IN THE SUPREME COURT OF NEVADA

Nationstar Mortgage LLC, Appellant, v. SATICOY BAY LLC SERIES 4641 VIAREGGIO CT, Respondent.	Case 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 REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Appellee Saticoy Bay Series 4641 Viareggio Ct asks this Court to affirm the district court's order granting summary judgment in its favor.[1] Saticoy Bay makes four arguments in support of its claim that the HOA Sale extinguished Freddie Mac's Deed of Trust. None is persuasive.

First, Saticoy Bay contends that Nationstar did not have standing to assert the Federal Foreclosure Bar. But this Court's precedent confirms that loan servicers like Nationstar may raise the Federal Foreclosure Bar without joining FHFA or Freddie Mac as a party, and may do so based on substantially similar evidence to that proffered here. *See Saticoy Bay LLC Series 9641Christine View v. Fannie Mae*, 417 P.3d 363, 366-67 (Nev. 2018); *Daisy Tr. v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 849-50 (Nev. 2019) (en banc).

Second, Saticoy Bay asserts that the evidence supporting Freddie Mac's property interest is inadmissible and insufficient. Wrong again. This Court's decisions confirm that Enterprise business records supported by affidavits of qualified employees are admissible and sufficient to support summary judgment where, as here, the opposing party proffers no contrary evidence. *E.g.*, *Daisy Trust*, 445 P.3d at 850-51.

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[1] This brief adopts the defined terms in Nationstar's Opening Brief ("AOB").

Third, Saticoy Bay argues that Freddie Mac lacked a property interest because Freddie Mac's name did not appear in the public record at the time of the HOA Sale. This Court has squarely foreclosed that argument, confirming that a loan owner maintains a secured property interest while its contractually authorized representative serves as record beneficiary of the deed of trust. *See In re Montierth*, 354 P.3d 648, 650-51 (Nev. 2015); *Daisy Trust*, 445 P.3d at 849.

Finally, Saticoy Bay posits that it is a bona fide purchaser exempt from the Federal Foreclosure Bar's effect. Saticoy Bay does not qualify for bona fide purchaser status. But if it did, the Federal Foreclosure Bar would preempt state bona fide purchaser law to the extent it would otherwise extinguish Freddie Mac's lien. *See Nationstar Mortg., LLC v. Guberland LLC-Series 3* (*Guberland I*), No. 70546, 2018 WL 3025919, at *2 n.3 (Nev. June 15, 2018) (unpublished disposition).[2]

Accordingly, Nationstar respectfully requests that this Court reverse the district court's judgment.

[2] Saticoy Bay includes various state-law arguments in its Answering Brief. Respondent's Brief ("RB") at 50-55. Nationstar is not challenging the district court's state-law rulings, *see* AOB at 3, so the Court can and should ignore Saticoy Bay's arguments on those points.

ARGUMENT

I. Nationstar Can Assert the Federal Foreclosure Bar

Saticoy Bay challenges Nationstar's ability to argue the Federal Foreclosure Bar because "FHFA did not act as a conservator or receiver in the case below," yet it concedes that this Court has already rejected that proposition: Nationstar can assert the Federal Foreclosure Bar without joining either Freddie Mac or FHFA. *See* RB at 39-40 (quoting *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 758 (Nev. 2017)). Regardless, the statutory language forecloses Saticoy Bay's argument. The Federal Foreclosure Bar states that "[n]o property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency." 12 U.S.C. § 4617(j)(3). The statute shields FHFA and the Enterprises in conservatorship from taxation, civil penalties, liens, nonjudicial foreclosures, and other actions that often attach or are imposed *without resort to the courts*. Saticoy Bay's construction would limit the statute's protection to litigation, rendering those terms inoperative; accordingly, that interpretation must be rejected. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (it is an "elementary canon of construction" not to render any part of a statute inoperative).

As noted above, this Court has already ruled against Saticoy Bay on this exact issue.[3] In *Nationstar v. SFR*, this Court held that "the servicer of a loan owned by [an Enterprise] may argue that the Federal Foreclosure Bar preempts NRS 116.3116"—the State Foreclosure Statute—"and that neither [the Enterprise] nor the FHFA need be joined as a party." 396 P.3d at 758. Nevertheless, Saticoy Bay argued to this Court in *Christine View* that Fannie Mae lacked standing to assert the Federal Foreclosure Bar because "(1) HERA only protects the property of the FHFA, and (2) the FHFA is not a party to this case." *Christine View*, 417 P.3d at 366 (describing argument). The Court again rejected the argument. *Id*. (citing *Nationstar*, 396 P.3d at 758). The Ninth Circuit has likewise held that a loan servicer like Nationstar has standing to argue the Federal Foreclosure Bar regardless of whether FHFA is a party to the action. *Saticoy Bay, LLC Series 2714 Snapdragon v. Flagstar Bank, FSB*, 699 F. App'x 658, 658-59 (9th Cir. 2017). Saticoy Bay does not provide any basis for this Court to depart from its clear holdings in *Nationstar* and *Christine View*.

Saticoy Bay further contends that Nationstar did not submit sufficient evidence to establish its servicing relationship with Freddie Mac. Specifically,

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[3] Nationstar reserves the right to seek sanctions under NRAP 38 and NRS 7.085 in cases in which an opposing party presents arguments that this Court has previously foreclosed by published precedent at the time that party files its brief and makes no effort to argue for the reversal or modification of that precedent.

