**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| DAISY TRUST,<br><br>Appellant,<br><br>vs.<br><br>WELLS FARGO BANK, N.A.,<br><br>Respondent. | Case No. 72747<br><br>District Court No. A-13-679095-C |



**APPEAL**
**From the Eighth Judicial District Court**
**The Honorable Stefany Miley**

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# RESPONDENT'S ANSWERING BRIEF

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## NRAP 26.1 Disclosure Statement

Wells Fargo Bank, N.A. discloses that Wells Fargo & Company owns 100 percent of the stock of Wells Fargo Bank, N.A. Wells Fargo & Company is a publicly-held corporation and has no parent corporation. No other publicly-held corporation owns 10% or more of Wells Fargo & Company's stock.

## Routing Statement

The Nevada Supreme Court should retain this appeal under NRAP 17(a)(10) & (11) because the issues raised under the Housing and Economic Recovery Act's ("HERA") Federal Foreclosure Bar, as applied to deeds of trust owned by Government Sponsored Enterprises, such as Appellant, Fannie Mae, have been addressed by the United States Court of Appeals for the Ninth Circuit but not yet by this Court. *See Berezovsky v. Moniz*, 869 F.3d 923, 926 (9th Cir. 2017). Such issues are significant and affect many pending cases in Nevada.

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## INTRODUCTION

The district court correctly held that because the Federal Foreclosure Bar preempts state law, a Nevada homeowners' association's foreclosure sale of property cannot extinguish the deed of trust owned by Federal Home Loan Mortgage Corporation ("Freddie Mac") while it is under the conservatorship of the Federal Housing Finance Agency ("FHFA"). The decision below rejected the arguments of Daisy Trust concerning the interpretation of that federal statute, how and when it can be applied, and whether FHFA consented to extinguishment of Freddie Mac's deed of trust. In so doing, the district court reached the same conclusion as the Ninth Circuit and the federal and state district courts of Nevada in nearly thirty decisions rejecting virtually identical arguments.

Accordingly, because the district court correctly determined that the Federal Foreclosure Bar precluded extinguishment of Freddie Mac's Deed of Trust, this Court should affirm the judgment.

## Statement of the Issues

1. *Preemption*: Under Nevada law, HOA foreclosure sales like the one by which Daisy Trust acquired the Property, if properly

conducted, may automatically extinguish deeds of trust recorded against the property being foreclosed on. But the deed of trust in this case was the property of an FHFA conservatorship, and federal law provides that such property is not "subject to . . . foreclosure . . . without the consent of the Agency." Does that federal law preempt state foreclosure law that otherwise would allow the extinguishment of conservatorship lien interests?

2. *Property Interest*: Under Nevada law, the owner of a mortgage loan maintains an interest in the underlying property when the record deed-of-trust beneficiary is the loan owner's contractually-authorized servicer. Here, business records prove that Freddie Mac acquired the loan long before the HOA Sale, and that Freddie Mac's servicer—Wells Fargo—was the record deed-of-trust beneficiary as of the date of the HOA Sale. Does Wells Fargo's status as record beneficiary undermine Freddie Mac's ownership interest in the deed of trust?

## STATEMENT OF THE CASE

This case presents a fact pattern familiar to this Court: Appellant Daisy Trust is the purchaser of a property sold at a Nevada

homeowners' association's sale following its foreclosure on a lien for unpaid dues (an "HOA Sale"). At the time of the HOA Sale, Freddie Mac owned both a promissory note evidencing a loan on the property and the corresponding security instrument, known as a deed of trust. The recorded deed of trust identified the loan owner's servicer (here, Wells Fargo Bank, N.A. ("Wells Fargo")) rather than the loan's owner (here, Freddie Mac) as record beneficiary—a common practice permitted under the Restatement and Nevada law.

Under Nevada law, properly conducted HOA Sales can purportedly extinguish all other private junior liens, including deed-of-trust interests. But federal law provides that the property of Freddie Mac, while under Federal Housing Finance Agency conservatorship, is not "subject to … foreclosure … without the consent of the Agency …." 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar"). The district court correctly determined that Freddie Mac maintained a protected property interest in the deed of trust and that the Federal Foreclosure Bar precluded extinguishment of Freddie Mac's deed of trust. As a result, the district court properly awarded summary judgment to Appellees on quiet-title and declaratory-judgment claims.

The district court's conclusion is directly on point with three recent decisions from the Ninth Circuit, holding that "the Federal Foreclosure Bar supersedes the Nevada superpriority lien provision" and "[a]lthough the recorded deed of trust … omitted Freddie Mac's name, Freddie Mac's property interest is valid and enforceable under Nevada law" when its contractually authorized representative appears as beneficiary of record. *Berezovsky v. Moniz*, 869 F.3d 923, 931, 932 (9th Cir. 2017); *Elmer v. JPMorgan Chase & Co.*, --- F. App'x ---, 2017 WL 3822061, at *1 (9th Cir. Aug. 31, 2017) (unpublished) (same); *Saticoy Bay, LLC v. Flagstar Bank, FSB*, --- F. App'x ---, 2017 WL 4712396 (9th Cir. Oct. 20, 2017) (unpublished) (same). This Court should join the holdings of the Ninth Circuit and affirm the district court judgment.

## STATEMENT OF FACTS

### I. The Secondary Mortgage Market.

Congress created Freddie Mac to support a nationwide secondary mortgage market. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). Under its charter, Freddie Mac's business is investing in secured residential mortgage loans. *See* 12 U.S.C. § 1454.

But Freddie Mac does not directly manage many of the practical aspects of mortgage relationships, such as handling day-to-day borrower interactions.

Instead, Freddie Mac contracts with servicers—here, Wells Fargo—to act on its behalf; in that role, servicers often appear as record beneficiaries of deeds of trust. *See Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 757-58 (Nev. 2017) (acknowledging servicer's role); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011) (describing servicers' role); Restatement (Third) of Property: Mortgages § 5.4 (the "Restatement") cmt. c (discussing the common practice where investors in the secondary mortgage market designate their servicer to be assignee of the mortgage); Freddie Mac's Single-Family Seller/Servicer Guide ("Guide") at 1101.2(a) (discussing Freddie Mac's relationship with servicers to manage the loans Freddie Mac owns).[1] In such situations, the note owner remains a secured

[1] The Guide was authenticated and explained by Freddie Mac's employee in a declaration submitted to the district court, and the district court incorporated the Guide into its findings of fact. JA 161-62. This Court may also take judicial notice of the Guide. *See Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (taking judicial notice on appeal). The Guide is "generally known," especially by members of the mortgage lending and servicing industry in Nevada,

creditor with a property interest in the collateral even if the recorded deed of trust names only the loan servicer. *Berezovsky*, 869 F.3d at 932. In short, the servicer is not the owner of the deed of trust or the mortgagee of a mortgage.

The Guide serves as a central document governing the contractual relationship between Freddie Mac and its servicers nationwide, including Wells Fargo. *See* Guide at 1101.2. Under the Guide, Wells Fargo is authorized to foreclose on Freddie Mac's behalf, and Freddie Mac could at any point compel an assignment of the deed of trust from Wells Fargo to Freddie Mac. *See* Guide at 1301.10, 6301.6, 8105.3, 9301.1, 9301.12, & 9401.1. The Guide also makes plain that among

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and "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." NRS 47.130(2). Indeed, the Ninth Circuit took judicial notice of the Guide, *e.g.*, *Berezovsky*, 869 F.3d at 932, n.9.

The Guide is publicly available on Freddie Mac's website. An interactive version is available at www.freddiemac.com/singlefamily/guide, and archived prior versions of the Guide are available at www.freddiemac.com/singlefamily/guide/bulletins/snapshot.html. While the cited sections of the Guide have been amended over the course of Freddie Mac's ownership of the loan, none of these amendments have materially changed the relevant sections. A static, PDF copy of the most recent version of the Guide is available at http://www.allregs.com/tpl/Viewform.aspx?formid=00051757&formtype=agency.

Wells Fargo's responsibilities as a servicer are to represent Freddie Mac's interests in litigation related to the loans Freddie Mac owns and Wells Fargo services. *See* Guide at 8105.3, 9301.1, 9301.12, 9401.1, 9402.2-4, & Chapter 9500.

## II. Statutory Background.

The Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq*.), established FHFA as the Enterprises' regulator, authorized FHFA's Director to place the Enterprises into conservatorships in certain circumstances, and enumerated the powers, privileges, and exemptions FHFA possesses as Conservator. In September 2008—at the height of the financial crisis—FHFA's Director placed the Enterprises into conservatorships, where they remain today.

