CODE: 2515

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DUKE RENSLOW and TINA RENSLOW,

Petitioners,

vs.

WELLS FARGO BANK, and DOES 1 through 10,

Respondents.

CASE NO. CV10-03382

DEPT. NO. 7

NOTICE OF APPEAL

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL

NOTICE IS GIVEN that Respondent Wells Fargo Bank appeals to the Supreme Court of Nevada from the Second Judicial District Court of the State of Nevada, from the final judgment entered in this action on March 29, 2011.

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See Order attached as Exhibit 1.

DATED this 26th day of April, 2011.

SNELL & WILMER, L.L.P.

/s/ Kelly H. Dove

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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **NOTICE OF APPEAL** filed in the Second Judicial District Court:

Does not contain the social security number of any person.

- OR -

Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____

(State specific law)

- OR -

B. For the administration of a public program or for an application for a federal or state grant.

DATED this 26th day of April, 2011.

SNELL & WILMER, L.L.P.

/s/ Kelly H. Dove

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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., and I certify that I served a copy of the foregoing **NOTICE OF APPEAL** on the 26th day of April, 2011, via electronic service through the Second Judicial District Court's ECF System upon each party in the case who is registered as an electronic case filing user and via U.S. First Class Mail, as follows:

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LIST OF EXHIBITS

Exhibit 1 – Order dated March 29, 2011 28 pages

EXHIBIT 1

EXHIBIT 1

FILED
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Howard W. Conyers
Clerk of the Court
Transaction # 2123198

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DUKE RENSLOW and TINA RENSLOW,

Petitioners,

vs.

WELLS FARGO BANK, and DOES 1 through 10,

Respondents.

Case No.: CV10-03382

Dept. No.: 7

ORDER

Procedural History

On October 19, 2010, Petitioners DUKE and TINA RENSLOW ("RENSLOWS") attended a mediation under the auspices of the Foreclosure Mediation Program with Respondents WELLS FARGO BANK ("WELLS FARGO"), representative for FEDERAL HOME LOAN BANK. No agreement was reached. The Mediator's Statement stated that WELLS FARGO did not have the requisite authority to modify the loan. On November 9, 2010, Petitioners timely filed a *Petition for Judicial Review*. This Court entered its *Order for Judicial Review* on November 12, 2010. On December 10, 2010 WELLS FARGO filed their *Response*. On December 15, 2010 Petitioners filed their *Reply*. On January 28, 2011, this Court held a hearing on the *Petition* and ordered an Evidentiary Hearing held. On January 31, 2011, Petitioners filed a *Supplement* containing exhibits in support of their *Petition*. On March 17, 2011 the Evidentiary Hearing was held. Both parties appeared in person, and presented their case.

Legal Standards

The scope of Judicial Review in Foreclosure Mediation cases is to analyze the underlying mediation, determine bad faith, enforce agreements between the parties, and determine sanctions pursuant to NRS Chapter 107. FMPR 21(1) (Former Rule 6(1)). Mediations conducted pursuant to NRS 107.086 are held to a standard of "good faith" negotiation. NRS 107.086. Petitions for Judicial Review of Foreclosure Mediation are conducted using a "*de novo*" standard. FMPR 21(5) (Former Rule 6(5)).

Findings of Fact

At the conclusion of the evidentiary hearing, after careful consideration of the testimony of witnesses, evidence admitted, and argument of counsel, this Court **finds** the following facts:

1) WELLS FARGO is the beneficiary of record of a Deed of Trust which is the security instrument to the Note. [Ex.2]

2) WELLS FARGO was the originating lender of the home loan, and original holder of the Note executed by the RENSLOWS.

3) Petitioners were never notified that the Deed of Trust had been assigned, or that the Note had been transferred.

4) On some uncertain date, WELLS FARGO transferred the Note by uncertain means to a certain FEDERAL HOME LOAN BANK ("FHLB").

5) WELLS FARGO has not recorded an assignment of the Deed of Trust.

6) WELLS FARGO did not provide a proper endorsement of the Note at mediation or throughout the judicial review proceedings.

7) WELLS FARGO did not inform Petitioners that their home loan had been sold, neither did FHLB contact Petitioners with such information. *See*, 15 U.S.C. 1641(g)(1)

8) Since the date that WELLS FARGO transferred the Note to FHLB, WELLS FARGO has acted as a master servicer of the loan, and has been Petitioner's sole point of contact throughout the entire life of the loan from origination through the present day.

9) In July 2009, Petitioners were <u>not</u> in default of their obligation under the Note.

///

10) In July 2009, Petitioners contacted WELLS FARGO to request a modification of their loan as Petitioners faced pay cuts and mounting medical bills for their daughter.

11) WELLS FARGO informed Petitioners that WELLS FARGO would only discuss modification if Petitioners were sixty (60) days late, and that Petitioners were not eligible for assistance unless they were sixty (60) days late.

12) Petitioners became sixty (60) days late in order to discuss a modification with WELLS FARGO, and to be eligible for assistance.

13) WELLS FARGO provided Petitioners with a Home Affordable Modification Program ("HAMP") application. WELLS FARGO participates in the HAMP program on loans for which it is the lender.

14) Petitioners made their next payment so that they would not be ninety (90) days late, and in default on their loan, so as to avoid foreclosure.

15) Petitioner completed the HAMP application and properly returned it to WELLS FARGO.

16) On September 17, 2009 Petitioners received a letter from WELLS FARGO stating, "You did it!" and accepting Petitioners into the HAMP program. [Ex.3]

17) The HAMP trial period began on November 1, 2009. [Ex.4]

18) Petitioners were informed that they did not need to make their October payment by WELLS FARGO.

19) When Petitioners did not make their October payment, they had missed a total of three payments. This put Petitioners ninety (90) days in arrears.

20) The HAMP Trial Period Packet states that WELLS FARGO is the "Lender".

21) The HAMP Trial Period Packet stated that the monthly payments during the trial period would be $1,127.06. [Ex.4 p.2]

22) The HAMP Trial Period Packet stated that "the last Trial Period Payment is due 2/1/2010" [Ex.4 p.2]

23) The HAMP Trial Period Packet stated that upon successful completion of the Trial Period, Petitioners would (not might) receive a modification on substantially similar terms.

24) Nowhere in the HAMP Trial Period packet is any notice provided that WELLS FARGO may not be the Lender.

25) Nowhere in the HAMP Trial Period packet is any notice that acceptance into HAMP is contingent on a decision made by any entity other than WELLS FARGO.

26) Nowhere in the HAMP Trial Period packet is any notice that Petitioner's eligibility may be in doubt.

27) After being accepted into the HAMP Trial Period, Petitioners timely made all three of the stated Trial Period Payments required to secure a permanent modification.

28) WELLS FARGO accepted the HAMP Trial Period Payments, but did not send a Modification Agreement.

29) At WELLS FARGO'S behest, Petitioners continued making payments to WELLS FARGO in the amount of the Trial Period Payments.

30) Petitioners contacted WELLS FARGO to check on the status of the modification and were informed that it was being processed.

31) On April 5, 2010 WELLS FARGO sent Petitioners a letter informing them that Petitioner's "may not be eligible" for HAMP because, "[WELLS FARGO] service[s] your loan on behalf of an investor or group of investors that has not given us the contractual authority to modify your loan under [HAMP]." [Ex.5]

32) The April 5, 2010 letter disclosed that WELLS FARGO had been directed to place Petitioner's "mortgage" in a review file until May 5, 2010, and instructed Petitioners to continue making their Trial Period Payments.

33) On April 29, 2010, WELLS FARGO sent another letter informing Petitioners that WELLS FARGO would not modify their loan because, "the investor on your mortgage has declined the request." This letter stated that the Trial Payments would be retained by WELLS FARGO and applied to the loan in accordance with the "current loan documents." WELLS FARGO further instructed that the only options they could recommend would be a short sale or a deed in lieu of foreclosure. [Ex.6]

34) WELLS FARGO reported Petitioners' loan as 180+ days delinquent on June 2010, despite the payments made pursuant to the agreement between WELLS FARGO and Petitioners.

35) WELLS FARGO'S reporting of this delinquency has adversely impacted Petitioners' credit on their credit report. [Ex. 6 of Petitioner's Supplement to Documenation.]

36) Petitioners have attempted to refinance the home twice, but have been rejected because of an adverse credit report caused by FHLB and WELLS FARGO.

37) On August 6, 2010 WELLS FARGO'S trustee National Default Servicing Corporation recorded a Notice of Default.

38) Petitioners elected to mediate under NRS 107.086.

39) At the mediation, WELLS FARGO submitted the original Deed of Trust demonstrating that it was the beneficiary.

40) During the mediation, WELLS FARGO'S telephonic representative disclosed that WELLS FARGO was not the owner of the loan, but rather merely the servicer. After almost two (2) hours of search, the representative could not conclusively identify the owner of the loan.

41) The Mediator found that WELLS FARGO'S representative lacked the requisite authority under NRS 107.086.

42) The Mediator found that WELLS FARGO acknowledged that the late fees charged during Petitioners' Trial Period were wrongful, and that WELLS FARGO rescinded the same after Petitioners showed they "had complied with every detail then offered by the bank."

43) At no time has this Court been informed how or when FHLB acquired an interest in Petitioners' home loan.

44) At no time has this Court been informed that WELLS FARGO actually contacted FHLB to request a HAMP modification, or substantively similar private modification.

Discussion

Conduct Prior to Mediation Only Relevant Insofar as it Impacted Mediation

At the Evidentiary Hearing, WELLS FARGO lodged numerous objections to the admission of testimony and evidence of conduct prior to the mediation. This Court overruled

each. WELLS FARGO further argued that such evidence and testimony should only be admitted for background and foundational purposes.

At status hearings prior to the evidentiary hearing, WELLS FARGO had argued that issues of what occurred prior to the mediation are outside of the scope of this Court's authority sitting in judicial review of a foreclosure mediation under FMPR Former Rule 6(1) and NRS 107.086(5). Essentially, even if it were true that WELLS FARGO'S conduct prior to the mediation would give rise to a negligent misrepresentation claim, or a promissory estoppel claim, or a breach of contract claim, or warrant an injunction against a foreclosure for some violation of law, because by terms of the Trial Period Program a Modification offered by WELLS FARGO without authority, a permanent Modification was mandated upon successful completion of the Trial Period and the Trial Period was successfully completed by Petitioners, those claims must be brought separately. This Court agrees with WELLS FARGO'S underlying legal theory that review is limited to the foreclosure mediation and that other claims must be brought through independent actions; but finds that the testimony and evidence introduced by Petitioner of what occurred prior to the foreclosure mediation is relevant to what occurs at the foreclosure mediation. While this Court cannot entertain independent legal *claims* and award relief for those *claims*, this Court can, and does, find those same *facts* relevant.

A categorical prohibition on the admission of evidence and testimony of prior conduct would deprive this Court of the ability to contextualize the mediation. When reviewing for good or bad faith participation, context is everything. If this Court were deprived of context, this Court would be unable to analyze whether a lender engaged in a pattern of conduct over multiple mediations tended to infer that some technical violations were actually intentional flouting of the law. Similarly this Court would be unable to look to a homeowner's previous conduct to determine whether mediation and review procedures were merely being used as a stall tactic, or to leverage a modification where none was necessary. This Court finds the entire relationship between the parties may be considered, with relevancy being the crux for whether such evidence and testimony is admissible.

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For instance, if the prior conduct at issue was a November 2009 HAMP modification that was reneged upon, but at the mediation the sole point of error was inadequate production of documents, then that November 2009 HAMP modification ostensibly would have had no impact on the mediation, and thus would not be particularly relevant to this Court's determination.

But, in the present case, what occurred between the parties prior to mediation had bearing on the mediation and is relevant. The November 2009 HAMP modification is directly relevant to the mediation in several ways. 1) The issue of uncertain ownership calls into question WELLS FARGO'S authority to mediate; 2) Prior performance or breach by a party in the foreclosure mediation program sheds light on their good faith participation; 3) The prior agreement shows the contours of a fair resolution.

Trial Period Plan/Modification Agreement Terms Read In Context With Agreement

The HAMP packet contained language in a separate sheet titled "Important Program Info" that, "The Trial Period Program is the first step. Once we are able to confirm your income and eligibility for the program, we will finalize your modified loan terms. . ." [Ex. 4] This Court finds that this language is not contained within the four corners of the agreement. This informational packet must be read in context with the provisions of the actual agreement which unequivocally stated that if Petitioner's complied with the Trial Program that WELLS FARGO would send a Modification Agreement for Petitioner's signature which would "reflect the new payment amount and waive any unpaid late charges." [Ex. 4]

The "eligibility" language in the "Important Program Information" could not be reasonably understood by an applicant to mean that there may be eligibility problems based on actions taken by WELLS FARGO. Rather, the "eligibility" language gives notice to applicants that if their income cannot be verified or if they do not abide by the Trial Period Program terms, that they will not receive a Modification Agreement.

Here, Petitioners successfully made all three trial payments, and by terms of the agreement executed by WELLS FARGO, Petitioners were to receive a Modification Agreement to permanently modify the loan. This did not occur, and upon receipt of a Notice of Default, Petitioners elected mediation.

Submitted "True and Certified" Documents Contradict WELLS FARGO'S Status

In its written *Response*, WELLS FARGO does not disclose in what capacity it attended the mediation, nor its relationship to the loan. At the Evidentiary Hearing, WELLS FARGO represented to this Court that it was the originator of the home loan note, and was the original beneficiary of the deed of trust. WELLS FARGO also represented to this Court that it no longer "owns" the note.

WELLS FARGO submitted "True and Certified" Documents to the Presiding Mediator that it was the beneficiary of the deed of trust. WELLS FARGO submitted a certified copy of the original Note showing WELLS FARGO to be the holder of the Note. WELLS FARGO did not submit any assignments of the deed of trust, or any endorsements of the Note.

The Rules in effect at the time of the mediation required that in order for certified copies to be acceptable, they must state under oath that "the person making the certification is in actual possession of the original mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust." Former Rule 5(10)(b)

The documents provided to the Presiding Mediator stated that WELLS FARGO was the beneficiary of the deed of trust and the holder of the note. However, at the mediation, WELLS FARGO'S telephonic representative, Greg Eastman, indicated that WELLS FARGO was merely the servicer, and that he could not tell who owned the Note.

All parties now agree that Federal Home Loan Bank, FHLB, is the owner of Petitioner's loan.[1] This Court has not been informed which FHLB is the owner of Petitioner's loan. Thus, even at the end of the Evidentiary Hearing, this Court does not actually know who owns Petitioner's loan. It is apparent that Petitioners also still do not know who owns their loan. Based on the record it is not clear that WELLS FARGO actually knows who owns the loan.

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[1] This Court notes that there are twelve Federal Home Loan Banks in the United States of America. This Court has not been informed which of these entities owns Petitioner's Loan. Based on geographic region it appears likely that Federal Home Loan Bank San Francisco is the owner. However, WELLS FARGO has not recorded any assignments to FHLB –San Francisco; has assigned one other Deed of Trust to Federal Home Loan Bank – Chicago [*See*, Corporation Assignment of Deed of Trust DOC # 3603514 of the Washoe County Records]; and has assigned well over one hundred Deeds of Trust to FHLMC (a HAMP participant). Petitioner DUKE RENSLOW'S credit report admitted into evidence shows that DUKE RENSLOW'S credit has been reviewed five times in 2010 by "FEDERAL HOME LOAN BANK OF" [Ex. 10]

WELLS FARGO admits it no longer owns the loan. This Court has not received any evidence of the manner in which the loan was transferred. WELLS FARGO has not demonstrated that it properly endorsed the note to FHLB, nor assigned the Deed of Trust.

In the documents provided at mediation, WELLS FARGO stated under oath that "the person making the certification is in actual possession of the original mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust." Former Rule 5(10)(b) However, the evidence has not borne this statement out. This Court finds that WELLS FARGO did not meet the documentary requirements of NRS 107.086(4) and Former Rule 5(10)(b). Under NRS 107.086(5), this Court finds the appropriate sanction for this failure to be seven thousand five hundred dollars ($7,500.00)

WELLS FARGO Merely Servicer

This case presents a novel legal issue in that WELLS FARGO is apparently still the beneficiary of the Deed of Trust of record. However, WELLS FARGO'S inability to complete the November 2009 HAMP Modification, and inability to offer a HAMP Modification or substantively similar private modification at mediation occurred because WELLS FARGO lacked the authority to do so.[2] WELLS FARGO'S authority to modify the loan is acknowledged to be entirely derivative of FHLB, the "owner" of the loan.

The language of NRS 107.086 specifies that the beneficiary of the Deed of Trust, or their representative, shall attend the mediation. Implicit in the plain language of NRS 107.086 is an assumption that beneficiaries of the Deed of Trust have decision making authority. Throughout the Foreclosure Mediation Rules in effect at the time of the subject mediation there is again an implicit assumption that the beneficiary of the Deed of Trust is the proper party to mediate because that party has authority. The term "beneficiary of deed of trust" and "lender" are used in an apparently interchangeable manner in the rules. *See*, FMPR Former Rule 1(2) "lender", Former Rule 5(8)(a) "beneficiary (lender)", Former Rule 7(1)) "beneficiary".

[2] This Court is mindful that one of the reasons for the establishment of the Foreclosure Mediation Program was that servicers, when contacted directly by borrowers, often claimed to lack authority to make modifications. Minutes of Joint Meeting of Senate and Assembly Committees on Commerce and Labor, at 13 (Feb. 11, 2009)

Former Rule 5(8)(a) and 5(10) when read together imply that Supreme Court conceived of the beneficiary of the deed of trust as being the same party as the holder of the note. Former Rule 4(8)(a) requires that:

> All beneficiaries of a deed of trust . . . shall participate in the Foreclosure Mediation Program, be represented at all times during a mediation by a person or persons who have the authority to *negotiate and modify the loan* secured by the deed of trust sought to be foreclosed . . . . In addition to the documents required by Rule 8 herein, the beneficiary must bring to the mediation the original or a certified copy of the deed of trust, *the mortgage note*, and each assignment of the deed of trust and *the mortgage note*.[3] (*emphasis added*)

Former Rule 5(8)(a) does not specify why the additional documents are required, but a reasonable interpretation of this rule infers that those documents tend to demonstrate authority and that the proper party to negotiate is present. Former Rule 5(10) mandates that the production of the mortgage note is only valid when the beneficiary of the deed of trust swears under oath that the note is in the possession of the person making the certification.

Although both NRS 107.086 and the Foreclosure Mediation Program Rules repeatedly specify the beneficiary of the deed of trust, and do not use the terms "holder" or "creditor," the focus throughout is on the ability to modify the loan.

This is supported by the legislative history of AB 149:

> "[Borrowers] cannot get a lender on the phone. They cannot get to someone willing to work with them. The reason might be that the loans have been sold so many times that it is not clear who the *lender* is." (emphasis added)

Further:

> "The other key component of this bill is that *lenders* or their representatives must appear or otherwise be available throughout the mediation. They also have to present a certified copy of the deed of trust and the promissory note, so that we know the person who is foreclosing *actually owns the note*." (emphasis added)

Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor February 11, 2009 p.5-7. (Comments of Assembly Speaker Barbara Buckley)

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[3] The newly amended Foreclosure Mediation Program Rules effective March 1, 2011 renumbered Rule 5(8) to Rule 10(1), and specified that "each endorsement of the mortgage note" must be provided.

The legislative history further indicates that the Legislature intended the party with actual beneficial interest should be present at the mediation.

> "The third amendment clarifies the term "trustee" to "beneficiary of the deed of trust." That language is more precise since we do not want the trustee to be there; we want the person with the beneficial interest to be present."

