

1 Code: \$2515
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Apr 16 2020 03:29 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

9 Attorneys for: Petitioners Marc and Kelley Radow

10
11 **In the Second Judicial District Court of the State of Nevada**
12
13 **In and For the County of Washoe**
14

15 Marc E. Radow and Kelley L. Radow,
16 husband and wife,

17 Petitioners,

18 vs.

19 U.S. Bank National Association, as Trustee,
20 successor in interest to Wachovia Bank,
21 National Association, as Trustee for Wells
22 Fargo Asset Securities Corporation,
23 Mortgage Pass-Through Certificates, Series
24 2005-AR1

25 Respondent.

Case No.: CV19-01604


Dept. No.: 1

26
27 **Notice of Appeal**
28

Notice is hereby given that Petitioners Marc E. Radow and Kelley L. Radow
(collectively, the "Radows") appeals to the Nevada Supreme Court from the Order denying
the Radows' Motion for Relief and further ordering that a Certificate of Foreclosure issue
for the Property.

1 April 13, 2020

2 HOY | CHRISSINGER | KIMMEL | VALLAS

3
4 

5 Theodore Chrissinger
6 Attorneys for Petitioners

7
8
9
10 **Privacy Affirmation and Certificate of Service**

11 I hereby affirm that this document does not contain and social security numbers or
12 other private information.

13 I hereby certify that on April 13, 2020, I electronically filed the foregoing with the
14 Clerk of the Court by using the electronic filing system which will send a notice of
15 electronic filing to the following:
16

17 HOME MEANS NEVADA
18 JASON C. KOLBE for US BANK NATIONAL ASSOCIATION TRUSTEE FOR WACHOVIA BANK
19 LINDA J. LINTON, ESQ.

20 April 13, 2020

21 

22 Theodore Chrissinger
23
24
25
26
27
28

Code: 1310
HOY | CHRISSINGER | KIMMEL | VALLAS
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Attorneys for: Petitioners Marc and Kelley Radow

In the Second Judicial District Court of the State of Nevada
In and For the County of Washoe

Marc E. Radow and Kelley L. Radow,
husband and wife,

Petitioners,

vs.

U.S. Bank National Association, as Trustee,
successor in interest to Wachovia Bank,
National Association, as Trustee for Wells
Fargo Asset Securities Corporation,
Mortgage Pass-Through Certificates, Series
2005-AR1

Respondent.

Case No.: CV19-01604

Dept. No.: 1

Case Appeal Statement

1. Name of appellants filing this case appeal statement:

Marc E. Radow and Kelley L. Radow

2. Identify the judge issuing the decision, judgment, or order appealed from:

The Hon. Kathleen M. Drakulich

3. Identify each appellant and the name and address of counsel for each

appellant:

Appellants: Marc. E. Radow and Kelley L. Radow

Counsel: Theodore E. Chrissinger
Hoy Chrissinger Kimmel Vallas P.C.
50 W. Liberty Street, Suite 840
Reno, Nevada 89501

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Respondent: U.S. Bank National Association, as Trustee, successor in interest to Wachovia Bank, National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2005-AR1

Appellate Counsel: Unknown

Trial Counsel: Ace C. Van Patten
Krista J. Nielson
Tiffany & Bosco P.A.
10100 W. Charleston Boulevard, Suite 220
Las Vegas, Nevada 89135

5. All attorneys identified above are licensed to practice law in Nevada.

6. Appellants were represented by retained counsel in the district court.

7. Appellants are represented by retained counsel on appeal.

8. Appellants did not seek leave to proceed in forma pauperis, and appellants were not granted leave to proceed in forma pauperis.

9. Indicate the date proceedings commenced in the district court:

August 16, 2019

10. Brief description of the nature of the action and the result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

1 On August 16t, 2019, appellants Marc E. Radow and Kelley L. Radow (“Appellants”
2 or the “Radows”) petitioned the district court for Foreclosure Mediation Assistance under
3 NRS Chapter 107.

4 The district court assigned mediator Linda Linton to preside over a November 25,
5 2019 mediation. The mediation did not resolve the parties dispute, and Mediator Linton
6 found that respondent U.S. Bank failed to provide a certification with an original signature
7 of each assignment of the deed of trust. Mediator Linton further recommended “imposition
8 of a sanction that a certificate shall not issue and that Respondent shall pay for the
9 Homeowners’ costs as they relate to this mediation, along with the fee of \$200 as and for
10 the filing fee for any further mediation.”
11

12 The Radows then moved the district court under FMR 20(3) for appropriate
13 sanctions. In its opposition, Respondent appeared to countermove for an order issuing a
14 foreclosure certificate. On March 10, 2020, the district court denied the Radows’ motion,
15 and ordered that a foreclosure certificate issue, effectively terminating the Radows’
16 petition for foreclosure mediation.
17

18 11. This case has not previously been the subject of an appeal or an original writ
19 proceeding in the Supreme Court.
20

21 12. This appeal does not involve child custody of visitation.

22 13. This appeal involves the possibility of settlement.
23

24 April 13, 2020
25

26 HOY | CHRISSINGER | KIMMEL | VALLAS
27

28 
Theodore Chrissinger
Attorneys for Petitioners

Privacy Affirmation and Certificate of Service

I hereby affirm that this document does not contain and social security numbers or other private information.

I hereby certify that on April 13, 2020, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system which will send a notice of electronic filing to the following:

HOME MEANS NEVADA
JASON C. KOLBE for US BANK NATIONAL ASSOCIATION TRUSTEE FOR WACHOVIA BANK
LINDA J. LINTON, ESQ.

April 13, 2020



Theodore Chrissinger

SECOND JUDICIAL DISTRICT COURT**STATE OF NEVADA****COUNTY OF WASHOE****Case History - CV19-01604****Case Description: M & K RADOW VS US BANK NATL ASSOC (D1)****Case Number: CV19-01604 Case Type: FORECLOSURE MEDIATION CASE - Initially Filed On: 8/16/2019****Parties**

<u>Party Type & Name</u>	<u>Party Status</u>
JUDG - KATHLEEN DRAKULICH - D1	Active
PLTF - KELLEY RADOW - @205343	Active
PLTF - MARC RADOW - @205344	Active
DEFT - US BANK NATIONAL ASSOCIATION TRUSTEE TO WACHOVIA BANK - @1343844	Active
ATTY - Ace C. Van Patten, Esq. - 11731	Active
ATTY - Krista Nielson, Esq. - 10698	Active
ATTY - Theodore E. Chrissinger, Esq. - 9528	Active
ATTY - Jason C. Kolbe, Esq - 11624	Party ended on: 1/10/2020 12:00:00AM
HMN - HOME MEANS NEVADA - HMN	Active
NFMA - Linda J. Linton, Esq. - 5408	Active

Disposed Hearings

- 1 Department: D1 -- Event: Request for Submission -- Scheduled Date & Time: 1/3/2020 at 13:11:00
Extra Event Text: MOTION FOR RELIEF FILED 12-16-19
Event Disposition: S200 - 3/10/2020

Actions

<u>Filing Date</u>	<u>-</u>	<u>Docket Code & Description</u>
1	8/16/2019	- \$3670 - \$Pet for Foreclosure Mediation Additional Text: Petition for Foreclosure Mediation - Transaction 7431930 - Approved By: CSULEZIC : 08-16-2019:10:59:44
2	8/16/2019	- PAYRC - **Payment Receipted Additional Text: A Payment of \$275.00 was made on receipt DCDC643858.
3	8/16/2019	- 1356 - Certificate of Mailing Additional Text: Transaction 7432876 - Approved By: NOREVIEW : 08-16-2019:11:37:58
4	8/16/2019	- NEF - Proof of Electronic Service Additional Text: Transaction 7432881 - Approved By: NOREVIEW : 08-16-2019:11:39:06
5	9/4/2019	- \$1134 - \$Answer - Foreclosure Mediation Additional Text: RESPONDENT'S ANSWER TO PETITION FOR FORECLOSURE MEDIATION ASSISTANCE - Transaction 7464947 - Approved By: CSULEZIC : 09-04-2019:11:06:45
6	9/4/2019	- PAYRC - **Payment Receipted Additional Text: A Payment of \$250.00 was made on receipt DCDC645070.
7	9/4/2019	- NEF - Proof of Electronic Service Additional Text: Transaction 7465110 - Approved By: NOREVIEW : 09-04-2019:11:07:56
8	9/9/2019	- 1286 - Assignment of Mediator Additional Text: LINDA LINTON - Transaction 7473582 - Approved By: NOREVIEW : 09-09-2019:12:25:24

