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SUPREME COURT

STATE OF NEVADA

DAISY TRUST, Appellant, vs. WELLS FARGO BANK, N.A., Respondent.	Case No. 72747

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Daisy Trust is a Nevada trust.

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

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

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Even if Freddie Mac held an interest in the Property, the court should imply FHFA's consent to the public auction held on August 3, 2012.

The record on appeal does not contain admissible evidence proving that FHFA is "acting as a conservator or a receiver" in the present case as required by 12 U.S.C. § 4617(j)(1).

The record on appeal does not contain admissible evidence of any agreement between the parties to the transfer that alters the effect of the recorded assignment of deed of trust to defendant.

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

ARGUMENT

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

At page 16 of Respondent's Answering Brief, defendant states that the

decisions in Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017), and Elmer v. JPMorgan Chase & Co., — Fed. App'x. — , 2017 WL 3822061 (9th Cir. 2017), establish that "[t]he Federal Foreclosure Bar preempts contrary state law under theories of either express or conflict preemption." Each of these cases, however, involved two issues: one based on federal law and the other based on state law.

The federal law issue is whether the provisions of 12 U.S.C. § 4617(j)(3) apply to an HOA foreclosure sale held under NRS Chapter 116. The state law issue is a non-binding opinion regarding whether or not the regulated entity complied with Nevada law to be the owner of the deed of trust on the date of the foreclosure sale. As an interpretation of the requirements under Nevada law for Freddie Mac to own the deed of trust in the present case, the federal court decisions are not binding.

In Blanton v. North Las Vegas Municipal Court, 103 Nev. 623, 748 P.2d 494, 500 (1987), this Court stated:

> We note initially that the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court. United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075–76 (7th Cir.1970), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 140 (1971). Even an *en banc* decision of a federal circuit court would not bind Nevada to restructure the court system of this state. Our state constitution binds the courts of the State of Nevada to the United States Constitution as interpreted by the United States Supreme Court. Nev. Const. art. I, § 2. See Bargas v. Warden, 87 Nev. 30, 482 P.2d 317, *cert. denied*, 403 U.S. 935, 91 S.Ct. 2267, 29 L.Ed.2d 715 (1971). Further, we have respectfully concluded that *Bronson*, and the decisions of the 9th Circuit panels upon which the federal district court relied, represent an unnecessary and unwarranted expansion of the Supreme Court's holding in *Baldwin*.

This Court has also stated that the Ninth Circuit's interpretation of Nevada statutes does not constitute mandatory precedent, but may be construed as persuasive authority. *See* In re Nevada State Engineer Ruling No. 5823, 128 Nev., Adv. Op. 22, 277 P.3d 449, 456 (2012); Custom Cabinet Factory of New York, Inc. v. District Ct., 119 Nev. 51, 54, 62 P.3d 741, 742-743 (2003).

In Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003), the court stated that "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority and should reject the prior circuit opinion as having been effectively overruled." *See also* United States v. Swisher, 771 F.3d 514, 524 (9th Cir. 2014); CRST Van Expedited, Inc. v. Werner Enterprises, Inc., 479 F.3d 1099, 1106 n.6 (9th Cir. 2007); High v. Ignacio, 408 F.3d 585, 590 (9th Cir. 2005) ("This court accepts a state court ruling on questions of state law."); Rotec Indus., Inc. v. Mitsubishi Corp., 348 F.3d 1116, 1122 n.3 (9th Cir. 2003); Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1146 (9th Cir. 2001); Pershing Park Villas HOA v. United Pac. Ins. Co., 219 F.3d 895, 903 (9th Cir. 2000).

In Owen v. United States, 713 F.2d 1461, 1464 (9th Cir.1983), the court of

appeals recognized that its interpretation of Cal. Civ. Proc. Code § 877.6 (West Supp. 1983) was "only binding in the absence of any subsequent indication from the California courts that our interpretation was incorrect." The Ninth Circuit has also stated that "a state supreme court can overrule us on a question of state law" (Henderson v. Pfizer, Inc., 285 F. App'x 370, 373 (9th Cir. 2008)), and that "we are required to follow intervening decisions of the California Supreme Court that interpret state law in a way that contradicts our earlier interpretation of that law" (Bonilla v. Adams, 423 F. App'x 738, 740 (9th Cir. 2011)).

