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
The Honorable Elissa F. Cadish, District Judge
District Court Case No. A690924

MOTION TO REISSUE ORDER AS AN OPINION

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On March 21, 2018, the en banc Court issued a unanimous, unpublished Order affirming the District Court's judgment. Doc. No. 18-10977. Respondent Federal National Mortgage Association ("Fannie Mae") and amicus curiae Federal Housing Finance Agency ("FHFA") respectfully request that the Court reissue the Order as an opinion to be published in the *Nevada Reports*. The Court's decision resolves important questions pending in hundreds of similar cases in state courts across Nevada. But because the Order is unpublished it provides only persuasive, rather than controlling, authority on those questions. Publishing the decision would establish binding authority on those issues, and would thereby significantly help clear the enormous backlog of similar cases, streamline the resolution of many appeals currently pending before this Court, and lessen the need for further appeals addressing the same issues.

Statement of FHFA's Interest

Under Nevada Rule of Appellate Procedure 36(f), any "interested person" may file a motion to reissue an unpublished order as an opinion to be published in the *Nevada Reports*. If filed by a nonparty, like FHFA here, "the motion must [] identify [the movant's] interest in obtaining publication." NRAP 36(f)(3). While Fannie Mae, a party to this appeal, joins in this motion, FHFA sets out its interest pursuant to that Rule.

FHFA has a strong interest in the publication of the Court's Order because it addresses several issues that directly impact the interests of FHFA in its role as both regulator and Conservator of Fannie Mae and the Federal Home Loan Mortgage Corporation ("Freddie Mac," and, together with Fannie Mae, the "Enterprises"). Indeed, to protect those interests and assist the Court, FHFA submitted an amicus brief in this case, Doc. No. 16-20236, and presented oral argument at the November 6, 2017 hearing.

FHFA has a strong interest in seeing that the Court's conclusions in its Order become controlling precedent, as they affect its own powers and authority as Conservator. First, the Court's decision confirms that the property protections contained in FHFA's organic statute preempt conflicting Nevada law. Specifically, the Court held that 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar") preempts NRS § 116 to the extent it would permit a deed of trust owned by one of the Enterprises to be extinguished by an HOA lien foreclosure sale. Second, the Court's decision addresses whether FHFA consented to the extinguishment of Fannie Mae's property interest. The Court correctly held that such consent must be affirmatively given to relinquish the protection of the federal statute, and that FHFA did not consent in this particular case. Third, the Order correctly held that Fannie Mae's property is also the property of FHFA as Conservator while Fannie Mae is under FHFA conservatorship.

Furthermore, as the Enterprises' regulator and Conservator, FHFA oversees the Enterprises' fulfillment of the goals set by Congress in their federal statutory charters and in Congress's legislation concerning the conservatorships in which FHFA has placed the Enterprises. The issues resolved by this Court affect FHFA's and the Enterprises' statutory missions.

The publication of this decision will provide binding precedent useful to guide state district courts in resolving hundreds of similar cases that the Enterprises and their contractually authorized loan servicers (who manage the day-to-day administration of the Enterprises' mortgage loans) are litigating across Nevada. Publication will also streamline resolution of more than thirty appeals already pending before this Court that raise the same issues. *See, e.g.*, *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, No. 70060; *CitiMortgage, Inc. v. Noesis Prop. Acquisitions, LLC*, No. 71318; *JPMorgan Chase Bank, N.A. v. 3416 Brayton Mist Tr.*, No. 71435; *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 72519; *JPMorgan Chase Bank, N.A. v. Saticoy Bay LLC Series 1013 Adobe Flat*, No. 72823; *Nationstar Mortg., LLC v. Raab*, No. 72347; *OneWest Bank, F.S.B. v. Holm Int'l Props., LLC*, No. 72933.

This Order Is Appropriate for Publication

A motion to reissue an unpublished order as a published opinion "must state concisely and specifically" how it meets "one or more of the criteria for

publication set forth in Rule 36(c)(1)(A)-(C)." NRAP 36(f)(3). Specifically, this Court may "decide a case by published opinion if it:

(A) Presents an issue of first impression;

(B) Alters, modifies, or significantly clarifies a rule of law previously announced by either the Supreme Court or the Court of Appeals; or

(C) Involves an issue of public importance that has application beyond the parties."

NRAP 36(c)(1)(A)-(C). In the present case, all three of these criteria weigh heavily in favor of issuance as a published opinion.

(A) The Decision Addresses Several Issues of First Impression

The Court's Order resolves several issues that were before the Court as a matter of first impression. Specifically, for the first time, this Court held that:

- An Enterprise has standing to invoke the Federal Foreclosure Bar, Order at 2-3;
- The Federal Foreclosure Bar's protection extends to an Enterprise's property while in conservatorship, *id.* at 3-4;
- NRS 116.3116 (the "State Foreclosure Statute") directly conflicts with the Federal Foreclosure Bar and is thus preempted, *id.* at 4-6;
- The protections of the Federal Foreclosure Bar are not limited to tax liens but rather extend to HOA foreclosure sales, *id.* at 4 n.1; and
- FHFA did not consent to the extinguishment of the deed of trust, and such consent cannot be implied, *id.* at 6.

Publication of the Court's decision would establish controlling precedent on all five of these issues.

