IN THE SUPREME COURT OF NEVADA

Case No. 75890

SFR INVESTMENTS POOL 1, LLC,

Appellant,

vs.

NATIONSTAR MORTGAGE, LLC,

Respondent.

Appeal from the Eighth Judicial District Court, Department XVII
The Honorable Michael Villani, District Judge
District Court Case No. A-13-684715-C

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

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Federal Housing Finance Agency ("FHFA") respectfully supports Respondent Nationstar Mortgage, LLC ("Nationstar") in this appeal. The district court's decision to award summary judgment to Nationstar was correct, and this appeal will directly impact the interests of entities operating under FHFA's conservatorship—Fannie Mae and Freddie Mac (together, the "Enterprises")—and the interests of FHFA as the Enterprises' Conservator and regulator.

The Enterprises are federally chartered entities that Congress created to enhance the nation's housing-finance market. They own millions of mortgages nationwide, including hundreds of thousands in Nevada.

In 2008, Congress enacted the Housing and Economic Recovery Act ("HERA"), which established FHFA as an independent agency of the federal government and as the Enterprises' regulator. *See* 12 U.S.C. § 4511 *et seq*. HERA vests FHFA with the power to place the Enterprises into conservatorship or receivership under statutorily defined circumstances, mandating that as Conservator, FHFA succeeds to all "rights, titles, powers, and privileges" of an entity in conservatorship with respect to its assets. 12 U.S.C. § 4617(b)(2)(A). On September 6, 2008, FHFA's Director placed the Enterprises into FHFA's conservatorship, where they remain today.

When FHFA acts in its capacity as Conservator, its actions are deemed non-governmental for many substantive purposes. While this brief addresses FHFA's statutory powers as Conservator, FHFA submits the brief exclusively in its capacity as an agency of the United States.[1] In that capacity, FHFA has an interest in this case because if Appellant SFR Investments Pool 1, LLC ("SFR") were to prevail on appeal and this Court to reverse, it would effectively nullify the absolute federal statutory property protections Congress provided to FHFA conservatorships, affecting several hundred cases pending in Nevada state courts. These protections are crucial to the Enterprises' ability to fulfill their congressionally mandated mission, which is under FHFA's regulatory purview.

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

INTRODUCTION

This case involves a fact pattern likely familiar to the Court: a Nevada homeowners' association's non-judicial foreclosure and sale of real property for unpaid dues owed by the former homeowner (the "HOA Sale"). Under Nevada law, such HOA sales, if properly conducted, can extinguish all other preexisting lien interests in the underlying property, including deeds of trust. *See* NRS § 116.3116(2) (the "State Foreclosure Statute"). But a federal statute precludes that result here. Under 12 U.S.C. § 4617(j)(3), which this Court often refers to as the "Federal Foreclosure Bar," while an Enterprise is in FHFA's conservatorship, its "property," including lien interests, is not "subject to . . . foreclosure." And at the time of the HOA Sale here, Freddie Mac owned a deed of trust encumbering the property (the "Deed of Trust").

The district court correctly concluded that the HOA Sale did not extinguish Freddie Mac's Deed of Trust. Specifically, the district court held that Freddie Mac retained an ownership interest in the Deed of Trust and that the Federal Foreclosure Bar preempted Nevada's State Foreclosure Statute.

This appeal presents four straightforward questions concerning the Federal Foreclosure Bar's operation. *First*, does Freddie Mac, as the owner of the mortgage loan at issue, maintain a property interest under Nevada law when its contractually authorized servicer appears as beneficiary of record of the associated

Deed of Trust? *Second*, does the Federal Foreclosure Bar prevent the extinguishment of an Enterprise's deed of trust on property purchased at an HOA sale, rather than voiding the sale entirely? *Third*, is FHFA's affirmative consent, rather than inaction or silence, necessary to relinquish the Federal Foreclosure Bar's protection? And *fourth*, did SFR have notice of a potential Enterprise interest in the property, disqualifying it from bona fide purchaser status under Nevada law; and would the Federal Foreclosure Bar preempt Nevada's bona fide purchaser statutes if those state statutes are interpreted as SFR suggests? The answer to all these questions is "yes."

ARGUMENT

The district court properly held that the Federal Foreclosure Bar preempts the State Foreclosure Statute and protected Freddie Mac's Deed of Trust from extinguishment as a result of the HOA Sale. JA_1131-32. That decision adopts an interpretation of the Federal Foreclosure Bar's straightforward language reflected in this Court's precedent, multiple Ninth Circuit decisions, and more than thirty federal district court decisions. Each of SFR's arguments that the Federal Foreclosure Bar does not apply here fails as a matter of law.