In O'Brien v. Skinner, 414 U.S. 524, 531 (1974), the Supreme Court stated that "[i]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State."

In Berezovsky, the court acknowledged that its determination of whether Freddie Mac held an interest in the deed of trust was controlled by Nevada law. The court stated:

> Berezovsky maintains that even if the Federal Foreclosure Bar applies to his case and is preemptive, the district court should not have granted summary judgment to Freddie Mac because Freddie Mac did not prove beyond dispute that it holds an enforceable property interest. Berezovsky faults Freddie Mac for never recording its interest, for "splitting" the note from the deed of trust, and for pointing to insufficient evidence to establish its interest for purposes of summary judgment.
>
> **Here, we look to the Nevada Supreme Court's resolution of these issues**. *See* *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82

L.Ed. 1188 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). (emphasis added)
869 F.3d at 931.

In Berezovsky and Elmer, the court of appeals failed to examine Nevada's statute of frauds, the decision in Leyva v. National Default Servicing Corp. 127 Nev. 470, 255 P.3d 1275 (2011), and the public policy stated by this Court in Edelstein v. Bank of New York Mellon 128 Nev. Adv. Op. 48, 286 P.3d 249 (2012).

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

As quoted at page 11 and 12 of Appellant's Opening Brief, this Court stated in Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011), that a deed of trust or an assignment of a deed of trust is a "conveyance" of land as defined by NRS 111.010(1) and must be proved by a signed writing that complies with Nevada's statute of frauds in NRS 111.205(1).

As stated at page 12 of Appellant's Opening Brief, the record on appeal does not contain any document that assigned to Freddie Mac any interest in the deed of trust. Respondent's Answering Brief also does not identify any evidence proving that such an assignment exists.

At page 16 of Respondent's Answering Brief, defendant quotes from Valle del

Sol Inc. v. Whiting, 732 F.3d 1006 (9th Cir. 2013), that express preemption exists when a federal statute "explicitly manifests Congress's intent to displace state law." Defendant, however, does not identify any language in 12 U.S.C. § 4617 that preempts Nevada law on what actions a person must take to be the owner of a recorded deed of trust. As stated at page 10 of Appellant's Opening Brief, the United States Supreme Court held in Butner v. United States, 440 U.S. 48, 55 (1979), that "[p]roperty interests are created and defined by state law."

As stated at page 12 of Appellant's Opening Brief, the record on appeal does not contain admissible evidence proving that Freddie Mac complied with Nevada law to acquire ownership of either the Blume note or deed of trust.

As stated at pages 13 and 14 of Appellant's Opening Brief, the declaration by April H. Hatfield (JA, pgs. 48-54) and the declaration by Dean Meyer (JA, pgs. 146-158) do not prove Freddie Mac's compliance with Nevada law because neither declarant has personal knowledge of the proper execution or possession of the documents required by Nevada law for Freddie Mac to own the Blume note or deed of trust.

12 U.S.C. § 4617 does not contain any language that empowered Freddie Mac to acquire ownership of the Blume note or deed of trust without complying with the

requirements of Nevada law. Nothing in 12 U.S.C. § 4617 makes it impossible for Freddie Mac to comply with Nevada law to be the owner of the Blume note and deed of trust.

At the bottom of page 17 of Respondent's Answering Brief, defendant states that by adopting 12 U.S.C. § 4617(b)(2)(B), "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." No language in 12 U.S.C. § 4617(b)(2)(B) empowers FHFA to ignore state law if FHFA chooses to operate a regulated entity.

As stated at pages 10 and 25 of Appellant's Opening Brief, in United States v. View Crest Garden Apts., Inc., 268 F.2d 380, 383 (9th Cir. 1959), the court of appeals recognized that "state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved." Defendant cites no contrary authority.

Because there is no federal recording system, there are no "federal" rules that govern the transfer or conveyance of an interest in a deed of trust. In addition, 12 U.S.C. § 4617 does not contain any "federal" method of creating "property of the

Agency" independent of state law. As a result, Nevada law controls whether Freddie Mac held an enforceable interest in the Property on the date of the public auction.

