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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE INVESTMENT TRUST 2006-1,

Petitioner,

vs.

JOHN D. TRUEX, an individual,

Respondents.
_____/

Case No.: CV11-00584

Dept. No.: 7

ORDER

Introduction

The Founding Fathers believed the government they established would act as a whole for the governing good of the people. The Foreclosure Mediation Program was enacted by the Legislature. It was signed into law by the Governor. It has been administered by the Nevada Supreme Court.

Each branch of government is a separate, but not independent, arm of government. In the great enterprise of making democracy workable, all are partners. The Foreclosure Mediation Program is an example of all three branches of government, Legislative, Executive and Judiciary, working to meet the needs of its citizens who face an unprecedented crisis of historic proportions.

After a thorough examination of the challenges raised by DEUTSCHE BANK, this Court finds the Foreclosure Mediation Program to be constitutional.

Procedural History

On February 25, 2011, Petitioner DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE INVESTMENT TRUST 2006-1 (hereinafter, "DEUTSCHE BANK") filed a *Petition for Judicial Review*. On March 11, 2011, Respondent JOHN D. TRUEX (hereinafter, "TRUEX") filed a *Response*. On March 14, 2011, this Court filed an *Order on Judicial Review*, and set a briefing schedule that noted the *Petition* and *Response* and authorized a *Reply* and set a hearing. On April 1, 2011, DEUTSCHE BANK filed its *Reply*. On April 18, 2011, TRUEX filed a *Second Response*.

This Court held a hearing on April 22, 2011, at which time certain constitutional issues were raised. This Court ordered supplemental briefing. On May 13, 2011, DEUTSCHE BANK filed its *Supplemental Brief*, and a *Notice of Case Involving Constitutional Questions.* On May 25, 2011, TRUEX filed his *Supplemental Response*. On June 2, 2011, DEUTSCHE BANK filed their *Reply*.

On June 30, 2011, this Court ordered that DEUTSCHE BANK join the STATE OF NEVADA and the ADMINISTRATIVE OFFICE OF THE COURTS (hereinafter "the State") as a party. On July 5, 2011, DEUTSCHE BANK filed a *Notice of Joinder*. On July 14, 2011, this Court held a telephonic hearing, scheduling a hearing for August 11, 2011. On August 5, 2011, the Attorney General representing both the STATE OF NEVADA and the ADMINISTRATIVE OFFICE OF THE COURTS filed its *Points and Authorities in Support of the Constitutionality of the Foreclosure Mediation Program.* On August 8, 2011, the LEGISLATURE OF THE STATE OF NEVADA (hereinafter "the Legislature") filed a *Motion for Leave to File an Amicus Curiae Brief* and the *Amicus Brief.* On August 9, 2011, this Court granted the *Motion for Leave*. On August 9, 2011, TRUEX filed a *Supplemental Brief* addressing the issues raised by the State. On August 9, 2011, DEUTSCHE BANK filed its *Reply Brief* addressing the arguments of the State and Legislature.

On August 11, 2011, this Court heard oral argument. This Court's *Order* follows.

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Legal Standards

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

Parties must strictly comply with the provisions of NRS 107.086. Levya v. Wells Fargo, 127 Nev. Adv. Op. 40, p.8. When a lender violates NRS 107.086 or the Foreclosure Mediation Rules the District Court must determine appropriate sanctions and shall not permit a Certificate to issue. Pasillas v. HSBC, 127 Nev. Adv. Op. 39, pp. 11 – 13.

Discussion

This Court begins its analysis by addressing those issues outside of the constitutional question raised by Petitioner. This mediation occurred on February 9, 2011, thus the Foreclosure Mediation Rules (hereinafter "FMRs" or "Rules") in effect that that time apply and this Court shall refer to the Rules by the numbers then used.

Pleading Practice In Violation of Rules

On March 11, 2011, prior to this Court entering its *Order for Judicial Review*, TRUEX filed a *Response* that was primarily a *Motion to Dismiss*, alleging that DEUTSCHE BANK had failed to stated a claim recognized under judicial review.

On April 1, 2011, pursuant to this Court's *Order for Judicial Review*, DEUTSCHE BANK filed its *Reply to Response* and *Opposition to Motion to Dismiss*.[1] Included in DEUTSCHE BANK'S *Reply* was a request that this Court apply DCR 13(3) against TRUEX for failure to file a written opposition to the substantive contentions raised in the *Petition*. On April 18, 2011, TRUEX filed a *Second Response to Petition for Judicial Review*.

[1] DEUTSCHE BANK contended that TRUEX could have filed a *Response* alongside a *Motion to Dismiss* in the same pleading, and by way of footnote, pointed out that DEUTSCHE BANK was filing a "Reply brief coupled with an Opposition to Motion to Dismiss." Although DEUTSCHE BANK'S contention that TRUEX could have filed both a substantive response and the *Motion to Dismiss* at the same *time* is correct, DEUTSCHE BANK is referred to WDCR 10(9) mandating that any motion, opposition, reply, etc., must be filed as a separate document unless it is pleaded in the alternative.

This Court construes the *Second Response* as a *Surreply* not authorized by this Court's *Order for Judicial Review* and which was not preceded by a request for leave to file. However, this Court takes note of Nevada's oft stated public policy of adjudicating cases on the merits, rather on procedural grounds.

This Court notes that DCR 13(3) is a permissive rule, not a mandatory one. This Court will excuse TRUEX'S unauthorized *Surreply* which does address the substance of the *Petition.* This Court will excuse DEUTSCHE BANK'S violation of WDCR 10(9). This Court will address this action on the merits.

Motion to Dismiss

This Court has considered the arguments regarding TRUEX'S contention that the *Petition* fails to state a claim for which relief can be granted. This Court disagrees. DEUTSCHE BANK filed a *Petition* seeking confirmation that it had acted in good faith, had complied with the requirements of the Foreclosure Mediation Program, and that a Certificate would issue. This is within the purview of this Court sitting in review of a foreclosure mediation.