Saticoy Bay contends that Nationstar needed to provide the "applicable Purchase Contract **and** all other Purchase Documents," as well as the "master Servicing contract." RB at 41-42. That is wrong. Nationstar proffered all evidence necessary to show that it serviced the Loan for Freddie Mac.

The evidence proved that Freddie Mac acquired the Loan in March 2007, that Nationstar was Freddie Mac's servicer and the beneficiary of record of the Deed of Trust at the time of the HOA Sale,[4] and that Nationstar continues to serve as record beneficiary in its capacity as Freddie Mac's servicer. JA1551-52 (Meyer Decl. ¶¶ 5(d)-(k)). Freddie Mac's declarant attested that the Guide was the central document governing its relationship with Nationstar, JA1552 ¶ 5(l), and Nationstar submitted portions of the Guide into the record, JA1569-1623.[5]

This Court has repeatedly confirmed that evidence substantially similar to the evidence proffered here—Enterprise business records, a corresponding declaration,

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[4] Saticoy Bay suggests that Nationstar needed to prove it was "attorney in fact for Aurora [Loan Services]," such that it could assign the Deed of Trust on Aurora's behalf. RB at 41. That is unnecessary; other evidence in the record demonstrates that Lehman Brothers Holdings, Inc. ("LBHI"), Aurora Loan Services' parent company, serviced the Loan for Freddie Mac prior to the assignment of the Deed of Trust. JA1551 ¶ 5(j); JA1559. Accordingly, when the servicing rights were transferred from LBHI to Nationstar, the Guide required Aurora to "[a]ssign the Security Instruments to the Transferee Servicer (Nationstar), and record the assignment." JA1584 (2012 Guide at 56.7(a)).

[5] While the Guide was introduced into evidence here by the declaration of Freddie Mac's employee, courts have properly taken judicial notice of it. *E.g.*, *Daisy Trust*, 445 P.3d at 849 n.3; *Berezovsky*, 869 F.3d at 932 n.9.

and the Enterprise's servicing guide—sufficiently establish the contractual relationship between an Enterprise and its servicer. *See Daisy Trust*, 445 P.3d at 850; *JPMorgan Chase Bank, N.A. v. Guberland LLC-Series 2* (*Guberland II*), No. 73196, 2019 WL 2339537, at *2 (Nev. May 31, 2019) (unpublished disposition). This Court and the Ninth Circuit have also recognized that the Enterprises' Guides govern the Enterprises' relationships with their servicers.[6] *Daisy Trust*, 445 P.3d at 849 n.3; *Guberland I*, 2018 WL 3025919, at *2; *Berezovsky v. Moniz*, 869 F.3d 923, 932-33 & n.9 (9th Cir. 2017). The district court thus correctly found that "Nationstar was servicing the loan on behalf of Freddie Mac at the time of the HOA sale." JA1798.

Furthermore, the Court recently concluded that additional evidence, such as "the actual loan servicing agreement," is not necessary to establish a servicer's standing to raise the Federal Foreclosure Bar. *See Daisy Trust*, 445 P.3d at 850. Given the uniform and uncontradicted evidence establishing Nationstar's servicing

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[6] Saticoy Bay argues that "federal court decisions are not binding" on this Court. RB at 27-29. Nationstar agrees that this Court's prior decisions guide its determination here. But federal decisions should be highly persuasive, as federal courts and Nevada courts have adopted the same standard for what evidence is sufficient for summary judgment. *See Wood v. Safeway, Inc.*, 121 P.3d 1026, 1031 (Nev. 2005) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986) for Nevada's standard for summary judgment). Indeed, this Court has affirmatively cited many of the federal cases mentioned in this brief in the past. *E.g.*, *Christine View*, 417 P.3d at 368 (quoting *Berezovsky*, 869 F.3d at 929).

relationship with Freddie Mac here, Nationstar did not need to proffer additional documentation to prove the existence or contours of that relationship.

The fact that Nationstar did not produce a "Purchase Contract" or a "separate agreement" relating to the Freddie Mac-Nationstar servicing relationship does not "support[] a disputable presumption" that such evidence would have been adverse if produced (to the extent it even exists). RB at 16, 38 (citing NRS 47.250(3)). For that evidentiary presumption to apply, "the party seeking the presumption's benefit has the burden of demonstrating that the evidence was destroyed with the intent to harm." *Bass-Davis v. Davis*, 134 P.3d 103, 106-07 (Nev. 2006). Saticoy Bay has not alleged, much less demonstrated, that Nationstar spoliated or suppressed evidence with the intent to harm Saticoy Bay.

Finally, Saticoy Bay appears to contend that Nationstar is disqualified from asserting the protections of the Federal Foreclosure Bar because it breached its contractual obligations to Freddie Mac under the Guide, and that the purported breach "required Nationstar to indemnify Freddie Mac, repurchase Freddie Mac's interest in the mortgage, or terminate servicing." *See* RB at 43-44.

Saticoy Bay is not a party to the contract between Nationstar and Freddie Mac, and therefore has no standing, entitlement, or authority to assert any of the contract's purported terms as a sword or a shield. *See, e.g.*, *Wood v. Germann*, 331 P.3d 859, 861 (Nev. 2014). The Guide does not support Saticoy Bay's argument anyway.