By its express terms, 12 U.S.C. § 4617(j)(3) applies only to "property of the Agency," and 12 U.S.C. § 4502(2) defines the word "Agency" as FHFA. The definition of "regulated entity" in 12 U.S.C. § 4502(20) includes Freddie Mac.

As discussed at pages 8 and 9 of Appellant's Opening Brief, the court in Skylights, LLC v. Byron, 112 F. Supp. 3d 1145 (D. Nev. 2015), relied on the language in 12 U.S.C. § 4617(b)(2)(A)(i) to find that "the property of Fannie Mae effectively becomes the property of FHFA once it assumes the role of conservator, and that property is protected by section 4617(j)'s exemptions." 112 F. Supp. 3d at 1155.

As discussed at page 9 of Appellant's Opening Brief, the court did not address the many provisions in section 4617 that treat "property of Fannie Mae" [or "property of Freddie Mac"] as distinct from "property of the Agency." Defendant also does not acknowledge this distinction in Respondent's Answering Brief.

Because the record on appeal does not contain admissible evidence proving that Freddie Mac complied with Nevada law to own the Blume note and deed of trust, that "void" interest was not an "asset" that could vest in FHFA and be subject to 12

U.S.C. § 4617(j)(3).

2. Even if Freddie Mac held an interest in the Property on August 3, 2012, this Court should imply FHFA's consent to the public auction held on August 3, 2012.

At page 19 of Respondent's Answering Brief, defendant describes 12 U.S.C. § 4617(j)(3) as the "Federal Foreclosure Bar." The language used in 12 U.S.C. § 4617(j)(3), however, does not "bar" a nonjudicial foreclosure sale – it only creates a "consent" requirement. Because 12 U.S.C. § 4617(j)(3) creates a "consent" requirement, Congress necessarily imposed on FHFA an obligation to create a procedure by which a party conducting a nonjudicial foreclosure sale could obtain that consent.

Even though the public auction held on August 3, 2012 took place more than four (4) years after the effective date of 12 U.S.C. § 4617, FHFA had still failed to adopt a procedure by which parties could apply for and receive "consent" from FHFA as directed by Congress. FHFA also failed to develop a method by which third parties could determine whether a regulated entity claimed to hold an interest in a particular property and that consent from FHFA was necessary. In the present case, defendant joined in FHFA's failure by failing to make Freddie Mac's alleged ownership of the Blume loan publicly known.

In Cladianos v. Friedhoff, 69 Nev. 41, 240 P.2d 208, 210 (1952), this Court applied the "fundamental principle of justice" that one who causes a failure of performance cannot take advantage of that failure:

> The law is clear, however, that any affirmative tender of performance is excused when performance has in effect been prevented by the other party to the contract. See: 3 Williston on Contracts (Rev. Ed.) 1952 (sec. 677), 2325 (sec. 832); 17 C.J.S. 986, (Contracts, sec. 481); 12 Am. Jur. 889, (Contracts, sec. 333).
>
> As is stated by Mr. Williston (supra, sec. 677): "It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him **or of a condition upon which his own liability depends**, he cannot take advantage of that failure." (emphasis added)

The language used by Congress in 12 U.S.C. § 4617(j)(3) did not authorize FHFA to simply choose never to consent to a nonjudicial foreclosure sale under state law. Because FHFA has violated the intent of Congress when Congress created a "consent" requirement, this Court must imply FHFA's consent in the present case.

At page 20 of Respondent's Answering Brief, defendant states that 12 U.S.C. § 4617(j)(3) "preserved the Deed of Trust from extinguishment, but has no effect on whether title to the Property itself could be transferred." Defendant thereby acknowledges that the public auction held on August 3, 2012 was not barred by 12 U.S.C. §4617(j)(3) and that no consent to hold the sale was required.

Defendant nevertheless claims that unless FHFA consented to the sale, 12 U.S.C. § 4617(j)(3) creates an exception to the "fundamental principle of mortgage

law" that "[a] valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notice under applicable law." Restatement (Third) of Prop.: Mortgages § 7.1 (1997).

