IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK, N.A., Appellant, vs. DEWEY S. O'BRIEN; AND RENE D. O'BRIEN, Respondents.	No. 64421
WELLS FARGO BANK, N.A., Petitioner, vs. THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE, Respondents, and DEWEY S. O'BRIEN; AND RENE D. O'BRIEN, Real parties in interest.	No. 64481

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF MANDAMUS (DOCKET NO. 64481) AND VACATING AND REMANDING (DOCKET NO. 64421)

This is an original petition for a writ of mandamus challenging a district court order granting a petition for judicial review in a Foreclosure Mediation Program (FMP) matter (Docket No. 64481) and an appeal from a subsequent district court order granting a petition for judicial review in a related FMP matter (Docket No. 64421).

Docket No. 64481—Writ petition challenging the August 8, 2012, order

Having considered the parties' arguments and the record herein, we conclude that substantial evidence supported the district court's finding that Wells Fargo breached the forbearance agreement that

was reached at the April 5, 2011, mediation.[1] *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. ___, ___, 286 P.3d 249, 260 (2012) (deferring to a district court's factual determinations when they are supported by substantial evidence). Although that agreement was silent as to what would occur if Wells Fargo had not made a decision regarding a permanent loan modification by the time the O'Briens made their third trial payment, the record contains evidence adequate to support the conclusion that Wells Fargo instructed the O'Briens to continue making their monthly trial payments until a decision was made. *See Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. ___, ___, 335 P.3d 211, 214 (2014) (recognizing that "[s]ubstantial evidence is that which a reasonable mind might accept as adequate to support a conclusion" (internal quotations omitted)). The record also contains evidence adequate to support the conclusion that Wells Fargo denied the O'Briens a permanent modification on the ground that these continued monthly payments were insufficient to comply with the forbearance

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[1]Wells Fargo contends that the O'Briens' petition for judicial review should have been dismissed because it was not filed within FMR 21(2) (2011)'s 30-day time frame. This court has never declared that FMR 21's time frame is jurisdictional. Moreover, Wells Fargo's attempt to analogize FMR 21 to the statutory timing requirement in the Administrative Procedure Act is unpersuasive, as the Legislature imposed no such statutory timing requirement for seeking judicial review when it enacted the FMP. *See generally* NRS 107.086. Thus, the district court did not err in entertaining the O'Briens' petition for judicial review.

agreement's terms. Thus, substantial evidence supported the district court's conclusion that Wells Fargo breached the forbearance agreement.[2]

Based on the district court's conclusion that Wells Fargo breached the forbearance agreement, we conclude that the district court was within its discretion in awarding $10,000 in sanctions to the O'Briens. *See Pasillas v. HSBC Bank USA*, 127 Nev. ___, ___, 255 P.3d 1281, 1287 (2011) (recognizing that, absent factual or legal error, the choice of sanction in an FMP judicial review proceeding is committed to the sound discretion of the district court). In particular, the record contains substantial evidence from which the district court could have found that Wells Fargo's breach was not inadvertent and, similarly, that Wells Fargo was unwilling to continue meaningful negotiations with the O'Briens following the April 5, 2011, mediation. *See id.* In contrast, however, we cannot conclude that the district court acted within its discretion when it awarded an additional $10,000 in attorney fees to the O'Briens' counsel. While an award of attorney fees is not necessarily improper, the record contains no evidence to suggest that a request for attorney fees was made or that this $10,000 figure had any relation to the actual amount of fees incurred by the O'Briens' counsel.

Therefore, with regard to the writ petition in Docket No. 64481, we grant the petition insofar as it seeks to vacate the $10,000

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[2]Wells Fargo contends that the district court erred in finding a breach based on insufficient payments because Wells Fargo's actual basis for denying a permanent modification was the O'Briens' failure to provide necessary documentation. We disagree, as Wells Fargo's September 23, 2011, letter informed the O'Briens that no permanent modification could be made because "[w]e have not received the payments we requested from you."

award of attorney fees and deny the writ petition in all other respects. Accordingly, we direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate from its August 8, 2012, order in Case No. CV12-00038 the $10,000 award of attorney fees.

