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

APPELLANT'S REPLY BRIEF

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
Peter J. Goatz (NV Bar No. 11577)
Taylor Altman (NV Bar No. 15139C)
725 E. Charleston Blvd.
Las Vegas, Nevada 89104
Attorneys for Appellant

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. Attorneys Taylor Altman and Peter Goatz represent appellant on appeal.

Dated December 6, 2021.

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

/s/ Taylor Altman
Peter J. Goatz (NV Bar No. 11577)
Taylor Altman (NV Bar No. 15139C)
725 E. Charleston Blvd.
Las Vegas, Nevada 89104
Attorneys for Appellant

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INTRODUCTION

To avoid sanctions and obtain a foreclosure mediation program certificate, a beneficiary must attend the foreclosure mediation, participate in good faith, bring the required documents, and, if attending through a representative, the representative must have authority to modify the loan. *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 304, 300 P.3d 724, 727 (2013).

Here, Respondents[1] failed to satisfy these basic requirements. Respondents violated the Foreclosure Mediation Rules by failing to disclose a second appraisal of the property that they used and relied on a the mediation; orally providing a short sale value at the mediation that exceeded the home's appraised value; failing to present at the mediation all required documents, including the note, deed of trust, and assignments; and not attending the mediation through a representative with authority to modify the loan. Nevertheless, the district court—without a hearing—rejected Appellant's arguments that Respondents failed to comply with the rules and applicable statutes, disregarded the Mediator's Statement, and failed to impose sanctions. This was an abuse of discretion. Appellant therefore encourages 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.

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[1] Wells Fargo Bank, N.A. appears to be the only party participating in this appeal on behalf of respondents even though both it and National Default Services appeared and participated below. 2 ROA 32; 3 ROA 97. Appellant continues to refer to both Wells Fargo and National Default Services as Respondents.

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). "[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). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008). "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

I. APPELLANT DID NOT WAIVE HIS RIGHT TO CHALLENGE THE APPRAISAL, AND RESPONDENTS VIOLATED THE FORECLOSURE MEDIATION RULES BY FAILING TO DISCLOSE AN APPRAISAL THEY USED AND RELIED ON

Wells Fargo argues that Appellant waived any obligation he had to obtain a second appraisal; the first appraisal satisfied Wells Fargo's obligations under FMR 13(7)(f); and Wells Fargo did not use or rely on the second appraisal in evaluating Appellant for a loan modification or short sale, thereby making it irrelevant. Respondents' Answering Brief ("RAB") at 18. These contentions are demonstrably false.

The parties do not dispute that Appellant agreed to waive a second appraisal. But once Wells Fargo voluntarily undertook a second appraisal, it was required to comply with the Foreclosure Mediation Rules in its disclosure and use of the second appraisal. Wells Fargo failed to do so. The mediator noted in her statement that Wells Fargo failed to disclose the updated second appraisal that it relied upon at the mediation as the basis for its negotiations. The district court, however, overruled that determination and failed to impose sanctions. Because that determination was not supported by substantial evidence, the district court abused its discretion here, and its order should be reversed.

A. Although the Parties Agreed to Waive the Second Appraisal, Wells Fargo Obtained One Anyway, and Failed to Disclose it in Accordance with the Foreclosure Mediation Rules

The Foreclosure Mediation 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).

Here, the first appraisal of the property was performed on November 14, 2018 and valued the property at $615,000. 5 ROA 176.

The mediator originally set the mediation for December 19, 2018, but it did not take place on that date due to Appellant's medical emergency. 2 ROA 73. On February 15, 2019, the parties stipulated "that the current mediation hearing be vacated and the time for the mediation . . . be continued to a time not in excess of 75 days. 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.

Although the parties stipulated to waive a second appraisal, Wells Fargo admitted that it undertook to obtain one anyway. 7 ROA 460. According to Mr. Mora of Tiffany & Bosco, the second appraisal was going to be used during Appellant's appeal of the original decision to deny him a loan modification. 13 ROA 970. On February 1, 2019, in part, Mr. Mora wrote:

> The appeal review is still pending on this one. It appears the hold-up is awaiting a new valuation, which you have been working on with the company to schedule.

13 ROA 970.

On February 26, 2019, a second appraisal gave an appraised value of $540,000. 6 ROA 257; 7 ROA 460. The appraiser did not fax the second appraisal to Wells Fargo until March 4, 2019. 6 ROA 256. The date of the appraisal and its delivery to Wells Fargo was less than 10 days before the March 7, 2019 date of mediation in contravention of FMR 13(7)(f).

