MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 FAX
Attorney for plaintiff/appellant
Daisy Trust

Electronically Filed
Aug 12 2019 04:47 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT

STATE OF NEVADA

DAISY TRUST,

Appellant,

vs.

WELLS FARGO BANK, N.A.,

Respondent.

No. 72747

APPELLANT'S PETITION FOR REHEARING

Michael F. Bohn, Esq.
Law Office of
Michael F. Bohn, Esq., Ltd.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 Fax

Attorney for plaintiff/appellant
Daisy Trust

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Nevada cases

Federal and other cases

STATUTES AND RULES:

OTHER AUTHORITIES:

APPELLANT'S PETITION FOR REHEARING

Pursuant to NRAP 40(b)(2), Daisy Trust (hereinafter "plaintiff") petitions the court for rehearing of its opinion, filed on July 25, 2019, on the grounds that the court has "overlooked or misapprehended a material fact in the record or a material question of law in the case."

In particular, the order conflicts with the mandatory language in NRS 111.205(1), 111.315 and 111.325, other opinions by this court, and involves the following fundamental issues of statewide public importance:

1. Whether Freddie Mac complied with NRS 111.205(1) and Nevada's recording statutes to hold any interest in the deed of trust assigned to defendant.

2. Whether the holding in Montierth alters the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 that makes Freddie Mac's alleged interest in the Blume deed of trust void as to plaintiff.

3. Whether defendant provided a proper foundation to admit the computer screenshots upon which the court relied.

4. Whether plaintiff is protected by the conclusive presumptions in NRS 47.240.

/ / /

ARGUMENT

1. Freddie Mac did not comply with the statute of frauds in NRS 111.205(1) or Nevada's recording statutes.

At page 2 of its opinion, this court states that the proper foreclosure of an HOA's "superpriority" lien does not extinguish a first deed of trust "when the Federal Housing Finance Agency (FHFA) owns the loan secured by the deed of trust." 2019 WL 3366241 at *2.

The Blume "loan" is a promissory note secured by a deed of trust. It is the deed of trust that is extinguished by foreclosure of an HOA's superpriority lien.

The promissory note has a promisor and a promisee, or payor and payee. No person or entity is designated as an "owner." The promissory note is not an interest in real property.

A deed of trust is an interest in real property. A deed of trust has three parties: a trustor, a trustee and a beneficiary. No party is designated as an "owner" The beneficiary is the party entitled to enforce the deed of trust to satisfy the terms of the note.

As stated at pages 11 to 12 of Appellant's Opening Brief, defendant did not prove that Freddie Mac complied with the statute of frauds to hold any interest in the Property or the Blume deed of trust on August 3, 2012.

The statute of frauds is a part of the English Common Law. It was codified in Nevada in several statutes in 1861 when Nevada became a territory and is now part of the recording statutes contained in NRS Chapter 111.

In Edelstein v. Bank of New York Mellon, 128 Nev. 505, 522, 286 P.3d 249, 260, this court stated:

> To prove that a previous beneficiary properly assigned its beneficial interest in the deed of trust, the new beneficiary can demonstrate the assignment by means of a signed writing.

In In Re Faulkiner, 594 B.R. 426, 436 (D. Nev. 2018), Judge Nakagawa stated that "the primary purpose of the Statute of Frauds is evidentiary."

This court has stated that the purpose of recording statutes is to provide notice to a subsequent purchaser. *See* SFR Investments Pool 1, LLC v. First Horizon Home Loans, 134 Nev. Adv. Op 4, 409 P.3d 891, 893 (2018); Allison Steel Mfg. Co v. Bentonite, Inc., 86 Nev. 494, 497, 471 P.2d 666, 668 (1970).

Since the time that Nevada was a territory, real estate transactions have been guided by a few simple principles: the creation of any interest in land requires a properly executed written instrument, and any interests in real property that are not recorded are void as to subsequent purchasers.

