IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH COPPOLA, Trustee of the R.S. Coppola Trust dated October 19, 1995 as most recently Amended on September 13, 2001, Appellant, v. WELLS FARGO BANK, N.A. and NATIONAL DEFAULT SERVICES, Respondents.	No. 81007

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APPELLANT'S OPENING BRIEF

On appeal from the Second Judicial District Court from an order dismissing a petition and denying the imposition of sanctions in a foreclosure mediation program matter

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
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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 disqualifications or recusals.

(1) Appellant Ralph Coppola is an individual and Trustee of the R.S. Coppola Trust dated October 19, 1995 as most recently Amended on September 13, 2001. The trust is not owned in whole or in part by a publicly traded company.

(2) Legal Aid Center of Southern Nevada, Inc. is a 501(c)(3) non-profit legal services organization, which is not owned in whole or in part by a publicly traded company.

Dated July 26, 2021.

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

/s/ Peter J. Goatz
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JURISDICTIONAL STATEMENT

This appeal under NRAP 3A(b)(1) is from a final order by the Second Judicial District Court dismissing a petition and denying the imposition of sanctions in a foreclosure mediation program matter. On March 10, 2020, the district court entered its *Order (1) Denying Verified Petition for Judicial Review and (2) Granting Respondent's Request for Appropriate Relief*. 15 ROA 1082. Notice of entry of the district court's order was given on March 11, 2020. 15 ROA 1095. Appellant timely filed his *Notice of Appeal* on April 7, 2020. 15 ROA 1119.

ROUTING STATEMENT

Under NRAP 17(b)(15), this appeal from an order in a foreclosure mediation program matter is presumptively assigned and should be heard by the Court of Appeals.

ISSUES PRESENTED

I. Did the district court abuse its discretion in finding that a homeowner who stipulates to a waiver of the requirement that a beneficiary provide an appraisal within 10 days of mediation also waives their ability to challenge the appraisal, and does not require the beneficiary to disclose the appraisal as would otherwise be required under FMR 13(7)(f) when that appraisal is used as the basis for negotiations in mediation?

II. Did the district court abuse its discretion in finding that a beneficiary complies with FMR 13(10) when the beneficiary orally discloses for the first time at mediation a short sale value that is

more than the appraised value of the home but less than the amount due under the note?

III. Did the district court abuse its discretion by failing to address in its final order whether or not a beneficiary complied with the rules by timely disclosing the note, deed of trust, and assignments?

IV. Did the district court abuse its discretion in finding that a beneficiary whose purported representatives at mediation did not present evidence of their authority at mediation to either represent the beneficiary or negotiate a loan modification meet the requirements of FMR 12(1)(a)?

STATEMENT OF THE CASE

Appellant initiated this foreclosure mediation case in the district court by filing a *Petition for Foreclosure Mediation Assistance* in response to a notice of default. 2 ROA 1. On August 9, 2018, Respondents filed their answer to the petition. 2 ROA 32. On August 13, 2018, the district court assigned a mediator. 2 ROA 50.

The mediator scheduled an exchange of documents conference for September 10, 2018. 2 ROA 55. She also scheduled a mediation for November 15, 2018. 2 ROA 57.

On January 4, 2019, the district court ordered the mediator to file a Mediator's Statement or joint report advising of any new mediation date and the reasons for the mediation continuing beyond the time period specified in FMR 15(2) within 15 days. 2 ROA 61-62.

The mediator did not file anything in response to the order.

On January 28, 2019, the district court ordered the mediator to show cause why the mediator should not be held in contempt for failing to comply with its prior order. 2 ROA 66.

On February 15, 2019, the mediator submitted a *Stipulation and Order for Continuance of Mediation* signed by the parties. 2 ROA 73. The stipulation noted that the mediation scheduled for December 19, 2018 did not take place due to a medical emergency. 2 ROA 73.

On February 15, 2019, the district court entered an order granting a continuance. 2 ROA 78. In doing so, the district court directed the mediation to commence within 45 days of the order. 2 ROA 79.

On March 7, 2019, the parties participated in mediation. 3 ROA 85.

On March 17, 2019, the mediator filed a Mediator's Statement. 3 ROA 83.

On March 27, 2019, Respondents filed a request for appropriate relief asking the district court to dismiss the petition with prejudice under FMR 20(2) because they argued that they complied with the rules. 3 ROA 97.

On March 28, 2019, Appellant filed a petition for judicial review arguing, among other things, that Respondents failed to participate in mediation in good faith and requesting sanctions. 6 ROA 245.

After briefing, the parties each requested that their respective requests be submitted for decision. 15 ROA 1073; 15 ROA 1077.

On March 10, 2020, the district court entered its *Order (1) Denying Verified Petition for Judicial Review and (2) Granting Respondent's Request for Appropriate Relief*. 15 ROA 1082. The district court found that Respondents complied with the rules, and that Appellant did not demonstrate sanctions were warranted. 15 ROA 1090–91. Notice of

entry of the district court's order was given on March 11, 2020. 15 ROA 1095. Appellant timely appealed. 15 ROA 1119.

STATEMENT OF THE FACTS

Over 21 years ago, Appellant purchased his home at 4785 Rio Pinar Drive, Reno, NV 89509. 6 ROA 247. In January 2006, he obtained a loan from World Savings Bank, FSB secured by his property. 2 ROA 6.

On May 21, 2018, National Default Servicing Corporation recorded a *Notice of Default and Election to Sell Under Deed of Trust*. 2 ROA 6. The notice referenced a *Deed of Trust* dated January 24, 2006 in favor of World Savings Bank, FSB and/or assigns as beneficiary, and recorded on January 31, 2006. 2 ROA 6. The note secured by the *Deed of Trust* was for $612,000. 2 ROA 6.

The notice claimed a default as of March 23, 2009. 2 ROA 6.

The affidavit accompanying the notice lists Wells Fargo Bank, N.A. as the current servicer, beneficiary of the *Deed of Trust*, and holder of the note. 2 ROA 10.

In response to the notice, Appellant filed his *Petition for Foreclosure Mediation Assistance* on June 25, 2018 with the district court. 2 ROA 1.

On August 9, 2018, Respondents filed their answer to the petition. 2 ROA 32.

The district court assigned a mediator. 2 ROA 50. The mediator scheduled a mediation for November 15, 2018. 2 ROA 57. But the mediation did not occur then.

On February 15, 2019, the mediator submitted a *Stipulation and Order for Continuance of Mediation* signed by the parties. 2 ROA 73. The stipulation noted that the mediation scheduled for December 19,

2018 did not take place due to a medical emergency. 2 ROA 73. The parties further agreed that Respondents did not need to produce a new Broker's Prior Opinion or Appraisal before the next hearing because the continued hearing would not take place more than 75 days later. 2 ROA 73.

On February 15, 2019, the district court entered an order granting the continuance. 2 ROA 78. The district court directed the mediation to commence within 45 days of the order. 2 ROA 79.

