IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK

Appellant,

vs.

DUKE RENSLOW and TINA RENSLOW,

Respondents.

Case No. 58283

District Court Case No. CV10-03382

RESPONDENTS' ANSWERING BRIEF

Appeal
Second Judicial District Court, Washoe County, State of Nevada
The Honorable Patrick Flanagan, District Judge

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I. STATEMENT OF THE CASE.

This matter arises out of the Foreclosure Mediation Program as established by NRS 107.086(5), which provides for mediation between a lender and homeowner upon the filing of a Notice of Default by the lender and a subsequent request for mediation by the homeowner in the context of a non-judicial foreclosure. The purpose of the mediation is to bring the lender and homeowner together to discuss the modification of the loan pursuant to the federal programs offered, such as HAMP, as well as other in-house loan modifications. In the event that the lender fails to participate in good faith, as the mediator and District Court found in this matter, the homeowner may file a Petition for Judicial Review. Upon a finding of bad faith, the District Court may impose sanctions, including a loan modification, which is part of the sanctions imposed in this matter.

Upon hearing about various loan modification options in the media, the Renslows contacted their original lender, Wells Fargo, and requested information concerning the HAMP program, only to be informed that they must be at least sixty (60) days delinquent to be eligible. Due to the economic times, the Renslows needed the modification. Therefore, they took Wells Fargo's advice and ceased making their payments. After qualifying for HAMP and making seven (7) months worth of modified payments, Wells Fargo informed the Renslows that the holder of their note did not participate in HAMP. However, the holder of the note could not be identified. Consequently, they were ejected from HAMP and told to bring their loan current, which they could not do. As a result, Wells Fargo caused a notice of default to be recorded, and the Renslows chose mediation.

The only way for the Foreclosure Mediation Program to work is to have the holder of the beneficial interest in the note and deed of trust participate or an authorized representative. At the Renslows' Mediation, neither option occurred. Both the mediator and the District Court found that the representative on behalf of Wells Fargo lacked the authority to modify the loan. He could not even identify the owner of the note and deed of trust. If the holder of the note and deed of trust cannot be identified, there cannot be any authority granted. As noted by the District Court, even after the hearing on the

Petition for Judicial Review, it was not clear who owned the note and deed of trust. It was indicated in Court for the first time that Federal Home Loan Bank (FHLB) owned the note and deed of trust, but as noted by the District Court, there are twelve different FHLB's in the United States of America. Wells Fargo never provided a recorded assignment, nor copy of an endorsed promissory note. Consequently, Wells Fargo is still the holder of the beneficial interest under the deed of trust according to public records.

It is the bad faith participation by Wells Fargo in the mediation that resulted in the District Court imposing the $30,000 in sanctions and modifying the loan, which will result in payment of all of the principal, just not all of the interest originally possible under the note.

II. STATEMENT OF FACTS OF THE CASE.

Most of the facts stated in Wells Fargo's Opening Brief are accurate with the exception of the following. At the mediation Wells Fargo submitted the original deed of trust, which indicates that it is the beneficiary. JA at 237. During the mediation, the representative, Greg Eastman, from Wells Fargo acknowledged Wells Fargo did not own the loan. However, after two hours of searching, Mr. Eastman could not identify the owner of the loan. JA at 237.

While Wells Fargo at the hearing presented some evidence that Mr. Eastman had authority to modify the loan, the District Court specifically found that Wells Fargo did not have authority. JA at 241.

III. SUMMARY OF ARGUMENT.

First, no "taking" results from modifying the note as the holder of the note will receive all the return of its principal. The imposition of sanctions in the form of modifying the Renslow note is merely the result of a permissible regulation of bad faith conduct on the part of the lender, not taking personal property entitling Wells Fargo to compensation. Second, the only reason for modifying the note is Wells Fargo's bad faith participation in the Foreclosure Mediation Program. This case illustrates the need for imposing penalties to assure that lenders participate in the program to help Nevada's

citizens. The police power trumps the contract clause. Third, as there is a justiciable controversy inherent in the foreclosure process, the judiciary is the proper branch of government to oversee the Foreclosure Mediation Program. Fourth, the District Court held a full hearing to determine whether Wells Fargo acted in bad faith at the mediation before imposing sanctions, which provided Wells Fargo with their Due Process rights. Fifth, it is permissible to consider the conduct of Wells Fargo prior to the mediation for purposes of placing the conduct at the mediation in the proper context. The District Court based the award of sanctions upon the conduct at the mediation, which consisted of a failure to identify the lender as well as the failure to participate in good faith. The award of sanctions was not based upon prior conduct.