1. The statute of frauds in NRS 111.205(1) states that **"[n]o estate or interest**

in lands . . . **shall be created, granted , assigned**, surrendered or declared. . . **unless** by act or operation of law, or **by deed or conveyance, in writing, subscribed** by the party creating, granting, assigning, surrrendering or declaring the same. . . ." (emphasis added)

2. NRS 111.010(1) states that "**every instrument in writing**, except a last will and testament, whatever may be its form, and **by whatever name it may be known** in law, by which **an estate or interest in lands** is **created, aliened, assigned** or surrendered" is a "conveyance." (emphasis added)

Both a deed of trust and the "instrument in writing" that is required to alien or assign an interest in a deed of trust are "conveyances" as defined by NRS 111.010(1).

3. NRS 111.315 requires that "[e]very conveyance of real property" shall be recorded.

4. NRS 111.325 states that every "conveyance" that is not recorded "shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be recorded first.

Applying these rules to the present case, for Freddie Mac to have any interest in the Property, there must be a "signed" writing that creates, grants or assigns that

interest to Freddie Mac. No such "signed" writing has been produced.

Furthermore, because no such "signed" writing was recorded before the HOA foreclosure deed was recorded on August 9, 2012, even if the required "writing" exists, NRS 111.325 makes that writing void as to plaintiff.

NRS 111.205(1), NRS 111.315 and NRS 11.325 each use the word "shall," which means that the "writing" required for Freddie Mac to own any "estate or interest" in the Property is mandatory. *See* Pasillas v. HSBC Bank USA, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011).

As stated at page 10 of Appellant's Opening Brief, "[p]roperty interests are created and defined by state law." Butner v. United States, 440 U.S. 48, 55 (1979).

In United States v. View Crest Garden Apts., Inc., 268 F.2d 380, 383 (9th Cir. 1959), the court stated that "state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved."

At page 3 of its order, this court cites Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Ass'n, 134 Nev. Adv. Op. 36, 417 P.3d 363 (2018). In that case, however, the mandatory requirements in NRS 111.205(1), NRS 111.315 and NRS 111.325 were satisfied because a written assignment of the deed of trust to Fannie Mae was publicly recorded before the HOA foreclosure sale. 417

P.3d at 366. In the present case, MERS assigned "all beneficial interest" under the Blume deed of trust to defendant. (JA1, pg. 120)

In Christine View, this Court quoted from 12 U.S.C. § 4617(b)(2)(A)(i) that FHFA shall "immediately succeed to" the "**assets** of the **regulated entity**." 417 P.3d at 366. (Emphasis added)

Because defendant is not a "regulated entity," FHFA did not "immediately succeed to" defendant's recorded interest in the Property.

According to Black's Law Dictionary (10th ed. 2014), an "asset" is "[a]n item that is owned and has value." According to Black's Law Dictionary (10th ed. 2014), the word "void" is defined as "[o]f no legal effect; to null."

Because NRS 111.325 expressly provides that an unrecorded interest in real property is "void" as to a "subsequent purchaser for value," the unrecorded claim by Freddie Mac to "own" the deed of trust assigned to defendant cannot be an "asset" of Freddie Mac.

In addition, NRS 111.325 does not require that plaintiff be a bona fide purchaser without notice to be protected by the mandatory recording laws in NRS 111.205(1), NRS 111.315 and NRS 111.325.

In its opinion, this court identifies the first issue as "whether Freddie Mac must

be identified as the beneficiary of the publicly recorded deed of trust to establish its ownership interest in the subject loan." 2019 WL 3366241at *1. This court also identified "the decisive issue" as "being whether Freddie Mac owned the loan when the HOA foreclosure sale occurred." Id. at *2.

The framing of the issue in this way, however, does not account for the controlling language in NRS 111.205(1), NRS 111.315 and NRS 111.325 and defendant's failure to produce or record the "writing" required by Nevada law.

At pages 11 and 12 of Appellant's Opening Brief, plaintiff quoted this court's discussion of the statute of frauds in Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011).

At page 12 of Appellant's Opening Brief, plaintiff also explained that the "writing" required by NRS 111.205(1) was a "conveyance" as defined in NRS 111.010. At pages 31 and 32 of Appellant's Opening Brief, plaintiff quoted NRS 111.325 that makes the unrecorded "writing" (even if it exists) void as to plaintiff.

