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.	Electronically Filed May 15 2019 11:19 p.m. Elizabeth A. Brown Clerk of Supreme Court

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 REPLY 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.

Appellant, 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, and the same counsel on appeal.

DATED this 15th day of May, 2019.

KIM GILBERT EBRON

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I. THE DISTRICT COURT'S FINDINGS REGARDING FREDDIE'S ALLEGED OWNERSHIP FAIL, DESPITE THE THEORY USED.

Nationstar first concedes the District Court initially relied upon the form deed of trust in concluding Nationstar established that Freddie had an ownership interest in the subject loan (also conceding that this evidence does not "conclusively establish an Enterprise's ownership interest in that instrument[,]"). It then asserts that the form deed of trust was not the basis for a finding of sufficient ownership interest, pointing to the final Order which did not recite such a finding, but rather relied on Freddie's screen shots. (RAB_15-16.) However, under either theory, the District Court erred in concluding there existed sufficient evidence of Freddie's alleged ownership.

The District Court ruled on and directed an order using the minute order entered by the Court. (5JA_1108-1110.) There, the District Court used only the footer on the form deed of trust to find Freddie's ownership. (*Id*.) Instead, Nationstar prepared an order that, despite the Court's express direction, stated that the evidence (the purported screen shots) demonstrated Freddie's ownership. The District Court should have first considered and ruled on the merits of SFR's Countermotion to Strike, which was based on Nationstar's failure to timely disclose the evidence. Rather than address the merits, after concluding the form deed of trust footer

demonstrated Fannie's interest, the District Court deemed SFR's Countermotion to Strike "moot." (5JA_1108-1109.) But Nationstar did not even include the "moot" ruling in the final Order it drafted. Rather, the final Order relied on Freddie's purported business records to establish Freddie's ownership interest in the deed of trust. (*Compare* 5JA_1108-1110 with 5JA_1112-1120 *generally* and *specifically* 5JA_1118:7-9.)

By ruling on the sufficiency of Nationstar's alleged evidence regarding ownership and/or servicer relationship, without first ruling on SFR's Countermotion to Strike this evidence, the District Court improperly departed from the essential requirements of the law, constituting an arbitrary and capricious exercise of discretion. *See Imperial Credit Corp. v. Eighth Judicial Dist. Court of Nev.*, 130 Nev. 558, 563, 331 P.3d 862, 866 (2014)(citing *THI Holdings, LLC v. Shattuck*, 93 So. 3d 419, 424 (Fla. 2012) (a trial court's denial of pro hac vice application based on factors not part of a court's proper analysis, constituted a "departure from the essential requirements of the law" requiring the granting of certiorari, quash of order of denial and remand.)). NRCP 16.1 compels a party's disclosure of both non-privileged documentary evidence it will "use[ ] to support its claims or defenses" as well as the name and contact information for any witnesses "which have discoverable information." NRCP 16.1(A)(1)(a). Nationstar violated the rule by failing to disclose both Dean Meyer and his declaration during the two rounds of

discovery following remittitur. This alone demanded proper ruling on the merits of SFR's motion.

Nationstar tries to skirt its failure to comply by alleging that it "inadvertent[ly]" failed to disclose Meyer, and that SFR was not prejudiced by the failure to disclose— during all three of the court's discovery periods— because "SFR is a repeat litigant in Nevada HOA foreclosure cases [such that] SFR should have anticipated" such a witness. (RAB_18.) SFR's litigant status has no bearing on this case, and certainly does not relieve a knowledgeable litigant like Nationstar of its obligations under NRCP 16.1. And using inadvertence as an excuse for failure to disclosure falls flat, as the "inadvertent" affidavit was not even signed until almost a month after discovery closed. (4JA_856; 1JA_118.) SFR had no opportunity to conduct further discovery on these matters; it was prejudiced.

The prejudice is highlighted by Nationstar's concession that is could not win its case without the Meyer Declaration to authenticate and otherwise explain the meaning behind the screenshots previously disclosed by Nationstar in discovery. (RAB, p. 19.) Thus, it was imperative that the additional evidence be timely produced so the parties had an opportunity to analyze it and respond appropriately, including deposing Mr. Meyer. Again, Nationstar's attempted reliance on Meyer's

testimony in other cases does not relieve it of its disclosure obligations here under NRCP 16.1.[1] That failure requires reversal and remand.

