IN THE SUPREME COURT OF NEVADA

NATIONSTAR MORTGAGE, LLC; AND THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE HOLDERS OF THE CERTIFICATES, FIRST HORIZON MORTGAGE PASS-THROUGH CERTIFICATES SERIES PHAMS 2005-AA5, BY FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK NATIONAL MASTER SERVICER, IN ITS CAPACITY AS AGENT FOR THE TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT, Appellants, vs. CATHERINE RODRIGUEZ, Respondent.	Supreme Court No. 66761 District Court Case No. A685616

APPEAL

from the Eighth Judicial District Court
The Honorable KATHLEEN DELANEY, District Judge
District Court Case No. A-13-685616-J

APPELLANTS' OPENING BRIEF

GARY E. SCHNITZER, ESQ.
Nevada Bar No. 395
TYLER J. WATSON, ESQ.
Nevada Bar No. 11735
KRAVITZ, SCHNITZER & JOHNSON, CHTD.
8985 South Eastern Avenue, Suite 200
Las Vegas, Nevada 89123
Telephone: (702) 222-4149
Attorneys for Appellants

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Nationstar Mortgage LLC is a Delaware limited liability company with its principal place of business in Coppell, Texas. Nationstar's members are Nationstar Sub1, LLC and Nationstar Sub2, LLC. Nationstar Sub 1, LLC and Nationstar Sub2, LLC are both wholly-owned subsidiaries of Nationstar Mortgage Holdings, Inc., a Delaware corporation that is publicly traded.

Nationstar Mortgage LLC was represented in the District Court proceedings by:

Akerman, LLP
Ariel E. Stern, Esq.
Nevada Bar No. 8276
Allison R. Schmidt, Esq.
Nevada Bar No. 10743

Kravitz, Schnitzer & Johnson
Gary E. Schnitzer, Esq.
Nevada Bar No. 395
Tyler J. Watson, Esq.
Nevada Bar No. 11735

Nationstar Mortgage LLC was represented in the underlying foreclosure mediation by:

McCarthy & Holthus
Lindsey Bennet Morales, Esq.
Nevada Bar No. 11519

The Bank of New York Mellon F/K/A The Bank of New York is a wholly-owned subsidiary of The Bank of New York Mellon Corporation (collectively BONY).

BONY was represented in the District Court proceedings by:

Akerman, LLP
Ariel E. Stern, Esq.
Nevada Bar No. 8276
Allison R. Schmidt, Esq.
Nevada Bar No. 10743

McCarthy & Holthus
Kristin Schuler Hintz, Esq.
Nevada Bar No. 7171

APPELLANTS' OPENING BRIEF

ISSUES PRESENTED

1. The district court did not have jurisdiction to rule upon a petition for judicial review of a foreclosure mediation filed more than thirty days following receipt of the Mediator's statement.

2. The district court erred as a matter of law in considering evidence outside of the scope of the October 6, 2011 foreclosure mediation.

3. The district court erred in determining that Appellants participated in the foreclosure mediation in bad faith.

4. The district court violated Appellants' due process rights by awarding damages which were punitive in nature against Appellants for alleged bad faith participation in a foreclosure mediation.

STATEMENT OF THE CASE

This appeal stems from what is believed to be the largest sanction ever ordered by a court following a foreclosure mediation under the Nevada Foreclosure Mediation Rules. The Eighth Judicial District Court, the Honorable KATHLEEN DELANEY, District Judge.

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STATEMENT OF THE CASE

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JURISDICTIONAL STATEMENT

This appeal is taken from a Findings of Fact, Conclusions of Law and Order entered on October 6, 2014, by Department XV of the Eighth Judicial District Court, Clark County, Nevada. This Court has jurisdiction over the appeal from the district court's final order in the judicial review proceeding. *Nev. Const., art. 6, § 4;* NRAP 3A(b)(1). Appellants' Notice of Appeal was timely filed.

STATEMENT OF FACTS

I. Factual Background

Default and Prior Mediations

Respondent Catherine Rodriguez purchased the property located at 6845 Sweet Pecan Street, Las Vegas, Nevada on April 21, 2005 for $269,000. (App. 1 at 1-5.) First Horizon Home Loan Corporation ("First Horizon") was the original lender and beneficiary under the Deed of Trust, with MERS as a nominee beneficiary. (App. 1 at 14-37.)

In December 2009, Rodriguez strategically defaulted on her loan in hopes of obtaining better terms through the mediation process. (App. 13 at 2780.) Rodriguez has not made a mortgage payment since her intentional default in 2009. On March 18, 2010, MERS, as nominee for First Horizon, recorded a Notice of Default. (App. 4 at 878-880.) Thereafter, on May 24, 2010, BONY took assignment of the Deed of Trust. (App. 6 at 1343-1347.) Rodriguez elected to

mediate and ultimately participated in three separate mediations; on July 19, 2010, December 10, 2010, and October 6, 2011. (App. 4 at 881; App. 6 at 1383-90; App. 13 at 2782.) Nationstar began servicing Rodriguez's loan in August 2011 and had no involvement whatsoever in the July 2010 and December 2010 mediations. (App. 13 at 2791.)

