IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 69400

NATIONSTAR MORTGAGE, LLC,

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

Appeal from the Eighth Judicial District Court, Department XVII

The Honorable Michael P. Villani, District Judge

District Court Case No. A-13-684715-C

BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Federal Housing Finance Agency respectfully files this brief supporting Appellant Nationstar because the ruling below fundamentally misconstrues the law of standing in a way that directly and adversely impacts the interests of Fannie Mae and Freddie Mac (the "Enterprises")—federally chartered entities Congress created to enhance the nation's home-finance market, and that are presently in FHFA conservatorship.[1] The Enterprises own millions of mortgages, including hundreds of thousands in Nevada.

In 2008, Congress enacted the Housing and Economic Recovery Act ("HERA"), which established FHFA as the Enterprises' regulator. *See* 12 U.S.C. § 4511. HERA vested FHFA with the power to place the Enterprises into conservatorship or receivership under statutorily defined circumstances, mandating that as Conservator, FHFA would succeed to all "rights, titles, powers, and privileges" of the entity in conservatorship with respect to its assets. 12 U.S.C. § 4617. On September 6, 2008, FHFA's Director placed the Enterprises into FHFA's conservatorship, where they remain today. FHFA has an interest in this

[1] Pursuant to the Nevada Rules of Appellate Procedure, as an agency of the United States, FHFA is permitted to file this amicus curiae brief without consent of the parties or leave of court and without a corporate disclosure statement. Nev. R. App. P. 26.1, 29(a). Rule 29(a) parallels Section 517 of Title 28 of the U.S. Code which provides that the Attorney General of the United States may dispatch any officer of the Department of Justice to any state or district "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

case because it concerns statutory property protection Congress provided Freddie Mac while in FHFA's conservatorship. Specifically, this case presents the question whether a servicer of a loan owned by an Enterprise may assert HERA's protection in litigation to which neither FHFA nor the Enterprise is a party. As the Enterprises' Conservator and the owner-by-succession of the property interest at stake, FHFA respectfully submits that the answer is "Yes."

INTRODUCTION

This case involves a Nevada homeowners' association's sale of a property after non-judicial foreclosure on its lien for unpaid dues (an "HOA Sale"). Under Nevada law, HOA Sales, if properly conducted, can extinguish all other preexisting liens on the underlying property, including deeds of trust. But the federal statute creating FHFA provides that while an Enterprise is in conservatorship, its "property" is not "subject to . . . foreclosure." 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar").

This appeal presents a straightforward issue: Does a party that is the record beneficiary of a deed of trust owned by Freddie Mac and the contractually authorized servicer of the corresponding loan owned by Freddie Mac have standing to raise the Federal Foreclosure Bar as a defense to a claim of quiet title? It does.

Contrary to SFR's arguments, Freddie Mac's deed of trust (which the Nevada-law HOA foreclosure purported to extinguish) is property of the

conservatorship. The Federal Foreclosure Bar, therefore, preserved Freddie Mac's interest notwithstanding Nevada law. The district court's conclusion that Freddie Mac's servicer Nationstar lacks standing to assert the statutory protection is wrong; as the servicer of a loan owned by Freddie Mac, Nationstar has a pecuniary interest in this action and may invoke the Federal Foreclosure Bar, which under the Supremacy Clause provides the rule of decision.

ARGUMENT

The district court's decision contravenes established law on standing, property rights, and federal preemption. The Restatement approach to mortgages, which this Court adopted in *Montierth* and *Edelstein*, recognizes the indispensable role servicers play in the modern mortgage market and allows servicers to protect mortgage-owners' legal rights and property interests. *See In re Montierth*, 131 Nev. __, __, 354 P.3d 648, 650-51 (2015); *Edelstein v. Bank of New York Mellon*, 128 Nev. __, __, 286 P.3d 249, 257-58 (Nev. 2012). Through both its contractual relationship with Freddie Mac and its pecuniary interest in the property, Nationstar has standing and the ability to raise the Federal Foreclosure Bar as a defense to a claim of quiet title.

Allowing the Enterprises' loan servicers to assert the Federal Foreclosure Bar is not only consistent with governing law but also essential to the execution of FHFA's mission; FHFA has expressly stated its support of the practice. Given the

millions of loans owned by the Enterprises and the limited, taxpayer-supported resources of FHFA as their Conservator, there are important policy reasons for allowing servicers to assert the Federal Foreclosure Bar to protect the conservatorships' property interests.

