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SUPREME COURT

STATE OF NEVADA

NATIONSTAR MORTGAGE LLC,

Appellant,

vs.

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT,

Respondent.

No. 77874

# ANSWERING BRIEF BY RESPONDENT SATICOY BAY LLC SERIES 4641 VIAREGGIO CT

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## NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/respondent certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Plaintiff/respondent, Saticoy Bay LLC, Series 4641 Viareggio Ct, is a Nevada limited-liability company.

2. The manager for Saticoy Bay LLC, Series 4641 Viareggio Ct is Bay Harbor Trust.

3. The trustee for Bay Harbor Trust is Iyad Haddad a/k/a Eddie Haddad.

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## ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for plaintiff/respondent therefore believes that this appeal should be assigned to the Court of Appeals.

## ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale extinguished the deed of trust assigned to Nationstar Mortgage, LLC (hereinafter "defendant").

2. Whether Federal Home Loan Mortgage Corporation (hereinafter "Freddie Mac") complied with Nevada law to hold an interest in the deed of trust on the date of the HOA foreclosure sale.

3. Whether defendant provided a proper foundation to admit the computer screenshots upon which Mr. Meyer based his declaration.

4. Whether 12 U.S.C. § 4617(j)(3) protected the deed of trust from being extinguished even though FHFA did not act as a conservator or receiver in the case below and defendant did not prove that it had a contract to service the Guillory loan.

5. Whether 12 U.S.C. § 4617 preempts Nevada's recording statutes and prevents any unrecorded interest allegedly held by Freddie Mac from being void as to Saticoy Bay LLC Series 4641 Viareggio Ct (hereinafter "plaintiff").

6. Whether plaintiff is protected as a bona fide purchaser from defendant's unrecorded claim that Freddie Mac held an interest in the deed of trust assigned to defendant.

7. Whether an HOA foreclosure sale must be commercially reasonable and can

be set aside based solely on price.

8. Whether defendant is entitled to equitable relief against plaintiff from the extinguishment of the deed of trust.

9. An order granting summary judgment is reviewed de novo without deference to the findings of the lower court.

## STATEMENT OF THE CASE

On September 25, 2013, plaintiff filed a complaint asserting four claims for relief: 1) entry of an injunction prohibiting defendant from foreclosing a deed of trust recorded on January 25, 2007 against the real property commonly known as 4641 Viareggio Court, Las Vegas, Nevada (hereinafter "Property"); 2) entry of a judgment pursuant to NRS 40.010 determining that plaintiff was the rightful owner of the Property and that the defendants had no right, title, interest or claim to the Property; 3) entry of a declaration that title to the Property was vested in plaintiff free and clear of all liens and that the defendants be forever enjoined from asserting any right, title, interest or claim to the Property; and 4) entry of a writ of restitution restoring possession of the Property to plaintiff. (Joint Appendix ("JA"), Vol. I, pgs. 1-7)

On March 13, 2015, defendant filed an answer and counterclaim in response to plaintiff's complaint. (JA Vol. II, pgs. 282-433)

On March 19, 2015, plaintiff filed a motion to dismiss counterclaim. (JA Vol. II, pg. 434-463)

On April 20, 2015, defendant filed an opposition to plaintiff's motion to dismiss counterclaim and a countermotion for summary judgment. (JAVol. II, pg.475 to JA Vol. III, pg. 609)

On May 4, 2015, plaintiff filed a reply in support of plaintiff's motion to dismiss counterclaim and opposition to countermotion for summary judgment. (JA Vol. III, pgs. 613-625)

On July 28, 2015, the court entered an order granting plaintiff's motion to dismiss counterclaim and denying defendant's countermotion for summary judgment. (JA Vol. III, pgs. 707-721)

On May 15, 2017, plaintiff filed a motion for summary judgment. (JA Vol. IV, pgs. 810-978)

On August 10, 2017, defendant filed an untimely opposition to plaintiff's motion for summary judgment. (JA Vol. V, pgs. 1009-1165)

On September 12, 2017, the court entered findings of fact, conclusions of law, and judgment granting plaintiff's motion for summary judgment. (JA Vol. VI, pgs. 1306-1318)

On September 13, 2017, plaintiff served and filed a notice of entry of the findings of fact, conclusions of law, and judgment. (JA Vol. VI, pgs. 1319-1333)

On October 2, 2017, defendant filed a motion for reconsideration, motion for relief, and motion to alter or amend judgment. (JA Vol. VI, pgs. 1342-1362)

On October 17, 2017, plaintiff filed an opposition to defendant's motion for reconsideration, motion for relief, and motion to alter or amend judgment. (JA Vol. VI, pgs. 1369-1375)

On December 19, 2017, defendant filed an amended opposition to plaintiff's motion for summary judgment. (JA Vol. VII, pgs. 1512-1668)

On January 1, 2018, plaintiff filed a reply to opposition to motion for summary judgment. (JA Vol. VII, pg. 1669 to Vol. VIII, pg. 1781)

On December 11, 2018, the court entered findings of fact, conclusions of law, and judgment in favor of plaintiff. (JA Vol. VIII, pgs. 1785-1790)

On December 14, 2018, defendant served and filed a notice of entry of the findings of fact, conclusions of law, and judgment. (JA Vol. VIII, pgs. 1791-1800)

On January 7, 2019, defendant filed a notice of appeal. (JA Vol. VIII, pgs. 1801-1807)

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## STATEMENT OF FACTS

Plaintiff obtained title to the Property by entering and paying the high bid of $5,563.00 at a public auction held on August 22, 2013. *See* copy of foreclosure deed recorded on September 6, 2013 at JA Vol. IV, pgs. 835-837.

The public auction arose from a delinquency in assessments due from Monique Guillory (hereinafter "former owner") to the HOA pursuant to NRS Chapter 116.

Defendant is the beneficiary by assignment of a deed of trust recorded as an encumbrance against the Property on January 25, 2007. *See* deed of trust at JA Vol. V, pgs. 1172-1198, corporation assignment of deed of trust to Aurora Loan Services LLC (hereinafter "Aurora"), recorded on February 11, 2011, at JA Vol. V, pgs. 1200-1201, and assignment of deed of trust to defendant, recorded on October 18, 2012, at JA Vol. V, pg. 1203.

On August 19, 2011, Leach Johnson Song & Gruchow (hereinafter "foreclosure agent") mailed to the former owner a copy of the notice of delinquent assessment lien for $1,288.86 that was recorded against the Property on August 18, 2011. (JA Vol. IV, pgs. 839-853)

On January 24, 2012, the foreclosure agent recorded a notice of default and election to sell for $2,361.35 against the Property. (JA Vol. IV, pgs. 858-859)

On January 31, 2012, the foreclosure agent mailed copies of the notice of default to the former owner, to MERS and to Aurora. (JA Vol. IV, pgs. 860-896)

On July 24, 2012, the foreclosure agent mailed copies of a notice of foreclosure sale for $3,647.16 to the former owner, to MERS and to Aurora. (JA Vol. IV, pgs. 905-926)

On July 31, 2012, the foreclosure agent recorded the notice of foreclosure sale for $3,647.16 against the Property. (JA Vol. IV, pgs. 902-904)

On September 13, 2012, a copy of the notice of foreclosure sale was served upon the former owner by the posting of a copy of the notice in a conspicuous place on the Property. (JA Vol. IV, pg. 928, 930)

Beginning on September 13, 2012, copies of the notice of foreclosure sale were posted for 20 days successively in three public places in Clark County, Nevada (JA Vol. IV, pg. 929)

The notice of foreclosure sale was published in the Nevada Legal News on September 20, 2012, September 27, 2012 and October 4, 2012. (JA Vol. IV, pg. 932)

## SUMMARY OF THE ARGUMENT

The first deed of trust was extinguished when plaintiff purchased the Property at the HOA foreclosure sale held on August 22, 2013.

Freddie Mac did not comply with Nevada law to hold any interest in the Property on the date of the HOA foreclosure sale.

Defendant did not provide a proper foundation to admit the computer screenshots upon which Mr. Meyer based his declaration.

12 U.S.C. § 4617(j)(3) did not protect the deed of trust from being extinguished because FHFA did not act as a conservator or receiver in the case below and defendant did not prove that it had a contract to service the Guillory loan.