At page 14 of Appellant's Reply Brief, plaintiff cited Leyva and 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."

The Nevada statutes are consistent with the statement in comment b to Restatement (Third) of Prop.: Mortgages, § 5.4, pg. 381 (1997), that a "good faith purchaser for value" is "entitled to rely on the record" where there has been an assignment "of the obligation or the mortgage securing it."

In its opinion, this court states that "Daisy Trust points to NRS 106.210 and NRS 111.325 as the relevant statutes." 2019 WL 3366241at *3.

Although plaintiff did include a reference to the incorporation of NRS 106.210 by NRS 107.070 at page 14 of Appellant's Opening Brief, plaintiff's argument based on the statute of frauds does not rely on NRS 106.210. *See* pages 11 and 12 of Appellant's Opening Brief. Plaintiff also discussed Freddie Mac's failure to comply with the statute of frauds in NRS 111.205 at pages 5, 14 and 26 of Appellant's Reply Brief. Appellant's Reply Brief does not cite NRS 106.210.

In its opinion, this court states that "under the applicable version of NRS 106.210, there was no requirement that any assignment to Freddie Mac needed to be recorded." 2019 WL 3366241at *3.

This court's opinion, however, does not discuss the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 that have existed since 1861. NRS 111.315 was last amended in 1995. Consequently, Freddie Mac's failure to record

the "writing" required by NRS 111.205(1) makes any "estate or interest" in the Property claimed by Freddie Mac "void" as to plaintiff.

As stated at page 2 above, "ownership" of a loan does not create an interest in Nevada real property. As a result, even if Freddie Mac "owned" the Blume loan on August 3, 2012, the HOA foreclosure sale held on August 3, 2012 would not violate 12 U.S.C. § 4617(j)(3) because the foreclosure sale did not levy, attach, garnish, foreclose or sell Freddie Mac's "ownership" of the Blume loan. The HOA foreclosure sale instead extinguished the subordinate deed of trust assigned to defendant.

Under Nevada law, as a "sold-out junior lienor," Freddie Mac would retain the ability to file "a personal action on the promissory note." McMillan v. United Mortgage Co., 84 Nev. 99, 437 P.2d 878, 879 (1968). As a result, if the "unitary, indivisible master Servicing contract" required by Section 1.2 of the Freddie Mac Single-Family Seller/Servicer Guide (hereinafter "Guide") does exist, Freddie Mac still has its contractual right that allows Freddie Mac to receive any note payments collected by defendant from the borrower.

On the other hand, because Freddie Mac did not comply with Nevada law to hold any interest in the deed of trust on August 3, 2012, extinguishment of

defendant's deed of trust did not violate 12 U.S.C. § 4617(j)(3)

2. The holding in Montierth does not alter the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 that makes Freddie Mac's alleged interest in the Blume deed of trust void as to plaintiff.

In its opinion, this court cites In re Montierth (Montierth v. Deutsche Bank), 131 Nev. Adv. Op. 55, 354 P.3d 648 (2015), as authority that "even though a promissory note and accompanying deed of trust may be 'split,' the note nevertheless remains fully secured by the deed of trust when the record deed of trust beneficiary is in an agency relationship with the note holder." 2019 WL 3366241at *3.

In Montierth, however, this court did not discuss the impact of NRS 111.010(1), NRS 111.205, NRS 111.315 and NRS 111.325 on an unrecorded claim by a regulated entity to hold an interest in a deed of trust assigned to a third party.

This court focused only on "the legal effect on a foreclosure when the promissory note and the deed of trust are split at the time of foreclosure" and whether "recordation of an assignment of a deed of trust" to the holder of the note would violate the automatic stay provided by 11 U.S.C. § 362. 354 P.3d at 649.

Neither Edelstein v. Bank of New York Mellon, 128 Nev. 505, 286 P.3d 249 (2012), nor In re Montierth, involved a party with a hidden interest trying to claim lien priority over properly recorded interests. As noted at page 3 above, the purpose

of the recording statutes is to provide notice to a subsequent purchaser.

