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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, v. JOHN D. TRUEX, an individual, Respondent.	CASE NO.: CV11-00584 DEPT. NO.: 7

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SUPPLEMENTAL BRIEF

Petitioner, DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE, FOR AMERICAN HOME MORTGAGE INVESTMENT TRUST 2006-1 (hereinafter "Petitioner"), by and through its counsel of record, BROOKS BAUER LLP, and

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pursuant to this Court's request for further briefing, hereby presents this Court with the following supplemental brief discussing: 1) what is Petitioners remedy when the mediator does not recommend sanctions, there is no agreement and no finding of bad faith. 2) Should petitioner seek issuance of a certification from the administrator of the Nevada Foreclosure Mediation Program, and 3) is the Nevada Foreclosure Mediation Program constitutional.

DATED this 13 day of May, 2011.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

At the hearing on this matter, the Court heard argument from borrowers' counsel regarding the legislative limits of this Court's authority. The questions raised by counsel cut straight to the constitutional core of the nature of this Court's authority and proceedings. Specifically, this Court wanted further briefing on the following issues: 1) what is Petitioners remedy when the mediator does not recommend sanctions, there is no agreement and no finding of bad faith. 2) Should petitioner seek issuance of a certification from the administrator of the Nevada Foreclosure Mediation Program, and 3) is the Nevada Foreclosure Mediation Program constitutional. In this brief, it will be shown that borrowers' counsel espouses an unconstitutional reading of the statute and also that the Supreme Court's assumption of power under the Foreclosure Mediation Program violates Article III of Nevada's Constitution. Because of the magnitude of the Constitutional violation represented by the Foreclosure Mediation Program, we will address that first. Because of the overlap between the first two issues in the Court's minute order, they will be addressed together in section II.B. below.

II. ANALYSIS

> The division of power is probably the most important single principle of government declaring and guaranteeing the liberties of the people.
> -The Supreme Court of Nevada, *Galloway v. Truesdale*, 83 Nev. 13 (1967)

A. The Current Enactment of the Foreclosure Mediation Program Resulted in the Unconstitutional Assumption of Executive Authority by the Supreme Court.

1. Overview of Assembly Bill 149.

The 75th Session of the Nevada Legislature enacted Assembly Bill 149 ("AB 149"), creating the FMP in an effort to address the crisis of home foreclosures. The Governor signed AB 149 on May 29, 2009 and it was effective on July 1, 2009. According to legislative history, AB 149 would provide homeowners with the opportunity to participate in mediation with lenders to develop alternative solutions to foreclosure. Regarding the scope of the Supreme Court's rulemaking authority, former Speaker Buckley insisted the Supreme Court ought to have broad

discretion in rulemaking and implementation of the FMP. At one point, Speaker Buckley stated that any parameters built into the law would simply "tie the court's hands."[1] Within the body of AB 149, the following authority was assigned to the Nevada Supreme Court:

> NRS 107.086. Sec. 4. Each mediation required by this section must be conducted by a senior justice, judge, hearing master or other designee pursuant to the rules adopted pursuant to subsection 8.
>
> . . .
>
> Sec. 8. The Supreme Court shall adopt rules necessary to carry out the provisions of this section. The rules must, without limitation, include provisions:
>
> (a) Designating an entity to serve as the Mediation Administrator pursuant to this section. The entities that may be so designated include, without limitation, the Administrative Office of the Courts, the District Court of the county in which the property is situated or any other judicial entity.
>
> . . .
>
> (c) Requiring each party to a mediation to provide such information as the mediator determines necessary.
>
> (d) Establishing procedures to protect the mediation process from abuse and to ensure that each party to the mediation acts in good faith.
>
> . . .
>
> Sec. 12. As used in this section:
>
> (a) "Mediation Administrator" means the entity so designated pursuant to subsection 8.

NRS 107.086 (2009).