12 U.S.C. § 4617 does not preempt Nevada's recording statutes that make any interest in the Property claimed by Freddie Mac void as to plaintiff.

As a bona fide purchaser, plaintiff is protected from defendant's unrecorded claim that Freddie Mac held an interest in the deed of trust assigned to defendant.

Defendant did not prove the element of fraud, unfairness or oppression required by the California rule.

Defendant was not entitled to equitable relief against plaintiff altering the legal effect of the HOA foreclosure sale.

## STANDARD OF REVIEW

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this Court stated that it "reviews a district court's grant of summary judgment de novo,

without deference to the findings of the lower court."

## ARGUMENT

### 1. The first deed of trust was extinguished by the HOA foreclosure sale held on August 22, 2013.

NRS 116.3116(2) provides that an HOA's assessment lien is "prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association of a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien."

In Horizons at Seven Hills v. Ikon Holdings, 132 Nev., Adv. Op. 35, 373 P.3d 66, 73 (2016), this Court stated that the phrase "to the extent of" in NRS 116.3116(2) means "amount equal to." In other words, the super priority portion of the lien is a sum equal to nine months of common expenses that must be paid by the first security interest holder in order for the first security interest not to be extinguished by foreclosure of the HOA's lien.

The first deed of trust, recorded on January 25, 2007, falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this

priority in any way.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742,758, 334 P.3d 408, 419 (2014), this Court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust.

Every notice recorded, mailed, posted and published by the foreclosure agent stated "the total amount of the lien" as approved by this Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 757, 334 P.3d at 418.

The foreclosure deed (JA Vol. IV, pgs. 835-837) included detailed recitals regarding the dates of recording and mailing of the notice of delinquent assessment lien and the notice of default and the dates of recording, mailing, posting and publication of the notice of foreclosure sale.

Because the high bid of $5,563.00 paid by plaintiff exceeded the full amount stated in the notice of foreclosure sale, the HOA necessarily foreclosed its entire assessment lien including the superpriority portion of the lien.

The foreclosure of the HOA's super priority lien extinguished any estate, right, title, interest or claim in the Property created by defendant's subordinate deed of trust. Title to the real property was therefore vested in plaintiff free of the extinguished deed of trust.

**2. Freddie Mac did not comply with Nevada law to hold any interest in the Property on the date of the HOA foreclosure sale.**

In paragraph 5 of its conclusions of law (JA Vol. VIII, pg. 1789, ¶5), the district court stated:

> Because 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 does not apply here.

This conclusion of law is a correct interpretation of the requirements of Nevada law that prevented Freddie Mac from holding any interest in the Property on August 22, 2013.

In Butner v. United States, 440 U.S. 48 (1979), the United States Supreme Court stated that "[p]roperty interests are created and defined by state law." Id. at 55. The Supreme Court also stated:

> The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee in rents earned by mortgaged property.
>
> Id.

In United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir. 1959), the court of appeals stated:

> Thus **state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved.** It is commercially convenient to adopt existing state systems as it saves the expense of setting up a whole new federal recording system and it enables persons checking ownership interests in property to refer to one

set of record books rather than two. (emphasis added)

Id. at 383.

Paragraph (J) at page 2 of the deed of trust (JA Vol. V, pg. 1173) and Paragraph 16 at page 11 of the deed of trust (JA Vol. V, pg. 1182) both state that the rights of the beneficiary under the deed of trust are governed by Nevada law.

In Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011), this Court stated:

> A deed of trust is an instrument that "secure[s] the performance of an obligation or the payment of any debt." NRS 107.020. This court has previously held that a deed of trust "constitutes a conveyance of land as defined by NRS 111.010." Ray v. Hawkins, 76 Nev. 164, 166, 350 P.2d 998, 999 (1960). The **statute of frauds governs** when a conveyance creates **or assigns** an interest in land**:**
>
> > **No estate or interest in lands,** ... nor any trust or power over or concerning lands, or in any manner relating thereto, **shall be** created, granted, **assigned,** surrendered or declared ..., **unless ... by deed or conveyance, in writing, subscribed by the party** creating, granting**, assigning,** surrendering or declaring **the same**, or by the party's lawful agent thereunto authorized in writing.
>
> NRS 111.205(1) (emphases added).Thus, to prove that MortgageIT properly assigned its interest in land via the deed of trust to Wells Fargo, Wells Fargo **needed to provide a signed writing from MortgageIT demonstrating that transfer of interest**. No such assignment was provided at the mediation or to the district court, and **the statement from Wells Fargo itself is insufficient proof of assignment.** Absent a proper assignment of a deed of trust, Wells Fargo lacks standing to pursue foreclosure proceedings against Leyva. (emphasis added)

The "signed writing" required by NRS 111.205(1) is not limited to a deed of trust or an assignment of deed of trust, but includes every "writing" by which

defendant claims that an interest in the Property was transferred to Freddie Mac prior to August 22, 2013.

In Occhiuto v. Occhiuto 97 Nev. 143, 147, 625 P.2d 568, 570 (1981), this Court unequivocally stated:

> The law of this state specifically precludes the creation of any interest in land except by a properly executed written instrument. NRS 111.205(1).

The purpose of the statute of frauds is to prevent fraud. *See* Locken v. Locken 98 Nev. 369, 372, 650 P.2d 803, 804 (1982); Roberts v. Hummel,69 Nev. 154, 158, 243 P.2d 248, 250 (1952).

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

At page 5 of its Brief, defendant describes comment c to Restatement (Third) of Prop.: Mortgages, § 5.4, pg. 381 (1997), as "discussing the common practice where investors in the secondary mortgage market designate their servicer to be assignee of the mortgage." Although comment c to Section 5.4 states that "an assignment of the mortgage from the originating mortgagee to the servicer may be executed and recorded" and that "[i]t is clear in this situation that the owner of both the note and

mortgage is the investor and not the servicer," the next sentence in comment c states: "This follows from the express agreement to this effect that exists among the parties involved." The record on appeal does not contain admissible evidence proving the existence of such an "express agreement" for the Guillory note and deed of trust.

At page 9 of its Brief, defendant states that "[a]s 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."

None the pages cited by defendant are the signed "writing" required by Nevada law for Freddie Mac to hold any interest in the Property on August 22, 2013.

The Guillory "Loan" is a promissory note secured by a deed of trust. The note has a promisor and a promisee, or payor and payee. No party is designated as "owner." The promissory note also does not create any interest in the Property.

Similarly, the Guillory deed of trust has three parties: a trustor, a trustee and a beneficiary. No party is designated as "owner." The beneficiary of the deed of trust is the party that has the right to enforce the deed of trust.

At page 19 of its Brief, defendant states:

> 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.

On the other hand, under Nevada law, it is impossible for Freddie Mac to have held any interest in the Property unless the "writing" that created that interest was recorded.

In In re Montierth (Montierth v. Deutsche Bank), 131 Nev. Adv. Op. 55, 354 P.3d 648 (2015), this Court stated:

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

354 P.3d at 650.

No matter what label defendant places on the "writing" required by Nevada's statute of frauds, that "writing" must be recorded or it is void as to plaintiff.

Even if the unidentified "writing" is not an "assignment of the beneficial interest under a deed of trust," the writing would still be a "conveyance" as defined in NRS 111.010(1) because the word "conveyance" includes "every instrument in writing, except a last will and testament, **whatever may be its form**, and **by whatever name it may be known** in law, **by which any interest in lands** is **created,** aliened, **assigned** or surrendered." (emphasis added)

NRS 111.315 provides:

> Every conveyance of real property, and **every instrument of writing** setting forth an agreement to convey any real property, or **whereby any real property may be affected**, proved, acknowledged and certified in the manner prescribed in this chapter, to operate as notice to third persons, **shall be recorded** in the office of the recorder of the county in which the real property is situated or to the extent permitted by NRS 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such record. (emphasis added)

NRS 111.325 in turn provides:

> Every **conveyance of real property** within this State hereafter made, which shall not be recorded as provided in this chapter, **shall be void as against any subsequent purchaser**, in good faith and for a valuable consideration, of the same real property, or any portion thereof, **where his or her own conveyance shall be first duly recorded.** (emphasis added)

NRS 111.205(1), NRS 111.315 and NRS 111.325 each use the word "shall," which means that the "writing" required for Freddie Mac to own any "estate or interest" in the Property is mandatory. *See* Pasillas v. HSBC Bank USA, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011). That "writing" must also be recorded, or it is void against a third party like plaintiff.