The scope of Judicial Review in Foreclosure Mediation cases is to determine bad faith, enforce agreements between the parties, and determine sanctions pursuant to NRS Chapter 107. FMR 21(1) (Former Rule 6(1)). The *Petition* is one that seeks a declaration that DEUTSCHE BANK met its mandate. "Determining bad faith" includes the ability to determine that the parties did not act in bad faith. "Determine sanctions pursuant to NRS Chapter 107" includes the ability to determine that no sanctions should issue against a particular party.

Thus, if after a mediation, it appears to a lender that it has complied with all requirements of the Foreclosure Mediation Program, but it fears a Certificate will not issue, then it may petition the Court for an order directing the issuance of a Certificate, not as a sanction against a homeowner, but pursuant to this Court's powers to declare that the sanction of withholding a Certificate from the lender should not be imposed.

The issuance of a Certificate when a lender has fully complied with NRS 107.086 and the FMRs and negotiated in good faith is categorically not a sanction against a homeowner. It is the

expected and legislatively mandated result of a lender's good faith, compliant participation in the Foreclosure Mediation Program when no agreement is reached after good faith negotiations.

Accordingly, the *Petition*, which claims that DEUTSCHE BANK negotiated in good faith, complied with the requirements of NRS 107.086, and was entitled to a Certificate, is a Petition authorized by FMR 21(1) (Former Rule 6(1)). Therefore, and good cause appearing, the *Motion to Dismiss* is **DENIED**.

Substantive Review of the Mediation

In this action a mediation occurred in which the mediator found that DEUTSCHE BANK failed to provide required documents to TRUEX ten days prior to the mediation as required by Rule 8(1) which stated: "In addition to the documents set forth in Rule 5, the parties shall prepare such papers and provide to the mediator, and exchange the items required to be exchanged with each other party, using the most expedition method available, at least 10 days prior to the mediation. . ."

As this Court reads FMR 8(1), it requires that all the documents set forth in Rule 5, and the documents set forth in the remainder of Rule 8, and those documents required by the mediator must be exchanged between the parties no later than ten (10) days prior to the mediation. In Leyva, 127 Nev. Adv. Op. 40, the Nevada Supreme Court ruled that NRS 107.086 and FMR Rule 5 must be strictly complied with. In Pasillas, 127 Nev. Adv. Op. 39, the Nevada Supreme Court held that when a lender has committed a violation, a Certificate shall not issue, and sanctions must be determined.

The interesting twist to this case is that although DEUTSCHE BANK apparently violated Rule 8(1), TRUEX did not file a *Petition for Judicial Review* seeking sanctions. TRUEX did not ask for sanctions relating to DEUTSCHE BANK'S violations until his *Second Response*. This Court finds that in these cases the issue of violations may be raised at any time. Thus this Court, having been given notice of violations committed by DEUTSCHE BANK, must not permit a Certificate to issue, and must consider appropriate sanctions.

Here, Rule 8(1) was violated when documents set forth in Rule 5 were not timely provided. This Court finds that the purpose of Rule 8(1) is to provide the parties with sufficient

time to prepare for mediation. Rules concerning documents required by Rule 5, relating to those documents required by NRS 107.086(4), require strict compliance under Leyva. Here, certain certifications were not timely produced, and Rule 8(1) was not strictly complied with. This Court must determine appropriate sanctions. This Court finds that five hundred dollars ($500.00) is sufficient to demonstrate to DEUTSCHE BANK the necessity of timely providing documents.

This Court finds that sanctions are issued for their coercive effect, and are not "damages." In most cases in the Foreclosure Mediation Program, this Court finds that awarding sanctions to the adverse party would be an unwarranted windfall. Here, TRUEX has not suffered any harm from DEUTSCHE BANK'S violation. After this case, TRUEX will remain in possession of his house, and receive another mediation with his lender to potentially avert a foreclosure. Thus, awarding TRUEX sanctions for DEUTSCHE BANK'S violations would be a windfall. This Court finds that the sanctions against DEUTSCHE BANK should be awarded to an organization devoted to the public good.

Violations of TRUEX

This is an unusual case in that the Mediator's Statement reflects violations committed by a homeowner, Respondent TRUEX.

The mediator found that TRUEX failed to produce certain required financial statements, in that two pages from the statement were not provided ten days in advance of the mediation and TRUEX failed to provide those missing pages at the mediation. The Nevada Supreme Court has not yet decided what ought to be done when a homeowner violates NRS 107.086 or an FMR.[2]

In the only two published opinions relating to the Foreclosure Mediation Program, the Nevada Supreme Court has held that if a violation is found that the District Court must determine appropriate sanctions. Pasillas v. HSBC, 127 Nev. Adv. Op. 39. In that case, the Supreme Court reversed a District Court's denial of a petition for judicial review and remanded the matter for the District Court to determine appropriate sanctions against a lender who had violated certain

[2] Indeed, this issue was the jumping off point for DEUTSCHE BANK'S constitutional challenge, DEUTSCHE BANK initially posited that the Legislature could not *restrict* the District Court's authority to fashion equitable relief, and that if the Foreclosure Mediation Program was to work at all, that the Court must have authority to address shortcomings of homeowners.

provisions of NRS 107.086 and the FMRs. The Supreme Court noted that if there was any violation committed by a lender, a Certificate could not be issued. *Id.* This Department had previously found that while withholding a Certificate was a sanction that could be ordered, that some violations by a lender could be addressed solely through monetary sanctions while still permitting the Certificate to issue. In light of Pasillas and Leyva that paradigm is not longer operable.

In essence, the Supreme Court held that lenders in violation cannot get what they really want, namely to foreclose, if they violate NRS 107.086 or the FMRs. This Court is at a loss to apply the same form of sanction against a homeowner. What a homeowner really wants is to avoid a foreclosure and to modify their loan. This Court finds that addressing a homeowner's violation by ordering a Certificate to issue would be anathematic to the purposes of AB 149. So too would an order that determined that no modification would ever be required on the loan.

