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

9 **DEUTSCHE BANK NATIONAL TRUST**
10 **COMPANY, AS INDENTURE TRUSTEE**
11 **FOR AMERICAN HOME MORTGAGE**
12 **INVESTMENT TRUST 2006-1,**

Case No. CV11-00584

Petitioner

Dept. 7

13 vs.

14 **JOHN D. TRUEX, An Individual,**
15 **Respondent**

16 **JOHN TRUEX'S SUPPLEMENTAL RESPONSE**
17 **TO PETITION FOR JUDICIAL REVIEW**

18 The Petitioner Deutsche Bank National Trust (hereinafter "Deutsche") filed a Petition
19 for Judicial Review on February 25, 2011. Respondent John Truex filed his Response to
20 Petition for Judicial Review on March 11, 2011, in which he raised jurisdictional
21 challenges to Deutsche's Petition. Deutsch replied. At the hearing on Deutsche's Petition
22 on April 22, 2011, the Court instructed the parties to brief three issues:

- 23
- 24 1) What is the Petitioner's remedy when the mediator does not recommend sanctions,
25 there is no agreement and no finding of bad faith;
 - 26 2) Should Petitioner seek issuance of a certification of completion from the
27 administrator of the Nevada Foreclosure Mediation Program; and
28

1 3) Is the Nevada Foreclosure Mediation Program constitutional.

2 Deutsche's arguments in its Supplemental Brief focus on the third issue rather than
3 considering the questions in a more practical order. If there are remedies for the
4 beneficiaries, then the other two issues are considered in that context. Deutsche chose to
5 present an essay on the doctrine of separation of powers as a distraction to the Court's
6 core concern: Does Deutsche have a jurisdictional right to be before this Court with a
7 petition for judicial review?
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9 **PETIONER'S RIGHTS AND REMEDIES**

10 What are Deutsche's rights in this proceeding? Deutsche is a beneficiary under a
11 deed of trust. Deutsche is seeking a foreclosure and filed a Notice of Default against the
12 homeowner John Truex who then claimed his right to mediate. Under Nevada law of
13 NRS 107.086, Deutsche is obligated to participate in the mediation according to specific
14 rules. If Deutsche follows the rules, the Foreclosure Mediation Program (hereinafter
15 "FMP") issues a Certificate of Foreclosure, and Deutsche can proceed with the
16 foreclosure. If Deutsche does not follow the rules, no Certificate issues, and Deutsche
17 must initiate its foreclosure again with a new Notice of Default. If Deutsche follows the
18 rules in its subsequent exercise of its right to foreclose, a Certificate will issue, and it can
19 foreclose.
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22 In this statutory scheme, whom did the Legislature seek to protect? It is the
23 homeowner. It is the homeowner's right to require a mediation. It is the homeowner's
24 right to be presented with of legal documents supporting the beneficiary's foreclosure. It
25 is the homeowner's right to petition the District Court under the judicial review provided
26 by this statute to question the fairness of the mediation proceeding. This is the
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1 homeowner's only real opportunity to resolve his situation: it is his last chance. If the
2 beneficiary does not violate the rules, and no agreement is reached, the homeowner is
3 defenseless, and his fate is sealed.

4 In contrast, the beneficiary has no significant rights at risk in the mediation. It can
5 refile a Notice of Default and foreclose. It has little at stake if a Certificate of Foreclosure
6 does not issue; it can begin again with no loss other than a brief time delay. The simple
7 truth is that Deutsche did not follow rules, and it must issue a new Notice of Default to
8 enforce its rights to foreclose. Its right - the right to foreclose for failure to pay on the
9 note - has not been impaired.

11 Reality again undercuts the Petitioner's complaint. With mounting foreclosure
12 inventories and an incoming tide of more foreclosures, Deutsche and other beneficiaries
13 have little potential loss due to a delay in foreclosure. Deutsche in fact could have issued
14 and new Notice of Default against John Truex and either had another mediation or
15 achieved a final foreclosure in the same time it has taken to pursue this litigation it has
16 brought. Deutsche has not chosen an efficient path by coming to this Court given its
17 practical alternative.

18 The only risks that the mediation process pose to the beneficiary are accounted for in
19 the statutory grounds for judicial review brought by the beneficiary: sanctions, bad faith
20 and agreement non-compliance. These are the specific issues - the only issues - which
21 the judicial review process provides for the beneficiary because they are the only property
22 interests at stake for the beneficiary.

23 Deutsche documents that this statute is designed for the benefit of the homeowner and
24 not the beneficiary. John Truex agrees but with a different perspective. NRS 107.086
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1 recognizes the inherent disparity in bargaining power between a multi-billion-dollar
2 lending institution like Deutsche and a homeowner like John Truex in default of his loan.
3 This is not a law to protect beneficiaries; it is a law to protect homeowners. It was born
4 out of a housing crisis for homeowners and not to enable lenders to enforce their rights
5 more efficiently. This is a consumer advocacy statute with the basic rights vested in the
6 homeowner. The comparatively minor interests of the beneficiary are protected by the
7 limited bases for judicial review provided by the statute.