Comment b to Restatement (Third) of Prop.: Mortgages, § 5.4, pg. 381 (1997) similarly provides:

> Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it. **However, assignees are well advised to record.** One reason is that, if the assignment is not recorded, the original mortgagee appears in the public records to continue to hold the mortgage. If the mortgagee and mortgagor subsequently enter into and record a purported discharge or modification of the mortgage without the assignor's knowledge or

> involvement, **and the real estate is then transferred to a good faith purchaser for value, the latter is entitled to rely on the record.** (emphasis added)

In Edelstein v. Bank of New York Mellon, 128 Nev. 505, 286 P.3d 249, 259 (2012), this Court stated:

> Second, it is prudent to have the recorded beneficiary be the actual beneficiary and not just a shell for the "true" beneficiary. In Nevada, the purpose of recording a beneficial interest under a deed of trust is to provide "constructive notice . . . to all persons." NRS 106.210. **To permit an entity that is not really the beneficiary to record itself as the beneficiary would defeat the purpose of the recording statute and encourage a lack of transparency.** (emphasis added)

Nevada is a race notice state. See Buhecker v. R.B. Petersen & Sons Const. Co., Inc., 112 Nev. 1498, 929 P.2d 937 (1996).

Section 1.2(a)(2) of the Guide that became effective on July 20, 2012 (JA Vol. V, pg. 1089) states in relevant part:

> In connection with the sale of Mortgages to Freddie Mac, the Seller agrees that each transaction is governed by the Guide, the applicable Purchase Contract and all other Purchase Documents.

If such a "Purchase Contract" existed for the Guillory loan, it would be a "writing" as described in NRS 111.205(1) and a "conveyance" as described in NRS 111.010(1) that must be recorded pursuant to NRS 111.315. Defendant's failure to produce this required "writing" supports a disputable presumption "[t]hat evidence willfully suppressed would be adverse if produced." NRS 47.250(3).

12 U.S.C. § 4617(j)(3) only protects "property of the Agency" and not

property interests of defendant. 12 U.S.C. § 4617(b)(2)(A)(1) states that the Agency shall immediately succeed to "all rights, titles, powers and privileges of the regulated entity" and "the assets of the regulated entity." No language in 12 U.S.C. § 4617 purports to treat an "unrecorded" interest that is "void" under state law as an "asset" of the regulated entity. No language in 12 U.S.C. § 4617(j)(3) prohibited the extinguishment of defendant's deed of trust recorded against the Property.

Because the record on appeal does not contain any admissible evidence proving that Freddie Mac held any enforceable interest in the Property on August 22, 2013, 12 U.S.C. § 4617(j)(3) did not apply to the public auction held on August 22, 2013. The district court correctly determined that the unrecorded claim by defendant that Freddie Mac owned the deed of trust was void as to plaintiff.

In footnote 3 at page 13 of its Brief, defendant cites twelve decisions by this Court, including eleven unpublished orders that can only be cited for their persuasive value. NRAP 36(c)(3). None of the unpublished orders have any persuasive value because they do not address the statute of frauds in NRS 111.205(1) or the mandatory requirements of Nevada's recording statutes.

At the top of page 14 of its Brief, defendant cites Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Ass'n, 134 Nev. Adv. Op. 36,

417 P.3d 363 (2018), but in that case, Fannie Mae was a party to the case, and Bank of America assigned the deed of trust to Fannie Mae on October 19, 2012 before the HOA foreclosure sale was held on September 6, 2013. No similar evidence exists in the present case.

At page 14 of its Brief, defendant cites In re Montierth, but in that case, this Court stated: "The note was subsequently transferred to respondent Deutsche Bank." 354 P.3d at 649. In the present case, defendant did not prove that the Guillory note was ever transferred to Freddie Mac in a way that complied with Nevada law.

In addition, this Court stated that "[a]fter the Montierths filed for bankruptcy, MERS assigned its interest in the deed of trust to Deutsche Bank on November 25, 2011, but the assignment was not recorded until December 23, 2011." 354 P.3d at 650. In the present case, defendant did not prove that any such written assignment of the Guillory deed of trust to Freddie Mac exists.

As an evidentiary rule, the statute of frauds has application in judicial actions and not in nonjudicial actions, such as nonjudicial foreclosures.

For this reason, the cases of Edelstein v. Bank of New York Mellon, 128 Nev. 505, 286 P.3d 249 (2012), and In re Montierth, 131 Nev. 543, 354 P.3d 648 (2015), are distinguishable from the present case in several important aspects. Both cases

dealt with bankruptcy issues and nonjudicial foreclosures. Neither case involved a judicial action where the parties were required to comply with the evidentiary rules.

In Facklam v. HSBC Bank USA,133 Nev. Adv. Op. 65, 401 P.3d 1068, 1071 (2017), this Court recognized the distinction between a nonjudicial foreclosure and a court case stating:

> Nonjudicial foreclosure is neither a civil nor a criminal judicial proceeding. It is not commenced by filing a complaint with the court. NRS 11.190 serves only to bar judicial actions; thus, they are inapplicable to nonjudicial foreclosures.

Similarly, as the statute of limitations is not applicable to nonjudicial foreclosures, the statute of frauds is not applicable to nonjudicial foreclosures.

The Montieth and Edelstein cases, both being bankruptcy cases involving non-judicial foreclosure sales, did not deal with any judicial action, involving the rules of evidence. Therefore, both Montieth and Edelstein cases are distinguishable for this significant reason. On the other hand, once a party comes to court asking for equitable relief from a foreclosure sale, it is bound by the rules of evidence, including the statute of frauds.

Both Montieth and Edelstein are also distinguishable in that neither case dealt with a party with a hidden interest trying to claim lien priority over properly recorded interests. After all, the purpose of recording statutes is to provide notice to a

subsequent purchaser. *See* SFR Investments Pool 1, LLC v. First Horizon Home Loans, 134 Nev. Adv. Op 4, 409 P.3d 891, 893 (2018); Allison Steel Mfg. Co v. Bentonite, Inc., 86 Nev. 494, 471 P.2d 666 (1970).

Furthermore, in Montierth, no written assignment of the note and deed of trust to a third party was recorded after the note was transferred to Deutsche Bank.

Restatement (Third) of Prop.: Mortgages, § 5.4 (1997) states:

> §5.4 Transfer of Mortgages and Obligations Secured by Mortgages.
>
> (a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.
>
> (b) Except as other required by the Uniform Commercial Code, **a transfer of the mortgage also transfers the obligation** the mortgage secures **unless the parties to the transfer agree otherwise.**
>
> (c) A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures. (emphasis added)

In the present case, defendant did not prove that when MERS assigned the Guillory deed of trust to Aurora on February 11, 2011 (JA Vol. V, pgs. 1200-1201), Freddie Mae and Aurora agreed "otherwise" that the "obligation the mortgage secures" was not transferred to Aurora.

Defendant also did not prove that when Aurora assigned "all beneficial interest" under the Guillory deed of trust "with all moneys now owing or that may hereafter become due or owing in respect thereof" to defendant on October 18, 2012

(JA Vol. V, pg. 1203), Aurora and defendant agreed "otherwise" that the "obligation the mortgage secures" was not transferred to defendant.

Because no admissible evidence proved there was such a written agreement for the Guillory note and deed of trust, the assignment of the deed of trust to defendant also transferred the obligation secured by the deed of trust to defendant on October 18, 2012.

The plain language of the recorded instruments also showed that defendant, not Freddie Mac, held the interest in real proper August 22, 2013. NRS 47.240 creates "Conclusive presumptions." Two of the conclusive presumptions are:

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

The deed of trust does not list Freddie Mac as a party to the deed of trust. Additionally, the assignments recorded before the HOA foreclosure sale assigned all interest in the deed of trust first to Aurora and then to defendant. These documents are conclusively presumed to be correct. Defendant, not Freddie Mac, is the beneficiary of the deed of trust.

If defendant was servicing the Guillory loan for Freddie Mac on August 22, 2013, the property interest held by Freddie Mac was not a real property right, but a right to proceeds from the Guillory note collected by defendant. Freddie Mac also has rights against defendant for damages for its failure to comply with Freddie Mac's own guidelines which resulted in loss of the security. What Freddie Mac does not have is the right to enforce the deed of trust because it is not the beneficiary.

