IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONSTAR MORTGAGE LLC,

Appellant,

vs.

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT.,

Respondent.

Supreme Court No. 77874

APPEAL

from the Eighth Judicial District Court, Department XXIV
The Honorable Adriana Escobar, District Judge
District Court Case No. A-13-689240-C

APPELLANT'S OPENING BRIEF

MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
DONNA WITTIG, ESQ.
Nevada Bar No. 11015
AKERMAN, LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Telephone: (702) 634-5000

Attorneys for Appellant Nationstar Mortgage LLC

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Nationstar is an indirect, wholly-owned subsidiary of a publicly-traded company, Mr. Cooper Group Inc. (**Mr. Cooper**), a Delaware corporation.

Nationstar is directly owned by two entities: (1) Nationstar Sub1 LLC (**Sub1**) (99%) and (2) Nationstar Sub2 LLC (**Sub2**) (1%). Both Sub1 and Sub2 are Delaware limited liability companies. Sub1 and Sub2 are both 100% owned by Nationstar Mortgage Holdings Inc. (**NSM Holdings**). NSM Holdings is a wholly-owned subsidiary of Mr. Cooper.

Over 10% of the stock of Mr. Cooper is owned by KKR Wand Investors Corporation, a Cayman Islands corporation.

Akerman LLP

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

APPELLANT'S STATEMENT REGARDING ROUTING

This appeal is presumptively retained by the Supreme Court of Nevada because it raises a question of statewide public importance. *See* NRAP 17(a)(12). The question of statewide public importance is whether an Enterprise (Fannie Mae or Freddie Mac) maintains a property interest in the collateral real estate where a contractually authorized servicer appears as record beneficiary of the deed of trust securing a loan the Enterprise owns. The Supreme Court of Nevada has answered that oft-litigated question in the affirmative, but never in a published opinion; doing so would substantially assist in the resolution of hundreds of similar cases pending in state courts across Nevada.

INTRODUCTION

This case involves issues and circumstances familiar to the Court from dozens of other appeals in similar cases. Respondent Saticoy Bay LLC Series 4641 Viareggio Court ("Saticoy Bay") purchased property at a homeowners' association foreclosure sale. Appellant Nationstar Mortgage LLC ("Nationstar") submitted evidence showing that the Federal Home Loan Mortgage Corporation ("Freddie Mac") owned a deed of trust encumbering the property at the time of the foreclosure sale, and argued that a federal statute—12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar"), part of the Housing and Economic Recovery Act of 2008

("HERA")—preempted state law that might otherwise have allowed the foreclosure sale to extinguish the deed of trust.

The district court awarded summary judgment to Saticoy Bay. The court held that, "[b]ecause no interest" of Freddie Mac or its Conservator the Federal Housing Finance Agency ("FHFA") "was recorded, there was no interest that would be effective as against the HOA or Saticoy Bay," and further held that Freddie Mac's business records did not prove its ownership of the loan because "this evidence would conflict with the judicially noticeable public record." Joint Appendix ("JA") JA8 1789. To the contrary, these conclusions conflict directly with this Court's decision in *In re Montierth*, 354 P.3d 648 (Nev. 2015), which has been confirmed in no fewer than ten cases closely analogous to this one. This Court's precedent is clear that Freddie Mac has maintained its secured interest in the deed of trust while Nationstar, its contractually authorized servicer, appears as the deed of trust's beneficiary of record. Similarly, this Court and the Ninth Circuit have held that the same type of evidence provided by Nationstar in this case is sufficient to prove an Enterprise's loan ownership.

Because the district court erred in awarding summary judgment in favor of Saticoy Bay, this Court should reverse.

ISSUES PRESENTED

The Federal Foreclosure Bar

I. In *Montierth*, this Court confirmed that a loan owner maintains an interest in collateral property where the owner's contractually authorized representative appears as record beneficiary of the deed of trust. The district court, however, held that Freddie Mac had no interest in the loan because its interest was not publicly recorded in Freddie Mac's own name. Did the district court err in holding that Nevada law required Freddie Mac to record its interest in its own name?

