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SUPREME COURT

STATE OF NEVADA

DAISY TRUST,

Appellant,

vs.

WELLS FARGO BANK, N.A.,

Respondent.

No. 72747

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant certifies that 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.

1. Daisy Trust is a Nevada trust.

2. Resources Group, LLC, a Nevada limited-liability company, is the trustee for Daisy Trust.

3. Iyad Haddad a/k/a Eddie Haddad is the manager for Resources Group, LLC.

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The order granting defendant's motion for summary judgment is appealable under NRAP3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The order granting defendant's motion for summary judgment was filed on October 14, 2016. Notice of entry of the order was served and filed on October 17, 2016. The default judgment resolving plaintiff's claims against defendant Blume was entered on March 28, 2017. Plaintiff filed its notice of appeal on March 29, 2017.

(C) The appeal is from an order granting defendant's motion for summary judgment.

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ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for plaintiff/appellant therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale extinguished defendant's deed of trust.

2. Whether 12 U.S.C. § 4617(j)(3) protected the deed of trust assigned to defendant from being extinguished by the HOA foreclosure sale.

3. Whether the record on appeal contains admissible evidence proving that the Federal National Mortgage Association (hereinafter "Freddie Mac") complied with Nevada law to hold an interest in the deed of trust on the date of the foreclosure sale.

4. Whether 12 U.S.C. § 4617 preempts Nevada's recording statutes and prevents any unrecorded interest held by Freddie Mac from being void as to plaintiff.

5. Whether defendant had prudential standing to assert rights allegedly held by the Federal Housing Finance Agency (hereinafter "FHFA").

6. Whether plaintiff is protected as a bona fide purchaser from the unrecorded claim that Freddie Mac owned the loan and had an interest in the Property.

7. An order granting summary judgment is reviewed de novo without deference to the findings of the lower court.

STATEMENT OF THE CASE

On March 28, 2013, Daisy Trust (hereinafter "plaintiff") filed its complaint asserting three claims for relief: 1) entry of an injunction prohibiting Wells Fargo

Bank, N.A. (hereinafter "defendant") from foreclosing a deed of trust recorded on September 28, 2007 against the real property commonly known as 10209 Dove Row Avenue, Las Vegas, Nevada (hereinafter "Property"); 2) entry of a judgment pursuant to NRS 40.010 determining that plaintiff was the rightful owner of the Property and that the defendant had no right, title, interest or claim to the Property; 3) entry of a declaration that title to the Property was vested in plaintiff free and clear of all liens and that the defendant be forever enjoined from asserting any right, title, interest or claim to the Property. (JA, pgs. 1-5)

Defendant did not file an answer to plaintiff's complaint, but instead filed a motion for summary judgment on March 14, 2016. (JA, pgs. 25-54)

On March 29, 2016, plaintiff filed an opposition to defendant's motion for summary judgment. (JA, pgs. 62-120)

On June 21, 2016, defendant filed a reply in support of its motion for summary judgment. (JA, pgs. 121-141)

On July 12, 2016, defendant filed its supplemental evidence in support of its motion for summary judgment. (JA, pgs. 142-158)

On October 13, 2016, the court entered a default against defendant Donald K. Blume (hereinafter "defendant Blume"). (JA, pg. 159)

On October 14, 2016, the court entered an order granting defendant's motion for summary judgment. (JA, pgs. 160-165)

On October 17, 2016, defendant served and filed a notice of entry of order granting defendant's motion for summary judgment. (JA, pgs. 166-174)

On December 9, 2016, plaintiff filed a motion for default judgment against defendant Blume. (JA, pgs. 175-188)

On December 27, 2016, defendant filed a response to motion for default judgment against defendant Blume. (JA, pgs. 189-191)

On March 28, 2017, the court entered a default judgment against defendant Blume. (JA, pgs. 192-194)

On March 29, 2017, plaintiff served and filed a notice of entry of default judgment. (JA, pgs. 195-199)

On March 29, 2017, plaintiff filed its notice of appeal. (JA, pgs. 200-201)

STATEMENT OF FACTS

Plaintiff obtained title to the Property by entering and paying the high bid of $10,500.00 for the Property at a public auction held on August 3, 2012. See copy of foreclosure deed recorded on August 9, 2012 at JA, pgs. 88-90. The foreclosure sale arose from a delinquency in assessments due from defendant Blume to Westminster

at Providence (hereinafter "the HOA") pursuant to NRS Chapter 116. (JA, pg. 2, ¶3)

Defendant is the assigned beneficiary of a deed of trust recorded as an encumbrance to the subject property on September 28, 2007. See copy of deed of trust at JA, pgs. 100-118, and assignment of deed of trust at JA, pg. 120.

The agent for the HOA recorded a notice of delinquent assessment lien on August 5, 2010 (JA, pg. 92); recorded a notice of default and election to sell under homeowners association lien on September 30, 2010 (JA, pgs. 94-95); and recorded a notice of foreclosure sale. (JA, pgs. 97-98) As noted above, the public auction was held on August 3, 2012.

SUMMARY OF THE ARGUMENT

The language in NRS 116.3116(2) granted to the HOA a super priority lien that extinguished defendant's first deed of trust when plaintiff purchased the Property at the HOA foreclosure sale held on August 3, 2012.