Section 1.2(a)(3) of the Guide provides that a breach of contract "*entitle[s]*"—but does not *require*—Freddie Mac to "terminate all or a portion of the Servicing." JA1570. Section 67.5 of the Guide likewise does not "require[] that [Nationstar] 'repurchase' the Mortgage," or "require[] that Freddie Mac's servicers 'compensate Freddie Mac and hold Freddie Mac harmless,'" RB at 43-44, but rather reserves Freddie Mac's right to, "*at its sole discretion* … pursue any other remedies, including, without limitation, repurchase of the Mortgage or indemnification of Freddie Mac," Guide at 67.5 (emphasis added). Freddie Mac, not Saticoy Bay, is the party entitled to determine whether and if so how that discretion is exercised.

Accordingly, Nationstar has standing to invoke the Federal Foreclosure Bar to protect Freddie Mac's property interest.

II. The Federal Foreclosure Bar Protected Freddie Mac's Property Interest

Saticoy Bay argues—without any reference to the Federal Foreclosure Bar—that the Deed of Trust was extinguished under the State Foreclosure Statute. RB at 8-9. That argument ignores dozens of decisions from this Court, the Ninth Circuit, and state and federal trial courts holding that while the Enterprises are in FHFA conservatorship, the Federal Foreclosure Bar protects Enterprise property interests from extinguishment through the State Foreclosure Statute without FHFA's consent. *See, e.g.*, *Daisy Trust*, 445 P.3d at 847; *Christine View*, 417 P.3d at 368; *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.

Nationstar established the elements necessary to invoke the Federal Foreclosure Bar: (1) Freddie Mac was in FHFA's conservatorship at the time of the HOA Sale;[7] (2) Freddie Mac owned the Loan at that time; and (3) FHFA did not consent to the extinguishment of Freddie Mac's Deed of Trust.[8] *See* 12 U.S.C. § 4617(j)(3). Each element was established in the record below. Only the second element is at issue on appeal.

A. Nationstar's Evidence Established That Freddie Mac Owned the Loan at the Time of the HOA Sale

1. Nationstar's Evidence Was Admissible and Proved Freddie Mac's Ownership of the Loan

The district court's conclusion that the HOA Sale extinguished the Deed of

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[7] This fact is undisputed. In any event, the fact of conservatorship is subject to judicial notice because it is a fact "generally known or capable of verification from a reliable source" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See Mack v. Estate of Mack*, 206 P.3d 98, 105 (Nev. 2009) (taking judicial notice on appeal); *see also Nationstar Mortg. LLC v. East Trop. 2073 Tr.*, No. 2:17-cv-01769-MMD-CWH, 2019 WL 469897, at *1 n.3 (D. Nev. Dec. 20, 2018) (taking judicial notice of the fact that the Enterprises were placed under FHFA's conservatorship in 2008).

[8] Saticoy Bay does not argue on appeal that FHFA consented to the extinguishment of Freddie Mac's Deed of Trust. As "[t]he Federal Foreclosure Bar cloaks the FHFA's 'property with Congressional protection unless or until [the Agency] *affirmatively relinquishes it*,'" *Christine View*, 417 P.3d at 368 (quotation omitted, emphasis added), FHFA's non-consent prohibits the extinguishment of the Deed of Trust here.

Trust rested in part on its holding that "even if [Nationstar's evidence were] sufficient to show that Freddie Mac believed it had ownership of the loan," the evidence was unpersuasive because it "conflict[ed]" with the public record. JA1798-99. That is incorrect. To the contrary, Nationstar's evidence establishes Freddie Mac's ownership of the Loan at the time of the HOA Sale.

Nationstar submitted Freddie Mac's business-records data from Freddie Mac's Loan Status Manager and MIDAS systems, which store information concerning Freddie Mac's servicers and the purchase of loans. JA1548 (Meyer Decl. ¶ 2). Freddie Mac's records show that Freddie Mac acquired ownership of the Loan in March 2007 and has owned it ever since. JA1549-50 ¶¶ 5(d)-(f) & (k). The declaration explains how Mr. Meyer "was qualified to lay a foundation for the admissibility of [Freddie Mac's] documents under NRS 51.135's business-records exception to the hearsay rule," and demonstrates that the records meet the requirements of that exception. *See Daisy Trust*, 445 P.3d at 850. Freddie Mac's business records and declaration are "reliable and uncontroverted evidence of Freddie Mac's interest in the property on the date of the foreclosure." *Elmer v. JP Morgan Chase & Co.*, 707 F. App'x 426, 428 (9th Cir. 2017).

Indeed, this Court has repeatedly held that such evidence is admissible and sufficient to prove that an Enterprise owns a note and associated deed of trust. AOB at 19-23 (citing cases such as *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); and *Berezovsky*, 869 F.3d at 932-33 & n.8)). In *Daisy Trust*, the Court upheld the district court's judgment in favor of Freddie Mac's servicer, concluding that "in the absence of contrary evidence, [the servicer's] and Freddie Mac's business records sufficiently demonstrated that Freddie Mac owned the loan on the date of the foreclosure sale." 445 P.3d at 851.

2. Saticoy Bay's Evidentiary Challenges Fail

Saticoy Bay attacks the admissibility and sufficiency of Nationstar's evidence but provides no evidence, argument, or even a plausible theory undermining the admissibility or reliability of Freddie Mac's business records or declaration.

