable controversy, in which a claim of right is asserted against one who has an interest in contesting it;
2) The controversy must be between persons whose interests are adverse;
3) The party seeking declaratory relief must have a legal interest in the controversy; and
4) The issue involved in the controversy must be ripe for judicial determination.

Kress v. Corey, 65 Nev. 1 (1948); see also, *Doe v. Bryan*, 102 Nev. 52 (1986).

Armed with the extensive and unrefuted case law regarding the scope of judicial authority, UTA poses one overriding question: *Where is the justiciable case or controversy in the context of the Foreclosure Mediation Program?*

The foreclosure mediation program presents two possible sources of judicial authority: non-judicial foreclosure and foreclosure mediation. Both of these potential sources are insufficient either individually or in concert for the reasons set forth below.

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B) A Non-Judicial Foreclosure is Not a Justiciable Case or Controversy Giving Rise to the Exercise of Judicial Authority.

1) A Non-judicial Foreclosure is a Private Right of Action.

The 9th Circuit Court of Appeals has interpreted Nevada's foreclosure statute to confirm that a non-judicial foreclosure sale is not state action and therefore not subject to constitutional due process requirements of litigation. (*Charmicor v. Deaner* (9th Cir. 1978) 572 F.2d 694, 696; *See also, Lawson v. Smith* (N.D.Cal. 1975) 402 F.Supp. 851, 855; *Apao v. Bank of New York* (9th Cir. 2003) 324 F.3d 1091, 1094). Given that a non-judicial foreclosure is not state action, then authority over non-judicial foreclosures did not rest with any branch of the government until the Legislature enacted AB149 and created the FMP.

In addition, service of a non-judicial foreclosure has none of the hallmarks of a justiciable controversy. Specifically, there has been no jurisdiction acquired by any court, as no service of process has been effectuated pursuant to NRCP 4, or any other provision of due process. *BAC Home Loans Serv. LP*, 2010 WL 3410604, at *1 (holding that sanctions could be imposed in a mediation without personal service of the Petition for Judicial Review) (unpub) (cited here as example, and not as legal authority); *Cf. Pennoyer v. Neff*, 95 U.S. 714 (1877) (holding that a litigant must effectuate personal service in order for the court to acquire jurisdiction). Further, there is no evidentiary proceeding, taking of evidence, or cross-examination of witnesses. Finally, a foreclosure does not result in a final judgment. Rather, it results in a judicially challengeable Trustee's Deed Upon Sale. As a result, a non-judicial foreclosure is not a source of judicially authority.

2) A Non-judicial Foreclosure is Not an Equitable Remedy.

At face value, a party may argue that non-judicial foreclosure is an equitable remedy that allows for foreclosure without judicial supervision. However, this argument is flawed because it mistakenly attributes a judicial remedy (i.e., equity) to a private act

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between parties (i.e., non-judicial foreclosure). As has been stated herein, the fact is that a non-judicial foreclosure sale is not state action. Therefore, it is not subject to labels such as "equity" as those terms would require some exercise of authority by the judiciary.

Moreover, there is no final adjudication or order in a non-judicial foreclosure. In other words, there is no right of appeal to a non-judicial foreclosure. Rather, parties have recourse through separate litigation challenging the validity of the rights of the parties. It is only in the context of such litigation that a court has judicial authority to make factual determinations surrounding the mortgage contract, the authority of the parties to the non-judicial foreclosure, and the equitable remedies that may be available.

C) <u>A Mediation is Also Not a Justiciable Case or Controversy Giving Rise to the Exercise of Judicial Authority.</u>

Mediation in the context of litigation has emerged in the last few decades as a favorable and effective case management strategy for judges across the country with heavy case loads. However, this remains a fairly recent development without a significant amount of historical precedent. In fact, the Nevada Legislature only empowered the Supreme Court to conduct mediations in 1999. Thereafter, the Nevada Supreme Court did not adopt the Nevada Mediation Rules until 2005. Nev. R. Admin. Docket 310 (2005); Nev. R. Admin. Docket 361 (2005). Even when the Supreme Court adopted the Mediation rules, it recognized the unique non-judicial nature of a mediation:

Rule 1 Definitions:

> . . .
> (B) "Mediation" means a process whereby a neutral third person, called a mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in

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> identifying issues, fostering joint problem solving, and exploring settlement alternatives.
> N.M.R. 1(B) (2005).

There are several terms that stand out: 1) "encourage and facilitate; 2) "informal and nonadversarial"; 3) "authority rests with the parties"; and, 4) "assisting the parties . . . [and] fostering joint problem solving." The Supreme Court has used language that is friendly and empowering to encourage people to reach an agreement. The FMP offers a "kick" with its mediation. However, it is nothing more than a referee to ensure that the parties play fair. It certainly does not transform the mediation into an adjudicative function.

