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SUPREME COURT

STATE OF NEVADA

NATIONSTAR MORTGAGE LLC,

Appellant,

vs.

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT,

Respondent.

No. 77874

RESPONDENT'S PETITION FOR SUPREME COURT REVIEW

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiffs/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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RESPONDENT'S PETITION FOR SUPREME COURT REVIEW

Pursuant to NRAP 40B, Saticoy Bay LLC, Series 4641 Viareggio Ct (hereinafter "plaintiff") petitions the court for review of the order vacating and remanding, entered by the court of appeals on April 10, 2010, on the grounds that the order conflicts with prior opinions of this court and involves the following fundamental issue of statewide public importance:

> Whether Freddie Mac can enforce an unrecorded transfer of a deed of trust against a subsequent purchaser, in good faith and for a valuable consideration, of the same real property even where Freddie Mac did not comply with the mandatory language in NRS 111.010(1), NRS 111.205(1) and NRS 111.315.

BASIS FOR REVIEW

The precise basis on which plaintiff seeks review is the court of appeals' reliance on this court's opinion in Daisy Trust v. Wells Fargo Bank as dispositive even though that opinion did not discuss plaintiff's argument that is founded upon the mandatory language in NRS 111.010(1), NRS 111.205(1), NRS 111.315 and NRS 111.325 that makes Freddie Mac's unrecorded interest in the Guillory deed of trust void as to plaintiff.

CITATION OF AUTHORITY

1. This court's opinion in Daisy Trust v. Wells Fargo Bank did not address the statutory protection expressly granted to plaintiff by the mandatory language in NRS 111.010(1), NRS 111.205(1), NRS 111.315 and NRS 111.325.

At page 2 of its order, the court of appeals states that "we note that the district court did not have the benefit of the Nevada Supreme Court's recent decision in *Daisy Trust v. Wells Fargo Bank, N.A.*, which held that a deed of trust need not be assigned to a regulated entity like Freddie Mac in order for it to own the secured loan – meaning that Nevada's recording statutes are not implicated – where the deed of trust beneficiary is an agent of the note holder. 135 Nev. 230, 233-34, 455 P.3d 846, 849 (2019)."

In the next sentence in its order, the court of appeals states: "Accordingly, the district court erred in concluding that Freddie Mac's interest needed to be recorded in order for the Federal Foreclosure Bar to apply."

This statement, however, contains an unstated assumption that an unrecorded transfer of "ownership" of a loan also creates an unrecorded transfer of a deed of trust that can be enforced against a "subsequent purchaser, in good faith and for a valuable consideration, of the same real property." *See* NRS 111.325.

On the other hand, the portion of the Daisy Trust opinion cited by the court of

appeals discussed an argument based solely on the language in NRS 106.210 that did not become mandatory until July 1, 2011. The opinion in Daisy Trust did not discuss the binding opinions in Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275 (2011), and Occhiuto v. Occhiuto, 97 Nev. 143, 625 P.2d 568 (1981), or the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 that has existed since 1861. In addition, NRS 111.315 was last amended in 1995.

As quoted at pages 11 and 12 of plaintiff's Answering Brief, the binding opinions in Leyva v. National Default Servicing Corp. and Occhiuto v. Occhiuto establish that Freddie Mac could not hold an enforceable interest in the Property or the Guillory deed of trust unless there is a properly executed written instrument that grants or assigns that interest to Freddie Mac.

Because that signed "writing" required by NRS 111.205(1) is a "conveyance" as defined in NRS 111.010(1), NRS 111.315 expressly required that the "writing" be recorded in order to "operate as notice to third persons."

Because no such signed "writing" was recorded prior to the HOA foreclosure deed, NRS 111.325 expressly provides that the signed "writing" is "void" as to plaintiff because the HOA foreclosure deed was "first duly recorded."

Because plaintiff's Answering Brief was filed on July 17, 2019, plaintiff did

not have the opportunity to discuss the opinion in Daisy Trust, which was not published until July 25, 2019. On the other hand, defendant repeatedly cited the Daisy Trust opinion throughout Appellant's Reply Brief, filed on August 30, 2019, but defendant did not even mention plaintiff's argument based on the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325.

Moreover, instead of discussing the opinions in Leyva v. National Default Servicing Corp. and Occhiuto v. Occhiuto that prove Freddie Mac could not hold an interest in the Property or the Guillory deed of trust unless the signed "writing" required by NRS 111.205(1) exists, in Daisy Trust, this court relied on 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). However, both of those cases are unlike the present case in several important aspects, including that "neither case dealt with a party with a hidden interest trying to claim lien priority over properly recorded interests." *See* pg. 19 of plaintiff's Answering Brief.