On March 7, 2019, the parties participated in mediation. 3 ROA 85.

On March 17, 2019, the mediator filed a Mediator's Statement. 3 ROA 83. The statement notes that Respondents failed to provide an appraisal or BPO within 60 days as required by NRS 645.2515. 3 ROA 87. It also states that Respondents did not bring a short sale document in accordance with the rules. 3 ROA 87. The mediator wrote:

> Due to the extension of the mediation date, parties had agreed that the lender would not be required to submit a new appraisal.
>
> However, Lender did obtain a new appraisal, this appraisal was not made available to the Mediator or to the Homeowner. It was indicated at the mediation that the Lender had used the new appraisal as part of the process to evaluate the Homeowner for a modification. One day prior to mediation Homeowner was notified of the denial of the modification.
>
> At the mediation the short sale amount given by the Lender, was not based on the new appraisal amount which according to the Lender, was

> considerably less than the prior appraisal. Short sale amount would be considerably higher than the latest appraisal, which then would not be a short sale.

3 ROA 86.

The mediator marked that Wells Fargo did not bring to mediation an appraisal or short sale document in accordance with the rules. 3 ROA 87. She did not recommend sanctions. 3 ROA 87. The mediator did recommend the petition be dismissed. 3 ROA 93.

Appellant and Respondents then filed separate requests for relief based on the Mediator's Statement. 3 ROA 97; 6 ROA 245.

On March 27, 2019, Respondents filed a request for appropriate relief asking the district court to dismiss the petition with prejudice under FMR 20(2) because they argued they complied with the rules. 3 ROA 97. In support, Respondents stated that Stephen Wassner, an attorney, appeared for respondents at the mediation, and that the beneficiary made Joshua Ring available by phone. 3 ROA 98. Respondents disagreed with the mediator that they failed to provide a timely appraisal or a short sale value in accordance with the rules. 3 ROA 98. Respondents claimed the mediator was confused over their myriad denial letters—that a November 30, 2018 denial letter was not received by Appellant until the day prior to the mediation, not that the beneficiary denied a modification the day before. 3 ROA 98. Respondents also claimed that they provided a short sale proposal. 3 ROA 100. But the exhibit in support of the contention did not contain any information about a short sale. 4 ROA 159–62.

Respondents complained that the *Mediator's Statement* contained errors. 3 ROA 102. They alleged Appellant received a short sale

proposal in November 2018 and that the appraisal used for the denial was the one previously provided. 3 ROA 102. Thus they said that they complied with the rules and were entitled to dismissal. 3 ROA 103.

On March 28, 2019, Appellant filed a petition for judicial review. 6 ROA 245. He argued that a dispute over payment began over 10 years ago after Wells Fargo acquired the mortgage from World Savings Bank. 6 ROA 246. According to Appellant, Respondents changed the terms of the loan and required him to pay an amount different than agreed. 6 ROA 246. Respondents then refused to accept the correct amount. 6 ROA 246. Appellant requested relief because Respondents (1) failed to attend the mediation in person or through a representative; (2) failed to provide a short sale value; (3) provided a flawed appraisal; (4) failed to maximize the net present value of the property; and (5) failed to provide the loan documents at the mediation. 6 ROA 255–59, 261.

Appellant asserted Wells Fargo failed to have someone with authorization attend the mediation because the attorney only had an authorization by an undated letter from Tiffany & Bosco, P.A.—not Wells Fargo—which was not submitted within 10 days of the mediation. 6 ROA 255.

Appellant pointed to the Mediator's Statement that noted that Respondents did not present a short sale value. 6 ROA 256.

Appellant complained of problems with the appraisals provided by Wells Fargo. 6 ROA 256. He stated that the mediator ordered an interior appraisal be conducted, but that Wells Fargo only conducted an exterior appraisal. 6 ROA 256. He acknowledged the agreement among the parties in which he waived the requirement for a new appraisal. 6 ROA 256. Importantly, though, Appellant noted that he did not waive

the requirement if Wells Fargo elected to perform a new appraisal, in which case the new appraisal would need to be furnished to him prior to mediation. 6 ROA 256.

Appellant noted that the mediator found during the mediation that Wells Fargo had relied upon the new appraisal in denying a loan modification—a denial that occurred on appeal the day prior to mediation. 6 ROA 257. On March 4, 2019, the appraiser faxed to Wells Fargo the updated second appraisal. 6 ROA 257. The second appraisal gave an appraised value of $540,000—about $75,000 less than the first appraisal. 6 ROA 257. Even though Wells Fargo did not disclose the second appraisal prior to mediation, it relied on it at the mediation. 6 ROA 257.

Appellant took issue with the second appraisal because it did not take into account several existing conditions that affected the value of the property, including: a 45-year-old roof that leaks and needs replacement; the lack of any flooring in the master bathroom; old carpeting in the master bedroom; foundation cracking and settling that would cost $50,000 to repair; a front door in need of replacement; an unfinished guest bathroom; an inoperable geothermal heating system; a dated kitchen with several broken cabinet doors; the need for painting inside and outside; and generally a need to update the house. 6 ROA 257–58. He also pointed out that a recent comparable sale in the neighborhood for $459,300 was not used. 6 ROA 258.

Finally, Appellant noted that Wells Fargo failed to maximize the net present value. 6 ROA 259. Appellant provided Wells Fargo two sets of tax returns: one prepared while he was on pain killers, and a second, more accurate set. 6 ROA 259. He also provided Wells Fargo four

months of bank statements for income of at least $4,500 per month; signed lease agreements; and evidence of his social security disability benefits. 6 ROA 259. In spite of providing this information, Wells Fargo did not perform any net value calculation. 6 ROA 259.

Appellant also took issue with the mediator's statement for the mediator's failure to explain her reasoning and failure to discuss alternative mortgage relief programs. 6 ROA 259–61. He noted that the mediator failed to indicate whether or not the parties participated in good faith. 6 ROA 260. Due to these failings, he urged the district court not to follow the mediator's recommendation to dismiss the petition. 6 ROA 260.

Instead, Appellant requested that the district court sanction Respondents for their bad faith and failure to comply with the required disclosures and other failings. 6 ROA 261–63. In doing so, he requested that the district court impose: monetary sanctions, a prohibition against Respondents conducting a foreclosure until Appellant reached age 62 ½ so that he could refinance the loan through a reverse mortgage, setting aside the present foreclosure, and requiring Respondents to produce the original note. 6 ROA 262-63.

Wells Fargo responded to the petition for judicial review on July 1, 2019. 7 ROA 455. It argued that no sanctions should issue as supported by the mediator's recommendation. 7 ROA 456. Wells Fargo pointed out that, in spite of the waiver, it made an effort to obtain a new appraisal. 7 ROA 460. But, due to Appellant's health issues,[1] the appraiser did not

[1] Wells Fargo took issue with the delays, which were mutually agreed to, due to Appellant's health concerns. Respondents do not seriously contend that Appellant's medical situation, which required

view the property until February 26, 2019—less than 10 days before the March 7, 2019 mediation. 7 ROA 460. Wells Fargo claimed that due to the time limits imposed by the rules it elected to use the prior appraisal. 7 ROA 460.

