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Elizabeth A. Brown
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Appellant,)

BAYVIEW LOAN SERVICING, LLC;)
SEASIDE TRUSTEE, INC.; BANK OF)
NEW YORK MELLON; MEDIATION)
ADMINISTRATOR.)

Respondents.)

From the Eighth Judicial District Court
The Honorable Kathleen E. Delaney, District Court Judge
District Court Case No. A-16-741223-J

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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.

Bayview Loan Servicing, LLC, is wholly owned by Bayview Asset Management, LLC (“BAM”).

Seaside Trustee, Inc., has no parent company.

Attorney of record for Respondents is Aaron Waite, Esq., Nevada Bar No. 7947, of the law firm of Weinstein & Riley, P.S.

DATED this 4th day of May 2018.

WEINSTEIN & RILEY, P.S.

/s/ Aaron Waite, Esq.
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ISSUES PRESENTED FOR REVIEW

Whether Appellant has standing to participate in foreclosure mediation regarding the real property located at 560 Haunts Walk Avenue, Las Vegas, Nevada 89178 (“Property”).

STATEMENT OF CASE

Myrna Pascua obtained a \$345,500.00 loan for the purchase of the Property and executed an Interest Only Fixed Rate Note (“Note”) for the loan. Myrna Pascua also executed a deed of trust (“Trust Deed”) to secure the Note. The Trust Deed was recorded against the Property on or about January 6, 2006. The Trust Deed was assigned to The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-7CB, Mortgage Pass-Through Certificates, Series 2006-7CB (“Beneficiary”). Beneficiary also holds the original Note, through its custodian of records.

Myrna Pascua passed away. Appellant filed a Petition for Special Letters of Administration in February 2011 and filed an Amended Petition a few days later. The probate court entered the Order Appointing Special Administrator, appointing Appellant to be a special administrator of Myrna Pascua’s estate. Appellant did nothing after the appointment with regards to Myrna Pascua’s estate. Appellant is not the trustor or title owner to the Property.

1 Respondents commenced a foreclosure of the Property. Appellant
2 requested foreclosure mediation. The parties participated in foreclosure
3 mediation, and the mediator recommended that the Foreclosure Mediation
4 Program issue a certificate to Respondents. Appellant filed a petition for judicial
5 review. The District Court also found for Appellants and ordered that the
6 Foreclosure Mediation Program issue a certificate to Respondents.
7

8 **STATEMENT OF FACT**

9 **The Loan**

10 On or about December 29, 2005, Myrna Pascua obtained a \$345,500.00
11 loan for the purchase of the Property and executed an Interest Only Fixed Rate
12 Note ("Note") for the loan. *See* Record on Appeal ("ROA") at 40-43. On or
13 about December 29, 2005, Myrna Pascua executed a deed of trust ("Trust Deed")
14 to secure the Note. *See* ROA at 45-61. The Trust Deed was recorded against the
15 Property on or about January 6, 2006. *See id.*
16

17 The Note is endorsed in blank. *See* ROA at 40-43. The Trust Deed was
18 assigned to The Bank of New York Mellon FKA The Bank of New York, as
19 Trustee for the Certificateholders CWALT, Inc., Alternative Loan Trust 2006-
20 7CB, Mortgage Pass-Through Certificates, Series 2006-7CB ("Beneficiary"). *See*
21 ROA at 63-64. Beneficiary holds the Note. *See* ROA at 158. Respondent
22 Bayview services the loan for the Beneficiary. *See id.*
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1 Appellant is not a title owner of the Property. *See* ROA at 66-72.

2 Appellant is not the trustor on the Trust Deed. *See* ROA at 45-61.

3 **The Probate**

4 On or about February 16, 2011, Appellant filed a Petition for Special
5 Letters of Administration was filed in the Eight District Court, Clark County,
6 Nevada, Case P-11-070593 (“Probate”), regarding the estate of Myrna Pascua.
7

8 *See* ROA at 76-78. On or about February 18, 2011, Appellant filed an Amended
9 Petition for Special Letters of Administration in the Probate. *See* ROA at 80-83.
10

11 On or about February 18, 2011, the court in the Probate entered the Order
12 Appointing Special Administrator (“Probate Order”). *See* ROA at 85-88. The
13 Probate Order appointed Appellant to be a special administrator of Myrna
14 Pascua’s estate. *See id.* The Probate Order states that Appellant must “administer
15 the estate in accordance with Nevada Revised Statute Chapter 104.040.” *See id.*
16 A copy of NRS 104.040 was attached to the Probate Order. *See id.* The Probate
17 Order also states that “proof of the blocked account shall be filed with the court
18 within thirty (30) days from the date of entry of this court order. *See id.*
19
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21

22 After the Probate Order was entered in the Probate, five creditor’s claims
23 were filed in the Probate. *See* ROA at 90-98.
24

25 Plaintiff also filed a notice of lis pendens regarding the Property in the
26 Probate. *See* ROA at 100.
27
28

1 Appellant did not file proof of a blocked account or anything else in the
2 Probate Case. *See* ROA at 72.

3 The Property was not distributed or otherwise conveyed to Appellant by
4 Myrna Pascua or as part of the Probate. *See id.*