In addition to not being a core judicial function, courts have historically recognized that mediations or settlement conferences can corrupt the adjudicative process. The reason for the caution is that an informal conference, like mediation, runs the risk of breaching judicial canons against impartiality and against ex parte communication. NCJC 2.2 (Impartiality); NCJC 2.9 (Ex parte communications). Further, NCJC 2.9 specifically prohibits judges from participating in settlement conferences, or mediations, with parties to a lawsuit without the permission of the parties. There cannot be clearer evidence that mediation is not a judicial act. If courts were required to ask parties for permission to dispense their judicial authority, then no actions would ever be taken.

To that point, the mediation contemplated by the FMP is not a pretrial management procedure; rather, it is an administrative proceeding designed to address the foreclosure crisis. Inarguably, the mediation in the FMP is not a legal proceeding, because unlike a legal proceeding, FMP's mediation is not triggered by a lawsuit.

The Nevada Supreme Court recognized the absence of a justiciable controversy surrounding the FMP when it dispensed with the need properly to effectuate service of process pursuant to Nevada Rule of Civil Procedure 4 and traditional requirements of due process when a party filed a Petition for Judicial Review. *BAC Home Loans Serv.,*

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LP v. Eighth Judicial Dist. Ct., No. 55196, 2010 WL 3410604 (Nev. May 17, 2010). The Supreme Court's reasoning for its finding was that the Petition for Judicial Review was not a legal proceeding but instead an "other proceeding" not otherwise covered by due process requirement. *Id.*

1) Case Law From Other Jurisdictions Confirms the FMP is Not a Judicial Function.

UTA's conclusion that this program is an unconstitutional assumption of Supreme Court authority is corroborated by an Illinois decision entitled *People ex rel. Christiansen v. Connell*, 2 Ill.2d 332, 118 N.E.2d 262 (1954). In that case, the court invalidated a divorce statute which required the petitioner to file a written statement reciting his intention to file a complaint not less than sixty days nor more than one year before so doing. Section 5 of that statute provided that the judge may schedule a conference between the parties to discuss marital resolutions. In addressing the constitutional separation of powers issue, the Court stated:

> There is another constitutional objection which, in our opinion, is also fatal to the validity of the statute before us. There are many areas of conflict and of litigation in which the participation of a judge as mediator or conciliator might be desirable. The volume of personal injury litigation might be reduced, for example, or labor disputes averted, by preliminary mediation before a judge. It is arguable that the State should be able to make full use of its judiciary, wherever their services might be valuable. But that result cannot be reached unless our constitutional doctrine of separation of powers is first altered. Of course, as has been ably argued, the constitution does not require a rigid separation of powers, and a degree of flexibility is necessary if government is to function. But an understanding view of the purpose of our doctrine of separation of powers is not enough to justify the present provision. The function here required of a judge is too remote from normal judicial duties to be sustained.
>
> Here, * * * the gap between the contemplated conference and a judicial hearing is broad. In the first place, there is nothing

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> pending before the court to be decided. Decision is the heart of the judicial function. Without it, there can be no adjudication. 'The power to hear without the power also to adjudicate and determine the rights of the parties to such proceedings cannot be said to be the exercise of the judicial power as that term is used in the constitution of this State.' [Citation.] Moreover, no one, whether party or witness, can be required by judicial process to attend the conference. No record is to be made of what occurs at the conference and the conference may be ex parte. The pretrial conference [citation], relied upon by analogy, occurs in the course of a pending lawsuit. The judge commands attendance, he does not invite. A record of the pretrial conference may be preserved. In our opinion, the function to be performed by the judge at the conference contemplated by the present statute cannot fairly be described as judicial."
>
> (*People ex rel. Christiansen v Connell.* 2 Ill.2d at 332-3, 118 N.E.2d 259.)

Following *Christiansen*, the Illinois Court of Appeals upheld a statute allowing state courts to issue grant monies to non-profit dispute resolution centers, only when an actual case or controversy existed. See, *Wenger v. Finley* 541 N.E.2d 1220 (Ill. App. Ct. 1989). The stated purpose of that statute was to address the cost of litigation to the litigants and "providing a mechanism for resolving certain pending matters." (ILCS Ch. 710, §20/1). To fund the grants, all lawsuits filed in defined counties are surcharged a fee of $1.00. (ILCS Ch. 710, §20/3(c)). Thereafter, the chief judge of the defined counties had the authority to distribute the grants to those dispute resolution centers that comply with the rules for the issuance of grants established by the courts. *Id.* In ruling that the statute did not violate the separation of powers doctrine, the court looked at three factors: 1) the fact that courts were empowered to make referrals to the dispute resolution centers after a lawsuit was filed; 2) the chief judge only established rules for the efficient use of the dispute resolution centers and not their operations; and, 3) the legislative history of the legislation. *Id.* at 1226 -1228. The final element to the law in

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Illinois that distinguishes it from Nevada's FMP is that the Illinois law collects money from litigants. (ILCS Ch. 710, §20/3(c).)