The response noted that Appellant objected at the mediation to Wells Fargo's failure to disclose the second appraisal. 7 ROA 457. Wells Fargo characterized this objection as "nonsensical" because Wells Fargo was unable to conduct the second appraisal more than 10 days prior to the continued mediation date due to Appellant's delay in making the property available. 7 ROA 461. And Wells Fargo claimed that it did not use the second appraisal to evaluate Appellant for a loan modification, thus ensuring that there was no violation of its obligation to provide the appraisal more than 10 days before the mediation. 7 ROA 461. Wells Fargo argued that the mediator's findings—that Wells Fargo's evaluation was flawed because it used the second appraisal in evaluating Appellant for a loan modification and failed to disclose the second appraisal—were incorrect. 7 ROA 461. Wells Fargo claimed that it could not have used the second appraisal as the basis for its denial of a loan modification three months earlier, and Appellant had waived the new appraisal anyway. 7 ROA 461.

More specifically, Wells Fargo argued that it participated in the mediation in good faith through a representative with authority, and exchanged all required documents per Rule 13(7). 7 ROA 462. Wells Fargo noted first that the mediator's statement indicates that its employee Josh Ring participated via phone for the duration of the

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hospitalization, were fabricated to cause delay. *See* 11 ROA 726–36; 13 ROA 972 (detailing Appellant's conditions).

mediation; that the mediator did not check any box indicating that the beneficiary failed to attend or that its representative failed to demonstrate authority; and that Wells Fargo appeared in person through Tiffany & Bosco's local appearance counsel, Stephen Wassner, which was timely authorized in writing. 7 ROA 462.

Second, Wells Fargo argued that it complied with its document production requirements, and that Appellant put it in an impossible position with regard to the two appraisals. 7 ROA 464, 466. According to Wells Fargo, Appellant was dissatisfied that the first appraisal valued the property too high to qualify as a proper basis for a short sale, and the second appraisal's lower value did not comport with his idea of what challenges existed in selling the home. 7 ROA 466. Wells Fargo also argued that Appellant changed the terms of his waiver, claiming at mediation that although he waived the requirement for a second appraisal, he did not waive the right to require its production should Wells Fargo obtain one. 7 ROA 465. Wells Fargo did admit that it failed to provide a hard copy of the second appraisal at the mediation, but that it nevertheless complied with Rule 13(7)(f) by producing the first appraisal, relying on it to evaluate him for a loan modification, and obtaining a waiver for the second appraisal. 7 ROA 467.

Third, Wells Fargo maintained that its failure to provide a short sale value was due to Appellant's failure to perform a condition precedent: to provide the documents necessary for Wells Fargo to evaluate a short sale. 7 ROA 467. Wells Fargo requested these documents, but Appellant did not comply in violation of Rule 13(3), which provides that the homeowner "shall use his or her best effort to submit the required documents in his or her possession to the mediator and the beneficiary

of the deed of trust within 15 days. The homeowner should also begin the process to obtain required documents not in his or her possession." 7 ROA 467–68.

Finally, Wells Fargo refuted Appellant's other contentions in his petition for judicial review. First was the argument that Wells Fargo did not maximize net present value in considering Appellant for a loan modification at the mediation. 7 ROA 468. According to Wells Fargo, this has no bearing on Wells Fargo's good faith participation in the mediation, and Appellant admits that the denial was due to discrepancies in the two sets of tax returns he provided. 7 ROA 468.

Second, Wells Fargo contended that regardless of whether Appellant is right or wrong about the mediator's failures—*i.e.*, to present other programs that he may have qualified for, to provide a reason for her decision, and to make a finding of good or bad faith by either party—these do not form a basis for sanctioning Wells Fargo. 7 ROA 468, 469.

Third, Wells Fargo claimed that it did provide the loan documents at the mediation, as shown by the mediator's statement, which did not check the box indicating that Wells Fargo failed to bring the note, deed of trust, and certifications of the originals. 7 ROA 469.

On July 3, 2019, Appellant filed a response to Respondents' request for appropriate relief. 11 ROA 713. He argued that Respondents did not meet all criteria for a certificate of foreclosure to issue. 11 ROA 713. Specifically, they failed to provide the required documentation, including a short sale proposal. 11 ROA 715. Appellant pointed out that Respondents' Exhibit E-1 to the Request for Appropriate Relief was not actually a short sale proposal but simply a letter dated October 17, 2018. 11 ROA 715.

Appellant next argued that Wells Fargo demonstrated bad faith by providing a short sale estimate orally at the mediation that was in excess of both appraisals. 11 ROA 716. Further, Wells Fargo acted in bad faith by providing denials from prior mediations in which it did not prevail. 11 ROA 716. And Appellant argued that Wells Fargo was dishonest in the facts it presented about the loan modification denial. 11 ROA 716. On the one hand, Wells Fargo claimed that the denial was sent in November 2018, but on the other hand, it admitted that Appellant was notified of the denial one day prior to mediation. 11 ROA 717.

Lastly, Appellant cited another example of Wells Fargo's bad faith in that it failed to take seriously his life-threatening health issues. 11 ROA 717.

On September 24, 2019, Wells Fargo filed its reply in support of its request for appropriate relief. 11 ROA 859. Wells Fargo argued that it fully complied with Rule 12(1)(a) by having on the phone an authorized representative with authority to negotiate a loan modification and its local counsel appear in person at the mediation. 11 ROA 860. To the extent that Appellant made identical arguments in the 2017 mediation about the impropriety of Wells Fargo appearing through its local counsel, the district court rejected them. 11 ROA 861.

Next, Wells Fargo argued that, contrary to Appellants' assertions, it timely provided an appraisal both to him and to the mediator. 11 ROA 861. This is because Appellant expressly waived the requirement for a second appraisal in exchange for a lengthy continuance. 11 ROA 863. Appellant prevented Wells Fargo from obtaining the second appraisal until nine days before the mediation, yet claimed that Wells Fargo

failed to comply with the mediation rules by providing an untimely appraisal. 11 ROA 862.

Wells Fargo then argued that Appellant failed to provide requested documents to enable Wells Fargo to evaluate his short sale options. 11 ROA 863. Appellant allegedly did not comply with a condition precedent by responding to Wells Fargo's November 30, 2018 letter requesting documentation that would facilitate a short sale evaluation. 11 ROA 863.

On September 25, 2019, Appellant filed a reply to Respondents' response to his petition for judicial review. 12 ROA 883. Appellant argued eight different points. 12 ROA 884–85.