12 U.S.C. § 4617(j)(3) did not protect defendant's deed of trust from being extinguished.

Defendant did not present admissible evidence proving that Freddie Mac complied with Nevada law to hold any interest in the Property on the date of the HOA foreclosure sale.

12 U.S.C. § 4617 does not preempt Nevada's recording statutes, which made any unrecorded interest held by Freddie Mac void as to plaintiff.

Defendant did not produce admissible evidence proving that defendant had prudential standing to assert claims or defenses based on rights that belong to FHFA.

As a bona fide purchaser, plaintiff is protected from the unrecorded interest that defendant claims was held by Freddie Mac on the date of the foreclosure sale.

STANDARD OF REVIEW

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this Court stated that it "reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court."

ARGUMENT

1. Defendant's trust deed was extinguished by the HOA foreclosure sale held on August 3, 2012.

NRS 116.3116 (2) provides that the super-priority lien for up to 9 months of charges is "prior to all security interests described in paragraph (b)." The first deed of trust, recorded on September 28, 2007, falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this priority in any way.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75,

334 P.3d 408, 419 (2014), this Court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust. Because Chapter 116 permits nonjudicial foreclosure of HOA liens, and because SFR's complaint alleges that proper notices were sent and received, we reverse the district court's order of dismissal. In view of this holding, we vacate the order denying preliminary injunctive relief and remand for further proceedings consistent with this opinion.

In defendant's motion for summary judgment (JA, pgs. 25-54), in defendant's reply in support of its motion for summary judgment (JA, pgs. 121-141), and in defendant's supplemental evidence in support of its motion for summary judgment (JA, pgs. 142-158), defendant failed to prove that it tendered the superpriority amount of the HOA's assessment lien prior to the public auction. As a result, the HOA necessarily foreclosed the superpriority portion of its lien at the public auction held on August 3, 2012.

The first page of the foreclosure deed (JA, pg. 88) included the following recitals:

> Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 9/30/2010 as instrument # 0001822 Book 20100930 which was recorded in the office of the recorder of said county. Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale.

The foreclosure of the HOA's super priority lien extinguished any estate, right, title, interest or claim in the Property created by defendant's subordinate deed of

trust. SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 419 (2014). Title to the real property was therefore vested in plaintiff free of the extinguished deed of trust.

2. 12 U.S.C. § 4617(j)(3) did not protect defendant's deed of trust from being extinguished.

12 U.S.C. § 4617(j)(1) expressly provides that "[t]he provisions of this subsection shall apply with respect to the Agency **in any case in which the Agency is acting** as a conservator or a receiver." (emphasis added) The word "Agency" is defined by 12 U.S.C. § 4502(2) to be the FHFA. The definition of "regulated entity" in 12 U.S.C. § 4502(20) includes Freddie Mac.

Because FHFA never "acted" as a party in the present case either as "a conservator or a receiver," the provisions in 12 U.S.C. § 4617(j), and in particular, 12 U.S.C. § 4617(j)(3), cannot support the arguments made by defendant to protect defendant's interest in the extinguished the deed of trust.

In footnote 1 at page 4 of defendant's motion for summary judgment (JA, pg. 28), defendant cited nine cases decided by the United States District Court for the District of Nevada that are factually different from the present case because either Freddie Mac or Fannie Mae was the assignee named in a recorded assignment of the

deed of trust, and FHFA and Freddie Mac or Fannie Mae were parties in the lawsuit and joined in the motion claiming that 12 U.S.C. § 4617(j)(3) protected the deed of trust. Defendant also cited an unpublished order granting Fannie Mae's countermotion for summary judgment in a case where Fannie Mae was a named party and filed the countermotion. Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Association, Case No. A-13-690924-C (Dec. 8, 2015).

In the present case, Freddie Mac has never held a recorded interest in the Property, and Freddie Mac and FHFA were not named as parties and did not join in defendant's motion.

12 U.S.C. § 4617(j)(3) states:

> **No property of the Agency** shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the **property of the Agency**. (emphasis added)

In Skylights, LLC v. Byron, 112 F. Supp. 3d 1145 (D. Nev. 2015), which was the first decision cited in footnote 1 at page 4 of defendant's motion (JA, pg. 28), the court did not address the clear distinction throughout Section 4617between "property of the Agency" and "property of Fannie Mae." The court in Skylights found that based on the language in 12 U.S.C. § 4617(b)(2)(a)(i), "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." 112 F. Supp. 3d at 1155.

On the other hand, the court's treatment of "property of Fannie Mae" as identical with "property of the Agency" is contradicted by the many provisions in section 4617 that treat "property of Fannie Mae" as distinct from "property of the Agency."

The distinction is highlighted by the different goals assigned by 12 U.S.C. § 4617 to FHFA when it acts as a conservator compared to when FHFA acts as a receiver. In particular, 12 U.S.C. § 4617(b)(2)(D) states that the Agency, as conservator, may take the actions "necessary to put the regulated entity in a sound and solvent condition" and "appropriate to carry on the business of the regulated entity and **preserve and conserve the assets and property of the regulated entity.**" (emphasis added) This language expresses a clear intent that when FHFA acts as a conservator, the property of the regulated entity remains separate and apart from the property of FHFA.

