IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK,

Appellant,

vs.

DUKE RENSLOW and TINA RENSLOW,

Respondents.

Case No. 58283

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AMICUS CURIAE BRIEF

An Appeal of the Decision of the
Second Judicial District Court of the State of Nevada,
in and for The County of Washoe

For the Amicus Curiae
State of Nevada

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General of the State of Nevada is the chief legal officer of the State and is the attorney and protector of the interests of the State in all matters of public interest. The Attorney General files this amicus curiae brief in support of the position that the Foreclosure Mediation Program enacted by the 2009 Nevada Legislature and codified as the Foreclosure Mediation Rules do not violate either the United States Constitution or the Nevada Constitution. Any decision which would weaken the Foreclosure Mediation Program as enacted by the Nevada Legislature is against the manifest interests of the State of Nevada and its people.

BACKGROUND

The legislative history of Statutes of Nevada 2009, Chapter 364 (Assembly Bill 149), codified as NRS 107.086, clearly establishes that the legislative intent was to address equitable issues related to foreclosures in Nevada. It reflects dire circumstances facing the state.

> Nevada has the highest rate of foreclosures in the United States. The high rate of foreclosures affects more than just the homeowner facing foreclosure. There is a spillover effect, and it has caused the resale market to free fall at a precipitous rate. Declining real estate values mean that even homeowners with conventional loans now owe more on their mortgages than their house is worth. Falling home prices are leading to bank and investment losses. These losses reduce capital flows, which lead to job losses. Job losses lead to more foreclosures, which lead to more falling home prices. We see communities suffering from increased crime ...You also have the other spillover effects of abandoned homes in neighborhoods, unkempt lawns, trash accumulation, pools with West Nile virus, and unattended pools. The Center for Responsible Lending did their best "guestimate" of how many Nevada homeowners would take advantage of the program, and they estimate that 17,700 homes would be saved and that the total savings would be $1.6 billion. This would allow an opportunity to try to stabilize our market, to save homes for those borrowers who are ready, willing, and able to work out an agreement with their lender, and to hopefully help the entire Nevada economy by stopping the downward spiral caused by foreclosures in our state. This bill is to assist troubled homeowners and to stabilize neighborhoods. Assembly Bill 149 makes foreclosure a remedy of last resort.[1]

The bill was clearly was intended to address failures and inequities in the existing foreclosure process. Consider these additional quotes:

> We see people whose houses are being foreclosed. They cannot get a lender on the phone. They cannot get to someone willing to work with them. The reason

[1] *Minutes Of The Joint Meeting Of The Assembly Committee On Commerce And Labor And The Senate Committee On Commerce And Labo*r, 2009 Leg., 75th Sess. 3-8 (NV. 2009) (statement of Assemblywoman Barbara Buckley).Statutes of Nevada 2009, Chapter 364

> might be that the loans have been sold so many times that it is not clear who the lender is . . . [a] key component of this bill is that lenders or their representatives must appear or otherwise be available throughout the mediation. They also have to present a certified copy of the deed of trust and the promissory note, so that we know the person who is foreclosing actually owns the note. It is an elemental legal step, but one that is not being followed right now. This is such a crisis facing the entire State of Nevada that, even though it is a herculean task, we will take it on so that borrowers have an opportunity to try to work something out, and we will find an experienced mediator to help make this effective. . . The Nevada Supreme Court, or an entity designated by them, will set the rule governing the procedures and the requirements for the mediations.[2]

In the enactment of Statutes of Nevada 2009, Chapter 364, the Nevada Supreme Court provided comments as to the proper implementation of this statute:

> It would be necessary for the Court to adopt a set of rules which would govern the mediation process, and as an outline, we have a couple of sources that we can turn to. First, the Supreme Court can use the current settlement conference rules. Second, we have settlement conference mediation rules for alternate dispute resolution. We also have rules that govern other mediation processes throughout the court system. . .the best approach is to treat this as a judicial function administered by the Administrative Office of the Courts. . .through an appropriate rule-making process, the court could fashion certain rules for administering a settlement program that is envisioned in this bill.[3]

Thus, both the Legislature and the Judiciary were in agreement as to the constitutional authority of the Nevada Supreme Court to administer the Foreclosure Mediation Program which was created by Statutes of Nevada 2009, Chapter 364 and codified as NRS 107.086. The Office of the Nevada Attorney General represents the executive branch of the Nevada government, and by this Amicus Curiae brief, expresses its agreement that the Foreclosure Mediation Program is a proper power of the Judiciary in Nevada, and does not violate the Nevada Constitution separation of powers doctrine.

ARGUMENT

The Invisible Incentives: The Financial Interests of Servicers Such as Wells Fargo Conflict with the Interests of the Investors, Stakeholders and their Customers.

Before considering the arguments raised by Wells Fargo, it is important to consider its motivations, not only in the proceedings below, but in the arguments it presents to this Court.

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[2] *Id.* at 5-6 (Buckley)

[3] *Minutes Of The Joint Meeting Of The Assembly Committee On Commerce And Labor And The Senate Committee On Commerce And Labor*, 2009 Leg., 75th Sess. 3, 8-9 (NV. 2009) (statement of Justice James Hardesty).Statutes of Nevada 2009, Chapter 364

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The actions of Wells Fargo in this matter lead to a conclusion that mortgage loan servicers are motivated to foreclose rather than modify mortgages because they make more money by foreclosing. It has been argued in pleadings and in law review articles that mortgage loan servicers are breaching their fiduciary duty to investors, who could benefit more from a loan modification rather than foreclosure. As a result, whose interest is Wells Fargo protecting? The record on appeal shows that Wells Fargo could not provide evidence as to who owns the note. Wells Fargo is acting in its own interests, versus the interests of its investor customers who purchased the loan, or its borrower customers. In short, the arguments raised by Wells Fargo are based on pure avarice, not public or investor good.

Even when securities investors and borrowers in default would prefer modification, mortgage servicers are financially motivated to foreclosure. Investors receive income from borrower mortgage payments and are thus interested in a borrower's ability to make those payments without interruption. A mortgage servicer's compensation comes from fees: a base fee for servicing the loan, late payment fees, and a higher rate fee for loans in default. If the servicer modifies a loan, investors receive the benefit of continued monthly payments while the servicer receives little income.[4] Foreclosure is far more profitable to servicers than loan modification. This is a primary reason why voluntary modification by servicers has not been more widespread. It is against the mortgage servicer's interest to modify a loan, even if modifying the loan is in the best interest of the investors. Servicers remain largely unaccountable for their dismal performance in making loan modifications. These competing financial pressures do not necessarily provide the correct incentives from the perspectives of investors, borrowers, or society at large. In particular, servicers' incentives are generally biased to foreclose rather than modify a loan.[5] Since Wells Fargo apparently does not even know who owns the note, Wells Fargo as loan servicer brings this appeal, not for the investor's interests, but for its own interest.

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[4] Kazakes, Andrew J, *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, 43 Loy. L. A. L. Rev. 1383, 1405 (2009).

[5] Diane E. Thompson, *Nat'l Consumer Law Ctr., Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior.* National Consumer Law Center (2009), www.consumerlaw.org.

Wells Fargo Claims Foreclosure Mediation Program Represents an Impairment of Contract but Ignores its Own Breach of Its Contract Obligations Under HAMP.

Recognizing the dire situation for homeowners nationwide, on March 4, 2009, the Home Affordable Modification Program (HAMP) was created. Unlike previous federal foreclosure prevention efforts, this program mandates certain actions on the part of participating mortgage servicers--in theory taking the discretion in the loan modification process away from mortgage servicers.[6] Any financial institution receiving Toxic Asset Relief Funds (TARP), including Wells Fargo, was required to sign a contract to follow the HAMP requirements.

The most critical component of the HAMP review is the Net Present Value (NPV) test. The NPV calculation compares the net present value of the loan, if modified, with the estimated recovery the lender or investors will receive from a completed foreclosure. If the outcome is positive, the mortgage holder's financial interests would be better served by modifying the loan than foreclosing on the property. The servicer is prohibited from foreclosing and must offer the homeowner a three-month trial modification at the new lower payment. Upon successful completion of the trial period, the servicer is obligated to provide the homeowner with a permanent loan modification.[7] This is what occurred in the instant matter.

Under the Treasury Department's HAMP guidelines and directives, participating servicers are contractually required to review homeowners who are seriously delinquent (sixty or more days) on their mortgages to determine their eligibility for an affordable loan modification. If a homeowner qualifies for a loan modification under the program's objective criteria, the participating servicer must modify the loan to a monthly payment of principal, interest, taxes, and insurance that is no more than 31% of the homeowner's gross monthly income. Despite HAMP's promise to provide relief to homeowners, servicers are continuing to pursue foreclosure rather than comply with their legal obligation to provide eligible homeowners with affordable loan modifications.[8] Ironically, Wells Fargo ignores its legal

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[6] *How Foreclosure Mediation Legislation Can Keep Vermonters in Their Homes (and Money in the Pockets of Mortgage Holders)* Vermont Bar Journal, Vol. 36, Issue 1 (Spring 2010), pp. 24, 25

[7] *Id.* at 25

[8] *Id.* at 25

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obligations to continue the HAMP modification contracted with the Renslows, but does not mention that contract obligation in its briefs.