This court has held that the beneficiary of the deed of trust is the party that has the right to enforce the deed of trust. Edelstein v. Bank of New York Mellon, 128 Nev. 505, 519-520, 286 P.3d 249, 259 (2012). Therefore, if Freddie Mac cannot enforce the deed of trust, it has no interest in the deed of trust.

In Edelstein, this Court also stated that it was bound by the written language in the deed of trust:

> The deed of trust also expressly designated MERS as the beneficiary; a designation we must recognize for two reasons. First, it is an express part of the contract that we are not at liberty to disregard, and it is not repugnant to the remainder of the contract.. . . Further, to the extent the homeowners argued that the lenders were the true beneficiaries, "the text of the trust deed contradicts [their] position." *Id.* at 1161; *accord Reeves v. ReconTrust Co., N.A.,* 846 F. Supp. 2d 1149 (D. Or.2012). Similarly here, the deed of trust's text, as plainly written, repeatedly designated MERS as the beneficiary, and we thus conclude that MERS is the proper beneficiary.

128 Nev. at 258-259, 286 P.3d at 519.

Here, the deed of trust does not mention Freddie Mac. The deed of trust was

first assigned to Aurora and then to defendant. Neither assignment mentions Freddie Mac. Under the rationale of Edelstein, as well as the conclusive presumptions regarding written documents, this Court should give credence to the contents of the deed of trust and the assignments and recognize that defendant was the beneficiary with the right to enforce the deed of trust at the time of the foreclosure sale, not Freddie Mac.

Such a holding would also recognize the recording priorities and rules and the protections granted to purchasers of real property by the mandatory notice provisions. The public has the right to rely on the real property recording laws. Because Freddie Mac hid its alleged interest by keeping it unrecorded and led the public to believe that defendant was the beneficiary of the deed of trust, Freddie Mac is not permitted to take a contrary position in this litigation. NRS 47.240(3).

At page 16 of its Brief, defendant cites JPMorgan Chase Bank, N.A. v. Guberland LLC-Series 2, No. 73196, 2019 WL 2339537 (Nev. May 31, 2019)(unpublished disposition), but that unpublished order does not discuss the statute of frauds in NRS 111.205(1) or the mandatory language in NRS 111.315 and NRS 111.325.

Defendant also cites Nationstar Mortgage, LLC v. Guberland LLC-Series 3,

No. 70546, 2018 WL 3025919 (Nev. June 15, 2018) (unpublished disposition), but this Court did not address the purchaser's bona fide purchaser status "because the district court did not address it." Id. at *2, n. 3. The unpublished order also does not discuss the effect of NRS 111.325 on an unrecorded claim to "own" a deed of trust that has been publicly assigned to another person.

The unpublished order in CitiMortgage, Inc. v. TRP Fund VI, LLC, No. 71318, 435 P.3d 1226 (Table), 2019 WL 1245886 (Nev. Mar. 14,2019)(unpublished disposition), also has no "persuasive value" because it does not discuss NRS 111.205(1), NRS 111.315 or NRS 111.325.

In CitiMortgage, Inc. v. SFR Investments Pool 1, LLC, No. 70237, 433 P.3d 262 (Table), 2019 WL 289690 (Nev. Jan. 18, 2019) (unpublished disposition), the district court considered "deposition testimony of appellant's NRCP 30(b)(6) witness," and the respondent recognized that "appellant's status as the **recorded** deed of trust beneficiary" while "Fannie Mae owns the subject loan" is "acceptable and common." Id. at *2, n. 3. (emphasis added) In the present case, defendant did not support its motion with deposition testimony, defendant did not prove "how" Freddie Mac acquired ownership of the Guillory loan, and plaintiff did not agree that it was "acceptable" for Freddie Mac to conceal its alleged "ownership" of an interest

in Nevada real property.

In Noonan v. Bayview Loan Servicing, LLC, No. 73665, No. 74525, 438 P.3d 335, n. 2 (Table)(Nev. Apr. 8, 2019)(unpublished disposition), "Bayview's NRCP 30(b)(6) witness attested that Bayview was a servicing agent on behalf of the owner of the loan, which the witness presumably confirmed based on his review of the relied upon business records." As discussed below, Mr. Meyer did not have the required personal knowledge to prove that the "separate agreement, which incorporates the applicable Purchase Documents," as required by Section 1.2(a)(3) of the Guide, exists for the Guillory loan.

In Ohfuji Investments, LLC v. Nationstar Mortgage, LLC, No. 72676, 414 P.3d 813 (Table), 2018 WL 1448729 (Nev. Mar. 15, 2018) (unpublished disposition), the respondent "subsequently assigned the beneficial interest in the deed of trust" to Fannie Mae, and "appellant acknowledged that respondent was FNMA's loan servicer." Id. at *1. No such assignment to Freddie Mac or admission by plaintiff exists in the present case.

In M&T Bank v. Wild Calla Street Trust, No. 74715, 437 P.3d 1054 (Table)(Nev. Mar. 28, 2019)(unpublished disposition), this Court focused only on the language that was added to NRS 106.210 in 2011 and found that the pre-2011

version of NRS 106.210 did not require Freddie Mac to record the property interest that it acquired in 2007. On the other hand, the mandatory recording requirements in NRS 111.315, and NRS 111.325 have existed since 1861, and NRS 111.315 was last amended in 1995.

At page 18 of its Brief, defendant cites West Sunset 2050 Trust v. Nationstar Mortgage, LLC, 134 Nev. Adv. Op. 47, 420 P.3d 1032 (2018), but this Court stated that "to have standing to foreclose, the current beneficiary of the deed of trust and the current holder of the promissory note must be the same." In the present case, defendant did not prove that Freddie Mac was either "the current beneficiary of the deed of trust" or "the current holder" of the Guillory note on August 22, 2013.

Defendant also cites Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC, 133 Nev., Adv. Op. 34, 396 P.3d 754 (2017), but this Court remanded that case to the district court to consider the exact evidence that defendant has failed to produce in the present case.

Defendant also cites 5312 La Quinta Hills, LLC v. BAC Home Loans Servicing, LP, No. 71069, 2018 WL 3025927 (Table) (Nev. June 15, 2018) (unpublished disposition), but unlike plaintiff, the appellant did not challenge the district court's finding that "the Federal Foreclosure Bar preempts NRS 116.3116 in

this case." Id. at *1.

The federal court decisions cited by defendant in footnote 4 at page 13 of its Brief and at page 18 of its Brief each involved two issues: one based on federal law and the other based on state law.

The federal law issue is whether the provisions of 12 U.S.C. § 4617(j)(3) apply to an HOA foreclosure sale held under NRS Chapter 116. The state law issue is a non-binding opinion regarding whether or not the regulated entity complied with Nevada law to be the owner of the deed of trust on the date of the foreclosure sale. As an interpretation of the requirements under Nevada law for Freddie Mac to own the deed of trust in the present case, the federal court decisions are not binding.

In Blanton v. North Las Vegas Municipal Court, 103 Nev. 623, 748 P.2d 494, 500 (1987), this Court stated:

> We note initially that the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court. United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075–76 (7th Cir.1970), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 140 (1971). Even an *en banc* decision of a federal circuit court would not bind Nevada to restructure the court system of this state. Our state constitution binds the courts of the State of Nevada to the United States Constitution as interpreted by the United States Supreme Court. Nev. Const. art. I, § 2. See Bargas v. Warden, 87 Nev. 30, 482 P.2d 317, *cert. denied*, 403 U.S. 935, 91 S.Ct. 2267, 29 L.Ed.2d 715 (1971).

In addition, this Court has stated that the Ninth Circuit's interpretation of Nevada statutes on a matter of state law does not constitute mandatory precedent, but

may be construed as persuasive authority. *See* In re Nevada State Engineer Ruling No. 5823, 128 Nev. 232, 277 P.3d 449, 456 (2012); Custom Cabinet Factory of New York, Inc. v. District Ct., 119 Nev. 51, 54, 62 P.3d 741, 742-743 (2003).

In Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003), the court stated that "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority and should reject the prior circuit opinion as having been effectively overruled." *See also* United States v. Swisher, 771 F.3d 514, 524 (9th Cir. 2014); CRST Van Expedited, Inc. v. Werner Enterprises, Inc., 479 F.3d 1099, 1106 n.6 (9th Cir. 2007); High v. Ignacio, 408 F.3d 585, 590 (9th Cir. 2005) ("This court accepts a state court ruling on questions of state law.").

In Owen v. United States, 713 F.2d 1461, 1464 (9th Cir.1983), the court of appeals recognized that its interpretation of Cal. Civ. Proc. Code § 877.6 (West Supp. 1983) was "only binding in the absence of any subsequent indication from the California courts that our interpretation was incorrect."

The Ninth Circuit has also stated that "a state supreme court can overrule us on a question of state law" (Henderson v. Pfizer, Inc., 285 F. App'x 370, 373 (9th

Cir. 2008)), and that "we are required to follow intervening decisions of the California Supreme Court that interpret state law in a way that contradicts our earlier interpretation of that law" (Bonilla v. Adams, 423 F. App'x 738, 740 (9th Cir. 2011)).

In O'Brien v. Skinner, 414 U.S. 524, 531 (1974), the Supreme Court stated that "[i]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State."

In Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017), the court acknowledged that its determination of whether Freddie Mac held an interest in the deed of trust was controlled by Nevada law. The court stated:

> **Here, we look to the Nevada Supreme Court's resolution of these issues**. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) ("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."). (emphasis added)

869 F.3d at 931.

As discussed above, under Nevada law, an assignment of an interest in a deed of trust is a conveyance of land that must comply with the statute of frauds in NRS 111.205(1) and that must be recorded as required by NRS 111.315. None of the federal court decisions cited by defendant address these mandatory requirements of Nevada law.

At page 19 of its Brief, defendant states that "[o]wnership 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."

As stated at page 13 above, none of the pages cited by defendant are the signed "writing" required by Nevada law for Freddie Mac to hold any interest in the Property on August 22, 2013.

Comment b to Section 5.4 of Restatement (Third) of Prop: Mortgages (1997) states in part:

> Ownership of a contractual obligation can generally be transferred by a document of assignment; see Restatement, Second, Contracts § 316. However, if the obligation is embodied in a negotiable instrument, a transfer of the right to enforce must be made by delivery of the instrument; see U.C.C. § 3-203 (1995). The principle of this subsection, that the mortgage follows the note, applies to either form of transfer of the note.

This Court has stated that "[t]he proper method of transferring the right to payment under a mortgage note is governed by Article 3 of the Uniform Commercial Code – Negotiable instruments, because a mortgage note is a negotiable instrument." Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011).

NRS 104.3201(2) states that "if an instrument is payable to an identified person, negotiation requires **transfer of possession** of the instrument **and** its

**endorsement by the holder**." (emphasis added) NRS 104.3204(1) states that an "endorsement" is a signature "made on an instrument for the purpose of negotiating the instrument."

NRS 104.3203(1) states that "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." In addition, a note may be transferred without an endorsement, but NRS 104.3203(2) requires that the party seeking to establish its right to enforce the note "**must account for possession of the unendorsed instrument** by proving the transaction through which the transferee acquired it." (emphasis added)

The cited pages also do not prove that the right to enforce the Guillory note was ever transferred to Freddie Mac in the manner required by NRS 104.3203.

**3. Defendant did not provide a proper foundation to admit the computer screenshots upon which Mr. Meyer based his declaration.**

At page 19 of its Brief, defendant states that "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."

As discussed above, defendant's "uncontroverted evidence" is directly contradicted by the assignment of deed of trust to defendant, recorded on October 18, 2012, which proves that defendant owned both the Guillory note and deed of trust on August 22, 2013. *See* JA Vol. V, pg. 1203. As quoted at page 20 above, Restatement (Third) of Prop.: Mortgages, § 5.4(b) (1997) expressly provides that the "transfer of the mortgage" also transferred "the obligation the mortgage secures unless the parties to the transfer agree otherwise."

Because defendant did not produce the agreement by the parties that provides "otherwise," the recorded assignment of deed of trust is "uncontroverted evidence" that Freddie Mac did not own the Guillory deed of trust or the Guillory note on August 22, 2013.

At page 19 of its Brief, defendant states that "[t]here is no requirement that the owner of a deed of trust must be identified in the recorded instrument." On the other hand, because the "writing" required by NRS 111.205(1) for Freddie Mac to hold any interest in the Property is a "conveyance" as defined in NRS 111.010(1), NRS 111.315 requires that the writing "shall be recorded" in the office of the county recorder. As a result, the identify of any person claiming to hold an interest in Nevada real property must be identified in a recorded writing.

At the bottom of page 19 and top of page 20 of its Brief, defendant states that "Saticoy Bay has offered no evidence controverting the business record and witness testimony of Freddie Mac," but as stated above, the assignment of deed of trust that was recorded on October 18, 2012 proves that defendant, not Freddie Mac, owned the Guillory deed of trust and the Guillory note on August 22, 2013.

Defendant again cites JPMorgan Chase Bank, N.A. v. Guberland LLC-Series 2, No. 73196, 2019 WL 2339537 (Nev. May 31, 2019)(unpublished disposition), which may not be cited as precedent and which is not persuasive because the unpublished order does not discuss the statute of frauds in NRS 111.205(1) or the mandatory language in NRS 111.315 and NRS 111.325.

At pages 20 and 21 of its Brief, defendant cites M&T Bank v. Wild Calla Street Trust, No. 74715, 437 P.3d 1054 (Table)(Nev. Mar. 28, 2019)(unpublished disposition), where this Court stated that the words "Nevada Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT" on the deed of trust contradicted the district court's "conclusion that Wild Calla has no notice of Freddie Mac's interest." On the other hand, using a form document did not grant any interest in the deed of trust to Freddie Mac – Nevada law required that defendant produce a "signed writing" that transferred the deed of trust to Freddie Mac. Leyva v. National Default

Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011).

Defendant also cites CitiMortgage, Inc. v. SFR Investments Pool 1, LLC, No. 70237, 433 P.3d 262 (Table), 2019 WL 289690 (Nev. Jan. 18, 2019) (unpublished disposition), even though the record on appeal does not contain the deposition testimony upon which this Court relied in that case.

Defendant also cites SFR Investment Pool 1, LLC v. Green Tree Servicing, LLC, No. 72010, 432 P.3d 718 (Table), 2018 WL 6721370 (Nev. Dec. 17, 2018)(unpublished disposition), but this Court stated that "[o]n the same day that the trustee's deed upon sale was recorded, so was an assignment of the deed of trust to Fannie Mae." Id. at *1. No such written assignment of the deed of trust to Freddie Mac exists in the present case.

At page 22 of its Brief, defendant cites five (5) federal court decisions that are not a binding interpretation of the requirements under Nevada law for Freddie Mac to own the deed of trust in the present case. In addition, none of the cases mention the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325.

At page 22 of its Brief, defendant stated that "Nationstar submitted business-record data derived from Freddie Mac's MIDAS system," but as noted at page 7 of plaintiff's reply (JA Vol. VII, pg. 1675), Dean Meyer testified at trial in *6119 Magic*

*Mesa St. Trust v. Chase*, Case No. A-13-687837-C, that the information in Freddie Mac's MIDAS system comes from the entity selling a loan to Freddie Mac or the servicer and not from Freddie Mac employees. (JA Vol. VII, pg. 1706)

In U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040 (9th Cir. 2009), the court of appeals stated:

> The important issue is whether the database, not the printout from the database, was compiled in the ordinary course of business.
>
> In this case, the exhibits summarizing loss adjustment expense payments for each claim fit squarely within the business records exception of Rule 803(6). As the district court found (1) the underlying data was entered in the database at or near the time of each payment event; (2) **the persons who entered the data had knowledge of the payment event**; (3) the data was kept in the course of Republic Western's regularly conducted business activity; and (4) **Mr. Matush was qualified and testified as to this information.** (emphasis added)
>
> 576 F.3d at 1044.

The court of appeals also stated:

> In this case, **Matush testified regarding the process of inputting data into the computer** and the process of querying the computer to compile the information to create the summaries. **Matush testified that he was familiar with the record keeping practices of the company,** testified regarding the computer system used to compile and search the insurance claim records, **and testified regarding the process of querying the computer system to create the summaries admitted at trial**. (emphasis added)
>
> 576 F.3d at 1045.