On March 6, 2019, Respondents denied Appellant's appeal of the loan modification denial. 12 ROA 914.

On March 7, 2019, the parties participated in mediation. 3 ROA 85. Wells Fargo claimed that, due to the time limits imposed by the rules, it elected to use the first appraisal, rather than the second, during the mediation. 7 ROA 460. However, Wells Fargo actually relied upon the second appraisal when discussing foreclosure prevention options. 13 ROA 976.

Mediation observer Dr. Coppola said, "The person on the telephone for WELLS FARGO stated that there had been a second loan modification denial just preceding the mediation" and "stated that WELLS FARGO utilized a second appraisal, recently received, in making the second denial." 13 ROA 976. He said that "The person on the telephone for WELLS FARGO, in acknowledging that no prior short sale value or estimate had been provided, stated that if [Appellant] wanted a short sale value or estimate then it would be approximately $650,000 (which was over $200,000 more than the second appraisal)." 13 ROA 976. As such, the mediator correctly found that Wells Fargo did not comply with the appraisal requirement. 4 ROA 151.

The March 17, 2019 Mediator's Statement provides:

> 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 mediator also indicated in her statement that Respondents failed to bring an appraisal "dated not more than 60 days prior to the date of the scheduled mediation." 4 ROA 151. That is because Respondents used the *second* appraisal, which they did not disclose.

The district court later found that:

> Respondent Wells Fargo was under no obligation to provide the second appraisal to Petitioner at the March 4, 2019 [sic] mediation as Petitioner had waived his right to contest the November 14, 2018 appraisal when he requested the continuance. This Court is not persuaded that this waiver is superseded by Petitioner's request that Respondent Wells Fargo obtain a second appraisal that reflects the interior of the home as well, especially since Petitioner did not provide access to the home for this purpose. As such, the Mediator's finding that Respondent Wells Fargo

> failed to bring the required documentation is in error.

15 ROA 1090.

It is undisputed that the parties agreed to waive a second appraisal. RAB at 19. But it does not follow that Wells Fargo's obligation to provide Appellant with the second appraisal once conducted and used was also waived. The purpose of the appraisal requirement is to ensure that the parties know the fair market value of the property. Thus, when Wells Fargo took it upon itself to obtain a second appraisal, it was required to disclose that appraisal both to Appellant and the mediator under the rules. Failure to do so meant that Wells Fargo knew its first appraisal ($615,000) was off by $75,000 from the second ($540,000). By providing a $620,000 short sale value when the property was valued at $540,000 at the time of mediation, Wells Fargo acted in bad faith. Wells Fargo knew that the property could likely not ever garner the proposed short sale value even if it was less than the $649,201 principal owed under the note.

The district court's determination that Respondents did not need to disclose the second appraisal was clearly in error and not supported by substantial evidence. The district court erred when it found that Wells Fargo "was under no obligation to provide the second appraisal to Petitioner at the March 4, 2019 [sic] mediation[.]" 15 ROA 1090. Despite the parties' waiver of a new appraisal, Wells Fargo took it upon itself to obtain a new appraisal that accounted for both external and internal conditions of the property. As the mediator indicated in her statement, Wells Fargo relied on the new appraisal (performed on February 26, 2019) but did not make the appraisal available either to her or

Appellant. 4 ROA 150. Wells Fargo violated FMR 13(7)(f) by failing to make the disclosure at least 10 days prior to the mediation. Wells Fargo also failed to bring the second appraisal to the mediation. Otherwise, the mediator would have checked the box that Wells Fargo brought an appraisal or BPO "dated not more than 60 days prior to the date of the scheduled mediation." *See* 4 ROA 151. The first time Appellant obtained a copy of the second appraisal was the day *after* the mediation had concluded. 6 ROA 257. Thus, the district court, not the mediator, erred here. Because of this abuse of discretion, this Court should reverse.