Wells Fargo argues that the Foreclosure Mediation Program represents an impairment of contract between the borrower and the investors. Wells Fargo presents no evidence to support that argument. In reality, Wells Fargo has a conflict of interest with regard to that argument, since it has not shown, and cannot show that a loan modification is not in the best interest of the investors. In truth, it might be in the best interest of the investors to modify the loan, but it is not in the best interest of Wells Fargo. A loan servicer stands to have its profits reduced by not being able to get paid to handle the foreclosure with the associated fees and costs. The only contract that is impaired in this case is Wells Fargo's inchoate chance to profit from the foreclosure. Loan modification extinguishes this profit opportunity only to Wells Fargo's detriment. Wells Fargo provides no evidence to show that its motivation to foreclose on the Renslows would benefit the financial interests of those stakeholders who own this particular loan. When Wells Fargo acts to benefit itself over the borrower and investor customers, it breaches various fiduciary duties. That is why Wells Fargo and its supporting amicus argue that non-judicial foreclosure is not an equitable remedy (interestingly without citing any support). Take out equity, fair play, good faith and fiduciary duties and the path to profits is open. All of the arguments presented by Wells Fargo must be viewed though the lens of a bad faith actor with a profit motive, not on good law or the benefit of public policy.

NRS 107.086 Does not Represent a Constitutional Violation of the Separation of Powers Contained in the Nevada Constitution

The Nevada Constitution distributes governmental powers to the legislative, executive, and judicial departments: each separate from the other. *Galloway v. Truesdell*, 83 Nev. 13, 19 (1967) *citing* Nev. Const. art. 3, § 1. The Judicial power of Nevada is vested in the Nevada Supreme Court. Nev. Const. art. 6, § 1. Judicial power is the capability or potential capacity to exercise a judicial function. *Galloway*, 83 Nev. at 20. A judicial function includes the right to exercise any lesser power that is an integral part of judicial power. *Id.* For the purposes of interpreting the delegation of powers, "the intent of the framers of the Constitution must be

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fulfilled." *Galloway*, 83 Nev. at 27. Therefore, in order to adjudicate a challenge to the constitutionality of a statute, a reviewing court must determine the powers the framers understood the judiciary to have which is separate from the other two branches of government. *Id.* In this case, this Court must determine whether the framers understood overseeing foreclosure to be an integral part of judicial power or whether this was a power reserved for the executive or legislative branches.

Historically, foreclosure was an action in equity, not law. One of the very first cases decided by the Nevada Supreme Court on the issue of foreclosure describes the judicial origins as equitable in nature and a judicial process. *Hyman v. Kelly*, 1 Nev. 179 (1865). The decision in *Hyman* was made within a year of the drafting of the Nevada Constitution in 1864. The *Hyman* court reviewed the operating laws at the time and determined that the proper remedy was "the equitable one of foreclosure and sale." *Hyman*, 1 Nev. at 4. It was in this context that the framers assigned judicial power to the Nevada Supreme Court.

In 1929, Nevada enacted its foreclosure by sale statute, colloquially – if inexactly – referred to as non-judicial foreclosure. *See* NRS 107.086. A foreclosure by sale typically allows a mortgagee to bypass the courts and have a property sold without judicial supervision.[9] Nevada's law prior to the 2009 Legislature passing AB 149 was no different. A mortgagee, through a trustee, could exercise the *equitable* right of foreclosure without supervision. But because the legislature permitted, from 1929 to 2009, a means to redeem the equitable right of foreclosure without any judicial supervision, it does not follow that the Legislature is irrevocably barred from exercising judicial oversight to those parties that seek the equitable remedy of foreclosure.[10]

Equity is an inherent power of the Judiciary. *Halverson v. Hardcastle*, 123 Nev. 245, 270, 163 P.3d 428, 446 (2007). Equity is not a power of the executive or legislative branches of government. It was noted in the Legislative history of AB 149 that one of the chief concerns

[9] Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. Cal. L. Rev. 1261, 1276 (July, 1991).

[10] It is worth noting that Nevada did not eliminate foreclosure by court order which remains a remedy. NRS 40.430.

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of the Legislature in passing NRS 107.086 was that homeowners did not know who owned their loan, and thus did not know who ought to be foreclosing against them. The present case is such an example. Wells Fargo's inability to prove ownership of the deed of trust and mortgage note created a justiciable controversy as to the legality of its attempt to foreclose. It is the courts, not the executive branch or the legislature, which is empowered to consider and decide such disputes. There is a compelling need for dispute resolution and these dispute resolutions can make a substantial contribution to the operation and maintenance of the courts of this state even if some of these disputes would not reach the court. *Wenger v. Finley,* 185 541 N.E.2d 1220, 1225 Ill. App. Ct. (1989). The Foreclosure Mediation Program enacted through NRS 107.086 is the type of pre-litigation advance dispute resolution that has been upheld in other states so long as the process is related to the administration of justice. See *Wenger, supra.*

By enacting NRS 107.086, the Nevada Legislature simply created a limited-judicial foreclosure as a replacement for non-judicial foreclosure. In Nevada, one can foreclose through governmental intervention in the form of an order from the Court. NRS 40.430. Prior to the passage of AB 149, one could also foreclose without any governmental intervention. NRS 107.086, but the Legislature, by its prerogative, now requires both forms of enforcing the equity of foreclosure to be overseen by the government. And in both instances the branch of government with authority to oversee this remedy is the judicial branch.

NRS 107.086 also creates a process whereby a justiciable controversy is created since it requires the debtor to file a notice of mediation with the Court. Traditionally, cases where there is a justiciable controversy are matters for the courts, not the executive or legislative branches. All that has occurred is the elimination of a foreclosing party's ability to bypass the Judiciary. Wells Fargo fails to articulate a rationale that justifies transforming the traditional judicial powers into executive or legislative.

While the Supreme Court has not directly considered the issue of whether it is constitutionally permissible for the Judicial Branch to oversee the mediating of a party's attempt to obtain the equitable relief of foreclosure, the Court has had the opportunity to

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interpret other provisions of NRS 107.086. *See Pasillas v. HSBC Bank USA*, 127 Nev. Av. Op. No. 39, 255 P.3d 1281, (July 7, 2011) and *Levya v. National Default Servicing Corp.*, 127 Nev. Adv. Op. No. 40 (July 7, 2011). No mention was made as to the potential unconstitutionality of NRS 107.086. By interpreting and enforcing the provisions of NRS 107.086 by judicial order, the Nevada Supreme Court implicitly demonstrates that it does not agree that the statute unconstitutionally delegates power to the Supreme Court.

The State of Nevada adopts the decision of Judge Patrick Flanagan in *Deutche Bank National Trust Company v. Truex,* Second Judicial District Court, Department 7, Case No. CV11-00584 (2011), which is attached hereto as "Attachment A".

NRS 107.086 Does not Violate the Contracts Clause of the United States or the Nevada Constitutions

Wells Fargo raises the issue of the unconstitutionality of NRS 107.086 as violating the Contracts Clause of both the United States and Nevada State Constitutions. As an initial point, Wells Fargo admits that it is not the beneficial owner of the deed of trust and mortgage note in this matter. It is perhaps the servicer for the beneficial owner of the deed of trust and mortgage note, allegedly the Federal Home Loan Bank, but even that status was in question. As merely the servicer for the beneficial owner of the deed of trust and mortgage note, Wells Fargo cannot show it has any personal interest in the deed of trust and mortgage note in this matter, thus it has no standing to raise the Contracts Clause constitutionality of NRS 107.086. *Doolittle v. Eighth Judicial District Court*, 54 Nev. 319, 15 P.2d 684 (1932). See also *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) where the United States Supreme Court struck down a Contracts Clause issue by ruling that the Contract Clause challenge fails for the simple reason that there is nothing to suggest that that statute nullified any contractual obligations of which appellants were the beneficiaries. Wells Fargo as mere servicer does not have standing as would the beneficial owner of the deed of trust and mortgage note or the debtor.

The Contracts Clause has never been construed as setting an absolute bar to any state legislation that limited rights created under contracts. During the nineteenth and early twentieth centuries, the courts developed a rule that "remedies" for default were distinct from the

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underlying contractual "obligation." State laws could regulate remedies but they could not modify contractual obligations.[11]

It has long been interpreted that the Contracts Clauses of United States and Nevada State Constitution do not prohibit the state from enacting any statute which affects a contract or contract right, especially where the state is not a party to that contract. Perhaps the highlight of this interpretation is found in the case of *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934). In *Blaisdell*, the United States Supreme Court held that although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State "to safeguard the vital interests of its people." *See Blaisdell* at 290 U.S. 434. At issue was the Minnesota Mortgage Moratorium Law, enacted in 1933, during the depth of the Depression and when that state was under severe economic stress, and appeared to have no effective alternative. The statute was a temporary measure that allowed judicial extension of the time for redemption; a mortgagor who remained in possession during the extension period was required to pay a reasonable income or rental value to the mortgagee. A closely divided Court, in an opinion by Mr. Chief Justice Hughes, observed that "emergency may furnish the occasion for the exercise of power" and that the "constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions." *Id.*, at 426.

The U.S. Supreme Court revisited this issue again in the case of *El Paso v. Simmons*, 379 U.S. 497 (1965). That case concerned a 1941 Texas statute that limited to a 5-year period the reinstatement rights of an interest-defaulting purchaser of land from the State. For many years prior to the enactment of that statute, such a defaulting purchaser, under Texas law, could have reinstated his claim to the land upon written request and payment of delinquent interest, unless rights of third parties had intervened. The Court held that "it is not every modification of a contractual promise that impairs the obligation of contract under federal law." *Id.*, at 506-507. It observed that the State "has the sovereign right . . . to protect the . . .

[11] Walsh, Geoff *Finger in the Dike: State and Local Laws Combat the Foreclosure Tide*, The Suffolk University Law Review, Vol. 44, Issue 1 (2011), pp. 139-192 44 Suffolk U. L. Rev. 139 (2011),

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general welfare of the people" and we must respect the "wide discretion on the part of the legislature in determining what is and what is not necessary" *Id.,* at 508-509. Interestingly, both of these cases concern security notes involving real property, and both were held to be constitutional. See *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 25 (1977) which held that States may substantially impair their contractual obligations when the impairment is "reasonable and necessary to serve an important public purpose". As discussed below, there are no substantial constitutional rights at issue in this matter; instead there are additional protections for the parties.