The Federal Foreclosure Bar—a broad statutory "exemption," captioned "Property protection," within HERA—mandates that when the Enterprises are under FHFA conservatorship, "[n]o property of the Agency shall be subject to … foreclosure … without the consent of the Agency …." 12 U.S.C. § 4617(j)(3). Another HERA provision mandates that upon the inception of conservatorship, FHFA (i.e., the "Agency")

succeeds by operation of law to "all rights, titles, powers, and privileges" of the entity in conservatorship "with respect to [its] assets," *id.* § 4617(b)(2)(A), thereby rendering all of the Enterprises' assets "property of the Agency" for the duration of the conservatorship, *id.* § 4617(j)(3). These statutory provisions—readily available to anyone, including investors specializing in foreclosed-property purchases—exist to protect the conservatorships, and, ultimately, U.S. taxpayers.

Nevada Revised Statutes § 116.3116(2) grants homeowners' associations ("HOAs") a superpriority lien for up to nine months of unpaid HOA dues (six months when the property is encumbered by an Enterprise lien). *See* Nev. Rev. Stat. 116.3116(2) (the "State Foreclosure Statute"). The State Foreclosure Statute permits properly conducted foreclosure sales to extinguish all junior interests, including prior-recorded security interests. *SFR Invs. Pool 1 v. U.S. Bank*, 334 P.3d 408, 419 (Nev. 2014).

## III. Facts Specific to the Property at Issue.

This case involves a deed of trust securing a $417,000 loan on property located at 10209 Dove Row Avenue , Las Vegas, Nevada 89166 (the "Property") (the "Deed of Trust"). The Deed of Trust, recorded in

September 2007, lists Donald K. Blume and Cynthia S. Blume as the borrowers and Universal American Mortgage Company, LLC as the lender, and Mortgage Electronic Registration System, Inc. ("MERS") as beneficiary, solely as nominee for lender and lender's successors and assigns. JA 101-17. Freddie Mac purchased the loan—i.e., the note and Deed of Trust—in November 2007, thereby acquiring an ownership interest in the Deed of Trust. JA 49. In March 2011, MERS recorded an assignment of the Deed of Trust to Wells Fargo. JA 120, 149.

On August 9, 2012—almost five years after Freddie Mac purchased the loan and nearly four years into the FHFA conservatorship—a foreclosure deed was recorded indicating that the Property was purportedly sold at an HOA Sale for $10,500. JA 88-89. At no time did the Conservator consent to the HOA Sale extinguishing or foreclosing Freddie Mac's interest in the Deed of Trust. JA 61. (FHFA, Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx [hereinafter "FHFA, HOA Foreclosures Statement"]).[2] Daisy Trust did not seek, nor did it obtain,

[2] The statement reads, in relevant part: "FHFA confirms that it has not

FHFA's consent. At the time of the HOA Sale, Freddie Mac had succeeded to the original lender's ownership interest in the Deed of Trust, and Wells Fargo appeared as beneficiary of record on Freddie Mac's behalf as its servicer. JA 49, 120.

## IV. Procedural History.

On March 14, 2016, Wells Fargo moved for summary judgment. JA 25. Following briefing, the district court heard oral argument on June 28, 2016 and August 2, 2016. JA 202-07. On November 11, 2016, the district court granted summary judgment in favor of Wells Fargo. JA 160-65.

The district court addressed two primary issues: (1) whether the Federal Foreclosure Bar preempts state law that may otherwise allow Freddie Mac's Deed of Trust to be extinguished as a result of the foreclosure on a super-priority lien; and (2) whether Freddie Mac held an interest in the Property at the time of the HOA Sale. JA 160-65

The district court first held that the Federal Foreclosure Bar precludes the HOA's foreclosure on the property from extinguishing the

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consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection with HOA foreclosures of super-priority liens."

Deed of Trust. JA 161-64. The district court then held that the Federal Foreclosure Bar applied here, finding that business records and an affidavit from an employee verifying that Freddie Mac has held an interest in the property since its purchase of the loan on November 13, 2007. JA 161-64. Also, the district court held that FHFA did not consent here, noting that Daisy Trust offered no evidence to the contrary in opposition to Wells Fargo's motion. JA 162.

The district court accordingly awarded summary judgment to Wells Fargo, holding that Freddie Mac's Deed of Trust was not extinguished by the August 3, 2012 HOA foreclosure sale. JA 160-65.

This appeal followed.

## SUMMARY OF ARGUMENT

The decision below applied the straightforward language of the Federal Foreclosure Bar to protect Freddie Mac's Deed of Trust from extinguishment. Daisy Trust challenges this decision on two primary grounds. Neither has merit.

*First*, Daisy Trust argues that the Federal Foreclosure Bar does not preempt the State Foreclosure Statute. Black-letter preemption law refutes this argument conclusively. The district court correctly held

that the Federal Foreclosure Bar protects Freddie Mac's property interests from state-law extinguishment.

*Second*, Daisy Trust claims that the district court erred in holding that Freddie Mac had a property interest protected by the Federal Foreclosure Bar at the time of the HOA Sale. But protected property includes lien interests, and Nevada law confirms that a loan owner has a secured property interest even when the Deed of Trust or a recorded assignment thereof identifies that loan owner's servicer—here, Wells Fargo—as beneficiary of record. Freddie Mac established its interest in the loan with business records supported by a declaration from a qualified witness. Daisy Trust's challenges to Wells Fargo's evidence fall flat, and its other arguments misread HERA and Nevada's bona fide purchaser laws.

## ARGUMENT

Relying on this Court's precedent, the Ninth Circuit recently held, "the Federal Foreclosure Bar supersedes the Nevada superpriority lien provision." *Berezovsky*, 869 F.3d at 931. Accordingly, "the Federal Foreclosure Bar preempts the Nevada law to the extent that the Nevada law would permit a foreclosure on a superpriority lien to

extinguish Freddie Mac's interest without [FHFA's] consent, while Freddie Mac is under [FHFA's] conservatorship." *Elmer*, 2017 WL 3822061, at *1. These decisions were preceded by more than twenty decisions from the federal courts in Nevada, all of which held that an HOA foreclosure sale cannot extinguish the property interests of Freddie Mac, or similarly situated Fannie Mae, while they are in conservatorship.[3] Moreover, the district court's decision is one of more

[3] *See Skylights LLC v. Byron*, 112 F. Supp. 3d 1145 (D. Nev. 2015); *Elmer v. Freddie Mac,* No. 2:14-cv-01999-GMN-NJK, 2015 WL 4393051 (D. Nev. July 14, 2015); *Premier One Holdings, Inc. v. Fannie Mae*, No. 2:14-cv-02128-GMN-NJK, 2015 WL 4276169 (D. Nev. July 14, 2015); *Williston Inv. Grp., LLC v. JP Morgan Chase Bank, NA*, No. 2:14-cv-02038-GMN-PAL, 2015 WL 4276144 (D. Nev. July 14, 2015); *My Glob. Vill., LLC v. Fannie Mae*, No. 2:15-cv-00211-RCJ-NJK, 2015 WL 4523501 (D. Nev. July 27, 2015); *1597 Ashfield Valley Trust v. Fannie Mae*, No. 2:14-cv-02123-JCM, 2015 WL 4581220 (D. Nev. July 28, 2015); *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 2:14-CV-2046-JAD-PAL, 2015 WL 5723647 (D. Nev. Sept. 29, 2015); *Saticoy Bay, LLC Series 1702 Empire Mine v. Fannie Mae*, 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); *Opportunity Homes, LLC v. Freddie Mac*, 169 F. Supp. 3d 1073 (D. Nev. 2016); *FHFA v. SFR Investments Pool 1, LLC*, No. 2:15-cv-1338-GMN-CWH, 2016 WL 2350121 (D. Nev. May 2, 2016); *G & P Inv. Enters., LLC v. Wells Fargo Bank, N.A.*, No. 2:15-cv-0907-JCM-NJK, 2016 WL 4370055 (D. Nev. Aug. 4, 2016); *Saticoy Bay LLC, Series 2714 Snapdragon v. Flagstar Bank, FSB*, No. 2-13-CV-1589-JCM-VCF, 2016 WL 1064463 (D. Nev. Mar. 17, 2016); *Koronik v. Nationstar Mortg. LLC*, No. 2:13-CV-2060-GMN-GWF, 2016 WL 7493961 (D. Nev. Dec. 30, 2016); *Nevada Sand Castles, LLC v. Green Tree Servicing LLC*, No.

than sixteen holdings in Nevada state courts reaching the same conclusion.[4] None of the arguments Daisy Trust offers to evade the thrust of those decisions has merit.

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2:15-CV-0588-GMN-VCF, 2017 WL 701361 (D. Nev. Feb. 22, 2017); *Alessi & Koenig, LLC v. Dolan, Jr.*, No. 2:15-cv-00805-JCM-CWH, 2017 WL 773872 (D. Nev. Feb. 27, 2017); *FHFA v. Nevada New Builds, LLC*, No. 2:16-cv-1188-GMN-CWH, 2017 WL 888480 (D. Nev. Mar. 6, 2017); *LN Mgmt. LLC v. Pfeiffer*, No. 2:13-cv-1934-JCM-PAL, 2017 WL 955184 (D. Nev. Mar. 9, 2017); Order, *Vita Bella Homeowners Ass'n v. Fannie Mae*, No. 2:15-cv-0515-JCM-VCF (D. Nev. Mar. 9, 2017) (ECF No. 54); *JP Morgan Chase Bank, N.A. v. Las Vegas Dev't Grp., LLC*, No. 2:15-cv-1701-JCM-VCF, 2017 WL 937722 (D. Nev. Mar. 9, 2017); *Freddie Mac v. Donel*, No. 2:16-cv-176, 2017 WL 2692403 (D. Nev. June 21, 2017); *Cohen v. Bank of America, N.A.*, No. 2:15-cv-01393-GMN-GWF, 2017 WL 4185464 (D. Nev. Sept. 21, 2017).

