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' REPLY BRIEF

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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.

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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).

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APPELLANTS' REPLY BRIEF

Respondent Rodriguez's Answering Brief provides no applicable Nevada authority that would allow a district court to ignore or disregard a plain meaning of the statutory deadline for filing a Petition for Judicial Review under FMR 22(2). This is because no such authority exists. As the Rule mandates a 30-day filing from the time of the Petition for Judicial Review, it was improper and reversible error for the district court to hear Respondent Rodriguez's Petition. The responding brief also incorrectly asserts that subject matter jurisdiction is not a requirement to hearing a Petition for Judicial Review. This position is both illogical and contrary to long standing legal precedent on the matter. Lastly, the Answering Brief's assertion that the district court is allowed to consider evidence outside the scope of the October 6, 2011 foreclosure mediation is based upon a perversion of the legislative history and contains no support in fact or law. For these reasons, Appellants respectfully request this Honorable Court afford Respondent's Answering Brief no weight.

I. Respondent's Request that this Court Disregard the Unambiguous 30-Day Deadline to File a Petition for Judicial Review is Legally Unfounded.

In this matter, Rodriguez filed her PJR on July 22, 2013 for the mediation which took place on October 6, 2011. (App. 6 at 1383-1390; App. 10 at 2158-2317.) The filing was more than 20 months after the deadline. Importantly,

Rodriguez's Answering Brief in no way challenges the plain meaning of the statutory 30-day deadline for filing a Petition for Judicial Review under FMR 21(2). Instead, the Answering Brief attempts to cherry-pick a nearly 30 year-old case dealing with Nevada's open meeting laws (*McKay v. Board of Supervisors*, 102 Nev. 644 (1986) (RAB at p. 6), to avoid one of the most basic rules of statutory construction: "[w]hen a statute is facially clear, the supreme court will give effect to the statute's plain meaning and not go beyond the plain language to determine the Legislature's intent." *Sonia F. v. Eighth Judicial Dist. Ct.*, 125 Nev. 495, 499 (2009)(citing *Public Employees' Benefits Prog. v. LVMPD*, 124 Nev. ---,---, 179 P.3d 542, 548 (2008)). As the word "shall" is plain on its face, there is no legal basis to read the proverbial tea-leaves in the hopes of discerning the "intent" of the Rule's drafters. The decision to draft the Rule using the word "shall" leaves no room for ambiguity or confusion and precludes this Court from needing to review Rodriguez's misconstrued snippets of legislative history.

In fact, this Court previously analyzed the use of the word "shall" in the context of the FMRs, and held as follows:

> 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).

Additionally, Rodriguez's reliance on *Wood v. Germann*, 130 Nev. Adv. Op. 58, 331 P.3d 859 (2014) is misleading and misplaced. (RAB at p. 7.) Rodriguez claims the *Wood* case stands for the proposition that a borrower need not file a PJR within the mandatory 30-day period. The *Wood* case does no such thing. In *Wood*, the appeal issue was whether an assignment of the note was valid because the homeowner did not believe the party seeking to foreclose had the authority to do so. *Wood*, 130 Nev. Adv. Op. 58 at n. 3, 331 P.3d 681 n.3. In response, this Court held the purpose of the document-production requirement is to "ensure the party seeking to enforce the homeowner's promissory note and to proceed with foreclosure is actually authorized to do so." *Id.*

Here, no such concern existed because Nationstar, prior to the mediation, made it known to all participants that it did not have the necessary documents and would not be seeking a foreclosure certificate. (App. 1 at 1-7; see also, App. 12 at 2703.) Specifically, prior to the mediation, Nationstar's counsel sent an email to the Mediator and to Rodriguez's counsel informing them that Nationstar would not have certified documents prior to the mediation. (App. 12 at 2668-69, 2703.) At the mediation, 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.) It is important to note, these facts are not in dispute. 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 in good faith.[1] (App. 12 at 2703.) In spite of Rodriguez's poor debt to income ratio, which precluded a HAMP modification, Nationstar offered an internal modification. (App. 12 at 2687, 2703.) The modification would have temporarily reduced Rodriguez's payments to no more than 24% of her gross monthly income, but Rodriguez did not accept Nationstar's modification offer. *Id.* Accordingly, Rodriguez's curt, unsupported assertions that Nationstar acted in bad faith is disproved by the history of this case. Similarly, Rodriguez's disingenuous claim that she "pleaded" for a modification is disproved by her rejection of Nationstar's favorable modification proposal.