Report Does Not Contain Sealed Cases or Confidential Information

- 9 9/9/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7473583 - Approved By: NOREVIEW : 09-09-2019:12:26:16
- 10 12/5/2019 - 3975 - Statement ...
Additional Text: MEDIATOR'S STATEMENT - Transaction 7623274 - Approved By: YVILORIA : 12-06-2019:07:56:31
- 11 12/6/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7623312 - Approved By: NOREVIEW : 12-06-2019:07:57:34
- 12 12/16/2019 - 2490 - Motion ...
Additional Text: MOTION FOR RELIEF (FMR 20(2)) - Transaction 7640906 - Approved By: YVILORIA : 12-16-2019:16:09:12
- 13 12/16/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7641029 - Approved By: NOREVIEW : 12-16-2019:16:13:05
- 14 12/18/2019 - 2650 - Opposition to ...
Additional Text: DFX: NO EXHIBIT INDEX - MRESPONDENT'S OPPOSITION TO PETITIONERS' MOTION FOR RELIEF AND COUNTERMOTION FOR APPROPRIATE RELIEF - Transaction 7646413 - Approved By: YVILORIA : 12-18-2019:16:39:46
- 15 12/18/2019 - NEF - Proof of Electronic Service
Additional Text: Transaction 7646431 - Approved By: NOREVIEW : 12-18-2019:16:40:54
- 16 1/3/2020 - 3795 - Reply...
Additional Text: REPLY IN SUPPORT OF MOTION FOR RELIEF (FMR 20(2)) - Transaction 7666680 - Approved By: YVILORIA : 01-03-2020:13:22:16
- 17 1/3/2020 - 3860 - Request for Submission
Additional Text: Transaction 7666680 - Approved By: YVILORIA : 01-03-2020:13:22:16
DOCUMENT TITLE: MOTION FOR RELIEF FILED 12-16-19
PARTY SUBMITTING: THEODORE CHRISSINGER ESQ
DATE SUBMITTED: 1-3-2020
SUBMITTED BY: YV
DATE RECEIVED JUDGE OFFICE:
- 18 1/3/2020 - NEF - Proof of Electronic Service
Additional Text: Transaction 7666718 - Approved By: NOREVIEW : 01-03-2020:13:23:11
- 19 1/10/2020 - 3795 - Reply...
Additional Text: RESPONDENT'S REPLY IN SUPPORT OF COUNTERMOTION FOR APPROPRIATE RELIEF - Transaction 7680601 - Approved By: SACORDAG : 01-10-2020:16:31:08
- 20 1/10/2020 - NEF - Proof of Electronic Service
Additional Text: Transaction 7680650 - Approved By: NOREVIEW : 01-10-2020:16:32:03
- 21 1/10/2020 - 1650 - Errata...
Additional Text: ERRATA TO RESPONDENT'S REPLY IN SUPPORT OF COUNTERMOTION FOR APPROPRIATE RELIEF - Transaction 7680756 - Approved By: YVILORIA : 01-13-2020:07:53:44
- 22 1/13/2020 - NEF - Proof of Electronic Service
Additional Text: Transaction 7680916 - Approved By: NOREVIEW : 01-13-2020:07:54:39
- 23 3/10/2020 - 2842 - Ord Denying Motion
Additional Text: FOR RELIEF (FMR 20(2)) - Transaction 7783562 - Approved By: NOREVIEW : 03-10-2020:09:13:52
- 24 3/10/2020 - S200 - Request for Submission Complet
Additional Text: MOTION FOR RELIEF FILED 12-16-19 (SEE ORDER FILED 3/10/2020)
- 25 3/10/2020 - NEF - Proof of Electronic Service
Additional Text: Transaction 7783565 - Approved By: NOREVIEW : 03-10-2020:09:14:52

- 26 3/16/2020 - 2949 - Ord for Payment to Mediator
Additional Text: Transaction 7793871 - Approved By: NOREVIEW : 03-16-2020:12:31:09
- 27 3/16/2020 - NEF - Proof of Electronic Service
Additional Text: Transaction 7793877 - Approved By: NOREVIEW : 03-16-2020:12:32:12
- 28 3/16/2020 - F230 - Other Manner of Disposition
No additional text exists for this entry.
- 29 3/16/2020 - 2540 - Notice of Entry of Ord
Additional Text: NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RELIEF (FMR 20(2) - Transaction 7793969 - Approved By: NOREVIEW : 03-16-2020:12:55:42
- 30 3/16/2020 - NEF - Proof of Electronic Service
Additional Text: Transaction 7793974 - Approved By: NOREVIEW : 03-16-2020:12:56:41
- 31 4/13/2020 - 1310 - Case Appeal Statement
Additional Text: CASE APPEAL STATEMENT - Transaction 7831875 - Approved By: YVILORIA : 04-13-2020:12:50:32
- 32 4/13/2020 - \$2515 - \$Notice/Appeal Supreme Court
Additional Text: NOTICE OF APPEAL - Transaction 7831875 - Approved By: YVILORIA : 04-13-2020:12:50:32
- 33 4/13/2020 - 2547 - Notice of Filing Costs/Appeal
Additional Text: Transaction 7831905 - Approved By: NOREVIEW : 04-13-2020:12:05:18
- 34 4/13/2020 - NEF - Proof of Electronic Service
Additional Text: Transaction 7831913 - Approved By: NOREVIEW : 04-13-2020:12:06:39
- 35 4/13/2020 - PAYRC - **Payment Receipted
Additional Text: A Payment of \$24.00 was made on receipt DCDC657966.
- 36 4/13/2020 - NEF - Proof of Electronic Service
Additional Text: Transaction 7832105 - Approved By: NOREVIEW : 04-13-2020:12:51:48
- 37 4/13/2020 - SAB - **Supreme Court Appeal Bond
Additional Text: Transaction 7832123 - Approved By: YVILORIA : 04-13-2020:13:09:17
- 38 4/13/2020 - PAYRC - **Payment Receipted
Additional Text: A Payment of \$500.00 was made on receipt DCDC657967.
- 39 4/13/2020 - NEF - Proof of Electronic Service
Additional Text: Transaction 7832164 - Approved By: NOREVIEW : 04-13-2020:13:12:17
- 40 4/13/2020 - 1350 - Certificate of Clerk
Additional Text: CERTIFICATE OF CLERK AND TRANSMITTAL - NOTICE OF APPEAL - Transaction 7832585 - Approved By: NOREVIEW : 04-13-2020:14:54:21
- 41 4/13/2020 - 4113 - District Ct Deficiency Notice
Additional Text: NOTICE OF APPEAL DEFICIENCY - SUPREME COURT FILING FEE - Transaction 7832585 - Approved By: NOREVIEW : 04-13-2020:14:54:21
- 42 4/13/2020 - NEF - Proof of Electronic Service
Additional Text: Transaction 7832598 - Approved By: NOREVIEW : 04-13-2020:14:55:35

2840

**IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE**

Marc E. Radow and Kelley L. Radow,
husband and wife,

Petitioners,

Case No.: CV19-01604

vs.

Dept. No.: 1

U.S. Bank National Association, as Trustee,
successor in interest to Wachovia Bank,
National Association, as Trustee for Wells
Fargo Asset Securities Corporation,
Mortgage Pass-Through Certificates, Series
2005-AR1,

Respondent.

ORDER DENYING MOTION FOR RELIEF (FMR 20(2))

Currently before the Court is Petitioner Marc E. Radow and Kelley L. Radow's (Petitioners) *Motion for Relief (FMR 20(2))* ("Motion") filed December 16, 2019. On December 18, 2019, Respondent U.S. Bank National Association, as Trustee, successor in interest to Wachovia Bank, National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2005-AR1 ("Respondent") filed an *Opposition to Petitioners' Motion for Relief and Countermotion for Appropriate Relief* ("Opposition"). On January 3, 2020, Petitioners filed a *Reply in Support of Motion for Relief (FMR 20(2))* ("Reply") and submitted the Motion to the Court for consideration.

1 **I. Procedural History**

2 This matter concerns a property located at 1900 Joy Lake Road, Reno, Nevada (“Property”).
3 On August 16, 2019, Petitioners Marc E. Radow and Kelley L. Radow filed a *Petition for Foreclosure*
4 *Mediation Assistance*. On September 4, 2019, Respondent filed an *Answer to Petition for*
5 *Foreclosure Mediation Assistance* and on September 9, 2019, Linda J. Linton, Esq. was assigned as
6 the mediator. A foreclosure mediation took place on November 25, 2019. On December 5, 2019,
7 Mediator Linda J. Linton, Esq. filed a *Mediator’s Statement*. Petitioners and Respondent now bring
8 motions requesting relief in accordance with FMR 20(2).