Pursuant to its mandate to adopt rules, the Nevada Supreme Court adopted the Foreclosure Mediation Program Rules on June 30, 2009 ("FMP Rules"). The FMP Rules have been revised several times since their original enactment.

The FMP Rules enacted by the Nevada Supreme Court scrupulously avoid conferring judicial power on the mediator. The mediator is not there to adjudicate the rights or dictate a result. Rather, the stated purpose of the FMP is "to provide for the orderly, timely, and cost-effective mediation of owner-occupied residential foreclosures" and to encourage "deed of trust beneficiaries (lenders) and homeowners (borrowers) to exchange information and proposals that may avoid foreclosure." *See* FMP Rule 1(2), Purpose. If all goes well, the mediator simply

[1] *See Revising Provisions Governing Foreclosures on Property: Hearing on A.B. 149 Before the Assemb. Comm. on Commerce and Labor*, 2009 Leg., 75th Sess. 3-4, 11 [hereinafter *Hearing on AB 149*] (testimony of Assemb. Barbara E. Buckley, Speaker of the Nev. Assemb.) attached as Exhibit 1.

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reports that a mediation was conducted, the parties complied with the law and either an agreement was reached, or it was not.

2. Nevada Has A Clear And Unambiguous Separation Of Powers Doctrine Expressed In Article 3 Of The Nevada Constitution.

Nevada's Constitution is unique in that it expressly outlines the separation of powers doctrine. Article 3, Section 1 of the Nevada Constitution reads as follows:

> Art. 3 Section 1. Three separate departments; separation of powers; legislative review of administrative regulations.
>
> 1. The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Nev. Const. art. 3, § 1. The Supreme Court has had occasion to articulate the clarity and quality of Nevada's separation of powers doctrine. *See Comm'n on Ethics v. Hardy*, 212 P.3d 1098, 1104 (Nev. 2009). Specifically, unlike the United States Constitution and the separation of powers that has been read into that Constitution, the Nevada Constitution has an express provision which both empowers and limits the authority of each branch of government. *See id.*

The question now before this Court then is whether the authority granted to, and assumed by the Supreme Court under AB149 constitutes a violation of the doctrine of separation of powers. Specifically, the issue is whether the Nevada Supreme Court has assumed executive authority under the FMP.

3. Administration of the FMP Is An Exercise of Executive Authority.

The broad language of the Nevada Constitution gives only a general understanding of the meaning of executive authority. However, even under this broad understanding, it is apparent that the delegation of authority under the laws of the Legislature shall be directed to the executive. This point was articulated unequivocally in the *Galloway* decision. *See Galloway*, 83 Nev. at 19-20. In speaking of the executive power, the *Galloway* Court stated: "The executive power extends to the carrying out and enforcing the laws enacted by the Legislature. Except

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where there is a constitutional mandate or limitations, the Legislature may state which actions the executive shall and shall not perform." *Id.* at 20. Further, the United States Supreme Court articulated a concise definition of executive power when it stated: "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733, 106 S.Ct. 3181, 3191 (1986).

If we compare the definition of executive authority to AB 149 and the Supreme Court's actions, the hallmarks of executive authority are swirling about the FMP. First, the express language of the statute empowers the Nevada Supreme Court to "adopt rules necessary to carry out the provisions of this section." NRS 107.086 (2009). If we are to give any credence to the *Bowsher* decision, this single phrase makes AB 149 a delegation of executive authority to the judiciary because it is precisely an invitation to interpret AB 149 to implement its legislative mandate (i.e., mitigating the foreclosure crisis).

In addition to the clear language of the legislative delegation, we can also see that the Legislature intended to delegate executive authority to the Supreme Court. This is evident in the testimony of Speaker Buckley. From the outset, former Assembly Speaker Barbara E. Buckley made it clear that the legislation was directed at helping homeowners. As she stated, "This bill is to assist homeowners and to stabilize neighborhoods."[2] However, this very well-intentioned objective highlights the Supreme Court's involvement in the policy making objectives of the Nevada Legislature and not the adjudication of issues.