First, Wells Fargo denied him a loan modification for the second time one day prior to the mediation, basing that denial on its new appraisal of the property. 12 ROA 885–86. As evidence, he points to Wells Fargo's March 6, 2019 email regarding a second denial, as well as the mediator's statement. 12 ROA 885–86.

Second, Appellant claimed that it was Wells Fargo, not he, that caused the delay in obtaining the second appraisal. 12 ROA 886–89.

Third, Appellant asserted that Wells Fargo ignored its own evidence that it used the March 3, 2019 second appraisal as the basis for its March 6, 2019 loan modification denial. 12 ROA 889. That evidence was an email from Ivan Mora of Tiffany & Bosco to Appellant, wherein Mora stated that the appeal review of the loan modification was still pending due to a hold-up with the new valuation. 12 ROA 890.

Fourth, Appellant argued that, despite evidence that Wells Fargo used the second appraisal to inform the second denial, Wells Fargo

impliedly admitted that, had it used the second appraisal, it would have violated the 10-day requirement under Rule 13(7). 12 ROA 891.

Fifth, Appellant claimed that Wells Fargo's representative, Josh Ring, orally provided a short sale value of approximately $650,000 at the mediation, which was not a short sale value or estimate amount compared to the second appraisal. 12 ROA 891–92. Further, Wells Fargo's obligation to provide a short sale value did not require any documentation from Appellant. 12 ROA 892.

Sixth, Appellant took issue with Wells Fargo's assertion that the mediator did not check the box indicating that Wells Fargo provided no documents at the mediation, and thus all required documents were provided. 12 ROA 892–93. Instead, Appellant claimed that Attorney Wassner failed to present the note and need of trust. 12 ROA 892.

Seventh, Appellant contended that Wells Fargo did not specifically authorize Attorney Wassner to appear on its behalf in Appellant's mediation, and thus no authorized representative appeared. 12 ROA 893.

Eighth and finally, Appellant refuted several of Wells Fargo's factual allegations. 11 ROA 894. Among other things, Appellant asserted that he made the correct loan payments, which Wells Fargo rejected; Appellant collects rent payments but only to cover the expenses of the home; Appellant did not turn over rent payments because Wells Fargo never requested those payments per the Deed of Trust; and Wells Fargo rejected Appellant's numerous good faith attempts to settle this matter. 11 ROA 894–897.

On December 13, 2019, in response to an order of the district court, Wells Fargo filed a supplement in support of its request for appropriate

relief, specifically to clarify the facts surrounding the short sale value that it provided to Appellant at the mediation. 14 ROA 1020. Wells Fargo argued that Rules 13(7) and (10) are silent on the deadline for providing a short sale value, and that Attorney Wassner provided an opening short sale value of $620,000. 14 ROA 1021. As evidence, Wells Fargo cited to the mediator's statement and Appellant's admission in his moving papers that he considered the short sale offer too high, and that he stated at the mediation that he was not interested in a short sale. 14 ROA 1021–22.

Further, Wells Fargo argued as a matter of law that $620,000 was a valid short sale value because it was less than the loan balance at the time of the mediation, which was $720,336.53 (total of unpaid principal balance and escrow advances). 14 ROA 1022–23.

On December 30, 2019, Appellant filed a response to the supplement. 14 ROA 1049. Appellant argued that the $620,000 figure was not a true "short sale value" but rather the mortgage payoff amount at the time. 14 ROA 1050. Additionally, Appellant pointed out that $620,000 was more than the amount of either appraisal. 14 ROA 1064.

Appellant also argued that he was not required to enter into a contract to sell his home for Wells Fargo to be required to provide a short sale value. 14 ROA 1052. Rather, all that was required was an internal determination by Wells Fargo without any input from the homeowner. 14 ROA 1052. Appellant noted that, if a sale contract were required, the foreclosure mediation would be moot. 14 ROA 1053.

On March 3, 2020, the district court entered an order denying the petition for judicial review and dismissing the petition. 15 ROA 1064.

On April 7, 2020, Appellant filed a notice of appeal. 15 ROA 1119.

SUMMARY OF THE ARGUMENT

Because Respondents violated the Foreclosure Mediation Rules, they should not be rewarded with a foreclosure certificate. The district court abused its discretion by failing to impose sanctions based on its findings, contrary to the mediator's statement, that Respondents met the appraisal and short sale valuation requirements under the rules, and that Respondents had someone at the mediation with authority to modify the loan. Moreover, despite evidence in the record that Respondents failed to comply with document disclosure requirements, the district court did not address whether or not Respondents met their burden to show compliance. Accordingly, this Court should reverse the district court's order and remand with instructions to grant the petition for judicial review and for the imposition, at a minimum, of a sanction denying Respondents a foreclosure certificate.

First, the rules require a beneficiary to disclose an appraisal "dated no more than 60 days before the commencement date of the mediation with respect to the real property that is the subject of the notice of default . . ." FMR 13(10). The disclosure must be made at least 10 days prior to the mediation. FMR 13(7)(f). Although the parties agreed not to require a new appraisal, Respondents obtained one anyway. Respondents, however, failed to disclose the updated second appraisal that Wells Fargo relied upon at the mediation as the basis for its negotiations. The mediator noted this in her statement, but the district court overruled that determination and failed to impose sanctions. Because this was an abuse of the district court's discretion, its order should be reversed.

Second, the rules require a timely disclosure of short sale value, and any conditions that must be met in order for a short sale to be approved. FMR 13(10). Impliedly, disclosure of short sale value under FMR 13(10) must occur no later than at the mediation. Respondents conceded that they failed to disclose a short sale value with conditions prior to the mediation. Then, at the mediation, the beneficiary's representative orally provided a short sale value less than the amount owed, but greater than either of the two appraised values. Although technically the short sale value was less than the outstanding loan balance, it was not disclosed in good faith because it was more than the appraised value. In other words, the home would almost certainly not sell for the short sale value, thus resulting in foreclosure—contrary to the goal of the Foreclosure Mediation Program. The district court therefore erred in finding compliance with the rules in this case.

Third, Respondents violated FMR 12 and NRS 107.086(5) by failing to have someone with authority to modify the loan either present or accessible during the mediation. This is a sanctionable offense. NRS 107.086(6). An attorney and an underwriter appeared on behalf of Wells Fargo at the mediation. Although Wells Fargo authorized Tiffany & Bosco under NRS 107.086, Wells Fargo did not directly authorize Attorney Wassner to represent them at this particular mediation. Rather, Attorney Wassner presented at the mediation only his business card and an undated letter from Tiffany & Bosco authorizing him to appear at unspecified mediations. Likewise, the underwriter was also not authorized as someone with authority to modify the loan. Neither individual had actual or apparent authority to bind Wells Fargo in the mediation. Therefore, the district court abused its discretion in denying Appellant's

petition for judicial review because Respondents violated the rules by failing to have an authorized person present or accessible at the mediation. Respondents should have been sanctioned accordingly.