6 **The Foreclosure Mediation**

7 On or about February 9, 2016, Beneficiary commenced a foreclosure of the
8 Property, with Seaside as foreclosure trustee. *See* ROA at 159. Appellant
9 requested foreclosure mediation. *See id.* John Boyer was appointed the mediator.
10 *See id.* The Mediator issued the Notice to Appear on April 26, 2016, which
11 scheduled the mediation for June 22, 2016. *See id.*

14 On May 3, 2016, counsel for Bayview sent Bayview's initial document
15 requests to Appellant via email. *See id.* When the email to Appellant was
16 returned undelivered, counsel for Bayview mailed the initial document requests to
17 Appellant on May 10, 2016. *See* ROA at 160.

19 On June 10, 2016, Bayview sent its disclosure of documents to the
20 Appellant and mediator. *See id.* Bayview's disclosure included the Note, all
21 three endorsements to the Note, the Trust Deed, the Assignment, an appraisal
22 dated May 23, 2016, a power of attorney from BNYM to Bayview, and an
23 authorization from Bayview to its counsel. *See id.*

26 On June 22, 2016, Bayview and its counsel participated in the foreclosure
27

1 mediation, and brought to the mediation certified copies of the Note, all three
2 endorsements to the Note, the Trust Deed, and the Assignment, together with
3 copies of the May 23, 2016, appraisal, power of attorney from BNYM to
4 Bayview, and authorization from Bayview to its counsel. *See id.*

6 Appellant appeared at the mediation with a realtor. Appellant presented the
7 Probate Order to the mediator. *See id.*

9 The mediator found that Appellant was not eligible for foreclosure
10 mediation regarding the Property because the borrower is deceased, that the
11 Probate Order did not appoint Appellant as special administrator for the
12 mediation (among other things), and recommended that a certificate issue to
13 Bayview. *See ROA at 102-114.*

15 On July 7, 2016, the Foreclosure Mediation Program issued a notice that a
16 certificate would issue to Bayview. *See ROA at 116-140.*

18 **Petition for Judicial Review**

19 On August 5, 2016, Appellant filed his Petition for Judicial Review. *See*
20 ROA at 3-24. Appellant's Petition for Judicial Review alleges that Appellant is a
21 "co-owner and/or successor-in-interest of the subject owner-occupied residential
22 property," and the "Special Administrator of the estate of his deceased spouse."
23 See *id.* On August 31, 2016, Respondents filed a Response to Order to Show
24 Cause and to the Petition for Judicial Review. *See ROA at 29-140.*

1 On September 22, 2016, the District Court held a hearing on Appellant's
2 Petition. *See* ROA at 151-155. Appellant did not appear at the hearing. *See id.*
3 The District Court denied the Petition. *See id.* On October 24, 2016, the District
4 Court entered the Order on Petition for Judicial Review, denying Appellant's
5 Petition and concluding that Appellant is not the owner of the Property. *See id.*

7 **Appeal**

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9 On November 15, 2016, Appellant filed his Notice of Appeal.

10 **ARGUMENT SUMMARY**

11 Appellant does not have standing to participate in foreclosure mediation
12 regarding the Property because he is not the grantor or on title to the Property.
13 The Probate Order does not authorize Appellant to request or participate in
14 foreclosure mediation.
15

16
17 **ARGUMENT**

18 The Court should affirm the District Court's decision. The District Court
19 did not abuse its discretion in denying Appellant's Petition for Judicial Review.
20

21 Appellant lacks standing to appeal because Appellant is not an aggrieved
22 party as required by NRAP 3A. Appellant has no claim or right in or to the
23 Property. "A party is aggrieved within the meaning of NRAP 3A(a) when either
24 a personal right or right of property is adversely and substantially affected by a
25 district court's ruling." *Valley Bank v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d
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1 729, 734 (Nev. 1994) (quoting *Estate of Hughes v. First Nat'l Bank*, 96 Nev. 178,
2 180, 605 P.2d 1149, 1150 (1980) (quotations omitted)). Despite Appellant's
3 claim in his Petition for Judicial Review that he is a co-owner and successor in
4 interest regarding the Property, Appellant has no ownership interest in the
5 Property.
6