[4] *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, No. A-13-690924-C (Nev. Dist. Ct. Dec. 8, 2015); *5312 La Quinta Hills LLC v. BAC Home Loans Serv'g LP*, No. A-13-693427-C (Nev. Dist. Ct. Jan. 6, 2016); *NV West Servicing LLC v. Bank of America, N.A.*, No. A-14-705996-C (Nev. Dist. Ct. Jan. 25, 2016); *Fort Apache Homes, Inc. v. JPMorgan Chase Bank, N.A.*, No. A-13-691166-C (Nev. Dist. Ct. Feb. 5, 2016); *RLP-Buckwood Court, LLC v. GMAC Mortg., LLC*, No. A-13-686438-C (Nev. Dist. Ct. May 24, 2016); *A&I LLC Series 3 v. Lowry*, No. A-13-691529-C (Nev. Dist. Ct. May 31, 2016); *Gavirati v. Washington Mutual Bank, FA*, No. A-13-690263-C (Nev. Dist. Ct. Sept. 1, 2016); *Nevada New Builds, LLC v. Nationstar Mortg. LLC*, No. A-14-704924-C (Nev. Dist. Ct. Sept. 27, 2016); *Daisy Trust v. Wells Fargo*; No. A-13-679095-C (Oct. 14, 2016); *SFR Inv. Pool 1, LLC v. Green Tree Servicing, LLC*, No. A-13-680704 (Nev. Dist. Ct. Nov. 17, 2016); *Summit Canyon Resources LLC v. Kraemer*, No. A-15-714882-C (Nev. Dist. Ct. Nov. 22, 2016); *Nevada Sandcastles, LLC v. Nationstar Mortg., LLC*, No. A-14-701775-C (Nev. Dist. Ct. Dec. 21, 2016); *Saticoy Bay LLC Series 338 Flying Colt v. Nationstar Mortg., LLC*, No. A-13-684192-C (Nev. Dist. Ct. Dec. 21, 2016); *Honeybadgers Holdings LLC v. Karimi*, No. A-15-

## I. The District Court's Preemption Holding Is Correct.

HERA provides FHFA with powers and privileges Congress deemed necessary to protect the Nation's housing market—and, by extension, the overall economy—by regulating the Enterprises, and, if necessary, placing them into conservatorships, as occurred in 2008. *See Spokane*, 775 F.3d at 1114 (Enterprises' mission); *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 989-90 (9th Cir. 2013) (FHFA's powers).

Notwithstanding the obvious and important federal interests at stake, and Congress's equally obvious intent to facilitate and protect the nationwide secondary mortgage market, Daisy Trust argues that the district court erred in holding that the Federal Foreclosure Bar does not preempt state law. *See* Appellant's Opening Brief ("AOB") at 23-29. Daisy Trust is incorrect.

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718824-C (Nev. Dist. Ct. Mar. 22, 2017); *Choctaw Avenue Trust v. JPMorgan Chase Bank N.A.*, No. A-12-667762-C (Nev. Dist. Ct. June 12, 2017); *Saticoy Bay LLC Series 4930 Miners Ridge v. JPMorgan Chase Bank N.A.*, No. A-13-681090-C (Nev. Dist. Ct. June 27, 2017). Wells Fargo does not cite these cases as precedential authority but rather, consistent with Nev. R. App. P. 36(c)(3), cites them for their persuasive value.

### A. The Federal Foreclosure Bar Preempts State Foreclosure Law.

The Ninth Circuit recently confirmed that the district court's ruling on preemption was correct, holding that the Federal Foreclosure Bar "unequivocally expresses Congress's 'clear and manifest' intent to supersede any contrary law, including state law, that would allow foreclosure of Agency property without its consent." *Berezovsky*, 869 F.3d at 930-31; *Elmer*, 2017 WL 3822061, at *1. The Federal Foreclosure Bar preempts contrary state law under theories of either express or conflict preemption. Express preemption exists when a federal statute "explicitly manifests Congress's intent to displace state law." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013) (citation omitted). So it is here: the text of HERA declares that "[n]o property of the Agency shall be subject to . . . foreclosure," absent FHFA's consent. 12 U.S.C. § 4617(j)(3). Indeed, courts in the federal District of Nevada have noted that Congress' passage of the Federal Foreclosure Bar "clearly manifests its intent to displace state law." *Skylights*, 112 F. Supp. 3d at 1153.

The Federal Foreclosure Bar also 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 Mgmt. 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).

Here, the conflict is obvious. Congress enacted the Federal Foreclosure Bar to protect the Enterprises while in conservatorships from actions, such as the HOA Sale here, that otherwise would deprive them of their property interests. In so doing, Congress shielded the Enterprises from an array of conflicting state laws that could otherwise undermine the Conservator's efforts to preserve and conserve assets and to restore and assure the safety and soundness of the Enterprises' business operations. *See generally* 12 U.S.C. § 4617(b)(2)(B). Allowing

state-law foreclosures to extinguish conservatorship property would conflict directly with the law Congress enacted and the policy it sought to pursue. Accordingly, "the Federal Foreclosure Bar implicitly demonstrates a clear intent to preempt [the State Foreclosure Statute]." *Berezovsky*, 869 F.3d at 930; *see also Elmer*, 2017 WL 3822061, at *1 (same); *Flagstar*, 2017 WL 4712396, at *1 (same). Thus, the great weight of authority, including *all* federal court decisions and numerous state court decisions that have considered the Federal Foreclosure Bar, supports the principle that the Federal Foreclosure Bar preempts the State Foreclosure Statute.

### B. Daisy Trust's Arguments Against Preemption Fail.

Daisy Trust challenges this straightforward preemption analysis with several arguments, each of which fails.

#### 1. Express Preemption Need Only Show Congress' Intent to Displace State Law.

Daisy Trust asserts that there is no express preemption because the Federal Foreclosure Bar does not state *in haec verba* that it displaces Nevada law. AOB at 24. But such language need not appear in the statutory text. Daisy Trust's argument to the contrary would require that a statute include talismanic terms to indicate preemption,

but this has no basis in the case law; all that is necessary is that the text "manifest[] Congress's intent to displace state law." *Valle del Sol*, 732 F.3d at 1022. Hence, "magic words" are "never required" for Congress to express its intent. *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (finding that the requirement that a waiver of sovereign immunity must be "unequivocally expressed" does not mean Congress must "state its intent in any particular way"); *see also United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (Congress need not "incant magic words" when designating a procedural rule as jurisdictional).

### 2. FHFA's Option to Consent to Extinguishment Does Not Undermine the Statute's Preemptive Effect.

Daisy Trust argues that preemption is inapplicable because the Federal Foreclosure Bar only prohibits foreclosure or sale "without the consent of [FHFA]," reasoning that the Federal Foreclosure Bar does not apply to unrecorded property interests because parties would not know to seek consent. AOB at 25-26. But this argument is incorrect for multiple reasons. As an initial matter, Daisy Trust misstates the effect of the Federal Foreclosure Bar. It does not, as Daisy Trust claims,

prevent the HOA from selling or foreclosing on the Property here, as Freddie Mac did not hold a *title interest* to the Property prior to the HOA Sale. *Id.* Rather, because the Federal Foreclosure Bar protects only conservatorship property from extinguishment, it preserved the Deed of Trust from extinguishment, but has no effect on whether title to the Property itself could be transferred. Accordingly, Wells Fargo does not argue that the Federal Foreclosure Bar would prevent an otherwise proper HOA Sale from occurring, nor does it seek to unwind the HOA Sale here.

Daisy Trust also misinterprets the purpose of the Federal Foreclosure Bar's consent provision, which permits FHFA to forgo the Federal Foreclosure Bar's statutory protection of conservatorship property on a case-by-case basis as it deems necessary. The provision is not a limitation on the protections afforded to the Conservator, rather, it provides broader discretion to the Conservator in its management of the Enterprises' property interests.