Fourth and finally, Respondents failed to provide copies of the note, deed of trust, and assignments as required by NRS 107.086 and FMR 13(7)(a) and (b). The district court, however, did not address this failure in its order. Failure to strictly comply with these disclosure requirements should have resulted in the denial of a foreclosure certificate, and is a sanctionable offense. While Wells Fargo argued that it timely provided the documents, it did not provide a declaration or an email of such. However, an observer to the mediation stated in a declaration that Wells Fargo's attorney did not present any documents other than the attorney's business card. The district court erred by failing to address these disputed facts, and, based on the record, Respondents failed to comply with the document disclosure requirement.

Because of the above violations of the Foreclosure Mediation Rules, this Court should reverse the district court's order dismissing Appellant's petition, and remand with instructions to the district court to grant the petition and deny Respondents a foreclosure certificate.

STANDARD OF REVIEW

This Court reviews a district court's decision regarding the imposition of sanctions in foreclosure mediation program cases for an abuse of discretion. *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 468, 255 P.3d 1281, 1286 (2011)**Error! Bookmark not defined.**. "[A] district court abuses its discretion if it does not order the FMP certificate withheld for

noncompliance with the FMP requirements." *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 893, 266 P.3d 602, 607 (2011).

"In reviewing a district court order granting or denying judicial review in an FMP matter, this court gives deference to a district court's factual determinations and examines its legal determinations, such as the construction of a statute or FMP rule, de novo." *Pascua v. Bayview Loan Servicing, LLC*, 135 Nev. 29, 31, 434 P.3d 287, 289 (2019) (internal quotation and citations omitted). A district court's factual findings will not be disturbed on appeal if they are supported by substantial evidence. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 521-22, 286 P.3d 249, 260 (2012). "If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Beazer Homes Nev., Inc. v. Dist. Ct.*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (alteration in original) (internal quotation marks omitted). "Where the statutory language . . . does not speak to the issue before us, [this court] will construe it according to that which reason and public policy would indicate the legislature intended." *Pascua,* 135 Nev. at 31, 434 P.3d at 289 (internal quotations omitted).

ARGUMENT

A beneficiary must participate in the foreclosure mediation process in good faith, and may be sanctioned by the district court if it does not. *See Jacinto v. PennyMac Corp.*, 129 Nev. 300, 304, 300 P.3d 724, 727 (2013); *see also* NRS 107.086(6)[2]. To avoid sanctions and obtain a FMP certificate, the beneficiary must attend the mediation, participate in good faith, bring

[2] NRS 107.086 was amended effective October 1, 2019. 2019 Nev. Stat., ch. 238, § 12, at 1359-64. The amendments do not apply in this case.

the required documents, and, if attending through a representative, the representative must have authority to modify the loan. *Jacinto*, 129 Nev. at 304, 300 P.3d at 727. A beneficiary fails to participate in good faith if it does not strictly comply with the rules. *See Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 666, 310 P.3d 569, 572–73 (2013) (explaining that documents required to be submitted under the mandatory 10-day rule are "necessary . . . for the mediation and good-faith negotiations therein"). Generally, the FMR are mandatory and require strict compliance when they set forth "a specific 'time and manner' for performance." *Id.*, 129 Nev. at 664, 310 P.3d at 572. "Form and content provisions, on the other hand, dictate who must take action and what information that party is required to provide." *Id.* (original alterations omitted). If the beneficiary fails to comply with the rules, then, as a bare minimum sanction, the district court must order that the FMP certificate not issue. *Jacinto*, 129 Nev. at 304, 300 P.3d at 727.

Here, the district court abused its discretion by failing to impose sanctions based on its findings, contrary to the mediator, that Respondents met the appraisal and short sale valuation requirements of the rules. The district court also found that Respondents attended through counsel and a representative to meet the requirement that someone with authority attend, which Appellant contends is error. Finally, the district court did not address whether or not Respondents met their burden to show compliance with the remaining document disclosure requirements. But the evidence in the record does not show Respondents complied. Appellant asks this Court to reverse the district court's order and remand with instructions to grant the petition for judicial review and for the imposition

of the bare minimum sanction denying Respondents a foreclosure certificate.

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY FINDING THAT APPELLANT WAIVED HIS RIGHT TO CHALLENGE THE APPRAISAL, AND THAT RESPONDENTS DID NOT NEED TO DISCLOSE AN APPRAISAL THAT THEY USED AND RELIED ON

Respondents frustrated the mediation process by failing to disclose an updated second appraisal that Wells Fargo relied upon at the mediation. Even though the parties previously agreed not to require a new appraisal, as the parties anticipated completing mediation within 75 days of the stipulation, Wells Fargo undertook to obtain a second appraisal. Wells Fargo then used the undisclosed second appraisal as the basis for its negotiations. The mediator found as much when she wrote in her statement about Wells Fargo's failures. But the district court overruled that determination. The district court found, contrary to the mediator's percipient observations, the express stipulation between the parties, and the documents provided, that Wells Fargo did not need to provide the second appraisal. This Court should reverse that decision as an abuse of the district court's discretion.

Under the rules, "[t]he beneficiary of the deed of trust or its representative shall produce an appraisal dated no more than 60 days before the commencement date of the mediation with respect to the real property that is the subject of the notice of default . . ." FMR 13(10). The disclosure must be made at least 10 days prior to the mediation. FMR 13(7). A beneficiary complies with the appraisal requirement by timely making a disclosure of an appraisal that is reasonably close to the

60-day valuation window. *See Markowitz*, 129 Nev. at 667, 310 P.3d at 573.

The Court explained the purpose behind the rule. It stated:

> The policy behind providing a recent appraisal and/or BPO at the mediation is to ensure that the fair market value of the property is known to both parties to the mediation at the time when they are negotiating a potential loan modification or determining whether a short sale would be appropriate. FMR 8(3) (2010). This allows for fully informed negotiations to occur and ensures that offers made are based on the present economic reality concerning the property and are consistent with the FMP's purpose of bringing the parties together for meaningful negotiation.

Id., 129 Nev. at 666, 310 P.3d at 573.

FMP mediators are neutrals. FMR 4. They are subject to the high standards set forth in FMR 4, including Canon 2 and Rules 2.2 and 2.3 of the Nevada Code of Judicial Conduct that require them to be impartial. FMR 4(1). Their recitations of what occurred at the proceeding should be afforded deference in the absence of contrary evidence.

Here, Wells Fargo disclosed the first exterior-only appraisal, which set a value of the home at $615,000. 5 ROA 176. The parties then stipulated[3],

[3] DCR 16 provides that stipulations are effective if in writing and signed. Written stipulations are "a species of contract" and "should therefore generally be read according to their plain words unless those words are ambiguous, in which case the task becomes to identify and effectuate the objective intention of the parties." *DeChambeau v. Balkenbush*, 134 Nev. 625, 628, 431 P.3d 359, 361–62 (Ct. App. 2018).

> Due to the continuance, the beneficiary/servicer is not required to produce a new Broker's Price Opinion or Appraisal before the next hearing.