The business records exception in NRS 51.135 provides:

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, **made at or near the**

> **time** by, or from information transmitted **by, a person with knowledge,** all in the course of a regularly conducted activity, **as shown by the testimony or affidavit of the custodian or other qualified person**, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. (emphasis added)

The declaration by Mr. Meyer did not identify the "writing" required by NRS 111.205(1), and Mr. Meyer did not state that this required "writing" must exist before an unidentified person listed Freddie Mac as the owner of the Guillory loan in Freddie Mac's Loan Status Manager and MIDAS system upon which Mr. Meyer based his declaration.

The record on appeal also does not contain admissible evidence proving that the unidentified person(s) who entered the data regarding the Guillory loan in MIDAS followed any procedure that required the person(s) to first confirm the existence of the "writing" required by Nevada law for Freddie Mac to enforce either the Guillory note or deed of trust. Consequently, data entries made in MIDAS by an unknown person using an unknown procedure on an unknown date cannot prove that the "writing"required by Nevada law existed on August 22, 2013.

At pages 5 and 6 of its reply (JA Vol. VII, pgs. 1673-1674), plaintiff quoted the requirements to lay a proper foundation for the admission of computer records found in American Express Travel Related Services Company, Inc. v. Vinhee (In re

Vinhee), 336 B.R. 437, 446-447 (9th Cir. BAP 2015). Plaintiff also stated that "[t]he declaration by Mr. Meyer does not include statements based on personal knowledge that prove the required steps for the admission of the exhibits to his declaration." (JA Vol. VII, pg. 1674)

In Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1259 (9th Cir. 1984). the court of appeals stated that "where the only function that the report serves is to assist in litigation or its preparation, many of the normal checks upon the accuracy of business records are not operative." Id. (*quoting* McCormick on Evidence § 308, at 877 n. 26 (E. Cleary 3d ed. 1984)).

Because the computer records upon which Mr. Meyer based his declaration were not printed until February 22, 2017 (JA Vol. VII, pgs. 1555, 1557, 1559, 1561, 1563-1567), defendant did not prove that the "writing" required by Nevada law for Freddie Mac to enforce the Guillory loan existed on August 22, 2013.

NRS 50.025(1)(a) states that "[a] witness may not testify to a matter unless . . . [e]vidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." NRCP 56(e) states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is

competent to testify to the matters stated therein."

Because Mr. Meyer did not state that he had ever seen the documents that must exist for Freddie Mac to hold an interest in the Property or for defendant to be the servicer of the Guillory loan for Freddie Mac, Mr. Meyer's declaration is not admissible to prove the existence of those documents.

Section 1.2(a)(3) of the Guide that became effective on July 20, 2012 (JA Vol. V, pg. 1090) states:

> If a Servicer who services Mortgages for Freddie Mac is not also the Seller of the Mortgages for Freddie Mac, the Servicer must agree to service Mortgages for Freddie Mac by separate agreement, which incorporates the applicable Purchase Documents.

Defendant's failure to produce this required "separate agreement" also supports a disputable presumption "[t]hat evidence willfully suppressed would be adverse if produced." NRS 47.250(3).

At page 23 of its Brief, defendant cites Mr. Meyer's declaration at JA Vol. VII, pgs. 22-23 as evidence that "the Guide serves as the governing document for the relationship between Freddie Mac and Naitonstar." As quoted at page 16 above, Section 1.2(a)(2) of the Guide instead states that "each transaction is governed by the Guide, the applicable Purchase Contract and all other Purchase Documents."

Because the record on appeal does not contain the required "Purchase

Contract" and "other Purchase Documents" for the Guillory loan, defendant did not prove that Freddie Mac complied with the Guide to hold any interest in the Guillory loan.

At the bottom of page 23 of its Brief, defendant states that "[t]he district court's decision lacks support in either the record evidence or the governing law," but defendant's failure to produce the signed writing required by NRS 111.205(1), and Freddie Mac's failure to record that writing as required by NRS 111.315, proves that the district court correctly concluded 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." (JA Vol. VIII, pg. 1789, ¶5)

**4. 12 U.S.C. § 4617(j)(3) did not protect the deed of trust from being extinguished because FHFA did not act as a conservator or receiver in the case below and defendant did not prove that it had a contract to service the Guillory loan.**

12 U.S.C. § 4617(j)(1) provides that "[t]he provisions of this subsection shall apply with respect to the Agency **in any case in which the Agency is acting** as a conservator or a receiver." (emphasis added) The word "Agency" is defined by 12 U.S.C. § 4502(2) to be the FHFA. The definition of "regulated entity" in 12 U.S.C. § 4502(20) includes Freddie Mac.

In Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC, 133 Nev.,

Adv. Op. 34, 396 P.3d 754, 758 (2017), this Court held that "the servicer of a loan owned by a regulated entity may argue that the Federal Foreclosure Bar preempts NRS 116.3116, and that neither Freddie Mac nor the FHFA need be joined as a party." In reaching this conclusion, this Court relied on 12 U.S.C. § 4617(b)(2)(B)(v) and 12 C.F.R. § 1237.3(a)(8) to conclude that "HERA explicitly allows the FHFA to authorize a loan servicer to administer FHFA loans on FHFA's behalf." 396 P.3d at 757.

In Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017) and Elmer v. JPMorgan Chase & Co., 707 Fed. App'x 426 (9th Cir. 2017), the requirement in 12 U.S.C. § 4617(j)(1) was satisfied because FHFA intervened and was a party. In the present case, on the other hand, because FHFA never "acted" as a party either as "a conservator or a receiver," the provisions in 12 U.S.C. § 4617(j), and in particular, 12 U.S.C. § 4617(j)(3), cannot support the arguments made by defendant to claim that deed of trust assigned to defendant on October 12, 2012 was not extinguished. See assignment of deed of trust, recorded on October 18, 2012, at JA Vol. V, pg. 1203.

On December 19, 2017, defendant filed an amended opposition to plaintiff's motion for summary judgment. (JA Vol. VII, pgs. 1512-1668)

At page 6 of its opposition (JA VII, pg. 1517), defendant stated that "[a]t the time of the HOA Sale on August 22, 2013, Nationstar was the servicer of the Loan for Freddie Mac."

Defendant cited "**Exhibit C**, ¶ 5.i" as evidence, but this was only a statement made by Dean Meyer that "[o]n October 18, 2012, an Assignment of Deed of Trust was recorded, whereby Nationstar, as attorney in fact for Aurora, assigned its interest in the Deed of Trust to Nationstar." (JA Vol. VII, pg. 1551, ¶5(i))

In the present case, the record on appeal does not contain any admissible evidence proving that defendant was the "attorney in fact for Aurora" on October 8, 2012 when the assignment of deed of trust was signed by Sean Mckenzie. (JA Vol. V, pg. 1203) NRS 162A.480(2) provides:

> Every power of attorney, or other instrument in writing, containing the power to convey any real property as agent or attorney for the owner thereof, or to execute, as agent or attorney for another, any conveyance whereby any real property is conveyed, or may be affected, must be recorded as other conveyances whereby real property is conveyed or affected are required to be recorded.

No document has ever been recorded that proves defendant had any power to act on behalf of Aurora.

In paragraph 5 (h) at page 4 of his declaration (JA2a, pg. 374), Mr. Meyer stated that the Guide is "a publicly accessible document" and "serves as a central

document governing the contractual relationship between Freddie Mac and its servicers nationwide, including Nationstar." This statement is contradicted by Section 1.2(a)(2) of the Guide, which expressly provide that "the Seller agrees that each transaction is governed by the Guide, the applicable Purchase Contract **and** all other Purchase Documents." (emphasis added) Section 1.2(a)(3) of the Guide also states that "the Mortgages purchased will be serviced by the Seller pursuant to the unitary, indivisible master Servicing contract."

In paragraph 5 (k) at page 5 of his declaration (JA2a, pg. 375), Mr. Meyer stated that Freddie Mac's Loan Status Manager "reflects that Nationstar has serviced the Loan, pursuant to the Guide, from June 16, 2012 through the present." Mr. Meyer, however, did not state that he had ever seen the "unitary, indivisible master Servicing contract" for the Guillory loan that was required by Section 1.2(a)(3) of the Guide.