A. Respondent is Incorrect to Assert that a District Court Need Not Have Subject Matter Jurisdiction to Rule on the Merits of a Claim.

Rodriguez theorizes that even if FMR 21(2) creates a statute of repose, thus divesting the district court of any jurisdiction over her untimely PJR, it was still

[1] Given Rodriguez's focus on legislative intent, Nationstar would like to point out that it would be in a materially better position if it had simply failed to appear at the mediation. Instead of acting in pure self-interest, Nationstar attended the mediation, with no hope of obtaining a foreclosure certificate, and is now forced to appeal an enormous punitive damage award based upon the District Court's decision to punish the entire industry for perceived improprieties.

proper for the district court to sanction Nationstar because the district court "does not need subject matter jurisdiction to impose sanctions against offending lenders." (RAB at p. 10.) This assertion fails on both a logical and legal grounds.

Logically, if the district court could issue sanctions pursuant to an untimely PJR, then the 30 day requirement of FMR 21(2) would be rendered meaningless. It is Rodriguez's position that so long as a district court is displeased with a mediation participant, the court may issue a sanction regardless of the FMR 21(2). This would be an absurd result. As the Rule undisputedly limits the filing of a PJR to 30 days after the receipt of the Mediator's Statement, Rodriguez's assertion that a district court may issue sanctions on alleged acts of bad faith irrespective of the timeliness of the PJR must be disregarded. If Rodriguez wanted to file a PJR, she could have, and should have, filed within the 30-day limit claiming bad faith for failure to produce certified documents. This information was in Rodriguez's possession prior to the mediation.

Legally, a lack of subject matter jurisdiction precludes a district court from ruling on the merits of the case. Nev. R. Civ. P. 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d 982 (2000). The burden of proving the jurisdictional requirement is properly placed on the party bringing the claim. *Id.*

Accordingly, despite Rodriguez's assertion to the contrary, subject matter jurisdiction is a necessity before a court can hear a matter on the merits. Rodriguez has failed to satisfy her burden.

Tellingly, the cases Rodriguez cites to support her claim that subject matter jurisdiction is unnecessary to sanction Nationstar do not stand for the claimed proposition. See, (RAB at p. 10, citing *Chemiakin v. Yefimov*, 932 F.2d 124 (2d Cir. 1991); *Willy v. Coastal Corp.*, 915 F.2d 965 (5th Cir. 1990.)) Both cases related to suits being dismissed for lack of subject matter jurisdiction and an accompanying Rule 11 violation for filing harassing, meritless suits. These cases are not analogous to the present matter. In *Chemiakin*, the Rule 11 sanction was issued against plaintiff's counsel, not a litigant. *Chemiakin*, 932 F.2d at 130. In *Willy*, the Court expressly stated "the imposition of a [Rule] 11 sanction is not a judgment on the merits of an action." *Willy,* 915 F.2d at 967. Therefore, neither *Chemiakin* nor *Willy* would allow a court to rule on the merits of an action when the district court lacks subject matter jurisdiction.

B. The 30-Day Limitation Enumerated in FMR 21(2) Causes the Rule to Fit Squarely Within the Definition of a Statute of Repose.