First, Nationstar is not required to produce duplicative evidence, such as a "Purchase Contract," a "written agreement," or "deposition testimony" proving Freddie Mac's acquisition of the Loan and clarifying that Nationstar is merely record beneficiary—not the owner—of the Loan (*see* RB at 13, 16, 20-21, 24). Indeed, this Court has rejected the argument that such documentation is necessary where other competent evidence establishes an Enterprise's property interest. *Daisy Trust*, 445 P.3d at 850-51. In *Daisy Trust*, the Court held that it was not necessary for a servicer to produce "a copy of the actual loan servicing agreement" or the "original promissory note" where the servicer had already provided admissible business records, declarations, and Guide excerpts establishing an Enterprise's ownership of

the loan. *Id.* *Daisy Trust* confirms that Nationstar was required to provide *sufficient*—not *all*—evidence of Freddie Mac's ownership interest. Nor do Nevada's rules of evidence require Nationstar to produce superfluous materials to confirm the facts already established through admissible, uncontroverted evidence. *See id.* (holding Freddie Mac's business records and declaration admissible under NRS 51.135 and sufficient to prove Freddie Mac's property interest); *Guberland II*, 2019 WL 2339537, at *1 (similar).

Second, the fact that the publicly recorded documents named Nationstar—rather than Freddie Mac—as beneficiary of the Deed of Trust is not "uncontroverted evidence" that Freddie Mac *did not* own the Loan (RB at 32), and does not support a "conclusive presumption" that Nationstar *did* (RB at 21, 23 (citing NRS 47.240)). And Freddie Mac did not "hid[e] its alleged interest … [leading] the public to believe that [Nationstar] was the beneficiary of the deed of trust." RB at 23. Rather, the Deed of Trust was properly and validly recorded in a way that preserved Freddie Mac's ownership interest—with Freddie Mac's contractually authorized servicer, Nationstar, appearing as record beneficiary. *See, e.g.*, *Daisy Trust*, 445 P.3d at 849; *Guberland II*, 2019 WL 2339537, at *1-2. The *record beneficiary* of a deed of trust and the *owner* of that instrument do not have to be the same entity.

Third, Saticoy Bay attacks Freddie Mac's declaration, arguing that Dean Meyer "did not provide a proper foundation" for Freddie Mac's business records.

See RB at 31, 35-38. Saticoy Bay suggests that Mr. Meyer's declaration did not meet the applicable standard for authentication of computer database printouts set forth in *In re Vee Vinhnee*, 336 B.R. 437, 446-47 (9th Cir. BAP 2015). *See* RB at 36-37. This Court has squarely rejected the argument that servicers in HOA foreclosure cases like this one "need[] to satisfy the standard for admissibility discussed in *In re Vee Vinhnee*." *Daisy Trust*, 445 P.3d at 851 n.4. The Ninth Circuit has also foreclosed SFR's argument that the more stringent *Vinhnee* standard applies in HOA foreclosure sale cases. In *Berezovsky*, the Ninth Circuit held that "Freddie Mac's database printouts are admissible business records." 869 F.3d at 932 n.8. That holding is more recent and more relevant than *In re Vee Vinhnee*, and was issued by a superior court.

Saticoy Bay also asserts that Mr. Meyer lacked the "personal knowledge" necessary to authenticate Freddie Mac's business records because he had not "seen the documents that must exist for Freddie Mac to hold an interest in the Property" or the "master Servicing contract" between Freddie Mac and Nationstar. RB at 25, 37-38, 42. That is wrong.[9] A "qualified person" for the purpose of authenticating

[9] Saticoy Bay cites to NRS 50.025(a)(1) and NRCP 56(e) (or more likely, NRCP 56(c)(4)) to support its argument. RB at 37-38. But this Court has already found Mr. Meyer "qualified to lay a foundation for the admissibility of [Freddie Mac's] documents under NRS 51.135's business-records exception to the hearsay rule." *Daisy Trust*, 445 P.3d at 850.

business records "has been broadly interpreted as anyone who understands the record-keeping system involved." *Thomas v. State*, 967 P.2d 1111, 1124-25 (Nev. 1998). A witness with knowledge that the records "were kept in the ordinary course of business" and an ability to describe "the procedures for completing those writings" can authenticate business records, even if the witness did not "personally complete the documents in question." *Id.* at 1125; *see also United States v. Childs*, 5 F.3d 1328, 1334 (9th Cir. 1993) (a qualified witness need not be "the custodian of [the] documents offered into evidence," but must "understand the record-keeping system" involved).[10] Mr. Meyer reviewed the business records and was able to explain their significance, making that evidence both admissible and uncontroverted proof of Freddie Mac's ownership interest. *See* JA1547-53.

Saticoy Bay's contention that Mr. Meyer lacked personal knowledge that the persons entering the data into Freddie Mac's database "first confirmed" that Freddie Mac's property interest was memorialized in a "'writing' required by Nevada law," RB at 36, rehashes Saticoy Bay's misinterpretation of Nevada's recording statutes.

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[10] The Court may look to federal cases "discussing an analogous federal rule of evidence" when interpreting its own rules. *L.V. Dev. Assocs. v. Eighth Jud. Dist. Ct.*, 325 P.3d 1259, 1265 (Nev. 2014). The Nevada Rules of Evidence are "similar for the most part to the Federal Rules of Evidence," though there are some significant differences. *Braunstein v. State of Nevada*, 40 P.3d 413, 417 n.14 (Nev. 2012).