7 Appellant is not entitled to request or participate in foreclosure mediation
8 regarding the Property. Foreclosure mediation is available to the "grantor or the
9 person who holds the title of record." See NRS 107.086(2), and Rule 7 of the
10 Foreclosure Mediation Rules. Appellant is not the grantor. Myrna Pascua
11 executed the Note and Trust Deed, not Appellant. Appellant does not own the
12 Property. Myrna Pascua never conveyed the Property to Appellant. The Property
13 was never conveyed to Appellant through a probate or other court order.
14 Appellant does not have standing to request foreclosure mediation, to pursue the
15 Petition for Judicial Review, or to appeal, because he is not on title to the
16 Property, and he is not the trustor. The Property is not owner-occupied housing
17 for which foreclosure mediation is available.
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22 The Probate Order does not give Appellant standing to participate in
23 foreclosure mediation, does not make the Property eligible for foreclosure
24 mediation, and does not give Appellant a real property interest in the Property.
25 NRS Chapter 140 regards special administrators in probate actions. "A special
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27
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1 administrator is not a general representative of the estate. He is an emergency
2 officer with limited authority to care for and preserve the estate until an executor
3 or general administrator is ascertained or appointed as its proper legal
4 representative.” *Bodine v Stinson*, 85 Nev. 657, 660, 461 P.2d 868, 871 (1969)
5 (citing *Rich v. Dixon*, 153 Conn. 52, 212 A.2d 421 (1965), and NRS 140.070)
6 (superseded in part by statute, see *Jacobson v. Estate of Clayton*, 121 Nev. 518,
7 119 P.3d 132 (2005)). “[A special administrator] is not to conduct the
8 administration of the estate.” *Bodine v Stinson*, 85 Nev. 657, 660, 461 P.2d 868,
9 871 (1969).

10 NRS 140.010 et seq., contains provisions that may be relevant to a
11 foreclosure or foreclosure mediation, but that does not mean that Appellant or the
12 Property are eligible for foreclosure mediation. NRS 140.010 states a special
13 administrator can be appointed “to collect and take charge of the estate of the
14 decedent, in whatever county or counties the estate may be found, and to exercise
15 such other powers as may be necessary to preserve the estate.” NRS 104.040
16 details the powers of a special administrator, which include “tak[ing] charge and
17 management of real property” NRS 104.050 also authorizes a special
18 administrator to make mortgage payments with court authorization.

19 Here, however, nothing in the Probate Order gave Appellant authority
20 authorized or required Appellant take any action regarding the Note or Trust
21

1 Deed. Despite a reference to a short sale in the original probate petition, nothing
2 in the amended probate petition or order refer to the Note or Trust Deed. The
3 amended probate petition only asks that Appellant be allowed to marshal assets.
4 The Probate Order charges the Appellant to specially administer the Myrna
5 Pascua estate “in accordance with Nevada Revised Statute Chapter 104.040.”
6 Moreover, Appellant did nothing after obtaining the order. Appellant did not file
7 proof of a blocked account or file anything else. There is no evidence that
8 Appellant even attempted to short sell the Property. Instead, Appellant has
9 occupied the Property and not paid the mortgage payments.

10 The Probate Order does not authorize Appellant to negotiate a loan
11 modification for the estate of Myrna Pascua. In fact, the Probate Order is silent
12 regarding the Note and Trust Deed. Appellant would have been required to file a
13 separate motion and seek specific permission in this regard. NRS 140.050. The
14 Probate Order, together with the version of NRS 140.040 that is attached to the
15 Probate Order, clearly states that Appellant could “collect and preserve” the
16 assets of Myrna Pascua’s estate. The Probate Order charges Appellant with
17 collecting, taking charge of, and protecting the assets of Myrna Pascua’s estate.
18 There is no indication that he has done so. The documents filed in the Probate
19 indicate that Appellant only filed a lis pendens in the Probate after the Probate
20 Order was entered. Appellant did not file proof of a blocked account, information

1 regarding the litigation referenced in the Probate Order, or anything else. No
2 general administration was opened, and no letters testamentary were issued. The
3 Probate Order does not apply or bind the Court or the mediator here. The Court
4 should not construe the Probate Order or the Amended Probate Petition to make
5 Appellant eligible for foreclosure mediation regarding the Property. The specifics
6 of the Probate Order should govern the authority of Appellant as the special
7 administrator.
8
9

10 The Probate Order neither subrogated Appellant to the rights of Myrna
11 Pascua under the Note and Trust Deed, nor authorized Appellant to modify the
12 loan, nor otherwise made Appellant the owner of the Property. The Probate
13 Order did not authorize Appellant to assume ownership of the Property.
14 Appellant is not and never was on title to the Property. Appellant does not
15 “automatically become[] the owner or co-owner of the subject property upon the
16 death of her spouse.” *See* ROA at 3-24, Petition at p. 4, ¶ 20. The Probate Order
17 does not substitute Appellant in as the borrower, subrogate Appellant to Myrna
18 Pascua’s position, or result in Appellant assuming the loan. There is nothing in
19 Chapter 140, or the Probate Order, that would require or result in Appellant being
20 deemed a grantor, borrower, trustor, or title owner.
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ATTORNEY CERTIFICATION

I hereby certify that this 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 brief has been prepared in a
proportionally spaced typeface using Times New Roman in 14-point font.

I hereby certify that this 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 brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

Finally, 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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

1 with the requirements of the Nevada Rules of Appellate Procedure.

2 DATED this 4th day of May 2018.

3 WEINSTEIN & RILEY, P.S.

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10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on the 4th day of May 2018, I served a true and correct
12 copy of the foregoing RESPONDENTS' ANSWERING BRIEF via the electronic
13 filing system and First Class Mail, postage prepaid, to the following party:
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