In particular, the Court's holding on preemption would resolve an issue the Court declined to address in another recent case involving the interaction of federal law governing the Fannie Mae and Freddie Mac conservatorships with Nevada law governing homeowners' association ("HOA") foreclosures—*Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 396 P.3d 754 (Nev. 2017). In *Nationstar*, the district court did not address the merits of the preemption argument and the parties did not brief it on appeal, so this Court remanded the question of whether the Federal Foreclosure Bar preempts the State Foreclosure Statute. *Nationstar*, 396 P.3d at 758 n.3. A published opinion on this issue would finally answer that question and establish binding precedent that, because the State Foreclosure Statute directly conflicts with Congress's clear and manifest purpose in the Federal Foreclosure Bar to protect the operations of the Enterprises while in conservatorship, the Federal Foreclosure Bar preempts the State Foreclosure Statute "to the extent that a foreclosure sale extinguishes the deed of trust." Order at 6.

The Court's decision also marks the first time that the Court has resolved two important issues concerning the scope and breadth of the protections of the Federal Foreclosure Bar, holding both that the Federal Foreclosure Bar protects the property of Fannie Mae and Freddie Mac—not just the property of FHFA—while the Enterprises are in conservatorship, and that the Federal Foreclosure Bar's

protections apply in the context of HOA foreclosure sales. *Id.* at 3-4. In addition, until this case, the Court had never addressed the question whether FHFA's consent to the extinguishment of a deed of trust can be implied. The Court's answer in the negative adopts the well-reasoned conclusion of virtually every other court to consider the question under HERA or the analogous FDIC receivership statute. *Id.* at 6; *see also, e.g.*, *Berezovsky v. Moniz*, 869 F.3d 923, 929 (9th Cir. 2017); *Opportunity Homes, LLC v. Freddie Mac*, 169 F. Supp. 3d 1073, 1078 (D. Nev. 2016); *Beal Bank, SSB v. Nassau Cty.*, 973 F. Supp. 130, 133 (E.D.N.Y. 1997).

(B) The Decision Clarifies Previous Opinions of This Court

The Court's Order also significantly clarifies the rule of law that this Court announced in *Nationstar* when it held that "the servicer of a loan owned by [an Enterprise] may argue that the Federal Foreclosure Bar preempts NRS 116.3116, and that neither [the Enterprise] nor the FHFA need be joined as a party." *Nationstar*, 396 P.3d at 758. The decision in *Nationstar* left unresolved the issue of whether an Enterprise itself has standing to invoke the protections of the Federal Foreclosure Bar, a question the Court decided in the affirmative here.

In addition, the Order clarifies how courts should apply the Court's previous decision in *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408 (2014), in cases in which the loans were owned by an Enterprise at the time of the HOA foreclosure

sale. *SFR* held that, pursuant to NRS § 116, the foreclosure of an HOA superpriority lien could extinguish a first deed of trust on a property. *Id.* at 412. The Court's decision here makes clear that the effect of NRS § 116 articulated in *SFR* is preempted in cases where an Enterprise had a property interest at the time of foreclosure. Given the dominant role of Fannie Mae and Freddie Mac in the secondary mortgage market in Nevada, such cases are very common.

(C) The Court's Decision Resolves Issues of Public Importance

Finally, the statewide public importance of the issues addressed by the Court's decision can hardly be overstated. As noted previously, the Enterprises and their contractually authorized loan servicers are litigating hundreds of similar cases in state courts across Nevada. There are more than thirty related appeals pending before this Court, more than twenty trials currently scheduled in district courts, and hundreds of other cases at various stages of proceedings. Each such case involves the application of the Federal Foreclosure Bar to Enterprise property interests in the context of an HOA foreclosure sale.

Absent a precedential published opinion on these issues, investors who purchased properties encumbered by deeds of trust owned by Fannie Mae and Freddie Mac at HOA sales will continue to relitigate the questions resolved by the Court here, clogging state courts with numerous claims based on premises and arguments this Court has already rejected, albeit in an unpublished order that has

only persuasive value, rather than a binding, precedential decision. Without binding authority on these issues, such purchasers have every incentive to draw out and needlessly delay these cases, as they continue to collect rents on the properties while the Enterprises are not receiving payments on the underlying mortgages.

Accordingly, the establishment of binding precedent on the issues addressed by the Court in its decision here would resolve uncertainty around these legal questions and thus promote judicial efficiency and consistency.

Relative Ease of Reissuance as an Opinion

The Court's unpublished Order is comprehensive and complete. The Order provides a succinct summary of the relevant factual background and procedural history of the case as well as a thorough analysis of the legal issues. Accordingly, reissuance of the Order as a published opinion would not require revisions to the text or discussion of additional issues not included in the original decision. *See* NRAP 36(f)(4). Fannie Mae and FHFA respectfully submit that reissuing the Order as a published opinion would not be unreasonably burdensome, particularly when balanced against the need for binding, statewide precedent on these issues in hundreds of pending cases in the district courts and in this Court.

Conclusion

For the foregoing reasons, FHFA and Fannie Mae respectfully request that the Court reissue its March 21 Order of Affirmance as an opinion to be published in the *Nevada Reports*.

DATED: April 4, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date the foregoing was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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