Similarly, it was both an arbitrary and capricious exercise of discretion, and a "departure from the essential requirements of the law[,]" for the District Court to find its own independent "evidence" that favored Nationstar, the moving party, as the basis for granting summary judgment in its favor. *Humphries v. New York-New York Hotel & Casino*, 133 Nev. ___, ___, 403 P.3d 358, 360 (2017) (court must view evidence on motion for summary judgment in light of non-moving party). Specifically, without the argument being raised, the District Court concluded that Freddie owned the loan in question based upon the fact that the name of Freddie appeared at the bottom of the form deed of trust. As a result, SFR was never able to respond. (5JA_1108.) *Imperial Credit*, 331 P.3d at 866; *THI Holdings*, 93 So. 3d at 424; *see also Resources Group, LLC v. U.S. Bank Nat. Ass'n*, Case No. 64676, 2016 WL 2993803 (Nev. May 23, 2016) (unpublished order vacating and remanding district court's decision based on erroneous interpretation of controlling law and despite conflicting evidence in the record). There is no controlling case law allowing a footer on a form deed of trust to constitute sufficient evidence of Freddie's ownership. That is because it is an absurd concept because virtually every deed of

[1] It should also be noted that Nationstar attempts to further "explain" its deficient database screenshots through the argument of counsel in its brief. RAB, p. 27.

trust in the United States was and is contained on the same form, despite the fact that not all deeds of trust are Fannie/Freddie owned.

Furthermore, lenders have previously confirmed that these generic forms are used to facilitate the process **if** a GSE purchases the underling note. (*See* Motion to Supplement, Exhibit A-B, Nov. 26, 2018, Doc. 18-905536.) Nationstar concedes this. (RAB_16.) However, this does not constitute evidence of actual Freddie ownership,[2] and certainly does not amount to actual ownership in this case. For these reasons, and the reasons already set forth in SFR's Opening Brief, this Court should reverse and remand.

II. *BEREZOVSKY* CANNOT BE USED TO DISRUPT THE UNIFORMITY BETWEEN *LEYVA*, *EDELSTEIN*, AND *MONTIERTH*.

Nationstar and Agency want to rely on the Ninth Circuit's non-binding decision in *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017), as well the unpublished orders, *SFR Invs. Pool 1, LLC v. Green Tree Servicing, LLC*, Case No. 72010, 432 P.3d 718 (Nev. Dec. 17, 2018) (unpublished disposition) *and CitiMortgage, Inc. v. SFR Invs. Pool 1, LLC*, Case No. 70237, 433 P.3d 262 (Nev.

[2] Since Nationstar concedes this generic form does not establish actual Fannie/ Freddie ownership, then this same generic form cannot be alleged to constitute notice to a potential buyer that a property is actually owned by Fannie or Freddie. (RAB_43-44.)

Jan. 19, 2019) (unpublished disposition), for the proposition that a cognizable property interest under Nevada law was established here through purported "business records" and employee testimony. (RAB, pp. 14-16.) However, as FHFA has admitted, there is no mandatory authority confirming the alleged sufficiency of Fannie/Freddie declarations and "business records" evidence to establish alleged ownership of the deed of trust by a GSE. And this Court declined to publish *Green Tree* and *CitiMortgage*. In *CitiMortgage*, the dicta discussing ownership evidence, contained in a footnote, simply stated that CitiMortgage's NRCP 30(b)(6) witness "presumably confirmed" Fannie's alleged ownership based on her review of the relied-upon business records and an absence of any subsequent transfer in those records." *CitiMortgage*, 433 P3d 262, *1 n.1. This is certainly not case determinative. And, unlike in *CitiMortgage*, SFR did and does contest the district court's use of this evidence. *Id*.

Moreover, in *Green Tree* the Court did not specify exactly the alleged "property" interest to which it referred; the panel's inability in its order to define with any precision the exact nature of the "property" interest whose ownership interest was allegedly established by Fannie sheds light on how ill-suited any reliance on the Ninth Circuit's decision in *Berezovsky* is, in terms of establishing and defining property interests under Nevada law. This shortcoming also establishes the need for reversal of the district court's order herein, in order to secure and maintain

uniformity with this Court's prior precedents in *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275 (2011); *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 286 P.3d 249 (2012); and *Montierth v. Deutsche Bank*, 131 Nev. Adv. Op. 55, 354 P.3d 648 (2015).

A. Nevada State Law Defines "property of the Agency."

> No **property of the Agency** shall be subject to levy, attachment, garnishment, foreclosure, garnishment, foreclosure, or sale without consent of the Agency, nor shall an involuntary lien attach to the **property of the Agency.**

12 U.S.C. § 4617(j)(3) (emphasis added).

Nowhere in HERA does Congress define "property." *See* 12 U.S.C. § 4517. Matters left open in a federal statute are governed by state law. *See Shady Grove Orthopedic Assocs v. Allstate Ins. Co.*, 559 U.S. 393, 415-416 (2010) ("*[W]here neither the Constitution nor a statute provides the rule of decision or authorizes a federal court to supply one, 'state law* ***must govern because there can be no other law****.'*" (citations omitted) (internal citation omitted) (emphasis added")); *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 85 (1994) ("Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; *matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law*.") (emphasis added)). Even the *Berezovsky* court

recognized that any analysis using 4617(j)(3) begins with state law. *Berezovsky*, 869 F.3d at 932 ("Except in matters governed by the Federal Constitution or by acts of Congress, *the law to be applied in any case is the law of the state.*"), citing *Erie v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added)).