Moreover, if the existence of the consent provision somehow prevented preemption, this argument would lead to an absurd heads-they-win-tails-we-lose outcome: Despite Congress's obvious intent that

conservatorship property be subject to extinguishment only if FHFA *actually* consents, Daisy Trust suggests that the mere possibility that FHFA *could* consent would render the statutory protection from extinguishment unavailable in *every* situation involving a state-law procedure. This would invert the text and workings of the Federal Foreclosure Bar: The statute mandates that conservatorship property interests are protected unless FHFA authorizes their extinguishment, yet Daisy Trust reads the statute to leave those interests unprotected. Daisy Trust's attempt to rewrite the statute cannot succeed. *See RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 37, 110 P.3d 24, 26 (2005) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others … that a legislature says in a statute what it means and means in a statute what it says." (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

Daisy Trust's comparison of the language of the Federal Foreclosure Bar to that of Sections 4617(j)(2) and 4617(j)(4)—the sections preceding and following it within HERA—does not further its argument. *See* AOB at 27. Daisy Trust contends that those sections, which protect the conservatorships from penalties, fines, and certain

state taxes, have immediate and self-executing effect, but that the Federal Foreclosure Bar is different because the provision allowing FHFA to consent to the extinguishment of conservatorship property interests. Comparing the language of these sections does not lead to Daisy Trust's conclusion; the fact that the Federal Foreclosure Bar gives FHFA the option to consent to extinguishment does not change the fact that as written, the Federal Foreclosure Bar provides for immediate application without further action necessary for its protections to apply.

The different language in Sections 4617(j)(2) and 4617(j)(4) stems from the fact that both sections discuss forms of liability that are imposed directly on the Enterprises in conservatorship—taxes, penalties, and fines—that can be satisfied only by the Conservator or Enterprises actively paying them. Acknowledgement of the need for the Conservator's consent is therefore unnecessary, as the Conservator's decision to satisfy any taxes, penalties, or fines against it would manifest its consent. Section 4617(j)(3), on the other hand, protects against in rem actions that could be imposed against the property of the Conservator or Enterprises without their active participation.

Accordingly, the consent clause suggests how an entity seeking to impose an action on conservatorship property can seek a voluntary relinquishment of the default statutory protection, unnecessary when it would otherwise be seeking a direct payment otherwise barred by Sections 4617(j)(2) and 4617(j)(4).

### 3. The Federal Foreclosure Bar Is Not Limited to Tax Lien Foreclosures.

Daisy Trust cites to a Fifth Circuit case—*FDIC v. McFarland*, 243 F.3d 876 (5th Cir. 2001)—to argue that the FDIC's analogous property-protection clause, 12 U.S.C. § 1825(b)(2), does not apply to a nonjudicial foreclosure of a private lien, and that the same is true for the Federal Foreclosure Bar. AOB at 27. However, the Ninth Circuit expressly rejected the argument that *McFarland* applies to HERA, holding that "the protection provided by the Federal Foreclosure Bar applicable here cannot fairly be read as limited to tax liens." *Berezovsky*, 869 F.3d at 929.

Indeed, *McFarland* "based its determination on the titling and structure of section 1825, which is significantly different from the titling and structure of section 4617." *Skylights LLC v. Byron*, 112 F. Supp. 3d 1145, 1155-57 (D. Nev. 2015). Unlike the *McFarland*-era

version of the FDIC statute, neither the title of Section 4617(j) nor the text of introductory subsections 4617(j)(1) mentions or references taxation. Thus, as the Ninth Circuit observed, "§ 4617(j) includes no language limiting its general applicability provision to taxes alone." *Berezovsky*, 869 F.3d at 929.[5]

#### 4. The Protections of the Federal Foreclosure Bar Apply to the Property of Freddie Mac While Under Conservatorship.

Daisy Trust argues that, because Freddie Mac is not the FHFA, the protections of the Federal Foreclosure Bar do not extend to Freddie Mac, even though Freddie Mac is in FHFA's conservatorship. *See* AOB at 7-9, 25-26. This argument fails because it conflicts with the plain text and structure of HERA, which provides that the Federal Foreclosure Bar "shall 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.

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[5] The Fifth Circuit's analysis was also incorrect. While "several courts have applied subsection 1825(b)(2) to protect the FDIC from entities other than taxing authorities," the *only* decision to limit the protection for FDIC receiverships under Section 1825(b)(2) to the tax-lien context is *McFarland*. *Skylights*, 112 F. Supp. 3d at 1156 (collecting cases). For example, *McFarland*'s holding cannot be squared with a Tenth Circuit opinion where the court applied the same FDIC property-protection provision to bar a *private judgment creditor* from attempting to garnish payments owed to FDIC. *GWN Petroleum Corp. v. Ok-Tex Oil & Gas, Inc.*, 998 F.2d 853, 855-56 (10th Cir. 1993).

§ 4617(j)(1) (emphasis added). As Conservator, FHFA "immediately succeed[s] to" the property of Freddie Mac, 12 U.S.C. § 4617(b)(2)(A), with power to "perform all functions of the regulated entity in the name of the regulated entity." 4617(b)(2)(B)(iii). Accordingly, Daisy Trust's argument that the protections provided to "the Agency" do not extend to the property of Freddie Mac contravenes the statute.[6]

For the Federal Foreclosure Bar to apply in a case (such as this one) involving conservatorship property, FHFA need only have been acting as Conservator at the time the property otherwise would have been subject to foreclosure. Here, there is no question FHFA was acting as Conservator when the HOA Sale took place; FHFA has been acting as Conservator since September 6, 2008, when the director of FHFA placed Freddie Mac into conservatorship. No other action on the part of FHFA is needed. Indeed, every court to consider arguments akin to

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[6] Daisy Trust also attempts to distinguish this case from the federal cases cited by Wells Fargo because neither FHFA nor Freddie Mac is a party to the case. *See* AOB at 7-8. But, as explained above, nothing about the presence of Freddie Mac or FHFA in this case affects the applicability of the statute. Indeed, as this Court held in a related case, "the servicer of a loan owned by a regulated entity may argue that the Federal Foreclosure Bar preempts NRS 116.3116," and "neither Freddie Mac nor the FHFA need be joined as a party." *Nationstar Mortg., LLC v. SFR Investments Pool 1, LLC*, 396 P.3d 754, 758 (Nev. 2017).

Daisy Trust's has rejected them. *See, e.g.*, *Skylights*, 112 F. Supp. 3d at 1155 (collecting cases); *Nevada v. Countrywide Home Loans Servicing, LP*, 812 F. Supp. 2d 1211, 1218 (D. Nev. 2011) ("while under the conservatorship with the FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is").

### 5. Freddie Mac's Guide Does Not Alter the Federal Foreclosure Bar's Preemptive Effect.

The terms of the Guide do not undercut preemption. Daisy Trust cites a hodgepodge of contractual remedies from Freddie Mac's Guide in an attempt to argue that those provisions take precedence over the Federal Foreclosure Bar such that Wells Fargo's contractual relationship with Freddie Mac was void. AOB at 28-29. But Daisy Trust has it backward. The Federal Foreclosure Bar is a statutory protection provided by Congress for the duration of the conservatorships, regardless of any action by the Enterprises' servicers. If a servicer fails in its contractual duties during conservatorship, such failure does not erase the protective effect of the statute. The Guide, on the other hand, was written to apply throughout Freddie Mac's relationships with its servicers—relationships that predate, and will postdate, the conservatorship. Therefore, it is natural for the Guide to

instruct servicers on how to protect Freddie Mac's interests without assuming that the Federal Foreclosure Bar will always be in effect.

That the Enterprises have general procedures in place to allow them to protect their interests in circumstances when the Federal Foreclosure Bar would not apply (*i.e.*, outside of conservatorship or receivership) is entirely sensible, as the Federal Foreclosure Bar applies only while the Enterprises are in FHFA conservatorship or receivership. But whether the Enterprises invoked those procedures when (as at all times relevant here) the Federal Foreclosure Bar did apply is, at best, academic—those procedures involve costs and burdens that Congress plainly intended to alleviate in the event of conservatorship or receivership. There is no prerequisite that FHFA or Freddie Mac assert a claim against its servicers for the Federal Foreclosure Bar to apply.

Finally, as a matter of black-letter contract law, Daisy Trust cannot enforce the terms of the Guide against Freddie Mac or its servicers. While the Guide is a contract, Daisy Trust is not a party to, or a third-party beneficiary of, that contract and therefore cannot enforce its terms. *See, e.g.*, *Skylights*, 112 F. Supp. 3d at 1157; *Wood v.*

*Germann*, 331 P.3d 859, 861 (Nev. 2014); *Deerman v. Freddie Mac*, 955 F. Supp. 1393, 1404-05 (N.D. Ala. 1997). Accordingly, Daisy Trust's argument that Wells Fargo purportedly breached an obligation to pay the HOA lien, AOB 28-29, is of no moment; that contractual term is to be interpreted by Freddie Mac, not some third party, and whether Freddie Mac chooses to enforce any contractual remedies it may have is not up to unrelated third parties such as Daisy Trust to decide.

## II. Freddie Mac Had a Protected Property Interest at the Time of the HOA Sale.

To invoke the Federal Foreclosure Bar's preemptive protection and be entitled to summary judgment, Wells Fargo needed to establish two things: first, that Freddie Mac's ownership of the loan constituted a property interest encompassed by the Federal Foreclosure Bar; and second, that Freddie Mac held that interest at the time of the HOA Sale. *Accord Berezovsky*, 869 F.3d at 932-33; *Elmer,* 2017 WL 3822061, at *1. Wells Fargo did both.