On the other extreme, this Court cannot ignore homeowner violations. The law must be applied uniformly. To hold lenders to a standard of strict or substantial compliance, while excusing violations of homeowners would be manifestly inequitable. NRS 107.086 and the FMRs require certain enumerated actions of both parties. The failure of either party to perform its duty is a violation that requires this Court to determine appropriate sanctions.

In reviewing NRS 107.086, the only provision that discusses sanctions provides the District Court with the authority to issue sanctions against the beneficiary of the deed of trust or the representative. NRS 107.086(5). In reviewing the Foreclosure Mediation Rules, the only provision that discusses sanctions merely confirms the District Court's authority to determine appropriate sanctions pursuant to NRS Chapter 107. FMR 6(1). This Court finds that FMR 6(1)'s reference to sanctions refers specifically to NRS 107.086(5). Construed literally, there is no provision under NRS 107.086 or the Foreclosure Mediation Rules that authorizes sanctions against a homeowner for conduct during a mediation. There are certain homeowner requirements of NRS 107.086 that, if violated, result in an automatic issuance of a Certificate. NRS 107.086(3) & (6). This Court finds that it has the power to enforce the provisions of NRS

107.086(3) or (6) against a homeowner if a lender brought a petition against the homeowner challenging the timeliness of the Election to Mediate.

However, for FMR 8(1) or 8(2), there is no provision in NRS 107.086 or the FMRs that empower this Court to issue sanctions against a homeowner or describing what those sanctions ought to be.

This Court finds that if a homeowner participated in bad faith, by providing fraudulent information with an intent to deceive the lender for example, then perhaps harsh sanctions would be warranted if the same were requested by the lender in a petition for judicial review, but this Court also finds that those sanctions would likely be issued under NRCP 11, or similar provision of law. However, in this case, the failure to provide a complete financial packet does not rise to bad faith, especially when the fact that TRUEX disclosed his high income level and financial stability is taken into account. It is not that TRUEX feigned poverty to gain a modification to which he was not entitled, he merely failed to complete an information packet. Although this is a violation of FMR 8(2), it is not evidence of bad faith.

This Court finds, in light of Pasillas and Leyva, that it is unable to use the violations of a homeowner to offset the violations of a lender and excuse the lender's violations. That is, here DEUTSCHE BANK is charged with a violation that precludes a Certificate, but TRUEX has also committed a violation. This Court cannot use TRUEX'S violation to cancel out DEUTSCHE BANK'S violation and permit a Certificate to issue, although that would appear to be the most equitable option and is the primary relief prayed for by DEUTSCHE BANK.

This discussion of what this Court cannot do is sadly not particularly helpful in determining what this Court can do to address homeowner violations. In the aftermath of Leyva and Pasillas, a homeowner's performance is largely irrelevant to the question of whether a lender can obtain a Certificate. A homeowner who flouts FMR 8(1) and (2), or who records the mediation in violation of FMR 8(6) is under no threat of specific statutory or rule based sanctions. This Court fears that homeowner immunity for behaving badly will result in homeowners behaving badly with impunity.

This Court finds that NRS 107.086(5) did not *create* this Court's authority to sanction lenders for violations of NRS 107.086 or the FMRs. This Court's authority to issue sanctions in these cases derives from the equitable powers of this Court. The last sentence of NRS 107.086(5) is merely an expression of Legislative intent confirming that this Court has full access to its equitable authority to fashion justice. As discussed *infra*, foreclosure is a creature of equity, actions involving foreclosure are thus inherently equitable actions. This Court possess the full array of equitable powers. Equity regards as done what ought to be done. This Court has inherent coercive powers to address violations of law, whether statute or rule, regardless of which party violated the law.

Having concluded that this Court possesses the authority to redress homeowner violations of NRS 107.086 or the Foreclosure Mediation Rules, this Court considers what is the appropriate sanction. As a case in equity, context is everything. Here, TRUEX has defaulted on a promissory note secured by a deed of trust. Upon such default, a Notice of Default was properly recorded. TRUEX exercised his statutory right to mediate his loan. NRS107.086 was created through AB 149. The purpose of AB 149 was to address the foreclosure crisis plaguing Nevada.

Specifically identified as a cause of the crisis was the fact that homeowners could not afford their mortgages because of changes in the economy, referred to as the Great Rescession. The Legislature intended to create a pause in the foreclosure process governed by NRS 107.080, in order to give homeowners and lenders an opportunity to meet and seek alternatives to foreclosure. Neither AB 149, nor NRS 107.086, nor the FMRs have a requirement that a homeowner suffer from any hardship in order to qualify for the Foreclosure Mediation Program. Thus, a millionaire who has defaulted on a $800,000 note securing a mansion despite a clear ability to pay has identical rights to elect to mediate as a laid off teacher struggling to pay the last $35,000 on a note securing a modest condo.

However, a lender that is confronted with a homeowner who has every apparent ability to pay the loan that the homeowner agreed to may find that good faith negotiation is satisfied merely by offering reinstatement. There is no equitable force to the proposition that one who can meet his obligations ought to have his obligations excused because that person mistimed a

market. After all, a homeowner who saw great appreciation in the value of his home would be unlikely to agree to owe more money to his lender. TRUEX has not identified any authority for the proposition that gains should be privately realized by a homeowner, but that losses must be shared. TRUEX'S status as an individual who can afford his mortgage casts a less than favorable light on his failure to provide certain financial information.

This Court finds that TRUEX'S failure resulted in a mediation in which DEUTSCHE BANK was unable to fully negotiate because TRUEX withheld information. This caused DEUTCHE BANK to waste its time and money by having an attorney represent it at a mediation in which TRUEX failed to meet his obligations.