Service Transfer from MetLife to Nationstar

In August 2011, First Horizon, as master servicer, transferred thousands of loans to Nationstar, as subservicer. (App. 13 at 2791.) The loans transferred included Rodriguez's loan, which had already been in default since 2009. (App. 13 at 2792.) Nationstar has no ownership interest in the loan, but has power of attorney to foreclose and service the loan. (App. 13 at 2791.)

When the transfer occurred, all of MetLife's servicer documents were electronically transferred to Nationstar, which keeps the documents in an electronic filing imaging system. (App. 13 at 2792.) These servicer documents include the payment history, origination documents and copies of the note and deed of trust. (*Id.*) These servicer documents do not include the original promissory note and original deed of trust. (*Id.*) Those documents stayed with the custodian, in this case US Bank, until they were provided to foreclosure counsel, McCarthy & Holthus, on or about June 5, 2013 (App. 12 at 2720.)

The October 6, 2011 Mediation

The Petition for Judicial Review ("PJR") that is the subject of this appeal stems from the October 6, 2011 mediation. (App. 10 at 2158-2317.) The mediation was initially scheduled to occur on September 15, 2011; however, counsel for MetLife indicated that servicing of the loan had recently been transferred to Nationstar. (App. 12 at 2703.) For that reason, the mediation was rescheduled to October 6, 2011. (App. 12 at 2706.)

Lindsey Bennett-Morales attended the mediation as counsel for Nationstar, and Daniel Marks appeared telephonically as Nationstar's representative.[1] (App. 12 at 2701.) Prior to the mediation, Ms. Bennett-Morales sent an email to the Mediator and to Rodriguez's counsel informing them that Nationstar would not have certified documents prior to the mediation, and requesting a 30-day continuance so that the proper documentation could be provided. (App. 12 at 2668-69, 2703.) The request for continuance was denied. (App. 12 at 2703.) Nationstar appeared with a copy of the note. (App. At 1-7.) **Importantly, it was disclosed that the copy of the note was not certified as a copy of the original and that no party at the mediation should rely on the copy of the note for any purpose.** (App. 1 at 1-7; see also App. 12 at 2703.) Nationstar also appeared with

[1] The parties stipulated that Nationstar, as servicer, was acting as the agent of BONY at the October 6, 2011 foreclosure mediation. (App. 13 at 2822-54.)

copies of the Deed of Trust and Assignment to BONY that were certified as copies from the Clark County Recorder's office. (App. 1 at 14-37; App. 12 at 2702.)

The uncertified copy of the note presented at the mediation was an inaccurate copy of the original. (App. 1 at 1-7; 8-13.) It contained a stamp endorsing the note to Nationstar that was placed on the copy of the note by mistake made by one employee. (App. 1 at 1-7; App. 12 at 2692; App. 13 at 2793.) If Nationstar had access to the original note (or a certified copy of the original) at the mediation, the note would have contained an endorsement in blank with a red circle around it. (App. 1 at 8-13.)

Despite disclosing that Nationstar did not have the certified documents and knowing that the foreclosure Certificate would not issue, Nationstar continued with the modification review. (App. 12 at 2703.) Rodriguez did not qualify for a HAMP modification due to her debt to income ratio. (App. 12 at 2687.) Despite Rodriguez's financial issues, Nationstar offered an internal modification that was contingent upon escrow review. (App. 12 at 2703.) The modification temporarily reduced Rodriguez's payments to no more than 24% of her gross monthly income. (*Id.*) Rodriguez did not accept Nationstar's modification offer. (See, *Id.*)

The Mediator Statement was issued on October 11, 2011 (App. 6 at 1383-1390.) It indicated that Nationstar failed to produce certified copies of the note, deed of trust and assignments. (*Id.*) The Mediator Statement further indicated that

the Broker's Price Opinion was not compliant. (*Id.*) Importantly, **the Mediator did not find that Nationstar failed to participate in good faith.** (*Id.*) The foreclosure Certificate did not issue, and neither party filed a PJR until Rodriguez filed the subject PJR, twenty (20) months later. (App. 10 at 2159.)

The Judicial Foreclosure

On December 14, 2012, BONY filed a Verified Amended Complaint for Judicial Foreclosure containing a copy of the note containing an endorsement in blank.[2] (Exhibit 10.) Thereafter, BONY filed a Motion for Summary Judgment and, during the June 18, 2013 hearing, counsel for BONY presented the original wet-ink copy of the note containing the endorsement in blank. (App. 1 at 8-13; App. 9 at 1981-87.) The court denied the Motion for Summary Judgment without prejudice to allow the parties to engage in limited discovery. (App. 10 at 2156.)