In order for 12 U.S.C. § 4617(j)(3) to apply in this case, defendant was required to prove that FHFA held an interest in the Property on the date of the foreclosure sale. The record on appeal contains no admissible evidence proving that FHFA held such

an interest.

3. The record on appeal does not contain admissible evidence proving that FHFA or Freddie Mac complied with Nevada law to hold an interest in the Property.

In Butner v. United States, 440 U.S. 48 (1979), the Supreme Court stated that "[p]roperty interests are created and defined by state law." Id. at 55. The Supreme Court also stated:

> The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee in rents earned by mortgaged property.
>
> Id.

In United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir. 1959), the court of appeals held that federal law would govern the appointment of a receiver for a mortgage that was assigned by National Bank of Commerce of Seattle to the Federal National Mortgage Association and then to FHA. The court stated that it was appropriate to select state law as "the applicable federal rule." Id. at 382. The court explained in further detail:

> Thus **state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved.** It is commercially convenient to adopt existing state systems as it saves the expense of setting up a whole new federal recording system and it enables persons checking ownership interests in property to refer to one set of record books rather than two. (emphasis added)
>
> Id. at 383.

As proved by paragraph (C) at the bottom of page 1 and top of page 2 in the deed of trust recorded on September 28, 2007 (JA, pgs. 100-101), Universal American Mortgage Company, LLC was identified as the Lender. As proved by paragraph (E) at page 2 of the deed of trust (JA, pg. 101), MERS was identified as the the beneficiary of the deed of trust "acting solely as nominee for Lender and Lender's successors and assigns."

Paragraph (J) at page 2 of the deed of trust (JA, pg. 101) and Paragraph 16 at page 11 of the deed of trust (JA, pg. 110) both state that the rights of the beneficiary under the deed of trust are governed by Nevada law.

Under Nevada law, a deed of trust is a conveyance of land that must comply with the statute of frauds.

In Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011), this Court stated:

> A deed of trust is an instrument that "secure[s] the performance of an obligation or the payment of any debt." NRS 107.020. This court has previously held that a deed of trust "constitutes a conveyance of land as defined by NRS 111.010." Ray v. Hawkins, 76 Nev. 164, 166, 350 P.2d 998, 999 (1960). The statute of frauds governs when a conveyance creates or assigns an interest in land**:**
>
> No estate or interest in lands, ... nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, *assigned,* surrendered or declared ..., unless ... by deed or conveyance, in writing, subscribed by the party creating, granting, *assigning,* surrendering or declaring the same, or by the party's lawful agent thereunto authorized in writing.

> NRS 111.205(1) (emphases added). Thus, to prove that MortgageIT properly assigned its interest in land via the deed of trust to Wells Fargo, Wells Fargo needed to provide a signed writing from MortgageIT demonstrating that transfer of interest.

Because a deed of trust and an assignment of a deed of trust are both "conveyance(s)" of land as defined by NRS 111.010(1), defendant was required to produce a signed writing proving its claim that the deed of trust was assigned to Freddie Mac in a way that complies with Nevada law. In the present case, however, the record on appeal does not contain any document that assigned to Freddie Mac any interest in the deed of trust.

Defendant failed to produce any writing that conveyed any interest in the deed of trust to Fannie Mae and that satisfied Nevada's statute of frauds. The record on appeal does not contain admissible evidence that a written assignment of the deed of trust was ever signed in favor of Freddie Mac, and no assignment of the deed of trust to Freddie Mac has ever been recorded

The record on appeal also does not contain admissible evidence that satisfies the statute of frauds and proves that the underlying note was properly transferred to Freddie Mac. This Court has stated that "[t]he proper method of transferring the right to payment under a mortgage note is governed by Article 3 of the Uniform Commercial Code – Negotiable instruments, because a mortgage note is a negotiable

instrument." Leyva v. National Default Servicing Corp., 127 Nev. 3, 255 P.3d 1275, 1279 (2011). This Court also stated: "Thus, a mortgage note is a negotiable instrument, and any negotiation of a mortgage note must be done in accordance with Article 3." Id. at 1280.

In order to negotiate a note, NRS 104.3201(1) requires: "[I]f an instrument is payable to an identified person, negotiation requires **transfer of possession** of the instrument **and** its **endorsement by the holder**." (emphasis added) NRS 104.3204(1) provides that an "endorsement" is a signature "made on an instrument for the purpose of negotiating the instrument."

A note may also be transferred without an endorsement, but NRS 104.3203(2) requires that the party seeking to establish its right to enforce the note "**must account for possession of the unendorsed instrument** by proving the transaction through which the transferee acquired it." (emphasis added)

As support for its motion for summary judgment, defendant relied on a declaration by April H. Hatfield, a Vice President Loan Documentation employed by defendant (JA, pgs. 48-54) and a declaration by Dean Meyer, a director of Loss Mitigation for Freddie Mac (JA, pgs. 146-158). Plaintiff objected that the declaration by April H. Hatfield did not meet the requirements of NRCP 56(c) and that

defendant's motion was not supported by admissible evidence. (JA, pgs. 68-70) The declaration of Dean Meyer was filed after plaintiff filed its opposition to defendant's motion, so plaintiff was not granted the opportunity to discuss Mr. Meyer's declaration in any written pleading.