SFR's arguments also contravene sound policy considerations. Departing from the well-established legal principles governing Freddie Mac's property interest here would hamper FHFA in fulfilling its statutory mission as Freddie

Mac's regulator and conservator and undermine Freddie Mac's role in promoting a stable mortgage market. *See* 12 U.S.C. § 4513(a)(1)(B)(ii) (requiring that FHFA as regulator ensure that "the operations and activities of [Freddie Mac] foster liquid, efficient, competitive, and resilient national housing finance markets."); *id*. at § 4617(b)(2)(B)(iv) (empowering FHFA as conservator to "preserve and conserve" Freddie Mac's assets); *id*. at § 1716 (Freddie Mac's mission is to provide liquidity and "stability in the secondary market for residential mortgages.").

Reversal of the district court's ruling would force Freddie Mac and, by extension, the Conservator to choose between (1) relinquishing the efficiency gained by delegating management of mortgage servicing to third-party servicers; (2) severely constraining servicers' ability to perform their duties by refusing to allow them to appear as record beneficiaries; or (3) risking loss of ownership—for no consideration—of the valuable assets that form the core of Freddie Mac's statutory mission. Each of these options would impose unnecessary risks and costs to the conservatorship, the mortgage market, and borrowers. Neither the law nor the public interest counsels this Court to reach a holding with such an impact.

I. Freddie Mac Maintained Its Property Interest While Its Servicer Appeared as the Deed of Trust's Beneficiary of Record

In awarding summary judgment to Nationstar, the district court correctly held that Freddie Mac had a property interest that the Federal Foreclosure Bar

protected. JA_1131-32. SFR's arguments to the contrary—that the district court improperly relied on Freddie Mac's supplemental disclosures without ruling on SFR's motion to strike; that Freddie Mac lacked a property interest because it did not appear as the Deed of Trust's record beneficiary; and that Nationstar did not submit sufficient evidence of Freddie Mac's ownership of the loan—fail as a matter of law and contravene sound policy.

A. The District Court Properly Considered Freddie Mac's Supplemental Disclosures and Did Not Abuse Its Discretion by Failing to Expressly Rule on SFR's Motion to Strike

SFR argues that reversal of the district court's decision is warranted because the district court relied on the Deed of Trust as establishing Freddie Mac's ownership of the Loan, Appellant's Opening Brief ("AOB") at 11-13, and because the district court erred by failing to rule on SFR's motion to strike certain of Nationstar's evidence, AOB at 13-16. Not so. SFR first argues that reversal of the district court judgment is warranted because its decision that Freddie Mac owned the loan was based merely on the fact that the face of the Deed of Trust is labeled as a "Nevada-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS." *See* AOB at 11-12. But SFR proceeds from a mistaken premise: The district court did *not* rely exclusively on that prominent notation, but instead held that Freddie Mac's interest in the Property "was established by admissible evidence, namely Freddie Mac's business [records]." JA_1132.

Further, the district court's decision not to rule on the merits of SFR's motion to strike Freddie Mac's supplemental records prior to awarding Nationstar summary judgment was not an abuse of its discretion. SFR offers no authority to support its contention that the district court abused its discretion. *See* AOB a 13-14. In fact, this Court has noted that a district court does not abuse its discretion when it implicitly denies a motion, *Greene v. State*, No. 55971, 2016 WL 3524623, at *6 (Nev. June 24, 2016) (unpublished disposition), and that a district court's failure to rule on a motion constitutes a denial of that motion, *Bd. Of Galley of History, Inc. v. Datecs Corp.*, 994 P.2d 1149, 1150 (Nev. 2000).

SFR's contention that the district court improperly considered the evidence challenged in its motion fares no better. First, Nationstar's disclosures were not untimely. Parties are allowed to supplement their disclosures, as Nationstar did here upon discovering its mistake, under Nevada Rule of Civil Procedure 26(e)(1). JA_0996. Second, SFR cannot plausibly claim that it suffered "severe[] prejudice" when the district court relied on Freddie Mac's supplemental evidence. *See* AOB at 15-16. SFR argues that, as a result of the supplemental disclosures, it was not afforded the opportunity to conduct discovery as to Freddie Mac's declaration or exhibits. AOB at 16. But as SFR acknowledges, the "documents attached to the [Freddie Mac employee] declaration had been disclosed during discovery." AOB at 8. And, any claim to prejudice is offset by the fact that SFR is a repeat party in

quiet title actions following HOA sales, such as the one here, where an Enterprise's ownership of the deed of trust, and the documentary evidence to support that ownership, is a central issue. SFR is thus familiar with the documentary evidence necessary to support a claim asserting the Federal Foreclosure Bar, including an Enterprise's employee declaration. Nationstar's supplemental disclosures were thus timely under the Nevada Rules of Civil Procedure, and SFR cannot plausibly claim that it suffered any prejudice from the disclosures.

