IN THE SUPREME COURT OF NEVADA

Case No. 72747

DAISY TRUST,

Appellant,

vs.

WELLS FARGO BANK, N.A.,

Respondent.

Appeal from the Eighth Judicial District Court, Clark County
The Honorable Stefany A. Miley, District Judge
District Court Case No. A-13-679095-C

BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF RESPONDENT AND OF AFFIRMING THE DISTRICT COURT'S JUDGMENT

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Federal Housing Finance Agency ("FHFA") respectfully supports Respondent Wells Fargo Bank, N.A. ("Wells Fargo") in this appeal. The district court correctly held that 12 U.S.C. § 4617(j)(3) precluded a state-law homeowners' association foreclosure sale from extinguishing a deed of trust owned by Freddie Mac. This issue directly impacts the interests of Freddie Mac and Fannie Mae (together, the "Enterprises") and of FHFA. To protect those interests and assist the Court, FHFA submits this brief.

The Enterprises are federally chartered entities Congress created to enhance the Nation's housing-finance market. They own millions of mortgages nationwide, including hundreds of thousands in Nevada. In 2008, Congress enacted the Housing and Economic Recovery Act ("HERA"), which established FHFA as an independent agency of the federal government and the Enterprises' regulator. *See* 12 U.S.C. § 4511.

HERA vests FHFA with the power to place the Enterprises into conservatorships or receiverships under statutorily defined circumstances, mandating that as Conservator, FHFA succeeds to all "rights, titles, powers, and privileges" of an entity in conservatorship with respect to its assets. 12 U.S.C. § 4617(b)(2)(A). On September 6, 2008, FHFA's Director placed the Enterprises into FHFA's conservatorship, where they remain today. When FHFA acts in its

capacity as Conservator, its actions are deemed non-governmental for many substantive purposes. While this brief addresses FHFA's statutory powers as Conservator, FHFA submits the brief exclusively in its capacity as an agency of the United States.[1]

FHFA has an interest in this case because reversal of the district court decision would effectively nullify the absolute federal statutory property protection Congress provided to FHFA conservatorships. These protections are crucial to the Enterprises' ability to fulfill their congressionally mandated mission, which is under FHFA's regulatory purview.

INTRODUCTION

This case involves a Nevada homeowners' association's non-judicial foreclosure and sale of real property for unpaid dues owed by the former homeowner (the "HOA Sale"). Under Nevada law—Nevada Revised Statutes § 116.3116(2) (the "State Foreclosure Statute")—such HOA sales, if properly conducted, can extinguish all other preexisting lien interests in the underlying property, including deeds of trust. But the federal statute creating FHFA provides that while an Enterprise is in FHFA's conservatorship, its "property," including its

[1] Under the Nevada Rules of Appellate Procedure, FHFA is permitted, as an agency of the United States, to file this amicus curiae brief without consent of the parties or leave of court, and without a corporate disclosure statement. Nev. R. App. P. 26.1, 29(a).

lien interests, is not "subject to . . . foreclosure." 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar").

The district court correctly held that Freddie Mac had an interest in the deed of trust encumbering the subject property and that Freddie Mac's interest was a property interest protected by the Federal Foreclosure Bar. Conclusions of Law ¶¶ 5-7. FHFA submits this brief in support of Wells Fargo, addressing three basic points.

First, the Federal Foreclosure Bar unquestionably preempts state law and protects the property of the Enterprises while in conservatorship from actions that would extinguish those property interests, as the U.S. Court of Appeals for the Ninth Circuit and numerous federal and state district courts have held.

Second, settled Nevada law—which the Ninth Circuit recently summarized and applied—confirms that where a loan owner's contractually authorized servicer appears as record beneficiary of a deed of trust, as Wells Fargo did here, the loan owner maintains a property interest in the collateral real estate.