B. Appellant Sufficiently Challenged Wells Fargo's First Appraisal

Next, Wells Fargo argues that Appellant did not validly challenge the first appraisal, performed in November 2018, which satisfies FMR 13(7)(f) as a matter of law. RAB at 20. To comply with FMR 13(7)(f), the beneficiary of the deed of trust must prepare and submit, at least 10 days prior to the mediation, an appraisal and/or brokers price opinion (BPO) not more than 60 days old (prior to the date of mediation) that satisfies the requirements of Rule 13(11). Respondents claim that before the mediation, Wells Fargo obtained and provided an appraisal that complies with this rule. 5 ROA 175–93. Respondents argue that Appellant's only contention with the first appraisal was that it was exterior-only, while the BPO and appraisal requirements do not mandate an interior appraisal, and as such, Appellant has no legal basis to reject the appraisal. RAB at 21.

Here, Appellant sufficiently challenged Wells Fargo's first appraisal as exterior-only because the mediator had ordered that Wells Fargo conduct an interior appraisal. 6 ROA 256. Wells Fargo then obtained a second appraisal that evaluated both the interior and exterior

conditions of the property, which Appellant also challenged. Wells Fargo argues that Appellant's issues with the second appraisal are a mere "laundry list of repairs" and that he is "second-guessing the appraiser" (RAB at 21), but Respondents do not point to any evidence in the record showing that Appellant waived his right to challenge either appraisal for any reason.

Further, it does not matter whether Wells Fargo's first appraisal complied with FMR 13(7)(f) for Appellant to validly challenge the appraisal. The mediator has wide latitude under the rules to request information from the parties for purposes of the mediation: "The presiding mediator shall have all requisite authority to conduct the foreclosure mediation." FMR 3(1). Here, the mediator asked Wells Fargo for another appraisal that included the interior of the property. 6 ROA 256. Respondents did not dispute below that the mediator had authority or discretion to request an interior appraisal from Wells Fargo, or that the BPO and appraisal requirements of Rule 13 do not preclude an exterior and interior appraisal. Indeed, Wells Fargo does not point to any evidence in the record to support this contention in its brief. Wells Fargo relies instead on the argument that, simply because Wells Fargo's first appraisal met the requirements of FMR 13(7)(f), Appellant had no legal grounds to challenge it. The mediator indicated otherwise by checking the box that Respondents had failed to bring an appraisal/BPO to the mediation. 3 ROA 87.

Based on the mediator's requirement of an exterior and interior appraisal, Appellant validly challenged Wells Fargo's first appraisal, which was exterior-only. Thus, the district court erred when it

determined that the first appraisal complied with the rules, and its order should be reversed.

C. Wells Fargo Relied Upon the Second Appraisal in Evaluating Appellant for a Loan Modification

Finally, Wells Fargo argues that the district court "correctly recognized . . . that the mediator severely misunderstood the fact that Wells Fargo did not use the second appraisal to evaluate Mr. Coppola for a loan modification or a short sale." RAB at 22. Respondents contend that "Wells Fargo evaluated and denied his loan modification request by November 28, 2018, months before the second appraisal was conducted on February 26, 2019." RAB at 22.

However, the record supports that the mediator correctly found that although Wells Fargo did not disclose the second appraisal prior to mediation, Wells Fargo relied on it "as part of the process to evaluate the Homeowner for a [loan] modification." 4 ROA 150; 6 ROA 257. Wells Fargo relied on the second appraisal in denying Appellant's loan modification—which occurred on appeal the day prior to mediation, not November 28, 2018. 4 ROA 150; 6 ROA 257; 12 ROA 914. Appellant later 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. Respondents do not address or controvert these facts by pointing to any evidence in the record.

Additionally, Respondents claim that "the $620,000 short sale value was based on the first appraisal of $615,000, and not the second appraisal's lower value." RAB at 22. The $620,000 figure, however, was

not a true "short sale value" but rather the mortgage payoff amount at the time. 14 ROA 1050. Moreover, $620,000 was more than the amount of either appraisal. 14 ROA 1064. Indeed, the mediator noted, "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.

Although the parties waived a second appraisal, Wells Fargo obtained one and relied on it in evaluating Appellant for a loan modification, despite not disclosing it to Appellant or the mediator. Therefore, the non-disclosure of the second appraisal can be a basis to find a deficiency in Wells Fargo's foreclosure mediation participation.

II. THE DISTRICT COURT'S FINDING THAT WELLS FARGO COMPLIED WITH FMR 13(10) BY ORALLY PROVIDING A SHORT SALE VALUE AT THE MEDIATION WAS AN ABUSE OF DISCRETION

Wells Fargo conceded below that it failed to disclose a short sale value with conditions prior to the mediation. 14 ROA 1021. But it contends it complied with FMR 13(10) where it orally provided a short sale value at the mediation. RAB at 23. Here, the Court should find that a beneficiary's oral short sale value does not meet the requirements under the rules.