As this Court has held, "[i]n contrast to a statute of limitation, which forecloses suit after a fixed period of time following the occurrence or discovery of an injury, a statute of repose bars causes of action after a certain period of time, regardless of whether damage or an injury has been discovered." *Davenport v.*

Comstock Hills-Reno, 118 Nev. 389, 391 (2002). In *Davenport*, this Court concluded as follows:

> NRS 11.203 bars causes of action for, among other things, personal injury or property damage allegedly caused by a deficiency in the improvements to real property when the action is commenced more than ten years after "substantial completion" of the improvements in question. If the damage or injury occurs after the specified period, it is barred without regard to whether the statute of limitations has run on the injured party's claim.

Id. at 391-92.

This Court made it clear that when a statute provides a certain time to bring a cause of action after a known, specific event, such as the completion of a construction project or the receipt of a Foreclosure Mediator's Statement, a claim *must* be brought before the specified time period runs. If a timely claim is not brought, the claim is lost.

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, plain meaning and find that Rodriguez's PJR was not timely filed. Rodriguez's argument that a statute of repose "is usually expressed in years" is unpersuasive for several reasons. (RAB at p. 11.) First, the argument ignores the actual language of the Rule which provides that PJRs "shall"

be filed 30 days after receipt of the Mediator Statement. Accordingly, Rodriguez's citation to construction defect statutes is not persuasive.

Second, NRS 11.190(3)(d), which provides a three-year time period to bring fraud claims after the alleged fraud was discovered, already provides Rodriguez with an avenue to bring her claim. Therefore, Rodriguez's claim that she would suffer prejudice if FMR 21(2) were afforded its plain meaning is untrue. Rodriguez always could have filed a suit alleging fraud as a cause of action against Appellants. This would have provided Rodriguez with an opportunity to pursue her claim while also affording Appellants an opportunity to obtain a jury trial, conduct discovery and receive adequate due process.

II. The Answering Brief Provides No Legal Basis That Would Allow the District Court to Consider Evidence Outside the Scope of the October 6, 2011 Foreclosure Mediation.

The Answering Brief spends five pages presenting a partisan, unreliable statement of the procedural history of Rodriguez's mediations, along with sweeping, unsupported allegations about corrupt industry practices (RAB at p. 13-17.), but never addressed the key argument presented in the Opening Brief: petitions for judicial review are limited to a review of what occurred at the subject mediation. See FMR 21(2); *Pasillas* 255 P.3d 1285 n.8.; *Holt v. Regional Trustee Services Corp.*, 127 Nev. Adv. Op. 80, 266 P.3d 602, 606 (Nev. 2011); *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. Adv. Op. 40, 255 P.3d 1275 (2011). If

Rodriguez were to have a bad faith claim against Nationstar, it would be limited to Nationstar's failure to produce certified copies of the documents at the mediation. A claim for fraud, which is what Rodriguez is really asserting, is not contemplated by the FMRs or any associated PJR. This is because a PJR does not allow for necessary discovery and deprives Nationstar of its right to a jury trial.

When the district court concluded 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" (App. 13 at 2822-54), the district court exceeded its permissible scope because that claim does not relate in any way to Nationstar's conduct at the mediation. Further, the conclusion is unfounded. It is without dispute that Nationstar told Rodriguez's counsel and the Mediator, prior to the mediation, that it would not have certified documents and attended the mediation without expectation of a foreclosure certificate. Nationstar again disclosed this information at the mediation.

Again, the Answering Brief is replete with allegations of "fraud" and claims of an ongoing "pattern of falsification." Rodriguez's arguments are her undoing. Rodriguez admits her claim sounds in fraud, but instead of filing suit alleging fraud, she brought an untimely PJR. As addressed previously, a PJR is an abridged proceeding with limited due process protections meant to merely review what

occurred *at* the mediation. Further, fraud, which requires deceit, cannot exist when Nationstar expressly told Rodriguez the uncertified copies were not reliable. Moreover, Nationstar expressed it was not seeking a certificate and offered Rodriguez a favorable modification.