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

Freddie Mac's acquisition of the loan at issue and its use of a contractually authorized servicer to act on its behalf as the record deed-of-trust beneficiary conform to routine procedures that institutional mortgage investors follow in connection with their investments in millions of loans worth trillions of dollars. These procedures follow black-letter property law to ensure that the investor—here, Freddie Mac—acquires a loan *secured* by an interest in property; that is, ownership of both the note (which represents the borrower's personal financial obligation) and the deed of trust (which embodies a non-possessory property interest in the real estate securing repayment).

In *Montierth*, this Court explained that where the record beneficiary of the deed of trust has contractual or agency authority to foreclose on the note owner's

behalf, the note owner maintains a security interest in the collateral property. *See In re Montierth*, 354 P.3d 648, 651 (Nev. 2015). In that case, the owner of the deed of trust, Deutsche Bank, had acquired the related promissory note from the original lender; another entity, MERS, appeared as the deed of trust's record beneficiary at all relevant times. *Id.* at 649, 651. The borrowers argued that Deutsche Bank was not a secured creditor because "it did not have a unified note and deed of trust," given that MERS, rather than Deutsche Bank, appeared as the deed of trust's record beneficiary. *Id.* at 650. This Court rejected that argument, explaining that "foreclosure is not impossible if there is either a principal-agent relationship between the note holder and the mortgage holder or the mortgage holder 'otherwise has authority to foreclose in the [note holder]'s behalf.'" *Id*. at 651 (citing Restatement (Third) of Property: Mortgages § 5.4 § 5.4 cmts. c, e (1997) ("Restatement")).

Montierth's analysis first states an uncontroversial point of Nevada law—that "perfection of a deed of trust occurs upon proper execution and recordation," and thus "a security interest attaches to the property as between the mortgagor and mortgagee upon execution and as against third parties upon recordation." 354 P.3d at 650 (quotation marks and citation omitted). *Montierth* then explains that at the relevant time, Deutsche Bank owned the note while MERS appeared as the corresponding deed of trust's beneficiary of record. Finally, *Montierth* concludes

that Deutsche Bank's "security interest attached *and was perfected*" while MERS was still record beneficiary. *Id*. (emphasis added). That holding confirms that deeds of trust are properly recorded under Nevada law when the owner's authorized representative rather than the owner itself appears as record beneficiary.

This Court recently confirmed *Montierth*, and has applied it consistently in a variety of contexts. *See Nationstar Mortg., LLC v. Guberland LLC-Series 3*, No. 70546, 2018 WL 3025919 at *2 (Nev. June 15, 2018) (unpublished disposition) (applying *Montierth* to facts materially identical to those of this case, and emphasizing that where "different parties may hold the note and the deed of trust," the note remains secured "if there is *either* a principal-agent relationship between the note holder and the mortgage holder, *or* the mortgage holder otherwise has authority to foreclose in the [note holder]'s behalf"); *CitiMortgage, Inc. v. SFR Invs. Pool 1, LLC*, No. 70237, 2019 WL 289690, at *1 (Nev. Jan. 18, 2019) (unpublished disposition) (holding that a servicer's "status as the recorded deed of trust beneficiary does not create a question of material fact regarding whether Fannie Mae owns the subject loan, as this court has recognized that such an arrangement is acceptable and common"); *CitiMortgage, Inc. v. TRP Fund VI, LLC*, No. 71318, 2019 WL 1245886, at *1 (Nev. Mar. 14, 2019) (unpublished

disposition) (recognizing Enterprise's property interest under *Montierth* based on relationship between Enterprise and servicer).[2]

Requiring Freddie Mac to appear as record beneficiary on all of the loans that it owns is not only unnecessary under Nevada law, but would undermine sound public policy. Congress chartered Freddie Mac to facilitate liquidity in the nationwide secondary mortgage market, and thereby to enhance the equitable distribution of mortgage credit throughout the nation. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). Congress noted that "the continued ability of [Fannie Mae] and [Freddie Mac] to accomplish their public missions is important to providing housing in the United States and the health of the Nation's economy." 12 U.S.C. § 4501. In furtherance of that statutory mission, Freddie Mac owns millions of mortgages across the country. Indeed, it would be difficult to overstate the importance of the stability of these assets to the national economy. On July 30, 2008, "[c]oncerned that a default by Fannie and Freddie would imperil the already fragile national economy," *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017), Congress enacted HERA, creating

[2] *See also W. Sunset 2050 Tr. v. Nationstar Mortg., LLC*, 420 P.3d 1032, 1036 n.4 (Nev. 2018); *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 757 (Nev. 2017); *Ohfuji Invs., LLC v. Nationstar Mortg., LLC*, No. 72676, 2018 WL 1448729, at *1 (Nev. Mar. 15, 2018) (unpublished disposition).