Docket No. 64421—Appeal challenging the October 24, 2013, order

On appeal, Wells Fargo does not specifically challenge the district court's finding of bad faith, but it argues that the district court abused its discretion in imposing monetary sanctions. Thus, we do not consider whether the district court erred in denying Wells Fargo an FMP certificate. *See Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. ___, ___, 266 P.3d 602, 607 (2011) ("[D]enial of an FMP certificate follows automatically from a finding the statutory FMP requirements have been shirked . . . ."). We instead consider whether the district court acted within its discretion when it (1) awarded $7,500 in attorney fees to the O'Briens' counsel, (2) awarded $10,200 in sanctions to the O'Briens, and (3) permanently modified the O'Briens' loan.

We are unable to conclude that the district court acted within its discretion in any of these three respects. As for the $7,500 attorney fees award, the record contains no evidence to suggest that a request for attorney fees was made or that this $7,500 figure had any relation to the actual amount of fees incurred by the O'Briens' counsel. As for the $10,200 sanction awarded to the O'Briens, the district court appears to have based this award in large part on Wells Fargo's conduct leading up to the O'Briens' first petition for judicial review—conduct for which Wells Fargo was already sanctioned in the district court's August 8, 2012, order. The district court also appears to have based this award on Wells Fargo (1) recording a second notice of default after it rescinded the first notice of

default; (2) appealing the August 8, 2012, order; (3) sending representatives to the second mediation who were unaware of the pending appeal; and (4) offering a loan modification to the O'Briens on terms that the district court found the O'Briens could not afford. Having considered the reasoning set forth in the district court's October 24, 2013, order, we are unable to discern why this conduct was sanctionable and, if so, why the amount of $10,200 was appropriate under the factors set forth in *Pasillas*, 127 Nev. at ___, 255 P.3d at 1287. Thus, we cannot conclude that the district court acted within its discretion in awarding $10,200 in sanctions to the O'Briens.

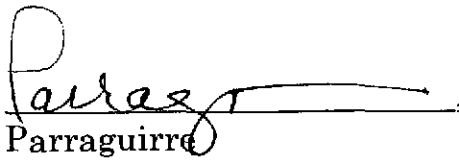
As for the permanent modification to the O'Briens' loan, although the district court's order indicates that a $658 monthly payment was "consistent with the terms of the April 5, 2011, agreement," nothing in the record suggests that a permanent modification would have included the same monthly payment as the forbearance agreement's trial payments.[3] Thus, we cannot conclude that the district court acted within its discretion when it permanently modified the O'Briens' loan.

Therefore, with regard to the appeal in Docket No. 64421, we vacate the district court's October 24, 2013, order in Case No. CV13-01767 and remand this matter for further proceedings consistent with this order. Specifically, this order should not be construed as prohibiting the district court from reconsidering monetary sanctions if it determines that Wells Fargo's conduct surrounding the May 6, 2013, mediation justifies such sanctions under *Pasillas*, 127 Nev. at ___, 255 P.3d at 1287, nor should it

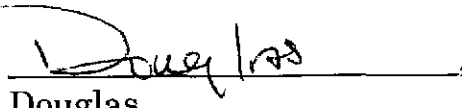
[3]Indeed, Mrs. O'Brien testified during the first petition for judicial review hearing that she did not believe a permanent modification would necessarily include a $658 monthly payment.

be construed as prohibiting the district court from awarding attorney fees if a request for those fees is supported with appropriate documentation.

It is so ORDERED.



_____, J.
Parraguirre



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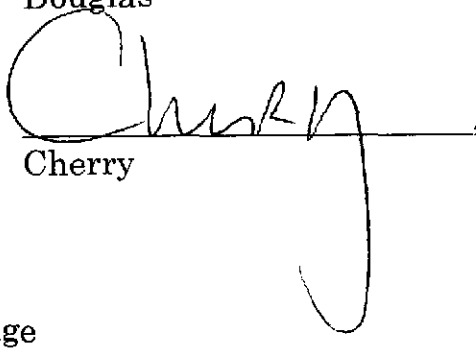
Douglas



_____, J.
Cherry

cc: Hon. Patrick Flanagan, District Judge
Tiffany & Bosco, P. A.
Mark L. Mausert
Washoe District Court Clerk