In 1986, Minnesota enacted mandatory mediation statutes that required lenders to negotiate with borrowers and certify compliance with the mediation requirements before proceeding to foreclosure. The statute applied retroactively to existing mortgages. Lenders challenged the Minnesota law under the similar contracts clauses of the United States and Minnesota constitutions. The Minnesota mediation statute applied to non-judicial foreclosures with case-by-case court supervision over the mediation process.

A Minnesota state appellate court upheld the Minnesota mediation statute in *Laue v. Production Credit Ass'n of Blooming Prairie*, 390 N.W.2d 823 (Minn. Ct. App. 1986). The Minnesota statute allowed a debtor to stop foreclosure proceedings for a period time until mediation could be concluded. Addressing the Contracts Clause challenge, the court did not find this instance of contractual impairment any more significant than what occurred under the previous Minnesota law upheld in *Blaisdell* (supra). The Nevada Foreclosure Mediation Program does not materially differ from the Minnesota statute.

Wells Fargo's citation to the rulings in *Worthen Co. ex rel. Board v. Kavanaugh*, 295 U.S. 56, 60 (1935) is ill placed. In *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, (1945) which considered a total moratorium on default actions by the State of New York, the United States Supreme Court refused to follow the *Kavanaugh* decision, ruling there was no "studied indifference to the interests of the mortgagee or to his appropriate protection" by the New York Legislature. The *Hahn* court held that the power "which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the

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general welfare of the people, is paramount to any rights under contracts between individuals." So far as the constitutional issue is concerned, "the power of the State when otherwise justified," is not diminished because a private contract may be affected. *See Hahn*, 326 U.S. 233. The citation to *Treigle v. Acme Homestead Ass'n.* 297 U.S. 189 (1936) is also misplaced since not only does *Treigle* have nothing to do with mortgage lending, it has not been cited as authority on any other case and was superseded by the decision in *Hahn, supra.* As discussed below, NRS 107.086 is fair to both the debtor and beneficial owner of the deed of trust and mortgage note.

The Nevada Supreme Court has also addressed the issue as it applies to the Nevada Constitution in the case of *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 530 P.2d 108 (1974). In *Koscot*, this Court held that a statute declaring contracts embracing pyramid promotional merchandise sales schemes to be against public policy and voidable was not constitutionally impermissible, even though there were contracts in place at the time the statute was enacted. The *Koscot* Court held:

> Our legislature is free to enact any law provided it is not clearly prohibited by some provision of the Constitution of the United States or the Nevada Constitution. Whether a legislative enactment is wise or unwise is not a determination to be made by the judicial branch. Every reasonable presumption must be indulged in support of the controverted statute with any doubts being resolved against the challenging party, who has the substantial burden of showing that the act is constitutionally unsound. *Cummings v. City of Las Vegas*, 88 Nev. 479, 499 P.2d 650 (1972); *Ex parte Philipie,* 82 Nev. 215, 414 P.2d 949 (1966); *Viale v. Foley*, 76 Nev. 149, 350 P.2d 721 (1960); *King v. Board of Regents*, 65 Nev. 533, 200 P.2d 221 (1948); *Ex parte Iratacable*, 55 Nev. 263, 30 P.2d 284 (1934); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 46 S.Ct. 320, 70 L.Ed. 654 (1926). . .Statutes, if enacted in the exercise of police power, are presumed to promote the public welfare and they come to court with the presumption of validity. *Viale v. Foley, supra; Caton v. Frank*, 56 Nev. 56, 44 P.2d 521 (1935). . . It is not only a right but the duty of a state to protect its citizens from injurious activities in commercial and business affairs by regulation through its police power. *Viale v. Foley, supra*. Even a legitimate occupation may be restricted or prohibited in the public *interest, and contracts adversely affecting that interest may be restrained. State ex rel. Sanborn v. Koscot Interplanetary, Inc.*, 212 Kan. 668, 512 P.2d 416 (1973).

The legislative history in this matter shows a clear public interest in the foreclosure process in Nevada, both with regard to improper foreclosure actions, but also with impairment of property values which affect not only other homeowners in the neighborhood, but also the

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beneficial owner of the deed of trust and mortgage note. Both suffer additional losses on the resale of foreclosed properties due to falling home values. NRS 107.086 therefore protects the interests of both the debtor and the beneficial owner of the deed of trust and mortgage note by creating another possibility of settlement instead of both parties losing in a foreclosure.

NRS 107.086 can hardly be claimed to be an impairment of contract rights existing in the relationship between the beneficial owner of the deed of trust and mortgage note and the debtor since it provides additional remedies. NRS 107.086(7) specifically holds that if the mediator determines that the parties, while acting in good faith, are not able to agree to a loan modification, the mediation will be deemed completed in the matter and the beneficial owner of the deed of trust and mortgage note is free to proceed with foreclosure on the property. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978). While NRS 107.086 adds an extra step in the foreclosure process, it does not impair the final foreclosure rights of the beneficial owner if the beneficial owner acts in good faith.

Because of the substantial public interest involved in the enactment and operation of NRS 107.086 and the fact that it operates to protect both the interests of the debtor and the beneficial owner of the deed of trust and mortgage note, it can hardly be an unconstitutional impairment of contract rights or a violation the Contracts Clause of either the United States or the Nevada Constitutions.

The Other Constitutional Arguments Raised by Wells Fargo are without Merit

NRS 107.086 cannot be construed as an unconstitutional taking in violation of either the United States or the Nevada Constitutions. If the parties negotiate in good faith but a modification cannot be agreed upon, the beneficial owner of the deed of trust and mortgage note is in the same position or in some situations, in a better position because of the mediation process cutting the greater losses which would occur if the foreclosure proceeded. The only rights affected in NRS 107.086 are time and insignificant costs relating to the mediation. Since the costs are related to the costs incurred by the Court in conducting the mediation, it can

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hardly be considered as an impairment of a contract right any more than the Court changing its filing fees or other court costs. The essential rights of the contracting parties in the original mortgage are not affected if they all act in good faith.

Wells Fargo claims here that the Foreclosure Mediation Program is a "per se regulatory taking." It clearly is not. The U.S. Supreme Court recently said:

> Our precedents stake out two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property-however minor-it must provide just compensation. . . . A second categorical rule applies to regulations that completely deprive an owner of "all economically beneficial us[e]" of her property.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005). Clearly the Foreclosure Mediation Program falls into neither of these classifications. Physical occupation of properties is not an issue. And no party claims deprivation of all economically beneficial use of property, be it real property or contractual rights. While rights and duties may be adjusted, there is significant value remaining in the property and the contracts after the adjustment.

Regulation that does not constitute a per se taking is measured by the test in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978).

> The Court in *Penn Central* . . . identified several factors that have particular significance. Primary among those factors are [t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good —may be relevant in discerning whether a taking has occurred. The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.

Lingle, 544 U.S. at 538-39 (internal citations and quotation marks omitted). Here the Foreclosure Mediation Program is a regulatory program that "merely affects property interests through [a] public program adjusting the benefits and burdens of economic life to promote the common good whose economic impact is not severe." *Id.*

The only "taking" is the loss suffered by the servicer, Wells Fargo, who stands to make money on the foreclosure regardless of the rights of the beneficial owner of the deed of trust

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and mortgage note. But that is not a true "taking" since, but for the default of the debtor, Wells Fargo would not be in the position of doing the foreclosure as the servicer. Likewise, had the Federal Home Loan Bank, the alleged owner of the note, terminated the services of Wells Fargo, Wells Fargo would not have been in the position of earning fees on the foreclosure services. At best Wells Fargo's "right" was inchoate in nature and may never have arisen. Termination of an inchoate contract interest is not a "taking."

The argument that NRS 107.086 operates as a violation of the due process clause of the United States or the Nevada Constitutions is also erroneous. The due process clause does not prohibit all takings, it prohibits takings without some form of hearing. In *Mathews v. Eldridge* the United States Supreme Court held that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319 (1976). Wells Fargo's complaint is that Judge Flanagan's decision, which was based on judicial review where all parties filed arguments and after which there was a hearing held, did not satisfy their due process rights to be heard. What additional due process hearing rights could be afforded to Wells Fargo which would have altered Judge Flanagan's decision? This is a disingenuous and frivolous argument by Wells Fargo. Thus, all of the arguments raised by Wells Fargo, this inherent bias and conflict of interest must be kept in mind when considering their arguments.

CONCLUSION

NRS 107.086 properly confers power to the Nevada Supreme Court to decide matters of equity and issues in controversy. Given the origins of the equitable remedy of foreclosure law, what the framers understood foreclosure to be at the time of drafting the Nevada Constitution, and the actual requirement of NRS 107.086, Wells Fargo cannot substantiate the claim that NRS 107.086 improperly gives executive or legislative power to the Supreme Court of Nevada.

Likewise, NRS 107.086 does not directly impair the contract rights of the beneficial owner of the deed of trust and mortgage notes. It adds a new layer in the foreclosure process but if the beneficial owner of the deed of trust and mortgage notes acts in good faith in the

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mediation process, his rights to foreclose and sell the property of the debtor remains. In some cases NRS 107.086 enhances the benefits to the beneficial owner of the deed of trust and mortgage note since it allows the consideration of an equitable remedy not contained in the contract which might wind up being to the benefit of the owner of the deed of trust and mortgage over his recovery in foreclosure.

