IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 69419

SATICOY BAY LLC SERIES 9641 CHRISTINE VIEW

Appellant,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Respondent.

Appeal from the Eighth Judicial District Court, Clark County, Nevada
The Honorable Elissa F. Cadish, District Judge
District Court Case No. A690924

RESPONDENT'S ANSWERING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Federal National Mortgage Association ("Fannie Mae") does not have a parent corporation and according to SEC filings, no publicly held corporation owns more than 10% of Fannie Mae's common (voting) stock.

ALDRIDGE PITE, LLP

Dated: June 15, 2016

By: */s/ Laurel I. Handley*
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FEDERAL NATIONAL MORTGAGE ASSOCIATION

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ROUTING STATEMENT

This matter does not involve a category of cases that is presumptively assigned to the Court of Appeals pursuant to Rule 17(b). Respondent believes this matter should be retained by the Supreme Court under NRAP 17 as the matter falls within subparagraphs (a)(13) and (a)(14) of Rule 17.

Specifically, this matter raises as a principal issue a question of first impression and a question of statewide public importance. Over the last several years Nevada's state and federal courts have been inundated with cases involving foreclosure sales conducted by homeowners associations pursuant to NRS 116.3116 *et seq*. The principal issue in this case, and hundreds of other cases pending within this state, is whether 12 U.S.C. 4617(j)(3) preempts NRS 116.31162 to bar homeowners associations' foreclosure sales from extinguishing Fannie Mae's first mortgage lien on real property while it is under the conservatorship of the Federal Housing Finance Agency. As of the date this Answering Brief is submitted this issue has not been decided by any Nevada appellate court and is a matter of first impression for this Court. The Supreme Court's resolution of this issue is of statewide public importance because it will provide much needed clarification and guidance to district courts as to whether a homeowners association's foreclosure sale conducted pursuant to NRS 116.31162

may extinguished deeds of trust owned by Fannie Mae (or Freddie Mac) or whether those deeds of trust are protected from extinguishment by federal statutes.

Based on the foregoing, Respondent respectfully requests that the Supreme Court retain, hear and decide this case.

STATEMENT OF THE ISSUES

1. Does 12 U.S.C. § 4617(j)(3), under which FHFA conservatorship property "shall not be subject to…foreclosure" absent FHFA's consent, preempt Nevada law governing homeowners association foreclosures to the extent that state-law foreclosures could automatically extinguish conservatorship property?

2. Did the foreclosure sale conducted by Nevada Association Services, Inc., on behalf of Cheyenne Ridge Homeowners Association extinguish Fannie Mae's interest in the real property located at 9641 Christine View Court, Las Vegas, NV 89129?

STATEMENT OF THE CASE

On September 6, 2013, Appellant Saticoy Bay LLC Series 9641 Christine View ("Saticoy Bay") purchased the real property located at 9641 Christine View, Las Vegas, Nevada ("Property") at a homeowners association's foreclosure sale ("HOA Sale"). JA at 55. On October 30, 2013, Saticoy Bay filed its complaint for quiet title naming Fannie Mae, The Cooper Castle Law Firm, LLP ("Cooper Castle"), Don Moreno and Rieta Moreno ("Morenos") as defendants. JA at 2-5.

Saticoy Bay claimed that it purchased the property free and clear of all liens, including Fannie Mae's first Deed of Trust which had been executed by the Morenos and recorded nearly a decade before the HOA Sale occurred. *Id.* In addition to seeking quiet title to the Property, Saticoy Bay sought an injunction prohibiting Fannie Mae and Cooper Castle from foreclosing pursuant to Fannie Mae's Deed of Trust. *Id.* at 2:10, 2:14-16, 2:20-21, 2:26-3:5. Fannie Mae filed its Answer on May 2, 2014, and its First Amended Answer on February 4, 2015. JA at 26-30, 31-37.

Cooper Castle, the trustee under the Deed of Trust at issue, filed a Motion to Dismiss, which was granted. JA at 18-20. The Order dismissing Cooper Castle was entered on February 12, 2014. *Id.*

On April 22, 2015, Saticoy Bay filed a Motion for Summary Judgment ("Motion"). JA at 38-117. Fannie Mae filed an opposition and Counter-Motion for Summary Judgment ("Counter-Motion"). JA at 125-208. After oppositions, replies and several rounds of supplemental briefing, the court heard oral argument on the Motion and Counter-Motion on November 17, 2015. JA at 421.

On December 7, 2015, the District Court signed an Order Denying Plaintiff's Motion for Summary Judgment and Granting Fannie Mae's Countermotion for Summary Judgment ("SJ Order"). JA 421-24. In its ruling, the District Court found that: (1) 12 U.S.C. § 4617(j)(3) preempts NRS 116.3116 to

the extent that a homeowners association's foreclosure of its super-priority lien cannot extinguish a property interest of Fannie Mae while it is under FHFA conservatorship; (2) Fannie Mae's interest in the Property secured by the Deed of Trust was a property interest protected by 12 U.S.C. § 4617(j)(3); (3) the homeowners association's foreclosure sale of its super-priority interest in this case did not extinguish Fannie Mae's interest in the Property nor convey the Property to Saticoy Bay free and clear of the Deed of Trust; and (4) Saticoy Bay's interest in the Property is subject to the Deed of Trust. JA at 423:15-23.

The SJ Order was entered on December 8, 2015. *Id*. A Notice of Entry of Order was served and filed on December 10, 2015, and Saticoy Bay filed its Notice of Appeal of the SJ Order on December 11, 2015. JA at 432-33.

At the time the Notice of Appeal was filed, Saticoy Bay's claims against the Morenos had not been resolved. Thereafter, on January 6, 2016, Saticoy Bay filed a Notice of Voluntary Dismissal as to the Morenos. JA 434-35. Therefore, the SJ Order in favor of Fannie Mae became a final and appealable order.

STATEMENT OF FACTS

The Deed of Trust and Assignments

On or about October 18, 2004, the Morenos obtained a home loan in the original amount of $174,950 (the "Loan") from Countrywide Home Loans, Inc. ("Countrywide"). JA at 59-80. The Loan is secured by a first deed of trust ("Deed

of Trust") encumbering the Property, which was recorded on November 2, 2004, in the Office of the Clark County Recorder as instrument number 20041102-0005250. *Id*. The Deed of Trust identified Countrywide as the original Lender and Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary, solely as nominee for Lender and its successors and assigns. JA at 60.

In July 2008, in an effort to deal with the immediate national economic crisis, the United States Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"). *See* Pub. L. No. 110-289, 122 Stat. 2654, codified at 12 U.S.C. § 4511 et seq. HERA established the Federal Housing Finance Agency ("FHFA" or the "Agency") to regulate Fannie Mae, the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal Home Loan Banks. *See id*.; *see also* JA at 332, 350-53. In September 2008, FHFA placed Fannie Mae and Freddie Mac (together, "the Enterprises") into conservatorships "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." *See* 12 U.S.C. § 4617(a)(2); JA at 350-53.

MERS assigned the Deed of Trust to BAC Home Loans Servicing LP, fka Countywide Home Loans Servicing LP ("BAC Home Loans") via a Corporation Assignment of Deed of Trust executed on September 3, 2010, and recorded on September 13, 2010, as instrument number 20100913-0000628. JA at 193. Thereafter, and prior to the September 2013 HOA Sale referenced below, Bank of

America, N.A., the successor by merger to BAC Home Loans, JA at 195, assigned the Deed of Trust to Fannie Mae via an Assignment of Deed of Trust executed on October 6, 2012, and recorded on October 19, 2012, as instrument number 20121019-0000325, JA at 198; *see also* Opening Br. at 15 (recognizing that Bank of America, N.A. assigned the Deed of Trust to Fannie Mae).

The HOA Lien and Foreclosure Sale

The Property is part of the Cheyenne Ridge Homeowners Association ("HOA"). JA at 82. On March 17, 2010, Nevada Association Services, Inc. ("NAS"), as agent for the HOA recorded a Notice of Delinquent Assessment Lien against the Property ("HOA Lien"). JA at 82. The HOA Lien indicated that at that time, the amount due under the lien was $1,050. *Id*. On August 16, 2010, NAS recorded a Notice of Default and Election to Sell Under Homeowners Association Lien ("NOD"), which indicated the amount due under the HOA Lien was $1,728. JA at 84-85.