FHFA with broad powers to place the Enterprises into conservatorships and fulfill its role as conservator.

Thus, Freddie Mac's business model is premised on maintaining security interests in property; Freddie Mac is not in the business of investing in unsecured promissory notes. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 557 (2017) (discussing Fannie Mae's role as a purchaser of mortgages); *Perry Capital*, 864 F.3d at 599-600 (discussing Enterprises' role in purchasing mortgage loans); *FHFA v. Nomura Holding Am., Inc.*, 873 F.3d 85, 105 (2d Cir. 2017) (same), *cert. denied* No. 17-1302 (June 25, 2018) (same). Indeed, under its charter, Freddie Mac may acquire *only* "mortgages"—which are, by definition, loans secured by an interest in real property—not other forms of debt. *See* 12 U.S.C. §§ 1717(b), 1719.

Freddie Mac can operate more efficiently as a mortgage investor, and thereby more effectively fulfill its federal statutory mission, by contracting with servicers such as Nationstar to handle the day-to-day administration of the mortgages Freddie Mac owns. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038-39 (9th Cir. 2011) (describing how loan owners contract with servicers and the servicers' role). This includes maintaining relationships with the borrowers under those loans, such as accepting payments, sending notices, and handling inquiries from the borrowers. If a borrower experiences financial difficulty, the servicer works to resolve the default, and, if necessary, may

ultimately have to foreclose on the collateral securing the loan. Servicers also receive and respond to other notices relating to the mortgage or the underlying property and handle litigation that could affect Freddie Mac's interests. To perform these duties most effectively, Freddie Mac's servicers may appear as the record beneficiaries of the deeds of trust that secure the obligations under the loans that Freddie Mac owns. Accordingly, if—contrary to the black-letter law cited to and described above—the appearance of Freddie Mac's servicer as record deed-of-trust beneficiary jeopardizes Freddie Mac's interests in the property securing the loans it owns, Freddie Mac's ability to fulfill its mission would be significantly impaired.

C. Nationstar Submitted Sufficient, Undisputed Evidence Establishing Freddie Mac's Property Interest

To establish an Enterprise's secured property interest, a servicer like Nationstar need only submit business records and declaration testimony—such as that submitted here—of the Enterprise's ownership of the loan and of the servicing relationship between the record beneficiary and the Enterprise. Indeed, this Court has recently held that an Enterprise's business records, supported by employee testimony, "establish[ed] that [the Enterprise] owned the loan at the time of the HOA foreclosure sale." *CitiMortgage v. SFR*, 2019 WL 289690, at *1 & n.1; *see also SFR Invs. Pool 1, LLC v. Green Tree Serv'g, LLC*, No. 72010, 2018 WL 6721370, at *2 (Nev. Dec. 17, 2018) (unpublished disposition) (Enterprise's

business records and employee testimony were "ample evidence" to establish Enterprise's ownership of the loan).[3]

Similarly, the Ninth Circuit recognized that Freddie Mac's database records were admissible business records that, along with a declaration from Freddie Mac's employee, were sufficient to prove its ownership of a mortgage loan for purposes of a motion for summary judgment. *Berezovsky v. Moniz*, 869 F.3d 923, 932 n.8 (9th Cir. 2017); *see also Williston Inv. Grp., LLC v. JPMorgan Chase Bank, NA*, 736 F. App'x 168, 169 (9th Cir. 2018) (noting that "similar evidence was sufficient in *Berezovsky*" in concluding that Freddie Mac established an interest in the property). The Ninth Circuit also took judicial notice of Freddie Mac's Single-Family Seller/Servicer Guide ("Guide") and explained that the Guide governs the relationship between Freddie Mac and its servicers. *Berezovsky*, 869 F.3d at 933 & n.9; *see also Guberland*, 2018 WL 3025919, at *2 (relying upon the "publicly available" Guide in this inquiry). This Ninth Circuit precedent should be highly persuasive, as federal courts and this Court have adopted the same standard for determining what evidence is sufficient for summary judgment. *See Wood v.*

[3] While *SFR v. Green Tree* is a post-trial decision, this Court unequivocally endorsed *Berezovsky*, a decision that affirmed summary judgment. *SFR v. Green Tree*, 2018 WL 6721370, at *1. Further, this Court does not mention anything about the trial court having had to weigh conflicting evidence. Thus, *Green Tree* confirms that the evidence Freddie Mac tenders here is sufficient to warrant summary judgment.