2 ROA 73. Nowhere in the express language of the stipulation did Appellant waive any rights to contest the appraisal.

But Wells Fargo later took it upon itself to prepare a second appraisal that took into account the interior and exterior conditions of the property. 10 ROA 697. It then relied upon that valuation when discussing foreclosure prevention options. 13 ROA 970. As such, the mediator found that Wells Fargo did not comply with the appraisal requirement. 4 ROA 151. She wrote:

> Lender did obtain new appraisal, this appraisal was not made available to the Mediator or to the Homeowner. It was indicated at the mediation that the Lender had used the new appraisal as part of the process to evaluate the Homeowner for a modification. One day prior to mediation Homeowner was notified of the denial of the modification.
>
> At the mediation the short sale amount given by the Lender, was not based on the new appraisal amount which according to the Lender, was considerably less than the prior appraisal. Short sale amount would be considerably higher than the latest appraisal, which then would not be a short sale.

4 ROA 150.

The district court abused its discretion when it found that Appellant waived his right to contest the first appraisal because the stipulation did not provide for any waiver as to the substance of the appraisal. 15 ROA 1090. Rather, the stipulation only waived the requirement for Wells Fargo

to obtain an appraisal that would be within the 60-day window. As Appellant detailed in his papers, the condition of the property did not make an exterior-only appraisal accurate. Wells Fargo's retorted that Appellant could have obtained his own appraisal at his own cost. But the purpose of the appraisal requirement is to ensure that the fair market of the property is known to the parties. And because Appellant preserved his right to make arguments about the accuracy of the appraisal, the district court, not the mediator, erred here.

Second, the district court incorrectly found that Wells Fargo did not need to disclose the second appraisal. 15 ROA 1090. Rather, the doctrine of estoppel applies to negate the waiver. "The defense of estoppel requires a clear showing that the party relying upon it was induced by the adverse party to make a detrimental change in position, and the burden of proof is upon the party asserting estoppel." *Nevada State Bank v. Jamison Fam. P'ship*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990). By using the undisclosed second appraisal at mediation, Wells Fargo materially changed its position as to the value of the property, thus frustrating the purpose of the mediation. 4 ROA 151; 7 ROA 465–66. Wells Fargo complained that Appellant's real and serious health issues made it impossible for it to comply with the rules. Yet it did not ask for a further continuance of the mediation so that the mediator and Appellant would have the most accurate information, and blamed Appellant for its failure to timely disclose. As found by the mediator, Wells Fargo used the second appraisal as a basis during the negotiations and that it varied wildly from the first appraisal. The second appraisal also led to much confusion as to setting a short sale value as discussed below. So when Wells Fargo admits to using, but not timely disclosing the second appraisal, it did not act in

good faith as it did not comply with the rules. 7 ROA 467. Therefore, the district court erred when it found that Wells Fargo's actions did not supersede the waiver here.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DETERMINING RESPONDENTS COMPLIED WITH THE RULES BY ORALLY GIVING AT MEDIATION A SHORT SALE VALUE GREATER THAN THE APPRAISED VALUE OF THE HOME, BUT LESS THAN THE AMOUNT DUE UNDER THE NOTE

Respondents conceded below that they failed to disclose a short sale value with conditions prior to the mediation. 14 ROA 1021. The question for this Court to resolve is whether a beneficiary's oral short sale value that is less than the amount owed, but greater than the appraised value, complies with the rules. Appellant urges this Court to hold that it does not.

The purpose of the FMP is to facilitate "the orderly, timely, and cost-effective mediation of owner-occupied residential foreclosures[.]" FMR 1(2). The program brings together beneficiaries and homeowners "to exchange information and proposals that may avoid foreclosure." FMR 1(2). As part of mediation, the beneficiary must "prepare an estimate of the 'short sale' value of the residence that it may be willing to consider as a part of the negotiation if loan modification is not agreed upon, and shall submit any conditions that must be met in order for a short sale to be approved." FMR 13(10). The rules do not define "short sale value." The Ninth Circuit explained, "[a] short sale is a real estate transaction in which the property serving as collateral for a mortgage is sold for less than the outstanding balance on the secured loan, and the mortgage lender agrees to discount

the loan balance because of a consumer's economic distress." *Shaw v. Experian Information Solutions, Inc.*, 891 F.3d 749, 752 (9th Cir. 2018) (discussing short sales in the context of reporting on a consumer credit report). The rules do not state when disclosure under FMR 13(10) must occur, but by implication it must be no later than at the mediation.

Between October 30 and 31, 2018, the following email exchange between Appellant and Ivan Mora, an employee of Respondents, occurred:

> Appellant: "In an effort to review all possible efforts, would you please send me the short sale information/form?" 11 ROA 725.
>
> Ivan Mora: "Yes, here you go. Thank you," 11 ROA 725.
>
> Appellant: "I have reviewed the letter. Apologies but I am confused. Is WF already putting together a proposal? Or, do I need to take another step?" 11 ROA 724.
>
> Mora: "If you decide to proceed with Short Sale, they would propose figures for you, ect. (sic)" 11 ROA 724.
>
> Appellant: "That seems backwards. The figures should be provided so that I can decide if its (sic) an option. I am not going to lock myself into something without appropriate information." 11 ROA 724.

On November 28, 2018, Wells Fargo wrote in response to Appellant's request for mortgage assistance. 5 ROA 238. Next to "short sale," Wells Fargo stated that Appellant did not provide it with valid documents as requested. 5 ROA 238.

In the late afternoon on March 6, 2019, the day before mediation, Mora wrote:

> As of this morning, the appeals team has completed their review and the appeal results in the same outcome as the original review, resulting in a denial due to application discrepancy. It was again confirmed that, were there no discrepancies, the review would still result in a denial. The income cannot be calculated using the 2017 1040 provided in the Appeal process, as this was the same form provided in the initial denial where the lender found discrepancies between this tax return and the other version provided, which caused the results to repeat as a denial for document discrepancies.
>
> An appeal denial letter will be provide once available, but these letters are not specific and will only state appeal review resulted in a denial."

11 ROA 738.

At the mediation, the parties discussed the possibility of a short sale. Wells Fargo orally disclosed a short sale value of $620,000[4]. But due to the issues surrounding the appraisals, the valuation was between $5,000 and $80,000 more than the property's value. Appellant contends that the short sale value above the appraisals is made in bad faith and does not comply with the rules when the short sale value is greater than the appraised value.

[4] Appellant contends that Wells Fargo gave a short sale value of $650,000. 12 ROA 891, 892. Yet, Wells Fargo argued it could not provide a short sale value due to inadequate records from Appellant. 14 ROA 1056–58. Appellant uses the figure assigned by the district court without conceding the fact.