Nearly two years later, on February 7, 2012, NAS recorded its first Notice of Foreclosure Sale ("First NOS") against the Property, which indicated the amount due under the HOA Lien was $3,426.42. JA at 202. A foreclosure sale did not proceed with regard to the First NOS. *See* JA at 94-95. Instead, eighteen months passed and on August 15, 2013, NAS recorded a second Notice of Foreclosure Sale ("Second NOS"), which indicated the amount due under the HOA Lien had been

reduced to $2,712.17. JA at 94-95. NAS conducted a foreclosure sale on September 6, 2013 (the "HOA Sale"), at which it sold the Property to Saticoy Bay for $26,800. JA at 55. That same day, NAS issued a Foreclosure Deed to Saticoy Bay, which was recorded on September 26, 2013. JA at 55.

At the time the Second NOS was recorded and at the time of the HOA Sale, Fannie Mae was the owner of the Loan and record beneficiary under the Deed of Trust. JA at 198-99. At no time did FHFA, as conservator of Fannie Mae, consent to the HOA Sale's extinguishment of Fannie Mae's interest in the Property. JA at 335:16-20, 355. Saticoy Bay does not contend that it or the HOA sought FHFA's consent.

SUMMARY OF THE ARGUMENT

None of the underlying facts are in dispute. All parties agree on what occurred and when. The only issue is the application of federal law to those undisputed facts. Since the only question is a question of law, this case was properly resolved on summary judgment in favor of Fannie Mae.

Specifically, federal law provides that while Fannie Mae is under the conservatorship of FHFA, none of its property "shall be subject to … foreclosure … without the consent of [the Agency]." 12 U.S.C. § 4617(j)(3) ("Federal Foreclosure Bar"). In this case, Saticoy Bay, the purchaser of the Property at the HOA Sale contends that the HOA Sale extinguished Fannie Mae's interest,

notwithstanding the undisputed fact that FHFA did not consent. Saticoy Bay relies on a Nevada statute that grants homeowners associations a first priority lien for up to six to nine months of uncollected dues ("superlien") and authorizes a homeowners association to foreclose all junior interests, including pre-existing first deeds of trust. *See* NRS 116.3116 (creating the superlien), 116.31162 (providing the process for foreclosure of the lien, hereinafter referred to as the "State Foreclosure Statute"). Saticoy Bay argues that the Federal Foreclosure Bar does not apply, that FHFA impliedly consented to the HOA Sale and that Fannie Mae lacks standing to assert the Federal Foreclosure Bar. However, there was no implied consent and Saticoy Bay is incorrect in suggesting that Fannie Mae lacks standing. Moreover, in eleven cases presenting the same legal issue, federal courts in Nevada have held the State Foreclosure Statute is preempted by the Federal Foreclosure Bar. *See* section B, *infra*. In its Counter-Motion, Fannie Mae asked the District Court to do the same. It did, and the Supreme Court should now affirm that decision.

Because the District Court found that the Federal Foreclosure Bar preempts the State Foreclosure Statute, and therefore Fannie Mae's lien was not extinguished by the HOA Sale, the District Court declined to rule on several other bases on which summary judgment in favor of Fannie Mae also was appropriate. The Supreme Court need not reach these additional issues either because summary

judgment is warranted based on the application of the Federal Foreclosure Bar. Nevertheless, in the event the Supreme Court does address these additional issues, it will see that the undisputed facts demonstrate that the HOA Sale both was commercially unreasonable and violated Fannie Mae's constitutional right to due process. Thus, additional grounds exist to affirm summary judgment in favor of Fannie Mae.

ARGUMENT

A. Standard of Review

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *George L. Brown Ins. v. Star Ins. Co.*, 126 Nev. 316, 322-23, 237 P.3d 92, 96 (2010) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). "Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Statutory interpretation and application is a question of law subject to de novo review. *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014).

B. The Federal Foreclosure Bar Preempts the State Foreclosure Statute

Saticoy Bay argues that foreclosure of the HOA's superlien, permitted by the State Foreclosure Statute, extinguished Fannie Mae's Deed of Trust. Opening Br. at 9:23-12:6. Fannie Mae does not dispute that the State Foreclosure Statute established a superlien on the Property. Rather, the central issue in this case is the effect of the Federal Foreclosure Bar on the State Foreclosure Statute: the Federal Foreclosure Bar preempts the State Foreclosure State to the extent the State Foreclosure State permits extinguishment of a statutorily protected Fannie Mae property interest without the consent of its conservator, FHFA.

A federal statute expressly preempts contrary law when it "explicitly manifests Congress's intent to displace state law." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013). This is the case here: the text of the federal statute declares that "[n]o property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale." 12 U.S.C. § 4617(j)(3). Thus, the Federal Foreclosure Bar automatically bars any nonconsensual limitation or extinguishment through foreclosure of any property interest held by Fannie Mae while in conservatorship; it therefore preempts the State Foreclosure Statute to the extent the state statute would otherwise permit any such nonconsensual limitation or extinguishment.

Even if Section 4617(j)(3) were not worded in such express terms, it nevertheless preempts the State Foreclosure Statute because "'state law is naturally preempted to the extent of any conflict with a federal statute.'" *Valle del Sol*, 732 F.3d at 1023 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). "[U]nder the Supremacy Clause … any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgm't Ass'n*, 505 U.S. 88, 108 (1992) (internal quotations and citations omitted). Therefore, conflict preemption occurs "where it is impossible for a private party to comply with both state and federal law" or "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Valle del Sol*, 732 F.3d at 1023 (internal quotations and citations omitted). In short, "state law that conflicts with federal law is without effect." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

Applying this governing rule, multiple federal courts in Nevada have held that the Federal Foreclosure Bar preempts the State Foreclosure Statute to bar an HOA's foreclosure sale from extinguishing a property interest of Fannie Mae or Freddie Mac without the consent of their conservator, FHFA.[1]

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[1] *See Skylights v. Byron*, 112 F. Supp. 3d 1145 (D. Nev. 2015); *Elmer v. JP Morgan Chase*, No. 2:14-cv-01999-GMN-NJK, 2015 WL 4393051 (D. Nev. July

In this case, the trial court agreed with the reasoning of the federal courts, as first articulated by Chief Judge Gloria Navarro, in *Skylights v. Byron*, 112 F. Supp. 3d 1145. The facts in *Skylights* are materially identical to those here: in both cases,

(1) Fannie Mae was the beneficiary of record under the Deed of Trust, JA at 195; *Skylights*, 112 F. Supp. 3d at 1149;

(2) the HOA, through its trustee, recorded a foreclosure deed conveying the real property to a third party, JA at 55; 112 F. Supp. 3d at 1149;

(3) at no time did FHFA, as conservator for Fannie Mae, consent to the extinguishment of Fannie Mae's interest by the HOA foreclosure sale, JA at 355; 112 F. Supp. 3d at 1149;

(4) the third party purchaser filed an action seeking to quiet title, asserting that it purchased the real property free and clear of Fannie Mae's Deed of Trust, JA at 2-5; 112 F. Supp. 3d at 1149; and

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13, 2015); *Premier One Holdings, Inc. v. Fed. Nat'l Mortg. Ass'n*, No. 2:14-cv-02128-GMN-NJK, 2015 WL 4276169 (D. Nev. July 13, 2015); *Williston Inv. Grp., LLC v. JP Morgan Chase Bank, NA*, No. 2:14-cv-02038-GMN-PAL, 2015 WL 4276144 (D. Nev. July 13, 2015*);My Global Village, LLC v. Fed. Nat'l Mortg. Ass'n*, No. 2:15-cv-0211-RCJ-NJK, 2015 WL 4523501 (D. Nev. July 27, 2015); *1597 Ashfield Valley Trust v. Fed. Nat'l Mortg. Ass'n*, No. 2:14-cv-02123-JCM-CWH, 2015 WL 4581220 (D. Nev. July 28, 2015); *Saticoy Bay, LLC Series 1702 Empire Mine v. Fed. Nat'l Mortg. Ass'n*, No. 2:14-CV-01975-KJD-NJK, 2015 WL 5709484 (D. Nev. Sept. 29, 2015); *Berezovsky v. Moniz*, No. 2:15-cv-01186-GMN-GWF, 2015 WL 8780198 (D. Nev. Dec. 15, 2015); Order, *Opportunity Homes, LLC v. Freddie Mac*, No. 2:15-cv-008993-APG-GWF (D. Nev. Mar. 11, 2016), ECF No. 39; *FHFA v. SFR Investments Pool 1, LLC*, No. 2:15-cv-1338-GMN-CWH, 2016 WL 2350121 (D. Nev. May 2, 2016).