Neither declaration included any statements made on personal knowledge proving that Freddie Mac complied with the requirements of Nevada law to acquire ownership of either the Blume note or deed of trust. In particular, neither declaration contains any statements regarding Freddie Mac's possession of the Blume note or the endorsement of the note to Freddie Mac by defendant Blume.

In addition, neither declaration stated that either Ms. Hatfield or Mr. Meyer had ever seen a written servicing agreement stating that defendant was servicing the Blume note and deed of trust for Freddie Mac. No such servicing agreement was produced by defendant.

NRS 107.070 provides:

> **Recording of assignments of beneficial interests and instruments subordinating or waiving priority of deeds of trust.** The provisions of NRS 106.210 and 106.220 apply to deeds of trust as therein specified.

NRS 106.210 requires that "any assignment of the beneficial interest under a deed of trust **must** be recorded." (emphasis added).

In Edelstein v. Bank of New York Mellon, 128 Nev., Adv. Op. 48, 285 P.3d 249, 259 (2012), this Court stated:

> Second, it is prudent to have the recorded beneficiary be the actual beneficiary and not just a shell for the "true" beneficiary. In Nevada, the purpose of recording a beneficial interest under a deed of trust is to provide "constructive notice ... to all persons." NRS 106.210. **To permit an entity that is not really the beneficiary to record itself as the beneficiary would defeat the purpose of the recording statute and encourage a lack of transparency.** (emphasis added)

Defendant's claim that Freddie Mac held an unrecorded and unwritten ownership of the subject deed of trust violates both Nevada's recording laws in NRS Chapter 111 and Nevada's statute of frauds in NRS 111.205(1).

The declaration by April H. Hatfield also proved that the computer screenshots attached to her declaration as Exhibits A and B were "prepared for purposes of litigation" and were "not a business record." Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1259 (9th Cir. 1984). As stated by the court of appeals, "where the only function that the report serves is to assist in litigation or its preparation, many of the normal checks upon the accuracy of business records are not operative." Id. (quoting McCormick on Evidence § 308, at 877 n. 26 (E. Cleary 3d ed. 1984)).

The screenshots attached as Exhibits A to D to Dean Meyer's declaration were also "prepared for purposes of litigation" and were "not a business record." The screenshots are dated July 1, 2016, which is more than three years and ten months

after the public auction held on August 3, 2012.

Furthermore, neither declaration contains a proper foundation for the admission of the screenshots upon which each declaration is based.

In American Express Travel Related Services Company, Inc. v. Vinhee (In re Vinhee), 336 B.R. 437, 446-447 (9th Cir. Bankr. 2015), the court discussed the eleven steps that are required to lay a foundation for the admission of computer records:

> Indeed, judicial notice is commonly taken of the validity of the theory underlying computers and of their general reliability. IMWINKELRIED § 4.03[2]; RUSSELL § 901.9. Theory and general reliability, however, represent only part of the foundation.
>
> Professor Imwinkelried perceives electronic records as a form of scientific evidence and discerns an eleven-step foundation for computer records:
>
> 1. The business uses a computer.
> 2. The computer is reliable.
> 3. **The business has developed a procedure for inserting data into the computer.**
> 4. **The procedure has built-in safeguards to ensure accuracy and identify errors.**
> 5. The business keeps the computer in a good state of repair.
> 6. The witness had the computer readout certain data.
> 7. **The witness used the proper procedures to obtain the readout.**
> 8. **The computer was in working order at the time the witness obtained the readout.**
> 9. The witness recognizes the exhibit as the readout.
> 10. The witness explains how he or she recognizes the readout.
> 11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.
>
> IMWINKELRIED § 4.03[2].
>
> Although this is a generally serviceable modern foundation, the fourth step warrants amplification, as it is more complex than first appears. The "built-in safeguards to ensure accuracy and identify errors" in the fourth step subsume details regarding computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging of changes, backup practices, and audit procedures to assure the continuing integrity of the records. (emphasis added)

In Berezovsky v. Moniz, – F.3d – , 2017 WL 3648519 at *7, n. 8 (9th Cir. 2017), the court of appeals cited U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., 576 F..3d 1040 (9th Cir. 2009), as authority that "Freddie Mac's database printouts are admissible business records." In U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., however, the court of appeals stated:

> The important issue is whether the database, not the printout from the database, was compiled in the ordinary course of business.
>
> In this case, the exhibits summarizing loss adjustment expense payments for each claim fit squarely within the business records exception of Rule 803(6). As the district court found (1) the underlying data was entered in the database at or near the time of each payment event; (2) **the persons who entered the data had knowledge of the payment event**; (3) the data was kept in the course of Republic Western's regularly conducted business activity; and (4) Mr. Matush was qualified and testified as to this information. (emphasis added)

576 F.3d at 1044.

The court of appeals also stated:

> In this case, **Matush testified regarding the process of inputting data into the computer** and the process of querying the computer to compile the information to create the summaries. **Marush testified that he was familiar with the recordkeeping practices of the company, testified regarding the computer system used to compile and search the insurance claim records, and testified regarding the process of querying the computer system to create the summaries admitted at trial**. The description of the process used to create the summaries was sufficient to authenticate the evidence, and the district court did not abuse its discretion in holding that a sufficient foundation was laid to admit the exhibits. (emphasis added)