The district court correctly held that Freddie Mac had a protected interest in the Property through ownership of the loan—a finding supported by the uncontroverted evidence in the record. JA 161. Wells Fargo established that Freddie Mac acquired ownership of the note and

Deed of Trust in 2007, and that at the time of the HOA Sale in 2012, Wells Fargo appeared as record beneficiary of the Deed of Trust—acting not on its own account, but instead on Freddie Mac's behalf. *See* JA 49, 120, 161. Freddie Mac's property interest is also amply supported in the evidentiary record through Freddie Mac's business records and the declaration of a Freddie Mac employee explaining the relationship between Freddie Mac and Wells Fargo. JA 49, 52, 146-58.

The Ninth Circuit's decisions in *Berezovsky* and *Elmer*, in which materially identical types of evidence were presented, concluded that such evidence is sufficient to establish Freddie Mac's property interest under Nevada law. Daisy Trust offered no evidence to rebut Freddie Mac's ownership, and the district court properly determined that this uncontroverted evidence entitled Appellees to judgment in their favor.

Daisy Trust makes three principal arguments regarding the validity of Freddie Mac's property interest. *First*, Daisy Trust purports that the property of Freddie Mac is not protected by the Federal Foreclosure Bar because its name did not appear in the public record. *Second*, Daisy Trust argues that Freddie Mac's evidence is unreliable and insufficient to prove Freddie Mac's ownership interest. *Lastly*,

Daisy Trust argues that it was a bona fide purchaser, and therefore is not subject to Freddie Mac's interest. As discussed below, Daisy Trust's arguments lack merit.

### A. Both Federal and Nevada Law Recognize Secured Loan Owners' Interests in the Collateral Property.

#### 1. Lien Interests Constitute Protected Property.

Under federal law, Freddie Mac's ownership of the loan qualifies as a protected property interest for purposes of the Federal Foreclosure Bar. Indeed, federal law defines the scope of property interests protected by statutes such as the Federal Foreclosure Bar broadly. *See Matagorda Cty. v. Russell Law*, 19 F.3d 215, 221 (5th Cir. 1994). Courts uniformly have held that mortgage liens constitute property for purposes of the analogous FDIC statute, 12 U.S.C. § 1825(b)(2). "[T]he term 'property' in § 1825(b)(2) encompasses all forms of interest in property, including mortgages and other liens." *Simon v. Cebrick*, 53 F.3d 17, 21 (3d Cir. 1995).[7] Nevada law similarly recognizes that

[7] When analyzing HERA's provisions, courts frequently turn to precedent interpreting the analogous receivership authority of the FDIC because the relevant language in both acts is often parallel. *See, e.g.*, *Cty. of Sonoma v. Feder*, 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)").

mortgage lenders maintain a security interest in the collateral. *In re Montierth*, 354 P.3d 648, 651 (Nev. 2015).

### 2. Freddie Mac's Property Interest Is Not Affected by Having Wells Fargo Appear as Record Beneficiary of the Deed of Trust.

This Court has affirmed that Nevada Law incorporates the Restatement's approach to the ownership and transfer of mortgages. *Id.* Under the Restatement approach, ownership of the Deed of Trust was transferred to Freddie Mac along with the promissory note when Freddie Mac purchased the loan.

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

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

Restatement § 5.4 cmt. c (emphasis added). The Restatement then emphasizes that this arrangement preserves the investor's ownership interest:

> *It is clear in this situation that the owner of both the note and mortgage is the investor and not the servicer.* This follows from the express agreement to this effect that exists among the parties involved. The same result would be reached if the note and mortgage were originally transferred to the institutional purchaser, who thereafter designated another party as servicer and executed and recorded a mortgage assignment to that party for convenience while retaining the promissory note.

*Id.* (emphasis added). Thus, the Restatement acknowledges that the assignment of a deed of trust to a servicer does not alter the fact that the purchaser of the loan remains the owner of the note and deed of trust. The Restatement approach is a recognition of and confirms the realities of the mortgage industry: The Enterprises can support the national secondary mortgage market more efficiently if they can contract with others to manage loans and have their servicers appear as the recorded beneficiary on property records without relinquishing ownership of deeds of trust.

This Court has applied the Restatement to acknowledge the existence of such interests. *See Montierth*, 354 P.3d at 650-51. In a

case in which MERS acted as recorded beneficiary in a nominee capacity for the lender, this Court clarified that Nevada follows the entirety of the Restatement approach, including certain exceptions that the court had not discussed in its prior decision on similar issues, such as *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 257-58 (Nev. 2012) (citing Restatement § 5.4(a)). Specifically, *Montierth* held that a foreclosure on a mortgage could proceed when the noteholder was not the beneficiary named in the recorded deed of trust, so long as the named beneficiary—there, MERS—had authority to foreclose on the noteholder's behalf. *Montierth*, 354 P.3d at 650-51. *Montierth* stated unequivocally that in those circumstances, a note owner remains "a secured creditor" under Nevada law, meaning that it retains a property interest in the collateral. *Id.* (citing Restatement § 5.4 cmts. c, e)

Therefore, *Montierth* establishes that where, as here, the record beneficiary of the deed of trust is in an agency or contractual relationship with the loan owner, that loan owner maintains a property interest in the collateral. *See id.* In such a circumstance, the purchaser of the loan, like Freddie Mac here, is a secured lender with a "fully secured, first priority deed" that can be enforced. *See id.*

Since *Montierth*, courts have recognized that when the entity appearing as record beneficiary of a deed of trust is MERS or a servicer in a contractual relationship with the loan owner, the loan owner retains a secured property interest under Nevada law. Indeed, this Court evaluated *Montierth* and the Restatement in detail to confirm that they applied to the relationship between Freddie Mac and its servicers. *See Nationstar*, 396 P.3d 756. And the Ninth Circuit analyzed *Montierth* and the Restatement extensively in concluding that Nevada law recognizes that a loan owner like Freddie Mac has a secured property interest. *Berezovsky*, 869 F.3d at 932-33; *Elmer,* 2017 WL 3822061, at *1. There is no plausible basis to distinguish these cases. Accordingly, this Court should hold that Freddie Mac had a secured property interest at the time of the HOA Sale.

### 3. The Loan Owner's Name Need Not Appear in the Public Title Records for the Loan Owner to Have a Protected Property Interest.

Daisy Trust's Brief attempts to avoid *Montierth* and the Restatement by focusing instead on *Edelstein* to argue that Nevada law requires Freddie Mac's property interest to be recorded. *See* AOB at 15, 21-22 (citing *Edelstein*, 286 P.3d at 259). But Daisy Trust fails to

mention that *Montierth* clarified that Nevada follows the entirety of the Restatement approach, explicitly stating that it adopted certain exceptions that this Court had not discussed in *Edelstein*. *Montierth*, 354 P.3d at 651 ("[b]ecause it was not pertinent to our analysis in *Edelstein*, we did not include the exceptions provided in the Restatement …. We agree with the Restatement's reasoning."). As explained in *Montierth* and consistent with the Restatement, when a loan owner has an agency or contractual relationship with an entity who acts as the beneficiary of record of a deed of trust, the loan owner (though not the record beneficiary) maintains a secured property interest. *See Montierth*, 354 P.3d at 650-51.

Daisy Trust also attempts to distinguish *Montierth*, but its arguments fare no better. It implies that *Montierth* is inapplicable because Wells Fargo failed to produce evidence of a subsequent "transfer" of the note to Freddie Mac. *See* AOB at 22. But the "transfer" discussed in *Montierth* was merely the acquisition of the loan by Deutsche Bank from the original lender. 354 P.3d at 649. Here, that "transfer" occurred when Freddie Mac purchased the loan in November 2007, evidenced by Freddie Mac's business records and the declaration

of its employee. JA 49, 146-58. Daisy Trust provides no contrary evidence, and the district court made no findings on that point.

Daisy Trust also argues that MERS's role in *Montierth* was factually distinct from Wells Fargo's role as servicer, thus rendering the decision inapplicable here. AOB at 22. But this assertion is supported by neither *Montierth* nor the record. Daisy Trust cites *Montierth*'s holding that the language in the Deed of Trust referring to MERS holding legal title only rendered any assignment of the Deed of Trust "ministerial." AOB at 22. But the *Montierth* Court's analysis of this language was not part of the holding that Deutsche Bank had a secured property interest. Rather, that discussion related to the automatic stay provisions of bankruptcy cases, which has no relevance here. *See Montierth*, 354 P.3d at 651-53.