In the *Petition for Judicial Review*, DEUTSCHE BANK asked this Court for such relief as deemed fair, just and equitable. This Court finds that this request encompasses asking this Court to consider sanctioning TRUEX for his violations. This Court finds that TRUEX ought to be sanctioned for his violation. This Court notes the minimal nature of TRUEX'S violation, and finds that a nominal sanction is appropriate. This Court finds that two hundred fifty dollars ($250.00) is sufficient to demonstrate to TRUEX and other homeowners the necessity of complying with the provisions of the program that they have elected to participate in and which they have compelled their lender to participate in. This Court finds that it would be inappropriate here to award the sanction to DEUTSCHE BANK, and shall instead order the sanction paid to an organization devoted to the public good.

No Certificate May Issue; New Mediation Ordered; No Attorneys Fees or Costs

Due to DEUTSCHE BANK'S violation, no Certificate may issue based on this mediation. This Court finds that DEUTSCHE BANK and TRUEX have both demonstrated a willingness to continue negotiating in good faith, and finds that it is equitable to order a new mediation. This will avoid the unnecessary time and expense of requiring DEUTSCHE BANK to rescind the Notice of Default and record a new one. This benefits both parties, because it will prevent unnecessary fees and expenses from accruing that DEUTSCHE BANK would seek against TRUEX. This Court does acknowledge that permitting a new mediation rather than requiring rescission and re-recording may seem to favor lenders because it shortens the time that

will elapse before a new mediation is held, but such a view is cynical in that it assumes that the second mediation will be unfruitful and that the lender will simply seek to foreclose. This Court finds that a new mediation based on the present Notice of Default provides equal benefits to lenders and homeowners alike. This Court is optimistic that good faith mediation may avert a foreclosure. Even if the second mediation is ultimately unsuccessful, it saves lenders time, and ultimately saves homeowners money.

Because both parties violated the FMRs, this Court finds that each should bear their own fees and costs incurred throughout these proceedings.

Constitutionality of the Foreclosure Mediation Program

In this action DEUTSCHE BANK made a serious and well articulated argument that the Foreclosure Mediation Program, as currently enacted and operated, violates the Nevada Constitution's Separation of Powers clause.[3] DEUTSCHE BANK contended that the Foreclosure Mediation Program is essentially an administrative agency that was constitutionally required to have been assigned to the Executive Branch. It contended that the fact that the Foreclosure Mediation Program is operated by the Administrative Office of the Courts by the Nevada Supreme Court, and that the Nevada Supreme Court drafts the Foreclosure Mediation Rules results in a finding that the Foreclosure Mediation Program has been assigned by the Legislature to the Judicial Branch. DEUTSCHE BANK contends that this violates the Foreclosure Mediation Program, because it either is an administrative agency under Chapter 233B which must be in the Executive Branch, or if it is not an executive agency, then it is a judicial program that is exercising executive function.

Nature of the Foreclosure Mediation Program

The Foreclosure Mediation Program is a relatively unique program within the State of Nevada. This Court had previously indicated that the Foreclosure Mediation Program was an administrative agency. [*See*, Petitioner's Reply at p. 4] The vehicle for judicial review by way of

[3] At oral argument each party contended that the other had first raised the constitutional issues. This Court finds that TRUEX first raised the constitutional issue by contending that this Court's powers had been limited by the Legislature. As a result, this Court does not find that it would be equitable to award TRUEX attorneys fees for briefing the constitutional question.

a petition is similar to review of an administrative agency action. The Supreme Court's first case, in an unreported order, dealing with the Foreclosure Mediation Program analogized to the procedures for service of pleadings in administrative actions under Chapter 233B.

To the extent that this Court previously indicated that the Foreclosure Mediation Program *was* an administrative agency, that statement was incorrect. Although the Foreclosure Mediation Program bears significant similarities to an administrative agency, in the State of Nevada an administrative agency pursuant to Chapter 233B is inherently part of the Executive Branch. Were the Foreclosure Mediation Program an administrative agency pursuant to Chapter 233B, but delegated to the judiciary, that would be a likely violation of the separation of powers clause. This Court finds that the Foreclosure Mediation Program is not an administrative agency within the definition of that term under Nevada law.[4] The Foreclosure Mediation Program was not established pursuant to the Administrative Procedures Act, and is not governed by the APA. Although it bears similarities to an administrative agency, it is not one.

As stated by the Attorney General in oral argument, the Foreclosure Mediation Program is a function of the judicial branch, and is, as its name implies, a "program," in the same manner that the Supreme Court's settlement conference program is a "program." It is not that the Supreme Court is running an agency that needs to be based in the Executive Branch. Rather, the Supreme Court, through the Administrative Office of the Courts runs a program that operates under its own set of rules. The question becomes whether that program, as presently operated, violates the separation of powers clause by operating outside of the judicial sphere and exercising executive function. If the Foreclosure Mediation Program is outside of the judicial sphere or judicial function, then the Supreme Court is operating a program that exceeds its judicial authority. *See*, Galloway v. Truesdale, 83 Nev. 13 (1967).

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[4] This Court had previously noted that the typical Petition for Judicial Review under FMR 21 does not challenge the actions of the Foreclosure Mediation Program itself, but merely challenged the actions of the parties to the mediation. This Court had indicated that a challenge against the Foreclosure Mediation Program itself would likely be brought pursuant to Chapter 233B. This was incorrect; the procedure for challenging an action of the Foreclosure Mediation Program itself is contained within the FMRs at FMR 21(4).

Three Out of Three Branches Agree

The mere fact that some entity with some authority does something does not make it right or lawful.[5] However, this Court takes some guidance from the fact that the entirety of the government of the State of Nevada appears to believe that AB 149 did not violate any constitutional mandates or prohibitions. This Court had ordered the State of Nevada to appear through the Attorney General's Office, and for the Foreclosure Mediation Program to appear, because due to the nature of the claim asserted, it was possible that each branch of government would have a differing opinion. In fact, the Foreclosure Mediation Program through the Administrative Office of the Courts agreed to permit the Attorney General's Office to represent it because its position was the same as the State of Nevada's executive branch. The Legislature filed an *amicus curiae* brief in support of the same position.