Safeway, 121 P.3d 1026, 1031 (Nev. 2005) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), for Nevada's standard with respect to sufficiency of evidence for purposes of summary judgment).

The evidence Nationstar submitted is materially the same as the evidence evaluated by this Court in *SFR v. Green Tree* and by the Ninth Circuit in *Berezovsky*. Here, the district court properly concluded that Freddie Mac's business records, along with a declaration by a Freddie Mac employee describing those records, was sufficient to establish Freddie Mac's ownership of the Loan. JA_1131-32. Freddie Mac's business records and its employee's declaration describe Freddie Mac's ownership of the loan and its servicing relationship with Nationstar, the servicer and record deed-of-trust beneficiary at the time of the HOA Sale, in connection with the Loan. JA_0113-34, 1131-32. Freddie Mac's employee declaration also discussed Freddie Mac's MIDAS database as well as the Guide, which operates as a "central document governing the contractual relationship between Freddie Mac and its servicers nationwide." JA_0118. Accordingly, the district court properly awarded summary judgment to Nationstar, following the controlling precedent this Court set in *Montierth* and applied in *Guberland* and other more recent decisions, and that the Ninth Circuit has followed in *Berezovsky* and its progeny.

Requiring servicers to submit more than the Enterprises' business records and an employee declaration to establish Freddie Mac's protected property interest would impose a pointless and burdensome requirement for duplicative evidence to prove a simple fact: that the Enterprise owned a particular loan on a particular date. To require more of Nationstar would "ignore[] the realities of modern business litigation, where many business records are kept in databases, and parties query these databases" to gather evidence. *Health All. Network, Inc. v. Cont'l Cas. Co.*, 245 F.R.D. 121, 129 (S.D.N.Y. 2007), *aff'd*, 294 F. App'x 680 (2d Cir. 2008). The burdens are particularly acute in the context of litigation involving FHFA and the Enterprises—entities that are engaged in hundreds of cases in federal and state courts where purchasers of property conveyed at HOA foreclosure sales seek declarations that those HOA Sales extinguished the Enterprises' deeds of trust. Requiring cumulative evidence would increase litigation costs and require the Enterprises to divert substantial resources to record retrieval, away from fulfilling their statutory roles of increasing the availability of mortgages.

Further, such documentation would not be proportionate to the needs of these cases, especially when Freddie Mac's business records that are used to track the loans that Freddie Mac owns provide more complete information. Nevada law confirms that business records and Enterprise employees' declarations suffice to establish an Enterprise's interest in the property at issue. While the law requires

nothing more from Nationstar, the burdens SFR seeks to foist onto Freddie Mac and FHFA are particularly unwarranted in the conservatorship context, where taxpayer resources are at stake.

II. The Federal Foreclosure Bar Preserves Freddie Mac's Lien on the Property

The Federal Foreclosure Bar prevents the extinguishment of an Enterprise's deed of trust on property purchased at an HOA sale; it does not, as SFR suggests, have the effect of voiding the HOA sale. *See* AOB at 29. As an initial matter, SFR did not raise this argument during the district court proceedings. It has thus waived the issue, and cannot raise it on appeal. *See Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

This Court holds appellants to their waivers and forfeitures for the sound and compelling reason that this Court, like all appellate courts, sits as a reviewing tribunal, not a court of first instance. *Brown v. MHC Stagecoach, LLC*, 301 P.3d 850, 851 (Nev. 2013) ("This court . . . *review[s]* decisions of the district courts.") (citing Nev. Const. art. 6, § 4) (emphasis added). Allowing SFR to offer on appeal arguments it could have raised in the trial court but did not assert below would violate that precept. And it would be particularly unwarranted here, where protracted and inefficient litigation would undermine the Conservatorship's primary objectives. The FHFA and Enterprises are engaged in hundreds of cases

in federal and state courts where HOA sale purchasers seek declarations that HOA sales have extinguished the Enterprises' deeds of trust. Permitting HOA sale purchasers, such as SFR, to raise arguments on appeal that they have waived would force FHFA and the Enterprises to divert their resources to address a barrage of attempts to raise new theories to support claims that have already been rejected by district courts under the theories SFR and others chose to rely on there. Such protracted litigation would undermine the Conservator's ability to "preserve and conserve" Enterprise assets and to "put the [Enterprises] in a sound and solvent condition." *See* 12 U.S.C. § 4617(b)(2)(B).

