Case No. 75890

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellant,

vs.

NATIONSTAR MORTGAGE, LLC, A DELAWARE LIMITED LIABILITY COMPANY,

Respondent.

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APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable MICHAEL VILLANI, District Judge
District Court Case No. A-13-684715-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

Apellant, SFR Investments Pool 1, LLC, is a privately held limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

In district court, SFR Investments Pool 1, LLC ("SFR") was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana Cline Ebron, Esq. and Karen L. Hanks, Esq. of Kim Gilbert Ebron fka Howard Kim & Associates. The same attorneys represent SFR on appeal.

DATED this 20th day of November, 2018.

KIM GILBERT EBRON

/s/Jacqueline A. Gilbert
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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A, as the Order granting Nationstar Mortgage LLC's Renewed Motion for Summary Judgment, entered on April 11, 2018, notice of entry of whch was entered the same day, disposed of all claims remaining in the case.[1] SFR timely appealed on May 14, 2018. (5JA_1136-1137.)

ROUTING STATEMENT

This case should stay with the Nevada Supreme Court pursuant to NRAP 17(a)(13)-(14), because it raises issues of first impression. First is the type of evidence that can be used to prove and conclude a given loan is "owned" by Fannie Mae or Freddie Mac such that 12 U.S.C. 4617(j)(3) applies. Here, the district court in making its findings and conclusions on the record stated it was relying solely on the footer on the deed of trust stating the document was prepared on a Nevada—Single Family – Fannie Mae/Freddie Mac UNIFORM INSTRUMENT – MERS. This issue was never raised by either party and therefore, SFR did not have an

[1] Gutierrez's claims against the Association and NAS were dismissed by Order entered on February 14, 2014. (5JA_1155-1156.) The same order resolved NAS's claims against Gutierrez. (Id.) SFR and Gutierrez stipulated to dismiss their respective claims against each other by order entered on May 9, 2014. (5JA_1144-1147.)

opportunity to address the issue at the district court level.[2] Furthermore, this appeal raises issues of first impression that have not yet been adjudicated in a published opinion of this Court: (1) the breadth and scope of *In re Monteirth*,[3] when the parties are not merely in a creditor/debtor relationship as in that case and where the rights of a third party have intervened; and (2) whether the "federal foreclosure Bar" acts to defeat a third-party's rights when Freddie Mac is not the beneficiary of record and a property interest does not attach as to third parties until recorded. These issues may be resolved by cases already pending before the Court,[4] but as yet there is no binding case law on point.

While some of the evidentiary issues raised in this appeal may presumptively be routed to the Court of Appeals, this is an issue that arises so often in these NRS 116 cases – where SFR has had to deal with trial/hearing by ambush related to purported Fannie/Freddie ownership with documents never produced in discovery and which are inadmissible due to failure of authentication/foundation that this Court

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[2] This serves as the basis for SFR's concurrently filed Motion to Supplement the Record, to provide testimony from witnesses for both Fannie and Freddie as to the nature of the form. Evidence that would have been produced had the issue arisen in the district court.

[3] 131 Nev. ___, 354 P.3d 648 (2015).

[4] *SFR Investments Pool 1, LLC v. Green Tree Servicing, LLC*, Case No. 72010, on the issue of whether a deed of trust is property of the FHFA for purposes of 4617(j)(3) when its interest is not recorded in Fannie or Freddie's name as required to attach as to third parties. *See also Nationstar Mortgage, LLC v. Guberland LLC-Series 3*, Case No. 70546 (same).

should retain the case. In too many of these cases the Rules of Civil Procedure and evidentiary standards are ignored or violations excused, where they would not be in other types of cases, such as personal injury.

Finally, this Court should determine the sufficiency of electronic records, especially provided only as partial screen shots to "prove' GSE "ownership" of a note or deed of trust where the public records provide otherwise.

ISSUES PRESENTED FOR REVIEW

1. Whether the footer on a deed of trust stating that the document is Nevada—Single Family – Fannie Mae/Freddie Mac UNIFORM INSTRUMENT – MERS, is proof of Freddie Mac's actual interest in the loan or deed of trust.
2. Whether the district court erred in failing to consider and rule on SFR's Motion to Strike evidence that was unjustifiably disclosed even after the extended discovery period the Bank requested.
3. Whether summary judgment was appropriate when the evidence relied on for proof of Freddie Mac's purported ownership of the loan and deed of trust, and the purported servicing relationship between Freddie Mac and Nationstar was inadmissible, unreliable and contradicted by witness testimony.

STATEMENT OF THE CASE

The real property located at 663 Moonlight Stroll Street, Henderson, Nevada 89002 (the "Property") was subject to foreclosure pursuant to the provisions of Nev. Rev. Stat. § ("NRS") 116.3116, *et seq*. Specifically, Horizon Heights Homeowners Association (the "Association"), through its foreclosure agent, Nevada Association Services, Inc. ("NAS") foreclosed on its lien for delinquent homeowner's association assessments on April 5, 2013, resulting in a sale at public auction to SFR Investments Pool 1, LLC ("SFR") as the highest bidder.