This means, Nevada law defines *the rights i.e. property, which must first be established before the remedy i.e. preventing foreclosure on Agency property, can be triggered. In fact, this is a point where SFR and FHFA agree; state law defines property.* Because only the remedial aspects of 4617(j)(3) have preemptive effect under the Supremacy Clause of the Federal Constitution, failure to establish the right makes the remedy unavailable.

B. The Deed of Trust Defines the Property Interest.

Green Tree blurred lines and obscured the sharp and careful distinctions this Court previously drew and relied upon in *Leyva* and *Edelstein*. It was through rigorous examination and constant refining that this Court's precedents in *Leyva* and *Edelstein* ultimately rejected the traditional rule that a mortgage or deed of trust is a mere incident to the note, and that a noteholder under the traditional rule always possessed the deed of trust—i.e. the property interest that could potentially be impacted by an association's foreclosure of the underlying real property. *Edelstein*, 128 Nev. at 517, 286 P.3d at 257.

In *Leyva*, this Court described a deed of trust as the instrument that discloses the identity of the person who is foreclosing. 255 P.3d at 1279. "A deed of trust is an instrument that 'secure[s] the performance of an obligation or the payment of any debt.' This court has previously held that **a deed of trust 'constitutes a conveyance of land** as defined by N.R.S. 111.010." *Id.* Absent a proper assignment of a deed of trust a mortgagee lacks standing to pursue foreclosure proceedings against a mortgagor. *Id.* (Emphasis added).

In *Edelstein*, this Court drew the following distinctions between the rights associated with holding a deed of trust versus the rights that inure to a noteholder when the note and deed of trust are split:

> To enforce the obligation by nonjudicial foreclosure and sale, "[t]he deed and note must be held together *because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment*."… "Conversely, the holder of the deed alone does not have a right to repayment and, thus, does not have an interest in foreclosing on the property to satisfy repayment."

286 P.3d at 254. (emphasis added) (citation omitted).

Citing *Leyva*, the *Edelstein* court went on to note that "transfers of deeds of trust and mortgage notes are distinctly separate." *Id.* at 257. Importantly, the *Edelstein* Court held, "And a beneficiary [of a deed of trust] is entitled to a ***distinctly different set of rights from a noteholder***." *Id.* at 259. Similarly, under Leyva, the

means of transferring a deed of trust and note are completely different. Leyva, 255 P.3d at 1279-1280. It is this distinction that dooms Nationstar here. In the present case, when the gavel fell at the Association foreclosure sale, Nationstar was the recorded beneficiary of the deed of trust. Therefore, Nationstar – and only Nationstar - had a property interest. Freddie did not have a property interest. Thus, Freddie has not and cannot prove the right i.e. "property" to trigger the remedy of the foreclosure bar. While Freddie may very well have still retained the *in personam* claims against the borrower/mortgagor (a point SFR does not concede) this does not change the fact that Freddie did not have a property interest at the time of the Association sale under existing Nevada law.

In *Edelstein,* this Court adopted the Restatement's approach and rejected the traditional rule precisely because the Restatement was "more consistent with reason and public policy and [this Court's] recent holding in *Leyva*." 128 Nev. at 520, 286 P.3d at 260. Effectively, in order to expand *Montierth* to function like the traditional rule, Nationstar and FHFA implicitly ask this Court to overrule *Edelstein* and *Leyva*. This Court should reject this, and instead, expressly confine *Montierth* to its appropriate and limited sphere (discussed below), leaving *Edelstein* and *Leyva* undisturbed as precedents.

It is plain to see, therefore, why the District Court's reliance on the screenshots and belated employee testimony herein, allegedly similarly to those presented in

Berezovsky, demands reversal. Notwithstanding Nationstar's failure to timely disclose the evidence pursuant to NRCP 16.1, the same types of evidence that were previously determined by this Court to be so insufficient as to allow even a foreclosure mediation to proceed in *Leyva*, were relied upon by the District Court in error to impair SFR's title here. *See Leyva*, 255 P.3d 1280-1281. Simply put, under established and governing Nevada law, at the time of the Association's foreclosure sale, it was Nationstar, not Freddie, with the property interest implicated by the Association's foreclosure sale. Section 4617(j)(3), therefore, was never triggered here because Freddie did not hold "property of the Agency" as determined and defined under Nevada law. This is the direct teaching of both *Leyva* and *Edelstein*.

Both *Leyva* and *Edelstein* emphasize that the note and the Deed of Trust , not a party's business records, define the property rights of the parties under Nevada law.

The District Court's reliance on the use of business records and employee testimony from an interested party should provide this Court with reason to reverse and remand.

III. *BEREZOVKSY* IS INAPPOSITE TO THE FACTS OF THIS CASE, AND TO THE FACTS OF MANY OF THE CASES RELYING ON IT.

Like so many before it, Nationstar also blindly relies upon *Berezovksy* without considering the materially distinguishable nature of that case. RAB, p. 15, 22-23.