IV. ARGUMENT.

A. THE MODIFICATION OF THE RENSLOW NOTE DOES NOT CONSTITUTE A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION.

Under the Takings Clause of the Fifth Amendment of the United States Constitution, as applicable to the states by the Fourteenth Amendment, it is unconstitutional for government to take private property for public use without just compensation. United States Constitution, amend. V. Nevada's state constitution provides, "[p]roperty shall not be taken for public use without just compensation having been first made, or secured." Nevada Constitution, art. 1, Section 8(6).

Initially, the Courts only recognized the actual taking of personal property or the functional equivalent of a "practical ouster" of the owner. McCarran International Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110, 1121 (2006). However, over time, the Courts began recognizing that in some instances the regulation of private property may result in the need for compensation. Id. These types of actions are considered "regulatory takings."

In Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the following *ad hoc* factors have been established in analyzing regulatory takings. "A Court should consider (1) the regulation's economic

impact on the property owner, (2) the regulation's interference with investment-backed expectations, and (3) the character of the government action." Id. at 1122.

An additional factor included in the *ad hoc* test under Penn Central is temporariness of the regulation. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). In other words, delaying the return of an investment does not constitute a taking.

The goal of the Takings Clause under the Fifth Amendment is to prevent a small group of the population from being singled out to bear the burden of furthering public policies and goals. Penn Central at 123.

The District Court modified the Renslow note in response to its finding that Wells Fargo failed to participate in the mediation in good faith. Under 107.086(5), it states:

> [t]he court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate, including, without limitation, requiring a loan modification in the manner determined proper by the court.

Based upon Wells Fargo's behavior, the District Court ordered the following modification to the terms of the Renslow note:

> a) The current principal shall be re-amortized;
> a) (sic)The payment is set at $1145.00;
> b) The interest rate is reduced to 2% (two percent) for the life of the note;
> c) The term of the note is set at ten (10) years commencing May 1, 2011 and ending on May 1, 2021.
> d) There shall be no pre-payment penalty. JA at 258-259.

The District Court further noted that the life of the note would be extended if necessary to accommodate full payment of the principal at the monthly payment amount of $1145. Additionally, the Court also noted that the modification was a result of the failure to have a representative present with authority as well as a lack of good faith negotiations. JA at 258.

It is clear that the investor in this scenario whether it be Wells Fargo, FHLB or some further purchaser of the Renslow note is to receive the entire principal. Further, as noted by the District Court, although the interest to be received is less, there is no guarantee as to the amount of interest to be paid under a note that may be prepaid with no

penalty, an original term in the Renslow note. In fact, if not for ceasing to make payments to qualify for HAMP at the insistence of Wells Fargo, the Renslows would have been able to refinance the home. In that scenario, the Wells Fargo loan would have been paid with far less interest. However, due to the need to cease making payments to even begin talking to Wells Fargo, the Renslows damaged their credit and could not qualify for a refinance after being ejected from HAMP. JA at 237.

Therefore, Wells Fargo or the holder of the Renslow note will receive their investment, the principal, albeit over a longer period of time, which is not considered a taking under Tahoe-Sierra. More importantly, the only reason Wells Fargo received this sanction is due to their bad faith participation in the mediation program. Had they participated in good faith, no sanctions would have been imposed. This is not an across-the-board law imposing modifications on all loans. Instead, sanctions occur only based upon an individual lender's failure to follow the laws created in a non-judicial foreclosure to assure that lenders participate in the Foreclosure Mediation Program, which Nevada's legislature created in response to the severe economic crisis facing our state.

Based upon the factors enumerated in Sisolak, the holder of the Renslow note will receive its investment. While the interest rate is reduced, there is still interest being received, and there is no guarantee of receiving interest under the original note in the event of prepayment of the note. Such a modification only occurs when a lender fails to participate in good faith, and the penalty is necessary to compel lenders to adhere to the law. Therefore, the penalty is merely a method to add teeth to the legislation. It is also important to note that non-judicial foreclosure is also a law created by the legislation that could be withdrawn at any time. It is not a right.