576 F.3d at 1045.

The business records exception in NRS 51.135 provides:

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, **made at or near the time** by, or from information transmitted **by, a person with knowledge, all in the course of a regularly conducted activity**, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. (emphasis added)

Defendant did not produce admissible evidence proving that the unknown person(s) who entered the data regarding the Blume note and deed of trust followed any procedure that required the person(s) to confirm that Freddie Mac had complied with Nevada law to become the owner of either the Blume note or deed of trust. Neither the declaration by Ms. Hatfield nor the declaration by Mr. Meyer included any statements describing "the process of inputting data into the computer" or "the process of querying the computer to compile the information to create the summaries" attached to the declarations.

In United States v. Salgado, 250 F.3d 438, 450 (6th Cir. 2001), the court identified four (4) requirements that must be met to satisfy Fed. R. Evid. 803(6):

> A business record must satisfy four requirements in order to be admissible under Rule 803(6):
>
> (1) it must have been made in the course of a regularly conducted business activity; (2) it must have been kept in the regular course of that business; (3) the regular practice of that business must have been to have made the memorandum; and (4) **the memorandum must have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge**.
>
> United States v. Weinstock, 153 F.3d 272, 276 (6th Cir.1998) (quoting Redken Laboratories, Inc. v. Levin, 843 F.2d 226, 229 (6th Cir.), cert. denied, 488 U.S. 852, 109 S.Ct. 137, 102 L.Ed.2d 110 (1988)). This

> information must be presented through "the testimony of the custodian or other qualified witness[.]" Fed.R.Evid. 803(6). Business records meeting these criteria are admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Id. (emphasis added)

In the present case, Dean Meyer stated in paragraph 3 of his declaration that "[e]ntries in Freddie Mac's systems and corresponding databases are made at or near the time of the events recorded by, or from information transmitted by, persons with knowledge" (JA, pg. 147, ¶ 3), but Mr. Meyer did not state how he knew this, and Mr. Meyer did not verify that Exhibits A to D to his declaration were based on information recorded in the ordinary course of Freddie Mac's business. It is pure speculation on Dean Meyer's part that the documents created in 2016 reflect the content of the records in Freddie Mac's systems and corresponding databases on the date of the HOA foreclosure sale held on August 3, 2012.

Contrary to requirement no. 3 identified by Professor Imwinkelried, defendant die not provide any evidence regarding the procedures used by Freddie Mac to record the information in its computer databases or the steps taken by Freddie Mac to confirm that the documents required by Nevada law existed before an employee of Freddie Mac made the data entries upon which Dean Meyer based his declaration. The entries may be made in the ordinary course of business, but without evidence proving the procedures, the date entries cannot be used to prove the existence of the

written documents that are required by Nevada law for Freddie Mac to be the owner of either the Blume note or deed of trust.

Paragraph 1 of Dean Meyer's declaration stated that "I have personal knowledge of and am competent to testify as to the matters stated herein" (JA, pg. 146, ¶1), but every statement made in the body of the declaration proves that the declaration is based upon "systems and databases" for which Mr. Meyer did not make any of the entries. Mr. Meyer also did not review any business records that confirm the truth of the data entries made by anonymous persons on unknown dates based on unidentified documents.

At page 13 of its motion for summary judgment (JA, pg. 37), defendant quoted from comment c to Restatement (Third) of Prop.: Mortgages, § 5.4 (1997), regarding "the typical arrangement between investors in mortgages, such as Freddie Mac, and their servicers." Defendant italicized the words: "*It is clear in this situation that the owner of both the note and mortgage is the investor and not the servicer.*" The next sentence in comment c states: "This follows from the express agreement to this effect that exists among the parties involved."

Restatement (Third) of Prop.: Mortgages, § 5.4 (1997) states:

§5.4 Transfer of Mortgages and Obligations Secured by Mortgages.

> (a) A transfer of an obligation secured by a mortgage also transfers the mortgage **unless the parties to the transfer agree otherwise**.
>
> (b) Except as other required by the Uniform Commercial Code, a transfer of the mortgage also transfers the obligation the mortgage secures **unless the parties to the transfer agree otherwise.**
>
> (c) A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures. (emphasis added)

In the present case, defendant did not produce admissible evidence proving that when MERS assigned "all beneficial interest"under the deed of trust to defendant on March 7, 2011 (JA, pg. 120), MERS and defendant agreed "otherwise" that the "obligation the mortgage secures" was not transferred to defendant. Absent admissible evidence of such a written agreement for the Blume note and deed of trust, the assignment of the deed of trust to defendant also transferred the obligation secured by the deed of trust to defendant.

At page 13 of its motion (JA, pg. 37), defendant cited Edelstein v. Bank of New York Mellon, 128 Nev. Adv. Op. 48, 286 P.3d 249 (2012), and In re Monteirth (Montierth v. Deutsche Bank), 131 Nev. Adv. Op. 55, 354 P.3d 648 (2015), as authority that "[u]nder this Restatement approach adopted in *Edelstein* and *Montierth*, ownership of the Deed of Trust was transferred to Freddie Mac along with the promissory note when Freddie Mac purchased the Loan." As discussed above, however, the record on appeal does not contain admissible evidence proving that the

Blume note was ever transferred to Freddie Mac in a way that complied with Nevada law.