Third, if Nevada's bona fide purchaser statute would otherwise permit Daisy Trust to take an interest free and clear of the deed of trust, the Federal Foreclosure Bar unquestionably would preempt that statute. The Federal Foreclosure Bar protects the property of the Enterprises while in conservatorships from actions, otherwise permitted under state law, that would extinguish those property interests.

Accordingly, the Federal Foreclosure Bar, which provides the rule of decision under the Supremacy Clause, preserved Freddie Mac's interest notwithstanding Nevada law.

ARGUMENT

The district court's holding that the Federal Foreclosure Bar preempts the State Foreclosure Statute correctly applied principles grounded in the U.S. Constitution's Supremacy Clause. Interpreting the Federal Foreclosure Bar's straightforward language, three Ninth Circuit decisions, more than twenty decisions from the federal courts in Nevada, and sixteen decisions from Nevada state courts, have held that the Federal Foreclosure Bar preempts the State Foreclosure Statute. *See Berezovsky v. Moniz*, 869 F.3d 923, 931 (9th Cir. 2017); *Elmer v. JPMorgan Chase & Co.*, No. 15-17407, 2017 WL 3822061, at *1 (9th Cir. Aug. 31, 2017) (unpublished); *Saticoy Bay, LLC v. Flagstar Bank, FSB*, 699 F. App'x 658, 658 (9th Cir. 2017) (unpublished); *see also* Wells Fargo Br. at 13-14 nn.3-4 (citing cases).

Further, the district court correctly found that the undisputed evidence supported that Freddie Mac possessed a protected property interest by virtue of its purchase of the mortgage loan, and maintained that interest when Wells Fargo was the record beneficiary of the deed of trust as Freddie Mac's contractually authorized servicer. As a result, the district court properly concluded that the HOA

Sale did not extinguish Freddie Mac's interest in the property, nor did it convey the property to Daisy Trust free and clear of the deed of trust.

I. The District Court Correctly Held That the Federal Foreclosure Bar Preempts the State Foreclosure Statute

The Supremacy Clause provides that courts must recognize the binding effect of federal law:

> This Constitution, and the Laws of the United States … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI cl. 2. Thus, an applicable federal statute preempts contrary state law and provides the rule of decision for cases within its ambit.

The supremacy of federal law is a foundational feature of our federal system. "[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). Thus, "state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

This case presents such a situation. In HERA, Congress intended to facilitate and protect the nationwide secondary mortgage market in which the Enterprises operate by permitting FHFA to place them under conservatorship and by protecting their assets from extinguishment. The district court correctly held

that the Federal Foreclosure Bar preempted Nevada law insofar as that law would extinguish a property interest of Freddie Mac while it is in conservatorship. Conclusions of Law ¶ 4. The Ninth Circuit recently entered the same holding in three cases involving Nevada HOA foreclosure sales of properties encumbered by Enterprise deeds of trust. *Berezovsky*, 869 F.3d at 931; *Elmer*, 2017 WL 3822061, at *1; *Flagstar*, 699 F. App'x at 658.

The Ninth Circuit held 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 [FHFA] property without its consent." *Id.* at 930-31. Moreover, the Federal Foreclosure Bar and the State Foreclosure Statute "impliedly conflict" because "Nevada's law is an obstacle to Congress's clear and manifest goal of protecting [FHFA's] assets in the face of multiple potential threats, including threats arising from state foreclosure law." *Id.* 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; *see also Flagstar*, 699 F. App'x at 658.