Defendant thereby places a burden on persons bidding at an HOA foreclosure sale to determine before bidding whether or not Fannie Mae or Freddie Mac has complied with Nevada law to hold an interest in the deed of trust being foreclosed. It is impossible, however, for a bidder to know that consent is necessary if Freddie Mac's claimed ownership of the subordinate deed of trust is not made known in the public record. As a "principle of fundamental justice," defendant cannot rely on Freddie Mac's unrecorded claim to own the Blume note and deed of trust to prevent the subordinate deed of trust assigned to defendant from being extinguished by the public auction held on August 3, 2012.

At page 21 of Respondent's Answering Brief, defendant states that "Daisy Trust's attempt to rewrite the statute cannot succeed." Defendant, however, seeks to have this Court rewrite the statute and convert a "consent" provision into a "bar" to foreclosure.

At page 22 of Respondent's Answering Brief, defendant states that the

language used in 11 U.S.C. § 4617(j)(2) and 11 U.S.C. § 4617(j)(4) is unlike the language in 11 U.S.C. § 4617(j)(3) because section 4617(j)(3) protects against in rem actions "against the property of the Conservator or Enterprises without their active participation." As discussed above, 11 U.S.C. § 4617(j)(3) instead obligates FHFA to either grant or deny its consent when "property of the Agency" is being sold.

At the top of page 23 of Respondent's Answering Brief, defendant states that "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," but as discussed above, it is impossible for any party to seek FHFA's consent when FHFA has no disclosed interest in the property being sold.

At pages 23 and 24 of Respondent's Answering Brief, defendant cites Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017), and Skylights, LLC v. Byron, 112 F. Supp. 3d 1145 (D. Nev. 2015), as authority that 11 U.S.C. § 4617(j)(3) is not limited only to tax obligations, but as discussed above, neither of these case is a binding interpretation of whether FHFA held an interest in the Property on August 3, 2012.

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/ / /

3. Defendant has not proved that FHFA is acting in the present case as required by 12 U.S.C. § 4617(j)(1).

At page 24 of Respondent's Answering Brief, defendant misstates the arguments made at pages 7 to 9 of Appellant's Opening Brief regarding defendant's failure to prove that FHFA is "acting as a conservator or a receiver" in the present case. At page 25 of Respondent's Answering Brief, defendant states that"FHFA has been acting as Conservator since September 6, 2008," but defendant did not prove that FHFA is "acting" in the present case.

In footnote 6 at page 25 of Respondent's Answering Brief, defendant quotes from Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC, 133 Nev., Adv. Op. 34, 396 P.3d 754, 758 (2017), where this Court stated that "the servicer of a loan owned by a regulated entity may argue that the Federal Foreclosure Bar preempts NRS 116.3116, and that neither Freddie Mac nor the FHFA need be joined as a party." In reaching this conclusion, however, this Court stated that the district court was required to determine "whether Feddie Mac owned the loan in question" and "whether Nationstar had a contract with Freddie Mac or the FHFA to service the loan in question." Id.

In the present case, defendant failed to prove that Freddie Mac complied with Nevada law to hold any interest in the Blume note and deed of trust, and defendant

failed to produce admissible evidence of a servicing agreement between defendant and Freddie Mac or FHFA for the Blume loan.

No such agreement exists in the record on appeal, and neither April H. Hatfield (JA, pgs. 48-54) nor Dean Meyer (JA, pgs. 146-158) stated that she or he had ever seen such an agreement. Defendant also did not prove that the person(s) who make the data entries in defendant's computer database or in SIR must follow any established procedure to confirm the existence of a written servicing agreement for a particular loan before an entity is identified as a servicer in the computer records.

As quoted at pages 11 and 12 of Appellant's Opening Brief, this Court stated that NRS 111.205(1) requires that defendant produce "a signed writing" proving that the Blume deed of trust was assigned to Freddie Mac in a way that complies with Nevada law. Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011). No such "writing" exists in the record on appeal.

Furthermore, as discussed at pages 20 and 21 of Appellant's Opening Brief, Restatement (Third) of Prop.: Mortgages, § 5.4(b) (1997) provides that both the note and deed of trust were transferred to defendant when the assignment of deed of trust was recorded on March 7, 2011 (JA, pg. 120) "unless the parties to the transfer agree otherwise." The record on appeal does not contain admissible evidence of any

agreement that provides "otherwise."