Lastly, it must not be forgotten that the enforced modification of the mortgage was the result of the numerous bad faith acts by Wells Fargo. Don't forget that it was Wells Fargo which promised that if the Renslows fulfilled the HAMP modification requirements, that the modification would become permanent. Wells Fargo should be responsible to honor that contract. The Courts have the authority under their inherent equitable powers to craft a just resolution in this matter. Considering the continued bad faith conduct of Wells Fargo in this matter, the call for an equitable remedy is obvious. The remedies crafted by the District Court in this matter are within its authority and represent a fair and just result for all parties.

DATED this 7th day of December, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of December, 2011

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CERTIFICATE OF SERVICE

I am an employee of the Office of the Attorney General, Bureau of Consumer Protection, over the age of 18 years, and certify that I served a true and correct copy of the foregoing AMICUS CURIAE BRIEF upon all parties of record in this proceeding by mailing a copy via United States Mail, certified, return receipt requested, addressed to the following:

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE INVESTMENT TRUST 2006-1,

Petitioner,

vs.

JOHN D. TRUEX, an individual,

Respondents.

Case No.: CV11-00584

Dept. No.: 7

/

ORDER

Introduction

The Founding Fathers believed the government they established would act as a whole for the governing good of the people. The Foreclosure Mediation Program was enacted by the Legislature. It was signed into law by the Governor. It has been administered by the Nevada Supreme Court.

Each branch of government is a separate, but not independent, arm of government. In the great enterprise of making democracy workable, all are partners. The Foreclosure Mediation Program is an example of all three branches of government, Legislative, Executive and Judiciary, working to meet the needs of its citizens who face an unprecedented crisis of historic proportions.

After a thorough examination of the challenges raised by DEUTSCHE BANK, this Court finds the Foreclosure Mediation Program to be constitutional.

ATTACHMENT A

Procedural History

On February 25, 2011, Petitioner DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE INVESTMENT TRUST 2006-1 (hereinafter, "DEUTSCHE BANK") filed a *Petition for Judicial Review*. On March 11, 2011, Respondent JOHN D. TRUEX (hereinafter, "TRUEX") filed a *Response*. On March 14, 2011, this Court filed an *Order on Judicial Review*, and set a briefing schedule that noted the *Petition* and *Response* and authorized a *Reply* and set a hearing. On April 1, 2011, DEUTSCHE BANK filed its *Reply*. On April 18, 2011, TRUEX filed a *Second Response*.

This Court held a hearing on April 22, 2011, at which time certain constitutional issues were raised. This Court ordered supplemental briefing. On May 13, 2011, DEUTSCHE BANK filed its *Supplemental Brief*, and a *Notice of Case Involving Constitutional Questions*. On May 25, 2011, TRUEX filed his *Supplemental Response*. On June 2, 2011, DEUTSCHE BANK filed their *Reply*.

On June 30, 2011, this Court ordered that DEUTSCHE BANK join the STATE OF NEVADA and the ADMINISTRATIVE OFFICE OF THE COURTS (hereinafter "the State") as a party. On July 5, 2011, DEUTSCHE BANK filed a *Notice of Joinder*. On July 14, 2011, this Court held a telephonic hearing, scheduling a hearing for August 11, 2011. On August 5, 2011, the Attorney General representing both the STATE OF NEVADA and the ADMINISTRATIVE OFFICE OF THE COURTS filed its *Points and Authorities in Support of the Constitutionality of the Foreclosure Mediation Program*. On August 8, 2011, the LEGISLATURE OF THE STATE OF NEVADA (hereinafter "the Legislature") filed a *Motion for Leave to File an Amicus Curiae Brief* and the *Amicus Brief*. On August 9, 2011, this Court granted the *Motion for Leave*. On August 9, 2011, TRUEX filed a *Supplemental Brief* addressing the issues raised by the State. On August 9, 2011, DEUTSCHE BANK filed its *Reply Brief* addressing the arguments of the State and Legislature.

On August 11, 2011, this Court heard oral argument. This Court's *Order* follows.

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Legal Standards

The scope of Judicial Review in Foreclosure Mediation cases is to determine bad faith, enforce agreements between the parties, and determine sanctions pursuant to NRS Chapter 107. FMPR 21(1) (Former Rule 6(1)). Petitions for Judicial Review of Foreclosure Mediation are conducted using a "*de novo*" standard. FMPR 21(5) (Former Rule 6(5).

Parties must strictly comply with the provisions of NRS 107.086. Levya v. Wells Fargo, 127 Nev. Adv. Op. 40, p.8. When a lender violates NRS 107.086 or the Foreclosure Mediation Rules the District Court must determine appropriate sanctions and shall not permit a Certificate to issue. Pasillas v. HSBC, 127 Nev. Adv. Op. 39, pp. 11 – 13.

Discussion

This Court begins its analysis by addressing those issues outside of the constitutional question raised by Petitioner. This mediation occurred on February 9, 2011, thus the Foreclosure Mediation Rules (hereinafter "FMRs" or "Rules") in effect that that time apply and this Court shall refer to the Rules by the numbers then used.

Pleading Practice In Violation of Rules

On March 11, 2011, prior to this Court entering its *Order for Judicial Review*, TRUEX filed a *Response* that was primarily a *Motion to Dismiss*, alleging that DEUTSCHE BANK had failed to stated a claim recognized under judicial review.

On April 1, 2011, pursuant to this Court's *Order for Judicial Review*, DEUTSCHE BANK filed its *Reply to Response* and *Opposition to Motion to Dismiss*.[1] Included in DEUTSCHE BANK'S *Reply* was a request that this Court apply DCR 13(3) against TRUEX for failure to file a written opposition to the substantive contentions raised in the *Petition*. On April 18, 2011, TRUEX filed a *Second Response to Petition for Judicial Review*.

[1] DEUTSCHE BANK contended that TRUEX could have filed a *Response* alongside a *Motion to Dismiss* in the same pleading, and by way of footnote, pointed out that DEUTSCHE BANK was filing a "Reply brief coupled with an Opposition to Motion to Dismiss." Although DEUTSCHE BANK'S contention that TRUEX could have filed both a substantive response and the *Motion to Dismiss* at the same *time* is correct, DEUTSCHE BANK is referred to WDCR 10(9) mandating that any motion, opposition, reply, etc., must be filed as a separate document unless it is pleaded in the alternative.

This Court construes the *Second Response* as a *Surreply* not authorized by this Court's *Order for Judicial Review* and which was not preceded by a request for leave to file. However, this Court takes note of Nevada's oft stated public policy of adjudicating cases on the merits, rather on procedural grounds.

This Court notes that DCR 13(3) is a permissive rule, not a mandatory one. This Court will excuse TRUEX'S unauthorized *Surreply* which does address the substance of the *Petition*. This Court will excuse DEUTSCHE BANK'S violation of WDCR 10(9). This Court will address this action on the merits.

Motion to Dismiss

This Court has considered the arguments regarding TRUEX'S contention that the *Petition* fails to state a claim for which relief can be granted. This Court disagrees. DEUTSCHE BANK filed a *Petition* seeking confirmation that it had acted in good faith, had complied with the requirements of the Foreclosure Mediation Program, and that a Certificate would issue. This is within the purview of this Court sitting in review of a foreclosure mediation.

The scope of Judicial Review in Foreclosure Mediation cases is to determine bad faith, enforce agreements between the parties, and determine sanctions pursuant to NRS Chapter 107. FMR 21(1) (Former Rule 6(1)). The *Petition* is one that seeks a declaration that DEUTSCHE BANK met its mandate. "Determining bad faith" includes the ability to determine that the parties did not act in bad faith. "Determine sanctions pursuant to NRS Chapter 107" includes the ability to determine that no sanctions should issue against a particular party.

Thus, if after a mediation, it appears to a lender that it has complied with all requirements of the Foreclosure Mediation Program, but it fears a Certificate will not issue, then it may petition the Court for an order directing the issuance of a Certificate, not as a sanction against a homeowner, but pursuant to this Court's powers to declare that the sanction of withholding a Certificate from the lender should not be imposed.

The issuance of a Certificate when a lender has fully complied with NRS 107.086 and the FMRs and negotiated in good faith is categorically not a sanction against a homeowner. It is the

expected and legislatively mandated result of a lender's good faith, compliant participation in the Foreclosure Mediation Program when no agreement is reached after good faith negotiations.

Accordingly, the *Petition*, which claims that DEUTSCHE BANK negotiated in good faith, complied with the requirements of NRS 107.086, and was entitled to a Certificate, is a Petition authorized by FMR 21(1) (Former Rule 6(1)). Therefore, and good cause appearing, the *Motion to Dismiss* is **DENIED.**

Substantive Review of the Mediation

In this action a mediation occurred in which the mediator found that DEUTSCHE BANK failed to provide required documents to TRUEX ten days prior to the mediation as required by Rule 8(1) which stated: "In addition to the documents set forth in Rule 5, the parties shall prepare such papers and provide to the mediator, and exchange the items required to be exchanged with each other party, using the most expedition method available, at least 10 days prior to the mediation. . ."

As this Court reads FMR 8(1), it requires that all the documents set forth in Rule 5, and the documents set forth in the remainder of Rule 8, and those documents required by the mediator must be exchanged between the parties no later than ten (10) days prior to the mediation. In Leyva, 127 Nev. Adv. Op. 40, the Nevada Supreme Court ruled that NRS 107.086 and FMR Rule 5 must be strictly complied with. In Pasillas, 127 Nev. Adv. Op. 39, the Nevada Supreme Court held that when a lender has committed a violation, a Certificate shall not issue, and sanctions must be determined.