This Court notes the following facts. The Foreclosure Mediation Program was enacted by statute by the Legislature through AB 149. AB 149 was signed by the Governor, the head of the Executive Branch. Pursuant to AB 149 the Supreme Court undertook the task of formulating the FMRs, hired individuals to run and administer the program, appointed mediators, collected fees for the mediations. The Supreme Court has issued no fewer than four (4) orders stemming from the Foreclosure Mediation Program, two of which were formal published opinions. The Supreme Court has also amended the Foreclosure Mediation Rules several times. In 2011, the Legislature passed AB 300, which made certain modifications to the Foreclosure Mediation Program, but did not remove it from the Supreme Court's oversight. Governor Brian Sandoval vetoed AB 300, noting in his veto letter that the Supreme Court had the authority to modify the program, pursuant to NRS 107.086(8), and thus Legislative action was unnecessary because such changes could be, and in his view should be, made by the Supreme Court.

Generally Pre-Litigation ADR Programs Are Within The Judicial Function

This Court finds that where there is a controversy of a legal or equitable nature between two parties, that the judiciary may be properly tasked with creating, administering, or supervising

[5] Many remember President Richard Nixon's infamous line, "When the President does it, that means that it is not illegal."

a program for dispute resolution with the intention of avoiding litigation. *See*, Wegner v. Finley, 541 N.E.2d 1220 (1989).

The Foreclosure Mediation Program does not fall squarely within this framework because not all foreclosures brought to mediation could be validly challenged. The Foreclosure Mediation Program accepts parties who are undeniably in default with no substantive defense to the underlying foreclosure. These mediations do not always avert a wrongful foreclosure action, because not all of the participants have sufficient facts to make a wrongful foreclosure claim. However, it cannot be denied that some of the participants in the Foreclosure Mediation Program may have substantive defenses to bring a wrongful foreclosure action, and that the Foreclosure Mediation Program does avoid some litigation.

This Court notes that one of the chief concerns of the Legislature in passing NRS 107.080 was a concern that homeowners did not know who owned their loan, and thus did not know who ought to be foreclosing against them, or with whom they should attempt to work out alternative arrangements. This Court finds that such issues of unproven ownership persist to this day. *See*, Leyva, 127 Nev. Adv. Op. 40. One of the key requirements of the Foreclosure Mediation Program as enacted is that lenders demonstrate who owns the note and who possesses beneficial interest in the deed of trust. This facet of the Foreclosure Mediation Program militates strongly towards a conclusion that the Foreclosure Mediation Program is the type of pre-litigation ADR that has been upheld in other states. By providing a forum where the lender and homeowner both analyze the documents supporting a foreclosure, both sides can determine whether the lender has standing to foreclose, and accordingly whether the homeowner has grounds to file a wrongful foreclosure suit. In a system in which homeowners do not know who owns their loan because the beneficiary recorded in the county office is a mere placeholder and their point of contact is a mere servicer, providing a forum designed in part to address the ownership issue does help prevent litigation, and certainly helps prevent needless litigation. The Foreclosure Mediation Program provides, at minimum, a forum for homeowners to be shown that the underlying foreclosure is being validly sought by the proper party. This obviates the need for the

filing of a civil suit in order to conduct formal discovery. Thus, the Foreclosure Mediation Program is a program that reduces litigation.

This Court finds that the judicial power includes the ability to craft and administer programs that are designed to reduce litigation. Essentially, if a program is designed to prevent a justiciable controversy between two parties from becoming a case, that is within the judicial power as defined in Galloway. This Court finds that the Foreclosure Mediation Program is such a program.

Other Court Based ADR Programs

The Legislature filed an *amicus brief* which cited to several judicially governed alternative dispute resolution programs in other states that provided for judicial ADR outside of litigation. [Leg. Amicus at pp.17-20] Michigan, Minnesota, Nebraska, Oklahoma, Indiana, Illinois, Colorado are all states with non-litigation based ADR programs and community dispute resolution programs established by the legislatures of those states and based in and overseen by the judiciary of those states. Those programs have generally been successfully upheld on appeal, or discussed on appeal with no concerns regarding their validity. *See*, Wegner v. Finley, 541 N.E.2d 1220 (1989); Yaekle v. Andrews, 195 P.3d 1101 (Colo. 2008).

The Legislature did not state whether these ADR programs were mandatory or merely voluntary. The Nevada Foreclosure Mediation Program may be elected by a homeowner. Once a homeowner makes a timely election to mediate that election is binding on the lender. Thus, there is a compulsory element to the Nevada Foreclosure Mediation Program.

This Court finds that the compulsory nature of the Foreclosure Mediation Program makes it unique. A state may certainly empower its judiciary to run a voluntary alternative dispute resolution program in an effort to avoid formal litigation. The question before this Court is whether the Legislature may mandate that a lender participate in a program administered by the judiciary in the absence of an active civil case. DEUTSCHE BANK argued that there is no formal process within the scope of NRCP 4 in the Foreclosure Mediation Program. There is the Notice of Default, the Election to Mediate, the Mediator's Statement, and potentially a Petition

for Judicial Review. None of these documents are served with a summons under NRCP 4, these mediation are not "cases".

Other Foreclosure Mediation Programs

This Court briefly looks to the Foreclosure Mediation Program of other states for examples of how other states have set up analogous systems. Although the fact that another state has or has not adopted a similar system to Nevada is not dispositive to the question of whether Nevada's Foreclosure Mediation Program as presently enacted violates the distribution of powers clause of Nevada's Constitution, such a survey is instructive.

The Foreclosure Mediation Program of New Jersey is run by the Administrative Office of the Courts. However, New Jersey foreclosure law is overseen entirely by the judiciary through formal cases. Thus, this mediation program is one that has been inserted into an existing actual case. Similarly, Connecticut has a Foreclosure Mediation Program that has been inserted into its judicial "case based" foreclosure proceedings. Florida also has a Foreclosure Mediation Program overseen by its Supreme Court, but is also a state where all foreclosures are prosecuted through a complaint seeking foreclosure. Maryland also offers a Foreclosure Mediation Program for foreclosures in which a "case" has been filed in a Circuit Court. Maryland's program is run by the Office of Administrative Hearings, an independent state agency. The State of Washington and Washington D.C. both require that a certificate of mediation completion be filed with the recorder's office prior to recording a transfer of title in the deed office. Washington State's program is handled by the Department of Commerce, and Washington D.C.'s program is handled by the Department of Insurance and Banking.