9 Deutsche's power is not confined to re-filing a Notice of Default. It also has the right
10 to take legal action by injunction directly against the FMP for its refusal to issue a
11 Certificate of Foreclosure. The general jurisdictional rights under NRS 30.040 and NRS
12 33.010 provide avenues of redress for a beneficiary to challenge the action of the FMP.
13 In that forum - under that jurisdiction - the Court has the authority to bring the full
14 spectrum of equitable remedies to the scene. This includes issuance of a Certificate of
15 Foreclosure. Respondent Truex maintains that Deutsche does not have the right to seek a
16 Certificate of Foreclosure under NRS 107.086 in judicial review and not that Deutsche
17 has no right to seek judicial remedy at all. The Petitioner does not have the right under
18 NRS 107.086.

21 **CONSTITUTIONALITY OF NRS 107.086**

22 Deutsche expends much energy arguing the unconstitutionality of the foreclosure
23 mediation statute itself. The main challenge is that the Legislature does not have the
24 authority to commit the FMP to the Supreme Court but could only have granted the
25 statutory authority to the Governor's Executive Office.
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1 Any constitutional analysis of separation of powers must begin with Galloway v.
2 Truesdell, 83 Nev. 13, 422 P2d 237 (1967). In that decision, the Nevada Supreme Court
3 defined the roles of the three branches of government. It rooted "Judicial Power" in
4 "judicial function" and stated:

5
6 Judicial function includes the right to exercise any lesser
7 power that can be subsumed under, or is included as an integral
8 part of, the broader heading of "Judicial Power"; that is, any
9 power or authority that is inherent or incidental to a judicial
10 function.... Galloway, at 20.

11 The Court has also interpreted this "inherent power" as definable by the Legislature itself:

12 [t]he legislature many, by statute, sanction the exercise of
13 inherent powers by the courts, and the courts may acquiesce
14 in such pronouncement by the legislature....
15 Lindauer v. Allen, 85 Nev. 430, 434, 456 P.2d 851(1969).

16 A more recent instruction from the Nevada Supreme Court is found in State v. Second
17 Judicial District Court, 116 Nev. 953, 11 P3d. 1209 (2000) in which the teachings of
18 Galloway and Lindauer are reiterated. It is noteworthy that these cases have upheld the
19 right of the Court to operate and regulate in the areas concerned. State even goes further:
20 the Court rejects the argument that one department of government cannot exercise a
21 power that might be the province of another. State, at 960.

22 Although the arena of separation of powers may seem murky, it is not when applied
23 in practice and with common sense. The basic inquiry is the nature of the task allocated.
24 Here, despite the Petitioner's characterizations, the essential job is one of dispute
25 resolution between two private parties. A foreclosure is a legal process whether it is a
26 strict judicial proceeding or a more common "non-judicial" proceeding. Foreclosure is
27 still a legal process that adjudicates property rights between two private interests. The
28 procedure is outlined in Nevada statutes at NRS 107.080. That foreclosures under that

1 law do not require a specific case to be filed in the District Court is a demonstration of the
2 Legislature's power to direct the resolution of legal disputes. Nevada's non-judicial
3 foreclosure scheme might better be labeled a "non-lawsuit" foreclosure, for it is clearly a
4 legal process authorized by the state Legislature to adjudicate legal property rights with
5 the full force of state law. NRS 107.080 lays out in detail the need and conditions for a
6 Notice of Default, Notice of Trustee's Sale and conduct of the Trustee's Sale itself.
7

8 The distinction between Judicial and Executive power can be elusive, but here it is in
9 sharp contrast. The foreclosure process is a dispute between two private entities: a
10 lender/beneficiary and a homeowner. There is no governmental party - no agency, no
11 state funding, no executive involvement. Administrative proceedings such as public
12 housing evictions, Unemployment Compensation adjudications and licensing
13 determinations all share a vested governmental interest. In those circumstances, the State
14 of Nevada has an involvement and stake. In foreclosure mediation there is no dispute
15 with the government as an entity; there is no inherent executive authority. Considering
16 the mirrored question is helpful: What is inherently "executive" in the alternative dispute
17 resolution process of foreclosures: Nothing.
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19
20 Deutsche claims that "the hallmarks of executive authority are swirling about the
21 FMP." Page 6, Line 7 of Supplemental Brief. The only "hallmark" argued is the
22 delegation to make necessary rules as if only the Executive is empowered to make rules
23 governing legal rights. The Nevada Supreme Court makes rules, many rules. It has an
24 extensive Administrative Docket which regulates the handling of disputes - often in
25 mediation. The Court has played an active role in administering alternative dispute
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1 resolution using a mediation rather than adjudicatory process with the Appellate
2 Settlement Program.