On July 8, 2013, former homeowner, Ignacio Gutierrez ("Gutierrez"), filed its Complaint against SFR, NAS, the Association, and original lender KB Home Mortgage Company for wrongful foreclosure and declaratory relief. (1JA_0001-0010). On August 2, 2013, SFR filed an Answer to Complaint, Counterclaim against Gutierrez, and Third Party Complaint against Nationstar Mortgage, LLC ("the Bank")[5] and Countrywide Home Loans, Inc. ("Countrywide") for Quiet Title, Unjust Enrichment and Injunctive Relief. (1JA_0011-0026.) Bank of America ("BANA"), claiming it was successor in interest to third-party defendant Countrywide, filed an Answer to SFR's Third Party Complaint on October 8, 2014.

[5] Unless otherwise stated, "the Bank" includes Nationstar and its predecessors in interest.

(1JA_44-48.) Although later alleging that Federal National Mortgage Corporation ("Freddie Mac") had owned the loan and the deed of trust since August of 2005, and that MERS as nominee assigned the deed of trust to BANA, BANA, who was allegedly an agent of Freddie Mac, did not assert any of these facts or an affirmative defense of 12 U.S.C. § 4617(j)(3) ("Federal Foreclosure Bar" or "Bar"). (1JA_68, ¶¶ 2-3.) It was not until Nationstar filed its answer, almost a year later, that the Bank asserted that the Deed of Trust as to this Property was precluded from extinguishment by the Bar. (1JA_0049, 54.)

The district court originally entered summary judgment in favor of SFR concluding that Nationstar lacked standing to raise the Bar as a defense.[6] The Bank appealed.[7] This Court authored a published opinion in that case, holding a servicer of a regulated entity (such as Freddie Mac) has standing to raise the Bar.[8] However, the Court remanded for the district court to determine (1) whether the Federal Home Loan Mortgage Corporation ("Freddie Mac") had an ownership interest in the loan and (2) whether there was an actual, contractual relationship between Nationstar and Freddie Mac.[9] The Court also remanded to allow Nationstar to introduce

[6] *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. ___, 396 P.3d 754, 756 (2017).
[7] *Id.*
[8] *Id*. at 758.
[9] *Id.*

evidence to support any equitable claim.[10]

Following remittitur, and over SFR's objection, on July 19, 2017, the district court granted the Bank's motion to reopen discovery for 90 days—until October 17, 2017—to allow it to supplement disclosures and therefore, allow SFR to depose additional witnesses based on those disclosures. (*See* 1JA_59-61.) Despite having this extra time, the Bank failed to disclose Dean Meyer, an employee of Freddie Mac, or his Declaration. (4JA_886.)

On November 15, 2017, the Bank filed a Motion for Summary Judgment against SFR SFR's claims. (1JA_0062-2JA_0336.) In it, the Bank relied on Mr. Meyer's undisclosed declaration in an attempt to authenticate Freddie Mac's computer screen shots. (1JA_0113-119.) On November 16, 2017, SFR filed its Motion for Summary Judgment against the Bank on its claims and against the Bank's claims. (2JA_0337-4JA_0852.) On December 14, 2017, SFR opposed the Bank's Motion for Summary Judgment and filed a Countermotion to Strike the belatedly disclosed Declaration of Dean Meyer, employee of Freddie Mac, and all arguments related to it. (4JA_0853-0930.) The declaration executed on November 10, 2017, well after the close of the extended discovery period and well before it was ultimately belatedly disclosed on November 29, 207, after hours, almost 45

[10] *Id.*

days after the end of extended discovery. (*See* 1JA_0119; 4JA_886.)

Following full briefing and a hearing held on January 17, 2018, the district court took the matter under advisement, and issued its detailed minute order on January 31, 2018. (5JA_1080-1111.) The district court granted summary judgment in favor of the Bank. (5JA_1111-1120.) It found, based on the footer on the deed of trust stating it was a Nevada—Single Family – Fannie Mae/Freddie Mac UNIFORM INSTRUMENT – MERS, that Federal National Mortgage Corporation ("Freddie Mac") "owned" the loan and deed of trust. (5JA_1109.) The Bank did not raise the form deed of trust as evidence of proof in its motion for summary judgment. (See generally, 1JS_0062-2JA_0336.) Thus, SFR did not have the opportunity to brief the issue in its opposition or in its reply. (See generally, 4JA_0853-0930; 4JA_0943-0950.) The district court also found that Nationstar was Freddie's servicer based on screen shots from Nationstar's computer system, and that SFR had not shown that Federal Housing Finance Agency ("FHFA") had consented to the foreclosure and, therefore, the Bar applied. (*See* 5JA_1109, 1116, 1117, 1118.) Thus, SFR took title to the Property subject to the deed of trust. (See 5JA_1109, 1120.) As to the equity claims, the district court found that the Bank failed to provide actual evidence of fraud, oppression or unfairness as to the conduct of the sale and, therefore the sale was "commercially reasonable," that there was no basis to set aside the sale. (5JA_1120.) The District Court also denied as moot SFR's

Countermotion to Strike, based on its decision to determine Freddie's ownership based on the form deed of trust. (5JA_1107-1110).