Freddie Mac did not need to serve as record beneficiary to maintain a property interest in the Deed of Trust. *Daisy Trust*, 445 P.3d at 849.

Fourth, Saticoy Bay suggests that the database records are inadmissible because they were prepared for purposes of litigation and printed after the HOA Sale. RB at 37. Those arguments are meritless. The Court found the argument that Freddie Mac's business records were prepared for litigation unpersuasive in *Daisy Trust*. 445 P.3d at 851 n.4. And a business record may include data prepared in the ordinary course of business and later printed for presentation in court. *See, e.g.*, *U-Haul Int'l., Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1043-44 (9th Cir. 2009). "The fact that business database records "were printed out … for purposes of this litigation does not impact the admissibility [of those records]." *Gen. Ins. Co. of Am. v. United States Fire Ins. Co.*, 886 F.3d 346, 349 (4th Cir. 2018). "[S]o long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice, the fact that the hard copy offered as evidence was printed for purposes of litigation does not affect its admissibility." *United States v. Hernandez*, 913 F.2d 1506, 1512-13 (10th Cir. 1990). And both this Court and the Ninth Circuit cited *U-Haul* in confirming that materially identical business records from Freddie Mac were admissible evidence of loan ownership. *Daisy Trust*, 445 P.3d at 850-51; *Berezovsky*, 869 F.3d. at 932 n.8.

Finally, Saticoy Bay relies on the Guide to claim that Freddie Mac's business records are insufficient to demonstrate ownership, arguing that without the "Purchase Contract" and "other Purchase Documents," Freddie Mac could not prove it complied with the Guide to hold any interest in the Loan. RB at 38-39. As an initial matter, Freddie Mac's purported failure to comply with the Guide would not rob it of its property interest. And as explained above, Freddie Mac did not need to introduce additional, duplicative evidence of its ownership to prevail. *See Daisy Trust*, 445 P.3d at 850-51. Saticoy Bay's arguments challenging the admissibility and sufficiency of Nationstar's evidence are unavailing.

B. Freddie Mac Maintained a Property Interest Under Nevada Law

1. Freddie Mac Owned the Deed of Trust While Nationstar Appeared as Record Beneficiary

Saticoy Bay argues that the Federal Foreclosure Bar cannot apply here because Freddie Mac did not properly record its property interest under Nevada law. *See* RB at 10-31. This Court's precedent firmly refutes any notion that Freddie Mac was required to record the Deed of Trust in its own name to maintain a valid property interest. A note owner maintains a property interest in a deed of trust where its contractually authorized representative serves as record beneficiary of that instrument. *Daisy Trust*, 445 P.3d at 849; *Montierth*, 354 P.3d at 650-51; AOB at 14-16.

Montierth established that where a security interest is "attached and … perfected"—i.e., properly recorded—the fact that a deed of trust names a party besides the loan owner does not necessarily "alter the interests of the parties" or "render[] either instrument void." 354 P.3d at 651. In order for the note owner to remain a "secured creditor" under those circumstances, there must be 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.* (citing Restatement § 5.4 cmts. c, e).

In *Daisy Trust*, the Court confirmed that *Montierth*'s holding applies in a case involving materially similar facts and legal issues as this case, rejecting any claim that an Enterprise must appear in the land records to maintain a property interest under Nevada law. *Daisy Trust*, 445 P.3d at 847-49. The Court made two key holdings that control here: (1) Nevada's recording statutes (NRS 106.210 and 111.325) did not require "that any assignment to Freddie Mac needed to be recorded"; and (2) under *Montierth* and *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 259-60 (Nev. 2012), "the deed of trust did not have to be 'assigned' or 'conveyed' to Freddie Mac in order for Freddie Mac to own the secured loan." *Id.* at 849. Saticoy Bay's opposition fails.

Even prior to *Daisy Trust*, this Court repeatedly applied *Montierth* to cases similar to this one. For example, in *Guberland II*, this Court confirmed that a "loan

holder maintains [a] secured status under the deed of trust even when not named as the deed's record beneficiary" when "the mortgage holder 'otherwise has authority to foreclose in the [note holder]'s behalf." 2019 WL 2339537, at *1. Accordingly, this Court reversed the district court decision, which had erroneously found that "[the Enterprise] did not have a security interest in the property because … no recorded assignment of the deed of trust to [the Enterprise] existed." *Id.; see also, e.g.*, *CitiMortgage v. TRP Fund*, 2019 WL 1245886, at *1 (confirming that "the record beneficiary need not be the actual owner of the loan"); *CitiMortgage, Inc. v. SFR Invs. Pool 1, LLC*, No. 70237, 2019 WL 289690, at *1 (Nev. Jan. 18, 2019) (unpublished disposition) (holding that "[an authorized representative's] status as the recorded deed of trust beneficiary does not create a question of material fact regarding whether [an Enterprise] owns the subject loan, as this court has recognized that such an arrangement is acceptable and common"); AOB at 16-18 (citing cases).

The Ninth Circuit similarly has applied *Montierth*'s principles and concluded that "Nevada law … recognizes that … a note owner remains a secured creditor with a property interest in the collateral even if the recorded deed of trust names only the owner's" contractually authorized servicer. *E.g.*, *Berezovsky*, 869 F.3d at 932.