In addition to the language and the legislative intent, we see in practice that AB 149 requires an exercise of executive authority. For example, the Supreme Court has engaged in: rulemaking not incident to a judicial proceeding; hiring of an FMP Administrator; and the hiring and training of mediators, just to name a few tasks. All of these items are properly within the province of the Executive branch.[3] *See, e.g., Blackjack Bonding v. Las Vegas Mun. Ct*, 116 Nev. 1213, 1218 (recognizing that "each branch of government is considered to be co-equal, with inherent powers to administer its own affairs.") As such, it should be concluded that AB 149

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[2] *See Hearing on A.B. 149*, 2009 Leg., 75th Sess. 3-4, attached as Exhibit 1.

[3] *See* NRS 107.086(8).

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violates the constitutional mandate of separation of powers. *See Hardy*, 212 P.3d at 1103 (holding that the Legislature cannot waive the protections inherent in separations of powers by delegating authority to the Executive Branch regarding core legislative functions).

Finally, the administrative structure of the FMP illustrates its executive nature. The Supreme Court is responsible for the performance of the FMP. Specifically, the Supreme Court has endeavored to address all circumstances surrounding an FMP Mediation through rulemaking. However, situations and questions arise that must be escalated to higher levels of management. At the end of the day, the Supreme Court is the ultimate level of management within the FMP. This can be best illustrated if we hypothetically assume the departure of the current FMP Administrator without a ready replacement. Under the circumstances, it would not be unheard of to contemplate Supreme Court justices fielding phone calls from mediators, borrowers or other participants during the course of a mediation to resolve the immediately present issues. The current FMP carries with it an inherent likelihood that the Supreme Court could violate multiple judicial canons against impartiality and *ex parte* communications in this context. NCJC, Canons, 2.2, 2.9. Accordingly, this Court should rule that AB 149 is unconstitutional.

4. Mediation in the FMP is not a judicial proceeding and does not derive its authority from an actual justiciable controversy.

When looking at the scope and breadth of the Supreme Court's judicial power, the Nevada Constitution does not provide a definition. The Nevada Supreme Court has held that the Supreme Court's task is the administration of justice. See *Hardy*, 212 P.3d at 1105. In *Galloway v. Truesdale*, the Supreme Court defined judicial authority as "the authority to hear and determine judiciable controversies." *See Galloway*, 83 Nev. at. 20-21. Furthermore, through well-developed case law and principles of justice, we know that a justiciable case or controversy is one in which the courts can provide relief. *See Personhood Nev. v. Bristol*, No. 55429, 2010 WL 5423718, at *1, 126 Nev. Ad. Op. 56 (Nov. 30, 2010). "This court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment." Id. at *2; see also, *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57 (1981) (precluding review for mootness); *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877 (2006) (precluding review for ripeness); *Doe v.*

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Bryan, 102 Nev. 523 (1986) (precluding review for standing); *Landreth v. Malik*, 221 P.3d 1265 (Nev. 2010) (Supreme Court does not exercise its authority absent subject matter and personal jurisdiction); *Morrison v. Beach City LLC*, 116 Nev. 34 (2000) (same).

Mediation in the context of litigation has emerged in the last few decades as a favorable and effective case management strategy for judges across the country with heavy case loads. However, this remains a fairly recent development without a significant amount of historical precedent. In fact, the Nevada Legislature only empowered the Supreme Court to conduct mediations in 1999. Thereafter, the Nevada Supreme Court did not adopt the Nevada Mediation Rules until 2005. Nev. R. Admin. Docket 310 (2005); Nev. R. Admin. Docket 361 (2005). Even when the Supreme Court adopted the Mediation rules, it recognized the unique non-judicial nature of a mediation:

Rule 1 Definitions:

> . . .
> (B) "Mediation" means a process whereby a neutral third person, called a mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.
> N.M.R. 1(B) (2005).