FACTUAL BACKGROUND

In addition to the facts presented in the Statement of the Case related to the proceedings, SFR presents the following undisputed facts:

DATE	FACTS
1991	Nevada adopted Uniform Common Interest Ownership Act as NRS 116, including NRS 116.3116(2).
March 30, 2003	Association perfected and gave notice of its lien by recording its Declaration of CC&Rs as Instrument No. 20030630002850.[11]
July 20, 2005	Ignacio Gutierrez obtained title to the Property through a Grant Bargain Sale Deed recorded as Instrument No. 200507200004599.[12]
July 20, 2005	First Deed of Trust ("FDOT") in favor of KB Home Mortgage Company recorded as Instrument No. 200507200004600, naming MERS as the nominee beneficiary.[13]
July 10, 2012	Association recorded Notice of Delinquent Assessments as Instrument No. 201207100001296[14]
August 30, 2012	Association recorded Notice of Default.[15]
November 28, 2012	Assignment of First Deed of Trust to Nationstar recorded.[16]
February 20, 2013	Association recorded a Notice of Foreclosure Sale. [17]

[11] 2JA_0363-0364.
[12] 2JA_0365-0375.
[13] 1JA_0089-0111.
[14] 2JA_0400-0401.
[15] 2JA_0402-0404.
[16] 2JA_0405-406.
[17] 2JA_0407-0409.

April 5, 2013	Association foreclosure sale took place and SFR placed winning bid of $11,000.00.[18]
April 8, 2013	Association foreclosure deed vesting title in SFR recorded as Instrument No. 201304080001036.[19] As recited in the Association Foreclosure Deed, the Association foreclosure sale complied with all requirements of law, including but not limited to, the elapsing of 90 days, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the recording, posting and publication of the Notice of Sale. SFR has no reason to doubt the recitals in the Foreclosure Deed — if there were any issues with delinquency or noticing, none of these were communicated to SFR.[20] Further, neither SFR, nor its manager, have any relationship with the Association besides owning property within the community and bidding on properties at auction.[21] Similarly, neither SFR, nor its manager, have any relationship with the Association's agent beyond attending auctions and bidding on properties.[22]
Prior to April 8, 2013	No release of the super-priority lien was recorded.[23] No lis pendens was recorded by Nationstar.[24] The Bank did not allege or argue it made any payment to the Association or NAS.[25] Freddie Mac was never a recorded beneficiary on the deed of trust.[26]

[18] 2JA_0410-0413.
[19] *Id.*
[20] 2JA_0414-0415, at ¶ 7.
[21] *Id.* at ¶ 8.
[22] *Id.* at ¶ 9.
[23] *Id.* at ¶ 10.
[24] *Id.* at ¶ 6.
[25] 1JA_46-47, 51-54.
[26] *Id.* at 0068.

The disputed facts related to whether Freddie Mac "owned" the loan and the deed of trust. The district court did not rely on the Dean Meyer declaration, instead relying solely on the form deed of trust as proof of Freddie's ownership. (5JA_1109.) Thus, the district court denied SFR's motion to strike as moot. (*Id.* at 1110.)

Also disputed was Nationstar's alleged relationship with Freddie Mac as a servicer. The district court found Nationstar did service the loan based on a screen shot from Freddie Mac's computer records which, as demonstrated below, are unreliable at best. The district court also found the relationship through Nationstar's records, the same records Keith Kovalic, Nationstar's Rule 30(b)(6) witness, was unable to authenticate, and could not lay foundation for. (2JA_0348-350; .)

SUMMARY OF ARGUMENT

Mortgage lenders and their agents, like the Bank, bet on their interpretation of NRS 116.3116(2) and refused to accept that their FDOT could be extinguished by a homeowners association's superpriority lien—something unanimously decided by this Court in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014). After mortgage borrowers had defaulted on their loans, lenders delayed their own foreclosures at the expense of the associations, who went years without being paid any money for the services they provided. As such, the associations were forced to foreclose on their liens for unpaid assessments. It was the lenders' arrogance and (in)action that led to the loss of their collateral – not

the state's actions, and certainly not the actions of SFR.

The foreclosure deed recitals provided that the subject foreclosure sale was properly noticed and conducted; this resulted in the extinguishment of the Bank's FDOT. Moreover, there was never any indication whatsoever that Freddie Mac, or any entity other than the recorded beneficiaries, owned the Note and FDOT. As such, the District Court erred in granting Nationstar's Motion for Summary Judgment, forcing SFR to take the Property subject to the FDOT, for the following reasons:

First, the Bank failed to bring any admissible evidence that Freddie Mac had an ownership interest in the Property. While the documents attached to the Dean Meyer declaration had been disclosed during discovery, the declaration which was necessary to attempt to authenticate the documents and lay foundation was not. Without that, Freddie's alleged ownership could not begin to be proven. When SFR moved to strike the declaration, the district court found what it deemed to alternative admissible evidence of Freddie's ownership: the deed of trust. The district court erroneously found that the form proved such ownership, and any inference of such should have been in the light most favorable to SFR. As none of the parties raised this as evidence of such ownership, and the Bank never asserted it in its statement of undisputed facts, SFR had no opportunity to brief the issue. Thus, as seen in the testimony attached to SFR's Motion to Supplement the Record, filed concurrently

herewith, the district court erred in relying on this form deed of trust. To the extent the Order Granting Nationstar Mortgage LLC's Renewed Motion for Summary Judgment ("Order") says otherwise, then it belies the district courts deeming SFR's Motion to Strike as moot. If the Court relied on the Dean Meyer declaration to authenticate any documents for ownership, it would have denied SFR's Motion to Strike outright, which it did not do, either in the minute order or in the Order.

This Court too, should deem the declaration and any argument supported by the declaration as inadmissible. The Bank claimed it inadvertently forgot to attach the declaration to its motion for summary judgment. But the failure was not inadvertent. The declaration was not even executed until after the motion was filed. It could not have been a simple oversight of not attaching it at the time of filing. The declaration did not exist. This Court should not countenance such blatant disregard for the rules of both evidence and discovery under NRCP.