The law is clear: Nationstar's appearance as record beneficiary of the Deed of Trust does not undermine Freddie Mac's property interest. Freddie Mac acquired

ownership of the Note and the Deed of Trust when it purchased the Loan in March 2007, and it maintained its property interest at the time of the HOA Sale.

2. Saticoy Bay Cannot Overcome Controlling Precedent

Saticoy Bay chiefly argues that "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." *E.g.*, RB at 14-15, 39, 44-46 (citing NRS 111.315 and 111.325). Essentially, Saticoy Bay contends that Freddie Mac could not have had a property interest in the Deed of Trust because its name did not appear in the public property records. *Id.* at 17. As explained above, this Court's decisions foreclose that argument.[11]

After Saticoy Bay filed its Answering Brief, this Court issued a published decision rejecting the same argument Saticoy Bay makes here: that "Nevada's recording statutes required Freddie Mac to record its interest in the loan." *Daisy Trust*, 445 P.3d at 849. The Court noted that under *Edelstein* and *Montierth*, there was no requirement that the beneficial interest in the deed of trust be assigned to Freddie Mac in order for Freddie Mac to acquire or maintain ownership of the loan,

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[11] Saticoy Bay's related argument that the Federal Foreclosure Bar does not preempt Nevada's recording statutes, RB at 44-46, misses the point. Freddie Mac *complied* with Nevada's recording statutes by having Nationstar appear as record beneficiary of the deed of trust on Freddie Mac's behalf at the time of the HOA Sale, so no preemption analysis is necessary. *See Daisy Trust*, 445 P.3d at 849.

and thus "neither NRS 106.210 nor NRS 111.325 was implicated."[12] *Id.* The Court thus held that "Nevada's recording statutes did not require Freddie Mac to publicly record its ownership interest as a prerequisite for establishing that interest." *Id.* This Court has held the same in other decisions, each time rejecting the argument that NRS 111.315 and 111.325 "required [the Enterprise] to record its interest to prevail against a bona fide purchaser for value," and noting that the deed of trust provided some record notice that the loan might be sold to an Enterprise. *See SFR Invs. Pool 1, LLC v. Green Tree Servicing, LLC*, No. 72010, 2018 WL 6721370, at *2 n.3 (Nev. Dec. 17, 2018) (unpublished disposition); *Guberland II*, 2019 WL 2339537, at *2.[13]

Accordingly, Nevada's recording statutes do not require something that this Court held was unnecessary in *Daisy Trust* and *Montierth*—namely, public recording of changes in the *ownership* of a loan as a condition of a legally recognized property interest. *See* NRS 106.210 (discussing only recording of assignments of beneficial interests). If Nevada's recording statutes required all loan *ownership* interests to be recorded, a loan owner would always need to serve as the deed of

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[12] *Daisy Trust* confirms that *Montierth* and *Edelstein* cannot be distinguished because they "dealt with bankruptcy issues and nonjudicial foreclosures" and "dealt with a party with a hidden interest." RB at 18-19. Neither *Montierth*'s nor *Edelstein*'s application of the Restatement turned on those facts. Moreover, there is no "hidden interest" here because Freddie Mac's deed of trust was recorded in Nationstar's name (as permitted under Nevada law) at the time of the HOA Sale.

[13] Saticoy Bay incorrectly states that *Guberland II* "does not discuss" NRS 111.325. RB at 23.

trust's beneficiary of record. Under such a rule, this Court would have reached the opposite holdings in *Daisy Trust* and *Montierth*. Saticoy Bay points to nothing in the recording statutes that require public recording of a change in the ownership of a loan in order for a party to obtain or maintain a property interest.

Nor does Saticoy Bay successfully distinguish cases cited in Nationstar's Opening Brief. RB at 17-18, 23-27, 33-34. The fact that not all of those cases specifically referenced Nevada's recording or bona fide purchaser statutes, or included deposition testimony, or featured an assignment of the deed of trust to an Enterprise, does not change the fact that they uniformly hold that a servicer may serve as record beneficiary of a deed of trust on behalf of a loan owner. *Daisy Trust* forecloses any argument that those specific facts might make *Montierth*'s principles inapplicable here. *See* 445 P.3d at 849. And contrary to Saticoy Bay's representation, federal cases interpreting *Montierth have* considered Nevada's recording statutes and have reached the same conclusion as Nevada's state courts. *Compare* RB at 34 *with Berezovsky*, 869 F.3d 932 ("Nevada law requires recording of a lien for it to be enforceable, but does not mandate that the recorded instrument identify the owner by name." (citing NRS 106.210)).

Saticoy Bay also relies on *Edelstein* to argue that *public policy* requires Freddie Mac to have recorded its interest. RB at 16. But *Montierth* was decided *after Edelstein,* and this Court expressly noted that *Montierth* clarified *Edelstein* by

confirming that Nevada follows certain facets of the Restatement approach not discussed in *Edelstein*. *See Montierth*, 354 P.3d at 651. *Daisy Trust* confirms that *Montierth* applies to situations where the record beneficiary is a loan servicer authorized by the loan owner to perform tasks on its behalf. 445 P.3d at 849 (holding that a "deed of trust did not have to be 'assigned' or 'conveyed' to [the Enterprise] in order for [the Enterprise] to own the secured loan").