A. Focusing on Pre-Mediation Communications Obscures the Real Issue: That Respondents Failed to Satisfy FMR 13(10)

Wells Fargo argues that Appellant's recounting of pre-mediation correspondence Mr. Mora, "sows confusion" and does not involve its obligation under FMR 13(10). RAB at 26. Appellant recounted this correspondence simply to provide background and to show that Wells Fargo did not provide a short sale figure before the mediation due to the failure of a condition precedent. When Wells Fargo then offered a short sale figure at mediation, it provided one that was more than the home's appraised value, in bad faith, in violation of FMR 13(10).

Between October 30 and 31, 2018, Appellant and Mr. Mora exchanged a series of emails in which Mr. Mora stated, "If you decide to proceed with Short Sale, they would propose figures for you, ect. (sic)" 11 ROA 724. Appellant replied, "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.

Then, 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. Wells Fargo later argued that it could not provide a short sale value due to inadequate records from Appellant. 14 ROA 1056–58. Appellant was required to put his home up for sale and provide Wells Fargo with a purchase contract. 12 ROA 892.

The district court correctly disregarded Wells Fargo's arguments that it had 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 Foreclosure Mediation Program guidelines to explore all available options to avoid foreclosure. FMR 1, FMR 19.

The district court, however, erred when it found that the beneficiary met its obligation under FMR 13(10) by orally disclosing a short sale value of $620,000 at the mediation without further conditions and based upon an undisclosed second appraisal. Appellant urges the Court to find that Wells Fargo did not satisfy its obligation under the rules, for the reasons below. This is the real issue here, not the emails between Appellant and Mora prior to the mediation.

B. The District Court Abused Its Discretion by Finding that Respondents Satisfied FMR 13(10) by Orally Disclosing a Short Sale Value

FMR 13(10) provides that, as part of the foreclosure 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."

We must look to caselaw for the definition of "short sale value": "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 it

would not make sense for the beneficiary to disclose it any later than at the mediation.

Wells Fargo argues that FMR 13(10) does not impose on the beneficiary any "time and manner" requirement as to how or when the short sale value must be disclosed. RAB at 27. At the mediation, Wells Fargo offered an oral, rather than a written, short sale value of $620,000, and did not offer any conditions for a proposed sale. Indeed, the mediator checked the box on the Mediator's Statement indicating that a "[s]hort sale **document** in accordance with the Nevada Foreclosure Mediation Rules" was missing. 4 ROA 151 (emphasis added). Appellant urges the Court to find that compliance with FMR 13(10) means that the short sale value and any conditions of the short sale be made in writing to avoid any discrepancy between the parties' recollections of an oral short sale value.[2]

But the core issue is not that Respondents committed a "time and manner" violation. *See* RAB at 27. Rather, the core issue is that a short sale value above the home's appraised value does not satisfy the beneficiary's obligations under FMR 13(10). Here, the $620,000 short sale value was more than the home's value from either of the two appraisals, the first for $615,000 and the second for $540,000.

The district court erroneously held:

> While this Court acknowledges that Respondent Wells Fargo has had varying explanations for

[2] The district court provides that the oral short sale value was $620,000. 15 ROA 1090. Appellant contends that Wells Fargo gave a short sale value of $650,000 at the mediation. 12 ROA 891, 892. Thus, there was a discrepancy of $30,000.

> how it satisfied the short sale value pursuant to NFMR 13(10), this Court finds that Respondent Wells Fargo did present the $620,000 short sale value figure orally at the mediation which satisfies the requirement.
>
> . . . this Court's understanding reflects that of the Ninth Circuit Court of Appeals in *Shaw* which provides that a short sale must be for less than the amount owed rather than the appraised value of the Property. 891 F.3d at 752.