There are several terms that stand out: 1) "encourage and facilitate; 2) "informal and nonadversarial"; 3) "authority rests with the parties"; and, 4) "assisting the parties . . . [and] fostering joint problem solving." The Supreme Court has used language that is friendly and empowering to encourage people to reach an agreement. The FMP offers a "kick" with its mediation. However, it is nothing more than a referee to ensure that the parties play fair. It certainly does not transform the mediation into an adjudicative function.

This conclusion then begs the question of why do courts now, after 150 years, offer mediation services when there is a lawsuit pending if it is not a core judicial function. The answer is simple: courts must ensure the manageability of caseloads involving actual cases and

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controversies. As a result, Courts use their authority derived from their judicial authority to place the parties in discussions toward a resolution. Mediation with litigation pending is certainly derived from the judicial power of the court and its administration of justice.

In addition to not being a core judicial function, courts have historically recognized that mediations or settlement conferences can corrupt the adjudicative process. The reason for the caution is that an informal conference, like mediation, runs the risk of breaching judicial canons against impartiality and against ex parte communication. NCJC 2.2 (Impartiality); NCJC 2.9 (Ex parte communications). Nevertheless, because of the case management benefits of encouraging settlements, both the district courts and the Supreme Court have set up settlement programs. See, NRAP 16; e.g., EDCR 2.51. All settlement programs require the settlement conference, or mediation, be conducted before a judge other than the ultimate adjudicator in the matter before it. See id. In fact, NCJC 2.9 specifically prohibits judges from participating in settlement conferences, or mediations, with parties to a lawsuit without the permission of the parties. There cannot be clearer evidence that mediation is not a judicial act. If courts were required to ask parties for permission to dispense their judicial authority, then no actions would ever be taken.

To that point, the mediation contemplated by the FMP is not a pretrial management procedure; rather, it is an administrative proceeding designed to address the foreclosure crisis. Inarguably, the mediation in the FMP is not a legal proceeding, because unlike a legal proceeding, FMP's mediation is not triggered by a lawsuit. The absence of a legal proceeding was recognized early on by Justice James W. Hardesty of the Nevada Supreme Court during his testimony about AB 149: "This situation is unique in a couple of respects. The process does not begin with a filed case; it is initiated, instead, through what appears to be a 'notice of default and election to sell.'"

The Nevada Supreme Court further recognized the absence of a justiciable controversy when it dispensed with the need properly to effectuate service of process pursuant to Nevada Rule of Civil Procedure 4 and traditional requirements of due process when a party filed a Petition for Judicial Review. *BAC Home Loans Serv., LP v. Eighth Judicial Dist. Ct.*, No. 55196, 2010 WL 3410604 (Nev. May 17, 2010). The Supreme Court's reasoning for its finding was that

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the Petition for Judicial Review was not a legal proceeding but instead an "other proceeding" not otherwise covered by due process requirement. *Id.*

Notwithstanding the dispensation of the service of a summons and process, the FMP mediation can result in a factual finding (i.e., "bad faith") without witnesses, testimony, formal notice of an action (i.e., Complaint), or a requirement of the party's presence in court to defend the action (i.e., Summons). Ultimately, the findings made at the mediation or the subsequent Petition for Judicial Review can materially affect a party's rights without due process of law and the only recourse for review is to the very party that made the operative rules in the first place. Even if we leave aside the value that such a program might have, we can say with certainty that it is not an exercise of judicial authority.