II. Under this Court's precedent, Freddie Mac's database records, a declaration from a Freddie Mac employee explaining those records, and Freddie Mac's Guide are admissible and sufficient to establish Freddie Mac's ownership interest in a mortgage lien and its contractual relationship with its loan servicers. Nationstar presented the same evidence in this case, while Saticoy Bay introduced no contrary evidence. Did the district court err in refusing to consider such evidence demonstrating Freddie Mac's ownership interest on the basis that it supposedly conflicted with the publicly recorded deed of trust?

STATEMENT OF THE CASE

Nationstar challenges the district court's award of summary judgment in favor of Saticoy Bay's quiet-title and declaratory-relief claims arising out of its purchase of property at a homeowners' association foreclosure sale (the "HOA Sale"). At the

time of the HOA Sale, Freddie Mac owned a deed of trust encumbering the property and its associated promissory note, and Nationstar served as the beneficiary of record of the deed of trust as Freddie Mac's contractually authorized servicer. Nationstar opposed summary judgment on the grounds that the Federal Foreclosure Bar protected Freddie Mac's deed of trust, which survived the HOA Sale.

After a hearing on Saticoy Bay's motion for summary judgment, the district court adopted Saticoy Bay's arguments and concluded that, unless Freddie Mac's name was on the publicly recorded deed of trust, it had no property interest under Nevada law, and thus the Federal Foreclosure Bar did not apply. Accordingly, the district court granted Saticoy Bay's motion for summary judgment. That conclusion is contrary to this Court's decision in *Montierth* and numerous subsequent opinions.

This appeal followed.

STATEMENT OF FACTS

I. The Secondary Mortgage Market

Congress created Freddie Mac and the Federal National Mortgage Association ("Fannie Mae" and, together with Freddie Mac, "the Enterprises") to support a nationwide secondary mortgage market. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). Freddie Mac's federal statutory charter authorizes it to purchase and deal only in secured "mortgages," not unsecured loans. *See* 12 U.S.C. §§ 1451(d), 1454; *see also Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct.

553, 557 (2017) (discussing Fannie Mae's role as a purchaser of mortgages); *FHFA v. Nomura Holding Am., Inc.*, 873 F.3d 85, 105 (2d Cir. 2017) (same); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599-600 (D.C. Cir. 2017) (same). Freddie Mac has purchased millions of mortgages nationwide, including hundreds of thousands of mortgages in Nevada.

Although Freddie Mac owns a large number of mortgage loans through its purchases on the secondary market, it is not in the business of managing the mortgages themselves, such as handling day-to-day borrower communications. Instead, Freddie Mac contracts with servicers to act on its behalf; in that role, servicers often appear as record beneficiaries of deeds of trust. *See Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 757-58 (Nev. 2017) (acknowledging servicers' role); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011) (describing servicers' role); Restatement (Third) of Property: Mortgages § 5.4 (the "Restatement") cmt. c (discussing the common practice where investors in the secondary mortgage market designate their servicer to be assignee of the mortgage); Freddie Mac's Single-Family Seller/Servicer Guide (the "Guide") at 1101.2(a) (discussing Freddie Mac's relationship with servicers to manage the loans Freddie Mac purchases), JA7 1602-03; *see also* JA7 1569 *et seq.*

(earlier versions of Guide excerpts).[1] In such situations, the note owner remains a secured creditor with a property interest in the collateral even if the recorded deed of trust names only the loan servicer. *E.g.*, *Montierth*, 354 P.3d at 650-51; *JPMorgan Chase Bank, N.A. v. Guberland LLC-Series 2* ("*Guberland II*"), No. 73196, 2019 WL 2339537, at *1 (Nev. May 31, 2019) (unpublished disposition); *Nationstar Mortg., LLC v. Guberland LLC-Series 3* ("*Guberland*"), No. 70546, 2018 WL 3025919, at *2 (Nev. June 15, 2018) (unpublished disposition); *Berezovsky*, 869 F.3d at 932.

[1] Relevant excerpts of the Guide were submitted with Nationstar's opposition to Saticoy Bay's Motion for Summary Judgment, and explained by Freddie Mac's supporting declaration. JA7 1518-20, 1552-53, 1568-1623. The Guide is publicly available on Freddie Mac's website as well. An interactive version is available at http://www.freddiemac.com/singlefamily/guide, and archived prior versions of the Guide are available at www.freddiemac.com/singlefamily/guide/bulletins/snapshot.html. While the cited sections of the Guide have been amended over the course of Freddie Mac's ownership of the Loan, none of these amendments have materially changed the relevant sections.

