

Supreme Court of the State of Nevada

MARC E. RADOW and KELLEY L. RADOW,
Husband and Wife,

Appellants,

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.

No.: 81021

Electronically Filed
May 08 2020 11:50 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Docketing Statement

General Information

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

Warning

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. Id. Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District: Second Judicial District Department: 1
County: Washoe Judge: Hon. Kathleen Drakulich
District Ct. Case No. CV19-01604

2. Attorney filing this docketing statement:

Attorney: Theodore Chrissinger Telephone: (775) 786-8000
Firm: Hoy Chrissinger Kimmel Vallas PC
Address: 50 W. Liberty Street, Suite 840
Reno, Nevada 89501
Clients: Marc E. Radow and Kelley L. Radow

3. Attorneys representing respondent:

Attorneys: Ace Van Patten Telephone: (702) 258-8200
Krista J. Nielson
Firm: Tiffany & Bosco P.A.
Address: 10100 W. Charleston Blvd., Suite 220
Las Vegas, Nevada 89135
Client: 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

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of Jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |

- | | |
|---|---|
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify) |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input checked="" type="checkbox"/> Other disposition: Order denying Motion for Relief under FMR 20(2) and Ordering Issuance of a Foreclosure Certificate |

5. Does this appeal raise issues concerning any of the following:

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None.

8. Nature of the action. Briefly describe the nature of the action and the result below:

After Respondent recorded a notice of default, Appellants filed a petition in district court for foreclosure mediation. The parties attended the foreclosure mediation, and the mediator issued her statement (1) finding that Respondent failed to provide all of the documentation required by the Foreclosure Mediation Rules (the "FMR's"), (2)

recommending that a foreclosure certificate not issue, and (3) recommending that Respondent be sanctioned.

Under FMR 20(2), Appellants moved the court for appropriate relief. The Court denied Appellants' motion, and ordered that a foreclosure certificate issue, ending the petition proceedings. The Court found that, despite the mediator's finding, Respondents did supply the required documents, and if they did not, the missing document was not essential, and if it was, the fact the Appellants had a copy of the missing document at the mediation sufficed.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. Whether the district court erred by determining that although Respondent failed to provide one of the assignments of the deed of trust, that specific deed of trust was invalid, and therefore did not need to be provided.

2. Whether the district court erred by finding that even if the deed of trust assignment was required to be produced, the fact Appellants had a copy of it at the mediation met the requirements set forth in *Einhorn v. BAC Home Loans Services, LP*, 128 Nev. 689, 290 P.3d 249 (2012).

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None of which Appellants are aware.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

N/A

12. Other issues. Does this appeal involve any of the following issues:

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain the uniformity of this court's decisions

☐ A ballot question

If so, explain:

N/A

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This is an appeal from a case arising from the foreclosure mediation program, and is therefore presumptively assigned to the Court of Appeals under NRAP 17(b)(15).

14. Trial. If this action proceeded to trial, how many days did it last? N/A

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

Appellants do not intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal.

16. Date of entry of written judgment or order appealed from: March 10, 2020

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

N/A

17. Date written notice of entry of judgment or order was served: March 16, 2020

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of the motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed: April 13, 2020

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A

- 20. Specify the statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other:**

NRAP 4(a)

Substantive Appealability

- 21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☒ Other (specify) FMR 24

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRAP 3A(b)(1) – The Court’s order is a final judgment in a Petition for Mediation Assistance, because the Court’s order directed issuance of foreclosure certificate, ending the petition procedure.

FRM 24 – FMR 24 provides, “Appeals of the decisions of the District Court will follow appropriate civil appeals processes.”