9 **II. Relevant Legal Authority**

10 Nevada Foreclosure Mediation Rule (“NFMR”) provides in relevant part:

11 7. The beneficiary of the deed of trust must prepare and submit, at least 10
12 days prior to the mediation, the following documents to the mediator and the
13 homeowner:

14 (a) The original mortgage note or a certified copy of the mortgage note,
15 together with each assignment or endorsement of said note, the original or a
16 certified copy of the deed of trust, and a certified copy of each assignment of the
17 deed of trust.

18 (b) The original or certified copy, if one was utilized, of any document
19 utilized to assign or endorse the mortgage note or the deed of trust.

20 ***

21 8. The requirement for a certified copy of the original mortgage note, deed of
22 trust, each assignment of the deed of trust and each assignment and endorsement
23 of the mortgage note, power of attorney, or other documents required by these
24 rules is only satisfied when the mediator receives:

25 (a) A statement under oath signed before a notary public pursuant to the
26 provisions of NRS 240.1655(2), which includes:

27 (1) The name, address, company, capacity, and authority of the person
28 making the certification;

 (2) The person making the certification on behalf of the beneficiary is
in actual possession of the original mortgage note, deed of trust, and each
assignment and any endorsement of the mortgage note and assignment of deed
of trust; and

 (3) The attached copy of the mortgage note, deed of trust, and each
assignment and any endorsement of the mortgage note and deed of trust are a
true and correct copy of the original mortgage note, deed of trust, and assignment
of the deed of trust in the possession of the person making the certification.

 (b) The certification shall contain the original signature of the certifying
party and the original seal and signature of the notary public. Each certified
document must contain a separate certification.

III. Analysis

Following the Mediation, Mediator Linton issued a *Mediator's Statement* finding that the parties were unable to agree to a loan modification or make other arrangements and the Mediation was terminated. Med. Stmt. at Part 2B. The *Mediator's Statement* further noted that the Homeowners (Grantor), who have been delinquent for ten years, failed to exchange all required documents. *Id.* at Part 2C. The Mediator found that although neither party produced all documents that are required, the parties participated in good faith with Respondent offering alternatives to foreclosure other than a retention option. Med. Stmt. Comments, Part 2C and 2E. The Comments state that the assignment of the deed of trust dated March 24, 2011, which was not produced by Respondents either ten days before the Mediation or at the Mediation, and the assignment of the deed of trust dated July 28, 2011 (recorded July 24, 2012, nearly one year later) which was produced, were nearly identical with the latter having a typographical error corrected for the word "Securities." *Id.* Pursuant to NRS 107.086(5), the Mediator relied upon the mandatory language of the statute, namely that "[t]he beneficiary of the deed of trust shall bring to the mediation the original or certified copy of the deed of trust, the mortgage note, each assignment of the deed of trust" to recommend as a sanction that a certificate not issue and that Respondents pay for Petitioners' costs as they related to the mediation including the \$200 filing fee for the Petition. *Id.*

The Motion sets forth the background related to five previous foreclosure mediations for the Property, identifying in each instance the shortcomings of the Respondent. Mot. at 2:13-5:19. As to the current Mediation, Petitioners contend that they should not have had to resubmit the financial documents sought by Respondent, since Respondent was never going to offer a loan modification. *Id.* at 5:21-6:12. Petitioners further contend that like the five prior mediations, Respondent failed to provide a certified copy of the March 24, 2011, deed of trust assignment and that Respondent's claimed lack of knowledge of the assignment belies Respondent's use of it to successfully lift the stay on Petitioner Marc Radow's bankruptcy eight years ago. *Id.* at 6:13-21. The Motion states that Respondents have violated NFMR 20(3) and therefore, sanctions are required. *Id.* at 7:1-18. Petitioners seek their attorney fees in the amount of \$3990 incurred subsequent to the filing of the Notice of Default through the end of Mediation; \$3290 in attorney fees incurred in the preparation of

1 the Motion; \$275 in filing fees; and an order that the certificate of foreclosure not issue. *Id.* at 7:26-
2 8:5. Petitioners further seek their attorney fees for the previous five mediations in the amount of
3 \$24,889.55; attorney fees in the amount of \$2135 incurred when Mr. Chrissinger took over the
4 Petition for Judicial Review, and \$250 for each of the previous mediations. *Id.* at 8:15-25.

5 The Motion contends that Respondent “now conjures new bases to deny a modification”
6 including the time delinquency based on the last payment made by Petitioners. *Id.* at 10:1-7.
7 Petitioners contend that the Court should sanction Respondent \$50,000 as recommended by Mediator
8 Hamilton after the Second Mediation which also pertained to Respondent’s failure to provide the
9 March 24, 2011 deed of trust assignment which was produced in Petitioner’s Marc Radow’s
10 bankruptcy, but which Respondents have failed to produce here. *Id.* at 10:23-12:2.

11 The Opposition states that the NFMR 13 requirement that the beneficiary produce a certified
12 copy of all assignments of the deed of trust, applies only to valid assignments and the March 24, 2011
13 assignment (“Invalid Assignment”) contained a typographical error as noted by the Mediator that was
14 corrected in the valid version that was ultimately recorded (dated July 28, 2011 and recorded July 24,
15 2012) (“Assignment”). *Id.* at 4:4-8. The Invalid Assignment was not an effective transfer and could
16 not and did not assign any interest in the deed of trust, so it was unnecessary to produce it as part of
17 the chain of title. *Id.* at 4:8-11. Respondent contends that it provided appropriate certifications and
18 copies of the Note, Deed of Trust, and the related endorsements and assignments and successfully
19 proved its chain of title. *Id.* at 4:11-13. Further, Respondent disputes that it is prevented from arguing
20 that the Invalid Assignment is rogue because it was attached to the Motion for Relief in Petitioner
21 Marc Radow’s bankruptcy proceeding. *Id.* at 4:24-26. Respondent contends that the Motion for
22 Relief does not adjudicate any parties’ rights and only seeks to balance the equities necessary to
23 release a creditor from stay. *Id.* at 4:26-28. Respondent contends that the Invalid Assignment was
24 being used to show that a colorable claim existed in the bankruptcy proceeding and the recorded
25 version, which is identical, except for the typographical error, reflect a colorable claim. *Id.* at 5:12-
26 17. Further, there is no preclusive effect because a document was produced in a bankruptcy
27 proceeding eight years ago, nor was there any intentional wrongdoing on behalf Respondent. *Id.* at
28 5:17-20. Even if the document should have been provided, Petitioners satisfied the requirement when

1 they produced a copy to the Mediator, emulating the exact scenario in *Einhorn v. BAC Home Loans*
2 *Servicing, LP*, 128 Nev. 689, 290 P.3d 249 (2012). *Id.* at 5:24-28. In *Einhorn*, the court noted that
3 satisfaction of the rule was not dependent on who brought the documents, and ultimately, Respondent
4 contends, a certificate issued on nearly identical facts. *Id.* at 5:28-6:3.

5 Respondent further argues that Petitioners did not produce the documents requested by the
6 NFMR which Respondent sought from Petitioner prior to the Mediation and therefore, sanctions
7 should not issue. *Id.* at 6:8-28. Lastly, Respondent contends that Petitioners are not entitled to recover
8 the attorney fees and costs incurred in prior mediations as this would bypass the statute of limitations
9 and this Court's determination in this case is limited to the instant Mediation. *Id.* at 7:12-8:22.

10 The Reply argues that Respondent does not provide any legal authority to contend that the
11 Invalid Assignment is somehow "invalid" noting that in the Assignment the typographical error was
12 corrected by hand and it was signed by a different person. *Id.* at 2:6-23. As to the use of the Invalid
13 Assignment in Bankruptcy Court, Petitioners argue that Respondents should not be able to change its
14 position to satisfy its current needs and that this Court should employ the doctrine of judicial estoppel
15 and prevent Respondent from arguing that a document previously labeled valid is invalid. *Id.* at 3:3-
16 24. Further, Petitioners contend that *Einhorn* is not applicable since in *Einhorn* the borrower's
17 attorney provided a copy of a recorded assignment and here Respondents failed to provide an
18 unrecorded assignment. *Id.* at 4:3-13. Petitioners do not dispute that they provided the unrecorded,
19 invalid assignment at the Mediation. *Id.* at 4:15-17.