The Court may take judicial notice of the Guide. *See Mack v. Estate of Mack*, 206 P.3d 98, 106 (Nev. 2009) (taking judicial notice on appeal); *Berezovsky v. Moniz*, 869 F.3d 923, 932 n.9 (9th Cir. 2017) (taking judicial notice of Freddie Mac's Servicing Guide); *Nationstar Mortg., LLC v. Guberland LLC-Series 3*, No. 70546, 2018 WL 3205919, at *2 (Nev. June 15, 2018) (unpublished disposition) (describing Fannie Mae Servicing Guide as "publicly available"); *Charest v. Fannie Mae*, 9 F. Supp. 3d 114, 118 & n.1 (D. Mass. 2014); *Cirino v. Bank of Am.*, No. 13-cv-8829, 2014 WL 9894432, at *7 (C.D. Cal. Oct. 1, 2014).

II. Statutory Background

HERA established FHFA as the Enterprises' regulator, authorized FHFA's Director to place the Enterprises into conservatorships in certain circumstances, and enumerated the powers, privileges, and exemptions FHFA possesses as Conservator. *See* Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq.*). In September 2008—at the height of the financial crisis—FHFA's Director placed the Enterprises into conservatorships, where they remain today. *See Nationstar*, 396 P.3d at 755.

The Federal Foreclosure Bar—a broad statutory "exemption," captioned "Property protection," within HERA—mandates that when the Enterprises are under FHFA conservatorship, "[n]o property of the Agency shall be subject to … foreclosure … without the consent of the Agency … ." 12 U.S.C. § 4617(j)(3). Another HERA provision mandates that upon the inception of conservatorship, FHFA (i.e., the "Agency") succeeds by operation of law to "all rights, titles, powers, and privileges" of the entity in conservatorship "with respect to [its] assets," *id.* § 4617(b)(2)(A), thereby rendering all of the Enterprises' assets "property of the Agency" for the duration of the conservatorship, *id.* § 4617(j)(3). These statutory provisions—readily available to anyone, including investors specializing in foreclosed-property purchases—exist to protect the conservatorships and, ultimately, U.S. taxpayers.

Nevada Revised Statute 116.3116(2) (the "State Foreclosure Statute") grants homeowners' associations a superpriority lien for up to nine months of unpaid HOA dues (six months when the property is encumbered by an Enterprise lien). The State Foreclosure Statute permits properly conducted foreclosure sales of superpriority HOA liens to extinguish all junior interests, including prior-recorded security interests. *SFR Invs. Pool 1 v. U.S. Bank*, 334 P.3d 408, 419 (Nev. 2014).

III. Facts Specific to the Property

In January 2007, Monique Guillory ("Borrower") executed a promissory note memorializing her commitment to repay a $258,400 loan from First Magnus Financial Corporation ("Lender") for the purchase of a property located at 4641 Viareggio Court in Las Vegas (the "Property"). JA7 1549.[2] The note was secured by a deed of trust recorded against the Property on January 25, 2007 (the "Deed of Trust," together with the corresponding note, the "Loan"). JA6 1382. The Deed of Trust named Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary of record solely as nominee for Lender and Lender's successors and assigns. JA6 1383. MERS, as nominee for Lender and Lender's successors and assigns, recorded an assignment of its interest in the Deed of Trust to Aurora Loan Services LLC ("Aurora") in February 2011. JA6 1410. In October 2012, Aurora

[2] The findings of fact included a typo that the Borrower obtained a loan in the amount of $58,400 from the Lender (JA8 1786), instead of $258,400 (JA6 1383, JA7 1549, 1555).

recorded an assignment of its interest in the Deed of Trust to Nationstar. JA6 1413; *see also* JA7 1550-51.

As evidenced by its authenticated business records, Freddie Mac purchased the Loan in March 2007 and has owned it ever since. JA7 1549-50, 1552, 1555, 1563-67; *see also* JA8 1788 (Freddie Mac's "business records and testimony of a Freddie Mac employee state that Freddie Mac purchased the loan, including both the note and the deed of trust, on March 29, 2007 and continued to own the loan at the time of the HOA sale").