15 ROA 1090. Although $620,000 is less than the amount that Wells Fargo alleges is owed—Wells Fargo states that Appellant owed in excess of $700,000 at the time of mediation—the district court failed to consider that the short sale value was more than either of the appraisals. *See* RAB at 29 n.1. Wells Fargo argues, "[W]hat is essential to a short sale is that the amount the lender agrees to accept is less than the amount owed—not the amount of the appraised value of the property. *See [Shaw, 891 F.3d at 757].* While a property's appraised value may provide insight as to the amount a prospective purchaser might pay for property, the focus of a short sale estimate is the amount the lender is owed." RAB at 29. This statement both mischaracterizes Appellant's argument and defies common sense. While a value of $620,000 may meet the definition of a short sale—"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"—Appellant's home could not likely sustain a sale for $620,000. *See Shaw*, 891 F.3d at 752. One can infer

that the property would not sustain such a sale from the two disparate appraisals, $615,000 and $540,000 respectively. Ultimately, this would result in foreclosure—contrary to the goal of the Foreclosure Mediation Program.

Wells Fargo argues further that "[t]he Court should decline to judicial[ly] amend FMR 13(10) to add the requirement that a short sale value must be no higher than a home's appraised value." RAB at 31. Appellant is not asking the Court to amend the rule. Rather, he strongly encourages the Court to hold that when the short sale value exceeds the home's appraised value, a beneficiary has not met its obligation under FMR 13(10) in good faith. The purpose of the Foreclosure Mediation Program is to bring together beneficiaries and homeowners "to exchange information and proposals that may avoid foreclosure." FMR 1(2). But here, foreclosure is all but guaranteed if the short sale value is $620,000, which is more than either appraisal. This is because 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 the FMP to avoid foreclosure.

The district court erred when it found that an oral short sale value of $620,000 satisfies Wells Fargo's obligation under FMR 13(10), and therefore the order should be reversed.

III. THE DISTRICT COURT FAILED TO ADDRESS APPELLANT'S ARGUMENTS THAT RESPONDENTS NEGLECTED TO BRING

REQUIRED DOCUMENTS TO MEDIATION UNDER FMR 13(7) AND NRS 107.086

The district court failed to make any findings addressing Appellant's argument that Respondents failed to provide copies of documents required by NRS 107.086 and FMR 13(7)(a) and (b). 12 ROA 892–93. The district court thus abused its discretion.

NRS 107.086 and FMR 13(7) require the beneficiary to prepare and submit, at least 10 days prior to the mediation, the deed of trust, the mortgage note, and each assignment of the deed of trust or mortgage note.

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.

Respondents are correct that, 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). RAB 34; 4 ROA 151. But Appellant contends that Wells Fargo failed to present at the mediation the deed of trust, note, and assignments as required by the statute and rules, and thus the mediator overlooked marking those boxes for missing/incomplete documents. 12 ROA 885, 892. As evidence, Appellant presented the declarations of mediation observers Dr. Coppola and Mr. Solomon. Dr. Coppola states:

> 3. The attorney present who identified himself as the attorney for WELLS FARGO presented only one piece of paper, a single page letter from TIFFANY & BOSCO.

> 4. No other document was presented by the attorney for WELLS FARGO, and, hence, no loan or deed of trust or certified copy was presented.

13 ROA 975–76. Similarly, Mr. Solomon recounts that Wells Fargo's attorney did not present any documents at the mediation other than the attorney's business card. 13 ROA 973.

Wells Fargo makes much of Appellant's "unsupported and self-serving claim" that the required documents were not presented at the mediation, as well as his "self-serving declarations" RAB at 35–36. But it presents no competing evidence and insist that "additional evidence of [Wells Fargo's] document production, such as a declaration" is unnecessary. RAB at 35. Wells Fargo cannot point to any evidence in the record showing that it presented those documents at the mediation. Wells Fargo simply alleges that it complied with FMR 13(7) by pointing to the Mediator's Statement, which did not indicate that any documents required by this rule were missing or incomplete.

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'S FINDING THAT WASSNER AND RING HAD AUTHORITY TO NEGOTIATE A LOAN MODIFICATION ON BEHALF OF THE BENEFICIARY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Two representatives with alleged authority attended the mediation on behalf of Wells Fargo: Attorney Stephen Wassner, a solo practitioner who appeared in person, and Joshua Ring, who appeared by telephone.

3 ROA 98. Appellant contends that Attorney Wassner lacked authority under NRS 107.086(5) and the Foreclosure Mediation Rules to negotiate a loan modification, in conjunction with Mr. Ring on the phone. The district court therefore abused its discretion when it found:

> First, this Court rejects Petitioner's contention that Mr. Ring and Mr. Wassner lacked authority to attend the mediation and to negotiate a loan modification. This Court finds that Mr. Ring is a Wells Fargo Underwriter who had authority to modify the loan and participated in the mediation by telephone.