The Ninth Circuit, consistent with and in express reliance on *Montierth*, has thrice rejected the argument Daisy Trust advances here. In *Berezovsky*, that court stated that "[a]lthough the recorded deed of trust here omitted Freddie Mac's name, Freddie Mac's property interest is valid and enforceable under Nevada law." 869 F.3d at 932 (citing *Montierth*, 354 P.3d at 651). In *Elmer*, the Ninth Circuit similarly held

that "Freddie Mac's property interest is valid and enforceable under Nevada law even if the recorded document omits Freddie Mac's name, *if the recorded beneficiary of the deed of trust is a party acting on Freddie Mac's behalf*." *Elmer,* 2017 WL 3822061, at *1 (emphasis added). And in *Flagstar*, relying on *Berezovsky*, the court held that "there were no genuine issues of material fact regarding Fannie Mae's ownership." *Flagstar*, 2017 WL 4712396, at *1.

These cases involved facts materially identical to those presented here: Freddie Mac maintaining a secured property interest as a loan owner, with its contractually authorized representative appearing as beneficiary of record on the Deed of Trust. More specifically, here, as in *Berezovsky* and *Flagstar*, the Enterprise's servicer was the beneficiary of record of the deed of trust at the time of the HOA foreclosure sale. Accordingly, the Ninth Circuit's growing list of precedents presents strong persuasive authority rebutting Daisy Trust's argument that Freddie Mac did not have a property interest.

#### 4. Nevada's Recording Statutes Do Not Contradict *Montierth*.

Daisy Trust argues that Freddie Mac's interest was void because it was not recorded, but Daisy Trust's reliance on Nevada's recording

statute is misplaced. *See* AOB at 23-24, 31-32 (citing Nev. Rev. Stat. § 111.325). As an initial matter, its arguments fail to satisfy its own premise: the interest at issue here—the interest embodied in the Deed of Trust owned by Freddie Mac—was *not* "unrecorded." Daisy Trust cannot and does not deny that the Deed of Trust or its assignment to Freddie Mac's servicer had been properly recorded.

The gist of Daisy Trust's argument appears to be that Freddie Mac's *ownership* of the Deed of Trust was not recorded, thereby rendering it unenforceable. *See id.* That is wrong. *Montierth*, along with the trio of Ninth Circuit decisions, unequivocally recognize that where, as here, the record beneficiary of the deed of trust is the loan owner's contractually authorized representative, the loan owner retains its interest as a "secured creditor," which, by definition, involves an "enforceable interest in the property." *Berezovsky*, 869 F.3d at 932 (citing *Montierth*, 354 P.3d at 651) (a loan owner "remains a secured creditor with a property interest in the collateral even if the recorded deed of trust names only the [loan] owner's" contractually authorized representative).

Daisy Trust also misreads the Nevada recording statutes, which do not contradict *Montierth* because those statutes do not require public recording in order for a party to have ownership of a *loan*. The statutes require only the recording of a "conveyance"—a deed of trust itself or an assignment of a deed of trust—not its subsequent acquisition by an investor through its purchase of a loan. *See* Nev. Rev. Stat. § 111.010(1) (defining "conveyance" as "every instrument in writing … by which any estate or interest in lands is created, aliened, assigned or surrendered"); *see also Leyva v. Nat'l Default Servicing Corp.*, 255 P.3d 1275, 1279 (Nev. 2011) (deed of trust constitutes a conveyance as defined by Nev. Rev. Stat. § 111.010). There is no statutory requirement that a deed of trust or its subsequent assignments reflect the identity of the *owner* of the loan.[8]

Daisy Trust's argument therefore confuses loan owners, such as Freddie Mac, with the nominee of the owner, such as Wells Fargo, that may act as record beneficiaries of deeds of trust on Freddie Mac's

[8] Indeed, the Ninth Circuit rejected a similar argument in *Elmer*. There, the appellant invoked Nev. Rev. Stat. § 111.315 as purportedly rendering Freddie Mac's property interest unenforceable against a subsequent purchaser. *See* Appellant's Reply Br. at 19-20, No. 15-17407 (Dkt. No. 23). This Court should find the Ninth Circuit's reasoning persuasive.

behalf. Indeed, this argument misunderstands the mortgage market itself, which has for many years prominently featured loan owners and servicers, among others. *See Cervantes*, 656 F.3d at 1038-39; *Nationstar*, 396 P.3d at 757 (citing the Restatement and Jason H.P. Kravitt & Robert E. Gordon, SECURITIZATION OF FINANCIAL ASSETS § 16.05 (3d ed. 2012) in describing the loan owner-servicer relationship). Moreover, there is no logical reason why Daisy Trust's argument would affect only deeds of trust at issue in HOA Sales; if adopted, Daisy Trust's argument could render billions of dollars of home loans unsecured, sending the housing-finance market into chaos.

### B. Daisy Trust's Challenges to the Type and Amount of Evidence That Supported Freddie Mac's Property Interest Fail.

Wells Fargo presented uncontroverted evidence that Freddie Mac owned the loan at the time of the HOA Sale. Daisy Trust's attacks on that evidence fall well short of their mark.

#### 1. The Evidence Unequivocally Proved That Freddie Mac Owned the Loan.

In accordance with NRCP 56(e), Wells Fargo established facts at summary judgment using Freddie Mac's business records and a declaration from a Freddie Mac employee explaining that the records

indicate when Freddie Mac acquired the loan and that Freddie Mac has owned the loan since the time it was acquired. JA 49, 146-58. The Ninth Circuit, applying NRCP 56's federal counterpart, confirmed that Freddie Mac's property interest can be established using such evidence.[9] *Berezovsky*, 869 F.3d at 933; *Elmer*, 2017 WL 3822061, at *2.

As in *Berezovsky* and *Elmer*, Freddie Mac presented the same type of evidence in this case before the district court when seeking summary judgment. This Court should confirm that this evidence is sufficient.

**a. Freddie Mac's Database Records Prove Its Ownership.**

In support of its motion for summary judgment, Wells Fargo submitted its own business records as well as the business records from Freddie Mac's MIDAS system, a database Freddie Mac uses in its ordinary business operations to track millions of loans it owns nationwide. *See* JA 48-49, 146-58. The MIDAS records offered in support of Wells Fargo's motion for summary judgment show that the "funding date" on which Freddie Mac acquired ownership of the loan

[9] This Court may look to federal law "discussing an analogous federal rule of evidence" for guidance in interpreting its own evidence rules. *L.V. Dev. Assocs. v. Eighth Jud. Dist. Ct.*, 325 P.3d 1259, 1265 (Nev. 2014) (citation omitted).

was in November 2007—long before the August 2012 HOA Sale. *Id.* This data also demonstrates Freddie Mac's continued ownership of the loan at the time of the HOA Sale. *Id.* The Ninth Circuit has held that Freddie Mac's records derived from MIDAS are admissible business records. *Berezovsky*, 869 F.3d at 932 & n.8 (holding that Freddie Mac "database printouts" were sufficient to support a "valid and enforceable" property interest under Nevada law); *Elmer*, 2017 WL 3822061, at *1 (finding that a declaration from a Freddie Mac employee and printouts from Freddie Mac's MIDAS system were "reliable and uncontroverted evidence of its interest in the property on the date of the foreclosure"). The same is true here, and the Court should reach the same conclusion.

These business records were properly introduced and explained by the declaration of Dean Meyer, a Freddie Mac employee qualified to give testimony as to the business records. *See* JA 161, 146-58. In his declaration, Mr. Meyer confirmed that the MIDAS data proves that: Freddie Mac purchased the loan in November 2007; Freddie Mac continues to own the loan; and Wells Fargo appeared as the beneficiary of record of the Deed of Trust at the time of the HOA Sale. JA 146-50. As in *Elmer*, this evidence constitutes "reliable and uncontroverted

evidence of [Freddie Mac's] interest in the property on the date of the foreclosure." *Elmer*, 2017 WL 3822061, at *1.

Based on Freddie Mac's business records and the Meyer Declaration, the district court properly found that "[Freddie Mac] purchased the Loan and thereby obtained a property interest in the Deed of Trust on or about November 13, 2007." JA 161.

**b. Daisy Trust Cannot Impugn Freddie Mac's Ownership of the Loan.**

In the district court, Daisy Trust presented *no* evidence to contradict Freddie Mac's ownership of the loan—nor did it offer any theory as to what other entity might have owned the loan at the time of the HOA Sale. The arguments Daisy Trust now offers lack merit.

Daisy Trust argues that the business records and the Meyer Declaration are inadmissible. *E.g.*, AOB at 14. But, as shown in *Elmer*, such attacks on the Meyer Declaration are unavailing. *Elmer* evaluated similar business records and rejected speculation by the party opposing summary judgment that the records might be interpreted in some way other than that presented in Freddie Mac's employee declaration. *Elmer*, 2017 WL 3822061, at *1. This Court should reject these arguments as well.

Daisy Trust also attempts to attack the admissibility of Mr. Meyer's Declaration on the grounds that he lacked personal knowledge of Freddie Mac's business records, as he did not make and keep the entries in the database system himself. *See* AOB at 20. But this is not the standard. All that is required is that the declarant be "qualified to testify about the business practices and procedures for inputting the underlying data. It is not necessary for each individual who entered a record of payment into the database to testify as to the accuracy of each piece of data entered." *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1043 (9th Cir. 2009). The witness "need not have personal knowledge of the actual creation of the document …. Nor is there any requirement under Rule 803(6) that the records be prepared by the party who has custody of the documents and seeks to introduce them into evidence." *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2d Cir. 1995) (citation omitted).