Indeed, extinguishment of Freddie Mac's lien by an HOA foreclosure sale would involuntarily erase an FHFA conservatorship's property interest—exactly

what the Federal Foreclosure Bar precludes. To allow the uncompensated extinguishment of the Enterprises' assets would subvert the Conservator's statutory power to "preserve and conserve" those assets. *See* 12 U.S.C. § 4617(b)(2)(B)(iv). Involuntary extinguishment would require FHFA and the Enterprises to develop systems and utilize additional resources to continuously monitor every potential HOA foreclosure sale to protect their interests.[2]

Given the text of the Federal Foreclosure Bar and the purpose of Congress in enacting HERA and providing the protection of the Federal Foreclosure Bar, state law must yield. Reversing the district court's ruling would require disregarding and inverting the language of the Federal Foreclosure Bar as a legal matter; as a practical matter, it would also introduce massive inefficiencies into the operations of FHFA and the Enterprises and waste the limited resources on which those entities rely. Accordingly, this Court should affirm that the Federal Foreclosure Bar protects property interests of Freddie Mac from extinguishment in an HOA foreclosure sale conducted under the State Foreclosure Statute.

II. The District Court Correctly Held That Freddie Mac Maintained Its Property Interest While Its Servicer Appeared as the Beneficiary of Record of the Deed of Trust

In ruling in Wells Fargo's favor, the district court followed Nevada law and recognized that the evidence of Freddie Mac's property interest was undisputed.

[2] Freddie Mac has purchased hundreds of thousands of mortgages in Nevada alone.

The district court decision preserves Freddie Mac's property interest while its contractually authorized servicer, Wells Fargo, appears as the record beneficiary of the deed of trust, which advances important policy objectives.

A. Nevada Law Confirms That a Loan Owner Maintains a Security Interest When Its Contractually Authorized Servicer Appears as the Record Deed-of-Trust Beneficiary

Under Nevada law, Freddie Mac owned the deed of trust and thereby maintained a property interest in the underlying collateral at all relevant times, including at the time of the HOA Sale. *See In re Montierth*, 354 P.3d 648, 650-51 (Nev. 2015). Specifically, this Court recognized in *Montierth* that the owner of a mortgage loan remained a secured creditor—meaning that it had a property interest in the collateral—while MERS, an entity with which the loan owner had an agency relationship, was record beneficiary of the deed of trust. *See Montierth*, 354 P.3d at 651.

Evaluating the same legal issues as this case in a similar factual context, the Ninth Circuit looked to this Court's decision in *Montierth* and concluded that "Nevada law . . . recognizes that . . . a note owner remains a secured creditor with a property interest in the collateral even if the recorded deed of trust names" another entity authorized to act on its behalf. *Berezovsky*, 869 F.3d at 932 (citing *Montierth*, 354 P.3d at 650-51); *see also Elmer*, 2017 WL 3822061, at *1-2 (following *Berezovsky*); *Flagstar*, 699 F. App'x at 658 (same).

Montierth confirmed that Nevada law incorporates the Restatement (Third) of Property: Mortgages ("Restatement"), which acknowledges the routine procedures that institutional mortgage investors like Freddie Mac and Fannie Mae follow in connection with their investments in loans. *Montierth*, 354 P.3d at 650-51. The Restatement outlines the typical arrangement between investors in mortgages, such as Freddie Mac, and their servicers, such as Wells Fargo:

> 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 further 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).

This Court held that it "agree[s] with the Restatement's reasoning," and thus recognizes that a loan owner retains a secured property interest when the entity

appearing as record beneficiary of a deed of trust is a servicer in a contractual relationship with the loan owner. *See Montierth*, 354 P.3d at 651 (citing Restatement § 5.4). The Ninth Circuit explained that in *Montierth*, this Court "relied on the Restatement Third of Property to clarify lien enforceability when the recording document lists the deed-of-trust beneficiary, here [the servicer], but not the note owner, here [the Enterprise]." *Berezovsky*, 869 F.3d at 932.

Moreover, this Court recently cited *Montierth* and the Restatement in discussing the servicing relationship between Freddie Mac and another of its servicers, Nationstar Mortgage, LLC, in a case evaluating related legal issues, and nearly identical facts, to those presented here. *See Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, No. 69400, 133 Nev. Adv. Op. 34, 2017 WL 2709806, at *8 (2017). This Court has thus acknowledged that *Montierth* is relevant to the servicing relationship at issue here, even though *Montierth*'s facts involved MERS, rather than a servicer, acting on behalf of a loan owner.