15 ROA 1089–90.

NRS 107.086(5) provides in relevant part:

> The beneficiary of the deed of trust or a representative shall attend the mediation. . . . 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). It is a sanctionable offense if the beneficiary fails to "have the authority or access to a person with the authority required by subsection 5." NRS 107.086(6). FMR 12(1)(a) and 13(7) echo the provisions of NRS 107.086. Specifically, FMR 13(7)(d) provides:

> 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).

Wells Fargo distorts Appellant's argument that neither Attorney Wassner nor Mr. Ring had authority to attend the mediation and negotiate a loan modification on Wells Fargo's behalf under the statute and rules. Appellant's arguments rest on actual and apparent authority, neither of which the attorney or the underwriter had. Appellant raised the argument below, even if it was not specifically articulated as agency.

Wells Fargo employed the law firm of Tiffany & Bosco, P.A., as its counsel of record. 5 ROA 195. But Attorney Wassner was not a member of Tiffany & Bosco; instead, he was a solo practitioner who served as the firm's local appearance counsel. 6 ROA 278; 7 ROA 464. Attorney Wassner appeared at the mediation in person 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. Dr. Coppola and Mr. Solomon corroborated that Attorney Wassner appeared with only a single document—the Tiffany & Bosco letter or his business card. 13 ROA 973, 975. In short, he lacked documentation to prove that he had authority to appear and negotiate on behalf of Wells Fargo.

Likewise, Mr. Ring did not have either actual or apparent authority to act on Wells Fargo's behalf. Respondents take it at face value that

because he was a "*Wells Fargo underwriter*," he automatically had the requisite authority to modify the loan on the beneficiary's behalf. *See* RAB at 38 (emphasis in original). But Wells Fargo points to no substantial evidence supporting the district court's finding that Mr. Ring had authority under NRS 107.086 and corresponding rules.

Further, Wells Fargo dismisses Appellant's arguments about Attorney Wassner's lack of authority as "meritless as they are hyper-technical." RAB at 38. This contention should not hold any weight with the Court because every violation of the Foreclosure Mediation Rules could be viewed as "hyper-technical." The rules have specific requirements for a reason: If parties simply were allowed to follow or disregard them at will, the rules would be merely illusory. The object of the FMP is to avoid foreclosure; the rules serve as safeguards to ensure that a productive meeting of the beneficiary and homeowner occurs, and that the parties explore all options to save the home from foreclosure. FMR 1(2).

In attempting to discredit Appellant's arguments, Wells Fargo contends that *Savage v. Deutsche Bank Nat'l Trust Co.*, 2019 WL 625701 (Nev. Ct. App. 2019) more strongly supports their position than Appellant's. In *Savage*, an attorney presented documents at a foreclosure mediation showing that the beneficiary, Deutsche Bank, appointed a master servicer, Impac, which appointed a subservicer that retained a law firm that authorized the attorney to appear on its behalf. *Id.* at *1. The attorney produced a limited power of attorney appointing Impac as Deutsche Bank's master servicer. *Id.* On a petition for judicial review, the homeowner argued 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*.

Respondents argue that:

> The Court of Appeals upheld every link of authorization in the *Savage* chain [of authority], finding that the district court did not abuse its discretion in concluding that the attorney attendee had the authority and appropriate documentation under NRS 107.086 and the applicable Rules.

RAB at 39–40. But Appellant distinguishes *Savage* on one very important ground: In *Savage*, the attorney appearing at the mediation on behalf of Deutsche Bank presented a limited power of attorney from the master servicer, but here Attorney Wassner presented no similar document. *See Savage*, 2019 WL 625701 at *1. Instead, he presented only a business card and a single-page undated letter from Tiffany & Bosco, authorizing him to attend unspecified mediations for that firm. Here, unlike in *Savage*, there was a broken chain of authority. *See Savage*, 2019 WL 625701 at *1. The chain should have extended from Wells Fargo to Tiffany & Bosco to Attorney Wassner, but there was a missing link between the latter two. Thus, Attorney Wassner lacked authority to attend the mediation and negotiate a loan modification on behalf of Wells Fargo.