Daisy Trust also contends that the MIDAS screenshots accompanying the Meyer Declaration were inadmissible because they were purportedly prepared for purposes of litigation and therefore cannot be considered a proper business record. AOB at 15. But Daisy

Trust confuses the meaning of "prepared for the purposes of litigation," and such an argument runs contrary to all the evidence. "[S]o long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice, the fact that the hard copy offered as evidence was printed for purposes of litigation does not affect its admissibility." *United States v. Hernandez*, 913 F.2d 1506, 1512–1513 (10th Cir. 1990). Accordingly, the fact that the records bear the date July 1, 2016—the date on which the information was pulled from the database and printed—has no effect on their admissibility.

Relying on a federal bankruptcy appeal, Daisy Trust argues that the declarations did not sufficiently authenticate Freddie Mac's computer records. *See* AOB 16-18 (citing *In re Vinhnee*, 336 B.R. 437, 446-447 (9th Cir. Bankr. 2015)). As an initial matter, Daisy Trust failed to make this argument in the proceedings below, despite the fact that *Vinhnee* was decided in 2015, and it has therefore waived such arguments. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (providing that arguments not raised below are waived on appeal). Moreover, *Vinhnee* did not hold that authentication of

computer records requires an eleven-step procedure. Rather, the panel of bankruptcy judges merely held that a bankruptcy court did not abuse its discretion when it applied an especially rigorous authentication standard to computer records where the accuracy of the records was in question.

In particular, the bankruptcy court in *Vinhnee* held that it was unclear whether the creditor providing the records "conducts its operations in reliance upon the accuracy of the computer in the retention and retrieval of the information in question." 336 B.R. at 442. To address the issue, the bankruptcy court established a list of requirements necessary to address this open question and gave the creditor the opportunity to cure the defect with post-trial supplements. When the creditor failed to authenticate the accuracy of the computer's underlying software, the court refused to admit its records. *See Vinhnee*, 336 B.R.at 442-43. In evaluating that decision, the panel of bankruptcy judges criticized the bankruptcy court's requirements as "finicky," but ultimately held that the court did not abuse its discretion. *Id.* at 443. The bankruptcy panel did not opine that such authentication is necessary for all computer records.

Indeed, none of the decisions of the Ninth Circuit or the more than twenty decisions of Nevada's federal courts in related cases has required Fannie Mae, Freddie Mac, or their servicers to satisfy the standard employed in *Vinhnee*. And for good reason: unlike in *Vinhnee*, there is no genuine question about the accuracy of the computer records provided, as they are derived from the systems of record employed daily for the core statutory mission of the Enterprises. Accordingly, there is no reason for the Court to apply the test utilized in *Vinhnee*.

In any event, Wells Fargo's evidence would meet the standard set out in *Vinhnee*. The declaration outlines Freddie Mac's record keeping procedures, identifies the systems on which the organization relies, describes the organizations' use of the computer systems in its everyday business, explains the declarants' method of authenticating the printouts, and outlines the declarants' interpretation of the computer records. JA 147. Thus, there is no issue regarding the authentication of Freddie Mac's business records.

In sum, like the party contesting Freddie Mac's evidence in *Elmer*, Daisy Trust "has not offered any evidence in support of [its] argument," and therefore has failed to "do more than simply show that there is

some metaphysical doubt as to the material facts." *Elmer,* 2017 WL 3822061, at *1.

### 2. Wells Fargo Need Not Provide Additional Evidence That Freddie Mac Acquired Ownership of the Promissory Note When Its Business Records Already Establish Its Ownership Interest.

Daisy Trust argues that Wells Fargo was required to prove that Freddie Mac's acquisition of the Loan conformed with Nevada law, contending that the evidence was insufficient to prove Freddie Mac's acquisition of the loan. *E.g.*, AOB 12-13. This is incorrect.

Daisy Trust's argument essentially amounts to a demand that Wells Fargo produce cumulative evidence of Freddie Mac's ownership of the loan.[10] But a litigant does not need to introduce "all" evidence, just

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[10] Daisy Trust's citation to the Statute of Frauds is a red herring. Contrary to Daisy Trust's argument, Freddie Mac's acquisition of its property interest is not subject to the statute of frauds. *See* AOB at 11. When Freddie Mac purchased the loan, the purchase was not a "promise or commitment to loan money or to grant or extend credit ... by a person engaged in the business of lending money or extending credit." Nev. Rev. Stat. § 111.220(4). Freddie Mac is not in the business of lending money or extending credit. Instead, Freddie Mac "purchases mortgages …., packages them into mortgage-backed securities, and sells those securities to investors, and it invests in mortgage-backed securities itself." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 557 (2017) (describing substantially identical operation of Fannie Mae). Moreover, Daisy Trust provides no support for its suggestion that Wells

"sufficient" evidence of a particular fact to prevail on a motion for summary judgment. Daisy Trust's demand contravenes NRS § 48.035, which expressly counsels against "needless presentation of cumulative evidence." *Id.*, *see also* NRCP 26(b)(2) (instructing courts to limit discovery when "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.").

An insistence on documentation of financial transactions outside of business records "ignores the realities of modern business litigation, where many business records are kept in databases, and parties query these databases in order to provide responses to discovery requests." *Health All. Network, Inc. v. Cont'l Cas. Co.*, 245 F.R.D. 121, 129 (S.D.N.Y. 2007), *aff'd*, 294 F. App'x 680 (2d Cir. 2008). Thus, courts routinely dismiss challenges to database records of financial institutions as evidence of facts about the loans they own or service.

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Fargo must affirmatively prove that Freddie Mac complied with the Statute of Frauds when it acquired the loan. AOB at 12-13, 23. Rather, all Wells Fargo must do is provide sufficient evidence of Freddie Mac's ownership of the loan, which the business records and declarations explain thoroughly. Thus, because Wells Fargo need not rely on any written agreement between the original lender and Freddie Mac to prove its case, there is no need for the evidence of that agreement to be introduced.

*See, e.g.*, *Curley v. Wells Fargo & Co.*, No. 13-CV-03805 NC, 2015 WL 4623658, at *4 (N.D. Cal. July 31, 2015) (finding admissible testimony from a bank employee supported by the bank's business records); *Bever v. Cal-W. Reconveyance Corp.*, No. 1:11-CV-1584 AWI SKO, 2014 WL 5500940, at *7 (E.D. Cal. Oct. 30, 2014) (same).

Moreover, Daisy Trust's characterization of the acquisition of loan ownership is incorrect, as the *owner* and the *holder* of a note may be two different entities. Thus, a transfer of a note has no bearing on ownership, but instead "vests in the transferee any right of the transferor to enforce the instrument." Nev. Rev. Stat. § 104.3203(2). Under Nevada law, "[a] person may be a person entitled to enforce [a promissory note] even though the person is not the owner of the [note]." *Id.* § 104.3301(2). Accordingly, "the status of holder merely pertains to one who may enforce the debt and is a separate concept from that of ownership." *Thomas v. BAC Home Loans Servicing, LP*, No. 56587, 2011 WL 6743044, at *3 n.9 (Nev. Dec. 20, 2011). In *Thomas*, this Court applied the Uniform Commercial Code in an analogous case where Freddie Mac claimed to own a note while BAC was the holder of the note and the record beneficiary of the associated deed of trust. The

Court held there was nothing inconsistent with this situation under Nevada law. *See id.* at *1, 3 & n.9.

Freddie Mac's business records, not the note, are original documents and evidence that establish the relevant facts: the date Freddie Mac purchased the loan and the fact that Freddie Mac owned the loan at the time of the HOA Sale. Daisy Trust does not identify how additional evidence of Freddie Mac's acquisition of the promissory note would be relevant to this case, as the business records that Freddie Mac itself uses in the central business function of keeping track of the loans it acquires provide sufficient evidence of its ownership. *See, e.g.*, *Berezovsky*, 869 F.3d at 932, n.8; *Elmer*, 2017 WL 3822061, at *1.

### 3. MERS's Assignment of the Deed of Trust to Wells Fargo Did Not Change Freddie Mac's Ownership.

Daisy Trust argues that MERS assigned "all beneficial interest" in the Deed of Trust to Wells Fargo. But that does not contradict Freddie Mac's ownership of the Deed of Trust. The assignment language does not suggest any change in ownership of the note or Deed of Trust.