According to Saticoy Bay, because Freddie Mac is not listed on the Deed of Trust and has not provided an endorsed note or accounted for possession of an unendorsed note, Freddie Mac cannot enforce the Deed of Trust and thus "has no interest" in it. RB at 22-23, 30-31 (citing UCC Art. 3). Saticoy Bay confuses the distinct status of the note's *holder* with its *owner*. The *owner* and the *holder* of a note may be two different entities. A transfer of a note has no bearing on ownership, but instead "vests in the transferee any right of the transferor to enforce the instrument." NRS 104.3203(2). Under Nevada law, "[a] person may be … entitled to enforce [a promissory note] even though the person is not the owner of the [note]." NRS 104.3301(2). Accordingly, "the status of holder merely pertains to one who may enforce the debt and is a separate concept from that of ownership." *Thomas v. BAC Home Loans Servicing, LP*, No. 56587, 2011 WL 6743044, at *3 n.9 (Nev. Dec. 20, 2011). Nationstar's ability to enforce the Deed of Trust as record beneficiary does not indicate that Nationstar owns the Deed of Trust or the Note.

Saticoy Bay's arguments regarding the statute of frauds are contradictory. Saticoy Bay contends that Freddie Mac did not comply with the statute of frauds because the record does not contain any "'writing' by which [Nationstar] claims that an interest in the Property was transferred to Freddie Mac" or an "express agreement" that Nationstar was serving as record beneficiary of the Deed of Trust on Freddie Mac's behalf. *See* RB at 10-13, 15-17, 32-33. Yet at the same time, it concedes that "the statute of frauds is not applicable to nonjudicial foreclosures"—the type of foreclosure at issue here. RB at 19. In any event, the statute of frauds has no bearing on the questions before the Court. It applies only "where there is a definite possibility of fraud." *Azevedo v. Minister*, 471 P.2d 661, 663 (Nev. 1970). There is none here; the record contains no indication—and Saticoy Bay offers no plausible theory—that anyone besides Freddie Mac claims to own the Loan.

Saticoy Bay also lacks standing to raise a statute-of-frauds defense because it was not a party to the purchase of the Loan. A "stranger to [an] alleged agreement" cannot challenge the legal sufficiency of the writings purportedly making up that agreement because "[t]he defense of the statute of frauds is personal, and available only to contracting parties or their successors in interest." *Harmon v. Tanner Motor Tours of Nev., Ltd.*, 377 P.2d 622, 628 (Nev. 1963); *see also Easton Bus. Opportunities, Inc. v. Town Exec. Suites*, 230 P.3d 827, 832 n.4 (Nev. 2010) (declining to apply statute of frauds *sua sponte* because obligor of assigned right was

not party to the agreement); *In re Circle K Corp.*, 127 F.3d 904, 908 (9th Cir. 1997) (citing Restatement (Second) of Contracts § 144 (1982)); *Wells Fargo Bank, N.A. v. Pine Barrens St. Trust*, No. 2:17-cv-1517-RFB-VCF, 2019 WL 1446951, at *5 (D. Nev. Mar. 31, 2019) ("Because Pine Barrens was not a party to the sale of the loan to Fannie Mae, it cannot assert a defense based on the statute of frauds."). Saticoy Bay was not a party to the sale of the Loan to Freddie Mac, so it cannot seek to invalidate that transaction on statute-of-frauds grounds.

Saticoy Bay is also barred from invoking the statute of frauds for a separate and independent reason: the writing requirement does not apply to transactions that have been fully performed by at least one party. *See* NRS 104.2201(3)(c); *accord Forsythe v. Brown*, No. 3:10-cv-716, 2011 WL 5190673 (D. Nev. Oct. 27, 2011); *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 923 P.2d 569, 574 (Nev. 1996); *Azevedo*, 471 P.2d at 664; *Micheletti v. Fugitt*, 134 P.2d 99, 103 (Nev. 1943). That is because the purpose of the statute of frauds is to ensure that the parties intended a transaction to close, and a transaction's actual closing establishes that intention conclusively. To allow the statute of frauds to operate as a defense when one party has partially or fully performed would in effect turn the doctrine into "an instrument of fraud." *Evans v. Lee*, 12 Nev. 393, 398 (Nev. 1877). In this case, Freddie Mac's acquisition of the Loan closed over twelve years ago, and both parties fully performed.

III. Saticoy Bay Is Not a Bona Fide Purchaser, But Even if it Were, the Federal Foreclosure Bar Would Still Apply

Saticoy Bay asserts that Nevada's bona fide purchaser laws protect it from any claim based on Freddie Mac's property interest. RB at 46-49. But Nevada's bona fide purchaser laws do not apply, for two reasons. *First*, this Court held in *Daisy Trust* that Nevada's bona fide purchaser laws (specifically NRS 111.325) are not "implicated [in cases like this one] because there is no requirement that the beneficial interest in the deed of trust needed to be 'assigned' or 'conveyed' to Freddie Mac" for it to acquire ownership of the Loan. 445 P.3d at 849. Accordingly, the Court did not find it "necessary to address Daisy Trust's argument that it is protected as a bona fide purchaser from the Federal Foreclosure Bar's effect." *Id.* The Court need not address that argument here, either.