Finally, Wells Fargo takes issue with Appellant's arguments based on the common law of agency, *i.e*., that neither Attorney Wassner nor Mr. Ring had actual or apparent authority to appear and negotiate on behalf of Wells Fargo. First, Wells Fargo claims that Appellant raises a new

argument on appeal based on agency, which he failed to raise below. RAB at 41. The issue of authority, and what kind of authority each of the alleged Wells Fargo representatives had, was impliedly raised below when Appellant argued that Wells Fargo failed to attend the mediation through an "authorized" representative, and when Appellant made a critical reference to Mr. Ring's appearance on the phone "purportedly 'with authority.'" 6 ROA 255; 12 ROA 942. The district court had the opportunity to address the agency/authority argument when it ruled that Mr. Ring "is a Wells Fargo Underwriter who had authority to modify the loan and participated in the mediation by telephone." 15 ROA 1089–90. Generally, "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Here, however, Appellant urged the point in district court, and thus he did not waive it on appeal.

Second, Wells Fargo argues that a common law agency analysis "only applies, however, when a principal seeks to avoid being bound by the agent's conduct—otherwise, there would be no dispute concerning agency." RAB at 42. That is one situation where the law of agency applies. But Wells Fargo does not account for situations where a party argues that the opposing party is bound by its agent's conduct. *See Dixon v. Thatcher*, 103 Nev. 414, 417, 742 P.2d 1029, 1031 (1987). In *Dixon*, homeowners borrowed money from Lemons and Associates, secured by a promissory note and deed of trust. *Id.* at 415, 742 P.2d at 1029. Lemons then assigned the note and deed of trust to Thatcher. *Id.* The homeowners maintained that Lemons was Thatcher's agent and therefore their payments to Lemons were proper. *Id.* at 416, 742 P.2d at 1030. The Court

agreed with the homeowners and found "sufficient indicia of agency here because there is no dispute that Lemons was authorized to collect monthly payments." *Id.* at 417, 742 P.2d at 1031.

Here, the same logic applies, just in reverse. There does not exist "sufficient indicia of agency," and thus Wells Fargo was not bound by the conduct of either Attorney Wassner or Mr. Ring at the foreclosure mediation, in violation of the rules. *See Dixon*, 103 Nev. at 417, 742 P.2d at 1031.

Specifically, neither individual had actual or apparent authority to bind Wells Fargo. "'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 v. Rib Roof, Inc.*, 130 Nev. 540, 549, 331 P.3d 850, 856 (2014) (quoting Restatement (Third) of Agency § 2.01 (2006)). "'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).

Attorney Wassner did not possess actual authority to bind Wells Fargo. He 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. With only that letter, 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.

Attorney Wassner also did not have apparent 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.

Like Attorney Wassner, Mr. Ring did not have either actual or apparent authority to bind Wells Fargo. Respondents' *Request for Appropriate Relief* failed to allege that either Attorney Wassner or Mr. Ring had negotiation authority. 6 ROA 256. The district court's finding that, as an underwriter for Wells Fargo, Mr. Ring had authority to modify the loan is not supported by substantial evidence.

Failure to "have the authority or access to a person with the authority required by" NRS 107.086(5) is a sanctionable offense. NRS 107.086(6). The Court, therefore, should hold that the district court abused its discretion in denying Appellant's petition for judicial review, 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 (holding that the foreclosing party's failure to have someone with loan-modification authority at mediation was a sanctionable offence under the FMP, and thus the district court abused its discretion by denying the homeowners' petition for judicial review and ordering the program administrator to enter a letter of certification authorizing the foreclosure process to proceed).

CONCLUSION

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 of the rules. The district court also found that Respondents attended the mediation 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. Respondents should not be rewarded with a foreclosure certificate for failing to follow the rules. Appellant therefore asks the 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.

Dated December 6, 2021.

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.

/s/ Taylor Altman
Peter J. Goatz (NV Bar No. 11577)
Taylor Altman (NV Bar No. 15139C)
725 E. Charleston Blvd.
Las Vegas, Nevada 89104

Attorneys for Appellant

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 6,944 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 December 6, 2021.

LEGAL AID CENTER OF SOUTHERN NEVADA, INC.
/s/ Taylor Altman
Peter J. Goatz (NV Bar No. 11577)
Taylor Altman (NV Bar No. 15139C)
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that, on the date and time of the electronic service, a copy of the foregoing *Appellant's Reply 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 December 6, 2021.

/s/ Taylor Altman
An employee of
Legal Aid Center of Southern Nevada, Inc.