5. <u>The concept of quasi-judicial power does not apply to the exercise of power by the judicial branch.</u>

The finding that the FMP is not a judicial function does not necessarily end the analysis because mediation power could arguably be derived from the judicial authority. *Hardy*, 212 P.3d at 1107; see also, *Galloway*, 83 Nev. at 22. For example, it is a long held view that departmental agencies may exist within each branch of government, which exercise ministerial functions that appear to tread on another governmental branch's authority as long as the functions are derived from the basic power source. *Galloway*, 83 Nev. at 22. This is frequently referred to by the courts as "quasi-" authority. *Nev. Indus. Comm'n v. Reese*, 93 Nev. 115, 119-22 (1977). For example, an executive branch office may exercise quasi-judicial authority by conducting hearings that look like trials to make determinations respecting the award of privileges or licenses without violating the separation of powers doctrine. *Id.*

What is important to note is that the judicial branch can only exercise actual judicial authority and quasi-legislative or quasi-executive authority arising out of its judicial authority. Furthermore, the executive branch exercises actual executive authority and quasi-judicial or quasi-legislative authority arising out of its executive authority. The same applies to the legislative branch. In the present case, we have demonstrated that there is no judicial authority being exercised because there is no lawsuit pending or even contemplated. Without underlying

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judicial authority there could not be either quasi-executive or quasi-legislative authority.

It is worth repeating that in every circumstance, other than the FMP, in which the judiciary is involved in mediation, there is a pending lawsuit with parties heading toward a day in court to ultimately resolve their issues through a final adjudication by the Court. The FMP, as acknowledged by Justice Hardesty from the earliest days of the bill's consideration, does not have such a lawsuit. *Hearing on AB 149, supra* at 8 (testimony of C.J. James W. Hardesty of the Nev. Sup. Ct.). Ultimately, the mediations in the FMP derive their authority simply from the delegation of executive power in AB 149.

6. The Supreme Court's assumption of authority under AB149 deprives the people of the State of Nevada of the checks and balances of power among the branches of government.

Significantly, one of the unfortunate consequences of the Supreme Court's assumption of executive power in administering the FMP is that it has undermined the most valuable protection against overreaching government -- accountability. Specifically, when the separation of powers is properly recognized, the legislative and the executive branches are subject to the judicary's authority to "say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803) (affirming the principle of judicial review). This lack of accountability of the Supreme Court to the other branches of government has been highlighted by the Supreme Court's own FMP rulemaking. Specifically, AB 149 states that the Mediation Administrator will transmit a Petition for Judicial Review to "a court" for the imposition of sanctions, as recommended by the mediator. However, the FMP Rules, promulgated by the Supreme Court, require the *parties* to file a petition to the *District Court* and review *de novo* the findings of the mediator. Contrary to AB 149, neither the Supreme Court and its Administrative Office, nor the mediators are involved in the imposition of sanctions. In fact, mediators are instructed by the FMP Administrator not to make recommendations for sanctions, despite the statutory mandate. This was not contemplated in the enactment of the statute. More to the point, this means for greater uncertainty and inconsistency in the execution of the programs, and greater instability in the results.

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B. Petitioner may seek the issuance of a certificate by Petition for Judicial Review because the District Court's jurisdiction is sufficient, and the Legislature cannot limit remedies having established jurisdiction.

The first two issues raised in this Court's minute order essentially address the same issue. Specifically, the question is whether this Court has the jurisdictional authority to issue an order granting a certificate at the request of the beneficiary of a Deed of Trust. Because of the overlap, Petitioner will respond to the first two issues in this section on a consolidated basis.

The Constitution of the State of Nevada sets forth the jurisdiction of the District Court in Article 6, § 6(1):

> The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of the justices' court... The District Courts and the Judges thereof have power to issue writs of Mandamus, Prohibition, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction.

Nev. Const. art. 6, § 6(1). The Constitution confers general jurisdiction upon the District Court, inclusive of the power to exercise the rights and remedies that necessarily come with the delegation of such power. Contrarily, the legislature has authority to establish separate courts of limited jurisdiction: Nev. Const. Art. 6, § 1 expressly gives the legislature authority to establish municipal courts, while Nev. Const. Art. 6, § 6(2) gives the legislature authority to establish referees in district courts and the establishment of a family court division.