Even if SFR had not waived this issue, its argument would fail on the merits. The Federal Foreclosure Bar protects only FHFA and Enterprise assets while the Enterprises are under FHFA's Conservatorship; it provides no protection to the purchasers of properties at HOA foreclosure sales. This interpretation is supported by the plain language of HERA. 12 U.S.C. § 4617(j) ("No *property of the Agency* shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency.") (emphasis added). SFR provides no authority or legal theory aside from "the traditional notions of equity" to support its argument that the Federal Foreclosure Bar's protections should extend to parties not within the scope of HERA's statutory language. *See* AOB at 29.

Indeed, SFR cannot point to any authority. This Court and the Ninth Circuit have consistently recognized that the Federal Foreclosure Bar prevents the extinguishment of an Enterprise's deed of trust while permitting the foreclosure to extinguish other junior lien interests secured by the property. *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 417 P.3d 363, 368 (Nev. 2018); *Berezovsky*, 869 F.3d at 933. Neither this Court nor the Ninth Circuit has interpreted the Federal Foreclosure Bar as SFR suggests here.

An interpretation of the Federal Foreclosure Bar that preserves the Enterprises' assets, including its lien interests, while extinguishing other junior lien interests is consistent with FHFA's congressional mandate—to ensure that the Enterprises operate in a manner that supports a reliable, stable, and liquid housing finance system and to maximize the Enterprises' ability to realize value from their assets. *See* 12 U.S.C. § 4513(a)(1)(B)(ii) (requiring that FHFA as regulator ensure that "the operations and activities of [Freddie Mac] foster liquid, efficient, competitive, and resilient national housing finance markets."); *id.* at § 4617(b)(2)(B)(iv) (empowering FHFA as conservator to "preserve and conserve" Freddie Mac's assets). Under an interpretation of the Federal Foreclosure Bar that preserves the Conservator's assets while extinguishing junior lien interests following an HOA sale, only the Conservator's and HOA sale purchaser's interests survive the foreclosure sale; parties are able to more easily negotiate a mutually

beneficial resolution than if the HOA sale was voided entirely. Such an outcome provides clarity about the state law consequences following an HOA sale, and facilitates FHFA's ability to maximize the value of Conservatorship assets. On the other hand, deeming an HOA foreclosure sale void in cases involving the Federal Foreclosure Bar would introduce inefficiency and uncertainty for all interested entities. Indeed, such an outcome would have the opposite effect of stabilizing the secondary mortgage market.

III. The Federal Foreclosure Bar Precludes Any Extinguishment of Conservatorship Property Unless FHFA Consents Affirmatively

The Federal Foreclosure Bar operates automatically to safeguard the property interests of the Enterprises while in conservatorship. The district court correctly held that "[i]n the absence of express consent, the Court cannot imply FHFA's consent." JA_1132. Indeed, no conduct, action, or inaction on the part of any party—save FHFA's express consent—would allow the HOA Sale to extinguish Freddie Mac's Deed of Trust. This is plain from the text of the statute, which contains no conditions precedent to the bar against extinguishment of conservatorship property interests. This Court recently held that "[t]he Federal Foreclosure Bar cloaks the FHFA's 'property with Congressional protection unless or until [the Agency] *affirmatively relinquishes it.*'" *Christine View*, 417 P.3d at 368 (quoting *Berezovsky*, 869 F.3d at 931) (emphasis added); *see also A&I LLC Series 3 v. Fannie Mae*, No. 71124, 2018 WL 3387787, at *1 (Nev. July 10, 2018)

(unpublished disposition). The Ninth Circuit has also concluded that the Federal Foreclosure Bar "does not require an affirmative decision by FHFA *not* to consent." *FHFA v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136, 1152 (9th Cir. 2018).

FHFA has not consented to the extinguishment of Freddie Mac's Deed of Trust in this case. Indeed, to the contrary, FHFA has stated publicly that it has not consented—and will not consent—to the extinguishment of a property interest held by the Enterprises.[4] SFR wrongly argues that FHFA's statement is inadmissible hearsay. AOB at 25. As an initial matter, and as the district court correctly noted, SFR "bears the burden of proof to establish that FHFA consented," and Nevada policy counsels against requiring a party to prove a negative, such as lack of consent. JA_1131; *Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092, 1096-97 (Nev. 1990). And here, SFR "failed to provide proof . . . FHFA consented to the HOA Sale extinguishing or foreclosing Freddie Mac's interest in the Property." JA_1132.