(5) Fannie Mae filed a motion for summary judgment asserting that 12 U.S.C. §4617(j) prevented the foreclosure of the HOA's super-priority lien from extinguishing Fannie Mae's interest in the Property, JA at 229-45; 112 F. Supp. 3d at 1149-50.

In applying the Federal Foreclosure Bar to the facts in *Skylights*, Judge Navarro held that the plain language of the Federal Foreclosure Bar bars the foreclosure of an HOA lien from extinguishing property of FHFA without its consent. 112 F. Supp. 3d at 1152. The Court reasoned as follows:

> 12 U.S.C. § 4617(j) explicitly states that "in any case in which [FHFA] is acting as a conservator," "[n]o property of [FHFA] shall be subject to . . . foreclosure[] or sale without the consent of [FHFA]." 12 U.S.C. § 4617(j). The plain meaning of this subsection is that when FHFA is acting as a conservator, none of the property sought to be conserved by FHFA may be subject to a foreclosure without its consent. Therefore, a straightforward reading of the statutory language bars the HOA's foreclosure in this case from extinguishing the Deed of Trust without FHFA's consent, regardless of the HOA lien's super-priority under state law.

Id. (citations omitted). To date, all federal decisions to address the issue have adopted that statutory analysis. This Court should similarly follow the persuasive reasoning of *Skylights* and hold that, while FHFA is acting as a conservator for Fannie Mae, none of Fannie Mae's property may be subject to a foreclosure or extinguishment without FHFA's consent.

Such a ruling would also be consistent with another federal court evaluating a similar provision of HERA, which held that it preempted certain state laws

because "[e]xposure to state law claims would undermine the FHFA's ability to establish uniform and consistent standards for the regulated entities, and thwart its mandate to assure their safe and sound operation. If [p]laintiffs' state claims were not preempted, liability based on these claims would create obstacles to the accomplishment of the policy goals set forth in [HERA]." *California ex rel. Harris v. FHFA*, No. 10-cv-03084, 2011 WL 3794942, at *16 (N.D. Cal. Aug. 26, 2011). In addition, courts applying the companion statute governing the Federal Deposit Insurance Corporation ("FDIC") receiverships have similarly held that the federal statute supersedes otherwise-applicable state law. *See, e.g., Fed. Deposit Ins. Corp. v. Lowery,* 12 F.3d 995 (10th Cir. 1993) (concluding that local taxing authorities could not sell property owned by FDIC to satisfy tax liens without FDIC's consent and noting that "[t]he text of section 1825(b)(2) is unequivocal and suggests no implied exception"); *GWN Petroleum Corp. v. Ok-Tex. Oil & Gas, Inc.*, 998 F.2d 853 (10th Cir. 1993) (concluding that a private judgment holder's attempt to garnish proceeds from the sale of oil and gas paid to the FDIC was barred by Section 1825(b)(2)).[2]

[2] When analyzing HERA's provisions, courts have frequently turned to precedent interpreting the analogous receivership authority of the FDIC. *See, e.g., Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 993 (9th Cir. 2013) (referring to the FDIC's statutory authority in a related area as "analogous to 12 U.S.C. § 4617(f)").

Similarly, Congress's clear and manifest purpose in enacting the Federal Foreclosure Bar was to protect the nationwide operations of the Enterprises while in conservatorship from actions, such as the HOA Sale, that otherwise might deprive them of their interests in property. In so doing, Congress ensured that the Enterprises would not be subject to an array of conflicting state laws, such as those relied upon by Saticoy Bay, which could undermine FHFA's efforts to restore and assure the safety and soundness of the Enterprises' business operations. Allowing state-law foreclosures to extinguish conservatorship property anyway would conflict directly with the law and policy Congress enacted. Accordingly, the Federal Foreclosure Bar preempts any state law that would authorize the HOA Sale to effect the nonconsensual extinguishment of Fannie Mae's interest in the Property and thereby permit the HOA to transfer to Saticoy Bay an interest free and clear of the Deed of Trust.

C. The Federal Foreclosure Bar Protects Fannie Mae's Property Interest in This Case

Saticoy Bay argues that the Federal Foreclosure Bar does not apply in this case because: (1) the Property is not "property of the Agency," Opening Br. at 15-16, and (2) the Federal Foreclosure Bar only protects property of the Agency from claims or liens by a "State, county, municipality, or local taxing authority," Opening Br. at 16-18. Both of these arguments lack merit.

1. The Protection of the Federal Foreclosure Bar Extends to Fannie Mae When It Is Under FHFA's Conservatorship

The Federal Foreclosure Bar necessarily protects the Deed of Trust because the Conservator has succeeded by law to all of Fannie Mae's "rights, titles, powers, and privileges." 12 U.S.C. § 4617(b)(2)(A)(i). "Accordingly, the property of [Fannie Mae] effectively becomes the property of FHFA once it assumes the role of conservator, and that property is protected by section 4617(j)'s exemptions." *Skylights*, 112 F. Supp. 3d at 1155. This interpretation is supported by the text and structure of HERA. *See Skylights*, 112 F. Supp. 3d at 1155. Section 4617 concerns FHFA's "[a]uthority over" Fannie Mae and Freddie Mac when they are "critically undercapitalized" and thus must be placed into conservatorship or receivership. Furthermore, the protections of Section 4617(j)(3) apply in "any case in which [FHFA] is acting as a conservator or a receiver." 12 U.S.C. § 4617(j)(1).

The property protection accorded by Section 4617(j)(3) would be meaningless if it did not extend to the entities in conservatorship. Indeed, such an interpretation would defeat the very purpose of the conservatorship. Accordingly, courts have uniformly rejected any argument that the immunities provided by Section 4617(j) do not apply to the property of Fannie Mae or Freddie Mac while in FHFA conservatorship. *See Skylights*, 112 F. Supp. 3d at 1155 (collecting cases); *Nevada ex rel. Hager v. Countrywide Home Loans Servicing*, LP, 812 F. Supp. 2d 1211, 1218 (D. Nev. 2011) ("[W]hile under the conservatorship with the

FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is."); *FHFA v. City of Chicago*, 962 F. Supp. 2d 1044, 1064 (N.D. Ill. 2013) (argument is "meritless").

The courts have also rejected similar arguments in the context of FDIC receiverships. *See In re Cnty. of Orange*, 262 F.3d 1014, 1020 (9th Cir. 2001) ("We also note that subsection (b)(2) provides 'nor shall any involuntary lien attach to the property of the Corporation.' That language's plain meaning is that once the property belongs to the FDIC, that is, when the FDIC acts as receiver, no liens shall attach") (emphasis omitted) (quoting 12 U.S.C. § 1825(b)(2)); *Cnty. of Fairfax v. Fed. Deposit Ins. Corp.* Civ. A. No. 92-0858, 1993 WL 62247, at *4 (D.D.C. Feb. 26, 1993) (rejecting the contention that the statutory penalty bar applicable to the FDIC as receiver, 12 U.S.C. § 1825(b)(3), only "exempts the FDIC itself from penalty assessment but not the [financial institution] for which the FDIC assumes receivership.").