At the time of the HOA Sale on August 22, 2013, Nationstar was the record beneficiary of the Deed of Trust in its capacity as Freddie Mac's servicer. JA6 1413, JA7 1551-52, 1555, 1559, 1563-67; *see also* JA8 1788 ("Nationstar was servicing the loan on behalf of Freddie Mac at the time of the HOA Sale"). Nationstar is the current record beneficiary of the Deed of Trust and continues to service the Loan for Freddie Mac. JA7 1551-53, 1563-67.

At no time did FHFA consent to the extinguishment or foreclosure of Freddie Mac's property interest through the HOA Sale. JA6 1433 ("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.").

IV. Procedural History

The HOA Sale took place on August 22, 2013. In September 2013, Saticoy Bay filed a complaint seeking declaratory and injunctive relief to free and clear title to the Property. JA1 2-5. In December 2013, Nationstar moved to dismiss the complaint, arguing under Nevada state law that the Deed of Trust survived the HOA Sale. JA1 12-26. Saticoy Bay opposed, or, in the alternative, moved to stay the case pending this Court's resolution of appeals interpreting the State Foreclosure Statute. JA1 99-121. In April 2014, the district court denied the motion to dismiss but granted the motion to stay. JA1 247-48. The stay was lifted in February 2015. JA2 261, 276.

In March 2015, Nationstar filed an answer and a counterclaim against Saticoy Bay for quiet title and injunctive relief. JA2 286, 282-99. Saticoy Bay moved to dismiss the counterclaim, JA2 434-48, and Nationstar filed an opposition and counter-motion for summary judgment on several state law grounds, JA2 475 - JA3 501-09. In July 2015, the district court granted Saticoy Bay's motion to dismiss Nationstar's counterclaim, and denied Nationstar's counter-motion for summary judgment. JA3 707-720.

In May 2017, Saticoy Bay filed a motion for summary judgment. JA4 810-32. In September 2017, the district court entered default judgment against Nationstar after its opposition was filed out of time. JA6 1310; *see also* JA6 1306-1318.

Thereafter, Nationstar moved for reconsideration and the district court granted that motion, allowing Nationstar to file its opposition to summary judgment. *See* JA6 1342, 1375A. Nationstar opposed Saticoy Bay's motion for summary judgment on the basis that the Federal Foreclosure Bar could not extinguish Enterprise property interests while under conservatorship without the conservator's consent, among other grounds. JA7 1512-53.

In December 2018, the district court granted Saticoy Bay's motion for summary judgment, concluding that because Freddie Mac's property interest was not recorded, the Federal Foreclosure Bar did not apply. JA8 1785-92. The court also rejected Freddie Mac's business-record evidence and supporting declaration on the basis that it would purportedly "conflict with the judicially noticeable public record." JA8 1789. Nationstar filed a timely notice of appeal. JA8 1801-12.

SUMMARY OF THE ARGUMENT

The Federal Foreclosure Bar protects Freddie Mac's property interests from extinguishment, including via a homeowners' association sale under NRS Chapter 116. *See* 12 U.S.C. § 4617(j)(3). The district court incorrectly concluded as a matter of law that Freddie Mac lacked a protected property interest because Freddie Mac did not itself appear as the Deed of Trust's record beneficiary. JA8 1789. The district court improperly reasoned that the absence of a recorded interest in Freddie Mac's name conflicted with Freddie Mac's business records, which demonstrated its

ownership of the Loan. *Id*. Those conclusions misapply Nevada law, contravening this Court's decision in *Montierth* and numerous subsequent decisions recognizing that the owner of a loan need not record its interest in its own name to maintain its status as a secured creditor where, as here, the loan owner's contractually authorized servicer was record beneficiary.

Furthermore, the record is replete with evidence of Freddie Mac's property interest, including the same type of business records that this Court and the Ninth Circuit have held to be both admissible and sufficient to establish a valid and enforceable property interest under Nevada law. Nationstar's appearance as beneficiary of record of the Deed of Trust is fully consistent with Freddie Mac's ownership of the Loan, not contradictory to it.

The district court's erroneous holding that the Federal Foreclosure Bar did not protect Freddie Mac's interest was therefore based on an incorrect understanding of Nevada law and must be reversed.