Assembly Committee on Commerce and Labor, March 11, 2009, p.5. (Comments of Assembly Speaker Barbara Buckley)

The Legislature's choice of the term "beneficiary of deed of trust" was not designed to elevate form over substance. Rather, the Legislature believed that "beneficiary of the deed of trust" was the term that would cause the party with actual beneficial interest to appear. In circumstances such as this, where the beneficiary of record of the deed of trust appears to have no actual beneficial interest, it is clear that the Legislature did not intend for the beneficiary to appear, but rather for the entity possessing actual beneficial interest.

The Supreme Court of Nevada has not yet had occasion to declare the law of Nevada as it relates to determining what entity has beneficial interest when faced with competing or imperfect transfers of interest in a secured home loan. The traditional approach to transferring interest in mortgages from one creditor to another has been by endorsing the note and assigning the mortgage or deed of trust, usually contemporaneously. In recent years, the financial industry has adopted novel methods of non-contemporaneous or incomplete or unrecorded transfers, that are not particularly relevant to the case at bar other than for a determination of who has actual beneficial interest sufficient to have standing to participate in the mediation program (either directly or through a duly appointed representative), and whether WELLS FARGO as the beneficiary of the deed of trust was empowered to attend the mediation on its own, or whether its authority was solely derivative as a representative of FHLB. The two prevailing theories throughout the nation are the Longan Rule and the Restatement (Third) approach.

In Carpenter v. Longan, 83 U.S. 271 (1872), the United States Supreme Court held that mortgages and notes are inseparable. Transferring the note carries with it the mortgage by operation of law. An attempt to transfer the mortgage without expressly transferring the note is a nullity, and the purported assignee has received nothing but worthless paper. Although Nevada

uses Deeds of Trusts instead of "mortgages", the rule is still applicable.[4] Under this approach, when WELLS FARGO transferred the note to FHLB, by operation of law, WELLS FARGO ceased being the mortgagee/beneficiary of the deed of trust. Instead, FHLB is the actual beneficiary, but has an unrecorded beneficial interest and essentially holds a wild deed.[5] Longan has never been repudiated or overturned, although it is of venerable vintage.

The competing theory is set forth in the Restatement (Third) of Property – Mortgages § 5.4, which specifically repudiates Carpenter v. Longan as archaic and founded on a now discarded theory of mortgages. Under the Restatement, the transfer of either the mortgage or the note carries the other with it, unless there is intent to sever the two. In analyzing the state of Nevada Common Law as it relates to real property, this Court finds that the Nevada Supreme Court has adopted the Restatement (Third) of Property – Mortgages on a consistent basis. This Court finds then that the Restatement (Third) approach is the proper approach for Nevada Courts. On the facts here, there is no indication that WELLS FARGO intended to sever the Deed of Trust from the Note. Therefore, by transferring the Note to FHLB, WELLS FARGO also transferred all beneficial interest in the Deed of Trust.

Under either approach, on the facts here, WELLS FARGO, although the beneficiary of record, had no beneficial interest in the Deed of Trust, and no right to proceeds from the Note. Therefore, at most, WELLS FARGO was a servicer for FHLB, and notwithstanding the language of NRS 107.086 and the Foreclosure Mediation Program Rules, had no independent standing to negotiate or appear at the mediation in any capacity other than as a "representative" of FHLB.

Servicer Representatives Amenable to Sanctions

Servicers do not have *independent* standing to participate in the Foreclosure Mediation Program. NRS 107.086 evidences a clear Legislative intent to have the party holding beneficial interest in the property at the mediation table. Rather, this Court has found that servicers may

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[4] *See*, Sims v. Grubb, 75 Nev. 173, 178 (1959); 59 C.J.S. Mortgages § 6; Restatement (Third) Trusts § 5 comment k

[5] The Supreme Court of Massachusetts, analyzing non-contemporaneous transfers of the note and mortgage, has held that "[T]he holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment" U.S. Bank National Association v. Ibanez, *Slip Copy* SJC 10694 at 11 (Mass. 2011) (*rejecting* transfer of mortgage by operation of law when note is transferred without mortgage.)

qualify as a "representative" for the beneficiary of the deed of trust within the meaning of NRS 107.086(4)'s requirement that, "The beneficiary of the deed of trust or a representative shall attend the mediation." *See, Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 2,3.

NRS 107.086(3) requires the trustee to notify the present beneficiary of the deed of trust and "every other person with an interest as defined in NRS 107.090. . ."[6] No evidence or testimony from WELLS FARGO tended to show that FHLB was in fact properly noticed. Given the oddities of the manner in which WELLS FARGO remains the beneficiary or record, this Court is troubled that whichever FHLB actually owns the loan may not have received notice that a mediation was scheduled to occur.

However, in other contexts, this Court has found that when a master servicer acting as a representative exceeds its authority in reaching an agreement at mediation, that the homeowner shall retain the benefit of the bargain, and that the lender shall have recourse only against the servicer. *See, Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 2,3. This seems a fitting rule for situations in which a master servicer may have essentially usurped the lender's place at the mediation table. If sanctions issue based on the conduct of the servicer that materially impact a right of the lender, then the lender shall have cause solely against the servicer. An innocent homeowner shall not suffer because a servicer's conduct has resulted in harm to the lender.

Here, Petitioners had an awareness prior to mediation that WELLS FARGO was not the owner of their loan, based on the April 29, 2010 termination letter. However, Petitioners were entitled to negotiate in good faith with the servicer of their loan acting as a representative for FHLB. Petitioners participated but had the purposes of the mediations frustrated by WELLS FARGO'S actions.

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[6] NRS 107.090(1) defines a "person with an interest" as "any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated."

This Court finds that the language of NRS 107.086(5) and Former Rule 6(1) is broad enough to sanction the servicer representative when the servicer appears at the mediation, and the deficiencies or violations are attributable to the representative and not the underlying lender.

Here, the violations are attributable to WELLS FARGO. WELLS FARGO submitted "true and certified" documents that conflicted with their representations as to ownership of the loan. WELLS FARGO could not identify the owner of the loan. WELLS FARGO's actions necessitated a mediation. It was WELLS FARGO that lacked authority. Thus, it is WELLS FARGO who should be bear the burden of any sanctions.

Bank Representative's Lack of Experience No Excuse

WELLS FARGO'S telephonic representative, Greg Eastman, did not know who owned the note. [Ex.1] At the evidentiary hearing, representative Eastman did not appear. Rather another individual, Phillip CARGIOLI from WELLS FARGO who serves as a telephonic representative in other mediations, appeared and testified that at the time of the mediation Mr. Eastman had been a loan adjustment officer for a mere four months.

Lack of experience is no excuse. Servicers have no independent authority in the Foreclosure Mediation Program. They are mere representatives. A new employee of a servicer acting as representative is held to the same standards under NRS 107.086 and the Foreclosure Mediation Rules as the most experienced hand. The failure of a representative to know who they represent is unacceptable. The testimony and evidence introduced demonstrates that well over an hour and a half of the mediation was spent trying to determine the identity of the lender. Petitioners had to leave the room for some time while this occurred. This clearly had a negative impact on the mediation.

Representatives must have full authority, or have access at all times to full authority. NRS 107.086(4); Former Rule 5(8)(a) It is clear that Mr. Eastman did not know what his authority was or even from whom it was derived "at all times". This Court finds that one cannot have access to an unknown entity. This is a violation of Former Rule 5(8)(a) which had a material and negative impact on the mediation. It is also a violation of NRS 107.086(4) which the Legislature has expressly authorized this Court to sanction for even mere technical violations.

In this instance, these violations had a detrimental impact and led to a finding by the mediator that the representative of the lender did not have the requisite authority. Under this Court's *de novo* review, this Court finds that the lender did not appear directly at the mediation. The lender only appeared through a representative, as authorized by NRS 107.086(4). However, that representative did not have sufficient authority to negotiate and modify the loan, and did not have access to such a person with authority "at all times." This Court finds the appropriate sanction for lack of authority in this case to be a monetary sanction in the amount of ten thousand dollars ($10,000.00) and an equitable sanction discussed *infra*.[7]

Petitioner Clearly Qualified for a Modification

Respondent contended that, "[P]etitioner did not qualify for a modification and therefore no agreement was reached." [Resp. at p.2] However, during the evidentiary hearing, Respondent's counsel asked a question that intimated that Petitioner had been offered a modification that would reduce the payment by $268.00 per month.[8] Further, WELLS FARGO'S witness, CARGIOLI testified that an offer reducing the payment by $268.00 per month had been made by Mr. Eastman. However, CARGIOLI had no personal knowledge that this offer was made. CARGIOLI was not involved in the RENSLOW'S mediation. CARGIOLI testified that he had "briefly reviewed . . . Mr. Eastman's notes from the mediation." [Trans. at 58] These notes were not introduced into evidence. The actual terms of this purported modification offer were not addressed. This Court does not have any information whether the $268.00 was a permanent modification, whether it created a balloon payment, whether it was a temporary modification, whether there were any fees and penalties associated with this purported offer. No testimony or evidence was given as to the source of authority for making this purported offer. The record is bereft of competent evidence for this Court to make a finding that a particular offer was in fact made. The record does not contain competent evidence of the terms

[7] Were equitable sanctions unavailable, this Court would increase the monetary sanctions.

[8] Questions of counsel are not testimony. Here, the questions of Respondent's counsel elicited an answer that Petitioner's representative Alsasua did not recall the terms of an offered modification. [Trans. at p.11] Petitioner also did not recall the terms of any specific modification being offered [Trans. at p.28] No one actually present at the mediation testified as to the terms of this purported offer, and the offer was not reflected on the Mediator's Statement.

of any such purported modification such that this Court could analyze the offer for its impact on good faith participation.

However, although this Court does not have sufficient evidence before it to find that a particular offer was made, or that that offer was a good faith offer, the testimony of WELLS FARGO is sufficient for the purpose of analyzing WELLS FARGO'S contention that, "[P]etitioner did not *qualify* for a modification and therefore no agreement was reached. Just because the [P]etitioner did not *qualify* for a modification does not mean that the [R]espondent did not have the required authority." [Resp. at p.2] The statement in the Response is directly contradicted by the testimony of WELLS FARGO'S representative CARGIOLI at the evidentiary hearing; they cannot both be true. No argument was made in support of the statement in the Response under NRCP Rule 11(b)(2) and (3).[9]

Respondent's representative witness CARGIOLI further admitted that the refusal to offer a specific modification, the HAMP modification previously agreed to, was based not on Petitioners' qualifications or lack thereof but rather on the fact that the underlying lender did not participate in HAMP and thus had not authorized the servicer to enter into a HAMP modification.[10]

Therefore, this Court finds that Petitioners did qualify for *a* modification; that Petitioners qualified for the HAMP modification offered in November 2009; and that the inability to enter into a modification at mediation stemmed from WELLS FARGO'S lack of authority to offer a HAMP modification.

Respondent's Conduct Impaired Petitioner's Ability to Obtain a Refinance

Respondent contends that loan modifications "are primarily for individuals who are unable to refinance their house. . ." and that "Petitioner would be in a better position to have

[9] This Court does not find a need to *sua sponte* enter an order to show cause under Rule 11(c)(1)(b).

[10] This Court professes a certain shock at the fact that a FHLB, as a federal GSE, does not participate in HAMP, which is required for loans owned by FNMA and FHLMC, two other federal GSE's. The fact that the Federal Home Loan Mortgage Corporation authorizes HAMP modifications while the Federal Home Loan Bank does not, that WELLS FARGO has sold mortgages in the past to both of these entities, and that the election to sell to one over the other is completely outside of the borrower's control has a certain Kafkaesque quality. Had WELLS FARGO simply chosen FHLMC instead of FHLB, this entire matter would have been averted.

refinanced their loan rather than allow it to go into default. In fact, if the [P]etitioners have as much equity as they claim, then they are still in a position to refinance the loan. . ." [Resp. at p.2]

Here, Petitioners are in fact presently unable to secure a refinance of their home, due to the actions of WELLS FARGO. They have made several attempts to do so, both through WELLS FARGO itself, and through U.S. Bank. However, because WELLS FARGO placed negative reports on Petitioners' credit reports, Petitioners are unable to obtain a refinance. [Ex.10]

Respondent's statement that Petitioners would have been better off refinancing rather than defaulting is tempered by the fact that Petitioners contacted WELLS FARGO prior to defaulting to work out arrangements regarding their loan and were instructed by WELLS FARGO that they could not be helped until they were sixty (60) days late.

This Court does not appreciate WELLS FARGO'S Monday morning quarterbacking regarding what Petitioner ought to have done when WELLS FARGO'S actions both precipitated Petitioners' default and impaired Petitioner's ability to obtain a refinance. These comments in WELLS FARGO'S written *Response*, when compared to the evidence in record, demonstrate either a complete lack of knowledge or outright disregard of the facts of this matter. These comments are nothing short of shameful.

Respondent's Admission That Late Fees Were Properly Rescinded Stands

At the mediation, WELLS FARGO explained that the November 2009 modification had been withdrawn because WELLS FARGO lacked the authority to offer it. Petitioners demonstrated to the Mediator and to WELLS FARGO'S representative that they had been charged penalties and late fees despite the fact that they had complied with all terms of the November 2009 modification and with "every detail then offered by the bank." Upon this showing, WELLS FARGO rescinded the fees and penalties. [Ex.1]

The plain language of the Mediator's Statement shows that WELLS FARGO'S rescission was not contingent, conditional, or part of an agreement. The rescission was an admission that the fees and penalties were improper. WELLS FARGO is estopped from reneging on that admission made by their representative. All fees and penalties incurred during, or as a result of,

the November 2009 modification have been RESCINDED and WAIVED. WELLS FARGO may not in any way attempt to collect on the same.

Mediation Fee Not Chargeable

When the Legislature enacted AB 149 implementing NRS 107.086, the Legislature made expressly clear that the mediation fee was to be evenly distributed between homeowners and lenders. NRS 107.086(8)(e); FMPR 5(1) (Former Rule 16(1))

WELLS FARGO has ignored this completely. WELLS FARGO has sought to recover the mediation fee, in direct contravention of the Legislature's express desire to evenly apportion the costs between homeowners and lenders.[11] [Petition Exh. 3] Even more shocking to this Court is that WELLS FARGO attempts to charge $500.00 as a "Mediation Fee", well in excess of the $200.00 that WELLS FARGO paid. Homeowners are legally entitled to seek a mediation. Each party bears their own cost of mediation. To shift the burden from an even division to resting solely on the homeowner is contrary to the spirit and letter of the law. To charge more than the fee paid, in essence to attempt to profit from the homeowner's election, is outrageous.

While this Court would certainly impose sanctions for the bare attempt to recover the mediation fee alone, when confronted with uncontroverted evidence that Lender is seeking to recover 250% of its statutory burden, this Court finds that harsh sanctions must be issued to deter such unscrupulous conduct in the future. This Court finds that the attempt to recover 250% of the mediation fee is appropriately assessed a 250% sanction. Accordingly, for this egregious and intentional violation, WELLS FARGO is SANCTIONED $1,250.00 (one thousand two hundred and fifty dollars).

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[11] The Mediation Fee is included on a reinstatement letter from National Default Servicing Corporation, which is WELLS FARGO'S foreclosure trustee. Foreclosure trustees are agents of the trustor and beneficiary of the deed of trust. *See*, Hendrickson v. Popular Mortg. Servicing, Inc.2009 WL 1455491 (N.D. Cal 2009) at *7 (citations omitted) (cited with approval by Nieto v. Litton Loan Servicing, LP, 2011 WL 797496 (D. Nev 2011) at *5); see also 54A Am. Jur. 2d Mortgages § 123 – Relationship of trustees to other parties in interest; Restatement (Third) Trusts § 5 comment k; Bogert's Trusts and Tustees §29 Mortgages and Trust Deeds (2010). Therefore, the actions of the trustee are imputed to WELLS FARGO. If the trustee's assessment of the fee exceeded their agreement with WELLS FARGO, then WELLS FARGO may seek to recover sanctions from the trustee.

Testimony and Evidence Lead to Competent Finding of Lack of Good Faith

This Court finds that WELLS FARGO'S conduct in this mediation falls well below the threshold of "good faith" negotiations. Thus, WELLS FARGO has failed to meet its burden to show why sanctions should not lie pursuant to NRS 107.086(4) which authorizes this Court to issue sanctions, without limitation, including modifications

Here, Petitioners were in a mediation with a representative servicer for a lender. Petitioners were only there because the servicer had executed an agreement to modify the loan, and after Petitioners had satisfied the terms, the servicer terminated the agreement.

The question of why a mediation occurs shapes the contours of what a good faith result will look like. Where a homeowner is in a mediation because they are attempting to receive a principal reduction despite the fact that the homeowner is more than capable of affording all obligations at their present rate, a good faith result may very well be that a lender offers reinstatement only. However, here, Petitioners were in a mediation because they were attempting to receive the modification previously promised and denied them, or one substantively similar.

It is in analyzing the good faith participation that this Court finds relevance in prior conduct. Good faith is not merely *pro forma* lip service to the rules. This Court has found that although good faith and bad faith escape precise definition, they are capable of description such that this Court may adequately determine their presence or absence. This Court adopts as a useful reference the descriptions of both concepts as follows:

> **Good Faith:** Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it emcompasses, among other things, an honest belief, the absence of malice and the absence of design to defraugh or to seek an unconscionable advantage, and an indvidual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. Doyle v. Gordon 158 N.Y.S.2d 248, 259 . . . In common usage this term is ordinarily used to describe that state of mind denoting honest of purpose, freedom of intention to defraud, and generally speaking, means being faithful to one's duty or obligation Efron v. Kalmanovitz, 57 Cal.Rptr. 248

> **Bad Faith:** The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "Bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will. Stath v. Williams 367 N.E.2d 1120, 1124.
>
> BLACK'S LAW DICTIONARY (5th ed. 1979)[12]

Although good faith is presumed, each party bears the onus of demonstrating that they are there to negotiate in good faith,[13] because good faith is typically adduced through the conduct of a party. This Court finds that conduct prior to the mediation has bearing on adducing good faith at the mediation.

Having made certain findings of fact *ante*, this Court concludes that WELLS FARGO has not demonstrated good faith participation. This Court concludes that the parties were unable to have meaningful good faith negotiations due to WELLS FARGO'S conduct at the mediation, including its failure to know who controlled the loan.

Equity regards as done which ought to be done. 30A C.J.S. Equity § 131. The basis of the maxim is the existence of a duty and it can only be invoked against a party who has failed or refused to perform a duty imposed on the party. The maxim only operates in favor of party holding an equitable right to performance, against a party with a duty to perform. *Id.* (citations omitted) Here, based on all of the evidence shown to this Court, what ought to be done is a modification of Petitioners' loan on the terms previously agreed to between Petitioners and WELLS FARGO.

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[12] This Court specifically adopts the definition from the Fifth Edition. The most recent Black's Law definition is of no assistance to this Court.

[13] This Court has adopted these working definitions because there are no Supreme Court rulings yet on point. This Court notes that the Supreme Court recently heard oral arguments in Leyva v. National Default Servicing Corp., Supreme Court Docket No. 55216 in which the definition of good and bad faith were issues. This Court has found that bad faith is not the mere absence of good faith, but the active opposite and that it requires an independent showing. *See, Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 9,10. This Court anticipates guidance from the Supreme Court in the near future.

By its conduct prior to mediation, WELLS FARGO took upon itself a duty to offer a HAMP modification to Petitioners. It refused and failed to do so at mediation. A modification on the parameters offered to Petitioners in November 2009 ought to be done.

Modification is a Permissible Sanction

WELLS FARGO did not present argument that modification of the loan is an impermissible sanction, nor cite authority for that proposition. Thus, WELLS FARGO has WAIVED such arguments.[14] However, because this is the first instance in which this Court has imposed a modification on the loan pursuant to NRS 107.086, and it appears that this may be the first such modification in the State of Nevada, it is prudent to discuss this Court's understanding of the legal grounds for modification of a home loan as a sanction.