As noted earlier, the imposition of loan modifications by the judiciary only occurs in the event a lender fails to participate as required by NRS 107.086(5). It is not a law that modifies all loans nor is it a law that can be exercised at the whim of the borrower. It is these two factors that distinguishes this law from the law imposed in Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

In Radford, the Frazier Lemke Act allowed farmers to purchase their property for less than fair market value. The law applied to all loans. Consequently, the lender would not be receiving the return of principal nor was it tied to any actions taken by the lender. The Radford Court found that such a law did constitute a taking as the lender would not receive a return of its investment. Id. at 580-581. Furthermore, in response to the Radford ruling, Congress did enact a watered-down version of the bill that the Supreme Court upheld. Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 44 (1937).

Both the lender and the borrower must follow the provisions of NRS 107.086. Leyva v. Wells Fargo, 127 Nev. Adv. Op. 40, p.8. Additionally, it is up to the District Court to impose and determine appropriate sanctions when a lender violates either NRS 107.086(5) or the rules of the Foreclosure Mediation Program. Pasillas v. HSBC, 127 Nev. Adv. Op. 39, pp. 11-13.

In the Renslow case, the holder of the note will receive its investment with a good portion of the interest, and the reduction in the interest resulted from the need of government to enforce its police powers to help the people. Therefore, there is no taking without just compensation. To avoid any penalty, all the lender needs to do is follow the rules. This is not a case of singling out a small portion of the population to bear the burden of a poor economy. If the lender acts in good faith, there will be no penalty.

B. THE SANCTION OF MODIFYING THE RENSLOW NOTE IN RESPONSE TO WELLS FARGO'S BAD PARTICIPATION IN THE MEDIATION PROCESS IS A LEGITIMATE EXERCISE OF THE POLICE POWERS THAT DOES NOT VIOLATE THE CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION.

Absent a clear contravention of constitutional principals, there is a presumption of constitutionality that attaches to legislation. State of Nevada v. City of Burbank, 100 Nev. 598, 691 P.2d 845 (1984). See also; Zamora v. Price, 125 Nev. Adv. 0-32 (August 6, 2009), 213 P.3d 490; Moldon v. County of Clark, 124 Nev. Adv. Op. 49, 188 P.3d 76 (July 24, 2008). Additionally, NRS 107.086(5) only effects non-judicial foreclosures not the other methods to collect on the note such as filing a suit or commencing a judicial

foreclosure under NRS 40.430 et.seq. Non-judicial foreclosure is a creation of the legislature that can be modified or even completely withdrawn.

Wells Fargo contends that the imposition of the loan modification by the District Court on the Renslow note violates the Contract clause found in the United States Constitution; Article 1, Section 1, which states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contract, or grant any Title of Nobility.

Based upon this language, Wells Fargo contends that the Renslow mortgage may not be modified. However, as must be noted, many of the concepts contained in the same paragraph as the contract clause are now outmoded. In yet, the changes as to currency and letter of Marque and Reprisal are not considered unconstitutional, but merely a matter of the evolution of our times as well as recognition that our Constitution is a living document.

There is no right to a non-judicial foreclosure. In fact, lenders could be limited to judicial foreclosure only should the legislature repeal the non-judicial foreclosure laws, which has occurred in multiple states across the United States. Richmond Mortgage Mortgage & Loan Corp. v. Wachovia Bank and Trust Co., 300 U.S. 124 (1937).

During the "Great Depression" of the 1930's, one state, Minnesota, placed a one year moratorium on foreclosures., which the U.S. Supreme Court upheld as constitutional. Home Building & Loan v. Blaisdell, 290 S. Ct. 398 (1934). The Blaisdell case established five factors to be considered in analyzing the constitutionality of a statute under the Contracts Clause:

1) Whether an emergency existed,
2) Was the legislation addressed to a legitimate state interest, and not particular persons,
3) Was the relief appropriate under the emergency,
4) Was the relief reasonable in relation to the creditor's rights, and

5) Was the legislation temporary in nature and limited to the emergency at hand.

Blaisdell at 444-447.

By the same token, an Arkansas statute was deemed unconstitutional as an unreasonable restriction of creditor's rights. W.B. Worthen v. Kavanaugh, 295 U.S. 56 (1935). In that law, the time between a default and commencement of the foreclosure sale was increased, the statutory default penalty was decreased, attorney's fees were eliminated and non-paying obligors were given a four-year grace period.

In more recent times, the U.S. Supreme Court has addressed the Contracts Clause in terms of recognizing the right of the states to exercise their police powers. See Allied Structural Steel Company v. Spannaus, 438 U.S. 234 (1978).