Specifically, in *Berezovsky*, there was no argument or evidence by the purchaser that the Guide was not the complete agreement, there was no motion to strike, and perhaps most importantly, no discovery whatsoever, as Berezovsky had filed his own motion for summary judgment before discovery had even begun. Specifically the court noted **"[a]lthough discovery had not yet opened**, Berezovsky himself moved for summary judgment and agreed to the district court's resolving the motions without further discovery." Berezovsky, 869 F.3d at 933 (emphasis added). Thus, to state the non-binding *Berezovksy* is instructive to the outcome of this case ignores the very different set of facts before it: unlike Berezovsky, SFR directly challenged the evidence, both procedurally and substantively.

Similarly, contrary to Nationstar's assertions, this Court's determination in *Green Tree* that late disclosure of documents was not prejudicial to SFR is materially distinguishable. There SFR tactically did not raise the late disclosure argument until motion in limine phase. RAB, pp. 17-18. Here, SFR immediate challenged the late disclosure of documents—as well as the deficient nature of the content—immediately through its Countermotion to Strike. (4JA_0855-0858.) However, the District Court did not substantively address SFR's important and immediate challenge. It instead disregarded the motion as moot after granting summary judgment in favor of Nationstar on this procedurally defective evidence.

IV. NATIONSTAR FAILED TO PRODUCE ACTUAL EVIDENCE OF A CONTRACT WITH FREDDIE AS TO THIS PROPERTY; THE SERVICING GUIDE DOES NOT SUFFICE.

Nationstar insists it had a contractual servicing relationship with Freddie, as to this property, based on unauthenticated summary screen shots and a publicly available servicing guide. It also relies on unpublished dispositions and non-binding authority to substantiate this. (RAB_28.) Similar to Nationstar's ownership evidence, there is no published Nevada case law holding the Servicing Guide as sufficient evidence of a servicing relationship. This publically available document, devoid of any signatures between the relevant parties, does not prove an agency relationship between Freddie and Nationstar as to this loan: it does not identify a party who is allegedly bound by the Guide or identify the relevant loans/deeds of trust to which it applies. The Guide itself does not address the authority of each alleged servicer/agent to act on Freddie's behalf for the loans and deeds of trust at issue. The Guides take effect only **after** a bank or servicer enters into a contractual relationship with Freddie; a contract naming both the servicer and the affected loans. Put simply, a potential servicer is not bound by the terms of the Guide without a specific contract naming a particular loan.

From litigating similar cases, SFR has learned that actual contracts, and sometimes powers of attorney, are the documents that provide actual authority for a servicer/agent to act on behalf of the Enterprises. These contracts, if they existed,

should date back before the date of the Association foreclosure sales and should be in the custody and control of Nationstar and Freddie. Yet Nationstar failed to produce the contract governing the agency relationship necessary to invoke 4617(j)(3) for this property at the time of the association foreclosure sale. It is presumed "[t]hat higher evidence would be adverse from inferior being produced." NRS 47.250. Indeed, "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Taylor, The Case for Secondary Evidence, Section 412 (Jan.-Feb. 1976); *see also In re Baroni*, 2015 WL 6956664, at *10-11 (9th Cir.BAP (Cal.), 2015). Nationstar's decision to rely on screenshots and a mere non-contractual public servicing Guide demands the evidence be viewed with distrust and a presumption that any such contract between the Enterprises and any alleged servicer/beneficiary would be adverse to Plaintiff, including a presumption the servicing contract and purchase documents do not exist or do not include this loan. At the very least, it precluded summary judgment in favor of Nationstar.

V. *MONTIERTH*'S PRECEDENTIAL EFFECT IS LIMITED TO THE QUESTION PRESENTED ON CERTIFICATION.

Nationstar relies heavily on this Court's decision in *Montierth* for the proposition that a note owner need not be named in a recorded deed of trust to own

a property interest, so long as a "contractually authorized representative serves as record beneficiary of the associated deed of trust." 131 Nev. Adv. Op. 55, 354 P.3d 648; RAB, pp. 28-31. Notwithstanding the fact that this Court in *Montierth* required a "contractually authorized" party, *Montierth*'s holding should not be expanded further than its facts. *Monteirth* stems from the a narrow question:

> However, under the facts of this case, the real question involves what occurs when the promissory note is held by a principal and the beneficiary under the deed of trust is the principal's agent *at the time of foreclosure.*

Id. at 649 (emphasis added).