The interesting twist to this case is that although DEUTSCHE BANK apparently violated Rule 8(1), TRUEX did not file a *Petition for Judicial Review* seeking sanctions. TRUEX did not ask for sanctions relating to DEUTSCHE BANK'S violations until his *Second Response*. This Court finds that in these cases the issue of violations may be raised at any time. Thus this Court, having been given notice of violations committed by DEUTSCHE BANK, must not permit a Certificate to issue, and must consider appropriate sanctions.

Here, Rule 8(1) was violated when documents set forth in Rule 5 were not timely provided. This Court finds that the purpose of Rule 8(1) is to provide the parties with sufficient

time to prepare for mediation. Rules concerning documents required by Rule 5, relating to those documents required by NRS 107.086(4), require strict compliance under Leyva. Here, certain certifications were not timely produced, and Rule 8(1) was not strictly complied with. This Court must determine appropriate sanctions. This Court finds that five hundred dollars ($500.00) is sufficient to demonstrate to DEUTSCHE BANK the necessity of timely providing documents.

This Court finds that sanctions are issued for their coercive effect, and are not "damages." In most cases in the Foreclosure Mediation Program, this Court finds that awarding sanctions to the adverse party would be an unwarranted windfall. Here, TRUEX has not suffered any harm from DEUTSCHE BANK'S violation. After this case, TRUEX will remain in possession of his house, and receive another mediation with his lender to potentially avert a foreclosure. Thus, awarding TRUEX sanctions for DEUTSCHE BANK'S violations would be a windfall. This Court finds that the sanctions against DEUTSCHE BANK should be awarded to an organization devoted to the public good.

Violations of TRUEX

This is an unusual case in that the Mediator's Statement reflects violations committed by a homeowner, Respondent TRUEX.

The mediator found that TRUEX failed to produce certain required financial statements, in that two pages from the statement were not provided ten days in advance of the mediation and TRUEX failed to provide those missing pages at the mediation. The Nevada Supreme Court has not yet decided what ought to be done when a homeowner violates NRS 107.086 or an FMR.[2]

In the only two published opinions relating to the Foreclosure Mediation Program, the Nevada Supreme Court has held that if a violation is found that the District Court must determine appropriate sanctions. Pasillas v. HSBC, 127 Nev. Adv. Op. 39. In that case, the Supreme Court reversed a District Court's denial of a petition for judicial review and remanded the matter for the District Court to determine appropriate sanctions against a lender who had violated certain

[2] Indeed, this issue was the jumping off point for DEUTSCHE BANK'S constitutional challenge, DEUTSCHE BANK initially posited that the Legislature could not *restrict* the District Court's authority to fashion equitable relief, and that if the Foreclosure Mediation Program was to work at all, that the Court must have authority to address shortcomings of homeowners.

provisions of NRS 107.086 and the FMRs. The Supreme Court noted that if there was any violation committed by a lender, a Certificate could not be issued. *Id.* This Department had previously found that while withholding a Certificate was a sanction that could be ordered, that some violations by a lender could be addressed solely through monetary sanctions while still permitting the Certificate to issue. In light of Pasillas and Leyva that paradigm is not longer operable.

In essence, the Supreme Court held that lenders in violation cannot get what they really want, namely to foreclose, if they violate NRS 107.086 or the FMRs. This Court is at a loss to apply the same form of sanction against a homeowner. What a homeowner really wants is to avoid a foreclosure and to modify their loan. This Court finds that addressing a homeowner's violation by ordering a Certificate to issue would be anathematic to the purposes of AB 149. So too would an order that determined that no modification would ever be required on the loan.

On the other extreme, this Court cannot ignore homeowner violations. The law must be applied uniformly. To hold lenders to a standard of strict or substantial compliance, while excusing violations of homeowners would be manifestly inequitable. NRS 107.086 and the FMRs require certain enumerated actions of both parties. The failure of either party to perform its duty is a violation that requires this Court to determine appropriate sanctions.

In reviewing NRS 107.086, the only provision that discusses sanctions provides the District Court with the authority to issue sanctions against the beneficiary of the deed of trust or the representative. NRS 107.086(5). In reviewing the Foreclosure Mediation Rules, the only provision that discusses sanctions merely confirms the District Court's authority to determine appropriate sanctions pursuant to NRS Chapter 107. FMR 6(1). This Court finds that FMR 6(1)'s reference to sanctions refers specifically to NRS 107.086(5). Construed literally, there is no provision under NRS 107.086 or the Foreclosure Mediation Rules that authorizes sanctions against a homeowner for conduct during a mediation. There are certain homeowner requirements of NRS 107.086 that, if violated, result in an automatic issuance of a Certificate. NRS 107.086(3) & (6). This Court finds that it has the power to enforce the provisions of NRS

107.086(3) or (6) against a homeowner if a lender brought a petition against the homeowner challenging the timeliness of the Election to Mediate.

However, for FMR 8(1) or 8(2), there is no provision in NRS 107.086 or the FMRs that empower this Court to issue sanctions against a homeowner or describing what those sanctions ought to be.

This Court finds that if a homeowner participated in bad faith, by providing fraudulent information with an intent to deceive the lender for example, then perhaps harsh sanctions would be warranted if the same were requested by the lender in a petition for judicial review, but this Court also finds that those sanctions would likely be issued under NRCP 11, or similar provision of law. However, in this case, the failure to provide a complete financial packet does not rise to bad faith, especially when the fact that TRUEX disclosed his high income level and financial stability is taken into account. It is not that TRUEX feigned poverty to gain a modification to which he was not entitled, he merely failed to complete an information packet. Although this is a violation of FMR 8(2), it is not evidence of bad faith.

This Court finds, in light of Pasillas and Leyva, that it is unable to use the violations of a homeowner to offset the violations of a lender and excuse the lender's violations. That is, here DEUTSCHE BANK is charged with a violation that precludes a Certificate, but TRUEX has also committed a violation. This Court cannot use TRUEX'S violation to cancel out DEUTSCHE BANK'S violation and permit a Certificate to issue, although that would appear to be the most equitable option and is the primary relief prayed for by DEUTSCHE BANK.

This discussion of what this Court cannot do is sadly not particularly helpful in determining what this Court can do to address homeowner violations. In the aftermath of Leyva and Pasillas, a homeowner's performance is largely irrelevant to the question of whether a lender can obtain a Certificate. A homeowner who flouts FMR 8(1) and (2), or who records the mediation in violation of FMR 8(6) is under no threat of specific statutory or rule based sanctions. This Court fears that homeowner immunity for behaving badly will result in homeowners behaving badly with impunity.

This Court finds that NRS 107.086(5) did not *create* this Court's authority to sanction lenders for violations of NRS 107.086 or the FMRs. This Court's authority to issue sanctions in these cases derives from the equitable powers of this Court. The last sentence of NRS 107.086(5) is merely an expression of Legislative intent confirming that this Court has full access to its equitable authority to fashion justice. As discussed *infra*, foreclosure is a creature of equity, actions involving foreclosure are thus inherently equitable actions. This Court possess the full array of equitable powers. Equity regards as done what ought to be done. This Court has inherent coercive powers to address violations of law, whether statute or rule, regardless of which party violated the law.

Having concluded that this Court possesses the authority to redress homeowner violations of NRS 107.086 or the Foreclosure Mediation Rules, this Court considers what is the appropriate sanction. As a case in equity, context is everything. Here, TRUEX has defaulted on a promissory note secured by a deed of trust. Upon such default, a Notice of Default was properly recorded. TRUEX exercised his statutory right to mediate his loan. NRS107.086 was created through AB 149. The purpose of AB 149 was to address the foreclosure crisis plaguing Nevada.

Specifically identified as a cause of the crisis was the fact that homeowners could not afford their mortgages because of changes in the economy, referred to as the Great Rescession. The Legislature intended to create a pause in the foreclosure process governed by NRS 107.080, in order to give homeowners and lenders an opportunity to meet and seek alternatives to foreclosure. Neither AB 149, nor NRS 107.086, nor the FMRs have a requirement that a homeowner suffer from any hardship in order to qualify for the Foreclosure Mediation Program. Thus, a millionaire who has defaulted on a $800,000 note securing a mansion despite a clear ability to pay has identical rights to elect to mediate as a laid off teacher struggling to pay the last $35,000 on a note securing a modest condo.

However, a lender that is confronted with a homeowner who has every apparent ability to pay the loan that the homeowner agreed to may find that good faith negotiation is satisfied merely by offering reinstatement. There is no equitable force to the proposition that one who can meet his obligations ought to have his obligations excused because that person mistimed a

market. After all, a homeowner who saw great appreciation in the value of his home would be unlikely to agree to owe more money to his lender. TRUEX has not identified any authority for the proposition that gains should be privately realized by a homeowner, but that losses must be shared. TRUEX'S status as an individual who can afford his mortgage casts a less than favorable light on his failure to provide certain financial information.

This Court finds that TRUEX'S failure resulted in a mediation in which DEUTSCHE BANK was unable to fully negotiate because TRUEX withheld information. This caused DEUTCHE BANK to waste its time and money by having an attorney represent it at a mediation in which TRUEX failed to meet his obligations.

In the *Petition for Judicial Review*, DEUTSCHE BANK asked this Court for such relief as deemed fair, just and equitable. This Court finds that this request encompasses asking this Court to consider sanctioning TRUEX for his violations. This Court finds that TRUEX ought to be sanctioned for his violation. This Court notes the minimal nature of TRUEX'S violation, and finds that a nominal sanction is appropriate. This Court finds that two hundred fifty dollars ($250.00) is sufficient to demonstrate to TRUEX and other homeowners the necessity of complying with the provisions of the program that they have elected to participate in and which they have compelled their lender to participate in. This Court finds that it would be inappropriate here to award the sanction to DEUTSCHE BANK, and shall instead order the sanction paid to an organization devoted to the public good.