II. Procedural Background

Rodriguez filed her PJR of the October 6, 2011 mediation on July 22, 2013. (App. 10 at 2156.) On August 30, 2013, Nationstar filed a Response objecting to the untimeliness of the PJR. (App. 11 at 2445-54.) A Show Cause hearing was held on September 5, 2013. (App. 11 at 2455-66.) The district court found that the PJR was timely and that no discovery would be allowed, as discovery was not

[2] The Verified Complaint filed on May 3, 2012 inadvertently did not include the page containing the endorsement. (App. 11 at 2455-66.) For that reason, BONY filed the Verified Amended Complaint. (*Id.*).

allowed by the FMRs. (App. 11 at 2464.) Thereafter, evidentiary hearings took place on November 1 and December 13, 2013. (App. 12 at 2681-2764; App. 13 at 2774-2805.) At the evidentiary hearing, Fay Janati, Nationstar Litigation Resolution Analyst, testified she did not know who improperly placed the "Nationstar" stamp on the Note, but affirmed such actions are inconsistent with Nationstar policies and procedures to comply with the Foreclosure Mediation Rules. (App. 12 at 2685, 2702.)

The district court, over Appellants' objections, allowed Rodriguez to submit evidence of non-party servicers First Horizons and Metlife's securitization of the subject loan, First Horizon's Pooling and Servicing Agreement with Bank of New York Melon, Nationstar's Securities and Exchange Commission Filings; Bank of New York Melon's Quarterly Earning Statements, and Nationstar's SEC earnings reports. (App. 1 at 38-250; App. 2 at 251-472; App. 3 at 473-665; App. 4 at 666-824; App. 5 at 915-1164; App. 6 at 1165-1308, 1369-1381; App. 7 at 1404-1575; App. 8 at 1576-1692; App. 9 at 1829-1980; App. 12 at 2730, 2736, 2738, 2741, 2743.) Rodriguez submitted these documents for the purpose of obtaining what is tantamount to a punitive damage award against BONY and Nationstar. (See generally, *id.*) The district court denied Appellants' the opportunity to respond to Rodriguez's punitive damages arguments but stated "if you want to get leave of

court to file some additional briefing that you thought would be valuable you can seek that." (App. 12 at 2745.)

On January 3, 2014, Appellants filed a Motion for Supplemental Briefing pursuant to the district court's instruction. (App. 12 at 2806-2811.) The Motion set forth supplemental briefing was necessary to address the legal standard for imposition of sanctions resulting from a PJR of a foreclosure mediation and to allow Appellants to respond to the lengthy, improper closing arguments of Rodriguez's counsel regarding the imposition of punitive damages. (*Id.*) On February 13, 2014, the district court, without explanation, denied Appellants' Motion for Supplemental Briefing. (App. 13 at 2818-21.)

On October 3, 2014, the district court issued its Findings of Fact, Conclusions of Law and Order finding, *inter alia*, the following:

- The mediations held prior to the subject mediation and the judicial foreclosure action were relevant to the PJR,
- The 2010 certification execution by non-party MetLife Home Loans was made falsely, as the attached copy of the note was not a true and correct copy of the original, and the affiant was not in possession of the original note,
- Nationstar and non-party McCarthy & Holthus were aware of the endorsement containing the Nationstar stamp prior to the subject mediation,

- Appellants engaged in a pattern and practice of having their attorneys obtain copies of notes from an imaging file when preparing documents for mediation and exhibits for filing in court, rather than making actual copies of the original for such use,
- Appellants knew original documents were not going to be provided for the subject mediation and created their own set of documents and certifications to lead Rodriguez and the Foreclosure Mediation Program to believe that the documents were compliant with the FMRs.
- The Response to the PJR filed by counsel for BONY contained a copy of the note that contained the endorsement in blank and, therefore, demonstrates a pattern and practice of BONY and its non-party counsel to utilize inaccurate and untrustworthy copies of documents. (App. 13 at 2822-54.)

Ultimately, the district court ordered Nationstar and BONY to pay to Rodriguez $50,000 each. (*Id.*) The district court also ordered Appellants to pay Rodriguez's attorneys' fees and costs, submitted by Rodriguez to be approximately $90,000.[3] (*Id.*)

SUMMARY OF ARGUMENT

[3] There is a Motion to Retax Costs and Reduce Excessive Attorneys' Fees that is under advisement with the District Court. (App. 13 at 2855-62.)

This appeal stems from an order sanctioning Appellants for allegedly participating in a foreclosure mediation "in bad faith". Respondent Catherine Rodriguez purchased the property located at 6845 Sweet Pecan Street, Las Vegas, Nevada in April 2005 for $269,000. Rodriguez admits to intentionally defaulting on her loan in 2009 and has not made a single mortgage payment since. Following her default, Rodriguez participated in Nevada's foreclosure mediation program. She had three separate mediations, on July 19, 2010, December 10, 2010, and October 6, 2011. Nationstar began servicing Rodriguez's loan in August 2011 and had no involvement whatsoever in the July 2010 and December 2010 mediations. Rodriguez was represented by counsel at each mediation. Following the three mediations, Rodriguez did not cure her default despite being offered two separate modifications in August 2010 and again in October 2011. On May 3, 2012, BONY, the current beneficiary, filed a judicial foreclosure action. The court denied BONY's motion for summary judgment and permitted Rodriguez to conduct discovery.