When a court answers a certified question, the precedential effect of such a decision is necessarily framed by reference to the question presented. *See, e.g., Wolner v. Mahaska Indus., Inc.*, 325 N.W.2d 39, 41 (Minn. 1982)("We conclude, as did the supreme court of the State of Washington, that our decisions on certification proceedings to federal court will be 'legal precedent applicable in all future controversies *involving the same legal question* until and unless this court overrules its opinion.'") (emphasis added)).[3]

[3] Because Nevada Rule of Appellate Procedure 5 is patterned on the Uniform Certification of Questions of Law Act, this Court can look to the decisions of other states for guidance on how to interpret and apply precedents that stem from answers to certified questions. *See Volvo Cars of North America, Inc. v. Ricci*, 122 Nev. 746, 750, 137 P.3d 1161, 1164 (Nev. 2006).

Here, application of this rule requires *Montierth*'s application to be limited by its temporal dimension—"at the time of foreclosure"—in the specific context of the mortgagor/mortgagee relationship and is thus best viewed as a standing doctrine permitting foreclosures to proceed in that specific context. *Montierth*, therefore, does not constitute binding precedent defining property interests. Put another way, *Montierth* cannot serve as a basis for displacing either the application of the Nevada's recording statutes, or this Court's binding precedents in *Leyva* and *Edelstein*.

Montierth arose in the context of a dispute over whether granting relief from the automatic stay to foreclose against the debtor/borrowers in that case was appropriate. 354 P.3d at 649-652. Stay relief is based simply on whether the bankruptcy court determines the moving party has a "colorable claim" with respect to property of the estate. *See, e.g., Biggs v. Stovin (In re Luz Intern. Ltd.)*, 219 B.R. 837, 842 (B.A.P. 9th Cir. 1998). Automatic stay relief litigation is limited and does not "involve an adjudication of the merits of any claims, defenses, or counterclaims:"

> Given the limited grounds for obtaining a motion for relief from stay, read in conjunction with the expedited schedule for a hearing on the motion, most courts hold that motion for relief from stay hearings should not involve an adjudication of the merits of claims, defenses, or counterclaims, but simply determine whether the creditor has a colorable claim to the property of the estate.

Id. (Emphasis added).

In light of the limited development of the factual record in the context of stay relief litigation, there is even less reason to extend *Montierth* outside of the confines of the specific question(s) presented by the certifying court. "[I]n the absence of an established set of underlying facts, our answers to certified questions will largely not be determinative of any part of the federal case *and will potentially be of questionable precedential value*." *Scottsdale Insurance Co. v. Liberty Mutual Ins. Co.*, Case No. 66706, 2014 WL 7188790, *1 (Nev. Dec. 16, 2014) (unpublished) (emphasis added). As process is rightly considered the undercurrent of substance, any expansion of *Montierth* is ill-advised and must be disregarded.

VI. STATE RECORDING STATUTES TRUMP THE RESTATEMENT.

The Restatement (Third) of Property: Mortgages forms the backbone of the *Montierth* decision, on which Nationstar and FHFA, so heavily rely. 354 P.3d at 651. (RAB_28-31; Am. Br._7.) And yet, in multiple and material instances, the Restatement, by its very terms, recognizes that its principles of law yield to applicable recording statutes:

> *The Restatement's subject matter*. A good deal of the Restatement is concerned with the enforceability of mortgages. *Hence it must be recognized at the outset that numerous doctrines not uniquely or directly related to mortgage law may render a mortgage unenforceable.*

> *Examples of these doctrines include* the Statute of Frauds, **the operation of the recording acts**, the principles of fraudulent transfers, the Bankruptcy Code, and the rules governing validity of transfers by such artificial entities as corporations, trusts, and partnerships. Except as specifically noted, the Restatement does not concern itself with these doctrines, and its commentary and Illustrations assume that the mortgage in question satisfies their demands.

Restatement Third of Property; Mortgages Introduction at 6 (Am. Law Inst. 1997) (emphasis added).

> Even if there is an antecedent obligation, a mortgage given to secure it will not inevitably be enforceable. A variety of doctrines, not generally within the scope of this Restatement, may warrant the setting aside of the mortgage as they would other types of conveyances. **For example, the mortgage may fail to meet the formalities required of conveyances of land, may be rendered void as against subsequent bona fide purchasers by operation of the recording act**, or may have been procured by undue influence, duress, fraud, or mistake.

Id. at § 1.2, Illustration 6, pgs. 17-18 (Am. Law Inst. 1997) (emphasis added).

Indeed, *Montierth* by its terms recognizes the primacy of the recording statutes where the rights of third parties, strangers to the note and deed of trust, are involved. Because *Montierth* is so heavily predicated upon the reasoning of the Restatement, this Court should limit the application of *Montierth* as precedent only to the Mortgagor/Mortgagee relationship, applying the recording statutes as to third parties. Both the terms of the Restatement and *Montierth* itself require this result.