There is no authority to support the contention that the legislature may handcuff the District Court by limiting the available remedies. In other words, the legislature cannot restrict a court's available remedies "in a manner that would substantially impair the constitutional powers of the courts, or practically defeat their exercise." *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 465, 93 P.3d 746, 752 (2004), citing *Leone v. Medical Bd. Of Cal.*, 22 Cal.4th 600, 94 Cal.Rptr.2d 61, 995 P.2d 191, 196 (2000), (stating that a legislature cannot restrict a court's original jurisdiction to issue writ relief). In contrast, the legislature has expressly limited the powers of courts of limited jurisdiction. For instance, whereas the Constitution has established

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the legislature's right to establish the family courts as a court of limited jurisdiction, the legislature is empowered to limit the subject matter jurisdiction of the family court by statute (NRS 3.223). *Landreth v. Malik*, 221 P.3d 1265, 1268 (2009). However, no case has ever found that the Legislature can go beyond subject matter limitations and actually limit outcomes.

If we apply these principles to the Court's questions, we can first address what a lender's remedy would be if there is no recommendation of sanctions, no agreement and no bad faith. If, as we have established, this Court has subject matter jurisdiction over the FMP, it may issue any order or adjudication regarding the implementation of the FMP. It would be constitutionally invalid to limit the remedies to only those itemized in the statute.

With regard to the Court's second itemized issue, it is apparent that without resort to the Court's a beneficiary would have to start a foreclosure sale all over again even without a finding of bad faith or agreement when it would otherwise be entitled to a certificate. As a result, in a normative sense, the answer is "Yes" that Petition should seek the issuance of a certificate under these circumstances. Without the authority to issue a certificate, fairness cannot be achieved as the only party that would be able to obtain relief from this Court would be borrowers. Such an absurd result would require this Court to relinquish its constitutionally granted authority and to ignore fundamental notions of equity.

III. CONCLUSION

Pursuant to this Court's request, Deutsche Bank, as Trustee, offers the foregoing supplemental brief regarding the constitutionality of the Foreclosure Mediation Program. Deutsche Bank, as Trustee maintains that the current administration of the FMP violates the separation of powers clause of the Constitution of the State of Nevada. Moreover, the Supreme Court of Nevada's role in the creation of the FMP Rules creates an inherent conflict when the judiciary is tasked with reviewing the administration of the program. Finally, the legislative branch may not restrict the scope of the authority vested upon the judiciary in reviewing petitions for judicial review.

Therefore, Deutsche Bank, as Trustee hereby requests that this Court make a determination that:

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1) Deutsche Bank, as Trustee has participated in the subject foreclosure mediation in good faith and that a foreclosure certificate shall issue; or, alternatively,

2) That the Supreme Court of Nevada's role in administering the Foreclosure Mediation Program is a violation of the separation of powers clause of the Constitution of the State of Nevada; and

3) That the executive authority vested upon the Supreme Court of Nevada renders the Foreclosure Mediation Rules to be unconstitutional and unenforceable; and

4) That the legislative branch does not have the authority to restrict the scope of the judiciary's review on a petition for judicial review.

DATED this 13 day of May, 2011.

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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned affirms that this document does not contain the social security number of any person.

DATED this 13 day of May, 2011.

BROOKS BAUER LLP

By: _____
Michael R. Brooks, Esq.
Nevada Bar No. 7287

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is that of Brooks Bauer LLP, 300 S. 4th Street, Suite 815, Las Vegas, Nevada 89101.

On this day, I served the above and foregoing **SUPPLEMENTAL BREIF** on the party in said action by U.S. certified mail, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

Wayne Pressel, Esq.
3094 Research Way, Suite 61
Carson City, NV 89706
Attorney for Respondent

I certify under penalty of perjury that the foregoing is true and correct and that this Certificate of Service was executed by me on the 13 day of May, 2011 at Las Vegas, NV.

An Employee of BROOKS BAUER LLP

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