Although the subject mediation took place on October 6, 2011, and the Mediator's Statement was served on October 11, 2011, Rodriguez did not file her PJR until July 22, 2013, 20 months later. The Foreclosure Mediation Rules ("FMRs") as they existed in October 2011 stated that "[a]ll such petitions **shall** be filed within 30 days of the date that the party to the mediation received the

Mediator's Statement." FMR 21(2) (prior to 2012 amendments). (*emphasis added*). The PJR was not filed timely and, as a result, the District Court lacked jurisdiction to consider the untimely petition.

Despite the untimeliness of the PJR, the district court entertained Rodriguez's argument. Essentially, Rodriguez claimed that Appellants mediated in bad faith because they did not provide a certified copy of the note. The note provided at the mediation was for sample purposes only. However, Rodriguez and her counsel fully knew about the status of the note even before the mediation began. Mediation counsel for the Appellants told Respondent's counsel prior to the mediation that she would not be producing a certified copy of the note. The Mediator and Respondent's counsel knew they could not rely on documents produced at the mediation. The **uncertified** copy of the note presented at the mediation was an incorrect copy as it contained a stamp endorsing the note to Nationstar that was placed on the note by mistake. Despite this, the mediation continued and the parties continued to negotiate in good faith as evidenced by an offer for a loan modification. Respondent did not accept the loan modification offered to her. The mediation ended without the issuance of a Certificate.

On May 3, 2012, BONY filed a Complaint for Judicial Foreclosure. At a hearing on a Motion for Summary Judgment, counsel for BONY presented the original note, which did not contain the endorsement to Nationstar. Almost three

months later, Rodriguez filed a PJR claiming that the presence of the endorsement on the uncertified note was evidence of bad faith mediation tactics. However, it is clear that the status of the note, however characterized, did not impede the parties from discussing, in good faith, a loan modification.

On October 3, 2014, the district court issued a Findings of Fact, Conclusions of Law and Order that completely ignores the fact that the note containing the incorrect endorsement **was not a certified copy of the original**. Drawing from evidence presented from the judicial foreclosure action, and from a prior mediation held in 2010, the district court determined that Appellants knew original documents were not going to be provided for the mediation and, instead created their own set of documents and certifications to mislead Rodriguez and the Foreclosure Mediation Program to believe that the documents were complaint with the FMRs. This finding is simply not supported by the evidence. Appellants reiterated again and again that the note was not certified and, therefore, could not be relied upon. Appellants knew that the mediation would not result in the issuance of a Certificate, and, instead of simply walking away, continued to negotiate in good faith. Despite this, the district court sanctioned Appellants $50,000 a piece and required further sanctions of $10,000 per day if payment was not made within thirty (30) days of entry of the Order, November 5, 2014. By awarding a sanction totaling $100,000.00, the district court improperly considered

Appellants' financial condition. This Court has never endorsed such a practice in the foreclosure mediation context.

ARGUMENT

I. Standard of Review

This Court reviews the scope and meaning of a statute and the Foreclosure Mediation Rules ("FME") *de novo*. *Pasillas v. HSBC Bank*, 225 P.3d 1281, 1285 (Nev. 2011). The imposition of sanctions issued pursuant to a Foreclosure Mediation Program Petition for Judicial Review is reviewed under an abuse of discretion standard. *Id.* at 1284.

II. The district court did not have jurisdiction to rule upon a petition for judicial review of a foreclosure mediation filed more than thirty days following receipt of the Mediator's statement.

The Foreclosure Mediation Rules ("FMRs") as they existed in October 2011 required a PJR to be filed within "30 days of the date that the party to the mediation received the Mediator's Statement."[4] FMR 21(2)[5]. Here, the Mediator served the Mediator Statement on October 11, 2011. (App. 6 at 1383-90.) In order for Rodriguez's PJR to be timely, it would have to have been filed by November

[4] The FMRs have since been amended to require the Foreclosure Mediation Program Administrator to issue a notice of homeowners stating whether a Certificate will issue. Under the current rules, a PJR must be filed 30 days of receipt of the notice. FMR 21(3) (as amended Dec. 2012.)

[5] Unless otherwise noted, all references to any FMR refers to the rules as they existed at the time of the subject mediation, October 16, 2011.

14, 2011.[6] Rodriguez did not file her PJR until July 22, 2013. (App. 10 at 2159.) Accordingly, the district court lacked jurisdiction to consider the untimely PJR.

A. A clear reading of the FMR 21(2) requires the PJR to be filed within 30 days of the date that Rodriguez received the Mediator's statement.

FMR 21(2) states:

> **All such petitions shall be filed within 30 days of the date that the party to mediation received the Mediator's Statement**, and the Mediator's Statement shall be reviewed by the district court within 60 days of the service of the petition in accordance with the Nevada Rules of Civil Procedure, NRS Chapter 107, and any local rule or administrative order adopted by a judicial district to adjudicate such petitions.