20 Petitioners further contend that they provided all of the required documents and if they had
21 not, it would not have mattered as they were advised at the Mediation that they would not be eligible
22 for any loan modification regardless of what their financial statements showed. *Id.* at 5:3-21. Lastly,
23 Petitioners contend that they are entitled to past attorney fees since the Motion is not a traditional
24 post-judgment motion; it is a motion for sanctions and the court is not limited to crafting an
25 appropriate sanction to deter future violations. *Id.* at 6:3-13.

26 Having reviewed the pleading on file and considered the facts and law applicable to this case,
27 this Court finds good cause to deny the Motion. Exhibit 3 to the *Mediator's Statement* is the
28 Corporation Assignment of Deed of Trust for the Property, i.e., the Assignment". It "grants, assigns

1 and transfers to US Bank National Association, as Trustee, successor in interest to Wachovia Bank,
2 National Association as Trustee for Wells Fargo Asset ~~Securities~~ *Securities Corporation, Mortgage
3 Pass-Through Certificates, Series 2005-ARI [Respondent] all beneficial interest under that certain
4 Deed of Trust dated 11/15/2004 executed by Kelley L. Radow and Marc E. Radow, husband and wife
5 as joint tenants, (Trustor) to United Title of Nevada (Trustee) and recorded on 11/23/2004 as
6 DOC#3132996 in Washoe County, NV describing the land therein...” The Assignment is signed by
7 Samuel Kremer, Vice President Loan Documentation, Wells Fargo Bank N.A. and dated July 28,
8 2011. The signature is notarized by Julie Ann Prieto who acknowledges that Mr. Kremer personally
9 appeared before her and is personally known to her. The Assignment is accompanied by a
10 Certification of Loan Documents for Mediation from Wells Fargo Bank, N.A. dated October 15, 2019,
11 executed by Fatime Bare, certifying that the Assignment is a true and correct copy of original
12 document that is in her actual possession. Petitioners do not contest that the Assignment was timely
13 provided. As to the Assignment, Respondent has met the requirement of NFMR 13(7)–(8) and NRS
14 107.086(5).¹

15 Petitioners contest the use of the Assignment since Respondents used the Invalid Assignment
16 at a Bankruptcy proceeding eight years ago and because Respondents failed to produce the Invalid
17 Assignment at the Mediation. Pursuant to NFMR 13(7)(a), respondents are required to produce a
18 “certified copy of each assignment of the deed of trust.” There is no requirement in the NFMRs that
19 the beneficiary produce an invalid document that was not recorded and that did not effectuate an
20 assignment of the deed of trust. Even if there was, not only were Petitioners in possession of the
21 Invalid Assignment in advance of the Mediation, they produced a copy at the Mediation. In *Einhorn*,
22 the Nevada Supreme Court addressed the circumstance where the homeowner brought the missing
23 assignment to the mediation that was needed to make the chain of transfers complete and opined as
24 follows:

25 In NRS 107.086(4), the Legislature directed that certified copies of the note,
26 deed of trust and all assignments be present at the mediation to ensure that the

27 ¹ NRS 107.086(5) provides in relevant part, “[t]he beneficiary of the deed of trust shall bring to the mediation the
28 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.” There is no requirement that invalid assignments
be provided.

1 party seeking to foreclose is the person entitled to enforce the note and to
2 proceed with foreclosure and hence the party authorized to negotiate a
3 modification of either or both. While *Leyva* properly holds that strict compliance
4 with the statute's document mandate is required, who brings which documents,
5 assuming they are all present, authenticated and accounted for, is a matter of
6 form. *Leven*, 123 Nev. at 408, 168 P.3d at 718. Only if a specified document is
7 missing does it matter who has the burden of providing it. Here, *Einhorn*
[borrower] brought the missing assignment needed to complete BAC's chain of
title. Since the assignment includes a certificate of acknowledgment before a
notary public, it carries a presumption of authenticity, NRS 52.165, that makes
it "self- authenticating."

8 128 Nev. at 696–97.

9 Accordingly, Petitioners delivery of the Invalid Assignment at the Mediation satisfies the
10 governing law. Further, this Court disagrees with Petitioners that the unrecorded nature of the Invalid
11 Assignment means that *Einhorn* does not apply. Petitioners offer no legal support for this assertion.
12 Moreover, any allegations by Petitioners that the Invalid Deed was presented at a bankruptcy
13 proceeding, should have been addressed with the Bankruptcy Court. As there is no evidence in the
14 record that Respondent perpetrated deceit on the Bankruptcy Court as opposed to providing the
15 Invalid Assignment in error, this Court does not undertake any further discussion of Petitioners' claim
16 on this issue.

17 The mediator acknowledges that the only assignment that was not produced was the one that
18 was not recorded, i.e., the Invalid Assignment. The Mediator's stated reason for recommending that
19 sanctions be imposed and that a certificate not issue was based on her finding that Respondent failed
20 to bring "all assignments" to the Mediation. Based on NFMR 13(7)–(8), NRS 107.086(5) and
21 *Einhorn*, this Court finds that the Mediator erred. Respondent was not required to bring the Invalid
22 Assignment and even if Respondent was, Petitioners' act of producing it at the Mediation met the
23 requirements for the Mediation as set forth in *Einhorn*. The Assignment and the certifications and
24 copies of the Note, Deed of Trust, and the related endorsements and other assignments produced by
25 Respondent at the Mediation, none of which are contested by Petitioners, successfully prove the chain
26 of title and establish Respondent as the person entitled to enforce the Note (NRS 104.3301) and to
27 foreclose on the deed of trust.

28 ///

1 Based on these findings this Court declines to undertake Petitioners' requests for sanctions in
2 the form of attorney fees and costs for this Mediation and the mediations that preceded the November
3 25, 2019 mediation.

4 Based upon the foregoing and good cause appearing,

5 IT IS HEREBY ORDERED that Petitioner Marc E. Radow and Kelley L. Radow's
6 (Petitioners) *Motion for Relief (FMR 20(2))* is DENIED.

7 IT IS HEREBY FURTHER ORDERED that a certificate of foreclosure issue for the Property.

8 DATED this 10th day of March, 2020.

9 

10 KATHLEEN DRAKULICH
11 DISTRICT JUDGE
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1 **CERTIFICATE OF SERVICE**

2 CASE NO. CV19-01604

3 I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the
4 STATE OF NEVADA, COUNTY OF WASHOE; that on the 10th day of March, 2020, I electronically
5 filed the **ORDER DENYING MOTION FOR RELIEF (FMR 20(2))** with the Clerk of the Court
6 by using the ECF system.

7 I further certify that I transmitted a true and correct copy of the foregoing document by the
8 method(s) noted below:

9 **Electronically filed with the Clerk of the Court by using the ECF system which will send a notice**
10 **of electronic filing to the following:**


11 HOME MEANS NEVADA

12 THEODORE CHRISSINGER, ESQ. for KELLEY RADOW, MARC RADOW

13 LINDA LINTON, ESQ.

14 **Deposited to the Second Judicial District Court mailing system in a sealed envelope for postage**
15 **and mailing by Washoe County using the United States Postal Service in Reno, Nevada:**

16 ACE C. VAN PATTEN, ESQ.
17 KRISTA J. NIELSON, ESQ.
18 10100 W. CHARLESTON BOULEVARD, SUITE 220
19 LAS VEGAS, NEVADA 89135

20
21 
22 DANIELLE REDMOND
23 Department 1 Judicial Assistant
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Ace C. Van Patten, Esq. (SB No. 11731)
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Las Vegas, Nevada 89135
Telephone: (702) 258-8200
Facsimile: (702) 258-8787

Attorneys for Respondent
14-74051

IN THE SECOND JUDICIAL DISTRICT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

Marc E. Radow and Kelley L. Radow,

Petitioners,

v.

U.S. Bank National Association, as
Trustee, successor in interest to Wachovia
Bank, National Association, as Trustee for
Wells Fargo Asset Securities Corporation,
Mortgage Pass-Through Certificates, Series
2005-AR1,

Respondent.

Case No. CV19-01604

Dept. No. 1

**NOTICE OF ENTRY OF ORDER
DENYING MOTION FOR RELIEF (FMR
20(2))**

PLEASE TAKE NOTICE that an Order Denying Motion for Relief (FMR 20(2)) was entered in the above-captioned matter on the 10th day of March, 2020. A true and correct copy of said Order is attached hereto.

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AFFIRMATION

Pursuant to NRS 239B.030, I hereby certify that the foregoing document does not contain the social security number of any person.

Dated: March 16, 2020

Tiffany & Bosco, P.A.

By: /s/ Ace C Van Patten

Ace C Van Patten, Esq.