Nonetheless, FHFA's statement is admissible for several reasons. This Court may take judicial notice of FHFA's statement. Indeed, this Court has taken

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[4] FHFA Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx ("FHFA confirms that it has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection with HOA foreclosures of super-priority liens.").

judicial notice of similar government material where the information is "[g]enerally known[,] . . . capable of accurate and ready determination[, and] not subject to reasonable dispute." NRS § 47.130(2); *cf. Coal. for Nevada's Future v. RIP Commerce Tax, Inc.*, No. 69501, 2016 WL 2842925, at *1 & n.1 (Nev. May 11, 2016) (unpublished disposition) (taking judicial notice of a report prepared by a panel created by the Nevada legislature and available on the Nevada legislature website); *Yellow Cab of Reno, Inc. v. Second Judicial Dist. Ct. of State ex rel. Cty of Washoe*, 262 P.3d 699, 704 & n.4 (Nev. 2011) (taking judicial notice of the 2000 U.S. Census). The FHFA statement also falls within the public-records exception of the hearsay rule. NRS § 51.155 (exempting statements made by public agencies or officials describing the agency's or official's activities where the sources of information are trustworthy). Finally, FHFA's statement is self-authenticating under NRS § 52.085, which provides that evidence that a statement is from the public office where such statements are typically kept is sufficient to authenticate that statement.

Furthermore, as a matter of public policy, it would not make sense for Congress to require anything less than FHFA's affirmative consent to the extinguishment of the Enterprises' property interests. As noted earlier, one of Congress's principle objectives in enacting HERA and creating FHFA was to facilitate the recovery of the country's economy, "foster liquid, efficient,

competitive, and resilient national housing finance markets," and reduce taxpayer risk. *See* FHFA, Conservatorship, http://www.fhfa.gov/Conservatorship. To interpret inaction by FHFA to allow the uncompensated extinguishment of the Enterprises' assets would undermine FHFA's ability to accomplish those goals and its power to "put the [Enterprises] in a sound and solvent condition," and "preserve and conserve the[ir] assets and property." 12 U.S.C. § 4617(b)(2)(D).

Moreover, to require FHFA to act affirmatively to preserve the Federal Foreclosure Bar's protection would make the Federal Foreclosure Bar toothless unless FHFA were to continuously monitor each potential HOA sale and any other potential action that could affect the Enterprises' property interests, including the millions of loans they own nationwide. HERA provides no support for the inference that Congress intended to condition the Federal Foreclosure Bar's operation on such a burdensome procedure to the virtual exclusion of all of FHFA's other functions; to the contrary, its text makes clear that the protection is automatic and requires no such herculean efforts. *See Beal Bank, SSB v. Nassau Cty.*, 973 F. Supp. 130, 133 (E.D.N.Y. 1997) (evaluating the FDIC's similar property-protection statute and concluding Congress did not intend for the FDIC to make individual decisions for that protection to be effective).

IV. SFR Is Not a Bona Fide Purchaser, But Even If Nevada's Bona-Fide-Purchaser Statutes Were Interpreted as SFR Proposes, the Federal Foreclosure Bar Would Preempt Them

SFR claims that it is a bona fide purchaser and that this status protects it from any claim based on Freddie Mac's interest in the Property, relying on the fact that Freddie Mac's name did not appear in the public records at the time of the HOA Sale. *See* AOB at 25-29. However, the plain language of Nevada's bona-fide-purchaser statutes makes clear that SFR was not a bona fide purchaser, as the deed of trust was undisputedly recorded prior to the HOA Sale. *See* NRS § 111.180. And as noted above, *Montierth* confirms that Freddie Mac's interest was "perfected" and therefore properly recorded under Nevada law when Freddie Mac's servicer at the time, Nationstar, appeared as beneficiary of record on Freddie Mac's behalf. 354 P.3d at 650-51.