Because defendant did not prove that Freddie Mac complied with Nevada law to own any interest in the Blume note or the Blume deed of trust, FHFA could not "succeed to" any such interest pursuant to 12 U.S.C. § 4617(b)(2)(A)(i).

At the bottom of page 5 and top of page 6 of its motion for summary judgment (JA, pgs. 29-30), defendant stated that its relationship "as servicer of the Loan" with Freddie Mac "as owner of the Loan" was governed by the Freddie Mac Single-Family Seller/Servicer Guide. As discussed at pages 28 and 29 of Appellant's Opening Brief, even if this was true, defendant breached "the entire contract" by not paying the superpriority amount of the HOA's assessment lien.

At page 26 of Respondent's Answering Brief, defendant states that "[i]f a servicer fails in its contractual duties during conservatorship, such failure does not erase the protective effect of the statute." Defendant does not cite any language in the statute that so provides.

At the bottom of page 27 of Respondent's Answering Brief, defendant states that "Daisy Trust is not a party to, or a third-party beneficiary of, that contract and therefore cannot enforce its terms." Defendant cites Skylights, LLC v. Byron, 112 F. Supp. 3d 1145 (D. Nev. 2015), but in that case, both Fannie Mae and FHFA were

parties to the action and filed the joint motion for summary judgment. Id. at 1147.

Defendant also cites Wood v. Germann, 130 Nev., Adv. Op. 58, 331 P.3d 859 (2014), but that case involved whether or not an assignment was void or voidable because it was signed after the closing date in a pooling and servicing agreement.

In the present case, defendant is affirmatively claiming that it has the right to assert legal rights belonging to FHFA pursuant to a servicing agreement that is not part of the record on appeal, that neither April H. Hatfield nor Dean Meyer claims to have seen, and that defendant necessarily breached by allowing the HOA to foreclose its superpriority lien.

This court has stated that "[t]o bind a principal, an agent must have actual authority, express or implied, or apparent authority." Dixon v. Thatcher, 103 Nev. 414, 417, 742 P.2d 1029, 1031 (1987). The record on appeal does not contain admissible evidence proving that defendant has authority to service the Blume loan for Freddie Mac.

At page 28 of Respondent's Answering Brief, defendant states that the Freddie Mac Single-Family Seller/Servicer Guide "is to be interpreted by Freddie Mac, not some third party." Defendant did not prove, however, that Freddie Mac has interpreted the Guide to eliminate the provisions quoted in Appellant's Opening

Brief.

Because defendant did not prove that it has authority to speak for Freddie Mac in the present case, 11 U.S.C. § 4617(j)(3) does not protect defendant's deed of trust from being extinguished.

4. The record on appeal does not contain admissible evidence of an agreement between the parties that alters the effect of the recorded assignment of deed of trust.

At the bottom of page 28 of Respondent's Answering Brief, defendant states that "[t]he 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." (emphasis added)

As discussed at pages 12 to 23 of Appellant's Opening Brief, the record on appeal does not contain any admissible evidence proving that Freddie Mac complied with Nevada law to hold any interest in the Blume note or the Blume deed of trust.

At page 29 of Respondent's Answering Brief, defendant states that "Freddie Mac's property interest" is proved by "Freddie Mac's business records and the declaration of a Freddie Mac employee explaining the relationship between Freddie Mac and Wells Fargo."

As discussed at pages 13 to 20 of Appellant's Opening Brief, neither April H.

Hatfield nor Dean Meyer had personal knowledge of the documents required to transfer the Blume note to Freddie Mac or any written agreement authorizing defendant to service the Blume loan for Freddie Mac. In addition, neither declaration states that defendant and Freddie Mac have procedures that require the documents required by Nevada law to exist before an entry regarding ownership of a particular loan is made in defendant's computer database or in Freddie Mac's computer database.

Because defendant failed to prove that the documents required by Nevada law must exist before the unknown person(s) made the entries in the databases upon which Ms. Hatfield and Mr. Meyer based their declarations, the declarations are not admissible to prove Freddie Mac's ownership of the Blume loan and defendant's authority as servicer of the loan.