MERS, the original beneficiary in the Deed of Trust, appeared only as nominee for the lender. JA 120. Thus, MERS had only a nominee's interest to transfer when it assigned the Deed of Trust to

Wells Fargo in 2011. The principle of *nemo dat quod non habet—i.e.*, one cannot give what one does not have—confirms that the assignment language could not enlarge the property rights MERS had and could transfer to Wells Fargo. *See Mitchell v. Hawley*, 83 U.S. 544, 550 (1872). Indeed, an "assignee stands in the shoes of the assignor and ordinarily obtains only the rights possessed by the assignor at the time of the assignment, and no more." 6A C.J.S. Assignments § 111; *accord* 55 Am. Jur. 2d Mortgages § 944 (An "assignee of a mortgagee's interest in a mortgage gains only the rights the assignor had.").

Thus, the assignment must be read consistently with black-letter law and Freddie Mac's servicing contracts: the assignment transferred only an interest in the Deed of Trust as beneficiary of record and whatever interest in the note the assignor had. The assignment did not transfer ownership of the note or the Deed of Trust because MERS never had those interests. Daisy Trust's contrary arguments are particularly flimsy given the well-known role of MERS as a nominee and record beneficiary of deeds of trust. *See In re Mortgage Elec. Registration Sys., Inc.*, 754 F.3d 772, 776-77 (9th Cir. 2014); *Cervantes*, 656 F.3d at 1038-39. Thus, under Nevada law, the fact that Wells

Fargo appeared as beneficiary of record at the time of the HOA Sale does not negate Freddie Mac's ownership interest. *See Montierth*, 354 P.3d at 649-651 (recognizing that the deed of trust holder can be separate from the note holder).

### C. Daisy Trust Cannot Rely on the Bona Fide Purchaser Statutes to Avoid Freddie Mac's Protected Deed of Trust.

#### 1. Daisy Trust Is Not a Bona Fide Purchaser.

Daisy Trust claims that even if Freddie Mac had a property interest under Nevada law, Nevada's bona fide purchaser laws would still allow Daisy Trust to claim a free and clear interest because the Deed of Trust was not recorded in Freddie Mac's name. AOB at 30-34. But Nevada's bona fide purchaser laws do not apply here, as Daisy Trust was not a bona fide purchaser. At the time of the HOA Sale, the Deed of Trust was publicly recorded, as Daisy Trust acknowledges. *Id.* at 4.

Therefore, Daisy Trust had "actual knowledge, constructive notice of, or reasonable cause to know that there exist[] … adverse rights" by virtue of the recorded Deed of Trust. *See* Nev. Rev. Stat. § 111.180. It is immaterial whether Nevada's statutes render an *unrecorded* Deed of Trust invalid against a subsequent bona fide purchaser—the Deed of

Trust that Freddie Mac owned was recorded at the time of the HOA Sale. Daisy Trust's discussion of statutes that concern the consequences of failing to record an interest in property, AOB at 31-33, is not relevant here.

While Daisy Trust argues that it had no notice that Freddie Mac was the owner of the note and Deed of Trust, AOB at 32, there is no requirement in the Nevada recording or bona fide purchaser statutes that an HOA sale purchaser receive notice of the *owner* of the note and Deed of Trust. The recording statutes require only that the lien's existence and the identity of the beneficiary of record with whom one could communicate about the lien be included in the record. *See supra* at 37-38.

Furthermore, Daisy Trust cannot dispute that it was dealing in a highly regulated industry in which Freddie Mac and Fannie Mae are by far the largest actors—especially in the aftermath of the recent housing crisis. In 2008, the Enterprises' "mortgage portfolios had a combined value of $5 trillion and accounted for nearly half of the United States mortgage market." *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1080 (D.C. Cir. 2017). Since 2012, "Fannie and Freddie, among other things,

collectively purchased at least 11 million mortgages." *Id.* at 1083. Parties engaged in a regulated business cannot plausibly claim ignorance of the relevant law. *See del Junco v. Conover*, 682 F.2d 1338, 1342 (9th Cir. 1982); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) ("[W]here … the probability of regulation is so great," one operating in that business "must be presumed to be aware of the regulation."). Daisy Trust cannot deny that Freddie Mac's ownership of the Deed of Trust was a foreseeable risk that it took in purchasing the Property at a steep discount at the HOA Sale.

At bottom, Daisy Trust's problem is of its own making; Daisy Trust did not research the law concerning its purchase of the Property, and therefore did not know that the Federal Foreclosure Bar might apply to protect the Deed of Trust from extinguishment. But whether Daisy Trust was consciously aware of the Federal Foreclosure Bar or understood how it could affect its rights has no bearing on the merits of this case. "All citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985).

Furthermore, the Supreme Court has rejected an analogous challenge to a statute allowing enforcement of an unrecorded lien that

the affected party (a secured lender who repossessed property subject to the lien) had no practical means of discovering. *See Int'l Harvester Credit Corp. v. Goodrich*, 350 U.S. 537 (1956). That case concerned a motor carrier's failure to pay a New York state highway tax, and the state's effort to impose and enforce a tax lien on trucks the carrier had purchased on credit from a vendor who retained a security interest in them. *Id.* at 538-42. When New York attempted to enforce its lien, the carrier's trucks had already been repossessed by the vendor under the security arrangement. *Id.* at 542. When the state contended that its unrecorded lien embodied a senior interest, essentially extinguishing the vendor's interest in the trucks, the vendor responded that the enforcement of such an unrecorded lien would violate its right to due process. *Id.* at 543. While the U.S. Supreme Court recognized that the vendor had no notice of the government's unrecorded tax lien before the conditional sale or the later repossession, and lacked any practical means of discovering it,[11] the U.S. Supreme Court upheld the validity

[11] Indeed, state employees were prohibited by law from informing the vendor that the trucks were subject to a tax lien. 350 U.S. at 541, n.7. The dissent focused on the point that the vendor had no reasonable means of avoiding the tax lien, noting that the vendor's only apparent means of doing so would be "by avoiding such sales" in the first place.

and seniority of the state's lien, reasoning that the vendor had subjected itself to the possibility of such a lien by executing conditional sales of trucks operating in New York. *Id.* at 541, 544-46.

As in *International Harvester*, even if Daisy Trust was unaware of Freddie Mac's ownership of the Deed of Trust, that would not make the operation of a statute protecting that lien invalid.

Furthermore, any suggestion by Daisy Trust that the application of the Federal Foreclosure Bar here is unfair elides the fact that Daisy Trust's purchase of a five-bedroom house at an HOA Sale for slightly more than $10,000 was a conscious gamble, just as the vendor in *International Harvester* took a risk in selling trucks in New York. Prior to the this Court's *SFR Investments* decision in September 2014, federal and state courts differed on whether a properly conducted foreclosure on an HOA superlien could extinguish a first deed of trust, and "purchasing property at an HOA foreclosure sale was a risky investment, akin to purchasing a lawsuit." *Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 80 F. Supp. 3d 1131, 1136 (D. Nev. 2015).

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*Id.* at 550 (Frankfurter, J., dissenting).

### 2. The Federal Foreclosure Bar Would Preempt Any Nevada Law That Would Otherwise Allow Daisy Trust to Acquire Clean Title as a Bona Fide Purchaser.

Even if Nevada's bona fide purchaser statutes were read to protect Daisy Trust from Freddie Mac's property interest because Wells Fargo appeared as the Deed of Trust's record beneficiary, the bona fide purchaser statutes would be preempted by the Federal Foreclosure Bar.

As explained above, the Federal Foreclosure Bar preempts the State Foreclosure Statute. *See also Berezovsky*, 869 F.3d at 931; *Elmer*, 2017 WL 3822061, at *1; *Flagstar*, 2017 WL 4712396, at *1. Such "adverse actions … could otherwise be imposed on FHFA's property under state law. Accordingly, Congress's creation of these protections clearly manifests its intent to displace state law." *Skylights*, 112 F. Supp. 3d at 1153.

If interpreted the way Daisy Trust suggests, the Federal Foreclosure Bar would preempt Nevada's bona fide purchaser statutes through conflict preemption because "state law is naturally preempted to the extent of any conflict with a federal statute." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). The conflict between

the Federal Foreclosure Bar and the bona fide purchaser statutes, as Daisy Trust would interpret them, is obvious. The Federal Foreclosure Bar automatically bars any nonconsensual extinguishment through foreclosure of any interest in property held by Freddie Mac while in conservatorship. 12 U.S.C. § 4617(j)(3). However, Daisy Trust's re-interpreted bona fide purchaser laws would allow state HOA lien sales to extinguish Freddie Mac's property interests whenever the associated deed of trust appeared in the name of Freddie Mac's nominee or servicer—an arrangement, as discussed *supra* at 51-52, that is both permitted under Nevada law and used extensively in practice. Federal law thus precludes what state law would permit: extinguishment of Freddie Mac's deed of trust.

## Conclusion

For the foregoing reasons, this Court should affirm.

DATED this 6th day of December, 2017.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the **RESPONDENT'S ANSWERING BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Times New Roman type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 12,273 words.

Finally, I hereby certify that I have read the **RESPONDENT'S ANSWERING BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: December 6, 2017

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## CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On December 6, 2017, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

X **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

*/s/ Ruby Lengsavath*
An Employee of Snell & Wilmer L.L.P.

4826-5943-5862