The recorded Deed of Trust and assignment put SFR on notice of a potentially adverse Enterprise interest. The Deed of Trust's language that it is a "Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS," JA_0089, is further notice that the instrument might be sold to an Enterprise. *TRP Fund VI, LLC*, 2019 WL 1245886, at *1 (holding that since the deed of trust states that it is a "Fannie Mae/Freddie Mac UNIFORM INSTRUMENT, . . . we cannot conclude that [HOA sale purchaser] purchased the property without notice of Fannie Mae's potential interest in the property"); *SFR v. Green Tree*, 2018 WL 6721370, at *2

n.3; *Guberland*, 2018 WL 3025919, at *1 n.2. Similarly here, it should have come as no surprise to SFR that the property it purchased at an HOA foreclosure sale might be subject to a mortgage owned by Freddie Mac. Fannie Mae and Freddie Mac are by far the largest actors in the mortgage industry, especially in the aftermath of the recent housing crisis. In 2008, the Enterprises' "mortgage portfolios had a combined value of $5 trillion and *accounted for nearly half of the United States mortgage market*." *Perry*, 864 F.3d at 599-600 (emphasis added). Since 2012, "Fannie and Freddie, among other things, collectively purchased at least 11 million mortgages." *Id.* at 602. Accordingly, "[t]he position held in the home mortgage business by Fannie Mae and Freddie Mac make[s] them *the dominant force* in the market." *Town of Babylon v. FHFA*, 699 F.3d 221, 225 (2d Cir. 2012) (emphasis added) (internal quotation marks omitted); *see Nomura*, 873 F.3d at 105 (same).

Indeed, this Court has recognized that "comparable language in the deed of trust provided 'some record notice that the loan might be sold to'" an Enterprise. *Guberland*, 2018 WL 3025919, at *1 n.2; *SFR v. Green Tree*, 2018 WL 6271370, at *2 n.3; *TRP Fund VI, LLC*, 2019 WL 1245886, at *1. Given the publicly recorded documents and the Enterprises' dominant role in the mortgage industry, SFR cannot deny that Freddie Mac's ownership of the Deed of Trust was a foreseeable risk at the time it purchased the Property, nor can it claim to be

ignorant of the federal law governing and protecting the conservatorships. *See del Junco v. Conover*, 682 F.2d 1338, 1342 (9th Cir. 1982). Allowing SFR to cloak itself with bona fide purchaser status and ignore the significant chance that a property purchased at a foreclosure sale was subject to an interest owned by one of the Enterprises would contravene Congress's clear and manifest goal of protecting the Agency's assets. *See Berezovsky*, 869 F.3d at 931.

But even if SFR were to be considered a bona fide purchaser, applying state bona-fide-purchaser doctrine to extinguish Freddie Mac's federally protected interest would clearly conflict with the Federal Foreclosure Bar. Indeed, this Court acknowledged that federal courts have held that the Federal Foreclosure Bar preempts Nevada's bona fide purchaser statutes under these circumstances. *See Guberland*, 2018 WL 3025919, at *2 n.3 (citing *JPMorgan Chase Bank, N.A. v. GDS Fin. Servs.*, No. 2:17-cv-02451, 2018 WL 2023123, at *3 (D. Nev. May 1, 2018)). The federal decision *Guberland* cites concluded that because Nevada's bona fide purchaser law was an obstacle to Congress's goal of protecting FHFA's assets, "Nevada's law on bona fide purchasers is preempted by the federal foreclosure bar." *GDS Fin. Servs.*, 2018 WL 2023123, at *3.[5]

[5] The *GDS* court is just one of several to have reached the same conclusion. *E.g.*, *Fannie Mae v. Vegas Prop. Servs., Inc.*, No. 2:17-cv-1798-APG-PAL, 2018 WL 5300389, at *2 (D. Nev. Oct. 25, 2018); *Nationstar Mortg. LLC v. Haus*, No. 2:17-cv-1762-JCM-CWH, 2018 WL 5268603, at *4 (D. Nev. Oct. 23, 2018);

Accordingly, even if SFR would otherwise qualify as a bona fide purchaser under Nevada law—and, as discussed above, it would not—SFR could not rely on any purported bona fide purchaser status to avoid the protection Congress provided Freddie Mac's interests during conservatorship; the Federal Foreclosure Bar preempts Nevada law to whatever extent it would otherwise permit the extinguishment of Freddie Mac's property interest while in FHFA conservatorship.

CONCLUSION

For these reasons, FHFA supports Nationstar's request that this Court affirm the district court's decision.

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Respectfully submitted,

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Residential Credit Solutions, Inc. v. LV Real Estate Strategic Inv. Grp. LLS Series 5112, No. 2:17-cv-84-JCM-NJK, 2018 WL 4258498, at *4 (D. Nev. Sept. 6, 2018); *U.S. Bank Home Mortg. v. Jensen*, No. 3:17-cv-0603-MMD-VPC, 2018 WL 3078753, at *2 (D. Nev. June 20, 2018).

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on March 21, 2019, a true and correct copy of the **BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF RESPONDENT AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT**, was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

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

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

Dated: March 21, 2019.

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