Without admissible evidence of Freddie's ownership, the grant of summary judgment in favor of the Bank based on the Bar must be reversed.

Second, because the Bank failed to provide admissible evidence of Freddie's ownership or interest in the loan and deed of trust, the Bank's assertions as to alleged servicer relationship are immaterial. But to the extent this Court deems otherwise, the Bank failed to bring admissible evidence that Nationstar had an actual, contractual servicer relationship with Freddie Mac as to this Property. The district

court relied on Freddie Mac's screen shots to prove the relationship. But the Bank's Rule 30(b)(6) witness, Keith Kovalic, could not testify to any of Freddie's documents. Nor could he authenticate and lay foundation for the screen shot from Nationstar's computer system. The Bank attempted to rely heavily on Freddie Mac's Servicing Guide as proof of its relationship. But that public document does not create such a relationship. If it did, anyone who downloads and reads the document could claim such a relationship without providing more. The evidence provided by Nationstar was insufficient to prove any relationship and was not admissible due to lack of authentication and foundation.

STANDARD OF REVIEW

While this Court reviews "summary judgment de novo, without deference to the findings of the lower court[,]" *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is only appropriate with the moving party is entitled to judgement as a matter of law. *Id.* at 731, 121 P.3d at 1031; see also NRCP 56(c). In ruling on a motion for summary judgment the court must view all evidence and reasonable inferences drawn from it in the light most favorable to the non-moving party. *Humphries v. New York-New York Hotel & Casino*, 133 Nev. ___, ___, 403 P.3d 358, 360 (2017), *citing Wood,* 121 Nev. at 729, 121 P.3d at 1029. Additionally, it also relies upon a number of presumptions in Nevada law regarding the validity of the foreclosure sale and deed, and the conclusive recitals contained in

the foreclosure deed. *See* NRS 47.250(16)-(18); *see also Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 670, 918 P.2d 314, 319 (1996) ("[T]here is a presumption in favor of the record titleholder"); NRS 116.31164, 116.31166; *see also Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. ___, ___, 405 p.3d 641, 646 (2017). Thus, the Bank bears all the burden to show why the Association's foreclosure sale should not be set aside. *Shadow Canyon*, 405 P.3d at 646.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING FREDDIE MAC "OWNED THE LOAN" SUCH THAT THE FEDERAL FORECLOSURE BAR APPLIED TO CLOUD SFR'S TITLE.

A. The Form Deed of Trust is Not Proof of Freddie Mac's Interest

The district court erroneously relied on the deed of trust as proof of Freddie Mac's interest in the loan and deed of trust. (5JA_1109.) The footer on the deed of trust states "Nevada—Single Family – Fannie Mae/Freddie Mac UNIFORM INSTRUMENT – MERS." (1JA_0089.) First, the district court erred in drawing the inference in favor of the Bank. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. To the extent Freddie, or Fannie as it also implies, ownership can be inferred from the form deed of trust, the district court should have drawn such inference that the form may not demonstrate such ownership—especially since it names both Fannie and Freddie.

Second, the Bank never raised this as a means to prove such interest, not even alleging it as an undisputed fact. (1JA_0062.) That is because it knows that the footer on the bottom of the deed of trust proves nothing. In fact, Jessica Woodbridge, on behalf of BANA has testified that the form deed of trust was adopted so lenders would not have to "reinvent the wheel every time." Also that "if you were intending to sell the note on [sic] or the mortgage, the deed of trust on to somebody else, you wouldn't [sic] want to put it on the paper that would give you the most value and allow you to sell it to the most -- to the widest audience [Fannie Mae and Freddie Mac]." *See* Motion to Supplement, Exhibit A. But simply using the form does not mean the mortgage was necessarily sold. As Eric Maltese, witness for Fannie Mae, has testified at trial, "this is a form for Nevada with MERS being the beneficiary that is acceptable for Fannie and Freddie to acquire such loans that are written on this type of form." Id. at Exhibit B. The witness did not say that the fact of the form means the loan was actually acquired by Fannie or Freddie, it is simply the acceptable form to use if the lender opts to sell to one of the entities. In fact, SFR owns properties for which the deed of trust was on such a form deed of trust but the loan could not have been acquired by Fannie or Freddie due to the amount of the loan. This includes the property at issue in the *SFR* case. Id. at Exhibit C-D. Finally, Freddie Mac's own website states that it "encourages originators to use the Fannie Mae/Freddie Mac Single-Family Uniform instruments whenever possible; however,

Freddie Mac Seller/Servicers must use the applicable Single-Family Uniform Instruments for Mortgages delivered and sold to Freddie Mac." *Available at* www.freddiemac.com/uniform/unifsecurity.html. Even Freddie Mac acknowledges that all deed of trusts using the forms are not acquired by Freddie Mac (or Fannie Mae, as Fannie has testified, see above).

Thus, neither the district court, nor this Court can find proof of Freddie Mac's purported ownership based simply on the instrument used for the deed of trust. This Court must reverse based on the foregoing.