No Certificate May Issue; New Mediation Ordered; No Attorneys Fees or Costs

Due to DEUTSCHE BANK'S violation, no Certificate may issue based on this mediation. This Court finds that DEUTSCHE BANK and TRUEX have both demonstrated a willingness to continue negotiating in good faith, and finds that it is equitable to order a new mediation. This will avoid the unnecessary time and expense of requiring DEUTSCHE BANK to rescind the Notice of Default and record a new one. This benefits both parties, because it will prevent unnecessary fees and expenses from accruing that DEUTSCHE BANK would seek against TRUEX. This Court does acknowledge that permitting a new mediation rather than requiring rescission and re-recording may seem to favor lenders because it shortens the time that

will elapse before a new mediation is held, but such a view is cynical in that it assumes that the second mediation will be unfruitful and that the lender will simply seek to foreclose. This Court finds that a new mediation based on the present Notice of Default provides equal benefits to lenders and homeowners alike. This Court is optimistic that good faith mediation may avert a foreclosure. Even if the second mediation is ultimately unsuccessful, it saves lenders time, and ultimately saves homeowners money.

Because both parties violated the FMRs, this Court finds that each should bear their own fees and costs incurred throughout these proceedings.

Constitutionality of the Foreclosure Mediation Program

In this action DEUTSCHE BANK made a serious and well articulated argument that the Foreclosure Mediation Program, as currently enacted and operated, violates the Nevada Constitution's Separation of Powers clause.[3] DEUTSCHE BANK contended that the Foreclosure Mediation Program is essentially an administrative agency that was constitutionally required to have been assigned to the Executive Branch. It contended that the fact that the Foreclosure Mediation Program is operated by the Administrative Office of the Courts by the Nevada Supreme Court, and that the Nevada Supreme Court drafts the Foreclosure Mediation Rules results in a finding that the Foreclosure Mediation Program has been assigned by the Legislature to the Judicial Branch. DEUTSCHE BANK contends that this violates the Foreclosure Mediation Program, because it either is an administrative agency under Chapter 233B which must be in the Executive Branch, or if it is not an executive agency, then it is a judicial program that is exercising executive function.

Nature of the Foreclosure Mediation Program

The Foreclosure Mediation Program is a relatively unique program within the State of Nevada. This Court had previously indicated that the Foreclosure Mediation Program was an administrative agency. [*See*, Petitioner's Reply at p. 4] The vehicle for judicial review by way of

[3] At oral argument each party contended that the other had first raised the constitutional issues. This Court finds that TRUEX first raised the constitutional issue by contending that this Court's powers had been limited by the Legislature. As a result, this Court does not find that it would be equitable to award TRUEX attorneys fees for briefing the constitutional question.

a petition is similar to review of an administrative agency action. The Supreme Court's first case, in an unreported order, dealing with the Foreclosure Mediation Program analogized to the procedures for service of pleadings in administrative actions under Chapter 233B.

To the extent that this Court previously indicated that the Foreclosure Mediation Program *was* an administrative agency, that statement was incorrect. Although the Foreclosure Mediation Program bears significant similarities to an administrative agency, in the State of Nevada an administrative agency pursuant to Chapter 233B is inherently part of the Executive Branch. Were the Foreclosure Mediation Program an administrative agency pursuant to Chapter 233B, but delegated to the judiciary, that would be a likely violation of the separation of powers clause. This Court finds that the Foreclosure Mediation Program is not an administrative agency within the definition of that term under Nevada law.[4] The Foreclosure Mediation Program was not established pursuant to the Administrative Procedures Act, and is not governed by the APA. Although it bears similarities to an administrative agency, it is not one.

As stated by the Attorney General in oral argument, the Foreclosure Mediation Program is a function of the judicial branch, and is, as its name implies, a "program," in the same manner that the Supreme Court's settlement conference program is a "program." It is not that the Supreme Court is running an agency that needs to be based in the Executive Branch. Rather, the Supreme Court, through the Administrative Office of the Courts runs a program that operates under its own set of rules. The question becomes whether that program, as presently operated, violates the separation of powers clause by operating outside of the judicial sphere and exercising executive function. If the Foreclosure Mediation Program is outside of the judicial sphere or judicial function, then the Supreme Court is operating a program that exceeds its judicial authority. *See*, Galloway v. Truesdale, 83 Nev. 13 (1967).

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[4] This Court had previously noted that the typical Petition for Judicial Review under FMR 21 does not challenge the actions of the Foreclosure Mediation Program itself, but merely challenged the actions of the parties to the mediation. This Court had indicated that a challenge against the Foreclosure Mediation Program itself would likely be brought pursuant to Chapter 233B. This was incorrect; the procedure for challenging an action of the Foreclosure Mediation Program itself is contained within the FMRs at FMR 21(4).

Three Out of Three Branches Agree

The mere fact that some entity with some authority does something does not make it right or lawful.[5] However, this Court takes some guidance from the fact that the entirety of the government of the State of Nevada appears to believe that AB 149 did not violate any constitutional mandates or prohibitions. This Court had ordered the State of Nevada to appear through the Attorney General's Office, and for the Foreclosure Mediation Program to appear, because due to the nature of the claim asserted, it was possible that each branch of government would have a differing opinion. In fact, the Foreclosure Mediation Program through the Administrative Office of the Courts agreed to permit the Attorney General's Office to represent it because its position was the same as the State of Nevada's executive branch. The Legislature filed an *amicus curiae* brief in support of the same position.

This Court notes the following facts. The Foreclosure Mediation Program was enacted by statute by the Legislature through AB 149. AB 149 was signed by the Governor, the head of the Executive Branch. Pursuant to AB 149 the Supreme Court undertook the task of formulating the FMRs, hired individuals to run and administer the program, appointed mediators, collected fees for the mediations. The Supreme Court has issued no fewer than four (4) orders stemming from the Foreclosure Mediation Program, two of which were formal published opinions. The Supreme Court has also amended the Foreclosure Mediation Rules several times. In 2011, the Legislature passed AB 300, which made certain modifications to the Foreclosure Mediation Program, but did not remove it from the Supreme Court's oversight. Governor Brian Sandoval vetoed AB 300, noting in his veto letter that the Supreme Court had the authority to modify the program, pursuant to NRS 107.086(8), and thus Legislative action was unnecessary because such changes could be, and in his view should be, made by the Supreme Court.

Generally Pre-Litigation ADR Programs Are Within The Judicial Function

This Court finds that where there is a controversy of a legal or equitable nature between two parties, that the judiciary may be properly tasked with creating, administering, or supervising

[5] Many remember President Richard Nixon's infamous line, "When the President does it, that means that it is not illegal."

a program for dispute resolution with the intention of avoiding litigation. *See*, Wegner v. Finley, 541 N.E.2d 1220 (1989).

The Foreclosure Mediation Program does not fall squarely within this framework because not all foreclosures brought to mediation could be validly challenged. The Foreclosure Mediation Program accepts parties who are undeniably in default with no substantive defense to the underlying foreclosure. These mediations do not always avert a wrongful foreclosure action, because not all of the participants have sufficient facts to make a wrongful foreclosure claim. However, it cannot be denied that some of the participants in the Foreclosure Mediation Program may have substantive defenses to bring a wrongful foreclosure action, and that the Foreclosure Mediation Program does avoid some litigation.

This Court notes that one of the chief concerns of the Legislature in passing NRS 107.080 was a concern that homeowners did not know who owned their loan, and thus did not know who ought to be foreclosing against them, or with whom they should attempt to work out alternative arrangements. This Court finds that such issues of unproven ownership persist to this day. *See*, Leyva, 127 Nev. Adv. Op. 40. One of the key requirements of the Foreclosure Mediation Program as enacted is that lenders demonstrate who owns the note and who possesses beneficial interest in the deed of trust. This facet of the Foreclosure Mediation Program militates strongly towards a conclusion that the Foreclosure Mediation Program is the type of pre-litigation ADR that has been upheld in other states. By providing a forum where the lender and homeowner both analyze the documents supporting a foreclosure, both sides can determine whether the lender has standing to foreclose, and accordingly whether the homeowner has grounds to file a wrongful foreclosure suit. In a system in which homeowners do not know who owns their loan because the beneficiary recorded in the county office is a mere placeholder and their point of contact is a mere servicer, providing a forum designed in part to address the ownership issue does help prevent litigation, and certainly helps prevent needless litigation. The Foreclosure Mediation Program provides, at minimum, a forum for homeowners to be shown that the underlying foreclosure is being validly sought by the proper party. This obviates the need for the

filing of a civil suit in order to conduct formal discovery. Thus, the Foreclosure Mediation Program is a program that reduces litigation.

This Court finds that the judicial power includes the ability to craft and administer programs that are designed to reduce litigation. Essentially, if a program is designed to prevent a justiciable controversy between two parties from becoming a case, that is within the judicial power as defined in Galloway. This Court finds that the Foreclosure Mediation Program is such a program.

Other Court Based ADR Programs

The Legislature filed an *amicus brief* which cited to several judicially governed alternative dispute resolution programs in other states that provided for judicial ADR outside of litigation. [Leg. Amicus at pp.17-20] Michigan, Minnesota, Nebraska, Oklahoma, Indiana, Illinois, Colorado are all states with non-litigation based ADR programs and community dispute resolution programs established by the legislatures of those states and based in and overseen by the judiciary of those states. Those programs have generally been successfully upheld on appeal, or discussed on appeal with no concerns regarding their validity. *See*, Wegner v. Finley, 541 N.E.2d 1220 (1989); Yackle v. Andrews, 195 P.3d 1101 (Colo. 2008).