STANDARD OF REVIEW

"This [C]ourt reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005). A district court's conclusions of law are not entitled to deference and are reviewed de novo. *Cty. of Clark v. Sun State Props., Ltd.*, 72

P.3d 954, 957 (Nev. 2003); *Paige v. State*, 995 P.2d 1020, 1021 (Nev. 2000) ("Questions of law are subject to de novo review.").

ARGUMENT

The district court erred in holding the Federal Foreclosure Bar inapplicable. Twelve decisions of this Court,[3] seven Ninth Circuit opinions,[4] and dozens of state and federal trial courts in Nevada all hold that an HOA foreclosure sale cannot extinguish property interests of the Enterprises while they are in conservatorship.

---

[3] *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 417 P.3d 363, 368 (Nev. 2018); *Guberland II*, 2019 WL 2339537, at *1; *M&T Bank v. Wild Calla Street Trust*, No. 74715, 2019 WL 1423107, at * 1 (Nev. Mar. 28, 2019) (unpublished disposition); *Nevada New Builds, LLC v. Nationstar Mortg., LLC*, No. 72243, 2019 WL 1245616, at *1 (Nev. Mar. 15, 2019) (unpublished disposition); *CitiMortgage, Inc. v. TRP Fund VI, LLC*, No. 71318, 2019 WL 1245886, at *1 (Nev. Mar. 14, 2019) (unpublished disposition); *Nationstar Mortg., LLC v. Raab*, No. 72347, 2019 WL 912649, at *1 (Nev. Feb. 20, 2019) (unpublished disposition); *CitiMortgage v. SFR*, 2019 WL 289690, at *1-2; *SFR v. Green Tree*, 2018 WL 6721370, at *2; *OneWest Bank FSB v. Holm Int'l Props., LLC*, No. 72933, 2018 WL 6817052, at *2 (Nev. Dec. 20, 2018) (unpublished disposition); *A&I LLC Series 3 v. Fannie Mae*, No. 71124, 2018 WL 3387787, at *1 (Nev. July 10, 2018) (unpublished disposition); *Guberland*, 2018 WL 3025919, at *2; *5312 La Quinta Hills v. BAC Home Loans Servicing, LP*, No. 71069, 2018 WL 3025927, at *1 (Nev. June 15, 2018) (unpublished disposition).

[4] *FHFA v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136, 1149 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1618 (Apr. 29, 2019); *Berezovsky*, 869 F.3d at 929-31; *G&P Inv. Enters. v. Barney*, 740 F. App'x 563, 563-64 (9th Cir. 2018); *JPMorgan Chase Bank v. LVDG, LLC*, 740 F. App'x 153, 154 (9th Cir. 2018); *Williston Inv. Grp., LLC v. JPMorgan Chase Bank, NA*, 736 F. App'x 168, 169 (9th Cir. 2018); *Saticoy Bay, LLC, Series 2714 Snapdragon v. Flagstar Bank, FSB*, 699 F. App'x 658, 658-59 (9th Cir. 2017); *Elmer v. JPMorgan Chase & Co.*, 707 F. App'x 426, 426 (9th Cir. 2017).

In *Christine View*, this Court held that the Federal Foreclosure Bar preempts the State Foreclosure Statute because it "is in direct conflict with Congress's clear and manifest goal to protect Fannie Mae's property interest while under the FHFA's conservatorship from threats arising from state foreclosure law." 417 P.3d at 367-68. Thus, the Federal Foreclosure Bar prevails over state law that would otherwise permit an HOA sale to extinguish an Enterprise's property interest. *Christine View* controls here.

The Ninth Circuit has likewise held that "the Federal Foreclosure Bar … preempts [the State Foreclosure Statute] and prevents the homeowners' association sale from extinguishing [FHFA's] interest." *LVDG*, 740 F. App'x at 154 (citing *Berezovsky*, 869 F.3d at 931).[5] The district court's ruling is erroneous because it conflicts with this Court's controlling precedent.