Put simply, any property of Fannie Mae effectively became property of FHFA once FHFA assumed the role of conservator. *Skylights v. Byron*, 112 F. Supp. 3d at 1155. Fannie Mae has a property interest created by the Deed of Trust.[3] JA at 198. That property interest effectively became the property of FHFA

[3] Courts have repeatedly held that mortgage liens constitute property for purposes of an analogous FDIC statute, § 1825(b)(2). "[T]he term 'property' in § 1825(b)(2)

once it assumed the role as conservator. Thus, the protections of the Federal Foreclosure Bar apply to Fannie Mae's interest in this case.

2. The Federal Foreclosure Bar is Not Limited to Tax Liens

Saticoy Bay argues that Section 4617(j)(3) should be interpreted to allow the extinguishment of the Deed of Trust because the statute's bar applies only to actions taken by government entities in enforcing tax liens. Opening Br. at 17:12-18:8, 24:21-23. Saticoy Bay contends that this Court should consider persuasive a Fifth Circuit decision that the FDIC property protection clause that is similar to Section 4617(j)(3), 12 U.S.C. § 1825(b)(2) does not apply to nonjudicial foreclosure. Opening Br. at 20:21-22:13 (citing *Fed. Deposit Ins. Corp. v. McFarland*, 243 F.3d 876 (5th Cir. 2001). As Chief Judge Navarro held when addressing this same argument in a recent federal case, this argument fails because the context of HERA supports a plain-language reading of the text of Section 4617(j)(3) to apply to foreclosures and other actions taken by private and public entities alike outside the tax context. *Skylights*, 112 F. Supp. 3d at 1156-57. Thus, for the reasons discussed immediately below, *McFarland* is inapplicable here, and, in any event, it was decided incorrectly.

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encompasses all forms of interest in property, including mortgages and other liens." *Simon v. Cebrick*, 53 F.3d 17, 20 (3d Cir. 1995*); see also S/N-1 REO Ltd. Liab. Co. v. City of Fall River*, 81 F. Supp. 2d 142, 150 (D. Mass. 1999) ("A lien held by the FDIC as mortgagee is 'property' within the meaning of § 1825(b)(2)").

a) The Text and Structure of HERA Refute Saticoy Bay's Argument

The plain terms of the statute contradict Saticoy Bay's contention that the Federal Foreclosure Bar applies only in the tax-lien context. Section 4617(j) bears the general heading "[o]ther Agency exemptions." The first subsection, which defines the applicability of the following three, is also not specific to the tax context—it does not restrict its applicability or even refer to taxation, providing instead that the following subsections "shall apply with respect to [FHFA] in any case in which [FHFA] is acting as a conservator or a receiver." 12 U.S.C. § 4617(j)(1). Each of the remaining subsections confers a different protection—one provides an exemption from "Taxation" (Section 4617(j)(2)), one grants "Property Protection" (Section 4617(j)(3)), and one creates immunity from "Penalties and fines" (Section 4617(j)(4)). Nor does the text of Section 4617(j)(3) support an implication that it is limited to the tax lien context. The statutory text does not even mention the word "tax," "taxation," or any analog. By contrast, when Congress intended to limit a statutory protection to the tax context, it did so expressly—Section 4617(j)(2) confers an "exempt[ion] from all taxation imposed by any State … or local taxing authority."

Having reviewed this statutory text, Chief Judge Navarro held that "both the plain language of subsection 4617(j)(3) and the structure of section 4617(j) lead … to the conclusion that FHFA's exemption from foreclosures without its consent

applies to private entities as well as state and local taxing authorities." *Skylights*, 112 F. Supp. 3d at 1156. This Court should similarly reject Saticoy Bay's attempt to subject the Federal Foreclosure Bar to a limitation not imposed by Congress.

b) *McFarland* Was Incorrectly Decided

McFarland held that elements of the structure and text of the FDIC's property protection clause, 12 U.S.C. § 1825(b)(2), restricted the protection afforded by that section to actions by government entities in the tax-lien context. Fannie Mae respectfully submits that the Fifth Circuit's analysis, which is not controlling in this Court, was incorrect. Indeed, "several courts have applied subsection 1825(b)(2) to protect the FDIC from entities other than taxing authorities." *Skylights*, 112 F. Supp. 3d at 1156-57. For example, *McFarland*'s holding cannot be squared with a Tenth Circuit opinion where the court applied the FDIC's property protection clause outside of a tax-lien context to bar a private judgment creditor from attempting to garnish proceeds from the sale of oil and gas paid to the FDIC. *GWN Petroleum Corp. v. OK-Tex Oil & Gas, Inc.*, 998 F.2d 853, 855-56. Nor is the Tenth Circuit the only court to apply Section 1825(b)(2) to bar the actions of private entities. In *Trustees of MacIntosh Condominum Ass'n v. Fed. Deposit Ins. Corp.*, the court held that the attempt of a private condo association (much like the HOA at issue here) to obtain a priority lien for unpaid condo fees after the FDIC-receiver had foreclosed on the condo and retained possession of the

condo violated § 1825(b)(2). *Trustees of MacIntosh Condominum Ass'n v. Fed. Deposit Ins. Corp.*, 908 F. Supp. 58, 65-66 (D. Mass. 1995); *see also Midlantic Nat'l Bank/North v. Fed. Res. Bank*, 814 F. Supp. 1195, 1197 (S.D.N.Y. 1993) (private judgment creditor "could not take action against [failed bank's] assets after the FDIC was appointed receiver").

Indeed, the only decision to hold that the protection for FDIC receiverships under Section 1825(b)(2) is limited to the tax-lien context is *McFarland*. *See Skylights*, 112 F. Supp. 3d at 1156 ("outside of the Fifth Circuit's opinion in *McFarland*, none of these opinions expressly limited the exemption to state and local taxing authorities").

The conclusion that *McFarland* was incorrectly decided is confirmed by many decisions analyzing 12 U.S.C. § 1825(b)(3), the subsection immediately following the FDIC property protection provision, which bars penalties from being imposed on FDIC receiverships in non-tax contexts. In one such case, the Ninth Circuit explained that Section 1825(b)(3)'s statutory history led it to a conclusion opposite that drawn by *McFarland*, noting that: "under a heading *formerly referring to 'Taxation' but later broadened by deletion*, §1825(b)(3) states that FDIC 'shall not be liable for any amounts in the nature of penalties or fines.'" *Monrad v. Fed. Deposit Ins. Corp.*, 62 F.3d 1169, 1175 (9th Cir. 1995) (emphasis

added).[4] On that basis, the Ninth Circuit held that the immunity of Section 1825(b)(3) applied to "late payment penalties" unrelated to taxation. *Id.* *McFarland* conspicuously ignores *Monrad*'s incisive point that the heading "Other Exemptions" (which omits the word "taxation") was added to the operative provision, Section 1825(b), long before the events at issue in *McFarland*.

Similarly, the Eastern District of Pennsylvania specifically rejected the argument that Section 1825(b)(3) is limited to the tax context, holding that the provision barred private plaintiffs seeking penalties pursuant to their RESPA claims. *Alexander v. Washington Mutual, Inc*., 2011 WL 2559641, at *3-4 (E.D. Pa. June 28, 2011). Indeed, Saticoy Bay's argument and *McFarland*'s holding would require that Section 1825(b)(3)'s penalty bar also be limited to the tax context—a result at odds with *Monrad*, *Alexander*, and the many cases holding that the statute barred private parties' claims (such as claims for punitive damages). *E.g., Nials v. Bank of Am.*, No. 13 Civ. 5720, 2014 WL 1174504, at *7 (S.D.N.Y. Mar. 21, 2014); *Horn v. Fed. Deposit Ins. Corp.*, Civ. A. No. ELH-11-2127, 2011 WL 6132309, at *1 (D. Md. Dec. 8, 2011).

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[4] *Monrad* applies § 1825(b)(3) and *McFarland* applies § 1825(b)(2), neither of which has a separate heading or title.

c) *McFarland* Does Not Apply

In any event, *McFarland* provides no basis for limiting the protections of Section 4617(j)(3) to tax liens because *McFarland* "based its determination on the titling and structure of section 1825, which is significantly different from the titling and structure of section 4617(j)(3)." *Skylights*, 112 F. Supp. 3d at 1156. First, *McFarland* put great weight on the fact that, at the time, the title of 12 U.S.C. § 1825 was "Exemption from taxation; limitations on borrowing." *McFarland*, 243 F.3d at 886. The analogous section title in HERA, in contrast, is "Other Agency Exemptions." 12 U.S.C. 4617(j). There is no reference to tax or taxation in the relevant section title.