This Court finds that NRS 107.086 is not an impermissible impairment of contracts by the Legislature. U.S.C.A. Const. art.1 §10 Rather, NRS 107.086 merely serves as an affirmation that the Legislature intended for the District Courts of the State of Nevada to have full access to the vast inherent powers the District Courts possess in equity. NRS 107.086 does not mandate modification, nor even express a particular legislative preference for modification. NRS 107.086 does not create a power of modification in this Court. Were the word "modification" omitted from NRS 107.086(5), the District Courts of the State of Nevada would possess the exact same equitable power to modify the terms of a note. Thus, NRS 107.086 does not even rise to the level of the legislation upheld by the United States Supreme Court in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)

Foreclosure is both a legal and an equitable construct. Actions involving real property are inherently equitable actions because real property is unique. Non-judicial foreclosures authorized by statute do not lose their equitable nature. Therefore, in these actions, this Court possesses its full array of equitable powers.

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[14] Indeed, WELLS FARGO concedes the power of this Court to modify loans, "The sanction of a court ordered modification of the loan as requested by the petitioner should only be utilized (if at all) when there is a finding of bad faith by the respondent." [Resp. at p.4]

When the Court imposes a modification of a home loan, it bears some similarity to reforming the note. Reformation of a written instrument is an equitable act. 66 Am. Jur. 2d Reformation of Instruments § 3.

NRS 107.086 merely confirms that a District Court *may* impose a modification and reform the note. This greatly comports with the Nevada Supreme Court's ruling in Tropicana Pizza, Inc. v. Advo, Inc., 238 P.3d 861 (Nev. 2008) adopting Restatement (Second) of Contracts § 166. "This Section. . . only states the circumstances in which a court "may" grant reformation, and, since the remedy is equitable, a court has the discretion to withhold it, even if it would otherwise be appropriate, on grounds traditionally considered by courts of equity in exercising their discretion." Restatement (Second) of Contracts § 166, cmt. a (1981).

The power of a court to impose sanctions is equitable in nature, and sanctions may be monetary or equitable. For example, a court may strike a pleading as a sanction or parts thereof under NRCP 37 *See*, Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592 (2010)

The exercise of a court's equitable power to sanction has been found to not violate due process even when it terminates a case. *See*, Skeen v. Valley Bank of Nevada, 89 Nev. 301 (1973); Societe International v. Rogerts, 357 U.S. 197 (1958) (*holding* default judgment proper sanction for willful discovery violation.) ; Hammond Packing co. v. Arkansas, 212 U.S. 322 (1909) (*holding* striking an answer and entering default judgment valid sanction). Thus, failure to abide by procedural elements of the law can result in a Court providing substantive equitable relief. There appears little difference between that proposition and the proposition that failure to obey the law as reflected in NRS 107.086 during a mediation can result in a Court granting substantive equitable relief.

Neither is the equitable imposition of a modification a regulatory taking. Mere delay in receiving investment backed expectations do not constitute a taking.[15] As to the principal,

[15] In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) the United States Supreme Court commented positively on the Ninth Circuit's determination that temporariness is a factor in determining whether a taking has occurred under Penn Central's *ad hoc* test. The United States Supreme Court rejected the view of Chief Justice Rehnquist that a delay of a set term could constitute a categorical taking. *See, id.* at n.34.

imposing a modification that extends the term of a loan merely delays the investor's expected return. The note is still worth the exact same principal balance, and is still freely assignable. As to the interest, investors in home loans have no reasonable investment backed expectation that they will realize the fully amortized value of the interest because there is no pre-payment penalty.[16] Were Petitioners to obtain a loan from another source and pay the home loan in its entirety, the investor would receive no further returns on interest. Thus, imposition of a new interest rate does not deprive the investor of anything that the investor has or could reasonably expect to have in the future.

Therefore this Court concludes that there is no impediment to the exercise of the equitable authority to impose a modification when the equities of a certain matter reveal that modification is proper. Here, those equities exist.

Equity and the Legislative History of NRS 107.086 Militate for Strong Sanctions

Beyond the technical violations of law discussed *supra*, this Court is compelled to take note that the facts present in this case are archetypal of the systemic problems that lead to the enactment of NRS 107.086.

Petitioners are hard working individuals who obtained a standard mortgage. Petitioners found themselves whipsawed by mounting medical expenses and decreased pay caused by the economic downturn colloquially referred to as the Great Recession. The economic downturn not only impaired Petitioners' income making their current mortgage difficult to afford, but also decreased the value of their home making a new mortgage through a refinance difficult to obtain.

Petitioners turned to their "lender," WELLS FARGO, seeking assistance. WELLS FARGO instructed them that it would not help unless they were further in arrears.[17] When Petitioners skipped their next payment to qualify for WELLS FARGO'S assistance, WELLS FARGO did offer them help. Unfortunately, unknown to Petitioners, and apparently unknown to

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[16] "[T]he test must be whether the deprivation is contrary to reasonable, investment-backed expectations" Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034 (Justice Kennedy concurring) (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935))

[17] This Court cannot help but wonder at the fiduciary implications of a mere servicer inviting default on a loan that it does not own.

WELLS FARGO itself, WELLS FARGO did not actually own the loan. WELLS FARGO did not actually have authority to offer Petitioners such a modification. Nevertheless, WELLS FARGO accepted payments for seven months, well in excess of the agreed upon three month trial period. Throughout this time, WELLS FARGO could not tell Petitioner why the trial period was extended beyond the specified time. WELLS FARGO provided conflicting information on who actually had authority to a HUD counselor. Petitioners had no way of knowing who owned their mortgage, and had no way of knowing what options were available to them. WELLS FARGO gave them misinformation when it instructed them on how to qualify for a HAMP loan. WELLS FARGO did not record or disclose its transfer of the loan. WELLS FARGO eventually terminated the modification, despite Petitioners compliance, because of WELLS FARGO'S own error. WELLS FARGO did not provide Petitioners with any recourse, or with any information that there could be someone else to speak to.

In response to similar situations around the State, the Legislature passed AB 149, enacting NRS 107.086. The Legislative history makes it clear that homeowners were receiving conflicting statements from their lenders, and that homeowners often could not find a person with whom to speak to discuss options to avoid foreclosure, and that often homeowners did not know who owned their loan. Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor February 11, 2009 p.5-7.

The Legislature intended to create a forum where homeowners could finally talk, preferably in person, to an individual who had actual control over the loan and who could, if not grant relief, at least discuss options. The Legislative history makes it abundantly clear that representatives for lenders had no independent authority, but were to have the full array of authority available to the lender itself. Assembly Committee on Commerce and Labor, March 11, 2009, p.5; *see also*, Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor February 11, 2009 Page 22-24.

By statute, Petitioners were entitled to speak to FHLB. FHLB was certainly permitted to send a representative. WELLS FARGO is certainly a viable representative for FHLB to send. At the evidentiary hearing, WELLS FARGO had every opportunity to introduce evidence that

the trustee validly contacted both FHLB and WELLS FARGO, that pursuant to a servicing agreement or after discussions between FHLB and WELLS FARGO that WELLS FARGO appeared at the mediation as a representative, and that WELLS FARGO had knowledge of the full array of options that FHLB could offer Petitioners, and negotiated in good faith with authority to make those offers. No such evidence was introduced.

At the mediation WELLS FARGO submitted certified documents that directly contradict its representations as to ownership of the loan. WELLS FARGO'S representative could not identify the owner of the loan. It is difficult to imagine that a representative could attend a proceeding without knowing who they represented. The lion's share of the mediation was spent determining who WELLS FARGO represented. Phrased differently, a significant portion of the mediation was spent trying to determine why WELLS FARGO was present. As a result, Petitioners were never able to speak to FHLB, or to a legitimate representative of FHLB. This falls woefully below the standard required for good faith participation under NRS 107.086. WELLS FARGO failed to participate in good faith as a representative of FHLB. This Court finds the appropriate sanctions to be both equitable sanctions and monetary sanctions in the amount of ten thousand ($10,000).[18]

Here, Petitioners have done everything that WELLS FARGO has told them to do and find themselves in worse position for it. When this process began Petitioners were thirty days late on their mortgage. After following every instruction by WELLS FARGO, and attending state mandated foreclosure mediation, Petitioners find themselves reportedly 180+ days delinquent, on the precipice of foreclosure, and facing additional charges and fees for participating in a modification program wrongfully offered to them by a servicer and facing fees for their proper and rightful decision to elect mediation. After all of this, WELLS FARGO contends that it has met its burden to comply with NRS 107.086 and asks for a certificate to foreclose and asks for attorney's fees. [Opp. at p.4] This cannot be the law. And so it is not.

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[18] If equitable sanctions were unavailable, the monetary sanctions would be increased.

This Court has found that the equitable imposition of a modification pursuant to NRS 107.086(5) would require extraordinary facts.[19] This Court had not thought it would see such facts. This Court was wrong.

Conclusion

THEREFORE, and good cause appearing, this Court **ORDERS** that:

1) WELLS FARGO is SANCTIONED in the amount of $30,000.00 (Thirty thousand dollars) for violations of NRS 107.086 and the Foreclosure Mediation Program Rules payable to Petitioners within thirty (30) days of entry of this Order;

2) WELLS FARGO shall pay Petitioners' costs and attorneys' fees for the mediation, the Petition for Judicial Review and the Evidentiary Hearing subject to the filing of a verified request for attorneys' fees and memorandum of costs to be filed by Petitioners within thirty (30) days of entry of this Order;

3) WELLS FARGO shall abide by its admission that late fees and penalties related to the November 2009 modification were improper and immediately and forever cease and desist any attempts to collect the same. However, penalties and late fees incurred prior to November 2009 are still valid;

4) Pursuant to NRS 107.086(5), on this Court's *de novo* finding that WELLS FARGO failed to participate in good faith negotiations and lacked authority to negotiate and modify the loan,[20] the subject note is **MODIFIED** as follows:

a) The current principal shall be re-amortized;

a) The payment is set at $1145.00;

b) The interest rate is reduced to 2% (two percent) for the life of the note;

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[19] This Court has used the rules of Olympic fencing as a useful framework, dividing penalties into yellow cards, red cards, and black cards. USA Fencing, RULES FOR COMPETITION (Omar Bhutta ed., 2010) Book 1, Part V, Ch. 3 Penalties t.114 – t.126 *See, Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 5,6; *Order* in Jones v. National Default Servicing Corporation (Wells Fargo Bank), CV09-03551 at p.5.

[20] This Court has specifically found that modification is warranted for either 1) lack of good faith negotiations or 2) lack of authority. Here, both have occurred, but this Court cannot modify the same note twice. If either finding were reversed on appeal, the modification would stand on the basis of the other finding.

c) The term of the note is set at ten (10) years commencing May 1, 2011 and ending on May 1, 2021.[21]

d) There shall be no pre-payment penalty.

5) The Foreclosure Mediation Program shall not issue a Certificate of Completion based on the presently recorded Notice of Default absent further Order from this Court.

IT IS SO ORDERED.

DATED this 29 day of March, 2011.

Patrick Flanagan
PATRICK FLANAGAN
District Judge

[21] It is the intent of this Court to amortize out the present principal with no reduction to the principal to generate a payment of $1145.00 at an interest rate of 2%. If the term specified by this Court is of insufficient length to result in the complete payment of the note within ten (10) years, then the length shall be extended.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 29 day of March, 2011, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Carole M. Pope, Esq. for Duke and Tina Renslow;

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Gregory Wilde, Esq.
Matthew Schreiver, Esq.
Wilde & Associates
208 South Jones Blvd.
Las Vegas, Nevada 89107

Stephen Wassner, Esq.
206 S. Division Street, Suite 2
Carson City, Nevada 89703

Judicial Assistant

FILED
Electronically
04-18-2011:09:37:59 AM
Howard W. Conyers
Clerk of the Court
Transaction # 2164185

CASE NO. CV10-03382

DUKE & TINA RENSLOW
VS.
WELLS FARGO BANK et al

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES-HEARING
3/17/11 HONORABLE PATRICK FLANAGAN DEPT. NO. 7 M. Conway (Clerk) S. Koetting (Reporter)	FORECLOSURE MEDIATION EVIDENTIARY HEARING Carole Pope, Esq. was present in Court on behalf of the Petitioners, who were present. Stephen Wassner, Esq. was present in Court on behalf of the Respondent, with Wells Fargo loan adjuster Phillip Cargioli present. 2:00 p.m. – Court convened. Counsel Pope addressed the Court and called **Benjamin Alsasua** who was sworn and direct examined. Counsel marked and offered exhibit 1; no objection. COURT ORDERED exhibit 1 ADMITTED. Cross-examination conducted, re-direct examination conducted, re-cross examination conducted. The witness was excused. Counsel Pope called **Duke Renslow** who was sworn and direct examined. Counsel Pope marked for identification exhibit 2; no objection. COURT ORDERED exhibit 2 ADMITTED. Counsel Pope marked for identification exhibit 3; objection, overruled. COURT ORDERED: exhibit 3 ADMITTED. Counsel Pope marked for identification exhibit 4; no objection. COURT ORDERED: exhibit 4 ADMITTED. Counsel Pope marked for identification exhibit 5 & 6. Counsel Pope marked for identification exhibit 7; objections to exhibit 5, 6, 7; overruled. COURT ORDERED: exhibits 5, 6, 7 ADMITTED. Counsel Pope marked for identification exhibit 8; no objection. COURT ORDERED: exhibit 8 ADMITTED. Counsel Pope marked for identification exhibit 9; no objection. COURT ORDERED exhibit 9 ADMITTED. Counsel Pope marked for identification exhibit 10; objection, overruled. COURT ORDERED exhibit 10 ADMITTED. Counsel Wassner conducted cross examination, re-direct examination conducted. Counsel Pope rested. Counsel Wassner called **Phillip Cargioli**, who was sworn and direct examined. Cross-examination conducted. The witness was released. Counsel Pope presented closing argument. Counsel Wassner presented his closing argument. Counsel Pope presented further closing argument. COURT ORDERED: Matter taken under ADVISEMENT. 4:08 p.m. – Court stood in recess.

Evidentiary Hearing Exhibits

Petitioner: Duke & Tina Renslow PATY: **Carole Marie Pope, Esq.**
Respondent: Wells Fargo Bank et al. DATY: **Stephen Wassner, Esq.**

Case No: **CV10-03382** Dept. No: **7** Clerk: **M. Conway** Date: **3/17/11**

Exhibit No.	Party	Description	Marked	Offered	Admitted
1	Petitioner	Mediator Statement	3-17-11	No objection	3-17-11
2	Petitioner	Copy of Deed of Trust Parcel number 086-225-04	3-17-11	No objection	3-17-11
3	Petitioner	Copy of Letter from Wells Fargo to Duke and Tina Renslow dated 9-17-09	3-17-11	Objection overruled	3-17-11
4	Petitioner	Copy of Home Affordable Modification Program Loan Trial Period	3-17-11	No objection	3-17-11
5	Petitioner	Copy of Letter from Wells Fargo to Duke and Tina Renslow dated 4-5-10	3-17-11	Objection overruled	3-17-11
6	Petitioner	Copy of Letter from Wells Fargo to Duke and Tina Renslow dated 4-29-10	3-17-11	Objection overruled	3-17-11
7	Petitioner	Copy of Letter from Wells Fargo to Duke and Tina Renslow dated 8-5-10	3-17-11	Objection overruled	3-17-11
8	Petitioner	Copy of Notice of Default and Election to Sell under Deed of Trust	3-17-11	No objection	3-17-11
9	Petitioner	Mortgage Interest Statement	3-17-11	No objection	3-17-11
10	Petitioner	Equifax Credit Report for Duke A. Renslow	3-17-11	Objection Overruled	3-17-11

Code: 2540
Carole M. Pope, SBN 3779
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Attorney for Borrowers/Petitioners

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

DUKE RENSLOW and TINA RENSLOW,

Petitioners,

vs. CASE NO. CV10-03382

WELLS FARGO BANK, and DOES 1 through 10, DEPT. NO. 7

Respondents.
_____/

NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES TO THE ABOVE-ENTITLED ACTION.

NOTICE IS HEREBY GIVEN that this Court entered an Order in the above-entitled matter on March 29, 2011. A true and correct copy of the Order is attached hereto and incorporated by reference.

***

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any

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RENO, NEVADA 89501
(775) 337-0773

person.

DATED this 30th day of March, 2011.

The law office of
CAROLE M. POPE,
a professional corporation

CAROLE M. POPE

Attorney for Petitioners

THE LAW OFFICE OF
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am over 21 years of age, not a party to nor interested in the herein matter, and that on this date, I deposited for mailing, a true and correct copy of the foregoing ***Notice of Entry of Order*** in Reno, Nevada, postage fully prepaid, addressed to the following:

Gregory L. Wilde, Esq.
Matthew K. Schriever, Esq.
Wilde & Associates
212 S. Jones Blvd.
Las Vegas, Nevada 89107

National Default Servicing Corporation
7720 N. 16th Street, Suite 300
Phoenix, Arizona 85020

Stephen R. Wassner, Esq.
206 South Division Street, Suite 2
Carson City, Nevada 89703-4276

DATED this 30th day of March, 2011.

Deanna M Church

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DUKE RENSLOW and TINA RENSLOW,

Petitioners,

vs.

WELLS FARGO BANK, and DOES 1 through 10,

Respondents.

Case No.: CV10-03382

Dept. No.: 7

ORDER

Procedural History

On October 19, 2010, Petitioners DUKE and TINA RENSLOW ("RENSLOWS") attended a mediation under the auspices of the Foreclosure Mediation Program with Respondents WELLS FARGO BANK ("WELLS FARGO"), representative for FEDERAL HOME LOAN BANK. No agreement was reached. The Mediator's Statement stated that WELLS FARGO did not have the requisite authority to modify the loan. On November 9, 2010, Petitioners timely filed a *Petition for Judicial Review*. This Court entered its *Order for Judicial Review* on November 12, 2010. On December 10, 2010 WELLS FARGO filed their *Response*. On December 15, 2010 Petitioners filed their *Reply*. On January 28, 2011, this Court held a hearing on the *Petition* and ordered an Evidentiary Hearing held. On January 31, 2011, Petitioners filed a *Supplement* containing exhibits in support of their *Petition*. On March 17, 2011 the Evidentiary Hearing was held. Both parties appeared in person, and presented their case.

Legal Standards

The scope of Judicial Review in Foreclosure Mediation cases is to analyze the underlying mediation, determine bad faith, enforce agreements between the parties, and determine sanctions pursuant to NRS Chapter 107. FMPR 21(1) (Former Rule 6(1)). Mediations conducted pursuant to NRS 107.086 are held to a standard of "good faith" negotiation. NRS 107.086. Petitions for Judicial Review of Foreclosure Mediation are conducted using a "*de novo*" standard. FMPR 21(5) (Former Rule 6(5)).

Findings of Fact

At the conclusion of the evidentiary hearing, after careful consideration of the testimony of witnesses, evidence admitted, and argument of counsel, this Court **finds** the following facts:

1) WELLS FARGO is the beneficiary of record of a Deed of Trust which is the security instrument to the Note. [Ex.2]

2) WELLS FARGO was the originating lender of the home loan, and original holder of the Note executed by the RENSLOWS.

3) Petitioners were never notified that the Deed of Trust had been assigned, or that the Note had been transferred.

4) On some uncertain date, WELLS FARGO transferred the Note by uncertain means to a certain FEDERAL HOME LOAN BANK ("FHLB").

5) WELLS FARGO has not recorded an assignment of the Deed of Trust.

6) WELLS FARGO did not provide a proper endorsement of the Note at mediation or throughout the judicial review proceedings.

7) WELLS FARGO did not inform Petitioners that their home loan had been sold, neither did FHLB contact Petitioners with such information. *See*, 15 U.S.C. 1641(g)(1)

8) Since the date that WELLS FARGO transferred the Note to FHLB, WELLS FARGO has acted as a master servicer of the loan, and has been Petitioner's sole point of contact throughout the entire life of the loan from origination through the present day.