In deciding the issue below, the district court correctly disregarded Wells Fargo's arguments that it previously disclosed a short sale value, and that Appellant was required to enter into a sales contract for the home prior to disclosure. 15 ROA 1089. To hold otherwise would violate the spirit if not the letter of the FMP guidelines to explore all available options to avoid foreclosure. FMR 1, FMR 19.

Even so, the district court found that Wells Fargo complied with the rules by orally presenting a short sale value of $620,000 at the mediation. 15 ROA 1090. While that amount is less than the amount Wells Fargo claims is owed, the district court failed to take into account that the short sale value was more than either of the appraisals. This meant that the amount of the short sale given was illusory and made in bad faith even if it meets the definition of a short sale. That is because the wildly varying appraisals, $615,000 and $540,000 respectively, show that the property could not likely sustain a sale for $620,000 as proposed by Wells Fargo.

This Court should hold that a beneficiary does not meet its obligation of good faith when it sets a short sale value that is more than the home's appraised value. That is because the result of a short sale value that is more than either appraised value is almost certain foreclosure, as a lender would not likely give a prospective buyer a mortgage for greater than the value of the home. Thus, a short sale value, like the one given here, defeats the purpose of FMP to avoid foreclosure.

The Court should also find that compliance with the FMR 13(10) means that the short sale value and any conditions of the short sale must be made in writing to avoid situations like the one here with a $30,000 dispute over the value given at mediation. The district court thus erred in finding compliance with the rules and this Court should reverse.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DID NOT ADDRESS RESPONDENTS' FAILURE TO DISCLOSE ALL REQUIRED DOCUMENTS AT MEDIATION

Appellant contends Respondents failed to provide copies of the note, deed of trust, and assignments as required by NRS 107.086 and FMR 13(7)(a) and (b). 12 ROA 892–93. The district court did not make findings addressing this argument in its order.

Failure to strictly comply with NRS 107.086 and FMR 13(7)'s disclosure requirements results in the denial of a foreclosure certificate and the possible imposition of other sanctions. *Pasillas*, 127 Nev. at 469, 255 P.3d at 1286.

Here, except for the appraisal and short sale valuation, the mediator did not mark that Respondents failed to bring other necessary documents as required by FMR 13(7)(a) and (b). But Appellant contends the mediator overlooked marking those boxes because he says no documents were provided. Wells Fargo argued it provided the documents, but it did not provide a declaration or an email that supports that it timely provided the documents. Rather, it argued that it emailed the documents and pointed to an exhibit to their request for relief that was not attached. 3 ROA 100. Contrary to the *Mediator's Statement*, the evidence provided by Appellant to support the contention that Wells Fargo did not comply with the rules is a declaration from an observer, Jesse Solomon, who stated that Wells Fargo's attorney did not present any documents at the mediation other than the attorney's business card. 13 ROA 973. The district court erred by failing to address these disputed facts, and, based on the record, Respondents failed to comply with the document disclosure requirement.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY FINDING RESPONDENTS HAD PERSONS WITH AUTHORITY ATTEND MEDIATION

Both NRS 107.086 and the Foreclosure Mediation Rules provide that "someone with authority to modify the loan must be present or accessible during the mediation." *Pasillas*, 127 Nev. at 463, 255 P.3d at 1282. NRS 107.086(5) provides:

> Each mediation required by this section must be conducted by a senior justice, judge, hearing master or other designee pursuant to the rules adopted pursuant to subsection 12. The beneficiary of the deed of trust or a representative shall attend the mediation. The grantor or his or her representative, or the person who holds the title of record or his or her representative, shall attend the mediation. The beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of the deed of trust, the mortgage note, each assignment of the deed of trust or mortgage note and any documents created in connection with a loan modification. **If the beneficiary of the deed of trust is represented at the mediation by another person, that person must have authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust or have access at all times during the mediation to a person with such authority.**

NRS 107.086(5) (emphasis added).

Similarly, the rules, in part, provide:

> 1. Both parties to a mediation should appear in person. However, a party may be represented by another person, subject to certain limitations, as follows:
>
> (a) Beneficiary. All beneficiaries of a deed of trust that are seeking to foreclose against an eligible participant who has timely filed a Petition for Mediation Assistance shall participate in Foreclosure Mediation Assistance and **be represented at all times during mediation by a person or persons who have the authority to negotiate and modify the loan secured by the deed of trust sought to be foreclosed**. A beneficiary or its representative shall be physically present at mediation. Physical presence of the beneficiary or its representative is satisfied by the physical presence of an authorized representative of the beneficiary, which may include counsel for the beneficiary. . . .

FMR 12 (emphasis added). Relatedly, the rules further provide:

> If the beneficiary of the deed of trust is represented by a third party at the time of mediation, the third party must produce a copy of the agreement, or relevant portion thereof, which authorizes the third party to represent the beneficiary at the mediation and authorizes the third party to negotiate a loan modification on behalf of the beneficiary of the deed of trust.

FMR 13(7)(d). To avoid sanctions and obtain an FMP certificate, if the beneficiary attends the foreclosure mediation through a representative, the representative must have authority to modify the loan. *Jacinto*, 129 Nev. at 304, 300 P.3d at 727.

The beneficiary's failure to "have the authority or access to a person with the authority required by subsection 5" is a sanctionable offense. NRS 107.086(6). "The court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate, including, without limitation, requiring a loan modification in the manner determined proper by the court." NRS 107.086(6).

This Court previously held that district courts must sanction a party who fails to participate in mediation with someone with authority to modify the loan under NRS 107.086 and the rules. In *Pasillas*, HSBC Bank USA failed to have a person present with authority to modify the loan or access to such a person, as required by NRS 107.086(5) and the FMRs. *Pasillas*, 127 Nev. at 468, 255 P.3d at 1286. Although HSBC's counsel was present at the mediation, the mediator's statement revealed that HSBC's counsel "claimed at the mediation that additional investor approval was needed in order to modify the loan." *Id.* The Court held that the foreclosing party's failure to have someone with loan-modification authority at the mediation was a sanctionable offense under the Foreclosure Mediation Program, and thus "the district court abused its discretion when it denied the Pasillases' petition for judicial review and ordered the program administrator to enter a letter of certification authorizing the foreclosure process to proceed." *Id.*, 127 Nev. at 469, 255 P.3d at 1286.

Additionally, the Court addressed this issue in *Savage v. Deutsche Bank Nat'l Trust Co.*, 2019 WL 625701 (Nev. Ct. App. 2019). In *Savage*, an attorney appeared at a foreclosure mediation for the beneficiary, presenting documents showing that Deutsche Bank appointed a master servicer, Impac Funding Corporation, which appointed a subservicer that retained a law

firm that authorized the attorney to appear on its behalf. *Id.* at *1. Specifically, the attorney produced at the mediation a limited power of attorney appointing Impac as Deutsche Bank's master servicer. *Id*. The homeowner petitioned for judicial review, arguing that the attorney failed to provide sufficient documentation to establish his authority to negotiate for Deutsche Bank. *Id*. The district court denied the petition. *Id*. On appeal, the Court concluded that "the district court did not err insofar as it determined that the limited power of attorney authorized Impac to negotiate for Deutsche Bank." *Id*.