Second, *McFarland* relies heavily on the structure and history of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). The court noted that before FIRREA, Section 1825 consisted of a single paragraph that provided a tax exemption. *See McFarland*, 243 F.3d at 886. With the enactment of FIRREA, however, this section was amended to include several subsections, the first of which is subsection 1825(a), entitled "General rule," which deals expressly with FDIC's tax exemption when acting in its corporate capacity. *Id.* FIRREA also created a new subsection 1825(b) entitled "Other exemptions." Based on this history of pre-FIRREA Section 1825 and the structure of the new subsections added by FIRREA, the court concluded that the

entirety of subsection 1825(b)—including FDIC's property exclusion provision—was intended by Congress to serve as an extension of the pre-FIRREA Section 1825 tax exemption. *Id.*

This statutory history is wholly inapposite in the context of HERA's Federal Foreclosure Bar. Section 4617(j), in which that clause is found, did not exist before HERA. Unlike the *McFarland*-era version of the FDIC statute, neither the title of Section 4617(j) nor the text of the introductory subsection 4617(j)(1) mentions or references taxation. Section 4617's overall purpose—as evidenced both by its title, "Authority over critically undercapitalized regulated entities," and its content—is not to articulate narrow tax exemptions, but rather to define the broad general powers and immunities of FHFA conservatorships and receiverships in response to the worst housing crisis since the Great Depression. *See Cnty. of Sonoma*, 710 F.3d at 989 (holding that Section 4617 enumerates the "broad powers FHFA has as conservator," and noting that it also provides the conservatorship with broad immunities and exemptions); *Leon Cnty., Fla. v. FHFA*, 700 F.3d 1273, 1279 (11th Cir. 2012) (similar). Put simply, none of the factors that *McFarland* relied upon to hold that the FDIC's property protection provision was limited to the tax context

are present in Section 4617(j)(3). *See Skylights*, 112 F. Supp. 3d at 1156-57. *McFarland* is simply inapplicable here. [5]

3. The Federal Foreclosure Bar Applies to Conservatorships As Well As Receiverships

Saticoy Bay attempts to avoid the Federal Foreclosure Bar by asking the Court to insert a limitation, absent from the statutory text, that the Bar applies only to receiverships, not conservatorships. *See* Opening Br. at 23-24. This argument is unavailing because it cannot survive the express language of HERA which provides that the Federal Foreclosure Bar applies in "any case in which [FHFA] is acting as a *conservator or a receiver*." 12 U.S.C. § 4617(j)(1) (emphasis added). Thus, Congress expressly provided that the protection be applicable without regard to whether FHFA is acting as receiver or conservator—a departure from Section 1825(b)(2), which applies only to properties held by the FDIC as receiver. *See Skylights*, 112 F. Supp. 3d, at 1158. Thus, Saticoy Bay's reliance on the Tenth Circuit's decision in *GWN Petroleum Corp. v. OK-Tex Oil & Gas, Inc.*, 998 F.2d

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[5] Although not clearly articulated in the Opening Brief, Saticoy Bay also appears to rely on *Fed. Deposit Ins. Corp. v. Lowery*, 12 F.3d 995, 996 (10th Cir. 1993), to support its proposition that the Federal Foreclosure Bar is limited to tax liens. *See* Opening Br. at 22. In *Lowery*, the Tenth Circuit held that section 1825(b)(2) does not extinguish an earlier lien predating FDIC receivership or excuse the payment of a tax by the FDIC, but that it does deny the ability to use an existing lien on FDIC property as a vehicle for collection of delinquent tax during the receivership. *Id.* at 996-97. While the case did involve a tax lien, the *Lowery* court did not provide any analysis as to whether section 1825(b)(2) is limited to the tax-lien context. The fact that there are cases applying section 1825(b)(2) in the tax-lien context does not mean the statute is *only* applicable in the tax-lien context.

853 (10th Cir. (1993), a case in which the FDIC acted as a receiver, not a conservator, is misplaced.

In support of its counter-textual argument, Saticoy Bay contends that the only property protection afforded by HERA is for entities in receivership pursuant to 12 U.S.C. § 4617(b)(11)(C), which provides that "[n]o attachment or execution may issue by any court upon assets in the possession of the receiver, or upon the charter, of a regulated entity for which the Agency has been appointed receiver." Opening Br. at 23. Saticoy Bay's discussion of this statute is a needless distraction, as Fannie Mae is not in receivership, and the Federal Foreclosure Bar applies to both conservatorship and receivership. There is no support for Saticoy Bay's contention that the Federal Foreclosure Bar does not apply because the FHFA is acting as conservator rather than as receiver.

D. There Was No Implied Consent to the Extinguishment of Fannie Mae's Interest

The Federal Foreclosure Bar contains no conditions with regard to the timing and effectiveness of its protection: no property of Fannie Mae in conservatorship "shall be subject to . . . foreclosure . . . without the consent of [FHFA]." 12 U.S.C. § 4617(j)(3). Thus, unless and until FHFA gives its consent, the federal protection "shall" be given full effect, which includes preemption of state law. FHFA has declared that it "has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any [Enterprise] lien or other

property interest in connection with HOA foreclosures of super-priority liens." FHFA, Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx.

Saticoy Bay acknowledges that FHFA did not provide express consent. JA at 355; Opening Br. at Section VI(5). But Saticoy Bay argues that FHFA has impliedly consented to the foreclosure of HOA liens because: (1) Fannie Mae and FHFA knew about the superlien created by NRS 116.3116 and failed to act; (2) Fannie Mae directed its servicers to advance funds necessary to protect the priority of Fannie Mae's mortgage lien; and (3) FHFA has not provided a procedure for HOAs to seek consent from FHFA to their foreclosure sales.

These arguments all fail, first, because they are based on a misunderstanding: Fannie Mae does not argue that the Federal Foreclosure Bar voids HOA foreclosure sales or prevents them from taking place. Rather, the Federal Foreclosure Bar merely restricts the effect of HOA sales on Fannie Mae's interest—whoever purchases a property at an HOA sale does so subject to Fannie Mae's deed of trust, which continues to encumber the property. Thus, there is no need for an HOA to seek FHFA's consent prior to conducting a sale to collect on its lien. FHFA's consent is only necessary if the HOA or the purchaser intend for the foreclosure sale to extinguish Fannie Mae's interest.

Each of Saticoy Bay's arguments also fail individually. The argument that FHFA and Fannie Mae's "failure to act" could imply consent, Opening Br. at 29, fails because the protection of the Federal Foreclosure Bar is not conditioned on any affirmative action from FHFA and Fannie Mae. Saticoy Bay's contrary interpretation would invert the default rule provided in the statutory text, as if Congress had decreed that Fannie Mae's property interests are subject to extinguishment by foreclosure unless FHFA or Fannie Mae servicers affirmatively acted to prevent the extinguishment of a particular property interest. This is not what the statute says, and courts are not free to rewrite a statute's text. *See Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

A similar argument was rejected in a case evaluating the similar statutory protection for FDIC receiverships under 12 U.S.C. § 1825(b)(2). *See Beal Bank, SSB v. Nassau Cnty.*, 973 F. Supp. 130, 133 (E.D.N.Y. 1997). There, a local taxing authority argued that the FDIC, by inaction, impliedly consented to a tax lien foreclosure on property in a bank receivership. *Id.* In substance, the county argued that the FDIC's statutory protection was not effective until FDIC had expressed an individualized decision not to consent. The court rejected the argument, finding no support for an inference that Congress intended to condition the statute's operation

on such a burdensome procedure. *See id.* at 133-34. The same is true for the Federal Foreclosure Bar.