Second, Saticoy Bay was not a bona fide purchaser because at the time of the HOA Sale, the Deed of Trust and its assignments were recorded (*see* RB at 5), constituting "actual knowledge, constructive notice of, or reasonable cause to know that there exist[] … adverse rights" by virtue of the recorded deed of trust. NRS 111.180. Accordingly, it is immaterial whether Nevada law renders an *unrecorded* deed of trust invalid against a subsequent bona fide purchaser—the Deed of Trust Freddie Mac owned *was recorded* at the time of the HOA Sale.

Moreover, Saticoy Bay could have discovered through reasonable diligence that Freddie Mac had an interest in the Deed of Trust by reaching out to FHFA to

clarify whether the Deed of Trust was owned by an Enterprise lien. HOA sale purchasers now routinely ask FHFA whether a property to be foreclosed on is encumbered by an Enterprise lien, and receive timely and complete answers to their inquiries. *See, e.g.*, FHFA Amicus Br. 15-16, *Nationstar Mortgage, LLC v. Guberland, LLC - Series 3*, No. 70546 (Nev. 2018); Appellees' Suppl. Br. 6-7, *SFR Invs. Pool 1, LLC v. Green Tree Servicing LLC.*, No. 72010 (Nev. 2018). Every entity that has directed such an inquiry to the Conservator has received a direct and prompt response.[14] Saticoy Bay made no effort to contact FHFA to determine whether the Property was encumbered by an Enterprise-owned Deed of Trust.

Moreover, Saticoy Bay could and should have anticipated that there was a significant chance that a property it purchased at an HOA foreclosure sale was encumbered by an Enterprise lien. In 2008, the Enterprises' "mortgage portfolios … accounted for nearly half of the United States mortgage market." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599-600 (D.C. Cir. 2017). Accordingly, "[t]he position held in the home mortgage business by Fannie Mae and Freddie Mac make[s] them *the dominant force* in the market." *Town of Babylon v. FHFA*, 699 F.3d 221, 225 (2d Cir. 2012) (emphasis added). And in purchasing the Property at

[14] The fact that the Conservator began receiving such inquiries in 2018 suggests that until recently, HOA sale purchasers were unaware of the Federal Foreclosure Bar.

a steep discount, Saticoy Bay accepted a foreseeable risk that it was encumbered by an Enterprise lien.

The Court's *Shadow Wood* decision does not support Saticoy Bay's claim that it was a bona fide purchaser. RB at 46 (citing *Shadow Wood Homeowners Assoc. v. N.Y. Bancorp, Inc.*, 366 P.3d 1005 (Nev. 2016)). In *Shadow Wood*, the Court examined whether an entity challenging the validity of an HOA foreclosure sale was entitled to equitable relief under state law. *Shadow Wood* did not need to resolve who had an interest at the time of the HOA foreclosure sale, but instead employed a balancing test to determine whether the foreclosure sale could be set aside. *See* 366 P.3d at 1116. The equitable balancing test described in *Shadow Wood* is irrelevant to the existence of Freddie Mac's property interest at the time of sale. A federal statute governs the preservation of Freddie Mac's interest, and the Federal Foreclosure Bar contains no limitation that it applies only when it would achieve an equitable result. Accordingly, the *Shadow Wood* factors are not relevant here. Saticoy Bay is not a bona fide purchaser.

Even if Saticoy Bay were considered to be a bona fide purchaser, the Federal Foreclosure Bar would preempt Nevada's bona fide purchaser laws to the extent they permitted Saticoy Bay to take title to the Property unencumbered by Freddie Mac's Deed of Trust. As this Court has recognized, "authority suggest[s] that the Federal Foreclosure Bar would preempt Nevada's law on bona fide purchasers." *Guberland*

I, 2018 WL 3025919, at *2 n.3 (citing *JPMorgan Chase Bank, N.A. v. GDS Fin. Servs.*, No. 2:17-cv-02451-APG-PAL, 2018 WL 2023123, at *3 (D. Nev. May 1, 2018)). Federal district courts have held as much in virtually identical cases.[15]

The reasoning behind these decisions is sound: because the Federal Foreclosure Bar protects Freddie Mac's property interest regardless of whether its name appears in any recorded documents, "[a]llowing Nevada's law on bona fide purchasers to control in this case would be 'an obstacle to Congress's clear and manifest goal of protecting the Agency's assets in the face of multiple potential threats, including threats arising from state foreclosure law.'" *GDS Fin. Servs.*, 2018 WL 2023123, at *3 (quoting *Berezovsky*, 869 F.3d at 931). Any state statute that conflicts with the Federal Foreclosure Bar's protections must yield.

[15] *See, e.g., Nevada Sandcastles, LLC v. Freddie Mac and Wells Fargo Mortg., LLC*, No. 2:16-cv-1146-MMD-NJK, 2019 WL 427327, at *3 (D. Nev. Feb. 4, 2019); *Fannie Mae v. Vegas Prop. Servs., Inc.*, No. 2:17-cv-1798-APG-PAL, 2018 WL 5300389, at *2 (D. Nev. Oct. 25, 2018).

CONCLUSION

Nationstar respectfully requests that this Court reverse the district court's holding and award summary judgment in Nationstar's favor.

DATED August 30th, 2019.

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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 **6,998** words.

FINALLY, I CERTIFY that I have read this **Appellant's Reply 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 August 30th, 2019.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on August 30, 2019, the foregoing **APPELLANT'S REPLY 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/ Patricia Larsen
An employee of AKERMAN LLP