(*emphasis added*).

When the language of a statute is unambiguous, the court should give the language its ordinary meaning. See, *Glover v. Concerned Citizens for Fuji Park*, 118 Nev. 488, 50 P.3d 546 (2002). Here, the statutory deadline contained within FMR 21(2), 30 days from receipt of the Mediator's Statement, is clear and unambiguous. Thus, the Court should give the language its ordinary meaning and find that Rodriguez's PJR was not timely filed.

Importantly, FMR 21(2) uses the mandatory "shall" when stating the deadline for filing a PJR. This Court has analyzed the use of the word "shall" in the FMRs, and has held as follows:

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[6] This date assumes the standard three days for mailing.

> Both NRS 107.086 and the foreclosure mediation rules use the word "shall" or "must" when listing the actions required to parties to foreclosure mediation. Use of the word "shall" in both the statutory language and the FMRs indicates a duty on the part of the beneficiary, and this court has stated that "shall" is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature. Additionally, Black's Law dictionary defines "shall" as meaning "imperative or mandatory ... inconsistent with a concept of discretion.

Pasillas, 225 P.3d at 1285 (internal citations omitted).

FMR 21(2) contains no discovery rule that would extend the time for filing the PJR due to the discovery of new information. However, even if it did, Rodriguez did not discover any new information that would justify the court's consideration of an untimely PJR. Nothing prohibited Rodriguez from filing a timely PJR. Rodriguez knew at the time of the mediation that Nationstar did not appear with a certified copy of the note. In fact, Nationstar attended the mediation knowing it could not obtain a foreclosure Certificate because it lacked a certified copy of the note. Nationstar still elected to mediate and even offered Rodriguez a loan modification.

Rather than filing a timely PJR challenging the sufficiency of the uncertified copy of the note produced at the mediation, Rodriguez waited 20 months and then sought sanctions for Nationstar's failure to present a certified copy of the note at the mediation. FMR 21(2) is clear and unambiguous. Rodriguez's PJR was not

filed within 30 days of her receipt of the Mediator's Statement, and the Court erred in considering the untimely PJR.

B. FMR 21(2) creates a statute of repose, not a statute of limitations, which divests the district court of any jurisdiction regarding the untimely PJR.

The time limitation for filing a PJR following a foreclosure mediation is a statute of repose, not a statute of limitations. Both statutes of limitations and statutes of repose are mechanisms used to limit the temporal extent or duration of liability; however, there are notable differences in the two policies designed to attain different purposes and objectives. See *CTS Corp. V. Waldburger*, 134 S. Ct. 2175, 189 L.Ed. 62 (2014). A statute of limitations prohibits a suit after a period of time that follows the accrual of the cause of action. *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775 n.2, 776 P.2d 904, 906 n.2 (1988). A statute of repose bars a cause of action after a specified period of time regardless of when the cause of action was discovered or a recoverable injury occurred. *Id.*at 775 n.2. By definition, a statute of repose is a statute "barring any suit that is brought after a specified time since the defendant acted". Black's Law Dictionary, 1451 (8th ed. 2004); *Allstate Ins. Co.*, 104 Nev. at 775 n.2, 766 P.2d at 906 n.2; *Libby v. Eighth Judicial Dist. Ct.*, 130 Nev.___, ___ n.l, 325 P.3d 1276, 1280 n.l (2014).

A statute of repose conditions the cause of action of filing a suit within the statutory time period and "defines the right involved in terms of the time allowed

to bring suit." *FDIC v. Rhodes*, 336 P.3d 961; 2014 Nev. LEXIS 112 (2014) quoting *P. Stolz Family P'ship L.P. v. Duam*, 355 F.3d 92, 102 (2d Cir. 2004). Such a statute seeks to give a defendant peace of mind by barring delayed litigation, so as to prevent unfair surprises that result from the revival of claims that have remained dormant for a period during which the evidence vanished and memories faded. *FDIC, 336 P.3d at 965* citing *Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc.*, 288 F.3d 405, 408-09 (9th Cir. 2002) (providing that statutes of repose are concerned with a defendant's peace of mind); *Joslyn v. Chang*, 445 Mass. 344, 837 N.E.2d 1107, 1112 (Mass. 2005) (noting statutes of repose prevent "stale claims" from surprising parties when the evidence has been lost.)

FMR 21(2) establishes a statute of repose because the "evidence" from a mediation, which is primarily based upon the memories of the participants, becomes less reliable as time passes. The utilization of a statute of repose prevents prejudice to the parties in the form of minimizing unreliable testimony and divesting the district court of jurisdiction to hear untimely PJRs.

C. Even if this Court adopts a "delayed discovery" exception to the FMR 21 deadline, Respondent's PJR was still filed more than thirty days following her discovery of the improper endorsement.