NV Bar No. 11731

Attorneys for Respondent(s)

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF**
7 **THE STATE OF NEVADA IN AND FOR THE**
8 **COUNTY OF WASHOE**

9 Marc E. Radow and Kelley L. Radow,
10 husband and wife,

11 Petitioners,

Case No.: CV19-01604

Dept. No.: 1

12 vs.

13 U.S. Bank National Association, as Trustee,
14 successor in interest to Wachovia Bank,
15 National Association, as Trustee for Wells
16 Fargo Asset Securities Corporation,
17 Mortgage Pass-Through Certificates, Series
2005-AR1,

18 Respondent.
19 _____ /

20 **ORDER DENYING MOTION FOR RELIEF (FMR 20(2))**

21 Currently before the Court is Petitioner Marc E. Radow and Kelley L. Radow's (Petitioners)
22 *Motion for Relief (FMR 20(2))* ("Motion") filed December 16, 2019. On December 18, 2019,
23 Respondent U.S. Bank National Association, as Trustee, successor in interest to Wachovia Bank,
24 National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-
25 Through Certificates, Series 2005-AR1 ("Respondent") filed an *Opposition to Petitioners' Motion*
26 *for Relief and Countermotion for Appropriate Relief* ("Opposition"). On January 3, 2020, Petitioners
27 filed a *Reply in Support of Motion for Relief (FMR 20(2))* ("Reply") and submitted the Motion to the
28 Court for consideration.

1 **I. Procedural History**

2 This matter concerns a property located at 1900 Joy Lake Road, Reno, Nevada ("Property").
3 On August 16, 2019, Petitioners Marc E. Radow and Kelley L. Radow filed a *Petition for Foreclosure*
4 *Mediation Assistance*. On September 4, 2019, Respondent filed an *Answer to Petition for*
5 *Foreclosure Mediation Assistance* and on September 9, 2019, Linda J. Linton, Esq. was assigned as
6 the mediator. A foreclosure mediation took place on November 25, 2019. On December 5, 2019,
7 Mediator Linda J. Linton, Esq. filed a *Mediator's Statement*. Petitioners and Respondent now bring
8 motions requesting relief in accordance with FMR 20(2).

9 **II. Relevant Legal Authority**

10 Nevada Foreclosure Mediation Rule ("NFMR") provides in relevant part:

11 7. The beneficiary of the deed of trust must prepare and submit, at least 10
12 days prior to the mediation, the following documents to the mediator and the
13 homeowner:

14 (a) The original mortgage note or a certified copy of the mortgage note,
15 together with each assignment or endorsement of said note, the original or a
16 certified copy of the deed of trust, and a certified copy of each assignment of the
17 deed of trust.

18 (b) The original or certified copy, if one was utilized, of any document
19 utilized to assign or endorse the mortgage note or the deed of trust.

20 ***

21 8. The requirement for a certified copy of the original mortgage note, deed of
22 trust, each assignment of the deed of trust and each assignment and endorsement
23 of the mortgage note, power of attorney, or other documents required by these
24 rules is only satisfied when the mediator receives:

25 (a) A statement under oath signed before a notary public pursuant to the
26 provisions of NRS 240.1655(2), which includes:

27 (1) The name, address, company, capacity, and authority of the person
28 making the certification;

 (2) The person making the certification on behalf of the beneficiary is
in actual possession of the original mortgage note, deed of trust, and each
assignment and any endorsement of the mortgage note and assignment of deed
of trust; and

 (3) The attached copy of the mortgage note, deed of trust, and each
assignment and any endorsement of the mortgage note and deed of trust are a
true and correct copy of the original mortgage note, deed of trust, and assignment
of the deed of trust in the possession of the person making the certification.

 (b) The certification shall contain the original signature of the certifying
party and the original seal and signature of the notary public. Each certified
document must contain a separate certification.

1 III. Analysis

2 Following the Mediation, Mediator Linton issued a *Mediator's Statement* finding that the
3 parties were unable to agree to a loan modification or make other arrangements and the Mediation
4 was terminated. Med. Stmt. at Part 2B. The *Mediator's Statement* further noted that the Homeowners
5 (Grantor), who have been delinquent for ten years, failed to exchange all required documents. *Id.* at
6 Part 2C. The Mediator found that although neither party produced all documents that are required,
7 the parties participated in good faith with Respondent offering alternatives to foreclosure other than
8 a retention option. Med. Stmt. Comments, Part 2C and 2E. The Comments state that the assignment
9 of the deed of trust dated March 24, 2011, which was not produced by Respondents either ten days
10 before the Mediation or at the Mediation, and the assignment of the deed of trust dated July 28, 2011
11 (recorded July 24, 2012, nearly one year later) which was produced, were nearly identical with the
12 latter having a typographical error corrected for the word "Securities." *Id.* Pursuant to NRS
13 107.086(5), the Mediator relied upon the mandatory language of the statute, namely that "[t]he
14 beneficiary of the deed of trust shall bring to the mediation the original or certified copy of the deed
15 of trust, the mortgage note, each assignment of the deed of trust" to recommend as a sanction that a
16 certificate not issue and that Respondents pay for Petitioners' costs as they related to the mediation
17 including the \$200 filing fee for the Petition. *Id.*

18 The Motion sets forth the background related to five previous foreclosure mediations for the
19 Property, identifying in each instance the shortcomings of the Respondent. Mot. at 2:13-5:19. As to
20 the current Mediation, Petitioners contend that they should not have had to resubmit the financial
21 documents sought by Respondent, since Respondent was never going to offer a loan modification.
22 *Id.* at 5:21-6:12. Petitioners further contend that like the five prior mediations, Respondent failed to
23 provide a certified copy of the March 24, 2011, deed of trust assignment and that Respondent's
24 claimed lack of knowledge of the assignment belies Respondent's use of it to successfully lift the stay
25 on Petitioner Marc Radow's bankruptcy eight years ago. *Id.* at 6:13-21. The Motion states that
26 Respondents have violated NFMR 20(3) and therefore, sanctions are required. *Id.* at 7:1-18.
27 Petitioners seek their attorney fees in the amount of \$3990 incurred subsequent to the filing of the
28 Notice of Default through the end of Mediation; \$3290 in attorney fees incurred in the preparation of

1 the Motion; \$275 in filing fees; and an order that the certificate of foreclosure not issue. *Id.* at 7:26-
2 8:5. Petitioners further seek their attorney fees for the previous five mediations in the amount of
3 \$24,889.55; attorney fees in the amount of \$2135 incurred when Mr. Chrissinger took over the
4 Petition for Judicial Review, and \$250 for each of the previous mediations. *Id.* at 8:15-25.

5 The Motion contends that Respondent “now conjures new bases to deny a modification”
6 including the time delinquency based on the last payment made by Petitioners. *Id.* at 10:1-7.
7 Petitioners contend that the Court should sanction Respondent \$50,000 as recommended by Mediator
8 Hamilton after the Second Mediation which also pertained to Respondent’s failure to provide the
9 March 24, 2011 deed of trust assignment which was produced in Petitioner’s Marc Radow’s
10 bankruptcy, but which Respondents have failed to produce here. *Id.* at 10:23-12:2.

11 The Opposition states that the NFMR 13 requirement that the beneficiary produce a certified
12 copy of all assignments of the deed of trust, applies only to valid assignments and the March 24, 2011
13 assignment (“Invalid Assignment”) contained a typographical error as noted by the Mediator that was
14 corrected in the valid version that was ultimately recorded (dated July 28, 2011 and recorded July 24,
15 2012) (“Assignment”). *Id.* at 4:4-8. The Invalid Assignment was not an effective transfer and could
16 not and did not assign any interest in the deed of trust, so it was unnecessary to produce it as part of
17 the chain of title. *Id.* at 4:8-11. Respondent contends that it provided appropriate certifications and
18 copies of the Note, Deed of Trust, and the related endorsements and assignments and successfully
19 proved its chain of title. *Id.* at 4:11-13. Further, Respondent disputes that it is prevented from arguing
20 that the Invalid Assignment is rogue because it was attached to the Motion for Relief in Petitioner
21 Marc Radow’s bankruptcy proceeding. *Id.* at 4:24-26. Respondent contends that the Motion for
22 Relief does not adjudicate any parties’ rights and only seeks to balance the equities necessary to
23 release a creditor from stay. *Id.* at 4:26-28. Respondent contends that the Invalid Assignment was
24 being used to show that a colorable claim existed in the bankruptcy proceeding and the recorded
25 version, which is identical, except for the typographical error, reflect a colorable claim. *Id.* at 5:12-
26 17. Further, there is no preclusive effect because a document was produced in a bankruptcy
27 proceeding eight years ago, nor was there any intentional wrongdoing on behalf Respondent. *Id.* at
28 5:17-20. Even if the document should have been provided, Petitioners satisfied the requirement when

1 they produced a copy to the Mediator, emulating the exact scenario in *Einhorn v. BAC Home Loans*
2 *Servicing, LP*, 128 Nev. 689, 290 P.3d 249 (2012). *Id.* at 5:24-28. In *Einhorn*, the court noted that
3 satisfaction of the rule was not dependent on who brought the documents, and ultimately, Respondent
4 contends, a certificate issued on nearly identical facts. *Id.* at 5:28-6:3.