B. The District Court Failed to Rule on SFR's Motion to Strike, or if It Impliedly Did, Failed to Make Finding Related to Its Denial

After the close of the second round of discovery (following remand), and indeed during the competing Motions for Summary Judgment, the Bank—for the first time—produced a Declaration of Freddie Mac employee Dean Meyer, which included exhibit printouts of Freddie Mac's alleged databases. (1JA_0112-0268.) This declaration, which purported to authenticate the Freddie Mac screen shots, was executed on November 10, 2017, **after** the Bank filed its Motion for Summary Judgment. (1JA_0119)As a result of this eleventh hour production, SFR filed a (Counter)Motion to Strike these documents as untimely and improper. (4JA_0853-0930.) However, without considering SFR's arguments on the merits, the District Court instead concluded in its Minute Order dated January 31, 2018 - ***after*** granting

summary judgment in favor of the Bank - that "SFR's Countermotion to Strike the declaration from the Freddie Mac employee is moot." (5JA_1109.) The district court did not deny SFR's motion to strike on the merits. Determining it as moot means the court did not have to reach the merits because some other determination made it unnecessary to consider. *See, e.g., In re Discipline of Serota*, 129 Nev. 631, 636, 309 p.3d 1037, 1040 (2010). It appears from the Minute Order that using the deed of trust to prove Freddie's ownership was a workaround to having to directly address SFR's motion to strike and rendering the motion moot. (5JA_1109.)

But, the Order granting summary judgment clearly relied on the Dean Meyer declaration and related exhibit database printouts, concluding that "Nationstar, as servicer for Freddie Mac, has an interest in the Property through its contractual servicing relationship with Freddie Mac and as the beneficiary of record of the Deed of Trust . . . [as] evidenced by . . . Freddie Mac's MIDAS database . . . as well as the testimony of Freddie Mac's employee []." (5JA_1116.) Because the District Court relied on this evidence in arriving at its conclusion to grant summary judgment in favor of the Bank, it was erroneous for the District Court not to first consider SFR's Motion to Strike on the merits and to make findings as to why the evidence was admissible. To the extent this Court does not reverse on the reason stated by the district court in the Minute Order, then this Court should not only consider SFR's Motion to Strike, but hold that it should be granted.

C. The Bank Disregarded NRCP 16.1, Despite having Additional Time to Disclose Dean Meyer; His Declaration and All Argument Relying on It Should be Disregarded.

NRCP 37(c)(1) provides that a party is not permitted to use as evidence information or witnesses that, without substantial justification, it failed to properly disclose pursuant to NRCP 16.1, 16.2 or 26(e)(2), unless the failure to disclose was harmless. NRCP 37(c)(1).

On remand, the district court granted the Bank's request for further discovery. (1JA_0056-61.) It granted an additional 90 days to make further disclosures and allow SFR time to depose any additional witnesses. (*Id.*) The extended discovery closed on October 17, 2017, nearly one month before the Bank filed its Motion for Summary Judgment. However, without the agreement of counsel, permission from the Court, or substantial justification, the Bank unceremoniously attached to its Motion for Summary Judgment the Dean Meyer Declaration, a Declaration of Freddie Mac employee, Dean Meyer, along with alleged Freddie Mac Database printouts. The Bank never disclosed Freddie Mac nor Den Meyer in its disclosures pursuant to NRCP 16.1.

SFR properly filed a Motion to Strike this impermissible Freddie Mac evidence, due to its untimeliness and as violative of NRCP 16.1 and NRCP 37. In its Motion, SFR explained that the Bank's use of this never-disclosed evidence

would "severely prejudice" SFR. (4JA_0856.) Rather than considering the merits of this argument, however, the District Court proceeded to grant summary judgment in favor of the Bank, relying on these precise pieces of evidence. (5JA_1112-1120.) The Order never mentioned any decision on SFR's motion to strike or the courts having deemed the motion "moot." , and thereafter deeming SFR's Motion to Strike "moot." (5JA_1107-1110; 1112-1120.) Because the Bank failed to properly disclose Mr. Meyer or the exhibits attached to the declaration, SFR was never afforded the opportunity to conduct discovery as to Mr. Meyer's Declaration or exhibits. Had the Bank complied with the Rules, SFR would have done so. (4JA_0885-888.)

D. There Could Be No Substantial Justification for the Bank's Failure to Timely Produce Freddie Mac Evidence.

Certainly there is no substantial justification for Nationstar's failure to disclose this evidence prior to the close of discovery, since the Loan was initiated in 2005; according to Nationstar, Freddie Mac allegedly possessed an ownership interest since that time; and this action has been proceeding for several years. In other words, these were not documents outside of Nationstar's possession or control, nor were they newly discovered.

In response to SFR's motion to strike, the Bank argues that the Rules allow it to supplement at any time, even after discovery closes. (5JA_988.) The Bank also tries to shift the burden to SFR to tell it that it "**inadvertently** failed to disclose a

witness." (5JA_994.) Its reasoning is that SFR knew that Freddie's ownership was "front and center." (*Id.*) But the Bank then argues that SFR cannot claim prejudice or claim that it believed Nationstar's failure to timely disclose a witness was purposeful. (Id.) Yet, Nationstar expressly stated that **it's** corporate representative would provide information on Freddie's ownership. (4JA_887.) SFR attempted to get information from Nationstar about the documents Dean Meyer attempts to authenticate, but Nationstar refused to explain the documents. (*Id.*) But it is not SFR's duty to tell the Bank who it should use to make its evidence admissible. The Bank bears that burden and, as in every other class of cases, if a party fails to timely do so, that party cannot rely on that evidence. This case should be no different. The issue is not whether SFR knew Freddie's ownership was at issue, it is whether the Bank followed the Rules to prove its case. It did not. Again, any inference regarding this evidence must be viewed in SFR's favor.