Rhode Island has a foreclosure mediation program based in the United States' Bankruptcy Court, as well as a Providence City specific program.[6] Again, these programs are part of formally filed cases.

By contrast, Hawaii is another state like Nevada with a judicially assisted and governed foreclosure mediation program in a state with "non-judicial" foreclosures. Hawaii has two

[6] A program that was challenged by Deutsche Bank National Trust Company, with mixed results. Deutsche Bank National Trust Co. v. City of Providence P.C. No. 10-1240

programs, one governed by the Court based on a pilot project out of its Third Circuit, and one that is managed by the Department of Commerce and Consumer Affairs but provided "performance oversight" by the judiciary.

From this Court's survey of the Foreclosure Mediation Programs in other states,[7] it appears that nearly all of them would satisfy DEUTSCHE BANK'S constitutional concerns. That is, they are all pursuant to filed foreclosure *cases*, or they are administered by an independent agency and not the judiciary of that state.

Nevada appears to be unique in juxtaposing a completely judicial foreclosure *mediation* process with "non-judicial" foreclosure process. Because it is agreed by all parties that the Foreclosure Mediation Program is within the judicial branch, the question is whether the subject matter of that program, "non-judicial" foreclosures pursuant to statute (NRS 107.080) and written agreements between two private parties, are within the judicial power of the courts. Galloway v. Truesdale, 83 Nev. 13 (1967).

The State contended that the judicial power includes the "administration of justice," citing to Galloway. DEUTSCHE BANK contended that as used in Galloway, the administration of justice is limited to justiciable cases or controversies. This Court agrees with DEUTSCHE BANK'S interpretation of what the administration of justice means. The "administration of justice" must relate back to "justiciable cases or controversies." This Court finds that the administration of justice need not be based in already established cases. As discussed *ante*, an ADR program specifically designed to reduce specific types of justiciable cases is a valid judicial function because it is a program that administers justice, and relates to justiciable cases or controversies. This Court finds that even an additional step of abstraction is permissible. A non-litigation ADR program that relates to specific types of justiciable cases or controversies is a valid judicial function.

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[7] *See*, Heather Scheiwe Kulp, "Foreclosure Mediation and Mitigation Program Models." May 17, 2011 (*available at* http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/Foreclosuremed6-29.authcheckdam.pdf)

Accordingly, this Court finds that the judicial power may extend beyond formally filed "cases" if there is a "justiciable controversy," and the judiciary is engaged in programs to resolve that controversy. This Court looks to determine whether in the context of the Foreclosure Mediation Program, there is a justiciable controversy due to the nature of foreclosure or due to the relative status of the parties.

Foreclosure is Inherently Equitable In Nature And Properly Within the Judicial Sphere

This Court finds significant merit in the State's contention that the phraseology of "judicial" or "non-judicial" foreclosure is a misnomer; and in this case a dangerously misleading one. The State refers to this process as, "foreclosure by trustee's sale," because it is the trustee's sale that forecloses on the homeowners ability to exercise the right of redemption. This Court finds that a fitting term for the entire process under NRS 107.080 is, "foreclosure by notice and sale," as opposed to judicial foreclosure or "foreclosure by judgment." The process known as "judicial foreclosure" is more appropriately "case-based foreclosure". The process known as non-judicial foreclosure is more appropriately "notice-based foreclosure".

Calling Nevada's process of foreclosure by trustee's sale through notice a "non-judicial" foreclosure insinuates that such a process is outside of the judiciary. This Court finds that foreclosure pursuant to NRS 107.080 is not outside the judicial function.

The State laid out a persuasive argument that the founders of Nevada conceived of foreclosure as a purely judicial function. The equitable rights of redemption and foreclosure were created by the Chancery Courts of England, and passed down through English and American Common Law. BFP v. Resolution Trust Corp., 511 U.S. 531 (1994). Thus, when the founders framed the Constitution of Nevada, and assigned judicial power to the judicial branch, foreclosure of a homeowner's right of redemption was included in those powers.

Programs that address foreclosure issues are inherently programs that involve the balancing of the homeowner's equitable right of redemption and the lender's equitable right to foreclose. This is clearly judicial in nature. Foreclosures are *per se* within the judicial sphere. This Court next looks to whether NRS 107.080 removed certain classes of foreclosure from the judicial function.

Foreclosure Through Notice and Trustee's Sale Is a Justiciable Controversy

Petitioner's argument is that the metes and bounds of the judicial power can be summed up by the phrase, "justiciable case or controversy," citing to Galloway v. Truesdell, 83 Nev. 13 (1967). This Court finds that the use of "or" is ultimately dispositive in this action. As discussed *infra*, this Court finds a foreclosure pursuant to NRS 107.080 is a justiciable controversy, although certainly not a "case".

The definition of a justiciable controversy was expressed by the Nevada Supreme Court in Kress v. Corey, 65 Nev. 1 (1948): (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination. *See also*, Doe v. Bryan, 102 Nev. 52 (1986).

Here, (1) lenders claim a right to foreclose on homeowner's right to redeem, which homeowners have an interest in contesting; (2) the interests of lenders and homeowners are adverse; (3) the party seeking to participate in the Foreclosure Mediation Program to prevent foreclosure is the owner/occupier at risk of foreclosure and losing their residence and is thus an interested party with a cognizable legally protectable interest; (4) from the moment the Notice of Default is filed, the issue is ripe for judicial determination whether the foreclosure is proper.

This Court finds that there are two distinct documents which cause a controversy between the homeowner and the lender in the context of the Foreclosure Mediation Program. Each of these independently would be sufficient to place the parties into a justiciable controversy. Merely being late on a mortgage does not create an actual controversy.