I. Freddie Mac Had a Property Interest Under This Court's Controlling Decision in *Montierth*

The district court cited *Montierth* for the proposition that, "[i]n Nevada, a security interest is only effective against a third party once it is recorded," JA8 1788 (citing *Montierth*, 354 P.3d at 650). The district court then held that, "[b]ecause no interest of Freddie Mac or FHFA was recorded, there is no such interest that would be effective as against the HOA or Saticoy Bay. Thus, the federal foreclosure bar

[5] *See also, e.g.*, *FHFA v. SFR*, 893 F.3d at 1146-47; *G&P*, 740 F. App'x at 564; *Williston*, 736 F. App'x at 169.

does not apply here." JA8 1789. The district court's holding is wrong and does not reflect this Court's decision in *Montierth*, as it omits much of the substantive analysis of the opinion. Under Nevada law, Freddie Mac had a secured property interest that was properly recorded with Nationstar—Freddie Mac's servicer—named as record beneficiary of the Deed of Trust.

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 Montierth*, 354 P.3d at 651. 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 § 5.4 cmts. c, e).

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 held in *Montierth*—and consistently has reaffirmed in the context of the Enterprises and their servicers in numerous decisions—that when a loan owner has an agency or contractual relationship with the record beneficiary of a deed of trust, the loan owner maintains a secured property interest. *See, e.g*., *Montierth*, 354 P.3d at 650-51; *Guberland II*, 2019 WL 2339537, at *1; *Guberland*, 2018 WL 3025919, at *2. Since *Montierth*, this Court has held in no fewer than ten cases that the owner of a loan maintains its property interest where its contractually authorized representative serves as record beneficiary of the associated deed of trust.

This Court has "recognized that the record beneficiary need not be the actual owner of the loan," *CitiMortgage v. TRP Fund*, 2019 WL 1245886, at *1 (citing *Montierth*, 354 P.3d at 650-51), and also confirmed that "[a servicer's] status as the

recorded deed-of-trust beneficiary does not create a question of material fact regarding whether [the Enterprise] owns the subject loan," *CitiMortgage v. SFR*, 2019 WL 289690 at *2. In *Noonan*, this Court recently cited *Montierth* for the proposition that "it is an acceptable practice for a loan servicer to serve as the beneficiary of record for the actual deed of trust beneficiary." *Noonan v. Bayview Loan Servicing, LLC*, No. 73665, 74525, 2019 WL 1552690, at *2 (Nev. Apr. 8, 2019) (unpublished disposition); *see also Ohfuji Invs., LLC v. Nationstar Mortg., LLC*, No. 72676, 2018 WL 1448729, at *1 (Nev. Mar. 15, 2018) (unpublished disposition) (also characterizing *Montierth* as "recognizing that it is an acceptable practice for a servicer to serve as the beneficiary of record for the actual deed of trust beneficiary"). In *Wild Calla*, this Court held that Freddie Mac "need not be the beneficiary of record on a deed of trust so long as it has a principal-agent relationship with the named beneficiary." 2019 WL 1423107, at *1 (citing *Montierth*). And in *Guberland*, this Court described *Montierth* as recognizing that "the note holder retains a secured interest where the mortgage holder has authority to foreclose on behalf of the note holder" in the context of a servicer's relationship with Fannie Mae as the loan owner. 2018 WL 3025919, at *2. Recently in *Guberland II*, this Court reaffirmed that "when such relationship or authority exists" as described in *Montierth*, "the loan holder maintains secured status under the deed of trust even

when not named as the deed's record beneficiary." 2019 WL 2339537, at *1 (citing *Montierth*).

Again and again, the Court has reaffirmed *Montierth*'s holding in similar contexts. *See, e.g.*, *W. Sunset 2050 Tr. v. Nationstar Mortg., LLC*, 420 P.3d 1032, 1036 n.4 (Nev. 2018) (en banc); *Nationstar*, 396 P.3d at 757 (applying principles articulated in *Montierth* and the Restatement to the Enterprise-servicer relationship); *5312 La Quinta Hills*, 2018 WL 3025927, at *1 (affirming summary judgment where an Enterprise's servicer was record beneficiary of the relevant deed of trust).

The Ninth Circuit has also applied *Montierth* to protect a loan owner's property interest when the owner's servicer is record beneficiary of the deed of trust. In *Berezovsky*, the court held that Freddie Mac's property interest "is valid and enforceable under Nevada law," though "the recorded deed of trust … omitted Freddie Mac's name." 869 F.3d at 932; *see also, e.g.*, *FHFA v. SFR*, 893 F.3d at 1149 ("Nor did the absence of the Enterprises' names in the mortgage loans' local recording documents at the time of the HOA sales undercut the Enterprises' interests."); *Elmer*, 707 F. App'x at 428; *Flagstar*, 699 F. App'x 658. The district court's decision is in conflict with this overwhelming authority. It did not cite (let alone try to distinguish) any of this authority from this Court or the Ninth Circuit. *See* JA8 1788-89.