The "Purchase Contract" and "the unitary, indivisible master Servicing contract" for the Guillory loan are not "a publicly accessible document," and neither document appears in the record on appeal. In addition, no person with personal knowledge stated that he or she had ever seen these required documents for defendant to be a servicer of the Guillory loan for Freddie Mac.

Furthermore, Section 1.2(a)(3) of the Guide states that "[t]he Seller agrees that any failure to service any Mortgage in accordance with the terms of the unitary, indivisible master Servicing contract, or any breach of the Seller's obligations under any aspect of the unitary, indivisible master Servicing contract, **shall be deemed to constitute a breach of the entire contract** and shall entitle Freddie Mac to terminate all or a portion of the Servicing contract." (emphasis added) *See* JA Vol. VII, pg. 1570.

Section 66.29 of Guide (adopted on January 14, 2011 and October 31, 2012) states:

> **The Servicer must obtain bills, and make payment for all expenses** requiring payment under the Security Instrument. Such expenses may include, but are not limited to, real estate or personal property taxes, special assessments, water bills, ground rents and other charges including condominium, **homeowners association (HOA)** and Planned Unit Development (PUD) regular assessments, that are, or may become, a First Lien priority on the property or that if not paid would result in the subordination of Freddie Mac's interest in the property. (emphasis added)

Section 67.5(2) of the Guide (adopted on June 30, 2011 and November 9, 2012) requires that Freddie Mac's servicers "compensate Freddie Mac and hold Freddie Mac harmless for any loss, damage or expense, including court costs and attorney fees, that Freddie Mac sustains as a result of the Servicer's failure to comply with the Guide or that result from errors, omissions or delays by the Servicer or the

Servicer's agent." Section 67.5(6) of the Guide (adopted on June 30, 2011 and November 9, 2012) requires that defendant "repurchase" the Mortgage as provided in Section 78.20 of the Guide.

As a result, even if defendant did have a written agreement to service the Guillory loan for Freddie Mac at the time of the HOA foreclosure sale, defendant's failure to observe Freddie Mac's guidelines caused "a breach of the entire contract" requiring defendant to indemnify Freddie Mac, repurchase Freddie Mac's interest in the mortgage, or terminate servicing.

Defendant cannot use an agreement that does not exist in the record on appeal, which no person with personal knowledge has stated exists, to give defendant authority to assert FHFA's rights in order to prevent the deed of trust assigned to defendant from being extinguished.

**5. 12 U.S.C. § 4617 does not preempt Nevada's recording statutes that make any interest in the Property claimed by Freddie Mac void as to plaintiff.**

NRS 111.325 protects plaintiff from defendant's claim that Freddie Mac held an undisclosed interest in the Property. Plaintiff was entitled to rely upon the recorded corporation assignment of deed of trust (JA1b, pgs. 216-217) proving that defendant owned both the Guillory deed of trust and the underlying note on the date

of the HOA foreclosure sale. If there was an unrecorded conveyance of the deed of trust to Freddie Mac, it has no effect under Nevada law.

As stated by the court in Shipman v Wells Fargo Bank, N.A., 2012 WL 642777 (D. Nev. Feb. 24, 2012):

> When a party fails to timely record a conveyance, **the conveyance is void** as to any subsequent bona fide purchaser or mortgagee who lacks knowledge of the previous conveyance, where the purchaser or mortgagee records its conveyance first. NRS 111.325. (emphasis added)
>
> Id. at *1.

There is no conflict between 12 U.S.C. § 4617(j)(3) and Nevada's bona fide purchaser laws. In Valle del Sol Inc. v. Whiting, 732 F.3d 1006 (9th Cir. 2013), the Court of Appeals identified three classes of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption.

Express preemption does not apply because no provision in Title 12 of the U.S. Code purports to displace the recording laws of the State of Nevada and the inability under Nevada law to enforce an unrecorded property interest against a bona fide purchaser like plaintiff. In United States v. View Crest Garden Apts., Inc., 268 F.2d 380 (9th Cir. 1959), the court stated that "state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved." Id. at 383.

Field preemption does not apply because the United States Supreme Court recognized that "[p]roperty interests are created and defined by state law." Butner v. United States, 440 U.S. 48, 55 (1979).

Conflict preemption does not apply because compliance with the recording laws of the State of Nevada does not make it impossible for defendant Bank to comply with 12 U.S.C. § 4617. Nevada's recording laws also do not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Valle del Sol Inc. v. Whiting, 732 F.3d at 1022-1023.

**6. As a bona fide purchaser, plaintiff is protected from defendant's unrecorded claim that Freddie Mac owned the deed of trust.**

As discussed at pages 12 to 14 of plaintiff's motion for summary judgment (JA Vol. IV, pgs. 821-823), plaintiff is protected as a bona fide purchaser from any unrecorded objections to the public auction held on August 22, 2013.

At pages 26 of its opposition (JA VII, pg. 1537), defendant stated that "Saticoy Bay was a sophisticated investor, well advised of the inherent risks of purchasing properties at HOA foreclosure sales when it purchased its purported interest in the Property." On the other hand, in Melendrez v. D&I Investment, Inc.,127 Cal. App. 4th 1238, 26 Cal. Rptr. 3d 413 (2005), the court discussed the policy reason why experienced buyers are entitled to protection as bona fide

purchasers:

> A holding that an experienced foreclosure buyer perforce cannot receive the benefits of the law as a BFP if he or she buys property for substantially less than its value would chill participation at trustee's sales by this entire class of buyers, and, **ultimately, could have the undesired effect of reducing sales prices at foreclosure**. (emphasis added)
>
> 26 Cal. Rptr. at 426.

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016), this Court stated:

> A subsequent purchaser is bona fide under common-law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and **without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him**, if he failed to make such inquiry." Bailey v. Butner, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); *see also* Moore v. De Bernardi, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that **the bona fide purchaser of a legal title is not affected by any latent equity** founded either on a trust, [e]ncumbrance, or otherwise, **of which he has no notice, actual or constructive."**). (emphasis added)
>
> 366 P.3d at 1115.

In Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333, 335 (1957), the California Supreme Court stated:

> The protection of such purchasers is consistent 'with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.' Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions. Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill.

> 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.

The bona fide purchaser doctrine protects a purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172 (1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

At page 31 of its opposition (JA Vol. VII, pg. 1542), defendant stated that plaintiff had "constructive notice in its CC&Rs that the HOA's foreclosure would not disturb the first Deed of Trust."

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., however, 130 Nev. 742, 757-758, 334 P.3d 408, 419 (2014), this Court stated that NRS 116.1104 provides that a mortgage savings clause in the recorded CC&Rs cannot alter or amend the superpriority lien rights granted to the HOA by NRS 116.3116(2).

In footnote 3 in Wilmington Trust, N.A. v Las Vegas Rental & Repair, LLC Series 69, Case No. 71885, 408 P.3d 557, *1, n. 3 (Table) (Nev. Dec. 22, 2011)(unpublished disposition), this Court stated:

> In this respect, we conclude that the facts in *ZYZZX2 v. Dizon*, No. 2:13-cv-1307, 2016 WL 1181666, at *5 (D. Nev. Mar. 25, 2016), are distinguishable and that *In re Worcester*, 811 F.2d 1224, 1231 (9 th Cir. 1987), does not dictate a different result to the extent that it is on point. **We further note that to the extent that Wilmington Trust seeks to**

> **charge prospective bidders with record notice of the CC&Rs' mortgage savings clause, those bidders would likewise have been charged with notice of NRS 116.1104.** *See SFR Invs.*, 130 Nev., Adv. Op. 75, 334 P.3d at 419 (recognizing that NRS 116.1104 invalidates such clauses). (emphasis added)

Because every recorded document was consistent with the foreclosure of a delinquent assessment lien that included an unpaid superpriority amount, plaintiff is protected as a bona fide purchaser from defendant's unrecorded claim that the CC&Rs prevented the HOA from foreclosing its superpriority lien.

Defendant also stated that the foreclosure notices "do not identify any super-priority lien, and include improper collection fees and costs." (JA Vol. VII, pg. 1543) Defendant, however, did not cite any authority that supports this objection.