Here, Wells Fargo was the named beneficiary of record of the deed of trust at the time of the HOA Sale. Findings of Fact, ¶ 7. Wells Fargo established that Freddie Mac maintained a secured property interest in the deed of trust through its purchase of the mortgage loan in November 2007 by relying on testimony from Freddie Mac's employee as well as Freddie Mac's Single-Family Seller/Servicer Guide (the "Guide") that establishes the contractual relationship between Freddie

Mac and Wells Fargo. Findings of Fact ¶¶ 3-9. The Ninth Circuit took judicial notice of Freddie Mac's Guide and held that the relationship between Freddie Mac and its servicers as defined in the Guide met the standard outlined in *Montierth* for Freddie Mac to maintain a property interest. *Berezovsky*, 869 F.3d at 933 & n.9. The Ninth Circuit confirmed 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." *Berezovsky*, 869 F.3d at 932.

Daisy Trust presented no evidence to dispute Freddie Mac's secured property interest or the contractual relationship between Freddie Mac and Wells Fargo. Accordingly, the district court was correct to hold that Freddie Mac maintained its property interest while Wells Fargo was its contractually authorized servicer.

B. Sound Policy Supports Recognition of Freddie Mac's Property Interest

By preserving Freddie Mac's property interest while its servicer appears as beneficiary of record of the deed of trust, Nevada law and its incorporation of the Restatement furthers the objectives of the public mission reflected in Freddie Mac's federal statutory charter and FHFA's conservatorship of Freddie Mac.

Congress chartered Freddie Mac to facilitate the nationwide secondary mortgage market, and thereby to enhance the equitable distribution of mortgage credit throughout the Nation. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113,

1114 (9th Cir. 2014). In furtherance of that statutory mission, Freddie Mac owns millions of mortgages across the country. Indeed, Freddie Mac may acquire only "mortgages"—which are by definition loans *secured* by an interest in real property—not other forms of debt. *See* 12 U.S.C. §§ 1451(d), 1454.[3] Thus, Freddie Mac's business model is premised on maintaining security interests in property; Freddie Mac is not in the business of investing in unsecured promissory notes.

If—contrary to the blackletter law summarized above—the appearance of Freddie Mac's servicer as record deed of trust beneficiary jeopardized Freddie Mac's interests in property securing the loans it owns, Freddie Mac's ability to fulfill its mission would be significantly impaired. Freddie Mac can operate more efficiently as a mortgage investor, and thereby more effectively fulfill its federal statutory mission, by contracting with others such as Wells Fargo to handle the day-to-day administration of the mortgages Freddie Mac owns. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038-39 (9th Cir. 2011) (describing how loan owners contract with servicers and the servicers' role).

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[3] Freddie Mac's charter charges it with the mission of supporting a robust national secondary mortgage market, and Congress intended the Enterprises to align their investment practices with that limited mission. *See DeKalb Cty. v. FHFA*, 741 F.3d 795, 803 (7th Cir. 2013) ("Freddie['s] charter like that of Fannie makes clear that its sole purpose, like Fannie's, is to promote federal home financing policy.").

Servicers maintain relationships with the borrowers of those loans; they accept payments, send notices, and handle inquiries from the borrowers. If a borrower experiences financial difficulty, the servicer works to resolve the default, and, if necessary, may ultimately have to foreclose on the collateral securing the loan. Servicers also receive and respond to other notices relating to the mortgage or the underlying property, and handle litigation that could affect Freddie Mac's interests. In order to allow servicers to perform these servicing duties more effectively, Freddie Mac's servicers may appear as the record beneficiary of the deeds of trust that correspond to the loans that Freddie Mac owns.