Accordingly, *Montierth*'s application here is straightforward, and there is no plausible basis to distinguish this case. Ownership of the Note and Deed of Trust was transferred to Freddie Mac when it purchased the Loan in 2007, e.g., JA7 1549-50, 1555, 1563-67, JA8 1788, and Freddie Mac maintained ownership of the Loan on the date of the HOA Sale and indeed remains the owner of the Loan today, e.g., JA7 1549-50, 1553, 1563-67.

II. Nationstar Submitted Sufficient, Admissible Evidence to Establish Freddie Mac's Property Interest

Nationstar presented clear and uncontroverted evidence that at the time of the HOA Sale, Freddie Mac owned the Note and the Deed of Trust, and that Freddie Mac had a contractual relationship with Nationstar with regard to the Loan. The district court's conclusion rejecting this evidence was based on a flawed premise—that the lack of a recorded interest in Freddie Mac's own name weighed against (if not precluded) the business-record evidence from Freddie Mac. The district court held that, "even if" Freddie Mac's evidence was "sufficient to show that Freddie Mac believed it had ownership of the loan, this evidence would conflict with the judicially noticeable public record." JA8 1789. As explained above, that is incorrect as a matter of law. There is no requirement that the owner of a deed of trust must be identified in the recorded instrument; to the contrary, servicers like Nationstar frequently appear as beneficiaries of record for loan owners like Freddie Mac. Moreover, Saticoy Bay has offered no evidence controverting the business record

and witness testimony of Freddie Mac—it merely sought cumulative and duplicative evidence from Nationstar beyond that which this Court and the Ninth Circuit have found sufficient. The evidence submitted by Nationstar comported with this Court's precedent, including this Court's recent decision in *Guberland II*.

In *Guberland II*, this Court reversed a district court decision awarding summary judgment to an HOA sale purchaser that was much like the district court decision here. There, this Court held that Freddie Mac employee "Dean Meyer's declaration and the supporting computer printouts satisfy NRS 51.135's standard for admissibility." 2019 WL 2339537, at *1. This Court concluded that business-record evidence of Freddie Mac's ownership, similar evidence confirming Chase's status as Freddie Mac's loan servicer, and the generally applicable Guide, "was sufficient to show that Freddie Mac maintained a property interest and Chase, as servicer, was authorized to assert the Federal Foreclosure Bar on Freddie Mac's behalf." *Id*. at *2 (citing *Berezovsky*, 869 F.3d at 932-33 & n.8). This Court made that evidentiary ruling notwithstanding the fact that "no recorded assignment of the deed of trust to Freddie Mac existed" in that case. *Id.* at *1.

In *Wild Calla*, this Court reversed another district court decision awarding summary judgment to an HOA sale purchaser and held that the Federal Foreclosure Bar applied to protect Freddie Mac's property interest, concluding that "Freddie Mac presented evidence of its ownership and relationship with M&T Bank and MERS"

through "an employee affidavit," "internal database printouts," and the Guide that governed Freddie Mac's relationship with its servicers. 2019 WL 1423107, at *1. In *Wild Calla*, as here, Freddie Mac's potential interest in the Property was also further reflected in the Deed of Trust's language that it was a "Nevada Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT." *Id*. at *2; JA6 1382. This Court in *Wild Calla* also rejected the district court's holding (like the district court's holding here) that Freddie Mac had to be listed on the publicly recorded deed of trust in order for the Federal Foreclosure Bar to apply. 2019 WL 1423107, at *1.