The only parties involved in the Montierth case were the debtors (who signed the note and deed of trust) and the creditor (to whom the note was transferred). This court stated:

> "[A]n unrecorded deed is valid immediately between the mortgagor and the mortgagee." 59 C.J.S. Mortgages § 256 (2009). In Nevada, "perfection of a deed of trust occurs upon proper execution and recordation." *In re Madrid*, 725 F.2d 1197, 1200 (9th Cir.1984), superseded by statute on other grounds, Bankr. Amendments & Fed. Judgeship Act of 1984, Pub.L. No. 98-353, 98 Stat. 333, as recognized in *In re Ehring*, 900 F.2d 184, 187 (9th Cir.1990). Thus, a security interest attaches to the property as between the mortgagor and mortgagee upon execution **and as against third parties upon recordation.** (emphasis added)
>
> 354 P.3d at 650.

Later in the opinion, this Court stated:

> Because the security interest attached and was perfected before bankruptcy, **and separation of the note from the deed of trust did not alter the interests of the parties in this instance**, see *Phillips*, 491 B.R. at 275; *In re Corley*, 447 B.R. 375, 380-81 (Bankr. S.D.Ga. 2011) (explaining that MERS, as the designated nominee of the note holder, had a "fully-secured, first priority deed to [the] secure debt"), we conclude that Deutsche Bank was a secured creditor when the Montierths filed for bankruptcy. (emphasis added)
>
> 354 P.3d at 651.

In In re Phillips, 491 B.R. 255 (Bankr. D. Nev. 2013), the debtor objected to

a proof of claim filed by Seterus. Unlike the present case, Fannie Mae complied with NRS 111.205(1) and NRS 111.315 because there was a recorded assignment of the deed of trust to Fannie Mae. 491 B.R. at 274-275.

Similarly, in In re Corley, 447 B.R. 375 (Bankr. S.D. Ga. 2011), no third party was affected by TBW's endorsement of the note in blank and TBW's role as servicer for Freddie Mac. Id. at 378.

In the present case, however, defendant states that the unwritten and unrecorded transfer of "ownership" of the Blume loan to Freddie Mac removed the HOA's ability to foreclose its superpriority lien rights without first obtaining FHFA's consent. The present case is unlike Montierth for that reason alone.

In addition, Exhibits A and B (JA1, pgs. 51-54) to the declaration by April H. Hatfield (JA1, pgs. 48-50) and Exhibits A to D (JA1, pgs. 151-158) to the declaration by Dean Meyer (JA1, pgs. 146-150) are not the "signed writing" required by NRS 111.205(1) for Freddie Mac to hold any interest in the Blume deed of trust.

As acknowledged by this Court in Montierth, Freddie Mac's rights against plaintiff can only exist "upon recordation." 354 P.3d at 650.

Because no "writing" was recorded prior to the HOA foreclosure sale stating that Freddie Mac held an interest in the Blume deed of trust, that unrecorded claim

is void as to plaintiff.

To hold otherwise would eliminate the protection expressly granted by the Nevada Legislature to plaintiff pursuant to NRS 111.325.

3. The declarations by Ms. Hatfield and Mr. Meyer did not lay a proper foundation to admit the computer screenshots upon which the court relied.

Neither Ms. Hatfield nor Mr. Meyer stated that either had seen the Purchase Contract or the "unitary, indivisible master Servicing contract" required by Section 1.2 of the Guide.

In its opinion, this court stated that "the printouts accompanying Ms. Hatfield's and Mr. Meyer's declarations were probative" on the issue of whether "Freddie Mac owned the loan or that the servicer had a contract with Freddie Mac to service the loan." 2019 WL 3366241at *4.

On the other hand, as stated at pages 16 to 20 of Appellant's Opening Brief, because neither Ms. Hatfield nor Mr. Meyer stated that any person confirmed that the "writing" required by Nevada law for Freddie Mac to hold any interest in the Blume deed of trust existed before Freddie Mac was identified as the owner of a loan in each computer database (or that any person confirmed that the "unitary, indivisible master Servicing contract" required by Section 1.2 of the Guide existed before defendant was

identified as a servicer), defendant did not prove that the "database entries" were made by "a person with knowledge" as required by NRS 51.135.