> First of all, it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any right under contracts between individuals.' Manigault v. Springs, 199 U.S. 473, 480, 26 S.Ct. 127, 130, 50 L.Ed. 274. As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in Hudson Water Co. v. McCarter, 209 U.S. 349, 457, 28 S.Ct. 529, 531, 52 L.Ed. 828, 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject-matter.'

Allied at 241-242.

In the most recent case considering a state law under the Contracts Clause, the U.S. Supreme Court refined the Blaisdell analysis. Energy Reserves Group v. Kansas Power and Light, 459 U.S. 400 (1983). Although the case did not deal with mortgages, it does state; "state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." Id. at 411. Substantial deference needs to be given to a state's determination of just what constitutes a reasonable means to promote a legitimate state interest.

In response to the crisis created by the down-turn in the real estate market coupled with the vast number of questionable loans made by lenders, the Nevada legislature enacted legislation modifying the requirements for a lender to use the non-judicial foreclosure process. Nevada became one of the states impacted the most by the foreclosures. A clear emergency existed that required attention to protect and promote the welfare of Nevada's citizens as well as preserving the real estate market to some degree. As a result, a new step was added to already existing legislation. Upon the filing of a Notice of Default, the homeowner is entitled to elect mediation. All that is required of the lender is that it appear in good faith and mediate the possible modification of a loan applying either federal government created programs such as HAMP or some in-house program. Should either the lender of the borrower not appear or not negotiate in good faith, the legislature saw fit to provide a vehicle for either party to receive judicial review of the mediation process.

NRS 107.086(5) allows a Court to sanction a lender who either fails to appear or fails to negotiate in good faith among other things, modifying the note. Only those lenders who act in bad faith receive sanctions. The Renslow matter is an example of a lender not acting in good faith. As noted by the Court, even at the end of the hearing on the Petition for Judicial Review, the Court could not ascertain which FHLB owned the Renslow note as Wells Fargo failed to provide an assignment from itself to a specific FHLB. JA at 240.

The imposition of sanctions is limited to a specific scenario, bad faith on the part of the lender. Clearly, the inability to identify the lender means the lender did not appear at the mediation. It also means that the Wells Fargo representative cannot seriously profess to have any authority to act on behalf of an unknown lender. The mortgage contract is only modified if the lender acts in bad faith in an effort to promote Nevada's interest in helping its citizens through a time of crisis. Furthermore, it cannot be overstated, that it occurs only in the non-judicial foreclosure situation, which is a creation of the legislature.

Nevada's legislature was merely exercising its police power in a limited fashion to assure that lenders take the mediation process seriously–something that Wells Fargo failed to do. Therefore, the need to exercise their police power allows Nevada to implement a law that modifies the mortgage contract under specific situations, which the lenders can control if they simply follow the rules. Consequently, the modification of the Renslow note does not violate the Contract Clause, and the Foreclosure Mediation legislation is constitutional.

C. THE FORECLOSURE MEDIATION PROGRAM IS DESIGNED TO PREVENT A JUSTICIABLE CONTROVERSY, WHICH IS WITHIN THE POWERS OF THE JUDICIARY.

There is a fundamental concept of the separation of powers among the three branches of government in Nevada. The constitution provides: "[t]he 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. III.

> 'Judicial Power' is the capability or potential capacity to exercise a judicial function. That is, 'Judicial Power' is the authority to hear and determine justiciable controversies. Judicial power includes the authority to enforce any valid judgment, decree or order. A mere naked power is useless and meaningless. The power must be exercised and it must function to be meaningful. A District Judge is a constitutionally established judicial officer (Const. Art. 6, Sections 1, 5 and 6), and the instrumentality by whom the Judicial Power is exercised and through whom District Courts function. A judicial function is the exercise of judicial authority to hear and determine questions in controversy that are proper to be examined in a court of justice.

Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237, 242 (1967).

A justiciable controversy occurs when there is 1) a claim of right being asserted by one party that another party contests; 2) a controversy between two adverse parties; 3) the party seeking relief must have a legal interest in the dispute; 4) the issue must be ripe for judicial determination. Kress v. Corey, 65 Nev. 1 (1948). See also, Doe v. Bryan, 102 Nev. 523 (1986).