When looking at the Illinois law and the *Wenger* decision, we first observe that the statute certainly pushes the outer limit on a court's exercise of judicial authority. In fact, some courts have refused to extend the *Wenger* decision further to allow courts to collect fees to help battered women. *Safety Net for Abused Persons v. Segura*, 692 So.2d 1038, 1042 (1997). The court's rationale in the *Safety Net* case was that if the cost imposed was not related to the efficient administration of justice, then it was not incidental to the judicial authority of the courts. *Id.*

The second noticeable feature of the *Wenger* decision is that there are several places when an actual case or controversy is identified in both the enactment and the application of the law. First, the presence of an actual case or controversy is found in the fact that the $1.00 fee used to provide the grants is paid by litigants to a judicial action. Secondly, an actual case or controversy is implicated when the court is empowered to refer pending lawsuits to the dispute resolution centers for the purpose of resolving the matter in a cost-effective manner, further managing the courts' case loads. Finally, the Illinois Legislature made it clear that the statute was intended to address the needs of actual litigants to pending litigation and not simply those matters that were pre-litigation.

Conversely, the Nevada law is not associated with an actual case or controversy in any respect. First, there is not an actual case or controversy when the lender records a Notice of Default and Election to Sell and has to pay a $50.00 fee to the County Recorder that will go to the FMP. (NRS 107.080(b).) The fee is paid by non-litigants because a non-judicial foreclosure has been established as non-state action. In addition, the fee is paid by more than 90% of foreclosing lenders that are never impacted by the FMP including commercial foreclosures and raw land foreclosures. (*Id.;* NRS 107.086) As a result, unlike the litigants that pay the fee in the Illinois legislation, the foreclosing lenders in Nevada will never receive the benefit of their payment.

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Additionally, there is no case or controversy when the borrower elects mediation because the election is by right. There is no need to dispute that the debt is owed or that the foreclosure is wrongful. Rather, the borrower can elect to mediate simply to have a face-to-face conversation with the lender.

Finally, the presence of an actual case or controversy is nowhere mentioned in the legislative history or testimony of any of the witnesses. In fact, Justice James W. Hardesty recognized the absence of a legal proceeding during his testimony about AB 149: "This situation is unique in a couple of respects. The process does not begin with a filed case; it is initiated, instead, through what appears to be a 'notice of default and election to sell.'"

2) The FMP Does Not Result in a Final Adjudication, Order, or Finding of Fact.

As stated above, a non-judicial foreclosure does not result in a final adjudication or order from the judiciary. Similarly, the FMP ends with the same result. Specifically, the FMP acts as a gateway to the issuance of a foreclosure certificate. Yet, the foreclosure certificate is not a final judgment – it is merely a document that is required before a trustee's sale may occur. Upon issuance of the certificate, there is still no foreclosure and the borrower is still holding title.

Additionally, the issuance of a certificate does not offer any factual conclusions that can be used as prima facie evidence if a judicial action is filed. Specifically, there is never a finding of fact during the FMP process to questions such as: "Who holds the beneficial interest under the Deed of Trust?" or "Does the party at mediation have authority to modify the loan?". Rather, the mediator or court on judicial review must determine whether the parties to mediation meet a prescribed threshold to demonstrate their right to appear at mediation. If, however, the parties do not meet this threshold, this does not act as a permanent bar to foreclosure, nor does it imply that some other party holds that right – it merely means that the parties at mediation must re-start the process and appear with the proper proof of authority. Simply put, failure to comply

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with the rules of the FMP may delay foreclosure, but it does act as a finding of fact that permanently revokes a parties right to foreclose.

3) The FMP is not a Ministerial Function Incidental to the Scope of Judicial Authority.

A faulty explanation for the judiciary's role in the rule-making and administration of the FMP would be that the judiciary has the authority to engage in ministerial functions. "Ministerial functions are methods of implementation to accomplish or put into effect the base function of each Department." *State v. Second Judicial District Court*, 116 Nev. 953, 11 P.3d 1209, 1214 (2000). In other words, ministerial functions may be quasi-legislative powers allowing the Court to create "any and all rules necessary or desirable to handle the business of the courts or their judicial functions." *Galloway v. Truesdell*, 83 Nev. 13, 21 (1967).

The scope of ministerial duties is not absolute – the sole purpose of the judiciary's ministerial duties is to enable and assist the courts in carrying out 'judicial functions'. As this brief has pointed out, the Constitution of the State of Nevada provides the courts with judicial authority only where a judiciable case or controversy exists. [*Nevada Constitution, Art. 3]*. Without judicial authority, the courts are unable to conduct their judicial function. In turn, without judicial authority, the courts cannot exercise ministerial functions since there is no judicial function to put into effect.