Moreover, departing from the well-established Restatement and Nevada law principles supporting Freddie Mac's property interest would hamper FHFA in its statutory mission as Freddie Mac's regulator and conservator. HERA requires that FHFA as regulator ensure that "the operations and activities of [Freddie Mac] foster liquid, efficient, competitive, and resilient national housing finance markets." 12 U.S.C. § 4513(a)(1)(ii). It also empowers FHFA as conservator to "preserve and conserve" Freddie Mac's assets. *Id.* § 4617(b)(2)(B)(iv). Thus, preserving Freddie Mac's property interests while its contractually authorized servicers appear as the record beneficiaries of the deeds of trust that correspond to Freddie Mac's loans advances important policy objectives. To further the goal of the conservatorship in ensuring Freddie Mac is able to support a robust nationwide

secondary mortgage market, it is critical that Freddie Mac maintain a secured interest while it delegates the administrative duties of managing its mortgages to its servicers.

Reversal of the district court's holding would undermine FHFA and Freddie Mac's roles in promoting a stable mortgage market. Such a holding would force Freddie Mac and, by extension, the Conservator to choose between (1) relinquishing the efficiency gained by delegating the management of mortgage servicing to third-party servicers; (2) severely constraining the ability of servicers to perform their duties by refusing to allow them to appear as record beneficiaries; or (3) risking loss of ownership—for no consideration—of the valuable assets that form the core of its statutory mission. Each of these options would impose unnecessary risks and costs to the conservatorship, the mortgage market, and borrowers. Neither law nor the public interest counsels this Court to reach a holding with that effect. Instead, the Court should apply the property protections Congress enacted in the Federal Foreclosure Bar.

III. The Federal Foreclosure Bar Preempts Nevada's Bona Fide Purchaser Statutes

Daisy Trust claims that Nevada's bona fide purchaser laws protect it from any claim based on Freddie Mac's interest in the Property, relying, again, on the fact that Freddie Mac's name did not appear in the public records at the time of the HOA Sale. AOB at 31-34. However, the plain language of Nevada's bona fide

purchaser statutes makes clear that Daisy Trust was not a bona fide purchaser, as the deed of trust was undisputedly recorded prior to the HOA Sale. *See* NRS 111.180; Appellee's Br. at 53-57. But even if Daisy Trust were able to claim bona fide purchaser status and thereby argue it should be released from the lien, that would conflict with the Federal Foreclosure Bar's protection of any property interest of Freddie Mac from extinguishment. Given the Supremacy Clause, bona fide purchaser status under state law does not and cannot supersede the protection granted conservatorship property under federal law. *See supra* at 5-7.

Here, the text of the Federal Foreclosure Bar provides that "[n]o property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of [FHFA]." 12 U.S.C. § 4617(j)(3). The Ninth Circuit recognized 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 [FHFA] property without its consent" and that the State Foreclosure Statute "impliedly conflict[s]" with the Federal Foreclosure Bar because "Nevada's law is an obstacle" to Congress's goal of protecting Enterprise assets during conservatorship. *Berezovsky*, 869 F.3d at 931 (emphasis added).

The same would be true of Nevada's bona fide purchaser statutes if interpreted, as Daisy Trust suggests, to extend bona fide purchaser status to Daisy Trust despite the fact that the deed of trust was recorded prior to the HOA Sale.

Accordingly, Daisy Trust cannot rely on its purported bona fide purchaser status to get around the protection extended by Congress to Freddie Mac's interests during conservatorship; the Federal Foreclosure Bar preempts Nevada law insofar as it would permit that outcome. Appellee's Br. at 53-59.

CONCLUSION

For these reasons, FHFA supports Wells Fargo's request for affirmance of the district court's decision.

DATED: December 18, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on December 18, 2017, a true and correct copy of the BRIEF OF **AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF RESPONDENT AND OF AFFIRMING THE DISTRICT COURT'S JUDGMENT** was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

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

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

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface; or

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

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

Dated this 18th day of December, 2017.

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