VII. *MONTIERTH* RECOGNIZES THE DIFFERENT REQUIRMENTS FOR A PROPERTY INTEREST TO ATTACH TO A DEBTOR VS. A THIRD PARTY.

The unpublished disposition of *Nationstar Mortgage, LLC v. Guberland LLC-Series 3*, Case No. 70546, 420 P.3d 556 (Nev. June 15, 2018)[4] purported to find support in this Court's decision in *Montierth*, for the proposition that the Servicing Guides provide sufficient servicer relationships, based upon an alleged "authority to foreclose" in the absence of an agency relationship (and despite language in the Servicing Guides). *Id.* at *1. However, it is important to note a crucial distinction: *Montierth* deals with a dispute between contracting parties: bankrupt debtor/borrower, on the one hand (the "Mortgagor"), and lender/noteholder and deed of trust holder (collectively defined solely for illustrative purposes as the "Mortgagee")[5], on the other. *Id.* at 650-651. The Mortgagor/Mortgagee analysis, however, does not and cannot apply in cases that involve the intervening rights of third parties i.e. strangers to the contractual Mortgagor/Mortgagee relationship. In that regard, *Montierth's* analysis and holding, both in substance and procedure, must be confined to resolution of disputes in the context of the contracting parties.

[4] This Court denied FHFA's motion to publish.

[5] In *Monteirth* The note-holder and deed of trust owner were different entities. In fact, at issue there was whether the trustee could lift the stay to assign the deed of trust to the note-holder as required under *Edelstein*.

Montierth simply provides an enforcement mechanism for a Mortgagee to foreclose in the context of a Mortgagor/Mortgagee relationship by *constructively* reunifying an otherwise separated note and deed of trust. It does so through private law principles of contract and/or agency law and authority to confer standing to foreclose *at the time foreclosure is sought*. 354 P.3d at 651. *Montierth's* rationale and holding are driven largely by the temporal dimension of the Court's analysis: standing to foreclose on the part of a Mortgagee springs into existence at the time the Mortgagee seeks to foreclose on the Mortgagor.

Montierth, however, did not purport to eliminate the different and distinct sets of rights that pertain to a note and deed of trust recognized in both *Edelstein* and *Leyva*. To put this in familiar terms for FHFA, *Leyva* and *Edelstein* occupy this field of Nevada law, with *Montierth* functioning as the slightest of exceptions in the form of a standing doctrine between a Mortgagor and Mortgagee. Nationstar has contorted *Montierth* to stand for the proposition that a government sponsored entity (GSE), such as Freddie, acting as noteholder, can take no action whatsoever to protect its interests, whether by way of recordation of its alleged property interests, through pursuit of its own foreclosure remedy, or otherwise. And Nevada law will then somehow intervene to construe the GSE's mere noteholder status as conferring a property right that can be invoked to defeat the rights of innocent third parties,

without notice through recordation.[6] **This is not Nevada law.** Nevada law requires recording to have a cognizable property interest. And a noteholder fails to record in its own name at its own peril. The rule FHFA and Bank advance here has a name: the traditional rule. The very rule discarded by this Court in *Edelstein*. 128 Nev. at 517, 286 P.3d at 257.

It is error, therefore, to apply the *Montierth* Mortagor/Mortgagee relationship to resolve priority and property rights disputes involving third parties. This Court should return to the first principles it enunciated in *Montierth* and bring an end to *Montierth*'s misapplication in factually inapposite contexts, like this case.

The Court's summation of this area of law, as recognized in *Monteirth*, can be expressed as follows:

- A security interest attaches to the property as between the mortgagor and mortgagee upon execution (referred to below as the "Two-Dimensional Model").
- A security interest *attaches*
    - ***to the property***

[6] Nationstar and FHFA inaccurately contend SFR never raised an argument that forcing SFR to take property subject to the deed of trust, rather than voiding the sale, was an improper remedy, constituting waiver. (RAB_38-39; Am. Br._15.) SFR argued that "[t]o grant equitable relief in the form of SFR taking subject to the Bank's deed of trust, only punishes SFR, an undisputed BFP." (4JA_0882.)

- *as against third parties*
- ***upon recordation*** (referred to below as the "Three-Dimensional Model").

In re Montierth, 354 P.3d at 650 (emphasis added); see also NRS § 111.325.

This language from *Montierth itself* in demonstrates how inapt and ill-suited its Mortgagor/Mortgagee approach is in addressing a dispute involving a third-party stranger to the contract. Lines of legal duty between the parties to the Mortgagor/Mortgagee relationship are drawn from principles of general contract and agency law. Indeed, this is shown in *Montierth* itself. 354 P.3d at 650-651.

But, as *Montierth* also recognizes, the line of legal duty is not drawn to third party strangers to the contractual relationship in such a manner; rather, the line of legal duty is drawn by *statute*—in this instance Nevada's recording statutes. 354 P.3d at 650 (again explicating, "Thus, a security interest . . . *attaches* to the property… *against third parties upon recordation*.") (emphasis added)).