Saticoy Bay's second argument, that Fannie Mae's Servicing Guide suggests implied consent, also fails. *See* Opening Br. at 30-31. Saticoy Bay cites to certain portions of the Guide in which Fannie Mae directs its servicers to pay a limited amount of unpaid assessments if the payment is necessary to protect the priority of Fannie Mae's mortgage lien. These provisions cannot, of course, override the statutory protection provided to the Enterprises by Congress for the duration of their conservatorship. Regardless of any action by Fannie Mae's servicers, the Federal Foreclosure Bar applies; if a servicer fails in its contractual duties, this does not erase the protective effect of the statute. If a state law would extinguish a property interest without any servicer payments, as the State Foreclosure Statute purports to do here, the Federal Foreclosure Bar preempts that law.

Saticoy Bay's suggestion that the Guide indicates that Fannie Mae does not believe the Federal Foreclosure Bar protects its liens from extinguishment is wrong. It is consistent for Fannie Mae to direct its servicers to try to protect the *priority* of its liens even when the Federal Foreclosure Bar protects those liens from *extinguishment*. Furthermore, the Guide articulates directives to servicers that

apply regardless of whether Fannie Mae is under the conservatorship of FHFA, when the Federal Foreclosure Bar applies.[6]

Saticoy Bay's third argument, that consent may be implied because FHFA has not announced a procedure by which an HOA can obtain consent to a foreclosure sale, is similarly off the mark. Opening Br. at 31. FHFA's website, mailing address, and telephone numbers are publicly available, allowing any party seeking consent to contact the Agency directly. Saticoy Bay never availed itself of these avenues of communication, suggesting that they were unaware of the protections of the Federal Foreclosure Bar, not that they were somehow hindered from seeking FHFA consent. Moreover, as discussed above, the Foreclosure Bar does not require HOAs to seek FHFA approval to conduct foreclosure sales, so there need not be any procedure for them to do so. Even if Saticoy Bay meant to argue that there should be a procedure to permit purchasers such as itself to seek FHFA's consent to extinguish Fannie Mae's property interest, there is nothing in the Federal Foreclosure Bar that requires that FHFA facilitate that process. Indeed, Saticoy Bay cannot explain why FHFA would ever consent to extinguishment of Fannie Mae's property interests in exchange for no consideration. Regardless,

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[6] In any event, the Guide, though a contract between Fannie Mae and its servicers, is not a regulation that a third party such as Saticoy Bay can enforce against Fannie Mae or FHFA. *See Skylights*, 112 F. Supp. 3d at 1157; *Ishee v. Fed. Nat'l Mortg. Ass'n*, No. 2:13-cv-234, 2015 WL 518682, at *14 (S.D. Miss. Feb. 6, 2015).

because the effectiveness of the Federal Foreclosure Bar is not dependent on the existence of a consent mechanism, the lack of any such procedure does not imply that FHFA consented to the HOA Sale here.

E. Fannie Mae Has Standing to Assert The Federal Foreclosure Bar

Saticoy Bay argues that only FHFA has prudential standing to assert the Federal Foreclosure Bar. According to Saticoy Bay, because the property interest at issue is "property of the Agency," only the Agency—FHFA—has the right to assert the Federal Foreclosure Bar.[7] *See* Opening Brief at 26:3-10. Saticoy Bay correctly notes that the Conservator has succeeded by law to all of Fannie Mae's "rights, titles, powers, and privileges." 12 U.S.C. § 4617(b)(2)(A)(i). Thus, the property of Fannie Mae effectively becomes the property of FHFA once it assumes the role of conservator, and that property is protected by the exemptions in section 4617(j). *See, e.g.*, *Skylights*, 112 F. Supp. 3d at 1155.

However, Saticoy Bay is incorrect in suggesting that Fannie Mae can no longer assert its interest or that it lacks prudential standing to protect its property. During conservatorship, Fannie Mae continues to exist as a private entity that can litigate in its own right. *See* Statement of Edward J. DeMarco, Acting Director,

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[7] Notably, this argument is inconsistent with Saticoy Bay's earlier argument that because the assignment of the Deed of Trust names Fannie Mae, not FHFA, the Deed of Trust was not "property of the Agency," protected by the Federal Foreclosure Bar. *See* Opening Brief at 15-16.

FHFA, Before the U.S. House of Representatives Subcommittee on Capital Markets, Insurance, and Government-Sponsored Enterprises, Transparency, Transition and Taxpayer Protection: More Steps to End the GSE Bailout, at 8-9 (May 25, 2011), available at http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg66871/html/CHRG-112hhrg66871.htm ("Fannie Mae and Freddie Mac . . . are still private companies operating in conservatorship. They did not cease to be private legal entities when they were placed into conservatorship, nor did they become part of FHFA."); *Fed. Nat'l Mortg. Ass'n v. Bell*, 576 Fed. App'x 196 (4th Cir. 2014) (addressing judgment granted in favor of Fannie Mae in case arising after conservatorship and where FHFA was not a party); FHFA, History of Fannie Mae & Freddie Mac Conservatorships, http://www.fhfa.gov/Conservatorship/pages/history-of-fannie-mae-freddieconservatorships.aspx (FHFA has delegated authority to Fannie Mae to manage its day-to-day operations). Fannie Mae and FHFA have a shared interest in protecting Fannie Mae's assets during conservatorship; each has standing to protect those interests here.

In protecting its property interest, Fannie Mae is not barred from raising the Federal Foreclosure Bar as the rule of decision which should govern the Court's resolution of Saticoy Bay's quiet title claims. The Supremacy Clause, though not establishing an independent cause of action, "creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the

supreme Law of the Land.' They must not give effect to state laws that conflict with federal laws." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) (quoting U.S. Const. Art. IV cl. 2). Accordingly, "once a case or controversy properly comes before a court, judges are bound by federal law." *Id.* at 1384. Thus, a private defendant may successfully argue that federal law preempts a state doctrine, thereby defeating a private plaintiff's claim. *See Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013).

Federal courts have applied this principle with regard to the State Foreclosure Statute at issue here and in cases involving Saticoy Bay. *See Thunder Props., Inc. v. Wood*, No. 3:14-cv-00068-RCJ-WGC, 2015 WL 1926768, at *4 (D. Nev. Apr. 28, 2015) ("[W]hether 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 1383); *Saticoy Bay LLC v. SRMOF II 2012-1 Trust*, No. 2:13-CV-1199-JCM-VCF, 2015 WL 1990076, at *4 (D. Nev. Apr. 30, 2015) ("Plaintiff cites no case law, nor does the court know of any, limiting federal preemption arguments to government parties."). In addition, other private parties have invoked the operation of the FDIC's similar property-protection statute to protect their property interests. *See Beal Bank, SSB v. Nassau Cnty.*, 973 F. Supp. 130, 133 (E.D.N.Y. 1997); *Cambridge Capital Corp. v. Halcon Enter*s., *Inc.*, 842 F. Supp. 499, 503 (S.D. Fla.

1993) (same); *see also Grimsley v. Bd. of Cnty. Comm'rs of Atoka Cnty., Okla.*, 9 F. App'x 970, 973 n.3 (10th Cir. 2001) (noting that private party injured by a sale without FDIC consent could bring claim invoking the operation of FDIC's property-protection statute).

Moreover, Fannie Mae falls within the prudential "zone of interest" that the Federal Foreclosure Bar was intended to protect. "[R]ules of prudential standing are flexible rule[s] applied to ensure the concrete adverseness which sharpens the presentation of issues." *Mills v. United States*, 742 F.3d 400, 406 (9th Cir. 2014) (citation and internal quotation marks omitted). To satisfy prudential standing, "the plaintiff's complaint [must] fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*

In this case, it is clear that Fannie Mae falls within the zone of interests that the Federal Foreclosure Bar is intended to protect. Fannie Mae's property is precisely the property that the Federal Foreclosure Bar was designed to protect. Because it is within the zone of interest, Fannie Mae has standing to assert the Federal Foreclosure Bar as a defense to Saticoy Bay's quiet title claim.