Inconsistent with the stated purpose of a PJR, Rodriguez argued Nationstar was engaged in extensive fraudulent conduct occurring over a period of many years and including many different cases. The district court's decision to hear these arguments under the guise of a PJR constitutes reversible error. Fraud claims, as a matter of law, must be proved by clear and convincing evidence, see *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 954 P.2d 1382 (1998), but the district court did not satisfy, or even mention, this burden of proof in its decision. (See App. 13 at 22-34). More importantly, Nationstar was not afforded its right to a jury trial in violation of NRS 175.011.

In sum, Nationstar was found guilty of fraud in an abridged proceeding, which did not satisfy the applicable standard of proof, was denied the ability to conduct discovery, and did not receive a trial by jury. These facts make clear the wisdom of applying the Rule as written, and strictly limiting a PJR hearing to what occurs at the actual mediation.

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A. It is Improper to Issue Sanctions Based Upon Alleged Conduct Occurring Outside the Mediation.

The district court's issuance of a punitive damages sanction based upon events occurring outside the mediation was improper and an abuse of discretion. The district court is limited to imposing sanctions based upon a failure to mediate in good faith. NRS 107.086. 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,..." FMR 21(2).

Despite this limitation, Rodriguez argued an alleged "pattern" of fraudulent conduct throughout the lending industry. The district court improperly allowed these arguments to be made and adopted these arguments in its findings in its Findings of Fact and Conclusions of Law. Specifically, the district court concluded (1) that prior mediations, of which Nationstar was not a participant, were relevant to the punitive damages award against it; (2) that 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; and (3) that Appellants have a pattern and practice of utilizing inaccurate and untrustworthy copies of documents. (App. 13 at 2822-54.) As stated in the Opening Brief, 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.*) Further, MetLife was 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.) Accordingly, the district court's bad faith determination far exceeded the permissible scope of its inquiry. In truth, to the extent Nationstar did engage in bad faith, it could have only done so at the mediation when it failed to produce *certified* copies of the required documents and any sanction awarded must be limited to that potential bad faith conduct. It was impermissible for the district court to make a determination of fraud, which is not contemplated by the FMRs, which do not provide for any discovery, a jury trial or punitive damage awards.

B. It is Improper to Award a "Sanction" Based Upon a Party's Financial Condition at a Petition for Judicial Review.

In the Answering Brief, Rodriguez spends numerous pages arguing that the district court has discretion to issue sanctions for violations of the FMRs. (RAB at pp. 19-22.) Appellants never argued that the district court does not have this discretion. The argument raised in the Opening Brief is that the district court's

discretion is subject to limitation and, in this circumstance, the district court's sanction, which is a punitive damage award in all but name, is improper.

Rodriguez then attempts to justify the punitive damages award based upon the incorrect assertion that the *Pasillas v. HSBC Bank, USA*, 127 Nev. Adv. Op. 39, 255 P.3d 1281 (2011) case instructs district court to consider a party's financial condition when issuing a sanction. (RAB at p. 22.) The *Pasillas* case does no such thing. In *Pasillas*, this Court lists factors that 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; and (3) the violating party's willingness to mitigate any harm by continuing meaningful negotiation. *Pasillas*, 255 P.3d at 1287. In support of this enumerated list, this Court cited *Young v. Johnny Ribeiro Building*, 106 Nev. 88 (1990); *Bahena v. Goodyear Tire & Rubber Co.*, 235 P.3d 592; and *Arnold v. Kip*, 123 Nev. 410 (2007). Tellingly, none of these cases address considering evidence of a party's financial condition when issuing sanctions or punitive damages. Therefore, Rodriguez's assertion that the cited cases provided the district court with authority to issue a sanction based upon Nationstar's financial condition is blatantly false.

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II. CONCLUSION

Accordingly and for all the foregoing reasons, this Court should: (1) vacate the District Court's Findings of Fact, Conclusions of Law and Order; and (2) grant Appellants' Appeal.

DATED this 12th day of October, 2015.

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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' Reply 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' Reply 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' Reply 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 7,000 words.

3. Finally, I hereby certify that I have read this Appellants' Reply 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' Reply 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' Reply Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of October, 2015.

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