5 Respondent further argues that Petitioners did not produce the documents requested by the
6 NFMR which Respondent sought from Petitioner prior to the Mediation and therefore, sanctions
7 should not issue. *Id.* at 6:8-28. Lastly, Respondent contends that Petitioners are not entitled to recover
8 the attorney fees and costs incurred in prior mediations as this would bypass the statute of limitations
9 and this Court's determination in this case is limited to the instant Mediation. *Id.* at 7:12-8:22.

10 The Reply argues that Respondent does not provide any legal authority to contend that the
11 Invalid Assignment is somehow "invalid" noting that in the Assignment the typographical error was
12 corrected by hand and it was signed by a different person. *Id.* at 2:6-23. As to the use of the Invalid
13 Assignment in Bankruptcy Court, Petitioners argue that Respondents should not be able to change its
14 position to satisfy its current needs and that this Court should employ the doctrine of judicial estoppel
15 and prevent Respondent from arguing that a document previously labeled valid is invalid. *Id.* at 3:3-
16 24. Further, Petitioners contend that *Einhorn* is not applicable since in *Einhorn* the borrower's
17 attorney provided a copy of a recorded assignment and here Respondents failed to provide an
18 unrecorded assignment. *Id.* at 4:3-13. Petitioners do not dispute that they provided the unrecorded,
19 invalid assignment at the Mediation. *Id.* at 4:15-17.

20 Petitioners further contend that they provided all of the required documents and if they had
21 not, it would not have mattered as they were advised at the Mediation that they would not be eligible
22 for any loan modification regardless of what their financial statements showed. *Id.* at 5:3-21. Lastly,
23 Petitioners contend that they are entitled to past attorney fees since the Motion is not a traditional
24 post-judgment motion; it is a motion for sanctions and the court is not limited to crafting an
25 appropriate sanction to deter future violations. *Id.* at 6:3-13.

26 Having reviewed the pleading on file and considered the facts and law applicable to this case,
27 this Court finds good cause to deny the Motion. Exhibit 3 to the *Mediator's Statement* is the
28 Corporation Assignment of Deed of Trust for the Property, i.e., the Assignment". It "grants, assigns

1 and transfers to US Bank National Association, as Trustee, successor in interest to Wachovia Bank,
2 National Association as Trustee for Wells Fargo Asset ~~Securities~~ *Securities Corporation, Mortgage
3 Pass-Through Certificates, Series 2005-ARI [Respondent] all beneficial interest under that certain
4 Deed of Trust dated 11/15/2004 executed by Kelley L. Radow and Marc E. Radow, husband and wife
5 as joint tenants, (Trustor) to United Title of Nevada (Trustee) and recorded on 11/23/2004 as
6 DOC#3132996 in Washoe County, NV describing the land therein..." The Assignment is signed by
7 Samuel Kremer, Vice President Loan Documentation, Wells Fargo Bank N.A. and dated July 28,
8 2011. The signature is notarized by Julie Ann Prieto who acknowledges that Mr. Kremer personally
9 appeared before her and is personally known to her. The Assignment is accompanied by a
10 Certification of Loan Documents for Mediation from Wells Fargo Bank, N.A. dated October 15, 2019,
11 executed by Fatime Bare, certifying that the Assignment is a true and correct copy of original
12 document that is in her actual possession. Petitioners do not contest that the Assignment was timely
13 provided. As to the Assignment, Respondent has met the requirement of NFMR 13(7)-(8) and NRS
14 107.086(5).¹

15 Petitioners contest the use of the Assignment since Respondents used the Invalid Assignment
16 at a Bankruptcy proceeding eight years ago and because Respondents failed to produce the Invalid
17 Assignment at the Mediation. Pursuant to NFMR 13(7)(a), respondents are required to produce a
18 "certified copy of each assignment of the deed of trust." There is no requirement in the NFMRs that
19 the beneficiary produce an invalid document that was not recorded and that did not effectuate an
20 assignment of the deed of trust. Even if there was, not only were Petitioners in possession of the
21 Invalid Assignment in advance of the Mediation, they produced a copy at the Mediation. In *Einhorn*,
22 the Nevada Supreme Court addressed the circumstance where the homeowner brought the missing
23 assignment to the mediation that was needed to make the chain of transfers complete and opined as
24 follows:

25 In NRS 107.086(4), the Legislature directed that certified copies of the note,
26 deed of trust and all assignments be present at the mediation to ensure that the

27 ¹ NRS 107.086(5) provides in relevant part, "[t]he beneficiary of the deed of trust shall bring to the mediation the
28 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." There is no requirement that invalid assignments
be provided.

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IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE

Marc E. Radow and Kelley L. Radow,
husband and wife,

Petitioners,

Case No.: CV19-01604

Dept. No.: 1

vs.

U.S. Bank National Association, as Trustee,
successor in interest to Wachovia Bank,
National Association, as Trustee for Wells
Fargo Asset Securities Corporation,
Mortgage Pass-Through Certificates, Series
2005-AR1,

Respondent.

ORDER DENYING MOTION FOR RELIEF (FMR 20(2))

Currently before the Court is Petitioner Marc E. Radow and Kelley L. Radow's (Petitioners) *Motion for Relief (FMR 20(2))* ("Motion") filed December 16, 2019. On December 18, 2019, Respondent U.S. Bank National Association, as Trustee, successor in interest to Wachovia Bank, National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2005-AR1 ("Respondent") filed an *Opposition to Petitioners' Motion for Relief and Countermotion for Appropriate Relief* ("Opposition"). On January 3, 2020, Petitioners filed a *Reply in Support of Motion for Relief (FMR 20(2))* ("Reply") and submitted the Motion to the Court for consideration.

1 **I. Procedural History**

2 This matter concerns a property located at 1900 Joy Lake Road, Reno, Nevada ("Property").
3 On August 16, 2019, Petitioners Marc E. Radow and Kelley L. Radow filed a *Petition for Foreclosure*
4 *Mediation Assistance*. On September 4, 2019, Respondent filed an *Answer to Petition for*
5 *Foreclosure Mediation Assistance* and on September 9, 2019, Linda J. Linton, Esq. was assigned as
6 the mediator. A foreclosure mediation took place on November 25, 2019. On December 5, 2019,
7 Mediator Linda J. Linton, Esq. filed a *Mediator's Statement*. Petitioners and Respondent now bring
8 motions requesting relief in accordance with FMR 20(2).

9 **II. Relevant Legal Authority**

10 Nevada Foreclosure Mediation Rule ("NFMR") provides in relevant part:

11 7. The beneficiary of the deed of trust must prepare and submit, at least 10
12 days prior to the mediation, the following documents to the mediator and the
13 homeowner:

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15 together with each assignment or endorsement of said note, the original or a
16 certified copy of the deed of trust, and a certified copy of each assignment of the
17 deed of trust.

18 (b) The original or certified copy, if one was utilized, of any document
19 utilized to assign or endorse the mortgage note or the deed of trust.

20 ***

21 8. The requirement for a certified copy of the original mortgage note, deed of
22 trust, each assignment of the deed of trust and each assignment and endorsement
23 of the mortgage note, power of attorney, or other documents required by these
24 rules is only satisfied when the mediator receives:

25 (a) A statement under oath signed before a notary public pursuant to the
26 provisions of NRS 240.1655(2), which includes:

27 (1) The name, address, company, capacity, and authority of the person
28 making the certification;

 (2) The person making the certification on behalf of the beneficiary is
in actual possession of the original mortgage note, deed of trust, and each
assignment and any endorsement of the mortgage note and assignment of deed
of trust; and

 (3) The attached copy of the mortgage note, deed of trust, and each
assignment and any endorsement of the mortgage note and deed of trust are a
true and correct copy of the original mortgage note, deed of trust, and assignment
of the deed of trust in the possession of the person making the certification.

 (b) The certification shall contain the original signature of the certifying
party and the original seal and signature of the notary public. Each certified
document must contain a separate certification.