At page 29 of its Answering Brief, defendant Bank states that in Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017), and Elmer v. JPMorgan Chase & Co., — Fed. App'x. —, 2017 WL 3822061 (9th Cir. 2017), "materially identical types of evidence were presented," and the court of appeals "concluded that such evidence is sufficient to establish Freddie Mac's property interest under Nevada law."

First, the evidence considered by the court of appeals in Berezovsky and Elmer

is not part of the record on appeal in the present case, so defendant's conclusion is only an assumption. Second, as discussed at pages 2 to 6 above, this Court is not bound by decisions of the federal courts regarding interpretations of state law and what documents must exist for a person to be the owner of a deed of trust.

At page 30 of Respondent's Answering Brief, defendant states that "[c]ourts uniformly have held that mortgage liens constitute property for purposes of the analagous FDIC statute, 12 U.S.C. § 1825(b)(2)." On the other hand, as stated at page 10 of Appellant's Opening Brief, Nevada law determines whether or not Freddie Mac held an interest in the deed of trust recorded against the Property in the present case.

At pages 31 and 32 of Respondent's Answering Brief, defendant quotes from comment c to Restatement (Third) of Prop.: Mortgages, § 5.4 (1997), regarding "the typical arrangement between investors in mortgages, such as Freddie Mac, and their servicers." Defendant italicizes the words: "*It is clear in this situation that the owner of both the note and mortgage is the investor and not the servicer.*" On the other hand, the next sentence in comment c states: "This follows from the express agreement to this effect that exists among the parties involved."

As discussed at pages 20 and 21 of Appellant's Opening Brief, the record on

appeal does not contain admissible evidence of an agreement that provides "otherwise" for the Blume loan. Respondent's Answering Brief also does not identify such an agreement in the record on appeal.

As a result, pursuant to Restatement (Third) of Prop.: Mortgages, § 5.4(b) (1997), the assignment of deed of trust recorded on March 7, 2011 (JA, pg. 120) also transferred "the obligation the mortgage secures" to defendant.

At page 33 of Respondent's Answering Brief, defendant cites Edelstein v. Bank of New York Mellon, 128 Nev. Adv. Op. 48, 286 P.3d 249 (2012), and In re Monteirth (Montierth v. Deutsche Bank), 131 Nev. Adv. Op. 55, 354 P.3d 648 (2015), but as discussed at pages 21 and 22 of Appellant's Opening Brief, the evidence in the record on appeal does not prove that defendant had "an agency or contractual relationship" with Freddie Mac for the Blume loan or that the Blume note was ever transferred to Freddie Mac in a way that complied with Nevada law.

At the bottom of page 35 and top of page 36 of Respondent's Answering Brief, defendant states that "Freddie Mac's business records" and the declaration by Dean Meyer prove that the "transfer" of the Blume note to Freddie Mac "occurred when Freddie Mac purchased the loan in November 2007."

As discussed at pages 13 to 15 of Appellant's Opening Brief, the declarations

by April K. Hatfield and Dean Meyer do not contain any statements made on personal knowledge proving that the Blume noted was transferred to Freddie Mac in a way that complied with NRS 104.3201(1) or NRS 104.3203(2). As discussed at pages 15 and 16 of Appellant's Opening Brief, the screenshots attached to the two declarations do not prove that Freddie Mac complied with Nevada law because neither Ms. Hatfield nor Mr. Meyer testified that an established procedure exists to make sure that Freddie Mac or defendant complied with Nevada law before an entry is made in the computer databases that are the sole basis for the conclusions drawn by Ms. Hatfield and Mr. Meyer in their declarations.

At the bottom of page 36 and top of page 37 of Respondent's Answering Brief, defendant cites Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017), Elmer v. JPMorgan Chase & Co., No. 15-17407, 2017 WL 3822061 (9th Cir. Aug. 31, 2017), and Saticoy Bay, LLC v. Flagstar Bank, FSB, 699 F. App'x. 658 (9th Cir. 2017), and defendant states that "[t]hese cases involved facts materially identical to those presented here." Because the record on appeal in this case does not contain the evidence considered by the court of appeals in the three cases cited by defendant, defendant's description of the evidence in these other cases is pure speculation.