9) In July 2009, Petitioners were <u>not</u> in default of their obligation under the Note.

///

10) In July 2009, Petitioners contacted WELLS FARGO to request a modification of their loan as Petitioners faced pay cuts and mounting medical bills for their daughter.

11) WELLS FARGO informed Petitioners that WELLS FARGO would only discuss modification if Petitioners were sixty (60) days late, and that Petitioners were not eligible for assistance unless they were sixty (60) days late.

12) Petitioners became sixty (60) days late in order to discuss a modification with WELLS FARGO, and to be eligible for assistance.

13) WELLS FARGO provided Petitioners with a Home Affordable Modification Program ("HAMP") application. WELLS FARGO participates in the HAMP program on loans for which it is the lender.

14) Petitioners made their next payment so that they would not be ninety (90) days late, and in default on their loan, so as to avoid foreclosure.

15) Petitioner completed the HAMP application and properly returned it to WELLS FARGO.

16) On September 17, 2009 Petitioners received a letter from WELLS FARGO stating, "You did it!" and accepting Petitioners into the HAMP program. [Ex.3]

17) The HAMP trial period began on November 1, 2009. [Ex.4]

18) Petitioners were informed that they did not need to make their October payment by WELLS FARGO.

19) When Petitioners did not make their October payment, they had missed a total of three payments. This put Petitioners ninety (90) days in arrears.

20) The HAMP Trial Period Packet states that WELLS FARGO is the "Lender".

21) The HAMP Trial Period Packet stated that the monthly payments during the trial period would be $1,127.06. [Ex.4 p.2]

22) The HAMP Trial Period Packet stated that "the last Trial Period Payment is due 2/1/2010" [Ex.4 p.2]

23) The HAMP Trial Period Packet stated that upon successful completion of the Trial Period, Petitioners would (not might) receive a modification on substantially similar terms.

24) Nowhere in the HAMP Trial Period packet is any notice provided that WELLS FARGO may not be the Lender.

25) Nowhere in the HAMP Trial Period packet is any notice that acceptance into HAMP is contingent on a decision made by any entity other than WELLS FARGO.

26) Nowhere in the HAMP Trial Period packet is any notice that Petitioner's eligibility may be in doubt.

27) After being accepted into the HAMP Trial Period, Petitioners timely made all three of the stated Trial Period Payments required to secure a permanent modification.

28) WELLS FARGO accepted the HAMP Trial Period Payments, but did not send a Modification Agreement.

29) At WELLS FARGO'S behest, Petitioners continued making payments to WELLS FARGO in the amount of the Trial Period Payments.

30) Petitioners contacted WELLS FARGO to check on the status of the modification and were informed that it was being processed.

31) On April 5, 2010 WELLS FARGO sent Petitioners a letter informing them that Petitioner's "may not be eligible" for HAMP because, "[WELLS FARGO] service[s] your loan on behalf of an investor or group of investors that has not given us the contractual authority to modify your loan under [HAMP]." [Ex.5]

32) The April 5, 2010 letter disclosed that WELLS FARGO had been directed to place Petitioner's "mortgage" in a review file until May 5, 2010, and instructed Petitioners to continue making their Trial Period Payments.

33) On April 29, 2010, WELLS FARGO sent another letter informing Petitioners that WELLS FARGO would not modify their loan because, "the investor on your mortgage has declined the request." This letter stated that the Trial Payments would be retained by WELLS FARGO and applied to the loan in accordance with the "current loan documents." WELLS FARGO further instructed that the only options they could recommend would be a short sale or a deed in lieu of foreclosure. [Ex.6]

34) WELLS FARGO reported Petitioners' loan as 180+ days delinquent on June 2010, despite the payments made pursuant to the agreement between WELLS FARGO and Petitioners.

35) WELLS FARGO'S reporting of this delinquency has adversely impacted Petitioners' credit on their credit report. [Ex. 6 of Petitioner's Supplement to Documenation.]

36) Petitioners have attempted to refinance the home twice, but have been rejected because of an adverse credit report caused by FHLB and WELLS FARGO.

37) On August 6, 2010 WELLS FARGO'S trustee National Default Servicing Corporation recorded a Notice of Default.

38) Petitioners elected to mediate under NRS 107.086.

39) At the mediation, WELLS FARGO submitted the original Deed of Trust demonstrating that it was the beneficiary.

40) During the mediation, WELLS FARGO'S telephonic representative disclosed that WELLS FARGO was not the owner of the loan, but rather merely the servicer. After almost two (2) hours of search, the representative could not conclusively identify the owner of the loan.

41) The Mediator found that WELLS FARGO'S representative lacked the requisite authority under NRS 107.086.

42) The Mediator found that WELLS FARGO acknowledged that the late fees charged during Petitioners' Trial Period were wrongful, and that WELLS FARGO rescinded the same after Petitioners showed they "had complied with every detail then offered by the bank."

43) At no time has this Court been informed how or when FHLB acquired an interest in Petitioners' home loan.

44) At no time has this Court been informed that WELLS FARGO actually contacted FHLB to request a HAMP modification, or substantively similar private modification.

Discussion

Conduct Prior to Mediation Only Relevant Insofar as it Impacted Mediation

At the Evidentiary Hearing, WELLS FARGO lodged numerous objections to the admission of testimony and evidence of conduct prior to the mediation. This Court overruled

each. WELLS FARGO further argued that such evidence and testimony should only be admitted for background and foundational purposes.

At status hearings prior to the evidentiary hearing, WELLS FARGO had argued that issues of what occurred prior to the mediation are outside of the scope of this Court's authority sitting in judicial review of a foreclosure mediation under FMPR Former Rule 6(1) and NRS 107.086(5). Essentially, even if it were true that WELLS FARGO'S conduct prior to the mediation would give rise to a negligent misrepresentation claim, or a promissory estoppel claim, or a breach of contract claim, or warrant an injunction against a foreclosure for some violation of law, because by terms of the Trial Period Program a Modification offered by WELLS FARGO without authority, a permanent Modification was mandated upon successful completion of the Trial Period and the Trial Period was successfully completed by Petitioners, those claims must be brought separately. This Court agrees with WELLS FARGO'S underlying legal theory that review is limited to the foreclosure mediation and that other claims must be brought through independent actions; but finds that the testimony and evidence introduced by Petitioner of what occurred prior to the foreclosure mediation is relevant to what occurs at the foreclosure mediation. While this Court cannot entertain independent legal *claims* and award relief for those *claims*, this Court can, and does, find those same *facts* relevant.

A categorical prohibition on the admission of evidence and testimony of prior conduct would deprive this Court of the ability to contextualize the mediation. When reviewing for good or bad faith participation, context is everything. If this Court were deprived of context, this Court would be unable to analyze whether a lender engaged in a pattern of conduct over multiple mediations tended to infer that some technical violations were actually intentional flouting of the law. Similarly this Court would be unable to look to a homeowner's previous conduct to determine whether mediation and review procedures were merely being used as a stall tactic, or to leverage a modification where none was necessary. This Court finds the entire relationship between the parties may be considered, with relevancy being the crux for whether such evidence and testimony is admissible.

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For instance, if the prior conduct at issue was a November 2009 HAMP modification that was reneged upon, but at the mediation the sole point of error was inadequate production of documents, then that November 2009 HAMP modification ostensibly would have had no impact on the mediation, and thus would not be particularly relevant to this Court's determination.

But, in the present case, what occurred between the parties prior to mediation had bearing on the mediation and is relevant. The November 2009 HAMP modification is directly relevant to the mediation in several ways. 1) The issue of uncertain ownership calls into question WELLS FARGO'S authority to mediate; 2) Prior performance or breach by a party in the foreclosure mediation program sheds light on their good faith participation; 3) The prior agreement shows the contours of a fair resolution.

Trial Period Plan/Modification Agreement Terms Read In Context With Agreement

The HAMP packet contained language in a separate sheet titled "Important Program Info" that, "The Trial Period Program is the first step. Once we are able to confirm your income and eligibility for the program, we will finalize your modified loan terms. . ." [Ex. 4] This Court finds that this language is not contained within the four corners of the agreement. This informational packet must be read in context with the provisions of the actual agreement which unequivocally stated that if Petitioner's complied with the Trial Program that WELLS FARGO would send a Modification Agreement for Petitioner's signature which would "reflect the new payment amount and waive any unpaid late charges." [Ex. 4]

The "eligibility" language in the "Important Program Information" could not be reasonably understood by an applicant to mean that there may be eligibility problems based on actions taken by WELLS FARGO. Rather, the "eligibility" language gives notice to applicants that if their income cannot be verified or if they do not abide by the Trial Period Program terms, that they will not receive a Modification Agreement.

Here, Petitioners successfully made all three trial payments, and by terms of the agreement executed by WELLS FARGO, Petitioners were to receive a Modification Agreement to permanently modify the loan. This did not occur, and upon receipt of a Notice of Default, Petitioners elected mediation.

Submitted "True and Certified" Documents Contradict WELLS FARGO'S Status

In its written *Response*, WELLS FARGO does not disclose in what capacity it attended the mediation, nor its relationship to the loan. At the Evidentiary Hearing, WELLS FARGO represented to this Court that it was the originator of the home loan note, and was the original beneficiary of the deed of trust. WELLS FARGO also represented to this Court that it no longer "owns" the note.

WELLS FARGO submitted "True and Certified" Documents to the Presiding Mediator that it was the beneficiary of the deed of trust. WELLS FARGO submitted a certified copy of the original Note showing WELLS FARGO to be the holder of the Note. WELLS FARGO did not submit any assignments of the deed of trust, or any endorsements of the Note.

The Rules in effect at the time of the mediation required that in order for certified copies to be acceptable, they must state under oath that "the person making the certification is in actual possession of the original mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust." Former Rule 5(10)(b)

The documents provided to the Presiding Mediator stated that WELLS FARGO was the beneficiary of the deed of trust and the holder of the note. However, at the mediation, WELLS FARGO'S telephonic representative, Greg Eastman, indicated that WELLS FARGO was merely the servicer, and that he could not tell who owned the Note.

All parties now agree that Federal Home Loan Bank, FHLB, is the owner of Petitioner's loan.[1] This Court has not been informed which FHLB is the owner of Petitioner's loan. Thus, even at the end of the Evidentiary Hearing, this Court does not actually know who owns Petitioner's loan. It is apparent that Petitioners also still do not know who owns their loan. Based on the record it is not clear that WELLS FARGO actually knows who owns the loan.

[1] This Court notes that there are twelve Federal Home Loan Banks in the United States of America. This Court has not been informed which of these entities owns Petitioner's Loan. Based on geographic region it appears likely that Federal Home Loan Bank San Francisco is the owner. However, WELLS FARGO has not recorded any assignments to FHLB –San Francisco; has assigned one other Deed of Trust to Federal Home Loan Bank – Chicago [*See*, Corporation Assignment of Deed of Trust DOC # 3603514 of the Washoe County Records]; and has assigned well over one hundred Deeds of Trust to FHLMC (a HAMP participant). Petitioner DUKE RENSLOW'S credit report admitted into evidence shows that DUKE RENSLOW'S credit has been reviewed five times in 2010 by "FEDERAL HOME LOAN BANK OF" [Ex. 10]

WELLS FARGO admits it no longer owns the loan. This Court has not received any evidence of the manner in which the loan was transferred. WELLS FARGO has not demonstrated that it properly endorsed the note to FHLB, nor assigned the Deed of Trust.

In the documents provided at mediation, WELLS FARGO stated under oath that "the person making the certification is in actual possession of the original mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust." Former Rule 5(10)(b) However, the evidence has not borne this statement out. This Court finds that WELLS FARGO did not meet the documentary requirements of NRS 107.086(4) and Former Rule 5(10)(b). Under NRS 107.086(5), this Court finds the appropriate sanction for this failure to be seven thousand five hundred dollars ($7,500.00)

WELLS FARGO Merely Servicer

This case presents a novel legal issue in that WELLS FARGO is apparently still the beneficiary of the Deed of Trust of record. However, WELLS FARGO'S inability to complete the November 2009 HAMP Modification, and inability to offer a HAMP Modification or substantively similar private modification at mediation occurred because WELLS FARGO lacked the authority to do so.[2] WELLS FARGO'S authority to modify the loan is acknowledged to be entirely derivative of FHLB, the "owner" of the loan.

The language of NRS 107.086 specifies that the beneficiary of the Deed of Trust, or their representative, shall attend the mediation. Implicit in the plain language of NRS 107.086 is an assumption that beneficiaries of the Deed of Trust have decision making authority. Throughout the Foreclosure Mediation Rules in effect at the time of the subject mediation there is again an implicit assumption that the beneficiary of the Deed of Trust is the proper party to mediate because that party has authority. The term "beneficiary of deed of trust" and "lender" are used in an apparently interchangeable manner in the rules. *See*, FMPR Former Rule 1(2) "lender", Former Rule 5(8)(a) "beneficiary (lender)", Former Rule 7(1)) "beneficiary".

[2] This Court is mindful that one of the reasons for the establishment of the Foreclosure Mediation Program was that servicers, when contacted directly by borrowers, often claimed to lack authority to make modifications. Minutes of Joint Meeting of Senate and Assembly Committees on Commerce and Labor, at 13 (Feb. 11, 2009)

Former Rule 5(8)(a) and 5(10) when read together imply that Supreme Court conceived of the beneficiary of the deed of trust as being the same party as the holder of the note. Former Rule 4(8)(a) requires that:

> All beneficiaries of a deed of trust . . . shall participate in the Foreclosure Mediation Program, be represented at all times during a mediation by a person or persons who have the authority to *negotiate and modify the loan* secured by the deed of trust sought to be foreclosed . . . . In addition to the documents required by Rule 8 herein, the beneficiary must bring to the mediation the original or a certified copy of the deed of trust, *the mortgage note*, and each assignment of the deed of trust and *the mortgage note*.[3] (*emphasis added*)

Former Rule 5(8)(a) does not specify why the additional documents are required, but a reasonable interpretation of this rule infers that those documents tend to demonstrate authority and that the proper party to negotiate is present. Former Rule 5(10) mandates that the production of the mortgage note is only valid when the beneficiary of the deed of trust swears under oath that the note is in the possession of the person making the certification.

Although both NRS 107.086 and the Foreclosure Mediation Program Rules repeatedly specify the beneficiary of the deed of trust, and do not use the terms "holder" or "creditor," the focus throughout is on the ability to modify the loan.

This is supported by the legislative history of AB 149:

> "[Borrowers] cannot get a lender on the phone. They cannot get to someone willing to work with them. The reason might be that the loans have been sold so many times that it is not clear who the *lender* is." (emphasis added)

Further:

> "The other key component of this bill is that *lenders* or their representatives must appear or otherwise be available throughout the mediation. They also have to present a certified copy of the deed of trust and the promissory note, so that we know the person who is foreclosing *actually owns the note*." (emphasis added)

Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor February 11, 2009 p.5-7. (Comments of Assembly Speaker Barbara Buckley)

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[3] The newly amended Foreclosure Mediation Program Rules effective March 1, 2011 renumbered Rule 5(8) to Rule 10(1), and specified that "each endorsement of the mortgage note" must be provided.

The legislative history further indicates that the Legislature intended the party with actual beneficial interest should be present at the mediation.

> "The third amendment clarifies the term "trustee" to "beneficiary of the deed of trust." That language is more precise since we do not want the trustee to be there; we want the person with the beneficial interest to be present."

Assembly Committee on Commerce and Labor, March 11, 2009, p.5. (Comments of Assembly Speaker Barbara Buckley)

The Legislature's choice of the term "beneficiary of deed of trust" was not designed to elevate form over substance. Rather, the Legislature believed that "beneficiary of the deed of trust" was the term that would cause the party with actual beneficial interest to appear. In circumstances such as this, where the beneficiary of record of the deed of trust appears to have no actual beneficial interest, it is clear that the Legislature did not intend for the beneficiary to appear, but rather for the entity possessing actual beneficial interest.

The Supreme Court of Nevada has not yet had occasion to declare the law of Nevada as it relates to determining what entity has beneficial interest when faced with competing or imperfect transfers of interest in a secured home loan. The traditional approach to transferring interest in mortgages from one creditor to another has been by endorsing the note and assigning the mortgage or deed of trust, usually contemporaneously. In recent years, the financial industry has adopted novel methods of non-contemporaneous or incomplete or unrecorded transfers, that are not particularly relevant to the case at bar other than for a determination of who has actual beneficial interest sufficient to have standing to participate in the mediation program (either directly or through a duly appointed representative), and whether WELLS FARGO as the beneficiary of the deed of trust was empowered to attend the mediation on its own, or whether its authority was solely derivative as a representative of FHLB. The two prevailing theories throughout the nation are the Longan Rule and the Restatement (Third) approach.

In Carpenter v. Longan, 83 U.S. 271 (1872), the United States Supreme Court held that mortgages and notes are inseparable. Transferring the note carries with it the mortgage by operation of law. An attempt to transfer the mortgage without expressly transferring the note is a nullity, and the purported assignee has received nothing but worthless paper. Although Nevada

uses Deeds of Trusts instead of "mortgages", the rule is still applicable.[4] Under this approach, when WELLS FARGO transferred the note to FHLB, by operation of law, WELLS FARGO ceased being the mortgagee/beneficiary of the deed of trust. Instead, FHLB is the actual beneficiary, but has an unrecorded beneficial interest and essentially holds a wild deed.[5] Longan has never been repudiated or overturned, although it is of venerable vintage.

The competing theory is set forth in the Restatement (Third) of Property – Mortgages § 5.4, which specifically repudiates Carpenter v. Longan as archaic and founded on a now discarded theory of mortgages. Under the Restatement, the transfer of either the mortgage or the note carries the other with it, unless there is intent to sever the two. In analyzing the state of Nevada Common Law as it relates to real property, this Court finds that the Nevada Supreme Court has adopted the Restatement (Third) of Property – Mortgages on a consistent basis. This Court finds then that the Restatement (Third) approach is the proper approach for Nevada Courts. On the facts here, there is no indication that WELLS FARGO intended to sever the Deed of Trust from the Note. Therefore, by transferring the Note to FHLB, WELLS FARGO also transferred all beneficial interest in the Deed of Trust.

Under either approach, on the facts here, WELLS FARGO, although the beneficiary of record, had no beneficial interest in the Deed of Trust, and no right to proceeds from the Note. Therefore, at most, WELLS FARGO was a servicer for FHLB, and notwithstanding the language of NRS 107.086 and the Foreclosure Mediation Program Rules, had no independent standing to negotiate or appear at the mediation in any capacity other than as a "representative" of FHLB.

Servicer Representatives Amenable to Sanctions

Servicers do not have *independent* standing to participate in the Foreclosure Mediation Program. NRS 107.086 evidences a clear Legislative intent to have the party holding beneficial interest in the property at the mediation table. Rather, this Court has found that servicers may

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[4] *See*, Sims v. Grubb, 75 Nev. 173, 178 (1959); 59 C.J.S. Mortgages § 6; Restatement (Third) Trusts § 5 comment k

[5] The Supreme Court of Massachusetts, analyzing non-contemporaneous transfers of the note and mortgage, has held that "[T]he holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment" U.S. Bank National Association v. Ibanez, *Slip Copy* SJC 10694 at 11 (Mass. 2011) (*rejecting* transfer of mortgage by operation of law when note is transferred without mortgage.)

qualify as a "representative" for the beneficiary of the deed of trust within the meaning of NRS 107.086(4)'s requirement that, "The beneficiary of the deed of trust or a representative shall attend the mediation." *See*, *Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 2,3.