I. FHFA SUPPORTS SERVICERS' STANDING TO RAISE THE FEDERAL FORECLOSURE BAR

FHFA has issued a public statement specifically supporting the practice of the Enterprises' servicers raising the Federal Foreclosure Bar in litigation: "FHFA supports the reliance on Title 12 United States Code Section 4617(j)(3) in litigation by authorized servicers of [Freddie Mac] to preclude the purported involuntary extinguishment of [Freddie Mac]'s interest by an HOA foreclosure sale." FHFA, Statement on Servicer Reliance on the Housing and Economic Recovery Act of 2008 in Foreclosures Involving Homeownership Associations, http://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Authorized-Enterprise-Servicers-Reliance.pdf. Doing so assists FHFA in its role as Conservator in efficiently managing, protecting, and administering its property interests and advancing the policy goals of HERA.

The Enterprises own millions of loans nationwide. FHFA and the Enterprises can more efficiently fulfill their federal statutory mission of supporting the national secondary mortgage market if they can contract with servicers to manage loans. For this reason, Fannie Mae and Freddie Mac regularly delegate

practical aspects of mortgage management—such as communicating with borrowers and initiating loss-mitigation of default-resolution activity—to contractually authorized servicers such as Nationstar. Defending Freddie Mac's legal interests, especially in cases involving individual mortgage loans among the millions it owns, is an integral part of the servicer's duties.

The Restatement approach to mortgages—adopted by the decisions of this Court—embraces the reality of the modern mortgage market: that servicers are fully entitled to take action to protect the loan owner's interests. Indeed, this Court affirmed that it adopted the entirety of the Restatement approach in *Montierth*. 354 P.3d at 650-51 (citing Restatement (Third) of Prop.: Mortgages § 5.4(a) (1997) and adopting the Restatement approach to the transfer of mortgages); *see also Edelstein*, 286 P.3d at 257-58 (same).

The Restatement describes the typical arrangement between investors in mortgages, such as Freddie Mac, and their servicers:

> Institutional purchasers of loans in the secondary mortgage market often designate a third party, not the originating mortgagee, to collect payments on and otherwise "service" the loan for the investor. In such cases the promissory note is typically transferred to the purchaser, but an assignment of the mortgage from the originating mortgagee *to the servicer* may be executed and recorded. This assignment is convenient because it facilitates actions that the servicer might take, such as releasing the mortgage, at the instruction of the purchaser.

Restatement § 5.4 cmt. c (emphasis added). The Restatement approach is a sound

recognition of the realities of the mortgage industry: Freddie Mac and Fannie Mae can more efficiently support the national secondary mortgage market if they can contract with servicers to manage loans. That is exactly what Nationstar sought to do in the court below.

Precluding servicers from asserting the Federal Foreclosure Bar to protect the Enterprises' property interests would contravene those principles and introduce massive inefficiency, to no apparent end. Freddie Mac and Fannie Mae each own hundreds of thousands of loans in Nevada and tens of millions of loans in other states. These loans are constantly the subject of hundreds of cases in federal and state courts, including many where, as here, an HOA foreclosure sale purports to extinguish an Enterprise's deed of trust. A requirement that the Enterprises and FHFA be a party to each case would require the Enterprises to divert substantial resources to managing litigation and away from fulfilling their statutory roles of increasing the availability of mortgages, yet would do nothing to advance the cases. The preemptive effect of the Federal Foreclosure Bar is a straightforward matter of law, and its application in any given cases depends primarily on a single fact to which servicers have ready access—whether the servicer is acting on its own account or as an Enterprise's contractually authorized representative with respect to the loan and the underlying collateral, i.e., whether the Enterprise has a property interest at stake. There is no legal requirement, and no practical need, for

an Enterprise to be a party to every case in which the Federal Foreclosure Bar's protection is asserted.

Nor would it be sensible to require FHFA to participate directly in every case in which the Federal Foreclosure Bar is at issue. To the contrary, allowing servicers to assert the Federal Foreclosure Bar—when, in FHFA's judgment, that is appropriate—advances important policy goals. For one, it conserves taxpayer dollars, as it would be duplicative and wasteful for FHFA to intervene in hundreds of cases to assert substantially the same statutory argument. FHFA has only a few hundred employees. Those employees do not just manage the conservatorships; they are tasked with overseeing the regulation of Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. Servicers, conversely, have dedicated employees and attorneys experienced in efficiently managing litigation involving individual mortgage loans like the one at issue here.

II. SERVICERS HAVE STANDING TO RAISE THE FEDERAL FORECLOSURE BAR

Contrary to the district court's holding, FHFA is not the only party capable of raising the Federal Foreclosure Bar to protect Freddie Mac's interest. HERA provides—with no conditions precedent—that "[n]o property of the Agency shall be subject to … foreclosure … without the consent of the Agency." 12 U.S.C. § 4617(j)(3). Thus, the Federal Foreclosure Bar works automatically, by operation of law, to protect deeds of trust. As Freddie Mac's servicer, Nationstar has an

interest in the property through its contractual servicing relationship with Freddie Mac and as the record beneficiary of the deed of trust in the instant appeal. These two interests, separately or together, confer standing on Nationstar to raise the Federal Foreclosure Bar in this litigation.