In paragraph 8 of his affidavit in support of motion for summary judgment, Iyad Haddad stated that "[a]s a result of the limited information available to myself and other potential bidders, I, on behalf of the plaintiff, am a bona fide purchaser of the property, for value, without notice of any claims on the title to the property or any alleged defects in the sale itself." (JA IV, pg. 832, ¶8)

Defendant did not produce any contrary evidence.

In the present case, no language in any recorded document provided plaintiff with notice of defendant's unrecorded claim that Freddie Mac owned the deed of trust that had been publicly assigned to defendant.

**7. Defendant did not prove the element of fraud, unfairness or oppression required by the California rule.**

At pages 28 of its opposition (JA Vol. VII, pg. 1539), defendant stated that "[t]he HOA Sale was void because it was commercially unreasonable."

On the other hand, in Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev., Adv. Op. 91, 405 P.3d 641 (2017)(hereinafter "Shadow Canyon"), this Court stated:

> As to the Restatement's 20-percent standard, we clarify that *Shadow Wood* did not overturn this court's longstanding rule that "'inadequacy of price, however, gross, is not in itself a sufficient ground for setting aside a trustee's sale'" absent additional "'proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price,'" 132 Nev., Adv. Op. 5, 366 P.3d at 1111 (quoting *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963)).

133 Nev., Adv. Op. 91, at *2, 405 P.3d at 643-644.

In First Mortgage Corp. v. Saticoy Bay LLC Series 1828 La Calera, No. 70994, 432 P.3d 189 (Table), 2018 WL 6617714 (Nev. Dec. 11, 2018)(unpublished disposition), this Court stated that "[m]ore importantly, appellant did not introduce evidence that it or any of the prospective bidders were actually misled by any of these purported shortcomings such that there might be fraud, unfairness or oppression." Id. at *1.

In Shadow Wood Homeowners Association v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1115 (2016), this Court stated:

> Although, as mentioned, NYCB might believe that Gogo Way purchased the property for an amount lower than the property's actual worth, that Gogo Way paid "valuable consideration" cannot be contested. Fair v. Howard, 6 Nev. 304, 308 (1871) ("The question is not whether the consideration is adequate, but whether it is valuable."); see *also* Poole v. Watts, 139 Wash. App. 1018 (2007) (unpublished disposition) (stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).

The $5,563.00 paid by plaintiff satisfies this standard.

Page 3 of the residential appraisal report prepared by defendant's appraiser (JA Vol. VII, pg. 1646) included two extraordinary assumptions. Because defendant did not prove that either of the "extraordinary assumptions" was true, the retrospective appraisal report is not competent evidence of the fair market value of the Property on August 22, 2013.

The appraisal report also failed to mention the Detrimental Condition that distinguishes the Property in the present case from the six comparable sales (all traditional sales) listed at pages 4 and 6 of the appraisal report. (JA Vol. VII, pgs. 1647, 1649) Unlike the six comparable sales, plaintiff did not receive insurable clear title to the Property because no title company in Southern Nevada is willing to issue title insurance following an HOA foreclosure sale.

The Appraisal of Real Estate, 14th Edition, p. 406 (Chicago: Appraisal Institute, 2013) states: "Before a comparable sale property can be used in sales

comparison analysis, the appraiser must first ensure that the sale price of the comparable property applies to **property rights that are similar** to those being appraised." (emphasis added) Because the appraisal report prepared by defendant Bank's appraiser violated this standard, the value assigned to the Property by defendant Bank's appraiser is merely hypothetical.

Page 5 of the report (JA Vol. VII, pg. 1648) stated that the "Exterior Only" inspection took place on September 20, 2015 which is more than two (2) years after the public auction held on August 22, 2013.

At page 31 of its opposition (JA Vol. VII, pg. 1542), defendant cited the reference to ZYZZX2 v. Dizon, 2:13-cv-1307 JCM (PAL), 2016 WL 1181666 (D. Nev. Mar. 25, 2016), in footnote 11 of Shadow Canyon, 133 Nev., Adv. Op. 91, *16, n. 11,405 P.3d at 648, n. 11, and defendant stated that the language in Section 7.8 and Section 7.9 of the CC&Rs "represented to the world the HOA's foreclosure would not extinguish the Deed of Trust."

On the other hand, because defendant knew that it had not tendered a payment for any amount of money to pay the superpriority portion of the lien, defendant had actual notice that the assessment lien included an unpaid superpriority amount and that the HOA's foreclosure of that superpriority lien would extinguish the deed of

trust.

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1116 (2016), this Court stated that the purchaser at an HOA sale is entitled to rely on the recorded notices as proof that the HOA foreclosed a superpriority lien:

> And if the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property. *SFR Invs.*, 334 P.3d at 412–13. So, when an association's foreclosure sale complies with the statutory foreclosure rules, **as evidenced by the recorded notices, such as is the case here, and without any facts to indicate the contrary,** the purchaser would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge, the basis of which is unknown to that purchaser**.** (emphasis added)

In the present case, each of the notices recorded by the foreclosure agent stated "the total amount of the lien" as approved by this Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 334 P.3d 408, 418 (2014), and none of the notices indicated that the superpriority lien had been paid.

**8. Because defendant had an adequate remedy at law against the HOA and the foreclosure agent, defendant was not entitled to equitable relief against plaintiff altering the legal effect of the HOA foreclosure sale.**

As discussed above, defendant did not allege or prove that plaintiff took any action that justified granting equitable relief against plaintiff. Defendant's argument instead rests upon its claim that Freddie Mac held an unwritten and unrecorded

interest in the deed of trust.

As stated at pages 10 to 12 of plaintiff's motion for summary judgment (JA Vol. IV, pgs. 819-821), equitable relief is not available when a party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992).

This same limitation on the availability of equitable relief has consistently been applied by this Court. Las Vegas Valley Water District v. Curtis Park Manor Water Users Ass'n, 98 Nev. 275, 278, 646 P.2d 549, 551 (1982); County of Washoe v. City of Reno, 77 Nev. 152, 360 P.2d 602, 604 (1961); State v. Second Judicial District Court, 49 Nev. 145, 241 P. 317, 321-322 (1925); Turley v. Thomas, 31 Nev. 181, 101 P. 568, 574 (1909); Conley v. Chedic, 6 Nev. 222, 224 (1870); Sherman v. Clark, 4 Nev. 138 (1868).

In County of Washoe v. City of Reno, this Court stated that "our concern is with the existence of a remedy and not whether it will be unproductive in this particular case, [citation omitted], or inconvenient, [citation omitted], or ineffectual, [citation omitted]." 360 P.2d at 604.

In Shadow Wood, this Court also stated that Gogo Way's "putative status as a bona fide purchaser" had a bearing on the bank's request for equitable relief and

that "[e]quitable relief will not be granted to the possible detriment of innocent third parties." 366 P.3d at 1115 (quoting Smith v. United States, 373 F.2d 419, 424 (4th Cir. 1966)).

In Moeller v. Lien, 25 Cal. App. 4th 822, 831-832, 30 Cal. Rptr. 777 (1994), the court held that a bona fide purchaser is protected from an unrecorded claim that the trustor had been wrongfully deprived of his right of redemption:

> Thus, as a general rule, a trustor has no right to set aside a trustee's deed as against a bona fide purchaser for value by attacking the validity of the sale. (Homestead Savings v. Darmiento, *supra*, 230 Cal. App.3d at p. 436.) The conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption. (4 Miller & Starr, *supra*, § 9:141, p. 463; cf. Homestead v. Darmiento, *supra*, 230 Cal. App.3d at p. 436.) The conclusive presumption precludes an attack by the trustor on the trustee's sale to a bona fide purchaser even where the trustee wrongfully rejected a proper tender of reinstatement by the trustor. (5) Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee. (Munger v. Moore (1970) 11 Cal. App.3d 1, 9, 11 [89 Cal. Rptr. 323].)

Because defendant had an adequate remedy at law against the HOA and its foreclosure agent even if defendant could prove that they violated 12 U.S.C. § 4617(j)(3), the district court properly denied defendant's request for equitable relief that would alter the legal effect of the HOA foreclosing its superpriority lien on August 22, 2013.

## CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court

affirm the order granting plaintiff's motion for summary judgment.

DATED this 17th day of July, 2019.

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 13,664 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules

of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

DATED this 17th day of July, 2019.

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## CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 17th day of July, 2019, a copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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