The Amended Verified Complaint in the Judicial Foreclosure action was filed on December 14, 2012. (App. 8 at 1784-1828.) The Amended Complaint

included a copy of the Note containing an endorsement in blank; not an endorsement to Nationstar. (*Id.*) At that point, Respondent knew or, in the exercise of due diligence, should have known, of her claim regarding the mistaken endorsement. Despite this, Respondent sat on her rights for an additional seven months and did not file the PJR until July 22, 2013. (App. 10 at 2159.) Accordingly, Respondent's PJR was clearly untimely and improperly considered.

III. The district court erred as a matter of law in considering evidence outside of the scope of the October 6, 2011 foreclosure mediation.

FMR 21(2) states that, upon the filing of a PJR, a hearing shall be held "**for the limited purposes** of determining the beneficiary of the deed of trust's compliance in attending the mediation, having the authority or access to a person with the authority required by subsection 4, bringing to the mediation each document required by subsection 4, and participating in the mediation in good faith compliance with the rules of the Program,..." (emphasis added). In addition, Rule 21(6) provides that PJR review shall be conducted *de novo*. This Court has clarified that "*de novo* review may include an evidentiary hearing concerning what transpired **at the mediation.**" *Pasillas* 255 P.3d 1285 n.8. (emphasis added).

In its Findings of Fact, the district court expressly relied upon evidence from the mediations held prior to the October 6, 2011 mediation, as well evidence from the judicial foreclosure proceeding. (App. 13 at 2822-54.) Nationstar did not attend either of these mediations. (*Id.*) MetLife is the party responsible for any

document deficiency in the prior mediations, but Rodriguez did not name MetLife as a party to the PJR. (App. 10 at 2159.) Moreover, MetLife and BONY filed a PJR after the first mediation, and any issues arising from that mediation should have been addressed at that time. (App. 6 at 1309-41; App. 13 at 2823.) Instead, the district court considered evidence concerning non-parties who attended mediations that occurred over three years prior. (App. 13 at 2825.) The district court's decision to improperly rely upon evidence outside the scope of a hearing on a PJR and election to issue a sanction against Nationstar based upon evidence of MetLife's conduct was a reversible error. (*Id.*)

A petition for judicial review of a foreclosure mediation is limited in scope and "exists for the **limited purpose** of determining bad faith, enforcing agreements made between the parties in the Program, including temporary agreements, and determining appropriate sanctions pursuant to NRS Chapter 107." *Holt v. Regional Trustee Services Corp.*, 127 Nev. Adv. Op. 80, 266 P.3d 602, 606 (Nev. 2011). (emphasis added). For these reasons, PJRs are expedited proceeding, FMR 21(2), and do not require personal service, FMR 21(3). (*Id.*)

Unlike typical mediation-related PJRs, the district court abused its discretion when it allowed this matter to become an adversarial litigation for damages. The district court departed from typical procedure by granting Rodriguez the ability to discover and introduce evidence of prior mediations, the judicial foreclosure

action, evidence of Appellants' "pattern and practice" of obtaining documents for mediation, and Appellants' financial condition, thereby broadening the scope of its inquiry beyond the limited purpose described in *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. Adv. Op. 40, 255 P.3d 1275 (2011). (App. 13 at 2823-26; 2833.)

In *Leyva*, this Court held NRS 107.086 and the FMRs necessitate strict compliance in the production of "essential documents." *Id.* at 1279. Compliance is reviewed by examining whether the original or a certified copy of the deed of trust, note, and each assignment of the deed of trust or note were produced at the mediation – or during the PJR. *Id.* at 1279-81. By allowing admission of documents beyond those required to be produced at a foreclosure mediation, the district court exceeded its authority under the Rules.

IV. The district court erred in determining that Appellants participated in the foreclosure mediation in bad faith.

The district court improperly expanded "bad faith" beyond the plain language of the statute and FMRs. The text of the foreclosure mediation rules requires "participating **in the mediation** in good faith." FMR 21 (emphasis added). Likewise, NRS 107.086 uses the language "fails to participate **in the mediation** in good faith." NRS 107.086 (emphasis added). Neither authority imposes a good faith obligation on the production of documents or allows a district court to sanction bad faith in the execution of document certifications. Textually, only bad faith that occurs while the parties are "in the mediation" can be

sanctioned. Alleged acts occurring before the mediation takes place cannot be sanctioned.

The district court's conclusion that Nationstar "created their own set of documents and certifications to lead (Rodriguez) and the Foreclosure Mediation Program to believe that the documents were compliant with the Foreclosure Mediation Program Rules" does not relate in any way to Nationstar's conduct "at the mediation" or the parties' negotiation with respect to loan modification and is patently false. (App. 13 at 2828.)

Factually, Nationstar told Rodriguez's counsel and the Mediator prior to the mediation that it would not have certified documents at the mediation; Nationstar knew a certification would not issue. (App. 12 at 2668-69, 2703.) Nevertheless, Nationstar appeared at the mediation **without** certifications and worked with Rodriguez to obtain a modification. (App. 1 at 17; see also, App. 12 at 2703.) With the knowledge that the foreclosure Certificate would not issue, Nationstar conducted a good faith modification review. (App. 12 at 2703.) In fact, Rodriguez was offered a loan modification and she chose to reject the offer. (*Id.*) An offer of a loan modification is prima facie evidence of good faith conduct on behalf of Appellants.