In Monteirth, for example, this Court stated that "[t]he note was subsequently transferred to Deutsche Bank," but the opinion does not discuss in detail how this transfer occurred. In Montierth, the recorded deed of trust designated MERS as the beneficiary of the deed of trust "solely as nominee for Lender and Lender's successors and assigns," and this Court stated:

> MERS holds only legal title to the interests granted by Borrower in this Security Instrument; but, if necessary . . ., MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of the interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.
>
> 354 P.3d at 649.

Based on these provisions in the deed of trust, this Court held in Montierth that it was only a "ministerial" act for MERS to assign the deed of trust to Deutsch Bank without violating the automatic stay.

Paragraph 5(i) of the declaration by Dean Meyer (JA, pg. 150) stated that Freddie Mac's Single-Family Seller/Servicer Guide "serves as a central document governing the contractual relationship between Freddie Mac and its servicers nationwide, including Wells," but Mr. Meyer did not identify any writing that

established such a servicing relationship between defendant and Freddie Mac for the Blume note and deed of trust. Because there is no writing proving the relationship between Freddie Mac and defendant for the Blume note and deed of trust, the claimed agreement violates the statute of frauds and is void.

The declaration by Dean Meyer is also not based on personal knowledge. Mr. Meyer instead admitted in paragraph 2 (JA, pg. 147) that "[t]his declaration is based upon my review of Freddie Mac's systems, databases containing loan information and data, and the Guide."

Because defendant failed to submit admissible evidence proving defendant's claim that Freddie Mac owned the note and deed of trust pursuant to Restatement (Third) of Prop.: Mortgages § 5.4 (1997), and because defendant failed to submit admissible evidence proving that Freddie Mac complied with Nevada law to acquire an interest in the deed of trust prior to the HOA foreclosure sale, the subordinate deed of trust owned by defendant was extinguished when plaintiff purchased the Property at the public auction held on August 3, 2012.

4. 12 U.S.C. § 4617(j)(3) does not preempt Nevada's recording laws that make Freddie Mac's alleged unrecorded interest in the Property void as it relates to plaintiff.

NRS 111.325 protects plaintiff from defendant's claim that Freddie Mac held

an undisclosed interest in the Property. Instead, plaintiff was entitled to rely upon the recorded assignment of deed of trust (JA, pg. 120) proving that defendant owned the deed of trust on the date of the HOA foreclosure sale. If there was an unrecorded conveyance of the deed of trust to Freddie Mac, it has no effect under Nevada law.

As stated by the court in Shipman v Wells Fargo Bank, N.A., 2012 WL 642777 (D. Nev. Feb. 24, 2012):

> When a party fails to timely record a conveyance, **the conveyance is void** as to any subsequent bona fide purchaser or mortgagee who lacks knowledge of the previous conveyance, where the purchaser or mortgagee records its conveyance first. NRS 111.325. (emphasis added)

Id. at *1.

There is no conflict between 12 U.S.C. § 4617(j)(3) and Nevada's bona fide purchaser laws. In Valle del Sol Inc. v. Whiting, 732 F.3d 1006 (9th Cir. 2013), the Court of Appeals identified three classes of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption.

Express preemption does not apply because no provision in Title 12 of the U.S. Code purports to displace the recording laws of the State of Nevada and the inability under Nevada law to enforce an unrecorded property interest against a bona fide purchaser like plaintiff.

Field preemption does not apply because the United States Supreme Court

recognized that "[p]roperty interests are created and defined by state law." Butner v. United States, 440 U.S. 48, 55 (1979). As noted above, the Court of Appeals in United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir. 1959), agreed that "state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved." Id. at 383.

Conflict preemption does not apply because compliance with the recording laws of the State of Nevada does not make it impossible for defendant to comply with 12 U.S.C. § 4617. NRS Chapter 116 also does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Valle del Sol Inc. v. Whiting, 732 F.3d at 1022-1023.

12 U.S.C. § 4617(j)(3) only protects "property of the Agency" and not property interests of Freddie Mac's alleged undisclosed agent, defendant. 12 U.S.C. § 4617(b)(2)(A)(1) states that the Agency shall immediately succeed to "all rights, titles, powers and privileges of the regulated entity" and "the assets of the regulated entity." No language in 12 U.S.C. § 4617 purports to treat an "unrecorded" interest that is "void" under state law as an "asset" of the regulated entity. No language in 12 U.S.C. § 4617(j)(3) prohibits the extinguishment of defendant's deed of trust recorded against the Property.

In addition, 12 U.S.C. § 4617(j)(3) does not prohibit foreclosure or sale of property of the Agency in every instance – it only prohibits foreclosure or sale "without the consent of the Agency." If, however, the Agency (or a regulated entity) has no disclosed interest in the real property, how could a foreclosing entity (or an innocent purchaser) know that consent was required? Nothing in the statutory language reveals an intent by Congress to protect concealed property interests (that are not recognized under state law) from being extinguished by a foreclosure sale. Federal preemption does not apply in the present case.

In Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1023 (9th Cir. 2013), the court stated that "the purpose of Congress is the ultimate touchstone in every pre-emption case," and "in a field which the states have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." In the present case, 12 U.S.C. §4617(j) does not express an intent by Congress to pre-empt the nonjudicial foreclosure of an HOA superpriority lien pursuant to existing state law against a deed of trust that is not held in the name of the Agency (FHFA) or a regulated entity (Freddie Mac).

At page 18 of its motion for summary judgment (JA, pg. 43), defendant cited

case law interpreting the FDIC statute, 12 U.S.C. § 1825(b)(2). In Federal Deposit Insurance Corp. v. McFarland, 243 F.3d 876 (5th Cir. 2001), however, the court held that "section 1825(b)(2) merely extends the general exemption of the FDIC from taxation to the receivership context" and that "[t]his Court has not applied the exemption of section 1825(b)(2) to liens not attached by state and local taxing authorities." Id. at 886.

Like the provision in 12 U.S.C. § 1825(b)(2), the language in 12 U.S.C. § 4617(j)(3) is sandwiched between two provisions that exempt property of the Agency (not property of Freddie Mac) from taxation (12 U.S.C. § 4617(j)(2)) and from penalties and fines(12 U.S.C.§ 4617(j)(3)). When coupled with the statement in 12 U.S.C. § 4617(j)(1) stating that the provisions in subsection (j) only "apply with respect to the Agency in any case in which the Agency is acting as a conservator or a receiver," 12 U.S.C. § 4617(j)(3) does not apply to a nonjudicial foreclosure of an assessment lien recorded against a property in which neither FHFA nor Freddie Mac holds a disclosed interest.

In Robinson v. Shell Oil Co., 519 U.S. 337 (1997), the United States Supreme Court recognized that the use of the term "employees" did not have "the same meaning in all other sections and in all other contexts" and that "each section must

be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." When read in context, 12 U.S.C. § 4617 does not purport in any way to apply to the nonjudicial foreclosure of an assessment lien against property in which Freddie Mac claims to hold an unrecorded interest in a mortgage or deed of trust.

Section 1.2(a)(3) of the Freddie Mac Single Family Seller/Servicer Guide published on December 30, 2011 states that "any failure to service any Mortgage in accordance with the terms of the unitary, indivisible master Servicing contract, or any breach of the Seller's obligations under any aspect of the unitary, indivisible master Servicing contract, **shall be deemed to constitute a breach of the entire contract** and shall entitle Freddie Mac to terminate all or a portion of the Servicing." (emphasis added)

Section 66.29 of Guide states:

> **The Servicer must obtain bills, and make payment for all expenses** requiring payment under the Security Instrument. Such expenses may include, but are not limited to, real estate or personal property taxes, special assessments, water bills, ground rents and other charges including condominium, **homeowners association (HOA)** and Planned Unit Development (PUD) regular assessments, that are, or may become, a First Lien priority on the property or that if not paid would result in the subordination of Freddie Mac's interest in the property. (emphasis added)

Section 67.5 of the Guide requires that Freddie Mac's servicers "compensate

Freddie Mac and hold Freddie Mac harmless for any loss, damage or expense, including court costs and attorney fees, that Freddie Mac sustains as a result of the Servicer's failure to comply with the Guide or that result from errors, omissions or delays by the Service or the Servicer's agent" and that defendant "repurchase" the Mortgage as provided in Section 78.20 of the Guide.

As a result, if defendant was in fact servicing the Blume loan for Freddie Mac at the time of the HOA foreclosure, defendant's failure to observe Freddie Mac's guidelines caused "a breach of the entire contract" requiring defendant to indemnify Freddie Mac, repurchase Freddie Mac's interest in the mortgage, or terminate servicing.

Consequently, even if defendant did have an agreement with Freddie Mac to service the Blume loan, defendant breached that agreement by allowing the deed of trust to be "subordinated" to the HOA's superpriority lien and "extinguished" by the foreclosure of that superpriority lien. Defendant cannot use an agreement that defendant breached as authority to assert FHFA's rights and protect defendant's interest in the Property from being extinguished.

5. Defendant did not prove that it had prudential standing to assert rights belonging to FHFA.

In Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC, 133 Nev., Adv. Op. 34, 396 P.3d 754, 758 (2017), this Court held that "the servicer of a loan owned by a regulated entity has standing to argue that the Federal Foreclosure Bar preempts NRS 116.3116." In that case, however, this Court noted that "the district court did not determine whether Nationstar is such a servicer," and this Court remanded the matter for further proceedings. Id.

In paragraph 7 of the findings of fact entered by the court on October 14, 2016 (JA, pg. 161, ¶7), the district court found that "Wells Fargo is the servicer of the Loan for Freddie Mac and was the servicer at the time of the HOA Sale on August 3, 2012." As discussed above, however, defendant did not produce a servicing agreement between defendant and Freddie Mac for the Blume loan, and neither April H. Hatfield nor Dean Meyer stated that they had ever seen such an agreement.

Plaintiff should have the opportunity to engage in discovery to determine whether the required servicing agreement in fact existed for the Blume note and deed of trust at the time of the HOA foreclosure sale. Plaintiff should also have the opportunity to discover whether Freddie Mac terminated the servicing agreement as provided by Section 1.2(a)(3) of the Guide due to defendant's breach of the alleged servicing agreement.