The District Court's failure to consider SFR's untimeliness arguments is particularly concerning when 4617(j)(3) was the sole basis for the District Court's order granting summary judgment in favor of the Bank. As such, this Court should remand for the District Court's consideration of these arguments, including the possibility of sanction by exclusion of use of the documents, witnesses and arguments for failure to timely disclose. NRCP 37(c). Alternatively, this Court should remand with instructions to enter judgment in favor of SFR.

II. EVEN IF THE FREDDIE MAC EVIDENCE WAS TIMELY AND PROPER, WHICH IT WAS NOT, IT IS STILL INSUFFICIENT TO ESTABLISH THE REQUISITE OWNERSHIP AND RELATIONSHIP, AS IS THE NATIONSTAR EVIDENCE.

This Court recently held in this case on prior appeal that the servicer of a loan owned by a regulated entity such as Fannie Mae *may* have standing to assert a 4617(j)(3) defense in a quiet title action, should both a government enterprise's ownership and a contractual relationship between it and servicer is established.[27] *Nationstar Mortgage, LLC*, 133 Nev. Adv. Op. 34 (*citing Montierth*, 131 Nev. ___, 354 P.3d 648, 651 (2015)("[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.")). This is important because it is the establishment of ownership and an existing contractual relationship between servicer and owner which dictates whether the servicer can act on behalf of the owner.

A. The Freddie Mac Evidence is Unreliable and Lacking to Show Either Freddie's Ownership of the Loan or a Servicing Relationship with Nationstar.

The Bank had a second opportunity, on remand, to bring forth its evidence in support of its 4617(j)(3) defense: it failed to do so. However, even assuming for the sake of argument that the Freddie Mac evidence was timely—which it was not—the

[27] A point of note, however, is that this Court *did not* decide the merits of whether 4617(j)(3) preempts NRS 116.3116 et seq., or whether Freddie Mac property is property of the FHFA for purposes of 4617(j)(3).

evidence is nonetheless insufficient and conflicting. In short, the district court erred in considering this evidence sufficient to establish that Freddie Mac owned the Loan and that Nationstar had an actual, contractual servicing relationship with Freddie Mac as to this Property.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c). When a court reviews a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed ***in a light most favorable to the nonmoving party***." *Wood v. Safeway, Inc.*, 121 Nev. at 729, 121 P.3d at 1029 (emphasis added). Because the Freddie Mac evidence produced by the Bank with its motion for summary judgment was untimely and improperly disclosed, this should alone warrant reversal and remand for judgment to be entered in favor of SFR, or at the very least for consideration. However, notwithstanding the procedural issues with the evidence, the District Court also erred in determining that Freddie Mac acquired the loan, Nationstar serviced the loan, Freddie Mac owned the loan at the time of the foreclosure sale, and Nationstar was servicer of the loan at the time of the foreclosure sale. (5JA_1111-1120.)

First, the Meyer Declaration, while it purports to establish the screenshots as business records, it falls short. Mr. Meyers fails to explain how the system operates, whether there is backup, who has access, whether a person can tell if the information has been altered and what the screenshot would look like at the time the events happened. *See In re Vee Vinhnee*, 336 B.R. 437, 444 (B.A.P. 9th Cir. 2005) When business records exist in electronic form, the focus is not so much on the creation of the record, "but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created." *Id.* It is not sufficient to identify the computer program. Instead, Freddie Mac is required to show the "entities policies and procedures for the use of the equipment, database, and programs." *Id.* The custodian of records must also establish how access to the system is controlled, how changes are logged and recorded, and the implementation of backup systems. *Id*.

Mr. Meyers provides none of this information. These screen shots were created in November 2017 during ongoing litigation. Mr. Meyers does not explain how these screenshots are preserved, and, in fact, states that these records are "maintained and kept" by Freddie Mac. (1JA_115.) Therein lies the problem. For example Mr. Meyer uses a screenshot to purportedly prove that Freddie Mac purchased the loan in 2005, from Bank of America, N.A. (1JA_0116.) But, Bank of America, N.A.'s involvement with the loan did not happen until it was the successor

by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP. (1JA_0116; 2JA_270.) This merger took place in July 2011, so Freddie Mac could not have purchased the loan from Bank of America, N.A. in 2005. Thus, the inference is that the information in the computer is subject to alteration, making it unreliable, as it could be changed at any time. Thus, Mr. Meyers cannot confirm that the screenshot would have been the same in 2005 and 2013 as it is today.