The Election to Mediate is a document that is filed with the Administrative Office of the Courts. Once it has been filed, lenders are compelled to attend mediation and participate in good faith and to comply with NRS 107.086 and the FMRs. This Court finds that the Election to Mediate is analogous to a traditional complaint.

DEUTSCHE BANK contended at oral argument that the lack of formal service of a summons, or other process under NRCP 4, causes the Election to Mediation to not be analogous to a complaint. For purposes of determining whether the Foreclosure Mediation Program is a valid judicial function, this Court disagrees. A summons and complaint creates a "case," but this Court finds that a "justiciable controversy" is not synonymous with a case.

This Court appreciates DEUTSCHE BANK'S concerns that valid notice may not be given in the absence of process under NRCP 4, but such concerns are inapposite here. This case is a facial challenge, not one of specific application. Perhaps some bank could argue that it could not be validly sanctioned because the Election to Mediate was insufficient to give it notice under a due process argument. Such a concern was intimated during the discussions concerning AB 149 about the possibility that a lender who was not properly notified by a trustee could face sanctions for failure to appear. But that case is not before this Court. In this case, DEUTSCHE BANK received sufficient notice of the mediation, a conclusion strongly supported by the fact that DEUTSCHE BANK attended the mediation. There mere fact that the Election to Mediate *might* not give some hypothetical lender sufficient notice is not enough to call into question the constitutionality of the Foreclosure Mediation Program under a separation of powers analysis. The Election to Mediate is a document which, once filed, creates a justiciable controversy.

Separately, this Court finds that the Notice of Default, which provides the Election to Mediate, itself creates a justiciable controversy. This Court finds that NRS 107.080 did not create "non-judicial foreclosure" which removed foreclosures from judicial oversight, but rather, NRS 107.080 created a process of foreclosure in which judicial oversight was not *automatic*. When NRS 107.080 was passed, it simply inverted the burden on the parties to bring the matter before the Court, it did not take the matter outside of the judicial sphere.

Prior to 1929, a lender had the burden to file a foreclosure action. *See*, Hyman v. Kelly, 1 Nev. 179 (1865). This was time consuming and an inefficient use of judicial resources because typically all the parties agreed that there was a valid promissory note secured by a mortgage, that the note had been defaulted upon, and that the lender had the right to foreclose on the property and dispose of it. Thus, in 1929 the Legislature enacted a statute that permitted a lender to

provide due notice to the homeowner and thereafter exercise the lender's equitable right of foreclosure. However, nothing in the law from 1929 through 2009 precluded a homeowner from filing a challenge against the foreclosure. Essentially, in 1929, the Legislature made a policy choice favoring efficiency and expediency, and elevating the equitable right of foreclosure over the equitable right of redemption, and reversing the presumptions needed to exercise those relative and competing rights. Under NRS 107.080 it is presumed that the lender can foreclose. However, under NRS 107.080, the lender must give certain notices to the homeowner, so that the homeowner can either exercise the right of redemption, or challenge the matter in Court.

Thus, this Court agrees with the State of Nevada, and TRUEX, that foreclosure under NRS 107.080 is not outside of the judicial power of the judiciary of the State of Nevada. Rather NRS 107.080 merely removed *automatic* judicial oversight, and placed the burden on the homeowner to take the matter to Court. This Court further finds that it is permissible to give back limited oversight, or to create an alternative method of oversight.

Prior to NRS 107.080 a formal case was required to be filed by lenders. Subsequent to NRS 107.080 no such case was required, and a homeowner seeking to avoid a foreclosure had to file a case with sufficient grounds to demonstrate why the foreclosure should be stopped. In 1929, the Legislature relaxed requirements on lenders, and instead of requiring them to file a case against homeowners to exercise the right to foreclose, they merely had to provide notice to the homeowner to exercise the right to foreclose. In 2009, the Legislature could have repealed NRS 107.080, and restored automatic oversight of all foreclosures to the Courts, and placed the burden on lenders to prosecute all foreclosures.

Instead, the Legislature chose to pass a law restoring limited oversight to the Courts, and retaining the burden on the homeowner to make an application to the Courts. However, instead of requiring homeowners to file a case for violation of NRS 107.080 or wrongful foreclosure, the Legislature permitted the homeowner to file an Election to Mediate, and created the Foreclosure Mediation Program. It is difficult to accept a proposition that the Legislature could not make a partial restoration of judicial oversight when it could have made a complete restoration.

This Court finds that the Notice of Default under NRS 107.080 is a document that creates a justiciable controversy between the two parties. It is a notice served in a statutory manner that informs a homeowner that the lender seeks to exercise its equitable right of foreclosure, and that the homeowner must take certain steps to avoid that outcome. From the moment that Notice of Default under NRS 107.080 is filed, a controversy between the parties exists as to whether the lender may foreclose the homeowner's right to redeem.[8] That is a justiciable controversy.

This Court notes that when AB 149 was discussed in the Legislature, then Chief Justice Hardesty commented that: "This situation is unique in a couple of respects. The process does not begin with a *filed court case*; it is initiated, instead, through what appears to be a "Notice of Default and Election to Sell." Minutes of the Assembly Feb. 11, 2009 (*emphasis added*).

Chief Justice Hardesty also stated:

> We were asked to evaluate and consider participating in a mediation process, a dispute resolution process that has been outlined by Assemblywoman Buckley. *That is what courts do.* We conduct settlement conferences and mediations on a regular basis. We are well-trained to accomplish significant objectives in the settlement and mediation process.
>
> I believe that it would be necessary for the Court to adopt a set of rules which would govern the mediation process, and as an outline, we have a couple of sources that we can turn to. First, the Supreme Court can use the current settlement conference rules. Second, we have settlement conference mediation rules for alternate dispute resolution. We also have rules that govern other mediation processes throughout the court system. *Id.* (*emphasis added*)

Further, Chief Justice Hardesty stated:

> . . . the best approach is to treat this as a judicial function administered by the Administrative Office of the Courts. We do have in place a structure through the Senior Judge Program to be able to administer a program like this. *Id.*

From the statements made it is apparent that the possibility of handling the Foreclosure Mediation Program as an executive administrative agency was considered as a possibility, but

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[8] As above, this Court acknowledges that in many, if not most, cases the answer to the question of whether the lender has the right to foreclose is yes. But there is still a question. This question gives rise to the controversy.

that it was determined that the best approach was to keep this dispute resolution program within the branch of the government devoted to dispute resolution, the Judiciary. These statements lend some authority to the arguments of the State that ADR is inherently judicial.