A data entry made by an unknown person using an unknown process on an unknown date does not prove that the "writing" required by NRS 111.205(1) exists or that the "unitary, indivisible master Servicing contract" required by Section 1.2 of the Guide exists.

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 "Wells Fargo **needed to provide a signed writing** from MortgageIT demonstrating that transfer of interest" and that "**the statement from Wells Fargo itself is insufficient** proof of assignment." 255 P.3d at 1279. (emphasis added)

Because this was the law in effect on August 3, 2012, this court should find that defendant did not meet its burden to prove that the signed writing required by NRS 111.205(1) or the "unitary, indivisible master Servicing contract" required by Section 1.2 of the Guide existed on August 3, 2012.

In its opinion, this court states that "Daisy Trust bore the burden of showing that their declarations or the printouts were *not* trustworthy." 2019 WL 3366241at *5.

On the other hand, the plain language of the recorded instruments proved that defendant, not Freddie Mac, held the interest in the Property on August 3, 2012.

4. The recorded instruments create two conclusive presumptions that defendant was the beneficiary of the deed of trust on August 3, 2012.

NRS 47.240 identifies six "Conclusive presumptions." Two of the conclusive presumptions are:

> 2. The truth of the fact recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title, but this rule does not apply to the recital of a consideration.
>
> 3. Whenever a party has, by his or her own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, the party cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.

The deed of trust does not list Freddie Mac as a party to the deed of trust (JA, pgs. 100-118), and the assignment of deed of trust (JA, pg. 120) does not identify Freddie Mac as an assignee of any interest in the deed of trust.

As discussed above, no party is identified as the "owner" of the deed of trust. The recorded assignments proved that defendant was the beneficiary of the deed of trust on August 3, 2012. Freddie Mac was never identified in any writing as holding any interest in the deed of trust.

Even if defendant was servicing the Blume loan for Freddie Mac, the property interest held by Freddie Mac is not a real property right, but only a right to any proceeds from the Blume note collected by defendant. Freddie Mac did not have the right to enforce the deed of trust because it was not the beneficiary.

The deed of trust was never assigned to Freddie Mac. It was assigned only to defendant, and Freddie Mac is not mentioned in the assignment. Under the rationale of Edelstein, as well as the conclusive presumptions regarding written documents, this court should give credence to the contents of the recorded documents and recognize that defendant was the beneficiary with the right to enforce the deed of trust at the time of the foreclosure sale, not Freddie Mac.

Such a holding would recognize the recording priorities and rules, and the protections granted to purchasers of real property by the Nevada Legislature. The public has the right to rely on the real property recording laws. Because Freddie Mac hid its interests, if any, and kept them unrecorded, and led the public to believe that defendant was the beneficiary of the deed of trust, defendant cannot be permitted to take a contrary position in this litigation. NRS 47.240(3).

CONCLUSION

The ramifications are enormous should this court permit any unrecorded

interest to survive a nonjudicial foreclosure sale. It would create uncertainty in the recording system, which would affect lenders and borrowers, as well as the title insurers they rely upon, in regards to the financing and transfer of properties throughout the state of Nevada.

By reason of the foregoing, plaintiff respectfully requests that this court grant rehearing, withdraw its opinion, filed on July 25, 2019, and enter a new order reversing the order granting defendant's motion for summary judgment, and remanding this case to the district court for further proceedings.

DATED this 12th day of August, 2019.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
Attorney for plaintiff Daisy Trust

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)(5) and the type-style 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 type-volume limitations of NRAP 29(e) 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 4,059 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 12th day of August, 2019

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
Attorney for plaintiff Daisy Trust

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 12th day of August, 2019, a copy of the foregoing **APPELLANT'S PETITION FOR REHEARING** was placed in a sealed envelope with first-class postage fully prepaid thereon and deposited in the United States mail addressed to the following:

Andrew M. Jacobs, Esq.
Kelly H. Dove, Esq.
SNELL & WILMER, L.L.P.
3883 Howard Hughes Parkway
Suite 1100
Las Vegas, NV 89169

/s/ /*Marc Sameroff /*
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.