In Edelstein v. Bank of New York Mellon, the primary issue was whether BNY Mellon could properly participate in Nevada's Foreclosure Mediation Program even though the note and deed of trust were split prior to the bank foreclosing the deed of trust.

In Montierth, the only parties were the debtors (who signed the note and deed of trust) and the creditor (to whom the note had been transferred), and this court focused only upon whether recordation of the written assignment of the deed of trust would violate the automatic stay created by the debtors' bankruptcy. This court's statement that the "security interest attached and was perfected before the bankruptcy" (134 Nev. at 547, 354 P.3d at 651) as to the debtors does not mean that the creditor's interest was perfected against a third party purchaser like plaintiff.

As quoted at pages 15 and 16 of plaintiff's Answering Brief, comment b to Section 5.4 expressly provides that where there is an unrecorded "transfer of the obligation or the mortgage securing it," then "a good faith purchaser for value" like plaintiff "is entitled to rely on the record."

This is the same protection provided to plaintiff by the mandatory language in 111.205(1), NRS 111.315 and NRS 111.325.

Although the Montierth case referred to comments c and e to Restatement (Third) of Prop.: Mortgages, § 5.4 (1997), this court had no reason to mention the language in comment b to Restatement (Third) of Prop.: Mortgages, § 5.4 (1997) stating that "a good faith purchaser for value" is "entitled to rely on the record" because Montierth did not involve such a good faith purchaser.

The "plain meaning" of the language adopted by the Nevada Legislature expressly provides that because Freddie Mac never complied with the mandatory language in NRS 111.315 and recorded the signed "writing" required by NRS 111.205(1), the unrecorded conveyance of the Guillory deed of trust to Freddie Mac was "void" as to plaintiff because the HOA foreclosure deed was "first duly recorded." NRS 111.325. *See* Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dep't, 124 Nev. 138, 179 P.3d 542, 548 (2008).

This court has stated that "[t]he very purpose of recording statutes is to impart notice to a subsequent purchaser." SFR Investments Pool 1, LLC v. First Horizon Home Loans, 134 Nev. 19, 22, 409 P.3d 891, 893 (2018). *See also* Allison Steel Mfg. Co v. Bentonite, Inc., 86 Nev. 494, 497, 471 P.2d 666, 668 (1970)("Recording statutes provide 'constructive notice' of the existence of an outstanding interest in land, thereby putting a prospective purchaser on notice that he may not be getting all he expected.")

The interpretation of the Daisy Trust opinion adopted by the court of appeals violates the stated purpose of the recording statutes by assuming that the unwritten and unrecorded transfer of ownership of the Guillory loan could convey to Freddie Mac an interest in the Guillory deed of trust that could be enforced against a "a good

faith purchaser for value." Nevada law provides exactly the opposite.

In Butner v. United States, 440 U.S. 48, 55 (1979), the United States Supreme Court stated that "[t]he justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests . . . ."

Because 12 U.S.C. § 4617 did not enact a "federal" method of creating an enforceable interest in Nevada real property without complying with the mandatory language in NRS 111.205(1) and NRS 111.315, and because the HOA foreclosure deed was "first duly recorded," NRS 111.325 expressly provides that Freddie Mac held no interest in the Guillory deed of trust that could be enforced against plaintiff.

2. Because Freddie Mac did not comply with the mandatory language in NRS 111.010(1), NRS 111.205(1) and NRS 111.315, the Guillory deed of trust was not "property of the Agency" protected by 11 U.S.C. § 4617(j)(3).

12 U.S.C. § 4617(b)(2)(A) states that the Agency (FHFA) shall "immediately succeed to . . . all rights, titles, powers, and privileges of the regulated entity . . . and the assets of the regulated entity."

According to Black's Law Dictionary (10th ed. 2014), an "asset" is "[a]n item that is owned and has value," and the word "void" is defined as "[o]f no legal effect; to null."

Because Freddie Mac did not comply with the mandatory language in NRS

111.205(1) and NRS 111.315, and because NRS 111.325 expressly provides that Freddie Mac's unrecorded claim to hold an interest in the Guillory deed of trust is "void" as to plaintiff, that unrecorded interest was not an "asset" of Freddie Mac to which FHFA could succeed pursuant to 12 U.S.C. § 4617(b)(2)(A).