Further, Freddie Mac's untimely documents and declaration were questionable on their face and required further inquiry, if not outright rejection. (4JA_0855-0857.) First, the screenshots are partially illegible, incomplete with information missing where it should be, and all redacted without a privilege log. (*See, e.g.,* 1JA_0121-122.) The screenshots were incomplete and missing information, leaving one to wonder what was redacted, particularly since no privilege log accompanied the document. Thus, an inference should be drawn that the information would be harmful to the Bank. *Cf. Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 107 (2006) (rebuttable presumption that destroyed evidence is adverse to the destroying party). Further, the screenshots were dated in July 2017, a date which bore no relevance to the 2013 Association foreclosure sale, nor the motions. (*Id.*) Moreover, the screenshots do not match what Mr. Meyer testifies and belie the recorded documents and testimony of Nationstar employees; for example,

screenshots list Bank of America—not Nationstar—as "active" and possessing a power of attorney during times when Nationstar was alleged to have been servicing the loan and allegedly possessing a power of attorney. (*Id.*) Additionally,

Further, the screenshot purporting to show Nationstar as the current servicer is also questionable because it contradicts Nationstar's sworn testimony that it has a written power of attorney with Freddie Mac: the screenshot notes "NO" next to "Power of Attorney." (Compare 1JA_127 with 4JA_428 at p.30.) These are just a few of the irregularities with the Meyer Declaration and documents it attempts to authenticate and rely on for proving Freddie Mac's purported ownership or Nationstar's purported relationship.

Similarly, Meyer's statement regarding the Servicing Guide "govern[ing] the contractual relationship between Freddie Mac and its loan servicers nationwide[,]" along with a generic servicing guide, does not establish that an actual, contractual relationship existed as to this Property between Freddie Mac and Nationstar. (1JA_0118.) In other words, this evidence is insufficient to establishing actual servicing dates or the existence of a servicing relationship, an important consideration in a servicer's authority to act on behalf of a government sponsored enterprise. There must be more than a general document applicable to a universe of people, to establish that an actual relationship existed here

These improper, incomplete and conflicting documents were precisely those relied upon by the District Court in granting summary judgment in favor of the Bank. (5JA_1116) ("Nationstar, as servicer for Freddie Mac, has an interest in the Property through its contractual servicing relationship with Freddie Mac and as the beneficiary of record of the Deed of Trust . . . [as] evidenced by . . . Freddie Mac's MIDAS database . . . as well as the testimony of Freddie Mac's employee []." (5JA_1116.)

Finally, the Bank was also required to provide evidence that Freddie Mac purchased an interest in the deed of trust, which Nevada law requires must have been memorialized in a written agreement. NRS 111.325. Nothing of the sort has been proffered.

Because these documents fail to prove the Bank's case, and because the district court should never have relied on them, this Court should reverse and remand.

B. The Nationstar Evidence is Similarly Flawed.

Nationstar's records from its own computer program are similarly flawed as the Freddie Mac records. Keith Kovalic, Nationstar's Rule 30(b)(6) witness could not identify or explain the meaning of all the input on the screenshots, screenshots created in 2017. (2JA_348, 425, 464.) Further, he could not authenticate the

information because he did not know who input the information into the computer and did not know if any department within Nationstar would have that information. (2JA_349, 426 at p. 22.) Further, Mr. Kovalic stated that there should be written powers of attorney between Nationstar and Freddie Mac, but he only reviewed those dated 2014-2016, not one for the time of the foreclosure sale. (4JA_429 at pp. 36-37, 430 at p.40.) Further, he had never actually seen the originals, only digital copies. And, to the extent the Bank relies on the Declaration of AJ Loll for its records (4JA_956-958), it too suffers from the same deficiencies as Mr. Meyers as to electronic records. The screenshot relied on has no date on it, though presumably it is from 2017 based on some entries. (4JA_963.) As stated above, when business records exist in electronic form, the focus is not so much on the creation of the record, "but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created." In re *Vee Vinhnee,* 336 B.R. at 444. But nothing in the Loll Declaration advises if and how the records can be altered, and by who or if the screen shot would look the same in 2012 when Nationstar purports to have begun servicing the loan and in 2013 when the sale happened as it does at the time this shot was taken.

Accordingly, there is no admissible evidence of any servicing relationship with Freddie Mac at the time of the Association's foreclosure sale. The district court's grant of summary judgment should be reversed.

III. THE APRIL 2015 PRESS RELEASE IS INADMISSIBLE HEARSAY.

In its Order granting summary judgment in favor of the Bank, the District Court concluded that "SFR failed to provide proof Freddie Mac or the FHFA consented to the HOA Sale extinguishing or foreclosing Freddie Mac's interest in the Property." (5JA_1116.) The Court went on to state that "FHFA's April 21, 2015 Statement confirms that there was no such consent here." (5JA_1116.) The April 21, 2015 Press Release relied on by the Bank constitutes inadmissible hearsay. It is neither a statute nor regulation, nor does it meet the standard for any hearsay exception. It is not authenticated and does not qualify as a "public record." Moreover, it was prepared well after the foreclosure in this case, and for the purposes of litigation. Thus, it calls into question the relevance and authenticity of this statement. *See* NRS 51.155. This inadmissible and unreliable statement should not be considered as evidence of non-consent.

IV. THIS COURT HAS UNEQUIVOCALLY AFFORDED PROTECTION TO BONA FIDE PURCHASERS.

The District Court erred in failing to even consider SFR's bona fide purchaser ("BFP") status, deciding only to grant summary judgment in favor of Nationstar on

the 4617(j)(3) issue alone. (5JA_1111-1120.) This was particularly disturbing when the District Court refused to consider striking the Bank's untimely Freddie Mac evidence, despite SFR's presentation of argument that this Court's opinion in *Shadow Wood Homeowners Ass'n., Inc. v. New York Comm. Bancorp, Inc.*, 132 Nev. ___, ___, 366 P.3d 1105 (2016) acknowledged the protections afforded to BFP's and confirmed the applicability of such protections in HOA foreclosure sale matters. (4JA_0878-0882.)