1 III. Analysis

2 Following the Mediation, Mediator Linton issued a *Mediator's Statement* finding that the
3 parties were unable to agree to a loan modification or make other arrangements and the Mediation
4 was terminated. Med. Stmt. at Part 2B. The *Mediator's Statement* further noted that the Homeowners
5 (Grantor), who have been delinquent for ten years, failed to exchange all required documents. *Id.* at
6 Part 2C. The Mediator found that although neither party produced all documents that are required,
7 the parties participated in good faith with Respondent offering alternatives to foreclosure other than
8 a retention option. Med. Stmt. Comments, Part 2C and 2E. The Comments state that the assignment
9 of the deed of trust dated March 24, 2011, which was not produced by Respondents either ten days
10 before the Mediation or at the Mediation, and the assignment of the deed of trust dated July 28, 2011
11 (recorded July 24, 2012, nearly one year later) which was produced, were nearly identical with the
12 latter having a typographical error corrected for the word "Securities." *Id.* Pursuant to NRS
13 107.086(5), the Mediator relied upon the mandatory language of the statute, namely that "[t]he
14 beneficiary of the deed of trust shall bring to the mediation the original or certified copy of the deed
15 of trust, the mortgage note, each assignment of the deed of trust" to recommend as a sanction that a
16 certificate not issue and that Respondents pay for Petitioners' costs as they related to the mediation
17 including the \$200 filing fee for the Petition. *Id.*

18 The Motion sets forth the background related to five previous foreclosure mediations for the
19 Property, identifying in each instance the shortcomings of the Respondent. Mot. at 2:13-5:19. As to
20 the current Mediation, Petitioners contend that they should not have had to resubmit the financial
21 documents sought by Respondent, since Respondent was never going to offer a loan modification.
22 *Id.* at 5:21-6:12. Petitioners further contend that like the five prior mediations, Respondent failed to
23 provide a certified copy of the March 24, 2011, deed of trust assignment and that Respondent's
24 claimed lack of knowledge of the assignment belies Respondent's use of it to successfully lift the stay
25 on Petitioner Marc Radow's bankruptcy eight years ago. *Id.* at 6:13-21. The Motion states that
26 Respondents have violated NFMR 20(3) and therefore, sanctions are required. *Id.* at 7:1-18.
27 Petitioners seek their attorney fees in the amount of \$3990 incurred subsequent to the filing of the
28 Notice of Default through the end of Mediation; \$3290 in attorney fees incurred in the preparation of

1 the Motion; \$275 in filing fees; and an order that the certificate of foreclosure not issue. *Id.* at 7:26-
2 8:5. Petitioners further seek their attorney fees for the previous five mediations in the amount of
3 \$24,889.55; attorney fees in the amount of \$2135 incurred when Mr. Chrissinger took over the
4 Petition for Judicial Review, and \$250 for each of the previous mediations. *Id.* at 8:15-25.

5 The Motion contends that Respondent “now conjures new bases to deny a modification”
6 including the time delinquency based on the last payment made by Petitioners. *Id.* at 10:1-7.
7 Petitioners contend that the Court should sanction Respondent \$50,000 as recommended by Mediator
8 Hamilton after the Second Mediation which also pertained to Respondent’s failure to provide the
9 March 24, 2011 deed of trust assignment which was produced in Petitioner’s Marc Radow’s
10 bankruptcy, but which Respondents have failed to produce here. *Id.* at 10:23-12:2.

11 The Opposition states that the NFMR 13 requirement that the beneficiary produce a certified
12 copy of all assignments of the deed of trust, applies only to valid assignments and the March 24, 2011
13 assignment (“Invalid Assignment”) contained a typographical error as noted by the Mediator that was
14 corrected in the valid version that was ultimately recorded (dated July 28, 2011 and recorded July 24,
15 2012) (“Assignment”). *Id.* at 4:4-8. The Invalid Assignment was not an effective transfer and could
16 not and did not assign any interest in the deed of trust, so it was unnecessary to produce it as part of
17 the chain of title. *Id.* at 4:8-11. Respondent contends that it provided appropriate certifications and
18 copies of the Note, Deed of Trust, and the related endorsements and assignments and successfully
19 proved its chain of title. *Id.* at 4:11-13. Further, Respondent disputes that it is prevented from arguing
20 that the Invalid Assignment is rogue because it was attached to the Motion for Relief in Petitioner
21 Marc Radow’s bankruptcy proceeding. *Id.* at 4:24-26. Respondent contends that the Motion for
22 Relief does not adjudicate any parties’ rights and only seeks to balance the equities necessary to
23 release a creditor from stay. *Id.* at 4:26-28. Respondent contends that the Invalid Assignment was
24 being used to show that a colorable claim existed in the bankruptcy proceeding and the recorded
25 version, which is identical, except for the typographical error, reflect a colorable claim. *Id.* at 5:12-
26 17. Further, there is no preclusive effect because a document was produced in a bankruptcy
27 proceeding eight years ago, nor was there any intentional wrongdoing on behalf Respondent. *Id.* at
28 5:17-20. Even if the document should have been provided, Petitioners satisfied the requirement when

1 they produced a copy to the Mediator, emulating the exact scenario in *Einhorn v. BAC Home Loans*
2 *Servicing, LP*, 128 Nev. 689, 290 P.3d 249 (2012). *Id.* at 5:24-28. In *Einhorn*, the court noted that
3 satisfaction of the rule was not dependent on who brought the documents, and ultimately, Respondent
4 contends, a certificate issued on nearly identical facts. *Id.* at 5:28-6:3.

5 Respondent further argues that Petitioners did not produce the documents requested by the
6 NFMR which Respondent sought from Petitioner prior to the Mediation and therefore, sanctions
7 should not issue. *Id.* at 6:8-28. Lastly, Respondent contends that Petitioners are not entitled to recover
8 the attorney fees and costs incurred in prior mediations as this would bypass the statute of limitations
9 and this Court's determination in this case is limited to the instant Mediation. *Id.* at 7:12-8:22.

10 The Reply argues that Respondent does not provide any legal authority to contend that the
11 Invalid Assignment is somehow "invalid" noting that in the Assignment the typographical error was
12 corrected by hand and it was signed by a different person. *Id.* at 2:6-23. As to the use of the Invalid
13 Assignment in Bankruptcy Court, Petitioners argue that Respondents should not be able to change its
14 position to satisfy its current needs and that this Court should employ the doctrine of judicial estoppel
15 and prevent Respondent from arguing that a document previously labeled valid is invalid. *Id.* at 3:3-
16 24. Further, Petitioners contend that *Einhorn* is not applicable since in *Einhorn* the borrower's
17 attorney provided a copy of a recorded assignment and here Respondents failed to provide an
18 unrecorded assignment. *Id.* at 4:3-13. Petitioners do not dispute that they provided the unrecorded,
19 invalid assignment at the Mediation. *Id.* at 4:15-17.

20 Petitioners further contend that they provided all of the required documents and if they had
21 not, it would not have mattered as they were advised at the Mediation that they would not be eligible
22 for any loan modification regardless of what their financial statements showed. *Id.* at 5:3-21. Lastly,
23 Petitioners contend that they are entitled to past attorney fees since the Motion is not a traditional
24 post-judgment motion; it is a motion for sanctions and the court is not limited to crafting an
25 appropriate sanction to deter future violations. *Id.* at 6:3-13.