The Legislature did not state whether these ADR programs were mandatory or merely voluntary. The Nevada Foreclosure Mediation Program may be elected by a homeowner. Once a homeowner makes a timely election to mediate that election is binding on the lender. Thus, there is a compulsory element to the Nevada Foreclosure Mediation Program.

This Court finds that the compulsory nature of the Foreclosure Mediation Program makes it unique. A state may certainly empower its judiciary to run a voluntary alternative dispute resolution program in an effort to avoid formal litigation. The question before this Court is whether the Legislature may mandate that a lender participate in a program administered by the judiciary in the absence of an active civil case. DEUTSCHE BANK argued that there is no formal process within the scope of NRCP 4 in the Foreclosure Mediation Program. There is the Notice of Default, the Election to Mediate, the Mediator's Statement, and potentially a Petition

for Judicial Review. None of these documents are served with a summons under NRCP 4, these mediation are not "cases".

Other Foreclosure Mediation Programs

This Court briefly looks to the Foreclosure Mediation Program of other states for examples of how other states have set up analogous systems. Although the fact that another state has or has not adopted a similar system to Nevada is not dispositive to the question of whether Nevada's Foreclosure Mediation Program as presently enacted violates the distribution of powers clause of Nevada's Constitution, such a survey is instructive.

The Foreclosure Mediation Program of New Jersey is run by the Administrative Office of the Courts. However, New Jersey foreclosure law is overseen entirely by the judiciary through formal cases. Thus, this mediation program is one that has been inserted into an existing actual case. Similarly, Connecticut has a Foreclosure Mediation Program that has been inserted into its judicial "case based" foreclosure proceedings. Florida also has a Foreclosure Mediation Program overseen by its Supreme Court, but is also a state where all foreclosures are prosecuted through a complaint seeking foreclosure. Maryland also offers a Foreclosure Mediation Program for foreclosures in which a "case" has been filed in a Circuit Court. Maryland's program is run by the Office of Administrative Hearings, an independent state agency. The State of Washington and Washington D.C. both require that a certificate of mediation completion be filed with the recorder's office prior to recording a transfer of title in the deed office. Washington State's program is handled by the Department of Commerce, and Washington D.C.'s program is handled by the Department of Insurance and Banking.

Rhode Island has a foreclosure mediation program based in the United States' Bankruptcy Court, as well as a Providence City specific program.[6] Again, these programs are part of formally filed cases.

By contrast, Hawaii is another state like Nevada with a judicially assisted and governed foreclosure mediation program in a state with "non-judicial" foreclosures. Hawaii has two

[6] A program that was challenged by Deutsche Bank National Trust Company, with mixed results. Deutsche Bank National Trust Co. v. City of Providence P.C. No. 10-1240

programs, one governed by the Court based on a pilot project out of its Third Circuit, and one that is managed by the Department of Commerce and Consumer Affairs but provided "performance oversight" by the judiciary.

From this Court's survey of the Foreclosure Mediation Programs in other states,[7] it appears that nearly all of them would satisfy DEUTSCHE BANK'S constitutional concerns. That is, they are all pursuant to filed foreclosure *cases*, or they are administered by an independent agency and not the judiciary of that state.

Nevada appears to be unique in juxtaposing a completely judicial foreclosure *mediation* process with "non-judicial" foreclosure process. Because it is agreed by all parties that the Foreclosure Mediation Program is within the judicial branch, the question is whether the subject matter of that program, "non-judicial" foreclosures pursuant to statute (NRS 107.080) and written agreements between two private parties, are within the judicial power of the courts. Galloway v. Truesdale, 83 Nev. 13 (1967).

The State contended that the judicial power includes the "administration of justice," citing to Galloway. DEUTSCHE BANK contended that as used in Galloway, the administration of justice is limited to justiciable cases or controversies. This Court agrees with DEUTSCHE BANK'S interpretation of what the administration of justice means. The "administration of justice" must relate back to "justiciable cases or controversies." This Court finds that the administration of justice need not be based in already established cases. As discussed *ante*, an ADR program specifically designed to reduce specific types of justiciable cases is a valid judicial function because it is a program that administers justice, and relates to justiciable cases or controversies. This Court finds that even an additional step of abstraction is permissible. A non-litigation ADR program that relates to specific types of justiciable cases or controversies is a valid judicial function.

[7] *See*, Heather Scheiwe Kulp, "Foreclosure Mediation and Mitigation Program Models." May 17, 2011 (*available at* http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/Foreclosuremed6-29.authcheckdam.pdf)

Accordingly, this Court finds that the judicial power may extend beyond formally filed "cases" if there is a "justiciable controversy," and the judiciary is engaged in programs to resolve that controversy. This Court looks to determine whether in the context of the Foreclosure Mediation Program, there is a justiciable controversy due to the nature of foreclosure or due to the relative status of the parties.

Foreclosure is Inherently Equitable In Nature And Properly Within the Judicial Sphere

This Court finds significant merit in the State's contention that the phraseology of "judicial" or "non-judicial" foreclosure is a misnomer; and in this case a dangerously misleading one. The State refers to this process as, "foreclosure by trustee's sale," because it is the trustee's sale that forecloses on the homeowners ability to exercise the right of redemption. This Court finds that a fitting term for the entire process under NRS 107.080 is, "foreclosure by notice and sale," as opposed to judicial foreclosure or "foreclosure by judgment." The process known as "judicial foreclosure" is more appropriately "case-based foreclosure". The process known as non-judicial foreclosure is more appropriately "notice-based foreclosure".

Calling Nevada's process of foreclosure by trustee's sale through notice a "non-judicial" foreclosure insinuates that such a process is outside of the judiciary. This Court finds that foreclosure pursuant to NRS 107.080 is not outside the judicial function.

The State laid out a persuasive argument that the founders of Nevada conceived of foreclosure as a purely judicial function. The equitable rights of redemption and foreclosure were created by the Chancery Courts of England, and passed down through English and American Common Law. BFP v. Resolution Trust Corp., 511 U.S. 531 (1994). Thus, when the founders framed the Constitution of Nevada, and assigned judicial power to the judicial branch, foreclosure of a homeowner's right of redemption was included in those powers.

Programs that address foreclosure issues are inherently programs that involve the balancing of the homeowner's equitable right of redemption and the lender's equitable right to foreclose. This is clearly judicial in nature. Foreclosures are *per se* within the judicial sphere. This Court next looks to whether NRS 107.080 removed certain classes of foreclosure from the judicial function.

Foreclosure Through Notice and Trustee's Sale Is a Justiciable Controversy

Petitioner's argument is that the metes and bounds of the judicial power can be summed up by the phrase, "justiciable case or controversy," citing to Galloway v. Truesdell, 83 Nev. 13 (1967). This Court finds that the use of "or" is ultimately dispositive in this action. As discussed *infra*, this Court finds a foreclosure pursuant to NRS 107.080 is a justiciable controversy, although certainly not a "case".

The definition of a justiciable controversy was expressed by the Nevada Supreme Court in Kress v. Corey, 65 Nev. 1 (1948): (1) there must exist a justiciable controversy; that is to say, a 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, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination. *See also*, Doe v. Bryan, 102 Nev. 52 (1986).

Here, (1) lenders claim a right to foreclose on homeowner's right to redeem, which homeowners have an interest in contesting; (2) the interests of lenders and homeowners are adverse; (3) the party seeking to participate in the Foreclosure Mediation Program to prevent foreclosure is the owner/occupier at risk of foreclosure and losing their residence and is thus an interested party with a cognizable legally protectable interest; (4) from the moment the Notice of Default is filed, the issue is ripe for judicial determination whether the foreclosure is proper.

This Court finds that there are two distinct documents which cause a controversy between the homeowner and the lender in the context of the Foreclosure Mediation Program. Each of these independently would be sufficient to place the parties into a justiciable controversy. Merely being late on a mortgage does not create an actual controversy.

The Election to Mediate is a document that is filed with the Administrative Office of the Courts. Once it has been filed, lenders are compelled to attend mediation and participate in good faith and to comply with NRS 107.086 and the FMRs. This Court finds that the Election to Mediate is analogous to a traditional complaint.

DEUTSCHE BANK contended at oral argument that the lack of formal service of a summons, or other process under NRCP 4, causes the Election to Mediation to not be analogous to a complaint. For purposes of determining whether the Foreclosure Mediation Program is a valid judicial function, this Court disagrees. A summons and complaint creates a "case," but this Court finds that a "justiciable controversy" is not synonymous with a case.

This Court appreciates DEUTSCHE BANK'S concerns that valid notice may not be given in the absence of process under NRCP 4, but such concerns are inapposite here. This case is a facial challenge, not one of specific application. Perhaps some bank could argue that it could not be validly sanctioned because the Election to Mediate was insufficient to give it notice under a due process argument. Such a concern was intimated during the discussions concerning AB 149 about the possibility that a lender who was not properly notified by a trustee could face sanctions for failure to appear. But that case is not before this Court. In this case, DEUTSCHE BANK received sufficient notice of the mediation, a conclusion strongly supported by the fact that DEUTSCHE BANK attended the mediation. There mere fact that the Election to Mediate *might* not give some hypothetical lender sufficient notice is not enough to call into question the constitutionality of the Foreclosure Mediation Program under a separation of powers analysis. The Election to Mediate is a document which, once filed, creates a justiciable controversy.

Separately, this Court finds that the Notice of Default, which provides the Election to Mediate, itself creates a justiciable controversy. This Court finds that NRS 107.080 did not create "non-judicial foreclosure" which removed foreclosures from judicial oversight, but rather, NRS 107.080 created a process of foreclosure in which judicial oversight was not *automatic*. When NRS 107.080 was passed, it simply inverted the burden on the parties to bring the matter before the Court, it did not take the matter outside of the judicial sphere.