In support of its position that Fannie Mae lacks standing to assert the Federal Foreclosure Bar, Saticoy Bay cites *Freedom Mortgage Corp. v. Las Vegas Development Group, LLC*, 106 F. Supp. 3d 1174 (D. Nev. 2015). In *Freedom Mortgage*, the court held that the plaintiff lender, Freedom Mortgage, lacked

prudential standing to raise claims under the theory that the Property Clause protected property insured by the Department of Housing and Urban Development ("HUD"). *Id.* at 1179. The facts in *Freedom Mortgage* are starkly different from the facts in this case, where Fannie Mae is defending its *own* property interest. HUD had no protected interest in the property in *Freedom Mortgage*, and even if it had, the plaintiff lender was not the holder of that interest. *See id.* (holding that, unlike an insurance policy, a deed of trust is a protected interest). Here, by contrast, Fannie Mae is a defendant and stands to lose its property interest in the event Saticoy Bay prevails on its claim for quiet title. Thus, Fannie Mae is defending its own interest pursuant to a federal statute designed precisely to protect its property.[8] Indeed, Judge Dorsey, who issued *Freedom Mortgage*, appears to agree that case is distinguishable because she has denied a motion to dismiss in which an opposing party contended that Fannie Mae lacked standing to raise the Federal Foreclosure Bar. *See Fed. Nat'l Mortg. Ass'n v. SFR Inv. Pool 1, LLC*, No. 2:14-CV-2046-JAD-PAL, 2015 WL 5723647 (D. Nev. Sept. 28, 2015).

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[8] *Freedom Mortgage* is further distinguishable because there, a private lender sought to establish a purported conflict between the State Foreclosure Statute and the "purpose" of the HUD insurance program; here, the State Foreclosure Statute directly conflicts with the express terms of the Federal Foreclosure Bar. *Freedom Mortgage*, 106 F. Supp. 3d at 1179. Congress has spoken directly to the precise issue now before the Court; the Federal Foreclosure Bar expressly protects Fannie Mae's property interests from extinguishment by foreclosure.

F. The Alternative Grounds to Grant Fannie Mae's Cross-Motion for Summary Judgment Need Not be Considered

The District Court granted summary judgment in favor of Fannie Mae based on the Federal Foreclosure Bar. JA at 423:15-23. The court further ruled that the other arguments presented by the parties, including those asserted by Fannie Mae in its counter-motion for summary judgment, were moot. JA at 420:5-7. Thus, the District Court's SJ Order did not contain findings of fact or conclusions of law related to the commercial reasonableness of the HOA Sale or whether the State Foreclosure Statute comports with due process requirements.

The Supreme Court need not address these issues either because the Court can affirm the District Court's decision based on the Federal Foreclosure Bar. *See Turner v. State*, 98 Nev. 103, 108, 641 P.2d 1062, 1065 (1982) (Supreme Court will abstain from addressing moot issues.); *see also Hopkins v. City of Sierra Vista, Ariz.*, 931 F.2d 524, 527 (9th Cir. 1991) ("those questions were not ruled on by the district court and we refuse to address them here."); *Apartment Inv. and Management Co. (AIMCO) v. Nutmeg Ins. Co.*, 593 F.3d 1188, 1198 (10th Cir. 2010) (recognizing that the better practice on issues raised but not ruled on by the district court is to "leav[e] the matter to the district court in the first instance") (citation omitted).

G. Nevertheless, the Alternative Grounds Provide Additional Bases to Affirm the Summary Judgment in Favor of Fannie Mae

Although not ruled upon, Fannie Mae's alternative grounds for moving for summary judgment provide two additional and independent bases for this Court to affirm the summary judgment in favor of Fannie Mae. The Court can affirm summary judgment on any non-waived ground even though the district court did not address it. *See Estate of Suskovich v. Anthem Health Plans Of Virginia, Inc.*, 553 F.3d 559, 572 (7th Cir. 2009).) Moreover, a correct decision of a district court will be affirmed, even if the decision is based on the wrong reason. *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981); *see also Nelson v. Sierra Const. Corp.*, 77 Nev. 334, 343, 364 P.2d 402, 406 (1961) ("We have many times upheld the rule in this state that a correct judgment will not be reversed simply because it was based on a wrong reason.").

Here, even if the Federal Foreclosure Bar is not considered, the district court was correct in granting summary judgment to Fannie Mae because: (1) the HOA Sale was not commercially reasonable; and (2) the State Foreclosure Statute violates due process. Each of these bases provides an independent ground to set aside the HOA Sale and affirm summary judgment in favor of Fannie Mae because Saticoy Bay is not entitled to quiet title or an injunction prohibiting Fannie Mae from proceeding with foreclosure pursuant to its Deed of Trust.

1. The HOA Sale Was Not Commercially Reasonable

A foreclosure sale that is not conducted in a commercially reasonable manner is ripe to be set aside. *Shadow Wood Homeowners Ass'n. Inc. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. Adv. Op. 5 at *10, 366 P.3d 1105, 1110 (2016) (citing *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982); *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 98, 560 P.2d 917, 920 (1977). An HOA foreclosure sale is not commercially reasonable when the sales price is grossly inadequate and there is some element of "fraud, unfairness, or oppression." *Shadow Wood*, 132 Nev. Adv. Op. 5 at *9-10, 366 P.3d at 1110. While there is no bright line rule, generally a purchase price less than 20 percent of the property's fair market value is grossly inadequate. *Id.* at *15, 366 P.3d at 1112 (citing Restatement (Third) of Prop.: Mortgages §8.3 (cmt. b (1997) ("a court is warranted in invalidating a sale where the prices is less than 20 percent of fair market value"). In considering what level of misconduct justifies setting aside a sale, the wider the discrepancy between the sales price and market value, the lower the bar to setting the sale aside. *Levers*, 93 Nev. at 98-99, 560 P.2d at 920; *see also Ballentyne v. Smith*, 205 U.S. 285, 290 (1907) ("if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will be sufficient to justify setting it aside.")

Here, the HOA Sale was not commercially reasonable. First, the sale price at the HOA Sale was grossly inadequate. *See* JA at 55-57. Specifically, at the time of the HOA Sale, the Property was worth at least $170,266, as evidenced by the Declaration of Value attached to the Foreclosure Deed. *Id.* Yet Saticoy Bay paid only $26,800 – a mere 15.7 percent of the value. *Id.* Second, the inadequate price is a direct result of the unfair and unreasonable manner in which Cheyenne Ridge and NAS conducted the sale. Specifically, neither gave any indication of whether or not the superpriority piece of the HOA Lien has been satisfied. This lack of information left potential purchasers with no way of knowing what was being sold – a property free of any liens or a property encumbered by a deed of trust. JA at 271:21-272:15; JA at 82; JA at 84-85; JA at 202; JA at 94-95.

Indicative of their disregard for providing accurate information, neither the HOA nor NAS calculated the superpriority piece of the HOA Lien or accounted for payments made on the account between issuance of the First NOS and the Second NOS, which payments may have satisfied the superpriority piece of the lien. JA at 307; JA at 233; JA at 256; JA at 276-95. Indeed, the public record (and the appendix in this appeal) indicates that when the First NOS was recorded on February 7, 2012, the amount due under the HOA Lien was $3,426.42. JA at 202. Eighteen months later when the Second NOS was recorded on August 15, 2013, the amount due under the HOA Lien had been reduced to $2,712.17. JA at 94-95.

This reduced amount suggests that the super-priority piece of the lien may have been satisfied. Yet there was no way for a potential buyer to know what it was purchasing or for Fannie Mae to know whether the super-priority portion of the lien was being foreclosed upon or not.

Further adding to any potential buyer's uncertainty is the fact that the HOA's recorded CC&Rs include a mortgage savings clause. JA at 238; JA at 300.[9] While an HOA's CC&Rs cannot subordinate its lien, the continued inclusion of a mortgage savings clause in the recorded CC&Rs signals an intention not to extinguish first priority deeds of trust. Thus, the HOA provided conflicting statements regarding its intentions, which discouraged higher bids and resulted in an inadequate sales price. *See ZYZZX2 v. Dixon*, 2016 WL 1181666 *5 (D. Nev. March 25, 2016) (citing *Shadow Wood*, 132 Nev. Adv. Op at *6). Ultimately, the confusion surrounding whether the HOA Lien included the superpriority piece eroded potential buyers' confidence and lead to an inadequate sales price. This resulted in a commercially unreasonable sale that must be set aside.