Because FHFA did not succeed to any interest in the Guillory deed of trust, the public auction held on August 22, 2013 did not affect any "property of the Agency," and consent by FHFA was not required before the Guillory deed of trust could be extinguished.

In Daisy Trust, this court stated that "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." 135 Nev. at 234, 445 P.3d at 849.

On the other hand, as stated at page 13 of plaintiff's Answering Brief, the Guillory "Loan" is a promissory note secured by a deed of trust, and no party is designated as "owner" of either the promissory note or the deed of trust. The "ownership" of the Guillory "Loan" is irrelevant because the public auction held on August 22, 2013 did not affect Freddie Mac's unrecorded claim to "own" the loan. As a "sold-out junior lienor," Freddie Mac could still have filed "a personal action on the promissory note." McMillan v. United Mortgage Co., 84 Nev. 99, 437 P.2d 878,

879 (1968).

In Hardy Cos., Inc. v. SNMARK, LLC, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010), this court stated that "the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed unless an intention to do so plainly appears by express declaration or necessary implication."

NRS 116.1108 supplements NRS Chapter 116 with "the law of real property . . . except to the extent inconsistent with this chapter." NRS Chapter 116 does not contain any language that is "inconsistent" with the mandatory language in NRS 111.205(1) and NRS 111.315 with which Freddie Mac did not comply.

Moreover, no language in the Restatement or in the Montierth case exempts Freddie Mac from complying with the mandatory language in NRS 111.205(1) and NRS 111.315.

In Armenta-Carpio v. Nevada, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013), this court stated that "we will not overturn precedent absent compelling reasons for doing so."

As quoted at page 11 of plaintiff's Answering Brief, in Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011), this court quoted

NRS 111.205(1) and stated that in order to prove that MortgageIT properly assigned its interest in the deed of trust to Wells Fargo, "Wells Fargo needed to provide a signed writing from MortgageIT demonstrating that transfer of interest."

In the present case, defendant did not produce any signed "writing" by which Freddie Mac acquired any interest in the Guillory deed of trust.

In Leyva v. National Default Servicing Corp., this court also stated that "the statement from Wells Fargo itself is insufficient proof of assignment." Id.

In the present case, not only did defendant fail to produce the signed "writing" required by NRS 111.205(1), defendant did not prove that the signed "writing" even exists. As stated at page 37 of plaintiff's Answering Brief, Dean Meyer did not identify the 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. *See* declaration by Dean Meyer at JA Vol. VII, pgs. 1547-1553.

The order by the court of appeals assumes that in Daisy Trust, this court intended to disrupt more than 150 years of established law and jurisprudence respecting the importance of protecting all rights inherent in real property ownership,

including security in and title to property. *See generally* Hamm v. Arrowcreek Homeowners' Ass'n, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008) (quoting McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 657, 137 P.3d 1110,1119 (2006) (explaining that Nevada has recognized that the bundle of property rights includes the right to possess, use, and enjoy property, and includes the right to security in and title to real property)).

The order by the court of appeals also assumes that in Daisy Trust, this court abandoned the express holdings in Leyva v. National Default Servicing Corp. and Occhiuto v. Occhiuto without even mentioning those precedential opinions.

The opinion in Daisy Trust should instead be interpreted narrowly to only provide that "neither NRS 106.210 nor NRS 111.325 was implicated." 135 Nev. at 234, 445 P.3d at 849. Because plaintiff did not base its arguments before the district court and before the court of appeals on the language in NRS 106.210, this court's opinion in Daisy Trust does not control the outcome of the present case.

Instead, because Freddie Mac did not comply with the mandatory language in NRS 111.205(1) and NRS 111.315 before the HOA foreclosure deed was recorded, this court should find that the Guillory deed of trust was not "property of the Agency" protected by 11 U.S.C. § 4617(j)(3) and that the public auction held on August 22,

2013 extinguished the subordinate deed of trust.

CONCLUSION

By reason of the foregoing, plaintiff respectfully request that this court review the order entered by the Court of Appeals on April 10, 2020, vacate the order entered by the Court of Appeals, and affirm the order granting plaintiff's motion for summary judgment.

DATED this 28th day of April, 2020.

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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)(5) and the type-style 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 type-volume limitations of

NRAP 40B 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 2,909 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 28th day of April, 2020

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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 28th day of April, 2020, a copy of the foregoing **RESPONDENT'S PETITION FOR SUPREME COURT REVIEW** was served electronically through the Court's electronic filing system to the following individuals:

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