26 Having reviewed the pleading on file and considered the facts and law applicable to this case,
27 this Court finds good cause to deny the Motion. Exhibit 3 to the *Mediator's Statement* is the
28 Corporation Assignment of Deed of Trust for the Property, i.e., the Assignment". It "grants, assigns

1 and transfers to US Bank National Association, as Trustee, successor in interest to Wachovia Bank,
2 National Association as Trustee for Wells Fargo Asset Securities *Securities Corporation, Mortgage
3 Pass-Through Certificates, Series 2005-ARI [Respondent] all beneficial interest under that certain
4 Deed of Trust dated 11/15/2004 executed by Kelley L. Radow and Marc E. Radow, husband and wife
5 as joint tenants, (Trustor) to United Title of Nevada (Trustee) and recorded on 11/23/2004 as
6 DOC#3132996 in Washoe County, NV describing the land therein..." The Assignment is signed by
7 Samuel Kremer, Vice President Loan Documentation, Wells Fargo Bank N.A. and dated July 28,
8 2011. The signature is notarized by Julie Ann Prieto who acknowledges that Mr. Kremer personally
9 appeared before her and is personally known to her. The Assignment is accompanied by a
10 Certification of Loan Documents for Mediation from Wells Fargo Bank, N.A. dated October 15, 2019,
11 executed by Fatime Bare, certifying that the Assignment is a true and correct copy of original
12 document that is in her actual possession. Petitioners do not contest that the Assignment was timely
13 provided. As to the Assignment, Respondent has met the requirement of NFMR 13(7)-(8) and NRS
14 107.086(5).¹

15 Petitioners contest the use of the Assignment since Respondents used the Invalid Assignment
16 at a Bankruptcy proceeding eight years ago and because Respondents failed to produce the Invalid
17 Assignment at the Mediation. Pursuant to NFMR 13(7)(a), respondents are required to produce a
18 "certified copy of each assignment of the deed of trust." There is no requirement in the NFMRs that
19 the beneficiary produce an invalid document that was not recorded and that did not effectuate an
20 assignment of the deed of trust. Even if there was, not only were Petitioners in possession of the
21 Invalid Assignment in advance of the Mediation, they produced a copy at the Mediation. In *Einhorn*,
22 the Nevada Supreme Court addressed the circumstance where the homeowner brought the missing
23 assignment to the mediation that was needed to make the chain of transfers complete and opined as
24 follows:

25 In NRS 107.086(4), the Legislature directed that certified copies of the note,
26 deed of trust and all assignments be present at the mediation to ensure that the

27 ¹ NRS 107.086(5) provides in relevant part, "[t]he beneficiary of the deed of trust shall bring to the mediation the
28 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." There is no requirement that invalid assignments
be provided.

1 party seeking to foreclose is the person entitled to enforce the note and to
2 proceed with foreclosure and hence the party authorized to negotiate a
3 modification of either or both. While *Leyva* properly holds that strict compliance
4 with the statute's document mandate is required, who brings which documents,
5 assuming they are all present, authenticated and accounted for, is a matter of
6 form. *Leven*, 123 Nev. at 408, 168 P.3d at 718. Only if a specified document is
7 missing does it matter who has the burden of providing it. Here, *Einhorn*
[borrower] brought the missing assignment needed to complete BAC's chain of
title. Since the assignment includes a certificate of acknowledgment before a
notary public, it carries a presumption of authenticity, NRS 52.165, that makes
it "self- authenticating."

8 128 Nev. at 696–97.

9 Accordingly, Petitioners delivery of the Invalid Assignment at the Mediation satisfies the
10 governing law. Further, this Court disagrees with Petitioners that the unrecorded nature of the Invalid
11 Assignment means that *Einhorn* does not apply. Petitioners offer no legal support for this assertion.
12 Moreover, any allegations by Petitioners that the Invalid Deed was presented at a bankruptcy
13 proceeding, should have been addressed with the Bankruptcy Court. As there is no evidence in the
14 record that Respondent perpetrated deceit on the Bankruptcy Court as opposed to providing the
15 Invalid Assignment in error, this Court does not undertake any further discussion of Petitioners' claim
16 on this issue.

17 The mediator acknowledges that the only assignment that was not produced was the one that
18 was not recorded, i.e., the Invalid Assignment. The Mediator's stated reason for recommending that
19 sanctions be imposed and that a certificate not issue was based on her finding that Respondent failed
20 to bring "all assignments" to the Mediation. Based on NFMR 13(7)–(8), NRS 107.086(5) and
21 *Einhorn*, this Court finds that the Mediator erred. Respondent was not required to bring the Invalid
22 Assignment and even if Respondent was, Petitioners' act of producing it at the Mediation met the
23 requirements for the Mediation as set forth in *Einhorn*. The Assignment and the certifications and
24 copies of the Note, Deed of Trust, and the related endorsements and other assignments produced by
25 Respondent at the Mediation, none of which are contested by Petitioners, successfully prove the chain
26 of title and establish Respondent as the person entitled to enforce the Note (NRS 104.3301) and to
27 foreclose on the deed of trust.

28 ///


1 Based on these findings this Court declines to undertake Petitioners' requests for sanctions in
2 the form of attorney fees and costs for this Mediation and the mediations that preceded the November
3 25, 2019 mediation.

4 Based upon the foregoing and good cause appearing,

5 IT IS HEREBY ORDERED that Petitioner Marc E. Radow and Kelley L. Radow's
6 (Petitioners) *Motion for Relief (FMR 20(2))* is DENIED.

7 IT IS HEREBY FURTHER ORDERED that a certificate of foreclosure issue for the Property.

8 DATED this 10th day of March, 2020.

9 
10 KATHLEEN DRAKULICH
11 DISTRICT JUDGE
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1 **CERTIFICATE OF SERVICE**

2 CASE NO. CV19-01604

3 I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the
4 STATE OF NEVADA, COUNTY OF WASHOE; that on the 10th day of March, 2020, I electronically
5 filed the **ORDER DENYING MOTION FOR RELIEF (FMR 20(2))** with the Clerk of the Court
6 by using the ECF system.

7 I further certify that I transmitted a true and correct copy of the foregoing document by the
8 method(s) noted below:

9 **Electronically filed with the Clerk of the Court by using the ECF system which will send a notice**
10 **of electronic filing to the following:**


11 HOME MEANS NEVADA

12 THEODORE CHRISSINGER, ESQ. for KELLEY RADOW, MARC RADOW

13 LINDA LINTON, ESQ.

14 **Deposited to the Second Judicial District Court mailing system in a sealed envelope for postage**
15 **and mailing by Washoe County using the United States Postal Service in Reno, Nevada:**

16 ACE C. VAN PATTEN, ESQ.
17 KRISTA J. NIELSON, ESQ.
18 10100 W. CHARLESTON BOULEVARD, SUITE 220
19 LAS VEGAS, NEVADA 89135

20
21 
22 DANIELLE REDMOND
23 Department 1 Judicial Assistant
24
25
26
27
28

Code 4132

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MARC E. RADOW AND KELLEY L. RADOW,
husband and wife,

Case No. CV19-01604

Dept. No. 1

Petitioners,

vs.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,
SUCCESSOR IN INTEREST TO WACHOVIA BANK,
NATIONAL ASSOCIATION, AS TRUSTEE FOR WELLS
FARGO ASSET SECURITIES CORPORATION, MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2005-ARI,

Respondent.

NOTICE OF APPEAL DEFICIENCY

TO: Clerk of the Court, Nevada Supreme Court,
and All Parties or their Respective Counsel Of Record:

On April 13th, 2020, Attorney Theodore E. Chrissinger, Esq for Marc Radow and Kelley Radow, filed a Notice of Appeal with the Court. Attorney Theodore Chrissinger, Esq. was unable to include the Two Hundred Fifty Dollar (\$250.00) Supreme Court filing fee due to the Second Judicial District Court Administrative Order 2020-02 and 2020-05.

Pursuant to NRAP 3(a)(3), on April 13th, 2020, the Notice of Appeal was filed with the Nevada Supreme Court. By copy of this notice. Attorney Theodore Chrissinger, Esq. will be notified by electronic filing of the deficiency.

Dated this 13th day of April, 2020.

Jacqueline Bryant
Clerk of the Court
By: /s/YViloria
YViloria
Deputy Clerk

CERTIFICATE OF SERVICE

CASE NO. CV19-01604

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County Of Washoe; that on the 13th day of April, 2020, I electronically filed the Notice of Appeal Deficiency with the Clerk of the Court by using the ECF system.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

Electronically filed with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following: HOME MEANS NEVADA

THEODORE CHRISSINGER, ESQ. for KELLEY RADOW, MARC RADOW

LINDA LINTON, ESQ.

ACE C. VAN PATTEN, ESQ. for US BANK NATIONAL ASSOCIATION TRUSTEE TO WACHOVIA BANK

Deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada:

/s/YViloria
YViloria
Deputy Clerk

Code 1350

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MARC E. RADOW AND KELLEY L. RADOW,
husband and wife,

Case No. CV19-01604

Petitioners,

Dept. No. 1

vs.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE,
SUCCESSOR IN INTEREST TO WACHOVIA BANK,
NATIONAL ASSOCIATION, AS TRUSTEE FOR WELLS
FARGO ASSET SECURITIES CORPORATION, MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2005-ARI,

Respondent.

CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada,
County of Washoe; that on the 13th day of April, 2020, I electronically filed the Notice of Appeal in
the above entitled matter to the Nevada Supreme Court.

I further certify that the transmitted record is a true and correct copy of the original pleadings
on file with the Second Judicial District Court.

Dated this 13th day of April, 2020.

Jacqueline Bryant

Clerk of the Court

By /s//YViloria

YViloria

Deputy Clerk