6. As a bona fide purchaser, Plaintiff is protected from defendant's unrecorded claim that Freddie Mac owned the note and deed of trust assigned to defendant.

As discussed at pages 18 to 21 of plaintiff's opposition to defendant's motion for summary judgment (JA, pgs. 79-82), plaintiff is protected as a bona fide purchaser from defendant's unrecorded claim that Freddie Mac owned the deed of trust that was publicly assigned to defendant in the public records prior to the foreclosure sale.

NRS 111.180 defines the requirements to be a bona fide purchaser:

> **Bona fide purchaser: Conveyance not deemed fraudulent in favor of bona fide purchaser unless subsequent purchaser had actual knowledge, constructive notice or reasonable cause to know of fraud.**
>
> 1. Any purchaser who purchases an estate or interest in any real property in good faith and for valuable consideration and who does not have actual knowledge, constructive notice of, or reasonable cause to know that there exists a defect in, or adverse rights, title or interest to, the real property is a bona fide purchaser.
>
> 2. No conveyance of an estate or interest in real property, or charge upon real property, shall be deemed fraudulent in favor of a bona fide purchaser unless it appears that the subsequent purchaser in such conveyance, or person to be benefited by such charge, had actual knowledge, constructive notice or reasonable cause to know of the fraud intended.

The evidence in the record on appeal proves that plaintiff purchased the Property for $10,500.00 without notice of defendant's unrecorded claim that defendant held the deed of trust as an undisclosed agent for Freddie Mac.

NRS 111.325 also provides:

> **Unrecorded conveyances void as against subsequent bona fide**

> **purchaser for value when conveyance recorded.** Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded.

The record on appeal does not contain any evidence proving that any assignment of the deed of trust to Freddie Mac was ever executed or recorded. Even if an unrecorded assignment to Freddie Mac did exist, it would be void as to plaintiff.

In Allison Steel Manufacturing Co. v. Bentonite, Inc., 86 Nev. 494, 499, 471 P.2d 666, 699 (1970), this Court found that a duty of inquiry arose because "[a]t the time appellant's judgment lien attached on May 26, 1964, the two IRS liens were already of record giving it constructive notice." This court also stated that "[h]ad appellant purchased the Henderson land at the Sheriff's sale after instead of before the IRS tax liens were released, a different result would prevail." 86 Nev. at 500, 471 P.2d at 670.

In the present case, the only documents recorded as of the date of the HOA foreclosure sale showed that the deed of trust was owned by defendant and was subordinate to the HOA lien being foreclosed. Nothing appeared in the public record to alert the HOA or any bidders that defendant claimed to hold the deed of trust as an undisclosed agent for Freddie Mac. Plaintiff was therefore a bona fide purchaser

as to any unrecorded interest that defendant claims was owned by Freddie Mac in the deed of trust.

Under 11 U.S.C. § 544(a)(3), a bankruptcy trustee is granted the rights and powers of "a bona fide purchaser of real property." In applying this section of the Bankruptcy Code, the Court of Appeals stated that state law determines the rights of a bona fide purchaser over an unrecorded prior conveyance. In re Seaway Express Corp. (National Bank of Alaska v. Erickson), 912 F.2d 1125, 1128 (9th Cir. 1990); In re Tleel (Chbat v. Tleel), 876 F.2d 769, 772 (9th Cir. 1989).

In Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333, 335 (1957), the California Supreme Court stated:

> The rule indicated by section 2243, which would protect innocent purchasers for value who take without any notice that the conveyance by the trustee was unauthorized, is in accord with the rule protecting such purchasers who acquire their interests from one who holds a general power and who makes a conveyance for an unauthorized purpose, see Alcorn v. Buschke, 133 Cal. 655, 66 P. 15, and cases cited, or from a trustee under a secret trust. Ricks v. Reed, 19 Cal. 551; Rafftery v. Kirkpatrick, 29 Cal.App.2d 503, 508, 85 P.2d 147; Civil Code, s 869. The protection of such purchasers is consistent 'with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.' Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions. Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.

The bona fide purchaser doctrine protects a purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172 (1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

Section 7:21 from 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* (6th ed. 2014), states that "[i]f the defect only renders the sale voidable, the redemption rights can be cut off if a bona fide purchaser for value acquires the land." Id. at 956-957. The treatise also states that if the sale purchaser paid value and is unrelated to the mortgagee, he should take free of voidable defects if: (a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from the recorded instruments; and (c) the defects are such that a person attending the sale and exercising reasonable care would be unaware of the defects. Id. at 958.

In the present case, defendant did not prove that plaintiff had any obligation to search for and discover defendant's unrecorded claim that it held the beneficial interest in the deed of trust solely as a servicer for Freddie Mac.

/ / /

/ / /

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court reverse the order by the district court granting defendant's motion for summary judgment and remand this case to the district court, so that plaintiff can conduct discovery regarding defendant's claims and defenses.

DATED this 5th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and

contains 8,750 words.

3. 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 of the transcript or appendix where the matter relied on is to be found.

DATED this 5th day of September, 2017.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 5th day of September, 2017, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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