- 22. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

Marc E. Radow and Kelley L. Radow, Appellants

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

(b) If all the parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

All the parties in the district court are parties to this appeal.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Appellants: 1. Petition for Mediation Assistance
 2. Motion for Appropriate Relief

Respondent: No Claims

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

N/A

(b) Specify the parties remaining below:

N/A

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered “No” to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

N/A

27. Attach file stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

See Attached Documents

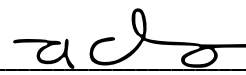
Verification

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Marc E. Radow and Kelley L. Radow
Name of appellants

Theodore Chrissinger
Name of counsel of record

May 8, 2020
Date


Signature of counsel of record

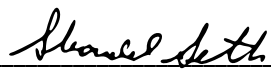
Nevada, Washoe County
State and county where signed

Certificate of Service

I certify that on the 8th day of May, 2020, I served a copy of this completed docketing statement upon all counsel of record by filing this docketing statement with the electronic filing system which will serve all counsel of record electronically on the following:

Krista Neilson
Ace Van Patten

May 8, 2020


Shondel Seth

Attachment to Docketing Statement – Civil Appeals – Case No. 80843

27. Attach file-stamped copies of the following documents:

- * Attach latest filed complaint, counterclaims, cross-claims, and third-party claims.

The following are attached:

Exhibit 1 – The Radows’ Petition for Foreclosure Mediation Assistance

- * Any tolling motion(s) and order(s) resolving tolling motion(s)

N/A

- * Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal

N/A

- * Any other order challenged on appeal

Exhibit 2 – Order Denying Motion for Relief

- * Notices of entry for each attached order

Exhibit 3 – Notice of Entry of Order re Exhibit 2

Exhibit 1

Exhibit 1

1 Code: \$3645
2 **HOY | CHRISSINGER | KIMMEL | VALLAS**
3 Theodore E. Chrissinger (NV Bar 9528)
4 50 W. Liberty St., Suite 840
5 Reno, Nevada 89501
6 775.786.8000 (voice)
7 775.786.7426 (fax)
8 tchrissinger@nevadalaw.com
9 mkimmel@nevadalaw.com
10

11 Attorneys for: Petitioners Marc and Kelley Radow

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

15 Marc E. Radow and Kelley L. Radow,
16 husband and wife,
17
18 Petitioners,

Case No.:

Dept. No.:

19 vs.

20 U.S. Bank National Association, as Trustee,
21 successor in interest to Wachovia Bank,
22 National Association, as Trustee for Wells
23 Fargo Asset Securities Corporation,
24 Mortgage Pass-Through Certificates, Series
25 2005-AR1

26 Respondent.
27
28

Petition for Foreclosure Mediation Assistance

Marc E. Radow and Kelley L. Radow (collectively, "Petitioners") hereby petition for
Foreclosure Mediation under Chapter 107 of the NRS. Petitioners allege:

1. Petitioners are the owners of, and currently reside at, the real property
located at 1900 Joy Lake Road in Washoe County, Nevada 89511, APN 047-072-03 (the
"Residence"). The Residence is currently encumbered by a deed of trust.



1 2. On or around July 30, 2019, Respondent, U.S. Bank National Association, as
2 Trustee, successor in interest to Wachovia Bank, N.A., as Trustee for Wells Fargo Asset
3 Securities Corporation, Mortgage Pass-Through Certificates, Series 2005-AR1
4 ("Respondent") served a Notice of Default (the "NOD") on Petitioners. The NOD was
5 recorded on July 16, 2019.
6

7 3. The NOD purports to initiate foreclosure proceedings on the Residence.

8 4. Petitioners meet all of the requirements for the foreclosure mediation
9 program.
10

11 5. Petitioners hereby demand mediation under NRS 107.086.

12 **Request for Relief**

13 Petitioners request the following relief:

- 14 1. Assignment to the foreclosure mediation program as provided in NRS 107.
15 2. Any other relief the Court deems just and proper.
16

17 August 16, 2019

18 HOY | CHRISSINGER | KIMMEL | VALLAS
19

20 
21 _____
22 Theodore Chrissinger
23 Attorneys for Petitioners
24
25
26
27
28

Privacy Affirmation

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

August 16, 2019



Theodore Chrissinger

Exhibit 2

Exhibit 2

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
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Exhibit 3

Exhibit 3



Ace C. Van Patten, Esq. (SB No. 11731)
avp@tblaw.com
Krista J. Nielson, Esq. (SB No. 10698)
knielson@tblaw.com
10100 W. Charleston Boulevard, Suite 220
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.

///

///

///

///

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Hoy Chrissinger Kimmel Vallas
Theodore E. Chrissinger
50 W. Liberty St., Suite 840
Reno, NV 89501
Petitioner(s) Counsel

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 2840

2
3
4
5
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.

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

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:

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.

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
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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