The Nevada Legislature enacted the Foreclosure Mediation program in 2009 in response to Nevada's foreclosure crisis. See Hearing on A.B. 149

Before the Joint Comm. on Commerce and Labor, 75th Leg. (Nev., February 11, 2009) (testimony of Assemblywoman Barbara Buckley). The purpose of the mediation is "to bring the lender together with the borrower, who is ready, willing, and able to enter into modification, and to allow those modification terms to be discussed." *Id.*; *Einhorn v. BAC Home Loans Servicing, LP*, 290 P.3d 249, 250 (Nev. 2012) ("The goal [of FMP mediation] is to bring the trust-deed beneficiary and the homeowner together to participate in a meaningful negotiation."). Here, it is clear Nationstar participated in the mediation and engaged in a meaningful negotiation which resulted in a modification offer. While Rodriguez's decision to strategically default and reject Nationstar's modification offer calls her good faith participation into question, Nationstar certainly conducted itself in keeping with the stated purpose of the Program. Further, as Nationstar was not seeking a Certificate due to its inability to obtain certified documents, any argument that Nationstar was attempting to mislead the Mediator is disproved by the record and illogical.

V. The district court violated Appellants' due process rights by awarding damages tantamount to punitive damages against Appellants for alleged bad faith participation in a foreclosure mediation.

This Court previously articulated a suggested list of factors district courts should apply in considering a sanction amount under the FMRs: (1) whether the violations were intentional; (2) the amount of prejudice to the

nonviolating party; (3) the violating party's willingness to mitigate any harm by continuing meaningful negotiation. *Pasillas*, 255 P.3d at 1287. Here, the district court incorrectly asserted that this Court directed district courts to consider "the financial condition of the party being sanctioned." (App. 13 at 2833.) Tellingly, none of the four cases the district court cited[7] state a litigant's financial condition should be considered. (*Id.*).

To Appellants' knowledge, the only context in which a fact finder assesses a defendant's financial condition is in the context of a punitive damages award. See generally, NRS § 42.005(4). In Nevada, a claim for punitive damages requires evidence that the defendant acted with a culpable state of mind. See, *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 743, 192 P.3d 243, 255 (2008). A culpable state of mind has knowledge of a probable harm and willfully and deliberately fails to avoid that harm. (*Id.* at 744, 256.)

A plaintiff is entitled to punitive damages only after proving by **clear and convincing** evidence that the defendant was guilty of express or implied oppression, fraud, or malice. NRS § 42.005. "'Malice, express or implied', means conduct which is intended to injure a person or despicable conduct which

[7] The district court cited *Young v. Johnny Ribeiro Building*, 106 Nev. 88 (1990); *Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592; *Arnold v. Kip*, 123 Nev. 410 (2007); and *Pasillas v. HSBC Bank USA*, 255 P.3d 1281 (Nev. 2011).

is engaged in with a conscious disregard of the rights or safety of others." NRS § 42.001(3) "'Conscious disregard' means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." NRS § 42.001(1). NRS. "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." NRS § 42.001(4).

Nevada follows the rule that proof of bad faith, by itself, does not establish liability for punitive damages. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 512, 780 P.2d 193 (Nev. 1989). Only after a finding of fraud, malice and oppression, is evidence of a defendant's financial condition permitted to be introduced. NRS § 42.005(4). If a punitive damage award is not based upon a cause of action sounding in tort, the award must be stricken on appeal. *Sprouse v. Wentz*, 105 Nev. 597, 602, 781 P.2d 1136 (Nev. 1989).

The district court's punitive sanction did not address key factors this Court articulated in *Pasillas*. (App. 13 at 2822-54.) Specifically, the district court ignored whether Rodriguez was prejudiced and refused to assess Appellants' willingness to mitigate any harm. (*Id.*) These factors are key because they show sanctions are not warranted. First, Rodriguez was not harmed because Appellants did not seek, nor did they obtain a foreclosure Certificate. (App. 6 at 1383-90; App. 12 at 2703.) Second, if Rodriguez was

harmed, the harm was mitigated due to Appellants' good faith negotiation which was evidence through Appellants' modification offer. (App. 12 at 2703.)

The district court also erred in considering the final factor articulated in *Pasillas*, whether the conduct was intentional. The district court concluded Appellants "created their own set of documents and certifications to lead (Rodriguez) and the Foreclosure Mediation Program to believe the documents were compliant with the Foreclosure Mediation Rules." (App. 13 at 2828.) First, the district court incorrectly asserts the documents in question were certified. (App. 1 at 1-7; App. 13 at 2828.) As is set forth above, no certifications were presented at the mediation and the parties were told well in advance of the mediation that Nationstar would be unable to produce certifications. (App. 12 at 2668-69, 2703). No evidence exists to support the conclusion that the Nationstar endorsement stamp was placed on the uncertified copy in an attempt to defraud the Respondent or the Mediator. In fact, Fay Janati, Nationstar Litigation Resolution Analyst and the only person with personal knowledge at the evidentiary hearing, testified she did not know who improperly placed the "Nationstar" stamp on the Note, but affirmed such actions are inconsistent with Nationstar practices. (App. 12 at 2685, 2702.) Therefore, the district court's finding is in conflict with the facts and constitutes an error.