Simply put, absent recordation, there is simply no way to draw the duty line to third parties who are strangers to the original Mortgagor-Mortgagee relationship. The inability to draw the line of legal duty to third parties means they are not bound by anything originally agreed to by the Mortgagor and Mortgagee because in the eyes of Nevada law, no property interest has *attached* ***as to third parties***. This result

is not a deviation from *Montierth*, rather it is an outcome *Montierth* directly commands. 354 P.3d at 650.

Other courts have so thoroughly overlooked the distinction this Court so carefully drew in *Montierth* that they have collapsed the rights of third parties into the Mortgagor-Mortgagee relationship. *Montierth*'s teaching is that these are two distinct relationships with different questions. *Montierth* itself could have been resolved solely using its recitation of attachment, thereby avoiding the repeated misuse of the case. In other words, there is constructive reuniting between the contracting parties, but recording is required to have a property interest that can be enforced against a third party.

What Nationstar would have this Court decide turns real property law on its head as illustrated: A sells real property to B, but B does not record. A then sells same real property to C, but C records. Under Nationstar's reasoning, in a suit between B and C, B can still prevail against C despite his lack of recording. Not only that, B even has a cognizable property interest that can be enforced against any stranger despite the lack of recording.

This illustrates the danger of using private law doctrines of contract and agency to establish rights against third parties which are determined under public law doctrines like the recording statues. Public rights, like the inalienable right under our State's constitution to acquire, possess, and protect property hang in the balance.

The use of the word "inalienable" certainly cannot be taken to mean that such rights can be divested by private agreement between two parties foreign to SFR; but, that is the very result that Nationstar seeks to establish here. This is not Nevada law.

This Court should stop the errant use of non-binding case law to abolish the binding precedent in *Leyva*, *Edelstein* and *Montierth*, as in the case at hand. The decision of the lower court should be reversed.

VIII. FEDERAL COURTS HAVE REJECTED IN DERISION FEDERAL AGENCIES' ATTEMPTS TO ALTER GOVERNING STATE LAW IN THE "ADVANCEMENT" OF A FEDERAL SCHEME.

It is not an answer to invoke 4617(j)(3) to defeat inconvenient state law doctrines that preclude creation or recognition of property rights under Nevada law. The alterations Nationstar and FHFA seek to effect under Nevada's real property law, all in the alleged service of HERA, are nothing new. Similar agencies in the past have argued for special rules or treatment when the federal statutory scheme they were charged with implementing left a key statutory term to be defined, or a key concept to be supplied, by state law.

When these agencies were confronted with a state rule they found unfavorable, they each argued that their respective federal statutory schemes allowed SCOTUS to deviate from the state law principle found to be unfavorable. They asked for either an outright creation of a federal common law rule or a kind of federal

common law gloss on a statutory term committed by Congress to resolution under state law. SCOTUS quickly dismissed those arguments in derision.

In *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204 (1946), the Defense Plant Corporation sought refuge under the Reconstruction Finance Corporation Act (the "RFCA") from a Pennsylvania rule of real property taxation the agency found too expansive. *Id.* at 206-208. The agency sought to nullify the state rule, arguing that the state rule conflicted with the RFCA's scope of real property. *Id.* SCOTUS rejected that the state court's construction of "real property" could not conflict "with the scope of that term as used in the federal statute." *Id.* at 208. In ruling against the agency SCOTUS relied upon Congress's express desire to leave state law undisturbed by leaving the concept of "real property" in the RFCA undefined, with its definition to come from state law. *Id.* at 210 ("*Concepts of real property are deeply rooted in state traditions, customs,* habits, *and laws.*") (emphasis added)). That is precisely the situation presented in HERA.

Similarly, in *O'Melveny*, the FDIC, FHFA's historical forebear, sought to use a federal common law rule to govern the liability of attorneys in tort for services provided to a bank placed by FDIC into federal receivership. 512 U.S. at 79. The Court quickly disposed of using a federal common law rule. Writing for a unanimous court, Justice Scalia stated "[t]he first of these contentions need not detain us long,

as it is so plainly wrong. 'There is no federal general common law…" *Id.* at 83 (*citing Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). The Court further noted that California law governed the attorney malpractice issues in that case, even if California law was somehow viewed as out of step with the rest of States or with what the FDIC described there as the majority view on the issue. *Id.* at 84.

The Court noted the FDIC's arguments for a federal common law rule more favorable than the applicable California rule were "demolished" by the various provisions of FIRREA that "specifically create federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." *Id.* at 87. The Court ruled against the FDIC unanimously, observing:

> It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) ***places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law***, except where some provision in the extensive framework of FIRREA provides otherwise. ***To create additional "federal common-law" is not to supplement this scheme, but to alter it***.

Id. (emphasis added).