NRS 107.086(3) requires the trustee to notify the present beneficiary of the deed of trust and "every other person with an interest as defined in NRS 107.090. . ."[6] No evidence or testimony from WELLS FARGO tended to show that FHLB was in fact properly noticed. Given the oddities of the manner in which WELLS FARGO remains the beneficiary or record, this Court is troubled that whichever FHLB actually owns the loan may not have received notice that a mediation was scheduled to occur.

However, in other contexts, this Court has found that when a master servicer acting as a representative exceeds its authority in reaching an agreement at mediation, that the homeowner shall retain the benefit of the bargain, and that the lender shall have recourse only against the servicer. *See*, *Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 2,3. This seems a fitting rule for situations in which a master servicer may have essentially usurped the lender's place at the mediation table. If sanctions issue based on the conduct of the servicer that materially impact a right of the lender, then the lender shall have cause solely against the servicer. An innocent homeowner shall not suffer because a servicer's conduct has resulted in harm to the lender.

Here, Petitioners had an awareness prior to mediation that WELLS FARGO was not the owner of their loan, based on the April 29, 2010 termination letter. However, Petitioners were entitled to negotiate in good faith with the servicer of their loan acting as a representative for FHLB. Petitioners participated but had the purposes of the mediations frustrated by WELLS FARGO'S actions.

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[6] NRS 107.090(1) defines a "person with an interest" as "any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated."

This Court finds that the language of NRS 107.086(5) and Former Rule 6(1) is broad enough to sanction the servicer representative when the servicer appears at the mediation, and the deficiencies or violations are attributable to the representative and not the underlying lender.

Here, the violations are attributable to WELLS FARGO. WELLS FARGO submitted "true and certified" documents that conflicted with their representations as to ownership of the loan. WELLS FARGO could not identify the owner of the loan. WELLS FARGO's actions necessitated a mediation. It was WELLS FARGO that lacked authority. Thus, it is WELLS FARGO who should be bear the burden of any sanctions.

Bank Representative's Lack of Experience No Excuse

WELLS FARGO'S telephonic representative, Greg Eastman, did not know who owned the note. [Ex.1] At the evidentiary hearing, representative Eastman did not appear. Rather another individual, Phillip CARGIOLI from WELLS FARGO who serves as a telephonic representative in other mediations, appeared and testified that at the time of the mediation Mr. Eastman had been a loan adjustment officer for a mere four months.

Lack of experience is no excuse. Servicers have no independent authority in the Foreclosure Mediation Program. They are mere representatives. A new employee of a servicer acting as representative is held to the same standards under NRS 107.086 and the Foreclosure Mediation Rules as the most experienced hand. The failure of a representative to know who they represent is unacceptable. The testimony and evidence introduced demonstrates that well over an hour and a half of the mediation was spent trying to determine the identity of the lender. Petitioners had to leave the room for some time while this occurred. This clearly had a negative impact on the mediation.

Representatives must have full authority, or have access at all times to full authority. NRS 107.086(4); Former Rule 5(8)(a) It is clear that Mr. Eastman did not know what his authority was or even from whom it was derived "at all times". This Court finds that one cannot have access to an unknown entity. This is a violation of Former Rule 5(8)(a) which had a material and negative impact on the mediation. It is also a violation of NRS 107.086(4) which the Legislature has expressly authorized this Court to sanction for even mere technical violations.

In this instance, these violations had a detrimental impact and led to a finding by the mediator that the representative of the lender did not have the requisite authority. Under this Court's *de novo* review, this Court finds that the lender did not appear directly at the mediation. The lender only appeared through a representative, as authorized by NRS 107.086(4). However, that representative did not have sufficient authority to negotiate and modify the loan, and did not have access to such a person with authority "at all times." This Court finds the appropriate sanction for lack of authority in this case to be a monetary sanction in the amount of ten thousand dollars ($10,000.00) and an equitable sanction discussed *infra*.[7]

Petitioner Clearly Qualified for a Modification

Respondent contended that, "[P]etitioner did not qualify for a modification and therefore no agreement was reached." [Resp. at p.2] However, during the evidentiary hearing, Respondent's counsel asked a question that intimated that Petitioner had been offered a modification that would reduce the payment by $268.00 per month.[8] Further, WELLS FARGO'S witness, CARGIOLI testified that an offer reducing the payment by $268.00 per month had been made by Mr. Eastman. However, CARGIOLI had no personal knowledge that this offer was made. CARGIOLI was not involved in the RENSLOW'S mediation. CARGIOLI testified that he had "briefly reviewed . . . Mr. Eastman's notes from the mediation." [Trans. at 58] These notes were not introduced into evidence. The actual terms of this purported modification offer were not addressed. This Court does not have any information whether the $268.00 was a permanent modification, whether it created a balloon payment, whether it was a temporary modification, whether there were any fees and penalties associated with this purported offer. No testimony or evidence was given as to the source of authority for making this purported offer. The record is bereft of competent evidence for this Court to make a finding that a particular offer was in fact made. The record does not contain competent evidence of the terms

[7] Were equitable sanctions unavailable, this Court would increase the monetary sanctions.

[8] Questions of counsel are not testimony. Here, the questions of Respondent's counsel elicited an answer that Petitioner's representative Alsasua did not recall the terms of an offered modification. [Trans. at p.11] Petitioner also did not recall the terms of any specific modification being offered [Trans. at p.28] No one actually present at the mediation testified as to the terms of this purported offer, and the offer was not reflected on the Mediator's Statement.

of any such purported modification such that this Court could analyze the offer for its impact on good faith participation.

However, although this Court does not have sufficient evidence before it to find that a particular offer was made, or that that offer was a good faith offer, the testimony of WELLS FARGO is sufficient for the purpose of analyzing WELLS FARGO'S contention that, "[P]etitioner did not *qualify* for a modification and therefore no agreement was reached. Just because the [P]etitioner did not *qualify* for a modification does not mean that the [R]espondent did not have the required authority." [Resp. at p.2] The statement in the Response is directly contradicted by the testimony of WELLS FARGO'S representative CARGIOLI at the evidentiary hearing; they cannot both be true. No argument was made in support of the statement in the Response under NRCP Rule 11(b)(2) and (3).[9]

Respondent's representative witness CARGIOLI further admitted that the refusal to offer a specific modification, the HAMP modification previously agreed to, was based not on Petitioners' qualifications or lack thereof but rather on the fact that the underlying lender did not participate in HAMP and thus had not authorized the servicer to enter into a HAMP modification.[10]

Therefore, this Court finds that Petitioners did qualify for *a* modification; that Petitioners qualified for the HAMP modification offered in November 2009; and that the inability to enter into a modification at mediation stemmed from WELLS FARGO'S lack of authority to offer a HAMP modification.

Respondent's Conduct Impaired Petitioner's Ability to Obtain a Refinance

Respondent contends that loan modifications "are primarily for individuals who are unable to refinance their house. . ." and that "Petitioner would be in a better position to have

[9] This Court does not find a need to *sua sponte* enter an order to show cause under Rule 11(c)(1)(b).

[10] This Court professes a certain shock at the fact that a FHLB, as a federal GSE, does not participate in HAMP, which is required for loans owned by FNMA and FHLMC, two other federal GSE's. The fact that the Federal Home Loan Mortgage Corporation authorizes HAMP modifications while the Federal Home Loan Bank does not, that WELLS FARGO has sold mortgages in the past to both of these entities, and that the election to sell to one over the other is completely outside of the borrower's control has a certain Kafkaesque quality. Had WELLS FARGO simply chosen FHLMC instead of FHLB, this entire matter would have been averted.

refinanced their loan rather than allow it to go into default. In fact, if the [P]etitioners have as much equity as they claim, then they are still in a position to refinance the loan. . ." [Resp. at p.2]

Here, Petitioners are in fact presently unable to secure a refinance of their home, due to the actions of WELLS FARGO. They have made several attempts to do so, both through WELLS FARGO itself, and through U.S. Bank. However, because WELLS FARGO placed negative reports on Petitioners' credit reports, Petitioners are unable to obtain a refinance. [Ex.10]

Respondent's statement that Petitioners would have been better off refinancing rather than defaulting is tempered by the fact that Petitioners contacted WELLS FARGO prior to defaulting to work out arrangements regarding their loan and were instructed by WELLS FARGO that they could not be helped until they were sixty (60) days late.

This Court does not appreciate WELLS FARGO'S Monday morning quarterbacking regarding what Petitioner ought to have done when WELLS FARGO'S actions both precipitated Petitioners' default and impaired Petitioner's ability to obtain a refinance. These comments in WELLS FARGO'S written *Response*, when compared to the evidence in record, demonstrate either a complete lack of knowledge or outright disregard of the facts of this matter. These comments are nothing short of shameful.

Respondent's Admission That Late Fees Were Properly Rescinded Stands

At the mediation, WELLS FARGO explained that the November 2009 modification had been withdrawn because WELLS FARGO lacked the authority to offer it. Petitioners demonstrated to the Mediator and to WELLS FARGO'S representative that they had been charged penalties and late fees despite the fact that they had complied with all terms of the November 2009 modification and with "every detail then offered by the bank." Upon this showing, WELLS FARGO rescinded the fees and penalties. [Ex.1]

The plain language of the Mediator's Statement shows that WELLS FARGO'S rescission was not contingent, conditional, or part of an agreement. The rescission was an admission that the fees and penalties were improper. WELLS FARGO is estopped from reneging on that admission made by their representative. All fees and penalties incurred during, or as a result of,

the November 2009 modification have been RESCINDED and WAIVED. WELLS FARGO may not in any way attempt to collect on the same.

Mediation Fee Not Chargeable

When the Legislature enacted AB 149 implementing NRS 107.086, the Legislature made expressly clear that the mediation fee was to be evenly distributed between homeowners and lenders. NRS 107.086(8)(e); FMPR 5(1) (Former Rule 16(1))

WELLS FARGO has ignored this completely. WELLS FARGO has sought to recover the mediation fee, in direct contravention of the Legislature's express desire to evenly apportion the costs between homeowners and lenders.[11] [Petition Exh. 3] Even more shocking to this Court is that WELLS FARGO attempts to charge $500.00 as a "Mediation Fee", well in excess of the $200.00 that WELLS FARGO paid. Homeowners are legally entitled to seek a mediation. Each party bears their own cost of mediation. To shift the burden from an even division to resting solely on the homeowner is contrary to the spirit and letter of the law. To charge more than the fee paid, in essence to attempt to profit from the homeowner's election, is outrageous.

While this Court would certainly impose sanctions for the bare attempt to recover the mediation fee alone, when confronted with uncontroverted evidence that Lender is seeking to recover 250% of its statutory burden, this Court finds that harsh sanctions must be issued to deter such unscrupulous conduct in the future. This Court finds that the attempt to recover 250% of the mediation fee is appropriately assessed a 250% sanction. Accordingly, for this egregious and intentional violation, WELLS FARGO is SANCTIONED $1,250.00 (one thousand two hundred and fifty dollars).

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[11] The Mediation Fee is included on a reinstatement letter from National Default Servicing Corporation, which is WELLS FARGO'S foreclosure trustee. Foreclosure trustees are agents of the trustor and beneficiary of the deed of trust. *See*, Hendrickson v. Popular Mortg. Servicing, Inc.2009 WL 1455491 (N.D. Cal 2009) at *7 (citations omitted) (cited with approval by Nieto v. Litton Loan Servicing, LP, 2011 WL 797496 (D. Nev 2011) at *5); see also 54A Am. Jur. 2d Mortgages § 123 – Relationship of trustees to other parties in interest; Restatement (Third) Trusts § 5 comment k; Bogert's Trusts and Tustees §29 Mortgages and Trust Deeds (2010). Therefore, the actions of the trustee are imputed to WELLS FARGO. If the trustee's assessment of the fee exceeded their agreement with WELLS FARGO, then WELLS FARGO may seek to recover sanctions from the trustee.

Testimony and Evidence Lead to Competent Finding of Lack of Good Faith

This Court finds that WELLS FARGO'S conduct in this mediation falls well below the threshold of "good faith" negotiations. Thus, WELLS FARGO has failed to meet its burden to show why sanctions should not lie pursuant to NRS 107.086(4) which authorizes this Court to issue sanctions, without limitation, including modifications

Here, Petitioners were in a mediation with a representative servicer for a lender. Petitioners were only there because the servicer had executed an agreement to modify the loan, and after Petitioners had satisfied the terms, the servicer terminated the agreement.

The question of why a mediation occurs shapes the contours of what a good faith result will look like. Where a homeowner is in a mediation because they are attempting to receive a principal reduction despite the fact that the homeowner is more than capable of affording all obligations at their present rate, a good faith result may very well be that a lender offers reinstatement only. However, here, Petitioners were in a mediation because they were attempting to receive the modification previously promised and denied them, or one substantively similar.

It is in analyzing the good faith participation that this Court finds relevance in prior conduct. Good faith is not merely *pro forma* lip service to the rules. This Court has found that although good faith and bad faith escape precise definition, they are capable of description such that this Court may adequately determine their presence or absence. This Court adopts as a useful reference the descriptions of both concepts as follows:

> **Good Faith:** Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it emcompasses, among other things, an honest belief, the absence of malice and the absence of design to defraugh or to seek an unconscionable advantage, and an indvidual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. Doyle v. Gordon 158 N.Y.S.2d 248, 259 . . . In common usage this term is ordinarily used to describe that state of mind denoting honest of purpose, freedom of intention to defraud, and generally speaking, means being faithful to one's duty or obligation Efron v. Kalmanovitz, 57 Cal.Rptr. 248

> **Bad Faith:** The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "Bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will. Stath v. Williams 367 N.E.2d 1120, 1124.
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> BLACK'S LAW DICTIONARY (5th ed. 1979)[12]

Although good faith is presumed, each party bears the onus of demonstrating that they are there to negotiate in good faith,[13] because good faith is typically adduced through the conduct of a party. This Court finds that conduct prior to the mediation has bearing on adducing good faith at the mediation.

Having made certain findings of fact *ante*, this Court concludes that WELLS FARGO has not demonstrated good faith participation. This Court concludes that the parties were unable to have meaningful good faith negotiations due to WELLS FARGO'S conduct at the mediation, including its failure to know who controlled the loan.

Equity regards as done which ought to be done. 30A C.J.S. Equity § 131. The basis of the maxim is the existence of a duty and it can only be invoked against a party who has failed or refused to perform a duty imposed on the party. The maxim only operates in favor of party holding an equitable right to performance, against a party with a duty to perform. *Id.* (citations omitted) Here, based on all of the evidence shown to this Court, what ought to be done is a modification of Petitioners' loan on the terms previously agreed to between Petitioners and WELLS FARGO.

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[12] This Court specifically adopts the definition from the Fifth Edition. The most recent Black's Law definition is of no assistance to this Court.

[13] This Court has adopted these working definitions because there are no Supreme Court rulings yet on point. This Court notes that the Supreme Court recently heard oral arguments in Leyva v. National Default Servicing Corp., Supreme Court Docket No. 55216 in which the definition of good and bad faith were issues. This Court has found that bad faith is not the mere absence of good faith, but the active opposite and that it requires an independent showing. *See, Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 9,10. This Court anticipates guidance from the Supreme Court in the near future.

By its conduct prior to mediation, WELLS FARGO took upon itself a duty to offer a HAMP modification to Petitioners. It refused and failed to do so at mediation. A modification on the parameters offered to Petitioners in November 2009 ought to be done.

Modification is a Permissible Sanction

WELLS FARGO did not present argument that modification of the loan is an impermissible sanction, nor cite authority for that proposition. Thus, WELLS FARGO has WAIVED such arguments.[14] However, because this is the first instance in which this Court has imposed a modification on the loan pursuant to NRS 107.086, and it appears that this may be the first such modification in the State of Nevada, it is prudent to discuss this Court's understanding of the legal grounds for modification of a home loan as a sanction.

This Court finds that NRS 107.086 is not an impermissible impairment of contracts by the Legislature. U.S.C.A. Const. art.1 §10 Rather, NRS 107.086 merely serves as an affirmation that the Legislature intended for the District Courts of the State of Nevada to have full access to the vast inherent powers the District Courts possess in equity. NRS 107.086 does not mandate modification, nor even express a particular legislative preference for modification. NRS 107.086 does not create a power of modification in this Court. Were the word "modification" omitted from NRS 107.086(5), the District Courts of the State of Nevada would possess the exact same equitable power to modify the terms of a note. Thus, NRS 107.086 does not even rise to the level of the legislation upheld by the United States Supreme Court in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)

Foreclosure is both a legal and an equitable construct. Actions involving real property are inherently equitable actions because real property is unique. Non-judicial foreclosures authorized by statute do not lose their equitable nature. Therefore, in these actions, this Court possesses its full array of equitable powers.

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[14] Indeed, WELLS FARGO concedes the power of this Court to modify loans, "The sanction of a court ordered modification of the loan as requested by the petitioner should only be utilized (if at all) when there is a finding of bad faith by the respondent." [Resp. at p.4]

When the Court imposes a modification of a home loan, it bears some similarity to reforming the note. Reformation of a written instrument is an equitable act. 66 Am. Jur. 2d Reformation of Instruments § 3.

NRS 107.086 merely confirms that a District Court *may* impose a modification and reform the note. This greatly comports with the Nevada Supreme Court's ruling in Tropicana Pizza, Inc. v. Advo, Inc., 238 P.3d 861 (Nev. 2008) adopting Restatement (Second) of Contracts § 166. "This Section. . . only states the circumstances in which a court "may" grant reformation, and, since the remedy is equitable, a court has the discretion to withhold it, even if it would otherwise be appropriate, on grounds traditionally considered by courts of equity in exercising their discretion." Restatement (Second) of Contracts § 166, cmt. a (1981).

The power of a court to impose sanctions is equitable in nature, and sanctions may be monetary or equitable. For example, a court may strike a pleading as a sanction or parts thereof under NRCP 37 *See*, Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592 (2010)

The exercise of a court's equitable power to sanction has been found to not violate due process even when it terminates a case. *See*, Skeen v. Valley Bank of Nevada, 89 Nev. 301 (1973); Societe International v. Rogerts, 357 U.S. 197 (1958) (*holding* default judgment proper sanction for willful discovery violation.) ; Hammond Packing co. v. Arkansas, 212 U.S. 322 (1909) (*holding* striking an answer and entering default judgment valid sanction). Thus, failure to abide by procedural elements of the law can result in a Court providing substantive equitable relief. There appears little difference between that proposition and the proposition that failure to obey the law as reflected in NRS 107.086 during a mediation can result in a Court granting substantive equitable relief.

Neither is the equitable imposition of a modification a regulatory taking. Mere delay in receiving investment backed expectations do not constitute a taking.[15] As to the principal,

[15] In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) the United States Supreme Court commented positively on the Ninth Circuit's determination that temporariness is a factor in determining whether a taking has occurred under Penn Central's *ad hoc* test. The United States Supreme Court rejected the view of Chief Justice Rehnquist that a delay of a set term could constitute a categorical taking. *See, id.* at n.34.

imposing a modification that extends the term of a loan merely delays the investor's expected return. The note is still worth the exact same principal balance, and is still freely assignable. As to the interest, investors in home loans have no reasonable investment backed expectation that they will realize the fully amortized value of the interest because there is no pre-payment penalty.[16] Were Petitioners to obtain a loan from another source and pay the home loan in its entirety, the investor would receive no further returns on interest. Thus, imposition of a new interest rate does not deprive the investor of anything that the investor has or could reasonably expect to have in the future.

Therefore this Court concludes that there is no impediment to the exercise of the equitable authority to impose a modification when the equities of a certain matter reveal that modification is proper. Here, those equities exist.

Equity and the Legislative History of NRS 107.086 Militate for Strong Sanctions

Beyond the technical violations of law discussed *supra*, this Court is compelled to take note that the facts present in this case are archetypal of the systemic problems that lead to the enactment of NRS 107.086.