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[9] In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, this court held that a mortgage savings clause in an HOA's CC&Rs cannot subordinate the HOA's lien to a prior recorded deed of trust. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.* 130 Nev. Adv. Op. 75, 334 P.3d at 419. However, there is nothing obligating associations to foreclose on the superpriority piece. Instead, if its policy is not to extinguish mortgages and deeds of trust, an HOA can elect to foreclose on only the subpriority piece.

2. The State Foreclosure Statute Violates Due Process

The HOA Sale must also be set aside because the State Foreclosure Statute violates due process, which requires that any party whose life, liberty or property is threatened be afforded notice and opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see also Swartz v. Adams*, 93 Nev. 240, 243, 563 P.2d 74, 76 (1977). To satisfy due process, NRS 116.3116 *et seq.* must require the HOA to provide actual notice to all junior interest holders. *See Cont'l Ins. Co. v. Moseley*, 100 Nev. 337, 338, 683 P.2d 20, 21 (1984) (citing *Menonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983)). However, it does not. Instead, it impermissibly shifts the burden to a junior interest holder to request notice. *See* NRS 116.31163; NRS 116.31165; NRS 116.31168; *see also Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883 (5th Cir. 1989) (holding that burden shifting statutes are only sufficient to provide notice to parties whose interests are difficult to ascertain). Because NRS 116.3116 *et seq.*, fails on its face to require actual notice, it therefore fails to satisfy due process and is unconstitutional.

Generally, due process scrutiny only applies to state action and does not extend to private conduct. *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191(1988). However, when the state provides the "mantle of authority that enhanced the power of the harm-causing individual action," the state is sufficiently involved to treat the private conduct as state action. *Id* This is particularly true

when the state creates the legal framework governing the conduct. *Id* (citing *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719 (1975)).

NRS 116.3116 provides the mantle of authority to HOAs and enhances their power. Indeed, without NRS 116.3116, no portion of an HOA lien would take priority over a prior recorded first security interest. In enacting the statute, the Legislature created the exception to the common law rule of first in time first in right, and elevated an HOA lien above any prior recorded interests. As such, due process scrutiny applies to HOA foreclosures and NRS 116.3116 *et seq.*

Saticoy Bay argues that due process is not implicated because there is no state actor involved in an HOA foreclosure process.[10] Opening Br. at 39. However, each of the cases Saticoy Bay relies upon addresses state involvement in nonjudicial foreclosures pursuant to deeds of trust. Importantly, each of the courts noted the power of sale was created by contract, i.e. the deed of trust or mortgage.

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[10] Saticoy Bay's argument that the State Foreclosure Statute does not involve a state actor was not sufficiently raised below. Although there is one reference to "state action" in Plaintiff's original Reply brief, it was mentioned in passing and with regard to nonjudicial foreclosures pursuant to deeds of trust. Moreover, no points or authorities regarding state action were presented. Therefore, this court should not consider this argument. *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) ("this court generally will not consider arguments that a party raises for the first time on appeal.") Fannie Mae briefly addresses the argument here. However, to the extent this Court considers the issue to be appropriate for consideration, Fannie Mae respectfully requests that the Court remand the issue to be decided in the first instance by the trial court or allow supplemental briefing on appeal.

See Apao v. Bank of New York Mellon, 324 F.3d 1091, 1092, 1094 (9th Cir. 2003); *Charmicor v. Deaner*, 572 F.2d 694, 695 (9th Cir. 1978). However, an HOA's power of sale is derived from the statute alone. For that reason, these cases are not instructive in the current action.

Saticoy Bay also argues that enactment of the State Foreclosure Statute is insufficient to constitute state action. *See* Opening Br. at 40. It argues that a person acting under a state's statute is simply a private actor who, without something more, cannot be characterized as a state actor. *See* Opening Br. at 40-41. However, beyond the statute that enables an HOA to pursue foreclosure, an HOA foreclosure requires official action. As part of a nonjudicial foreclosure, the HOA or its agent must record both a notice of default and notice of sale with the relevant county recorder. NRS 116.31162; NRS 116.31165. The county recorder's involvement in the nonjudicial foreclosure process is overt official action that constitutes the "something more" sufficient to subject NRS 116.3116 et seq., to due process scrutiny when the power of sale is created by statute rather than contract. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157, 98 S.Ct. 1729, 1734 (distinguishing *N. Ga. Finishing, Inc. v. Di-Chem, Inc*. 419 U.S. 601, 95 S.Ct. 719 (1975).)

Contrary to Saticoy Bay's argument, reference to NRS 107.090 in NRS 116.31168 does not remedy the notice deficiencies in NRS 116.3116 *et seq.*, because such a reading violates the fundamental tenets of statutory construction.

First, when interpreting statutory provisions, this Court attempts to read the common statutory scheme harmoniously and avoids unreasonable or absurd results. *S. Nevada Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). If all the notice provisions of NRS 107.090 were incorporated into NRS Chapter 116, as suggested by Saticoy Bay, it would render the express notice provisions of NRS 116.31163 and NRS 116.311635 superfluous and meaningless. Indeed, had the Legislature intended for the provision of NRS 107.090 to control, it could have clearly and easily stated as much. However, because the Legislature enacted these separate provisions, this Court must give meaning to each provision.

Second, such an interpretation runs contrary to Nevada's long-standing interpretive principle that a specific statute controls over the more general statute. *State Tax Comm'n v. American Home Shield of Nev., Inc.*, 127 Nev. 382, 388, 254 P.3d 601, 605 (2011). Within NRS Chapter 116 there are no less than four provisions that specifically address when and how junior interest holders must be notified. If the Nevada Legislature intended the notice provisions in NRS 107.090 to trump the specific provisions of NRS 116.116 *et seq.*, it could have referred to NRS 107.090 and excluded all of the detailed notice provisions in the statute. However, the Legislature crafted specific provisions governing who is entitled to receive notice and under what circumstances – provisions that differ from, and

arguably contradict, the notice requirements of NRS 107.090. In applying Nevada's rules of statutory construction, this Court cannot disregard the specific notice provisions of the Statute, in favor of a more general provision found in a different chapter and governing a different type of foreclosure.

H. If the Supreme Court Reverses the SJ Order, Saticoy Bay is Not Entitled to Judgment in its Favor

Saticoy Bay asks this Court not only to reverse the SJ Order to the extent that it grants Fannie Mae's motion for summary judgment, but also to remand with directions to enter judgment in favor of Saticoy Bay. This amounts to a request that this Court reverse the trial court's order denying Saticoy Bay's motion for summary judgment. However, reversal of the portion of the SJ Order granting Fannie Mae's Cross-Motion does not mandate that the District Court grant Saticoy Bay's Motion. Indeed, the denial of a motion for summary judgment is not a final judgment under the rule which "designates the judgments and orders from which an appeal may be taken." *Taylor Const. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984); *see also* NRAP 3A(b); *Smith v. Hamilton*, 70 Nev. 212, 216, 265 P.2d 214, 216 (1953) ("order denying summary judgment, however, is not a final judgment subject to appeal"). Thus, this Court has no authority to reverse that portion of the SJ Order denying Saticoy Bay's motion for summary judgment.

CONCLUSION

For the foregoing reasons, Fannie Mae respectfully requests that this Court affirm the trial court's Order Denying Plaintiff's Motion for Summary Judgment and Granting Fannie Mae's Countermotion for Summary Judgment.

Respectfully Submitted,

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Dated: June 15, 2016

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CERTIFICATE OF COMPLIANCE

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 Microsoft Word in 14 Times New Roman. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(ii) 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 11,676 words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable NRAP, 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 I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the NRAP.

Dated: June 15, 2016

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CERTIFICATE OF SERVICE

I, the undersigned, declare: I am, and was at the time of service of the foregoing RESPONDENT'S ANSWERING BRIEF, over the age of eighteen (18) years, and not a party to this action. My business address is 4375 Jutland Drive, Suite 200, San Diego, CA 92117.

I hereby certify that on the 15th day of June, 2016, I served the above-described documents electronically on the following, who are registered as electronic case filing users of the eFlex Electronic Filing System (EFS) system:

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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 15th day of June, 2016, at San Diego, California.

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