In the present case, the record on appeal does not contain any admissible

evidence proving that defendant was the "contractually authorized representative" for Freddie Mac relating to the Blume loan. The record on appeal does not contain a copy of a written servicing agreement for the Blume loan, and neither Ms. Hatfield nor Mr. Meyer claimed to have personally reviewed such an agreement. Because defendant did not prove that such a written agreement must exist before defendant is listed as a servicer in the computer databases relied upon by Ms. Hatfield and Mr. Meyer, the existence of an entry in the computer database does not prove the existence of the written agreement required by Nevada law.

At page 38 of Respondent's Answering Brief, defendant states that plaintiff "does not deny that the Deed of Trust or its assignment to Freddie Mac's servicer had been properly recorded." As discussed above, however, the record on appeal does not contain admissible evidence proving that defendant is "the loan owner's contractually authorized representative."

At page 39 of Respondent's Answering Brief, defendant states that Nevada's recording statutes "do not require public recording in order for a party to have ownership of a *loan*." As discussed above, in order for Freddie Mac to own the Blume loan, the note had to be negotiated to Freddie Mac in a manner that complies with either NRS 104.3201(1) or NRS 104.3203(2). The record on appeal does not

contain admissible evidence proving that Freddie Mac complied with Nevada law to own the Blume loan.

In addition, the record on appeal does not contain any evidence proving that the deed of trust was transferred to Freddie Mac. The recorded assignment of deed of trust (JA, pg. 120) proves that both the deed of trust and the obligation secured by the deed of trust were assigned to defendant on March 7, 2001 as provided by Restatement (Third) of Prop.: Mortgages, § 5.4(b)(1997).

At the bottom of page 39 of Respondent's Answering Brief, defendant states that plaintiff's argument "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 behalf." Again, however, the recorded assignment of deed of trust proves defendant's ownership of both the Blume note and the Blume deed of trust because defendant did not prove that "the parties to the transfer" agreed "otherwise."

At page 40 of Respondent's Answering Brief, defendant states that "Daisy Trust's argument could render billions of dollars of home loans unsecured, sending the housing-refinance market into chaos." Defendant cites no evidence proving this claim, and "chaos" would only occur for those loans where lenders failed to comply

with the requirements of Nevada law.

At page 41 of Respondent's Answering Brief, defendant states that in Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017), and Elmer v. JPMorgan Chase & Co., No. 15-17407, 2017 WL 3822061 (9th Cir. Aug. 31, 2017), "Freddie Mac presented the same type of evidence in this case before the district court when seeking summary judgment." Because the record on appeal does not contain the evidence considered by the court of appeals in these two cases, this Court cannot conclude that defendant's statement is true.

At page 41 and 42 of Respondent's Answering Brief, defendant repeats its claim that the declaration by Mr. Meyer and the screenshots from Freddie Mac's MIDAS system prove that "Freddie Mac acquired ownership of the loan" in November of 2007. Defendant again fails to identify any evidence proving that the procedures used by Freddie Mac required proof of compliance with Nevada law before the unnamed person entered loan information in the MIDAS system.

At page 43 of Respondent's Answering Brief, defendant states that "Daisy Trust presented *no* evidence to contradict Freddie Mac's ownership of the loan." As discussed at page 23 above, the recorded assignment of deed of trust (JA, pg. 120) proves that both the deed of trust and the obligation secured by the deed of trust were

assigned to defendant on March 7, 2001 as provided by Restatement (Third) of Prop.: Mortgages, § 5.4(b)(1997).

At page 44 of Respondent's Answering Brief, defendant quotes from U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040 (9th Cir. 2009), that computer evidence is admissible as a business record if the witness is "qualified to testify about the business practices and procedures for inputting the underlying data." In the present case, Mr. Meyer's declaration does not prove that he was so qualified. Mr. Meyer does not describe what procedures, if any, exist to make sure that Freddie Mac has complied with the requirements of Nevada law before Freddie Mac is identified as the owner of a loan in MIDAS.