In this type of matter, 1) the lender claims a right to foreclose, which the homeowner contests; 2) the interest between lenders and homeowners are adverse; 3) the homeowner has a legal interest; 4) the filing of a Notice of Default makes the action ripe for decision by the judiciary.

The filing of a Request for Mediation also begins the dispute process as the lender is required to attend mediation in good faith. Therefore, there is a justiciable controversy to be decided by the District Court should the lender act in bad faith as occurred in the Renslow mediation. Once a justiciable controversy is created, the judiciary is the proper branch of government to oversee a dispute resolution program designed to resolve such controversies. Wenger v Finley, 541 N.E.2d 1220 (1989). Such a program falls within the judiciary powers as defined in the Galloway case. The Foreclosure Mediation Program is properly within the powers of the judiciary and as such does not violate Nevada's Constitutional Requirement for the separation of powers.

D. NO VIOLATION OF WELLS FARGO'S DUE PROCESS RIGHTS OCCURRED.

First, the only reason Wells Fargo received any sanctions occurred because Wells Fargo failed to identify the lender on the Renslow note, and the District Court found that Wells Fargo did not participate in good faith in the mediation. The lender is still unknown, and no assignment was ever provided or recorded showing that Wells Fargo assigned the note. The sanctions were not imposed for failing to offer a modification.

Without being able to identify a lender, the representative for Wells Fargo cannot be said to have any authority to offer a modification. Furthermore, without identifying the lender, the Renslows cannot evaluate whether the best offer is being made to them. The purpose of the mediation process is to bring the holder of the note and the borrower together to evaluate the possibility of a modification. If the holder cannot be identified, then the purpose of the mediation process is lost.

It is agreed that there is no private right to obtain a modification. That is not the argument being made presently nor was that the argument made at District Court. It is

also not the failure of the Renslows to obtain a HAMP modification that resulted in the sanctions.

All the Renslows asked for was the identification of the holder of their note and that the holder participate in the mediation. When this failed to occur, the Renslows filed the Petition for Judicial Review. A hearing was held in which Wells Fargo had the opportunity to provide evidence that they participated in good faith and identified the true holder of the Renslow note. Wells Fargo failed to do so and as a consequence was sanctioned as provided under NRS 107.086(5). Wells Fargo received due process at that hearing.

E. THE DISTRICT COURT CONSIDERED WELLS FARGO'S CONDUCT PRIOR TO THE MEDIATION ONLY FOR PURPOSE OF ITS IMPACT UPON THE MEDIATION, WHICH IS PERMISSIBLE.

At the hearing on the Petition for Judicial Review, the District Court allowed testimony concerning the Renslows' qualification for the HAMP program and ejection from the program by Wells Fargo prior to the entry into the mediation program. The Court specifically noted that in evaluating the good faith or bad faith of Wells Fargo's conduct that "context is everything." JA at 238. The District Court further noted that the same is true for either lenders or borrowers.

This is similar to the facts in Association of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc., 976 F.2d 541 (1992). In that case, there were negotiations between the airline and the union. The Railway Labor Act (RLA) imposed a duty to use every effort to reach an agreement. The Court discussed whether actions could be considered beyond the six-month limitation period in determining whether the parties acted in good faith.

The Court found that "events occurring outside the limitations period may be proven 'to shed light on the true character of matters occurring within the limitations period...' Id. at 547.

This same analysis applies to the present matter. The fact that Wells Fargo had

determined the Renslows qualified under HAMP is significant as is the fact that Wells Fargo could not identify the lender when it ejected the Renslows from the HAMP program. It clearly shed light on the matters that occurred in the mediation. Wells Fargo was still not in a position to identify the lender at the mediation. It also demonstrated that the Renslows could qualify under HAMP if their lender participated in the program.

It is not error to consider the actions prior to the mediation. While such facts aid the Court in placing the parties' actions at the mediation in context when determining bad faith, it is the actions of Wells Fargo at the mediation that resulted in the imposition of sanctions. Therefore, the District Court did not exceed the scope of its powers permitted in the judicial review process of the Renslow mediation.

V. CONCLUSION.

For the foregoing reasons, the Foreclosure Mediation Program should be declared constitutional, and the Order of the District Court entered March 29, 2011 should be upheld. The Renslow note should be modified permanently as provided in that Order and Wells Fargo should be ordered to pay the sanctions of $30,000 plus attorney fees.

DATED this 2nd day of December, 2011.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28A

I hereby certify that I have read Respondents' Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of December, 2011. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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