Petitioners are hard working individuals who obtained a standard mortgage. Petitioners found themselves whipsawed by mounting medical expenses and decreased pay caused by the economic downturn colloquially referred to as the Great Recession. The economic downturn not only impaired Petitioners' income making their current mortgage difficult to afford, but also decreased the value of their home making a new mortgage through a refinance difficult to obtain.

Petitioners turned to their "lender," WELLS FARGO, seeking assistance. WELLS FARGO instructed them that it would not help unless they were further in arrears.[17] When Petitioners skipped their next payment to qualify for WELLS FARGO'S assistance, WELLS FARGO did offer them help. Unfortunately, unknown to Petitioners, and apparently unknown to

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[16] "[T]he test must be whether the deprivation is contrary to reasonable, investment-backed expectations" Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034 (Justice Kennedy concurring) (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935))

[17] This Court cannot help but wonder at the fiduciary implications of a mere servicer inviting default on a loan that it does not own.

WELLS FARGO itself, WELLS FARGO did not actually own the loan. WELLS FARGO did not actually have authority to offer Petitioners such a modification. Nevertheless, WELLS FARGO accepted payments for seven months, well in excess of the agreed upon three month trial period. Throughout this time, WELLS FARGO could not tell Petitioner why the trial period was extended beyond the specified time. WELLS FARGO provided conflicting information on who actually had authority to a HUD counselor. Petitioners had no way of knowing who owned their mortgage, and had no way of knowing what options were available to them. WELLS FARGO gave them misinformation when it instructed them on how to qualify for a HAMP loan. WELLS FARGO did not record or disclose its transfer of the loan. WELLS FARGO eventually terminated the modification, despite Petitioners compliance, because of WELLS FARGO'S own error. WELLS FARGO did not provide Petitioners with any recourse, or with any information that there could be someone else to speak to.

In response to similar situations around the State, the Legislature passed AB 149, enacting NRS 107.086. The Legislative history makes it clear that homeowners were receiving conflicting statements from their lenders, and that homeowners often could not find a person with whom to speak to discuss options to avoid foreclosure, and that often homeowners did not know who owned their loan. Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor February 11, 2009 p.5-7.

The Legislature intended to create a forum where homeowners could finally talk, preferably in person, to an individual who had actual control over the loan and who could, if not grant relief, at least discuss options. The Legislative history makes it abundantly clear that representatives for lenders had no independent authority, but were to have the full array of authority available to the lender itself. Assembly Committee on Commerce and Labor, March 11, 2009, p.5; *see also*, Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor February 11, 2009 Page 22-24.

By statute, Petitioners were entitled to speak to FHLB. FHLB was certainly permitted to send a representative. WELLS FARGO is certainly a viable representative for FHLB to send. At the evidentiary hearing, WELLS FARGO had every opportunity to introduce evidence that

the trustee validly contacted both FHLB and WELLS FARGO, that pursuant to a servicing agreement or after discussions between FHLB and WELLS FARGO that WELLS FARGO appeared at the mediation as a representative, and that WELLS FARGO had knowledge of the full array of options that FHLB could offer Petitioners, and negotiated in good faith with authority to make those offers. No such evidence was introduced.

At the mediation WELLS FARGO submitted certified documents that directly contradict its representations as to ownership of the loan. WELLS FARGO'S representative could not identify the owner of the loan. It is difficult to imagine that a representative could attend a proceeding without knowing who they represented. The lion's share of the mediation was spent determining who WELLS FARGO represented. Phrased differently, a significant portion of the mediation was spent trying to determine why WELLS FARGO was present. As a result, Petitioners were never able to speak to FHLB, or to a legitimate representative of FHLB. This falls woefully below the standard required for good faith participation under NRS 107.086. WELLS FARGO failed to participate in good faith as a representative of FHLB. This Court finds the appropriate sanctions to be both equitable sanctions and monetary sanctions in the amount of ten thousand ($10,000).[18]

Here, Petitioners have done everything that WELLS FARGO has told them to do and find themselves in worse position for it. When this process began Petitioners were thirty days late on their mortgage. After following every instruction by WELLS FARGO, and attending state mandated foreclosure mediation, Petitioners find themselves reportedly 180+ days delinquent, on the precipice of foreclosure, and facing additional charges and fees for participating in a modification program wrongfully offered to them by a servicer and facing fees for their proper and rightful decision to elect mediation. After all of this, WELLS FARGO contends that it has met its burden to comply with NRS 107.086 and asks for a certificate to foreclose and asks for attorney's fees. [Opp. at p.4] This cannot be the law. And so it is not.

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[18] If equitable sanctions were unavailable, the monetary sanctions would be increased.

This Court has found that the equitable imposition of a modification pursuant to NRS 107.086(5) would require extraordinary facts.[19] This Court had not thought it would see such facts. This Court was wrong.

Conclusion

THEREFORE, and good cause appearing, this Court **ORDERS** that:

1) WELLS FARGO is SANCTIONED in the amount of $30,000.00 (Thirty thousand dollars) for violations of NRS 107.086 and the Foreclosure Mediation Program Rules payable to Petitioners within thirty (30) days of entry of this Order;

2) WELLS FARGO shall pay Petitioners' costs and attorneys' fees for the mediation, the Petition for Judicial Review and the Evidentiary Hearing subject to the filing of a verified request for attorneys' fees and memorandum of costs to be filed by Petitioners within thirty (30) days of entry of this Order;

3) WELLS FARGO shall abide by its admission that late fees and penalties related to the November 2009 modification were improper and immediately and forever cease and desist any attempts to collect the same. However, penalties and late fees incurred prior to November 2009 are still valid;

4) Pursuant to NRS 107.086(5), on this Court's *de novo* finding that WELLS FARGO failed to participate in good faith negotiations and lacked authority to negotiate and modify the loan,[20] the subject note is **MODIFIED** as follows:

a) The current principal shall be re-amortized;

a) The payment is set at $1145.00;

b) The interest rate is reduced to 2% (two percent) for the life of the note;

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[19] This Court has used the rules of Olympic fencing as a useful framework, dividing penalties into yellow cards, red cards, and black cards. USA Fencing, RULES FOR COMPETITION (Omar Bhutta ed., 2010) Book 1, Part V, Ch. 3 Penalties t.114 – t.126 *See*, *Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 5,6; *Order* in Jones v. National Default Servicing Corporation (Wells Fargo Bank), CV09-03551 at p.5.

[20] This Court has specifically found that modification is warranted for either 1) lack of good faith negotiations or 2) lack of authority. Here, both have occurred, but this Court cannot modify the same note twice. If either finding were reversed on appeal, the modification would stand on the basis of the other finding.

c) The term of the note is set at ten (10) years commencing May 1, 2011 and ending on May 1, 2021.[21]

d) There shall be no pre-payment penalty.

5) The Foreclosure Mediation Program shall not issue a Certificate of Completion based on the presently recorded Notice of Default absent further Order from this Court.

IT IS SO ORDERED.

DATED this 29 day of March, 2011.

Patrick Flanagan
PATRICK FLANAGAN
District Judge

[21] It is the intent of this Court to amortize out the present principal with no reduction to the principal to generate a payment of $1145.00 at an interest rate of 2%. If the term specified by this Court is of insufficient length to result in the complete payment of the note within ten (10) years, then the length shall be extended.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 29 day of March, 2011, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Carole M. Pope, Esq. for Duke and Tina Renslow;

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Gregory Wilde, Esq.
Matthew Schreiver, Esq.
Wilde & Associates
208 South Jones Blvd.
Las Vegas, Nevada 89107

Stephen Wassner, Esq.
206 S. Division Street, Suite 2
Carson City, Nevada 89703

Judicial Assistant

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DUKE RENSLOW and TINA RENSLOW,

Petitioners,

vs.

WELLS FARGO BANK, and DOES 1 through 10,

Respondents.

Case No.: CV10-03382

Dept. No.: 7

ORDER

Procedural History

On October 19, 2010, Petitioners DUKE and TINA RENSLOW ("RENSLOWS") attended a mediation under the auspices of the Foreclosure Mediation Program with Respondents WELLS FARGO BANK ("WELLS FARGO"), representative for FEDERAL HOME LOAN BANK. No agreement was reached. The Mediator's Statement stated that WELLS FARGO did not have the requisite authority to modify the loan. On November 9, 2010, Petitioners timely filed a *Petition for Judicial Review*. This Court entered its *Order for Judicial Review* on November 12, 2010. On December 10, 2010 WELLS FARGO filed their *Response*. On December 15, 2010 Petitioners filed their *Reply*. On January 28, 2011, this Court held a hearing on the *Petition* and ordered an Evidentiary Hearing held. On January 31, 2011, Petitioners filed a *Supplement* containing exhibits in support of their *Petition*. On March 17, 2011 the Evidentiary Hearing was held. Both parties appeared in person, and presented their case.

Legal Standards

The scope of Judicial Review in Foreclosure Mediation cases is to analyze the underlying mediation, determine bad faith, enforce agreements between the parties, and determine sanctions pursuant to NRS Chapter 107. FMPR 21(1) (Former Rule 6(1)). Mediations conducted pursuant to NRS 107.086 are held to a standard of "good faith" negotiation. NRS 107.086. Petitions for Judicial Review of Foreclosure Mediation are conducted using a "*de novo*" standard. FMPR 21(5) (Former Rule 6(5)).

Findings of Fact

At the conclusion of the evidentiary hearing, after careful consideration of the testimony of witnesses, evidence admitted, and argument of counsel, this Court **finds** the following facts:

1) WELLS FARGO is the beneficiary of record of a Deed of Trust which is the security instrument to the Note. [Ex.2]

2) WELLS FARGO was the originating lender of the home loan, and original holder of the Note executed by the RENSLOWS.

3) Petitioners were never notified that the Deed of Trust had been assigned, or that the Note had been transferred.

4) On some uncertain date, WELLS FARGO transferred the Note by uncertain means to a certain FEDERAL HOME LOAN BANK ("FHLB").

5) WELLS FARGO has not recorded an assignment of the Deed of Trust.

6) WELLS FARGO did not provide a proper endorsement of the Note at mediation or throughout the judicial review proceedings.

7) WELLS FARGO did not inform Petitioners that their home loan had been sold, neither did FHLB contact Petitioners with such information. *See*, 15 U.S.C. 1641(g)(1)

8) Since the date that WELLS FARGO transferred the Note to FHLB, WELLS FARGO has acted as a master servicer of the loan, and has been Petitioner's sole point of contact throughout the entire life of the loan from origination through the present day.

9) In July 2009, Petitioners were <u>not</u> in default of their obligation under the Note.

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10) In July 2009, Petitioners contacted WELLS FARGO to request a modification of their loan as Petitioners faced pay cuts and mounting medical bills for their daughter.

11) WELLS FARGO informed Petitioners that WELLS FARGO would only discuss modification if Petitioners were sixty (60) days late, and that Petitioners were not eligible for assistance unless they were sixty (60) days late.

12) Petitioners became sixty (60) days late in order to discuss a modification with WELLS FARGO, and to be eligible for assistance.

13) WELLS FARGO provided Petitioners with a Home Affordable Modification Program ("HAMP") application. WELLS FARGO participates in the HAMP program on loans for which it is the lender.

14) Petitioners made their next payment so that they would not be ninety (90) days late, and in default on their loan, so as to avoid foreclosure.

15) Petitioner completed the HAMP application and properly returned it to WELLS FARGO.

16) On September 17, 2009 Petitioners received a letter from WELLS FARGO stating, "You did it!" and accepting Petitioners into the HAMP program. [Ex.3]

17) The HAMP trial period began on November 1, 2009. [Ex.4]

18) Petitioners were informed that they did not need to make their October payment by WELLS FARGO.

19) When Petitioners did not make their October payment, they had missed a total of three payments. This put Petitioners ninety (90) days in arrears.

20) The HAMP Trial Period Packet states that WELLS FARGO is the "Lender".

21) The HAMP Trial Period Packet stated that the monthly payments during the trial period would be $1,127.06. [Ex.4 p.2]

22) The HAMP Trial Period Packet stated that "the last Trial Period Payment is due 2/1/2010" [Ex.4 p.2]

23) The HAMP Trial Period Packet stated that upon successful completion of the Trial Period, Petitioners would (not might) receive a modification on substantially similar terms.

24) Nowhere in the HAMP Trial Period packet is any notice provided that WELLS FARGO may not be the Lender.

25) Nowhere in the HAMP Trial Period packet is any notice that acceptance into HAMP is contingent on a decision made by any entity other than WELLS FARGO.

26) Nowhere in the HAMP Trial Period packet is any notice that Petitioner's eligibility may be in doubt.

27) After being accepted into the HAMP Trial Period, Petitioners timely made all three of the stated Trial Period Payments required to secure a permanent modification.

28) WELLS FARGO accepted the HAMP Trial Period Payments, but did not send a Modification Agreement.

29) At WELLS FARGO'S behest, Petitioners continued making payments to WELLS FARGO in the amount of the Trial Period Payments.

30) Petitioners contacted WELLS FARGO to check on the status of the modification and were informed that it was being processed.

31) On April 5, 2010 WELLS FARGO sent Petitioners a letter informing them that Petitioner's "may not be eligible" for HAMP because, "[WELLS FARGO] service[s] your loan on behalf of an investor or group of investors that has not given us the contractual authority to modify your loan under [HAMP]." [Ex.5]

32) The April 5, 2010 letter disclosed that WELLS FARGO had been directed to place Petitioner's "mortgage" in a review file until May 5, 2010, and instructed Petitioners to continue making their Trial Period Payments.

33) On April 29, 2010, WELLS FARGO sent another letter informing Petitioners that WELLS FARGO would not modify their loan because, "the investor on your mortgage has declined the request." This letter stated that the Trial Payments would be retained by WELLS FARGO and applied to the loan in accordance with the "current loan documents." WELLS FARGO further instructed that the only options they could recommend would be a short sale or a deed in lieu of foreclosure. [Ex.6]

34) WELLS FARGO reported Petitioners' loan as 180+ days delinquent on June 2010, despite the payments made pursuant to the agreement between WELLS FARGO and Petitioners.

35) WELLS FARGO'S reporting of this delinquency has adversely impacted Petitioners' credit on their credit report. [Ex. 6 of Petitioner's Supplement to Documenation.]

36) Petitioners have attempted to refinance the home twice, but have been rejected because of an adverse credit report caused by FHLB and WELLS FARGO.

37) On August 6, 2010 WELLS FARGO'S trustee National Default Servicing Corporation recorded a Notice of Default.

38) Petitioners elected to mediate under NRS 107.086.

39) At the mediation, WELLS FARGO submitted the original Deed of Trust demonstrating that it was the beneficiary.

40) During the mediation, WELLS FARGO'S telephonic representative disclosed that WELLS FARGO was not the owner of the loan, but rather merely the servicer. After almost two (2) hours of search, the representative could not conclusively identify the owner of the loan.

41) The Mediator found that WELLS FARGO'S representative lacked the requisite authority under NRS 107.086.

42) The Mediator found that WELLS FARGO acknowledged that the late fees charged during Petitioners' Trial Period were wrongful, and that WELLS FARGO rescinded the same after Petitioners showed they "had complied with every detail then offered by the bank."

43) At no time has this Court been informed how or when FHLB acquired an interest in Petitioners' home loan.

44) At no time has this Court been informed that WELLS FARGO actually contacted FHLB to request a HAMP modification, or substantively similar private modification.

Discussion

Conduct Prior to Mediation Only Relevant Insofar as it Impacted Mediation

At the Evidentiary Hearing, WELLS FARGO lodged numerous objections to the admission of testimony and evidence of conduct prior to the mediation. This Court overruled

each. WELLS FARGO further argued that such evidence and testimony should only be admitted for background and foundational purposes.

At status hearings prior to the evidentiary hearing, WELLS FARGO had argued that issues of what occurred prior to the mediation are outside of the scope of this Court's authority sitting in judicial review of a foreclosure mediation under FMPR Former Rule 6(1) and NRS 107.086(5). Essentially, even if it were true that WELLS FARGO'S conduct prior to the mediation would give rise to a negligent misrepresentation claim, or a promissory estoppel claim, or a breach of contract claim, or warrant an injunction against a foreclosure for some violation of law, because by terms of the Trial Period Program a Modification offered by WELLS FARGO without authority, a permanent Modification was mandated upon successful completion of the Trial Period and the Trial Period was successfully completed by Petitioners, those claims must be brought separately. This Court agrees with WELLS FARGO'S underlying legal theory that review is limited to the foreclosure mediation and that other claims must be brought through independent actions; but finds that the testimony and evidence introduced by Petitioner of what occurred prior to the foreclosure mediation is relevant to what occurs at the foreclosure mediation. While this Court cannot entertain independent legal *claims* and award relief for those *claims*, this Court can, and does, find those same *facts* relevant.

A categorical prohibition on the admission of evidence and testimony of prior conduct would deprive this Court of the ability to contextualize the mediation. When reviewing for good or bad faith participation, context is everything. If this Court were deprived of context, this Court would be unable to analyze whether a lender engaged in a pattern of conduct over multiple mediations tended to infer that some technical violations were actually intentional flouting of the law. Similarly this Court would be unable to look to a homeowner's previous conduct to determine whether mediation and review procedures were merely being used as a stall tactic, or to leverage a modification where none was necessary. This Court finds the entire relationship between the parties may be considered, with relevancy being the crux for whether such evidence and testimony is admissible.

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For instance, if the prior conduct at issue was a November 2009 HAMP modification that was reneged upon, but at the mediation the sole point of error was inadequate production of documents, then that November 2009 HAMP modification ostensibly would have had no impact on the mediation, and thus would not be particularly relevant to this Court's determination.

But, in the present case, what occurred between the parties prior to mediation had bearing on the mediation and is relevant. The November 2009 HAMP modification is directly relevant to the mediation in several ways. 1) The issue of uncertain ownership calls into question WELLS FARGO'S authority to mediate; 2) Prior performance or breach by a party in the foreclosure mediation program sheds light on their good faith participation; 3) The prior agreement shows the contours of a fair resolution.

Trial Period Plan/Modification Agreement Terms Read In Context With Agreement

The HAMP packet contained language in a separate sheet titled "Important Program Info" that, "The Trial Period Program is the first step. Once we are able to confirm your income and eligibility for the program, we will finalize your modified loan terms. . ." [Ex. 4] This Court finds that this language is not contained within the four corners of the agreement. This informational packet must be read in context with the provisions of the actual agreement which unequivocally stated that if Petitioner's complied with the Trial Program that WELLS FARGO would send a Modification Agreement for Petitioner's signature which would "reflect the new payment amount and waive any unpaid late charges." [Ex. 4]

The "eligibility" language in the "Important Program Information" could not be reasonably understood by an applicant to mean that there may be eligibility problems based on actions taken by WELLS FARGO. Rather, the "eligibility" language gives notice to applicants that if their income cannot be verified or if they do not abide by the Trial Period Program terms, that they will not receive a Modification Agreement.

Here, Petitioners successfully made all three trial payments, and by terms of the agreement executed by WELLS FARGO, Petitioners were to receive a Modification Agreement to permanently modify the loan. This did not occur, and upon receipt of a Notice of Default, Petitioners elected mediation.

Submitted "True and Certified" Documents Contradict WELLS FARGO'S Status

In its written *Response*, WELLS FARGO does not disclose in what capacity it attended the mediation, nor its relationship to the loan. At the Evidentiary Hearing, WELLS FARGO represented to this Court that it was the originator of the home loan note, and was the original beneficiary of the deed of trust. WELLS FARGO also represented to this Court that it no longer "owns" the note.

WELLS FARGO submitted "True and Certified" Documents to the Presiding Mediator that it was the beneficiary of the deed of trust. WELLS FARGO submitted a certified copy of the original Note showing WELLS FARGO to be the holder of the Note. WELLS FARGO did not submit any assignments of the deed of trust, or any endorsements of the Note.