The statements of Chief Justice Hardesty also illustrate that the Legislature and the Supreme Court were aware that a foreclosure pursuant to NRS 107.080 does not involve a "filed court case." However, the lack of a formal civil case does not mean that there is no justiciable controversy. At the point in time the lender filed a Notice of Default and Election to Sell, the lender has informed the homeowner that the lender disputes that the homeowner retains the right to redeem, and that the lender shall foreclose that right if curative actions are not taken. This is a controversy. At the point that the homeowner files the Election to Mediate, the homeowner has informed the lender that he or she does not submit to the lender's decision and instead contests the lender's Election to Sell. This is an assertion of the homeowner's right to redeem against the lender's right to foreclose. This is a controversy. At its most basic, it can be said relative to the Foreclosure Mediation Program, that the lender wants to exercise the right to foreclose the homeowner's right to redeem and the homeowner does not want the lender to do so. *See*, Kress v. Corey, 65 Nev. 1 (1948). This is a justiciable controversy regarding two competing equitable rights of adverse parties that may be properly brought before the Courts.

Equity is broad. Although it is said that equity follows the law, equity is primarily concerned with fairness and justice. It must be remembered that homeowners have the right of redemption; and that Nevada is a lien theory state, which means that homeowners hold title to their homes. NRS 107.080 did not alter that situation. Rather, it provided lenders with an expedited means of foreclosing homeowners' equitable rights without automatic judicial oversight. In equity and in law, a homeowner may certainly ask a Court to stop the lender if the homeowner can demonstrate that the lender cannot properly meet the requirements to exercise the right to foreclose. This is contemplated by NRS 107.080. In equity, a homeowner may also ask the Court to compel a lender to take a pause on the march to foreclosing the homeowner's equitable rights and consider in good faith whether there is a mutually agreeable alternative. This is contemplated by NRS 107.086. This is equitable because it is fair in a world increasingly

driven by computers and automated processes, which have no concept of what is reasonable or what is just, to require a lender to produce a person who can weigh what is fair to make a human determination of whether the lender actually wishes to foreclose or whether an alternative can be reached.

Thus, this Court agrees with the State of Nevada, and TRUEX, that foreclosure is inherently equitable in nature and is within judicial power, and that foreclosure under NRS 107.080 remains equitable in nature and is not outside of the judicial power of the Judiciary of the State of Nevada. Rather NRS 107.080 merely removed *automatic* judicial oversight, and placed the burden on the homeowner to take the matter to Court. This Court finds that alternative dispute resolution programs that relate to equitable or legal claims are judicial in nature. This Court finds that the Foreclosure Mediation Program is an alternative dispute resolution program that relates to equitable claims. This Court finds that alternative dispute resolution programs that reduce litigation are judicial in nature. This Court finds that the Foreclosure Mediation Program is an alternative dispute resolution program that reduces litigation by providing a mechanism for demonstrating proper ownership of the loan outside of formal discovery in a wrongful foreclosure action. This Court finds that the judicial power extends to any justiciable controversy. This Court finds that the Foreclosure Mediation Program involves justiciable controversies regarding the relative and competing rights of a lender to foreclose on and a homeowner to retain the homeowner's equitable right of redemption, and is thus within the judicial power of the Judicial Branch of the government of the State of Nevada.

The Foreclosure Mediation Program Is Constitutional

This Court finds that the Legislature could have enacted the Foreclosure Mediation Program as an administrative agency pursuant to Chapter 233B. This Court finds that the Legislature could have enacted the Foreclosure Mediation Program with a requirement that in order to elect into the program a civil case must be filed in a District Court. But although the Legislature could have done those things, they were not required to do so by the Constitution of the State of Nevada. The Foreclosure Mediation Program as currently enacted and administered by the Nevada Supreme Court's Administrative Office of the Courts is constitutionally

permissible. NRS 107.086 is not facially unconstitutional for violating the separation of powers clause of the Nevada Constitution.

Accordingly, there is no constitutional defect that would void the underlying mediation between TRUEX and DEUTSCHE BANK, nor any constitutional problem prohibiting this Court entering an order pursuant to the *Petition for Judicial Review* filed by DEUTSCHE BANK.

This Court has been presented with an argument that creating a Foreclosure Mediation Program within the Administrative Office of the Courts in a "non-judicial" foreclosure state violates separation of powers because that program is inherently executive in nature. This Court finds that it is not.

Conclusion

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

1) No Certificate may issue from this Mediation;

2) The parties shall contact the Foreclosure Mediation Program to schedule a new mediation in front of a randomly assigned mediator;

3) TRUEX shall pay two hundred fifty dollars ($250.00) to Washoe Legal Services within thirty (30) days of entry of this *Order*;

4) DEUTSCHE BANK shall pay five hundred ($500.00) to Washoe Legal Services within thirty (30) days of entry of this *Order*.

5) Each party shall bear their own fees and costs for the first mediation, the *Petition for Judicial Review*, and the second mediation;

6) The *Petition for Judicial Review* is **DISMISSED**.

IT IS SO ORDERED.

DATED this 25 day of August, 2011.

Patrick Flanagan
PATRICK FLANAGAN
District Judge

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 25 day of August, 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:

Michael Brooks, Esq. for Deutsche Bank National Trust Company;

Wayne Pressel, Esq. for John Truex;

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:

Catherine Cortez Masto
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701

Judicial Assistant