The grounds of the district court's decision on standing are less than perfectly clear; the entire standing analysis is articulated in a single cursory sentence. (JA001446-1452). To the extent the district court relied on the principle that the Supremacy Clause does not provide a party with a separate cause of action, such reliance is misplaced. Although the Supremacy Clause "does not create a cause of action," the Supreme Court recently confirmed that courts deciding claims properly before them must apply federal law as the "rule of decision" in any case where "state and federal law clash." *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383 (2015). "Once a case or controversy properly comes before a court, judges are bound by federal law." *Id*. at 1384. "They must not give effect to state laws that conflict with federal laws." *Id.* at 1383 (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824)). Confirming that private parties may assert preemption arguments, *Armstrong* approvingly cites *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013), a tort case in which a private defendant successfully argued that federal law preempted state doctrine, thereby defeating the private plaintiff's claim. *See Armstrong*, 135 S. Ct. at 1384. Likewise, in the case below

Nationstar asserted the Federal Foreclosure Bar as providing the rule of decision for an independently cognizable claim—quiet title.

Nevada federal courts that have examined this issue have held that that private parties may raise federal preemption arguments. One court recently relied on *Armstrong* to hold that a private party had standing to challenge the constitutionality of the State Foreclosure Statute under the Supremacy Clause. *See Thunder Props., Inc. v. Wood,* 2015 WL 1926768, at *4, No. 3:14-cv-00068-RCJ-WGC (D. Nev. Apr. 28, 2015) ("an evaluation of whether N.R.S. 116.3116 as applied to federally insured mortgages conflicts with [the Supremacy Clause] is a question of law that may be raised by any party, and not just a government agency" (citing *Armstrong*, 135 S. Ct. at 1883)).

Alternatively, to the extent the district court concluded that the Federal Foreclosure Bar is somehow personal to FHFA or Freddie Mac and therefore cannot be asserted by Freddie Mac's contractually authorized servicer, that would be incorrect as well. Freddie Mac's contract with Nationstar further provides Nationstar standing to assert the Federal Foreclosure Bar. That contract authorizes Nationstar to protect Freddie Mac's interests in foreclosure proceedings. *See, e.g.*,

Freddie Mac's Single-Family Seller/Servicer Guide at 8105.3, 9301.1, 9301.12, 9401.1.[2]

By virtue of this contractual relationship, Nationstar has standing to litigate on the owner's behalf. *See Sprint Comm'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 271-72 (2008); *Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.*, 770 F.3d 1282, 1291 (9th Cir. 2014), *cert. denied sub nom. United Healthcare of Arizona v. Spinedex Physical Therapy USA, Inc.*, 136 S. Ct. 317, 193 L. Ed. 2d 227 (2015). Further, the contract provides Nationstar a pecuniary interest in the property that provides personal interest. *See, e.g.*, *CWCapital Asset Mgmt., LLC v. Chicago Props.*, 610 F.3d 497, 501 (7th Cir. 2010) ("There is no doubt about Article III standing in this case; though the plaintiff may not be an assignee, it has a personal stake in the outcome of the lawsuit because it receives a percentage of the proceeds of a defaulted loan that it services."); *Greer v. O'Dell*, 305 F.3d 1297, 1299 (11th Cir. 2002) ("[A] loan servicer is a 'real party in interest' with standing to conduct, through licensed counsel, the legal affairs of the investor relating to the debt that it services.").

[2] The Guide is publicly available on Freddie Mac's website. An interactive version is available at www.freddiemac.com/singlefamily/guide, and archived prior versions of the Guide are available at www.freddiemac.com/singlefamily/guide/bulletins/snapshot.html. The Court may take judicial notice of the Guide. *See, e.g.*, *Charest v. Fannie Mae*, 9 F. Supp. 3d 114, 118 & n.1 (D. Mass. 2014); *Cirino v. Bank of Am., N.A.*, No. CV 13-8829 PSG MRWX, 2014 WL 9894432, at *7 (C.D. Cal. Oct. 1, 2014).

Nationstar, either representing Freddie Mac or defending its own interest, has standing to assert the Federal Foreclosure Bar.

CONCLUSION

For the foregoing reasons, FHFA supports Nationstar's request for reversal of the trial court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on the 29th day of June, 2016, a true and correct copy of the **BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT,** was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case. If electronic notice is not indicated through the court's e-filing system, then a true and correct paper copy of the foregoing document was delivered via U.S. Mail.

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ATTORNEY'S CERTIFICATE PURSUANT TO NEVADA RULE OF APPELLATE PROCEDURE 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font size.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

Proportionately spaced, has a typeface of 14 points or more, and contains 2,199 words.

3. Finally, I hereby certify that I have read this appellate 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 29th day of June, 2016.

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