The Rules in effect at the time of the mediation required that in order for certified copies to be acceptable, they must state under oath that "the person making the certification is in actual possession of the original mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust." Former Rule 5(10)(b)

The documents provided to the Presiding Mediator stated that WELLS FARGO was the beneficiary of the deed of trust and the holder of the note. However, at the mediation, WELLS FARGO'S telephonic representative, Greg Eastman, indicated that WELLS FARGO was merely the servicer, and that he could not tell who owned the Note.

All parties now agree that Federal Home Loan Bank, FHLB, is the owner of Petitioner's loan.[1] This Court has not been informed which FHLB is the owner of Petitioner's loan. Thus, even at the end of the Evidentiary Hearing, this Court does not actually know who owns Petitioner's loan. It is apparent that Petitioners also still do not know who owns their loan. Based on the record it is not clear that WELLS FARGO actually knows who owns the loan.

[1] This Court notes that there are twelve Federal Home Loan Banks in the United States of America. This Court has not been informed which of these entities owns Petitioner's Loan. Based on geographic region it appears likely that Federal Home Loan Bank San Francisco is the owner. However, WELLS FARGO has not recorded any assignments to FHLB –San Francisco; has assigned one other Deed of Trust to Federal Home Loan Bank – Chicago [*See*, Corporation Assignment of Deed of Trust DOC # 3603514 of the Washoe County Records]; and has assigned well over one hundred Deeds of Trust to FHLMC (a HAMP participant). Petitioner DUKE RENSLOW'S credit report admitted into evidence shows that DUKE RENSLOW'S credit has been reviewed five times in 2010 by "FEDERAL HOME LOAN BANK OF" [Ex. 10]

WELLS FARGO admits it no longer owns the loan. This Court has not received any evidence of the manner in which the loan was transferred. WELLS FARGO has not demonstrated that it properly endorsed the note to FHLB, nor assigned the Deed of Trust.

In the documents provided at mediation, WELLS FARGO stated under oath that "the person making the certification is in actual possession of the original mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust." Former Rule 5(10)(b) However, the evidence has not borne this statement out. This Court finds that WELLS FARGO did not meet the documentary requirements of NRS 107.086(4) and Former Rule 5(10)(b). Under NRS 107.086(5), this Court finds the appropriate sanction for this failure to be seven thousand five hundred dollars ($7,500.00)

WELLS FARGO Merely Servicer

This case presents a novel legal issue in that WELLS FARGO is apparently still the beneficiary of the Deed of Trust of record. However, WELLS FARGO'S inability to complete the November 2009 HAMP Modification, and inability to offer a HAMP Modification or substantively similar private modification at mediation occurred because WELLS FARGO lacked the authority to do so.[2] WELLS FARGO'S authority to modify the loan is acknowledged to be entirely derivative of FHLB, the "owner" of the loan.

The language of NRS 107.086 specifies that the beneficiary of the Deed of Trust, or their representative, shall attend the mediation. Implicit in the plain language of NRS 107.086 is an assumption that beneficiaries of the Deed of Trust have decision making authority. Throughout the Foreclosure Mediation Rules in effect at the time of the subject mediation there is again an implicit assumption that the beneficiary of the Deed of Trust is the proper party to mediate because that party has authority. The term "beneficiary of deed of trust" and "lender" are used in an apparently interchangeable manner in the rules. *See*, FMPR Former Rule 1(2) "lender", Former Rule 5(8)(a) "beneficiary (lender)", Former Rule 7(1)) "beneficiary".

[2] This Court is mindful that one of the reasons for the establishment of the Foreclosure Mediation Program was that servicers, when contacted directly by borrowers, often claimed to lack authority to make modifications. Minutes of Joint Meeting of Senate and Assembly Committees on Commerce and Labor, at 13 (Feb. 11, 2009)

Former Rule 5(8)(a) and 5(10) when read together imply that Supreme Court conceived of the beneficiary of the deed of trust as being the same party as the holder of the note. Former Rule 4(8)(a) requires that:

> All beneficiaries of a deed of trust . . . shall participate in the Foreclosure Mediation Program, be represented at all times during a mediation by a person or persons who have the authority to *negotiate and modify the loan* secured by the deed of trust sought to be foreclosed . . . . In addition to the documents required by Rule 8 herein, the beneficiary must bring to the mediation the original or a certified copy of the deed of trust, *the mortgage note*, and each assignment of the deed of trust and *the mortgage note*.[3] (*emphasis added*)

Former Rule 5(8)(a) does not specify why the additional documents are required, but a reasonable interpretation of this rule infers that those documents tend to demonstrate authority and that the proper party to negotiate is present. Former Rule 5(10) mandates that the production of the mortgage note is only valid when the beneficiary of the deed of trust swears under oath that the note is in the possession of the person making the certification.

Although both NRS 107.086 and the Foreclosure Mediation Program Rules repeatedly specify the beneficiary of the deed of trust, and do not use the terms "holder" or "creditor," the focus throughout is on the ability to modify the loan.

This is supported by the legislative history of AB 149:

> "[Borrowers] cannot get a lender on the phone. They cannot get to someone willing to work with them. The reason might be that the loans have been sold so many times that it is not clear who the *lender* is." (emphasis added)

Further:

> "The other key component of this bill is that *lenders* or their representatives must appear or otherwise be available throughout the mediation. They also have to present a certified copy of the deed of trust and the promissory note, so that we know the person who is foreclosing *actually owns the note*." (emphasis added)

Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor February 11, 2009 p.5-7. (Comments of Assembly Speaker Barbara Buckley)

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[3] The newly amended Foreclosure Mediation Program Rules effective March 1, 2011 renumbered Rule 5(8) to Rule 10(1), and specified that "each endorsement of the mortgage note" must be provided.

The legislative history further indicates that the Legislature intended the party with actual beneficial interest should be present at the mediation.

> "The third amendment clarifies the term "trustee" to "beneficiary of the deed of trust." That language is more precise since we do not want the trustee to be there; we want the person with the beneficial interest to be present."

Assembly Committee on Commerce and Labor, March 11, 2009, p.5. (Comments of Assembly Speaker Barbara Buckley)

The Legislature's choice of the term "beneficiary of deed of trust" was not designed to elevate form over substance. Rather, the Legislature believed that "beneficiary of the deed of trust" was the term that would cause the party with actual beneficial interest to appear. In circumstances such as this, where the beneficiary of record of the deed of trust appears to have no actual beneficial interest, it is clear that the Legislature did not intend for the beneficiary to appear, but rather for the entity possessing actual beneficial interest.

The Supreme Court of Nevada has not yet had occasion to declare the law of Nevada as it relates to determining what entity has beneficial interest when faced with competing or imperfect transfers of interest in a secured home loan. The traditional approach to transferring interest in mortgages from one creditor to another has been by endorsing the note and assigning the mortgage or deed of trust, usually contemporaneously. In recent years, the financial industry has adopted novel methods of non-contemporaneous or incomplete or unrecorded transfers, that are not particularly relevant to the case at bar other than for a determination of who has actual beneficial interest sufficient to have standing to participate in the mediation program (either directly or through a duly appointed representative), and whether WELLS FARGO as the beneficiary of the deed of trust was empowered to attend the mediation on its own, or whether its authority was solely derivative as a representative of FHLB. The two prevailing theories throughout the nation are the Longan Rule and the Restatement (Third) approach.

In Carpenter v. Longan, 83 U.S. 271 (1872), the United States Supreme Court held that mortgages and notes are inseparable. Transferring the note carries with it the mortgage by operation of law. An attempt to transfer the mortgage without expressly transferring the note is a nullity, and the purported assignee has received nothing but worthless paper. Although Nevada

uses Deeds of Trusts instead of "mortgages", the rule is still applicable.[4] Under this approach, when WELLS FARGO transferred the note to FHLB, by operation of law, WELLS FARGO ceased being the mortgagee/beneficiary of the deed of trust. Instead, FHLB is the actual beneficiary, but has an unrecorded beneficial interest and essentially holds a wild deed.[5] Longan has never been repudiated or overturned, although it is of venerable vintage.

The competing theory is set forth in the Restatement (Third) of Property – Mortgages § 5.4, which specifically repudiates Carpenter v. Longan as archaic and founded on a now discarded theory of mortgages. Under the Restatement, the transfer of either the mortgage or the note carries the other with it, unless there is intent to sever the two. In analyzing the state of Nevada Common Law as it relates to real property, this Court finds that the Nevada Supreme Court has adopted the Restatement (Third) of Property – Mortgages on a consistent basis. This Court finds then that the Restatement (Third) approach is the proper approach for Nevada Courts. On the facts here, there is no indication that WELLS FARGO intended to sever the Deed of Trust from the Note. Therefore, by transferring the Note to FHLB, WELLS FARGO also transferred all beneficial interest in the Deed of Trust.

Under either approach, on the facts here, WELLS FARGO, although the beneficiary of record, had no beneficial interest in the Deed of Trust, and no right to proceeds from the Note. Therefore, at most, WELLS FARGO was a servicer for FHLB, and notwithstanding the language of NRS 107.086 and the Foreclosure Mediation Program Rules, had no independent standing to negotiate or appear at the mediation in any capacity other than as a "representative" of FHLB.

Servicer Representatives Amenable to Sanctions

Servicers do not have *independent* standing to participate in the Foreclosure Mediation Program. NRS 107.086 evidences a clear Legislative intent to have the party holding beneficial interest in the property at the mediation table. Rather, this Court has found that servicers may

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[4] *See*, Sims v. Grubb, 75 Nev. 173, 178 (1959); 59 C.J.S. Mortgages § 6; Restatement (Third) Trusts § 5 comment k

[5] The Supreme Court of Massachusetts, analyzing non-contemporaneous transfers of the note and mortgage, has held that "[T]he holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment" U.S. Bank National Association v. Ibanez, *Slip Copy* SJC 10694 at 11 (Mass. 2011) (*rejecting* transfer of mortgage by operation of law when note is transferred without mortgage.)

qualify as a "representative" for the beneficiary of the deed of trust within the meaning of NRS 107.086(4)'s requirement that, "The beneficiary of the deed of trust or a representative shall attend the mediation." *See, Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 2,3.

NRS 107.086(3) requires the trustee to notify the present beneficiary of the deed of trust and "every other person with an interest as defined in NRS 107.090. . ."[6] No evidence or testimony from WELLS FARGO tended to show that FHLB was in fact properly noticed. Given the oddities of the manner in which WELLS FARGO remains the beneficiary or record, this Court is troubled that whichever FHLB actually owns the loan may not have received notice that a mediation was scheduled to occur.

However, in other contexts, this Court has found that when a master servicer acting as a representative exceeds its authority in reaching an agreement at mediation, that the homeowner shall retain the benefit of the bargain, and that the lender shall have recourse only against the servicer. *See, Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 2,3. This seems a fitting rule for situations in which a master servicer may have essentially usurped the lender's place at the mediation table. If sanctions issue based on the conduct of the servicer that materially impact a right of the lender, then the lender shall have cause solely against the servicer. An innocent homeowner shall not suffer because a servicer's conduct has resulted in harm to the lender.

Here, Petitioners had an awareness prior to mediation that WELLS FARGO was not the owner of their loan, based on the April 29, 2010 termination letter. However, Petitioners were entitled to negotiate in good faith with the servicer of their loan acting as a representative for FHLB. Petitioners participated but had the purposes of the mediations frustrated by WELLS FARGO'S actions.

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[6] NRS 107.090(1) defines a "person with an interest" as "any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated."

This Court finds that the language of NRS 107.086(5) and Former Rule 6(1) is broad enough to sanction the servicer representative when the servicer appears at the mediation, and the deficiencies or violations are attributable to the representative and not the underlying lender.

Here, the violations are attributable to WELLS FARGO. WELLS FARGO submitted "true and certified" documents that conflicted with their representations as to ownership of the loan. WELLS FARGO could not identify the owner of the loan. WELLS FARGO's actions necessitated a mediation. It was WELLS FARGO that lacked authority. Thus, it is WELLS FARGO who should be bear the burden of any sanctions.

Bank Representative's Lack of Experience No Excuse

WELLS FARGO'S telephonic representative, Greg Eastman, did not know who owned the note. [Ex.1] At the evidentiary hearing, representative Eastman did not appear. Rather another individual, Phillip CARGIOLI from WELLS FARGO who serves as a telephonic representative in other mediations, appeared and testified that at the time of the mediation Mr. Eastman had been a loan adjustment officer for a mere four months.

Lack of experience is no excuse. Servicers have no independent authority in the Foreclosure Mediation Program. They are mere representatives. A new employee of a servicer acting as representative is held to the same standards under NRS 107.086 and the Foreclosure Mediation Rules as the most experienced hand. The failure of a representative to know who they represent is unacceptable. The testimony and evidence introduced demonstrates that well over an hour and a half of the mediation was spent trying to determine the identity of the lender. Petitioners had to leave the room for some time while this occurred. This clearly had a negative impact on the mediation.

Representatives must have full authority, or have access at all times to full authority. NRS 107.086(4); Former Rule 5(8)(a) It is clear that Mr. Eastman did not know what his authority was or even from whom it was derived "at all times". This Court finds that one cannot have access to an unknown entity. This is a violation of Former Rule 5(8)(a) which had a material and negative impact on the mediation. It is also a violation of NRS 107.086(4) which the Legislature has expressly authorized this Court to sanction for even mere technical violations.

In this instance, these violations had a detrimental impact and led to a finding by the mediator that the representative of the lender did not have the requisite authority. Under this Court's *de novo* review, this Court finds that the lender did not appear directly at the mediation. The lender only appeared through a representative, as authorized by NRS 107.086(4). However, that representative did not have sufficient authority to negotiate and modify the loan, and did not have access to such a person with authority "at all times." This Court finds the appropriate sanction for lack of authority in this case to be a monetary sanction in the amount of ten thousand dollars ($10,000.00) and an equitable sanction discussed *infra*.[7]

Petitioner Clearly Qualified for a Modification

Respondent contended that, "[P]etitioner did not qualify for a modification and therefore no agreement was reached." [Resp. at p.2] However, during the evidentiary hearing, Respondent's counsel asked a question that intimated that Petitioner had been offered a modification that would reduce the payment by $268.00 per month.[8] Further, WELLS FARGO'S witness, CARGIOLI testified that an offer reducing the payment by $268.00 per month had been made by Mr. Eastman. However, CARGIOLI had no personal knowledge that this offer was made. CARGIOLI was not involved in the RENSLOW'S mediation. CARGIOLI testified that he had "briefly reviewed . . . Mr. Eastman's notes from the mediation." [Trans. at 58] These notes were not introduced into evidence. The actual terms of this purported modification offer were not addressed. This Court does not have any information whether the $268.00 was a permanent modification, whether it created a balloon payment, whether it was a temporary modification, whether there were any fees and penalties associated with this purported offer. No testimony or evidence was given as to the source of authority for making this purported offer. The record is bereft of competent evidence for this Court to make a finding that a particular offer was in fact made. The record does not contain competent evidence of the terms

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[7] Were equitable sanctions unavailable, this Court would increase the monetary sanctions.

[8] Questions of counsel are not testimony. Here, the questions of Respondent's counsel elicited an answer that Petitioner's representative Alsasua did not recall the terms of an offered modification. [Trans. at p.11] Petitioner also did not recall the terms of any specific modification being offered [Trans. at p.28] No one actually present at the mediation testified as to the terms of this purported offer, and the offer was not reflected on the Mediator's Statement.

of any such purported modification such that this Court could analyze the offer for its impact on good faith participation.

However, although this Court does not have sufficient evidence before it to find that a particular offer was made, or that that offer was a good faith offer, the testimony of WELLS FARGO is sufficient for the purpose of analyzing WELLS FARGO'S contention that, "[P]etitioner did not *qualify* for a modification and therefore no agreement was reached. Just because the [P]etitioner did not *qualify* for a modification does not mean that the [R]espondent did not have the required authority." [Resp. at p.2] The statement in the Response is directly contradicted by the testimony of WELLS FARGO'S representative CARGIOLI at the evidentiary hearing; they cannot both be true. No argument was made in support of the statement in the Response under NRCP Rule 11(b)(2) and (3).[9]

Respondent's representative witness CARGIOLI further admitted that the refusal to offer a specific modification, the HAMP modification previously agreed to, was based not on Petitioners' qualifications or lack thereof but rather on the fact that the underlying lender did not participate in HAMP and thus had not authorized the servicer to enter into a HAMP modification.[10]

Therefore, this Court finds that Petitioners did qualify for *a* modification; that Petitioners qualified for the HAMP modification offered in November 2009; and that the inability to enter into a modification at mediation stemmed from WELLS FARGO'S lack of authority to offer a HAMP modification.

Respondent's Conduct Impaired Petitioner's Ability to Obtain a Refinance

Respondent contends that loan modifications "are primarily for individuals who are unable to refinance their house. . ." and that "Petitioner would be in a better position to have

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[9] This Court does not find a need to *sua sponte* enter an order to show cause under Rule 11(c)(1)(b).

[10] This Court professes a certain shock at the fact that a FHLB, as a federal GSE, does not participate in HAMP, which is required for loans owned by FNMA and FHLMC, two other federal GSE's. The fact that the Federal Home Loan Mortgage Corporation authorizes HAMP modifications while the Federal Home Loan Bank does not, that WELLS FARGO has sold mortgages in the past to both of these entities, and that the election to sell to one over the other is completely outside of the borrower's control has a certain Kafkaesque quality. Had WELLS FARGO simply chosen FHLMC instead of FHLB, this entire matter would have been averted.

refinanced their loan rather than allow it to go into default. In fact, if the [P]etitioners have as much equity as they claim, then they are still in a position to refinance the loan. . ." [Resp. at p.2]

Here, Petitioners are in fact presently unable to secure a refinance of their home, due to the actions of WELLS FARGO. They have made several attempts to do so, both through WELLS FARGO itself, and through U.S. Bank. However, because WELLS FARGO placed negative reports on Petitioners' credit reports, Petitioners are unable to obtain a refinance. [Ex.10]

Respondent's statement that Petitioners would have been better off refinancing rather than defaulting is tempered by the fact that Petitioners contacted WELLS FARGO prior to defaulting to work out arrangements regarding their loan and were instructed by WELLS FARGO that they could not be helped until they were sixty (60) days late.

This Court does not appreciate WELLS FARGO'S Monday morning quarterbacking regarding what Petitioner ought to have done when WELLS FARGO'S actions both precipitated Petitioners' default and impaired Petitioner's ability to obtain a refinance. These comments in WELLS FARGO'S written *Response*, when compared to the evidence in record, demonstrate either a complete lack of knowledge or outright disregard of the facts of this matter. These comments are nothing short of shameful.

Respondent's Admission That Late Fees Were Properly Rescinded Stands

At the mediation, WELLS FARGO explained that the November 2009 modification had been withdrawn because WELLS FARGO lacked the authority to offer it. Petitioners demonstrated to the Mediator and to WELLS FARGO'S representative that they had been charged penalties and late fees despite the fact that they had complied with all terms of the November 2009 modification and with "every detail then offered by the bank." Upon this showing, WELLS FARGO rescinded the fees and penalties. [Ex.1]

The plain language of the Mediator's Statement shows that WELLS FARGO'S rescission was not contingent, conditional, or part of an agreement. The rescission was an admission that the fees and penalties were improper. WELLS FARGO is estopped from reneging on that admission made by their representative. All fees and penalties incurred during, or as a result of,

the November 2009 modification have been RESCINDED and WAIVED. WELLS FARGO may not in any way attempt to collect on the same.