Prior to 1929, a lender had the burden to file a foreclosure action. *See*, Hyman v. Kelly, 1 Nev. 179 (1865). This was time consuming and an inefficient use of judicial resources because typically all the parties agreed that there was a valid promissory note secured by a mortgage, that the note had been defaulted upon, and that the lender had the right to foreclose on the property and dispose of it. Thus, in 1929 the Legislature enacted a statute that permitted a lender to

provide due notice to the homeowner and thereafter exercise the lender's equitable right of foreclosure. However, nothing in the law from 1929 through 2009 precluded a homeowner from filing a challenge against the foreclosure. Essentially, in 1929, the Legislature made a policy choice favoring efficiency and expediency, and elevating the equitable right of foreclosure over the equitable right of redemption, and reversing the presumptions needed to exercise those relative and competing rights. Under NRS 107.080 it is presumed that the lender can foreclose. However, under NRS 107.080, the lender must give certain notices to the homeowner, so that the homeowner can either exercise the right of redemption, or challenge the matter in Court.

Thus, this Court agrees with the State of Nevada, and TRUEX, that foreclosure under NRS 107.080 is not outside of the judicial power of the judiciary of the State of Nevada. Rather NRS 107.080 merely removed *automatic* judicial oversight, and placed the burden on the homeowner to take the matter to Court. This Court further finds that it is permissible to give back limited oversight, or to create an alternative method of oversight.

Prior to NRS 107.080 a formal case was required to be filed by lenders. Subsequent to NRS 107.080 no such case was required, and a homeowner seeking to avoid a foreclosure had to file a case with sufficient grounds to demonstrate why the foreclosure should be stopped. In 1929, the Legislature relaxed requirements on lenders, and instead of requiring them to file a case against homeowners to exercise the right to foreclose, they merely had to provide notice to the homeowner to exercise the right to foreclose. In 2009, the Legislature could have repealed NRS 107.080, and restored automatic oversight of all foreclosures to the Courts, and placed the burden on lenders to prosecute all foreclosures.

Instead, the Legislature chose to pass a law restoring limited oversight to the Courts, and retaining the burden on the homeowner to make an application to the Courts. However, instead of requiring homeowners to file a case for violation of NRS 107.080 or wrongful foreclosure, the Legislature permitted the homeowner to file an Election to Mediate, and created the Foreclosure Mediation Program. It is difficult to accept a proposition that the Legislature could not make a partial restoration of judicial oversight when it could have made a complete restoration.

This Court finds that the Notice of Default under NRS 107.080 is a document that creates a justiciable controversy between the two parties. It is a notice served in a statutory manner that informs a homeowner that the lender seeks to exercise its equitable right of foreclosure, and that the homeowner must take certain steps to avoid that outcome. From the moment that Notice of Default under NRS 107.080 is filed, a controversy between the parties exists as to whether the lender may foreclose the homeowner's right to redeem.[8] That is a justiciable controversy.

This Court notes that when AB 149 was discussed in the Legislature, then Chief Justice Hardesty commented that: "This situation is unique in a couple of respects. The process does not begin with a *filed court case*; it is initiated, instead, through what appears to be a "Notice of Default and Election to Sell." Minutes of the Assembly Feb. 11, 2009 (*emphasis added*).

Chief Justice Hardesty also stated:

> We were asked to evaluate and consider participating in a mediation process, a dispute resolution process that has been outlined by Assemblywoman Buckley. *That is what courts do.* We conduct settlement conferences and mediations on a regular basis. We are well-trained to accomplish significant objectives in the settlement and mediation process.
>
> I believe that it would be necessary for the Court to adopt a set of rules which would govern the mediation process, and as an outline, we have a couple of sources that we can turn to. First, the Supreme Court can use the current settlement conference rules. Second, we have settlement conference mediation rules for alternate dispute resolution. We also have rules that govern other mediation processes throughout the court system. *Id.* (*emphasis added*)

Further, Chief Justice Hardesty stated:

> . . . the best approach is to treat this as a judicial function administered by the Administrative Office of the Courts. We do have in place a structure through the Senior Judge Program to be able to administer a program like this. *Id.*

From the statements made it is apparent that the possibility of handling the Foreclosure Mediation Program as an executive administrative agency was considered as a possibility, but

[8] As above, this Court acknowledges that in many, if not most, cases the answer to the question of whether the lender has the right to foreclose is yes. But there is still a question. This question gives rise to the controversy.

that it was determined that the best approach was to keep this dispute resolution program within the branch of the government devoted to dispute resolution, the Judiciary. These statements lend some authority to the arguments of the State that ADR is inherently judicial.

The statements of Chief Justice Hardesty also illustrate that the Legislature and the Supreme Court were aware that a foreclosure pursuant to NRS 107.080 does not involve a "filed court case." However, the lack of a formal civil case does not mean that there is no justiciable controversy. At the point in time the lender filed a Notice of Default and Election to Sell, the lender has informed the homeowner that the lender disputes that the homeowner retains the right to redeem, and that the lender shall foreclose that right if curative actions are not taken. This is a controversy. At the point that the homeowner files the Election to Mediate, the homeowner has informed the lender that he or she does not submit to the lender's decision and instead contests the lender's Election to Sell. This is an assertion of the homeowner's right to redeem against the lender's right to foreclose. This is a controversy. At its most basic, it can be said relative to the Foreclosure Mediation Program, that the lender wants to exercise the right to foreclose the homeowner's right to redeem and the homeowner does not want the lender to do so. *See*, Kress v. Corey, 65 Nev. 1 (1948). This is a justiciable controversy regarding two competing equitable rights of adverse parties that may be properly brought before the Courts.

Equity is broad. Although it is said that equity follows the law, equity is primarily concerned with fairness and justice. It must be remembered that homeowners have the right of redemption; and that Nevada is a lien theory state, which means that homeowners hold title to their homes. NRS 107.080 did not alter that situation. Rather, it provided lenders with an expedited means of foreclosing homeowners' equitable rights without automatic judicial oversight. In equity and in law, a homeowner may certainly ask a Court to stop the lender if the homeowner can demonstrate that the lender cannot properly meet the requirements to exercise the right to foreclose. This is contemplated by NRS 107.080. In equity, a homeowner may also ask the Court to compel a lender to take a pause on the march to foreclosing the homeowner's equitable rights and consider in good faith whether there is a mutually agreeable alternative. This is contemplated by NRS 107.086. This is equitable because it is fair in a world increasingly

driven by computers and automated processes, which have no concept of what is reasonable or what is just, to require a lender to produce a person who can weigh what is fair to make a human determination of whether the lender actually wishes to foreclose or whether an alternative can be reached.

Thus, this Court agrees with the State of Nevada, and TRUEX, that foreclosure is inherently equitable in nature and is within judicial power, and that foreclosure under NRS 107.080 remains equitable in nature and is not outside of the judicial power of the Judiciary of the State of Nevada. Rather NRS 107.080 merely removed *automatic* judicial oversight, and placed the burden on the homeowner to take the matter to Court. This Court finds that alternative dispute resolution programs that relate to equitable or legal claims are judicial in nature. This Court finds that the Foreclosure Mediation Program is an alternative dispute resolution program that relates to equitable claims. This Court finds that alternative dispute resolution programs that reduce litigation are judicial in nature. This Court finds that the Foreclosure Mediation Program is an alternative dispute resolution program that reduces litigation by providing a mechanism for demonstrating proper ownership of the loan outside of formal discovery in a wrongful foreclosure action. This Court finds that the judicial power extends to any justiciable controversy. This Court finds that the Foreclosure Mediation Program involves justiciable controversies regarding the relative and competing rights of a lender to foreclose on and a homeowner to retain the homeowner's equitable right of redemption, and is thus within the judicial power of the Judicial Branch of the government of the State of Nevada.

The Foreclosure Mediation Program Is Constitutional

This Court finds that the Legislature could have enacted the Foreclosure Mediation Program as an administrative agency pursuant to Chapter 233B. This Court finds that the Legislature could have enacted the Foreclosure Mediation Program with a requirement that in order to elect into the program a civil case must be filed in a District Court. But although the Legislature could have done those things, they were not required to do so by the Constitution of the State of Nevada. The Foreclosure Mediation Program as currently enacted and administered by the Nevada Supreme Court's Administrative Office of the Courts is constitutionally

permissible. NRS 107.086 is not facially unconstitutional for violating the separation of powers clause of the Nevada Constitution.

Accordingly, there is no constitutional defect that would void the underlying mediation between TRUEX and DEUTSCHE BANK, nor any constitutional problem prohibiting this Court entering an order pursuant to the *Petition for Judicial Review* filed by DEUTSCHE BANK.

This Court has been presented with an argument that creating a Foreclosure Mediation Program within the Administrative Office of the Courts in a "non-judicial" foreclosure state violates separation of powers because that program is inherently executive in nature. This Court finds that it is not.

Conclusion

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

1) No Certificate may issue from this Mediation;

2) The parties shall contact the Foreclosure Mediation Program to schedule a new mediation in front of a randomly assigned mediator;

3) TRUEX shall pay two hundred fifty dollars ($250.00) to Washoe Legal Services within thirty (30) days of entry of this *Order*;

4) DEUTSCHE BANK shall pay five hundred ($500.00) to Washoe Legal Services within thirty (30) days of entry of this *Order*.

5) Each party shall bear their own fees and costs for the first mediation, the *Petition for Judicial Review*, and the second mediation;

6) The *Petition for Judicial Review* is **DISMISSED**.

IT IS SO ORDERED.

DATED this 25 day of August, 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 25 day of August, 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 Deutsche Bank National Trust Company;

Wayne Pressel, Esq. for John Trucx;

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:

Catherine Cortez Masto
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701

Judicial Assistant