3 Petitioner attempts to characterize foreclosures as something other than a dispute
4 needing resolution. It is imperative to recognize that a foreclosure is a legal dispute at its
5 core. A beneficiary under a deed of trust seeks to dispossess the homeowner of his title
6 to real property where the homeowner and his family live. The Legislature recognized
7 the crucial public interest in this process and created a structure to promote outcomes
8 other than physical ejection. The homeowner may not have paid the note when due;
9 however, he is not volunteering for eviction. There is dispute with opportunity for
10 challenge and conflict. The homeowner in mediation is seeking modification, short sale,
11 deed in lieu or other legal remedy, and the mediation process requires the beneficiary to
12 consider such resolutions. It requires the beneficiary to come to the mediation event with
13 proper documentation, in good faith and with proper authority. Without compliance, the
14 beneficiary is delayed in pursuing his next statutory step of Trustee Sale.
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18 Another reality check is the mediation event itself. The beneficiary does not come to
19 the room; it sends its trained attorney. The homeowner if unrepresented is faced with the
20 same deficit as a pro se litigant squaring off with a lawyer in court. This is not a mere
21 conversation; rather, it is a dispute to which the beneficiary sends a licensed attorney.
22 The beneficiary participates only by phone and then at the direction of the lender's
23 lawyer. Again, there are rules, several pages of rules, detailing the documentary and
24 authority requirements almost exclusively on the beneficiary. Certifications, notaries,
25 appraisals qualified under Nevada statutes are the whole cloth of the documents of a
26 mediation. These are the tools of disputes and dispute resolution.
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LEGISLATIVE LIMITS OF JUDICIAL POWER

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2 Deutsche's assertion that it is unconstitutional for the Nevada Legislature to limit the
3 scope of review of a District Court is simply wrong. Nevada statutes delineate District
4 Court jurisdiction and review standards in several arenas. "Judicial Review" under the
5 Administrative Procedures Act, NRS 233B.135 is a prime example of legislative
6 directives on the scope of review placed upon District Courts. While it is true that
7 District Courts are forums of "general jurisdiction", that is hardly the only role they serve.
8 In this context, District Court jurisdiction is conferred for limited purposes and for those
9 purposes only. To return full circle to the beginning issue, the District Court in a judicial
10 review brought by a beneficiary under NRS 107.086 may only review three actions:
11 sanctions imposed, bad faith declared and agreements not honored.
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CONCLUSION

14
15 Deutsche has struggled with arguments to permit it to stay in this Court. Raising the
16 constitutional dimensions of this Court's power and of the statute seem somewhat suspect.
17 If Deutsche wants to foreclose on John Truex, all it needs to do is to issue a new Notice
18 of Default and proceed with mediation and a Trustee's Sale. If Deutsche follows the
19 rules, mostly document production and good faith, it can act promptly and efficiently to
20 seize the Truex property. There is no requirement that Deutsche compromise; no offer by
21 Truex that it need even consider; and no deal it must make. Deutsche can simply
22 participate physically in a mediation with the proper authority and documents and refuse
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1 to negotiate - Deutsche will have the Certificate of Foreclosure. Claiming injury when
2 there is none questions even their standing, and it surely falls short of claiming specific
3 jurisdiction.

4 This 25th Day of May 2011.

5
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7 **AFFIRMATION**
8 **Pursuant to NRS 239B.030/603A.040**

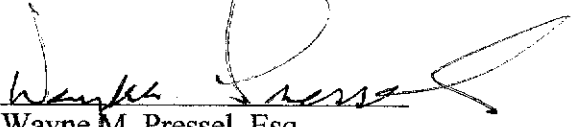
9 The undersigned does hereby affirm that the foregoing document does not contain any
10 of the following information governed by NRS 239B.030 and NRS 603.040:

- 11 1. Social Security Number;
- 12 2. Driver's License Number or identification Card Number; or
- 13 3. Account number, credit card number or debit card number, in combination
- 14 with any required security code, access code or password that would permit
- 15 access to the person's financial account.
- 16
- 17

18 The term does not include any publically available information that is lawfully made
19 available to the general public.

20 This 25th Day of MAY, 2011.

21 Respectfully submitted,

22 
23 Wayne M. Pressel, Esq.
24 Nevada State Bar No. 11685

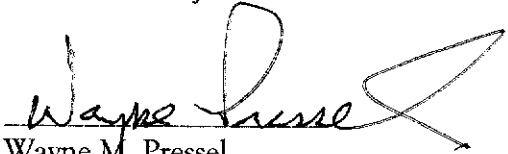
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CERTIFICATE OF SERVICE

I hereby certify that I am over the age of 18 years, and that on the 25th day of May 2011, I served a true and correct copy of the foregoing: John Truex's Supplemental Response to Petition for Judicial Review on counsel for Petitioner:

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By filing a copy through the electronic filing system of the Second Judicial District Court


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