Mediation Fee Not Chargeable

When the Legislature enacted AB 149 implementing NRS 107.086, the Legislature made expressly clear that the mediation fee was to be evenly distributed between homeowners and lenders. NRS 107.086(8)(e); FMPR 5(1) (Former Rule 16(1))

WELLS FARGO has ignored this completely. WELLS FARGO has sought to recover the mediation fee, in direct contravention of the Legislature's express desire to evenly apportion the costs between homeowners and lenders.[11] [Petition Exh. 3] Even more shocking to this Court is that WELLS FARGO attempts to charge $500.00 as a "Mediation Fee", well in excess of the $200.00 that WELLS FARGO paid. Homeowners are legally entitled to seek a mediation. Each party bears their own cost of mediation. To shift the burden from an even division to resting solely on the homeowner is contrary to the spirit and letter of the law. To charge more than the fee paid, in essence to attempt to profit from the homeowner's election, is outrageous.

While this Court would certainly impose sanctions for the bare attempt to recover the mediation fee alone, when confronted with uncontroverted evidence that Lender is seeking to recover 250% of its statutory burden, this Court finds that harsh sanctions must be issued to deter such unscrupulous conduct in the future. This Court finds that the attempt to recover 250% of the mediation fee is appropriately assessed a 250% sanction. Accordingly, for this egregious and intentional violation, WELLS FARGO is SANCTIONED $1,250.00 (one thousand two hundred and fifty dollars).

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[11] The Mediation Fee is included on a reinstatement letter from National Default Servicing Corporation, which is WELLS FARGO'S foreclosure trustee. Foreclosure trustees are agents of the trustor and beneficiary of the deed of trust. *See*, Hendrickson v. Popular Mortg. Servicing, Inc.2009 WL 1455491 (N.D. Cal 2009) at *7 (citations omitted) (cited with approval by Nieto v. Litton Loan Servicing, LP, 2011 WL 797496 (D. Nev 2011) at *5); see also 54A Am. Jur. 2d Mortgages § 123 – Relationship of trustees to other parties in interest; Restatement (Third) Trusts § 5 comment k; Bogert's Trusts and Tustees §29 Mortgages and Trust Deeds (2010). Therefore, the actions of the trustee are imputed to WELLS FARGO. If the trustee's assessment of the fee exceeded their agreement with WELLS FARGO, then WELLS FARGO may seek to recover sanctions from the trustee.

Testimony and Evidence Lead to Competent Finding of Lack of Good Faith

This Court finds that WELLS FARGO'S conduct in this mediation falls well below the threshold of "good faith" negotiations. Thus, WELLS FARGO has failed to meet its burden to show why sanctions should not lie pursuant to NRS 107.086(4) which authorizes this Court to issue sanctions, without limitation, including modifications

Here, Petitioners were in a mediation with a representative servicer for a lender. Petitioners were only there because the servicer had executed an agreement to modify the loan, and after Petitioners had satisfied the terms, the servicer terminated the agreement.

The question of why a mediation occurs shapes the contours of what a good faith result will look like. Where a homeowner is in a mediation because they are attempting to receive a principal reduction despite the fact that the homeowner is more than capable of affording all obligations at their present rate, a good faith result may very well be that a lender offers reinstatement only. However, here, Petitioners were in a mediation because they were attempting to receive the modification previously promised and denied them, or one substantively similar.

It is in analyzing the good faith participation that this Court finds relevance in prior conduct. Good faith is not merely *pro forma* lip service to the rules. This Court has found that although good faith and bad faith escape precise definition, they are capable of description such that this Court may adequately determine their presence or absence. This Court adopts as a useful reference the descriptions of both concepts as follows:

> **Good Faith:** Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it emcompasses, among other things, an honest belief, the absence of malice and the absence of design to defraugh or to seek an unconscionable advantage, and an indvidual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. Doyle v. Gordon 158 N.Y.S.2d 248, 259 . . . In common usage this term is ordinarily used to describe that state of mind denoting honest of purpose, freedom of intention to defraud, and generally speaking, means being faithful to one's duty or obligation Efron v. Kalmanovitz, 57 Cal.Rptr. 248

> **Bad Faith:** The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "Bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will. Stath v. Williams 367 N.E.2d 1120, 1124.
>
> BLACK'S LAW DICTIONARY (5th ed. 1979)[12]

Although good faith is presumed, each party bears the onus of demonstrating that they are there to negotiate in good faith,[13] because good faith is typically adduced through the conduct of a party. This Court finds that conduct prior to the mediation has bearing on adducing good faith at the mediation.

Having made certain findings of fact *ante*, this Court concludes that WELLS FARGO has not demonstrated good faith participation. This Court concludes that the parties were unable to have meaningful good faith negotiations due to WELLS FARGO'S conduct at the mediation, including its failure to know who controlled the loan.

Equity regards as done which ought to be done. 30A C.J.S. Equity § 131. The basis of the maxim is the existence of a duty and it can only be invoked against a party who has failed or refused to perform a duty imposed on the party. The maxim only operates in favor of party holding an equitable right to performance, against a party with a duty to perform. *Id.* (citations omitted) Here, based on all of the evidence shown to this Court, what ought to be done is a modification of Petitioners' loan on the terms previously agreed to between Petitioners and WELLS FARGO.

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[12] This Court specifically adopts the definition from the Fifth Edition. The most recent Black's Law definition is of no assistance to this Court.

[13] This Court has adopted these working definitions because there are no Supreme Court rulings yet on point. This Court notes that the Supreme Court recently heard oral arguments in Leyva v. National Default Servicing Corp., Supreme Court Docket No. 55216 in which the definition of good and bad faith were issues. This Court has found that bad faith is not the mere absence of good faith, but the active opposite and that it requires an independent showing. *See, Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 9,10. This Court anticipates guidance from the Supreme Court in the near future.

By its conduct prior to mediation, WELLS FARGO took upon itself a duty to offer a HAMP modification to Petitioners. It refused and failed to do so at mediation. A modification on the parameters offered to Petitioners in November 2009 ought to be done.

Modification is a Permissible Sanction

WELLS FARGO did not present argument that modification of the loan is an impermissible sanction, nor cite authority for that proposition. Thus, WELLS FARGO has WAIVED such arguments.[14] However, because this is the first instance in which this Court has imposed a modification on the loan pursuant to NRS 107.086, and it appears that this may be the first such modification in the State of Nevada, it is prudent to discuss this Court's understanding of the legal grounds for modification of a home loan as a sanction.

This Court finds that NRS 107.086 is not an impermissible impairment of contracts by the Legislature. U.S.C.A. Const. art.1 §10 Rather, NRS 107.086 merely serves as an affirmation that the Legislature intended for the District Courts of the State of Nevada to have full access to the vast inherent powers the District Courts possess in equity. NRS 107.086 does not mandate modification, nor even express a particular legislative preference for modification. NRS 107.086 does not create a power of modification in this Court. Were the word "modification" omitted from NRS 107.086(5), the District Courts of the State of Nevada would possess the exact same equitable power to modify the terms of a note. Thus, NRS 107.086 does not even rise to the level of the legislation upheld by the United States Supreme Court in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)

Foreclosure is both a legal and an equitable construct. Actions involving real property are inherently equitable actions because real property is unique. Non-judicial foreclosures authorized by statute do not lose their equitable nature. Therefore, in these actions, this Court possesses its full array of equitable powers.

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[14] Indeed, WELLS FARGO concedes the power of this Court to modify loans, "The sanction of a court ordered modification of the loan as requested by the petitioner should only be utilized (if at all) when there is a finding of bad faith by the respondent." [Resp. at p.4]

When the Court imposes a modification of a home loan, it bears some similarity to reforming the note. Reformation of a written instrument is an equitable act. 66 Am. Jur. 2d Reformation of Instruments § 3.

NRS 107.086 merely confirms that a District Court *may* impose a modification and reform the note. This greatly comports with the Nevada Supreme Court's ruling in Tropicana Pizza, Inc. v. Advo, Inc., 238 P.3d 861 (Nev. 2008) adopting Restatement (Second) of Contracts § 166. "This Section. . . only states the circumstances in which a court "may" grant reformation, and, since the remedy is equitable, a court has the discretion to withhold it, even if it would otherwise be appropriate, on grounds traditionally considered by courts of equity in exercising their discretion." Restatement (Second) of Contracts § 166, cmt. a (1981).

The power of a court to impose sanctions is equitable in nature, and sanctions may be monetary or equitable. For example, a court may strike a pleading as a sanction or parts thereof under NRCP 37 *See*, Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592 (2010)

The exercise of a court's equitable power to sanction has been found to not violate due process even when it terminates a case. *See*, Skeen v. Valley Bank of Nevada, 89 Nev. 301 (1973); Societe International v. Rogerts, 357 U.S. 197 (1958) (*holding* default judgment proper sanction for willful discovery violation.) ; Hammond Packing co. v. Arkansas, 212 U.S. 322 (1909) (*holding* striking an answer and entering default judgment valid sanction). Thus, failure to abide by procedural elements of the law can result in a Court providing substantive equitable relief. There appears little difference between that proposition and the proposition that failure to obey the law as reflected in NRS 107.086 during a mediation can result in a Court granting substantive equitable relief.

Neither is the equitable imposition of a modification a regulatory taking. Mere delay in receiving investment backed expectations do not constitute a taking.[15] As to the principal,

[15] In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) the United States Supreme Court commented positively on the Ninth Circuit's determination that temporariness is a factor in determining whether a taking has occurred under Penn Central's *ad hoc* test. The United States Supreme Court rejected the view of Chief Justice Rehnquist that a delay of a set term could constitute a categorical taking. *See, id.* at n.34.

imposing a modification that extends the term of a loan merely delays the investor's expected return. The note is still worth the exact same principal balance, and is still freely assignable. As to the interest, investors in home loans have no reasonable investment backed expectation that they will realize the fully amortized value of the interest because there is no pre-payment penalty.[16] Were Petitioners to obtain a loan from another source and pay the home loan in its entirety, the investor would receive no further returns on interest. Thus, imposition of a new interest rate does not deprive the investor of anything that the investor has or could reasonably expect to have in the future.

Therefore this Court concludes that there is no impediment to the exercise of the equitable authority to impose a modification when the equities of a certain matter reveal that modification is proper. Here, those equities exist.

Equity and the Legislative History of NRS 107.086 Militate for Strong Sanctions

Beyond the technical violations of law discussed *supra*, this Court is compelled to take note that the facts present in this case are archetypal of the systemic problems that lead to the enactment of NRS 107.086.

Petitioners are hard working individuals who obtained a standard mortgage. Petitioners found themselves whipsawed by mounting medical expenses and decreased pay caused by the economic downturn colloquially referred to as the Great Recession. The economic downturn not only impaired Petitioners' income making their current mortgage difficult to afford, but also decreased the value of their home making a new mortgage through a refinance difficult to obtain.

Petitioners turned to their "lender," WELLS FARGO, seeking assistance. WELLS FARGO instructed them that it would not help unless they were further in arrears.[17] When Petitioners skipped their next payment to qualify for WELLS FARGO'S assistance, WELLS FARGO did offer them help. Unfortunately, unknown to Petitioners, and apparently unknown to

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[16] "[T]he test must be whether the deprivation is contrary to reasonable, investment-backed expectations" Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034 (Justice Kennedy concurring) (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935))

[17] This Court cannot help but wonder at the fiduciary implications of a mere servicer inviting default on a loan that it does not own.

WELLS FARGO itself, WELLS FARGO did not actually own the loan. WELLS FARGO did not actually have authority to offer Petitioners such a modification. Nevertheless, WELLS FARGO accepted payments for seven months, well in excess of the agreed upon three month trial period. Throughout this time, WELLS FARGO could not tell Petitioner why the trial period was extended beyond the specified time. WELLS FARGO provided conflicting information on who actually had authority to a HUD counselor. Petitioners had no way of knowing who owned their mortgage, and had no way of knowing what options were available to them. WELLS FARGO gave them misinformation when it instructed them on how to qualify for a HAMP loan. WELLS FARGO did not record or disclose its transfer of the loan. WELLS FARGO eventually terminated the modification, despite Petitioners compliance, because of WELLS FARGO'S own error. WELLS FARGO did not provide Petitioners with any recourse, or with any information that there could be someone else to speak to.

In response to similar situations around the State, the Legislature passed AB 149, enacting NRS 107.086. The Legislative history makes it clear that homeowners were receiving conflicting statements from their lenders, and that homeowners often could not find a person with whom to speak to discuss options to avoid foreclosure, and that often homeowners did not know who owned their loan. Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor February 11, 2009 p.5-7.

The Legislature intended to create a forum where homeowners could finally talk, preferably in person, to an individual who had actual control over the loan and who could, if not grant relief, at least discuss options. The Legislative history makes it abundantly clear that representatives for lenders had no independent authority, but were to have the full array of authority available to the lender itself. Assembly Committee on Commerce and Labor, March 11, 2009, p.5; *see also*, Assembly Committee on Commerce and Labor Senate Committee on Commerce and Labor February 11, 2009 Page 22-24.

By statute, Petitioners were entitled to speak to FHLB. FHLB was certainly permitted to send a representative. WELLS FARGO is certainly a viable representative for FHLB to send. At the evidentiary hearing, WELLS FARGO had every opportunity to introduce evidence that

the trustee validly contacted both FHLB and WELLS FARGO, that pursuant to a servicing agreement or after discussions between FHLB and WELLS FARGO that WELLS FARGO appeared at the mediation as a representative, and that WELLS FARGO had knowledge of the full array of options that FHLB could offer Petitioners, and negotiated in good faith with authority to make those offers. No such evidence was introduced.

At the mediation WELLS FARGO submitted certified documents that directly contradict its representations as to ownership of the loan. WELLS FARGO'S representative could not identify the owner of the loan. It is difficult to imagine that a representative could attend a proceeding without knowing who they represented. The lion's share of the mediation was spent determining who WELLS FARGO represented. Phrased differently, a significant portion of the mediation was spent trying to determine why WELLS FARGO was present. As a result, Petitioners were never able to speak to FHLB, or to a legitimate representative of FHLB. This falls woefully below the standard required for good faith participation under NRS 107.086. WELLS FARGO failed to participate in good faith as a representative of FHLB. This Court finds the appropriate sanctions to be both equitable sanctions and monetary sanctions in the amount of ten thousand ($10,000).[18]

Here, Petitioners have done everything that WELLS FARGO has told them to do and find themselves in worse position for it. When this process began Petitioners were thirty days late on their mortgage. After following every instruction by WELLS FARGO, and attending state mandated foreclosure mediation, Petitioners find themselves reportedly 180+ days delinquent, on the precipice of foreclosure, and facing additional charges and fees for participating in a modification program wrongfully offered to them by a servicer and facing fees for their proper and rightful decision to elect mediation. After all of this, WELLS FARGO contends that it has met its burden to comply with NRS 107.086 and asks for a certificate to foreclose and asks for attorney's fees. [Opp. at p.4] This cannot be the law. And so it is not.

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[18] If equitable sanctions were unavailable, the monetary sanctions would be increased.

This Court has found that the equitable imposition of a modification pursuant to NRS 107.086(5) would require extraordinary facts.[19] This Court had not thought it would see such facts. This Court was wrong.

Conclusion

THEREFORE, and good cause appearing, this Court **ORDERS** that:

1) WELLS FARGO is SANCTIONED in the amount of $30,000.00 (Thirty thousand dollars) for violations of NRS 107.086 and the Foreclosure Mediation Program Rules payable to Petitioners within thirty (30) days of entry of this Order;

2) WELLS FARGO shall pay Petitioners' costs and attorneys' fees for the mediation, the Petition for Judicial Review and the Evidentiary Hearing subject to the filing of a verified request for attorneys' fees and memorandum of costs to be filed by Petitioners within thirty (30) days of entry of this Order;

3) WELLS FARGO shall abide by its admission that late fees and penalties related to the November 2009 modification were improper and immediately and forever cease and desist any attempts to collect the same. However, penalties and late fees incurred prior to November 2009 are still valid;

4) Pursuant to NRS 107.086(5), on this Court's *de novo* finding that WELLS FARGO failed to participate in good faith negotiations and lacked authority to negotiate and modify the loan,[20] the subject note is **MODIFIED** as follows:

a) The current principal shall be re-amortized;

a) The payment is set at $1145.00;

b) The interest rate is reduced to 2% (two percent) for the life of the note;

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[19] This Court has used the rules of Olympic fencing as a useful framework, dividing penalties into yellow cards, red cards, and black cards. USA Fencing, RULES FOR COMPETITION (Omar Bhutta ed., 2010) Book 1, Part V, Ch. 3 Penalties t.114 – t.126 *See, Order* in Navarro v. Wells Fargo Bank, NA., CV10-00941 at pp. 5,6; *Order* in Jones v. National Default Servicing Corporation (Wells Fargo Bank), CV09-03551 at p.5.

[20] This Court has specifically found that modification is warranted for either 1) lack of good faith negotiations or 2) lack of authority. Here, both have occurred, but this Court cannot modify the same note twice. If either finding were reversed on appeal, the modification would stand on the basis of the other finding.

c) The term of the note is set at ten (10) years commencing May 1, 2011 and ending on May 1, 2021.[21]

d) There shall be no pre-payment penalty.

5) The Foreclosure Mediation Program shall not issue a Certificate of Completion based on the presently recorded Notice of Default absent further Order from this Court.

IT IS SO ORDERED.

DATED this 29 day of March, 2011.

Patrick Flanagan
PATRICK FLANAGAN
District Judge

[21] It is the intent of this Court to amortize out the present principal with no reduction to the principal to generate a payment of $1145.00 at an interest rate of 2%. If the term specified by this Court is of insufficient length to result in the complete payment of the note within ten (10) years, then the length shall be extended.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 29 day of March, 2011, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Carole M. Pope, Esq. for Duke and Tina Renslow;

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Gregory Wilde, Esq.
Matthew Schreiver, Esq.
Wilde & Associates
208 South Jones Blvd.
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206 S. Division Street, Suite 2
Carson City, Nevada 89703

Judicial Assistant

IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK,

Appellant,

vs.

DUKE RENSLOW and TINA RENSLOW,

Respondents.

SUPREME COURT NO. 58283

District Court Case No. CV10-03382

APPEAL
from the Second Judicial District Court
The Honorable Patrick Flanagan, District Judge
District Court Case No. CV10-03382

APPELLANTS' APPENDIX VOLUME II

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Description	Numbered	Volume
Amended Certificate of Service (Findings of Fact, Conclusions of Law and Order), filed 2/09/11	139	I
Court Minutes for 1/28/11 (Petitioner's Exhibit 1 Admitted), filed 2/08/11	137 - 138	I
Court Minutes for 3/17/11 (Petitioner's Exhibits 1 through 10 Admitted), filed 4/18/11	292-293	II
Findings of Fact, Conclusions of Law and Order, filed 2/02/11	135 - 136	I
Notice of Appeal, filed 4/26/11	294 - 327	II
Notice of Entry of Findings of Fact, Conclusions of Law and Order, filed 2/11/10	140 - 144	I
Notice of Entry of Order filed 03/30/11	261 - 291	II
Order filed 3/29/10	233 - 260	II
Order for Judicial Review, filed 11/12/10	26 - 28	I
Petition for Judicial Review, filed 11/09/10	1 - 25	I
Reply To Response to Petition for Judicial Review, filed 12/15/10	35 - 50	I
Response to Order to Show Cause Why Sanctions Should Not Be Imposed, filed 12/10/10	29 - 34	I
Supplement to Documentation Presented to Court in Support of Petition for Judicial Review, filed 1/31/11	72 - 134	I
Transcript re: Foreclosure Mediation Evidentiary Hearing (Held 3/17/11)	145 - 232	I
Transcript re: Foreclosure Mediation Order to Show Cause (Held 1/28/11)	51 - 71	I

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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., and I certify that I served a copy of the foregoing **APPELLANTS' APPENDIX VOLUME II** on the 3rd day of October, 2011, via electronic service through the Nevada Supreme Court Electronic Filing System upon each party in the case who is registered as an electronic case filing user and via U.S. First Class Mail, as follows:

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