In doing so, the Court found persuasive that FIRREA expressly altered or displaced state laws as to (i) the statute of limitations applicable to the FDIC, (ii) precluding claims against the FDIC stemming from certain contracts the FDIC was authorized to repudiate, (iii) setting an actionable standard for director and officer conduct at the level of gross negligence without regard to a contrary state law rule,

and (iv) precluding enforcement of non-written contracts against the FDIC. 512 U.S. at 86. HERA has analogous provisions that expressly depart from established state law rules. 12 U.S.C. § 4617(b)(13) (altering the statute of limitations), §§ 4617(d)(1) and (d)(3) (precluding claims against FHFA with respect to certain contracts FHFA is authorized to repudiate), § 4617(g)(2) (setting a federal standard for director and officer liability regardless of contrary state law standard), and § 4617(b)(9)(B) (barring state law claims based on non-written agreements by the entity in conservatorship).

In other words, Congress's deviation from, or alteration of, state law rules in other provisions of FIRREA "demolished" FDIC's argument. *See O'Melveny*, 512 U.S. at 86. A similar fate should result here. This Court should not change existing Nevada law to suit FHFA. Expansion of *Montierth* at the expense of Nevada's recording statutes and constitutionally protected property rights, alters, rather than supplements, 4617(j)(3) against the dual commands of Congress and the Nevada Legislature. This Court should follow the reasoning by those courts, and quash any effort by the Bank and FHFA to advance arguments for a federal rule that attempts to deviate from this Court's authoritative construction of "property of the Agency" under 4617(j)(3).

IX. EXPANDING *MONTIERTH* WILL LEAD TO UNINTENDED AND DIRE CONSEQUENCES FOR THE REAL ESTATE AND TITLE INSURANCE INDUSTRIES IN NEVADA.

Nevada's recording statutes are the very means by which Nevada's recognition of the ability to acquire, possess, and protect property as an inalienable right under our State constitution is vindicated in the first instance. *See* NEV. CONST. § 1 ("All men are by Nature free and equal and have certain *inalienable rights* among which are those of enjoying and defending life and liberty; *Acquiring, Possessing and Protecting property* and pursuing and obtaining safety and happiness[.]") (emphasis added)).

Nevada's recording statutes draw lines of legal duty as a matter of public law through the recording statutes—not private law principles of agency and contract—to third party strangers to real property transactions precisely because public law rights, including inalienable rights, hang in the balance. It is impossible to *acquire, possess*, and *protect property* if one cannot ascertain with any certainty what exactly is being acquired in the first instance. If the metes and bounds of the very concept of property under Nevada law are indeterminate or negotiable by another's private agreement, then so too is the ability to acquire, possess, and protect property. The prospect of having property rights impaired or, as here, divested entirely due to privately arranged, unrecorded interests negotiated by others is at odds with the inalienable status of property rights under our State constitution.

If this Court expands *Montierth* and holds that a GSE's mere noteholder status confers upon it a real property interest under Nevada law that allows 4617(j)(3) to become operative as a matter of law, the consequences for real estate and title insurance interests in Nevada will be severe, indeed. For instance, this Court need only consider how many multi-tiered financing structures were foreclosed during the Great Recession and its aftermath. If the second- and third-tier notes in those structures were sheltered from foreclosure due to 4617(j)(3) they could now be asserted against unsuspecting homeowners and title insurers who relied upon the recording statutes in buying property and writing title insurance policies. The results for everyday Nevadans and their communities will be catastrophic. First of the protections to go will be the ability to obtain title insurance, as no underwriter will want to take on the risk that a hidden interest could rear its ugly head at any time to defeat what would otherwise be good title. It is of no consequence as to whether the number of second deeds of trust affected is one or thousands. And it is of no consequence the purpose of HERA. Servicers know they must assign a deed of trust to a GSE to avoid paying transfer tax because there is no tax involved if the grantor and grantee are the same. To capitalize on the exception the GSE and not its agent must be on the deed of trust. Nothing prevents the same when trying to assert 4617(j)(3) against a third party.

Expanding *Monteirth* and divesting Nevadans of the right to rely on publically recorded documents to determine title will affect title with existing deeds of trust and those recorded in the future. This is no small thing.

If the recognition of such a right is found to trigger due process protection under the Fourteenth Amendment, the consequences will be dire. *See, e.g.*, *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). As both 4617(j)(3) and potential due process challenges present federal questions, the Nevada state courts may very well lose control over their ability to mitigate the damage from these tragic consequences. Also, it could trigger due process challenges in this Court related to case made law working to divest a Nevada homeowner of its property. The Court should not invite such a result or, as this State's court of last resort, become a party to recognition of a heretofore unknown property right that will leave many Nevadans without a remedy.

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CONCLUSION

For the aforementioned reasons stated, SFR respectfully requests that this Court reverse the Order of the District Court and remand, instead granting summary judgment in favor of SFR.

DATED this 15th day of May, 2019.

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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 31pages long, and contains 6993 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 15th day of May, 2019.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 15th day of May 2019. Electronic service of the foregoing **Appellant's Reply Brief** shall be made in accordance with the Master Service List as follows:

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Dated this 15th day of May, 2019.

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