In *CitiMortgage v. SFR*, this Court again concluded that evidence similar to that proffered here—deposition testimony of the similarly-situated Fannie Mae's NRCP 30(b)(6) witness, affidavit, and relied-upon business records—established Fannie Mae's ownership of the loan and that CitiMortgage was its servicer with standing to assert the Federal Foreclosure Bar. 2019 WL 289690 at *1-2 & n.1. And in *SFR v. Green Tree*, this Court yet again concluded that Fannie Mae established its ownership of a mortgage loan where it provided "ample evidence[] in the form of business records and testimony from employees." 2018 WL 6721370, at *1.[6]

[6] The decision states that the appeal was from a summary judgment, but that is a scrivener's error. While *SFR v. Green Tree* is a post-trial decision, it unequivocally endorses *Berezovsky*, a decision that affirmed summary judgment. 2018 WL 6721370, at *1. And *SFR v. Green Tree* does not mention anything about the trial court having had to reconcile or weigh conflicting evidence. Thus, *SFR v. Green Tree* confirms that the evidence Nationstar tendered to the district court in this case is sufficient to warrant summary judgment.

Several Ninth Circuit decisions similarly hold that an Enterprise's business records, supported by a declaration from a qualified employee, provide sufficient evidence to establish the Enterprise's property interest under Nevada law. *See, e.g.*, *Berezovsky*, 869 F.3d at 932-33 & n.8 (Freddie Mac's "database printouts" were "admissible business records" sufficient to support a "valid and enforceable" property interest under Nevada law); *Elmer*, 707 F. App'x at 428 (holding that employee declaration and business record printouts were "reliable and uncontroverted evidence of Fannie Mae's interest in the property on the date of the foreclosure"); *FHFA v. SFR*, 893 F.3d at 1149-50; *Williston*, 736 F. App'x at 169; *Las Vegas Dev. Grp.*, 740 F. App'x at 154 (Fannie Mae "produced sufficient evidence [of a property interest] by providing printouts of its internal database records"); *Barney*, 730 F. App'x at 563 (similar).

Specifically, Nationstar submitted business-record data derived from Freddie Mac's MIDAS system—a database that Freddie Mac uses every day to track millions of loans it acquires and owns nationwide, and a declaration from a Freddie Mac employee explaining their contents. JA7 1547-67. Freddie Mac employee Dean Meyer (the same declarant as in *Guberland II*) attested and the supporting business records show each of the following points: (1) Freddie Mac purchased the Loan in 2007 and still owns the Loan, JA7 1549-50, 1555 (showing "funding date" of March 29, 2007, reflecting the date Freddie Mac acquired ownership of the Loan); *see also*

JA7 1553 ("Freddie Mac has not sold the Loan"); JA7 1563-67 (mortgage payment history records); (2) Nationstar was the servicer of the Loan on the date of the HOA Sale, JA7 1551-52, 1555, 1559, 1563-67; (3) Nationstar remains the servicer for Freddie Mac, JA7 1551-53, 1563-67; and (4) the Guide serves as the governing document for the relationship between Freddie Mac and Nationstar, JA7 1552-53, 1602-03.

The district court did not disagree that the evidence all pointed in this direction. Indeed, the court found that Freddie Mac's business records and employee testimony "state that Freddie Mac purchased the loan, including both the note and the deed of trust, on March 29, 2007 and continued to own the loan at the time of the HOA sale." JA8 1788. The court also found that "Nationstar was servicing the loan on behalf of Freddie Mac at the time of the HOA sale." *Id.* The district court erred thereafter by concluding that the evidence Nationstar submitted did not support the application of the Federal Foreclosure Bar because, in the district court's view, it would "conflict with the judicially noticeable public record." JA8 1789. As this Court has concluded, there is no conflict—servicers often are record beneficiaries for the owner of a loan instead of the loan owners. *See supra* 14-19.

The district court's decision lacks support in either the record evidence or the governing law. The decision was erroneous, and this Court should reverse it.

CONCLUSION

For these reasons, Nationstar respectfully requests that this Court reverse the district court's holding.

DATED June 17th, 2019.

AKERMAN LLP

/s/ Donna M. Wittig

MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
DONNA WITTIG, ESQ.
Nevada Bar No. 11015
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

Attorneys for Appellant Nationstar Mortgage LLC

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this answering brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains **5,434** words.

FINALLY, I CERTIFY that I have read this **Appellant's Opening 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 opening brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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

DATED June 17th, 2019.

AKERMAN LLP

/s/ Donna M. Wittig

MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
DONNA WITTIG, ESQ.
Nevada Bar No. 11015
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

Attorneys for Appellant Nationstar Mortgage LLC

CERTIFICATE OF SERVICE

I certify that I electronically filed on June 17, 2019, the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of AKERMAN LLP