Further, the addition of a punitive damages analysis, which included an extended argument about Appellants' financial condition, exceeded the permissible scope and authority of judicial review under the foreclosure mediation program. While Appellants did not have all of the documents required at the time of the mediation, this fact was made known to the Mediator and to opposing counsel **prior** to the mediation. (App. 12 at 2668-69, 2701.) As a result, a Certificate was not sought nor did one issue. (App. 6 at 1383-90; App. 12 at 2703.) That, in itself, is an appropriate sanction; yet the district court sanctioned Appellants $100,000.00 payable directly to Rodriguez. (App. 13 at 2822-54.)

Although the amount of sanctions to be imposed is within the court's discretion, "due process requirements limit that power." See *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983) (citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 249-54, 29 S. Ct. 370, 53 L. Ed. 530 (1909). The district court's sanction is nothing more than a number arbitrarily selected based upon inadmissible evidence: Appellants' financial condition. No evidence was presented concerning how Rodriguez, who had been living in the property for free since 2009 after a strategic default, suffered any damage. The fact that someone at Nationstar incorrectly stamped an uncertified copy of the note in no way damaged Rodriguez. She still rejected the modification offered

to her, and the foreclosure Certificate did not issue. To date, she continues to live in the property for free despite having a discharge of liability from the Promissory Note through her 2008 bankruptcy. (App. 13 at 2833-34.)

The United State Supreme Court has admonished that "punitive damages pose an acute danger or arbitrary deprivation of property" and that the presentation of evidence of a defendant's net worth creates the potential that verdicts will be used to express biases against big business, particularly those without strong local presences. *State Farm v. Campbell*, 538 US 408, 418, 123 S. Ct. 1513, 1520 (2003).

> The due process clause of the *Federal Constitution's Fourteenth Amendment* prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor, because elementary notions of fairness enshrined in the nation's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject the person to punishment, but also of the severity of the penalty that a state may impose.

The district court's award of punitive damages without discovery, without allowing for a jury trial, and in the context of a PJR deprived Appellants of their due process rights. (App. 11 at 2464.) This violation was exacerbated when the district court denied Appellants' Motion for Supplemental briefing despite the district court's assurances that they would be allowed to offer supplemental briefing after Rodriguez's counsel presented punitive damages

arguments. (App. 12 at 2745; App. 13 at 2818-21.) Further, the evidence Rodriguez presented is simply not contemplated by the FMRs. The FMRs provide for an expedited hearing to address issues that occurred at a foreclosure mediation. *Holt*, 266 P.3d at 606. As parties to a PJR have no right to a jury trial, a determination of fraud and imposition of punitive damages is a violation of Appellant's due process rights. FMR 21(1); *Campbell*, 538 U.S. at 418. The fact that the district court manipulated what was to be an expedited hearing into a full-blown bench trial on punitive damages is clear, reversible error.

CONCLUSION

Appellants request that the matter be reversed because FMR 21(2) creates a statute of repose which mandates that a PJR be filed 30 days or less from the date the parties received the Mediator's Statement. As Rodriguez did not file her PJR within the 30 day time constraint, the district court lacked jurisdiction to hear the matter. In the event this Court finds the district court had jurisdiction to hear the PJR, Appellants request the matter be reversed and remanded with instruction for the district court that Foreclosure Mediation PJR's are limited solely to conduct occurring at the mediation and that the conduct of non-parties at prior mediations must be excluded. Next, Appellants request the matter be reversed and remanded to the district court with instructions that FRM 21 and NRS § 107.086 limit determinations of bad faith to conduct occurring "at the mediation." Lastly,

Appellants request the matter be reversed and remanded to the district court with instructions that sanctions awarded under PJR 21(1), which do not allow for punitive damages, may not be based on the Appellant's financial condition.

CERTIFICATE OF COMPLIANCE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, Tyler J. Watson, Esq., declare the following under penalty of perjury:

1. I hereby certify that this Appellants' Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Appellants' Opening Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify this Appellants' Opening Brief complies with the page-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), it contains less than 14,000 words and 1,300 lines.

3. Finally, I hereby certify that I have read this Appellants' Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this Appellants' Opening Brief complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that the

accompanying Appellants' Opening Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of May, 2015.

TYLER J. WATSON, ESQ.
NEVADA BAR NO. 11735
KRAVITZ, SCHNITZER & JOHNSON, CHTD.
8985 S. Eastern Avenue, Suite 200
Las Vegas, Nevada 89123