But even if the Supreme Court were permitted to exercise ministerial functions, the power that the legislative branch bestowed upon the judiciary far exceeds that of ministerial. For instance, the Supreme Court's authority envelops the drafting of the Foreclosure Mediation Rules, drafting of forms, the creation of a new division of the Administrative Offices of the Courts, hiring of the FMP administrator, and the power to hire, train, and retain mediators. Additionally, through the FMP, the Supreme Court has effectively created new legislation by setting up requirements for lenders that were never before required during the exercise of non-judicial foreclosure. Most notably, the

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Supreme Court requires production of the original or certified copies of the Note, Deed of Trust, and any Assignments thereof. The production of each of these documents runs contrary to long-standing Nevada law.[1] These acts by the judiciary far exceed that of ministerial. But the fact remains that until a justiciable case or controversy arises, the courts cannot wield any ministerial functions.

III.

SPECIFIC ARGUMENTS ADDRESSED BY APPELLANT

A. The District Court's Order Modifying the Loan Should Be Reversed As the Order is an Unconstitutional Exercise of Judicial Authority.

UTA supports Wells Fargo Bank's challenge to the District Court Judge's Order modifying the subject mortgage, as the Order is an unconstitutional exercise of judicial authority that impinges upon a trustee's contractual power to perform a trustee's sale. Accordingly, UTA adopts the Arguments offered in Wells Fargo's Opening Brief, and the supplemental briefing below.

B. The Renslows Are Not Entitled to a Loan Modification.

A recent decision from the Federal District Court of Nevada has addressed the issue of entitlement to a loan modification as a matter of right.

> Plaintiffs claim that Wells Fargo breached [its] duty by negotiating in bad faith regarding a loan modification. However, Plaintiffs have not shown that a contract exists that requires Wells Fargo to negotiate in the first place. Accordingly, the Court dismisses this claim.

McCurdy v. Wells Fargo Bank, No. 2:10-cv-00880, 2010 WL 4102943, *2-3 (D. Nev. Oct. 18, 2010) (and holding, *inter alia*, that the Home Affordable Modification Program

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[1] "Defendants do not need to produce the note to the property in order to proceed with a non-judicial foreclosure." *Urbina v. Homeview Lending, Inc.*, 681 F. Supp. 2d 1254, 1258 (D. Nev. 2009) (citing NRS 107.080); *see also, North v. Bank of Am. Corp.*, 2011 WL 346070, *2 (D. Nev. February 2, 2011) (holding that NRS 107.080 does not require the foreclosing party to hold the note); *Wayne v. Homeq Serv., Inc.*, 2008 WL 4642595 * 3 (D. Nev. Oct. 16, 2008) (noting that "courts across the country have rejected claims by plaintiffs asserting a duty by the lender to provide the original note under the UCC to prove its holder in due course status."). Beneficiaries do not need to have been assigned the original note in order to initiate foreclosure proceedings, or to give full force and effect to the terms of a Deed of Trust. *Id.* See also, NRS 107.080.

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[HAMP] does not provide borrowers with a private cause of action against lenders for failing to consider their application for loan modification, or even to modify an eligible loan); *Simon v. Bank of Am., N.A.*, 2010 U.S. Dist LEXIS 63480, *26-27 (D. Nev. Oct. 15, 2010) (finding no cause of action for failure to evaluate a borrower for a loan modification under HAMP or any other program).

Other jurisdictions that have considered this issue have also found that no private right of action exists for a borrower who has been denied a loan modification, or even denied *evaluation* for a loan modification. *See, e.g., Lucero v. Countrywide Bank, N.A.*, No. 09-cv-1742 BTM(BLM), 2010 WL 1880649, at*3-4 (S.D. Cal. May 10, 2010); *Villa v. Wells Fargo Bank, N.A.*, No. 10-CV-81 DMS(WVG), 2010 WL 935680, at *3 (S.D. Cal. Mar. 15, 2010); *Aleem v. Bank of Am.*, No. EDCV 09-01812-VAP, 2010 WL 532330, at *4 (C.D. Cal. Feb. 9, 2010); *Escobedo v. Country Home Loans, Inc.*, No. 09-cv-1557-BTM (BLM), 2009 WL 4981618, at *2-3 (S.D. Cal. Dec. 15, 2009). Accordingly, neither should this Court allow a district court judge to impose the availability of a loan modification on a petition for judicial review.

IV.

CONCLUSION

For the foregoing reasons, UTA respectfully requests that this Court reverse the decision of the lower court on the basis that the FMP is an unconstitutional usurpation of judicial authority.

DATE: October 12, 2011

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