Here, Wells Fargo, by an undated written authorization, appointed Tiffany & Bosco, P.A. to act on its behalf. 5 ROA 195. The letter states in relevant part:

> Pursuant to NRS 107.086 the law firm of Tiffany & Bosco, P.A. is hereby authorized as required by statute number NRS 107.086(11) to act on behalf of the beneficiary of the deed of trust.
>
> This authorization extends to all matters wherein Tiffany & Bosco, P.A. is employed by Wells Fargo Bank, N.A. as its counsel of record.

5 ROA 195. At Appellant's foreclosure mediation on March 7, 2019, Attorney Wassner appeared in person on behalf of Wells Fargo. 3 ROA 98. The beneficiary also made Joshua Ring available by telephone during the mediation. 3 ROA 98. The beneficiary characterizes Ring as a "Wells Fargo Mediation Underwriter." 7 ROA 458.

However, neither Attorney Wassner nor Ring had authority to modify the loan as required by NRS 107.086 and FMR 12(1)(a) and FMR 13(7)(d).

Attorney Wassner was not a member of Tiffany & Bosco but rather was a solo practitioner who served as Tiffany & Bosco's local appearance counsel. 6 ROA 278; 7 ROA 464. At the mediation, Attorney Wassner stated that he was appearing for Tiffany & Bosco and presented his business card but failed to present any documentation other than a single-page undated letter from Tiffany & Bosco, which purportedly authorized him to attend unspecified mediations for that firm. 12 ROA 942. The letter was not from Wells Fargo, nor did it specifically reference Appellant's mediation. 12 ROA 942.

Attorney Wassner had neither actual authority nor apparent authority to bind Wells Fargo at the foreclosure mediation. "'To bind a principal, an agent must have actual authority . . . or apparent authority.'" *Simmons Self-Storage v. Rib Roof, Inc.*, 130 Nev. 540, 549, 331 P.3d 850, 856 (2014) (quoting *Dixon v. Thatcher*, 103 Nev. 414, 417, 742 P.2d 1029, 1031 (1987)). "'An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act[.]'" *Simmons Self-Storage*, 130 Nev. at 549, 331 P.3d at 856 (quoting Restatement (Third) of Agency § 2.01 (2006)). "When examining whether actual authority exists, we focus on an agent's reasonable belief." *Simmons Self-Storage*, 130 Nev. at 549, 331 P.3d at 856 (citing Restatement (Third) of Agency § 2.02 & cmt. e ("Whether an agent's belief is reasonable is determined from the viewpoint of a reasonable person in the agent's situation under all of the circumstances of which the agent has notice.")).

Actual authority did not exist here. A reasonable person in Attorney Wassner's situation, under all the circumstances of which he had notice,

could not have formed a reasonable belief that he had actual authority from Wells Fargo to act on its behalf at the mediation. Attorney Wassner attended the mediation with only a single-page undated letter from Tiffany & Bosco authorizing him to attend unspecified mediations for Tiffany & Bosco. 12 ROA 942. The letter was not from Wells Fargo. 12 ROA 942. Nor did he present "a copy of the agreement, or relevant portion thereof, which authorizes the third party to represent the beneficiary at the mediation and authorizes the third party to negotiate a loan modification on behalf of the beneficiary of the deed of trust." FMR 13(7)(d); 6 ROA 274. With only the aforementioned letter from Tiffany & Bosco, a reasonable person would not have concluded that he had authority from Wells Fargo to represent it and bind it at this particular mediation, but merely authority from Tiffany & Bosco to attend mediations generally. Unlike in *Savage*, where the attorney appearing at the mediation on behalf of Deutsche Bank presented a limited power of attorney from the master servicer, Attorney Wassner presented nothing of the kind at this mediation. *Savage*, 2019 WL 625701 at *1.

Attorney Wassner also did not have apparent authority to bind Wells Fargo in this particular mediation. "'Apparent authority is that authority which a principal holds his agent out as possessing or permits him to exercise or to represent himself as possessing, under such circumstances as to estop the principal from denying its existence.'" *Simmons Self-Storage*, 130 Nev. at 550, 331 P.3d at 857 (quoting *Dixon*, 103 Nev. at 417, 742 P.2d at 1031) (internal quotation marks and citation omitted).

Wells Fargo did not hold out Attorney Wassner as possessing authority to modify the loan, or permit him to exercise or represent himself as possessing that authority. Wells Fargo authorized Tiffany & Bosco under

NRS 107.086(5) to act on behalf of the beneficiary of the deed of trust. 5 ROA 195. And Tiffany & Bosco authorized Attorney Wassner to attend unspecified mediations for that firm. 12 ROA 942. But there is no direct connection between Wells Fargo and Attorney Wassner such that he had any kind of apparent authority to act for Wells Fargo in this particular mediation.

Further, like Attorney Wassner, Ring did not have authority—either actual or apparent—to negotiate on behalf of Wells Fargo or bind it in any way at the mediation. 6 ROA 256. Respondents' *Request for Appropriate Relief* failed to allege that either Attorney Wassner or Joshua Ring had negotiation authority. 6 ROA 256. The district court finding that, as employee of Wells Fargo, Ring had authority to modify the loan is not supported by substantial evidence.

As in *Pasillas*, neither the attorney present in person on behalf of the beneficiary nor the underwriter present on the telephone had authority to modify the loan. Therefore, this Court should similarly hold that the district court abused its discretion in denying Appellant's petition for judicial review, and reverse the district court's order and remand the matter "to determine the appropriate sanctions for respondents' violations of the statutory and rule-based requirements." *See Pasillas*, 127 Nev. at 470, 255 P.3d at 1287.

CONCLUSION

The district court abused its discretion by failing to impose sanctions—such as the bare minimum sanction that a certificate not issue—due to Respondents' failure to act in good faith under the rules. This Court should

reverse the district court's order and remand this matter with instructions to impose the sanction that a certificate not issue.

Dated July 26, 2021.

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

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CERTIFICATE OF COMPLIANCE

(1) I hereby certified 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 Microsoft Word 2013 in 14 point Century Schoolbook.

(2) I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 11,471 words; or

☐ does not exceed pages.

(3) Finally, I hereby certify that I have read this 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 with the requirements of the Nevada Rules of Appellate Procedure.

Dated July 26, 2021.

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
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CERTIFICATE OF SERVICE

I certify that, on the date and time of the electronic service, a copy of the foregoing *Appellant's Opening Brief* was sent via electronic means to the following at their last known email addresses pursuant to NEFCR 9 and NRAP 25(c):

Amy Sorenson
Gil Kahn
Blakeley Griffith
Andrew Jacobs

Dated July 26, 2021.

/s/ Peter Goatz
An employee of
Legal Aid Center of Southern Nevada, Inc.