In particular, this Court in *Shadow Wood* held that:

> When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities…This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief.

Shadow Wood, 366 P.3d at 1114 (*citing Smith v. United States*, 373 F.2d 419, 424 (4th Cir. 1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties."); *In re Vlasek*, 325 F.3d 955, 963 (7th Cir. 2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); *Riganti v. McElhinney*, 56 Cal. Rptr. 195, 199 (Ct. App. 1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.")) Specifically, "[c]onsideration of harm to potentially innocent third parties is especially pertinent here where [a bank] did not use the legal remedies available to it to prevent the property from being sold

to a third party." *Shadow Wood*, 366 P.3d at 1114 fn. 7 (*Cf. Barkley's Appeal. Bentley's Estate*, 2 Monag. 274, 277 (Pa. 1888)("in the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day.").

Put plainly, this Court has recognized that equity cannot be granted as against a BFP when that purchaser has no notice of a pre-sale irregularity or dispute. In fact, in this particular case on appeal the first time, this Court recently confirmed the importance of considering equitable arguments, even in the face of a Federal Foreclosure Bar defense. *See Nationstar*, 396 P.3d at 756 n.1 (remanded for consideration of "equitable argument in light of *Shadow Wood*.").

Here, the District Court seeks to hold SFR accountable by rendering its interest in the Property subject to the deed of trust, when the Bank not only failed to record any pre-sale documents in the chain of title which would have put a purchaser on notice of Freddie Mac's purported ownership, but failed to avail itself of any other remedies available to it, such as paying any portion of the Association's lien, challenging the foreclosure sale, or attending the sale and bidding. In emphasizing "the legal remedies available to prevent the property from being sold to a third party," this Court placed the burden on the party seeking equitable relief to prevent a potential purchaser from attaining BFP status. If that party's inaction allows a

purchaser to become a BFP, then equity cannot be granted to the detriment of an innocent third party, here Fort Apache.

Moreover, by holding a BFP accountable for information unknown to it, this would effectively reward the other party who, armed with information impacting the rights of others, failed to protect itself by taking certain actions or preventing a BFP from purchasing a property. Equity was not created to relieve a person of the consequences of his own inactions.

Lastly, in *Swartz v. Adams*, 93 Nev. 240, 245–246, 563 P.2d 74, 77 (1977), this Court found that, because the subject property had been sold to a BFP, it could not be returned to the original homeowners as a form of relief, despite the fact that they were not given notice of the sale. Rather than harm that innocent third party purchaser, this Court remanded the case to allow the homeowners to seek compensatory relief against the party who allegedly harmed it – the person who initiated the sale. *Id.* Thus, if even a due process violation is not sufficient to overcome an individual's status as a BFP, then neither can 4617(j)(3) be said to overcome BFP status.

This court stated in *Shadow Wood*, "[w]here the complaining party has access to all the facts surrounding the questioned transaction . . ., ***equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby***. 366 P.3d at 1116 (emphasis added). Thus, under no set of circumstances

can equitable relief be granted to the Bank, who failed to notify the world of Freddie Mac's purported ownership or Nationstar's relationship, and allowed SFR, a BFP, to purchase the Property.

V. EVEN IF THIS COURT FINDS THE SALE WAS IMPROPER, THE CORRECT RESULT IS THAT THE SALE SHOULD BE VOID.

In granting summary judgment in favor of the Bank, the District Court ordered that "SFR's interest, if any, is subject to the Deed of Trust." (5JA_1119.) However, this result is erroneous because, even if 4617(j)(3) precluded extinguishment of the deed of trust – which it does not – the result should be that the sale should be declared void, not that the sale should be subject to the deed of trust.

It offends the traditional notions of equity to suggest that, because a defect which was unknown to the purchaser at the time of sale existed, the effect should be to force the purchaser to bear the consequences of Freddie Mac's failure to record its interest. There is simply no way that SFR could have been on notice that the sale was anything but regular and customary. If this Court finds that the sale was irregular for any reason, the proper result is to declare the sale void, and require the purchaser to be made whole in accordance with Nevada law, not to require the purchaser to be stuck in a relationship with the Bank and Freddie Mac which it did not bargain for.

CONCLUSION

The Bank produced no viable evidence establishing Freddie Mac owned the Loan at the time of the Association Foreclosure Sale, or that Nationstar had an actual, contractual servicing relationship with Freddie Mac as to this Property at the time of the sale. Moreover, SFR is a BFP with no way of knowing of this alleged ownership prior to its purchase of the Property. Thus, equity dictates that SFR, a BFP, took title to the Property free and clear of the Bank's extinguished deed of trust. Based on the foregoing, the District Court improperly granted summary judgment in the Bank's favor, and this Court should Reverse and Remand.

DATED this 20th day of November, 2018.

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CERTIFICATE OF COMPLIANCE

1. I 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 Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 30 pages long, and contains 7044 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), 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.

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4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20th day of November, 2018. Electronic service of the foregoing **Appellant's Opening Brief** and Volumes I-V of the Joint Appendix filed concurrently herewith shall be made in accordance with the Master Service List as follows:

Docket Number and Case Title: 75890 - SFR INV.'S POOL 1, LLC VS. NATIONSTAR MORTG. LLC
Case Category Civil Appeal
Information current as of: Nov 21 2018 10:26 p.m.

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Melanie Morgan
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Dated this 20th day of November, 2018.

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An employee of KIM GILBERT EBRON