At page 45 of Respondent's Answering Brief, defendant states that plaintiff failed to make its arguments regarding the sufficiency of the computer records below, but plaintiff's argument regarding the inadequacy of the declaration and computer printout attached to defendant's motion is contained in plaintiff's opposition, filed on March 29, 2016. (JA, pgs. 68-70, 74-75, 85) Defendant was prevented from raising specific objections to the declaration by Mr. Meyer and the screenshots attached to his declaration because they were not filed until July 12, 2016. (JA, pgs. 142-158)

In footnote 10 at page 48 of Respondent's Answering Brief, defendant states

that it does not need to "produce cumulative evidence of Freddie Mac's ownership of the loan" because NRS 111.220(4) does not apply to Freddie Mac's business. On the other hand, as quoted at pages 11 and 12 of Appellant's Opening Brief, this Court stated in Leyva v. National Default Servicing Corp. 127 Nev. 470, 255 P.3d 1275, 1279 (2011), that the statute of frauds in NRS 111.205(1) "governs when a conveyance creates or assigns an interest in land."

At page 49 of Respondent's Answering Brief, defendant states that NRS 48.035 and NRCP 26(b)(2) limit the presentation of "cumulative" evidence. Defendant, however, did not present any admissible evidence proving that Freddie Mac complied with Nevada law to own the Blume note and deed of trust.

At page 50 of Respondent's Answering Brief, defendant cites the unpublished order in Thomas v. BAC Home Loans Servicing, LP, Case No. 56587, 2011 WL 6743044 (Nev. Dec. 20, 2011), as authority that "the *owner* and *holder* of a note may be two different entities." In Thomas, this Court analyzed the evidence proving that the promissory note had been properly negotiated and endorsed in blank in compliance with Nevada law. Id. at *3. This Court stated that "[b]ecause BAC is now in possession of the original promissory note and is the holder of the note, BAC is entitled to enforce the instrument against Thomas" and that "since the transfer of

the promissory note carried with it the deed of trust, MERS as the nominee beneficiary holds the deed of trust for BAC's benefit." Id.

As discussed above, the record on appeal does not contain any admissible evidence proving the proper negotiation of the Blume note to Freddie Mac.

Unlike the present case, in Thomas, MERS did not execute and record an assignment of the deed of trust to a third party after the negotiation of the underlying note to BAC.

At page 51 of Respondent's Answering Brief, defendant states that "Freddie Mac's business records, not the note, are original documents and evidence that establish the relevant facts. . . ." Under Nevada law, transfer of ownership of a note and deed of trust is not accomplished by making an entry in a computer database. Defendant must prove the proper negotiation of the Blume note to Freddie Mac and the agreement that the subsequent assignment of the deed of trust to defendant did not transfer the Blume note to defendant.

At page 51 of Respondent's Answering Brief, defendant states that "[t]he assignment language does not suggest any change in ownership of the note or Deed of Trust." Restatement (Third) of Prop.: Mortgages, §5.4(b) (1997) provides that transfer of the deed of trust to defendant "also transfers the obligation the mortgage

secures unless the parties to the transfer otherwise agree."

At page 52 of Respondent's Answering Brief, defendant states that "[t]he assignment did not transfer ownership of the note or the Deed of Trust because MERS never had those interests." This Court held otherwise in Edelstein v. Bank of New York Mellon 128 Nev. Adv. Op. 48, 286 P.3d 249 (2012).

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

At pages 53 and 54 of Respondent's Answering Brief, defendant states that plaintiff cannot be a bona fide purchaser because the deed of trust was recorded at the time of the sale. Plaintiff's knowledge of the deed of trust is irrelevant, however, because "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 419 (2014).

At page 55 of Respondent's Answering Brief, defendant states that plaintiff "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." On the other hand, NRS 111.325 makes defendant's unrecorded claim that the deed of trust was assigned to Freddie Mac void as to

plaintiff. That unrecorded claim cannot protect defendant's deed of trust from extinguishment.

At page 58 of Respondent's Answering Brief, defendant states that "the bona fide purchaser statutes would be preempted by the Federal Foreclosure Bar," but the language quoted by defendant from Skylights, LLC v. Bryon, 112 F. Supp. 3d 1145, 1153 (D. Nev. 2015), does not apply to Nevada's recording statutes.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court reverse the order by the district court granting defendant's motion for summary judgment.

DATED this 10th day of January, 2018.

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CERTIFICATE OF COMPLIANCE

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

been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 6,980 words.

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

DATED this 10th day of January, 2018.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 10th day of January, 2018, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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