IN THE SUPREME COURT OF NEVADA

SATICOY BAY LLC SERIES 133 McLAREN,

Appellant,

vs.

GREEN TREE SERVICING, LLC; THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS MASTER TRUST REVOLVING HOME EQUITY LOAN ASSET BACKED NOTES, SERIES 2004-T,

Respondents.

Case No. 78661

APPEAL

from the Eighth Judicial District Court, Department XXX
The Honorable Jerry Wiese, District Judge
District Court Case No. A-14-693882-C

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Ditech Financial LLC

Ditech Holding Corporation

Walter Investment Management Corp.

Bank of New York Mellon

Bank of New York Mellon Corporation

Akerman LLP

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

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STATEMENT OF JURISDICTION

Respondents Ditech Financial LLC f/k/a Green Tree Servicing LLC (**Ditech**) and The Bank of New York Mellon fka The Bank of New York, as successor Trustee to JPMorgan Chase Bank, N.A, as Trustee for the Certificateholders of CWABS Master Trust Revolving Home Equity Loan Asset Backed Notes, Series 2004-T (**BoNYM**) (collectively **respondents**) agree that this Court has jurisdiction under NRAP 3A(b)(1).

RESPONDENT'S STATEMENT REGARDING ROUTING

This appeal is presumptively retained by this Court because it raises a question of statewide public importance. *See* NRAP 17(a)(12).

Although the majority of the issues involved in this appeal have been answered by this Court, this Court has not yet squarely addressed whether an HOA sale purchaser may invoke the statute of frauds to invalidate Fannie Mae's property interest.[1]

[1] The Court's precedent from other factual contexts indicates that it cannot. *See, e.g., Harmon v. Tanner Motor Tours of Nev., Ltd.*, 377 P.2d 622, 628 (Nev. 1963).

INTRODUCTION

This case involves a fact pattern familiar to the Court from dozens of similar appeals: The purchaser of real property sold at a homeowners association foreclosure sale (the **HOA sale**) contends that it acquired free-and-clear title because, under NRS 116.3116 (the **State Foreclosure Statute**), the HOA sale purportedly extinguished a first deed of trust then encumbering the property.[2]

After a bench trial, the district court ruled in favor of Ditech, correctly concluding that the HOA sale did not extinguish the deed of trust because Bank of America, N.A. (**BANA**)—the prior servicer of the deed of trust—tendered and satisfied the superpriority portion of the HOA lien prior to the HOA sale. 1 APP 000169–70.

The district court incorrectly rejected a second reason why the HOA sale could not have extinguished the deed of trust, however. As Ditech asserted, a federal statute—12 U.S.C. § 4617(j)(3) (the **Federal Foreclosure Bar**)—preempted Nevada state law that might otherwise have allowed the HOA sale to extinguish the deed of trust because the Federal National Mortgage Association (**Fannie Mae**) owned the deed of trust on the date of the HOA sale. The court erroneously deemed

[2] Unless otherwise noted, all citations to NRS 116.3116 refer to the pre-2015 version of the statute that was in effect at the time of the relevant foreclosure sale.

Ditech's evidence insufficient to prove that Fannie Mae owned the loan. 1 APP 000166–68.

On appeal, Appellant Saticoy Bay LLC Series 133 McLaren raises both the district court's ruling on tender and its discussion of the Federal Foreclosure Bar. This Court should affirm the district court's ruling on tender and find in the alternative that Ditech's evidence was sufficient to support application of the Federal Foreclosure Bar.

Under each scenario, the result is the same: Fannie Mae's deed of trust survived the HOA sale. This Court should affirm.

STATEMENT OF THE ISSUES

I. Tender.

1. BANA's counsel delivered a check to the association in an amount sufficient to satisfy the superpriority portion of the association's lien, and the association's agent confirmed that it received and rejected the check. Should the district court's judgment be affirmed on the ground that BANA's delivery of the check was a legal tender that protected the deed of trust from extinguishment in the ensuing HOA sale?

II. The Federal Foreclosure Bar.

A. *Standing*: Does Ditech have standing to raise the Federal Foreclosure Bar when the Federal Housing Finance Agency (**FHFA**) and Fannie Mae are not parties to the case?

B. *Sufficiency of the Evidence*: Did the district court err in finding that Ditech did not submit competent and sufficient evidence proving Fannie Mae's ownership interest in the deed of trust?

C. *Statute of Frauds*: Can Saticoy Bay invoke the statute of frauds to undermine the validity of Fannie Mae's loan acquisition where there is no suggestion of fraud, Saticoy Bay was not a party to the transfer, and the transfer is complete?

D. *Bona Fide Purchaser*. Does the Federal Foreclosure Bar preserve Fannie Mae's interest notwithstanding Nevada's bona fide purchaser statutes because Saticoy Bay is not a bona fide purchaser and because, if it were, the Federal Foreclosure Bar would preempt those state statutes?

STATEMENT OF THE CASE

This case involves a Nevada homeowners' association's foreclosure on its superpriority lien for past-due assessments on a property against which Fannie Mae owned a deed of trust. Under the State Foreclosure Statute, properly conducted HOA foreclosures can extinguish a first priority mortgage lien. The district court held that the deed of trust at issue here was not extinguished by the HOA sale because BANA, the prior servicer, tendered the statutory superpriority amount prior to the HOA sale. 1 APP 000165–70. Accordingly, the court concluded that the deed of trust continues to encumber the property. 1 APP 000170. The district court rejected Ditech's Federal Foreclosure Bar argument, concluding that the evidence failed to establish Fannie Mae's interest in the property at the time of the HOA sale. 1 APP 00165–68. A

This appeal followed.

STATEMENT OF FACTS

I. The Secondary Mortgage Market.

Congress chartered Fannie Mae to facilitate the nationwide secondary mortgage market, and thereby to enhance the equitable distribution of mortgage credit throughout the nation. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). Fannie Mae's charter authorizes it to purchase and deal only in secured "mortgages," not unsecured loans. *See* 12 U.S.C. §§ 1717(b), 1719.

Fannie Mae does not directly manage many practical aspects of mortgage relationships, such as handling day-to-day interactions with the borrowers. Instead, Fannie Mae contracts with servicers to act on its behalf. In that role, servicers often appear as record beneficiaries of deeds of trust. *See Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 757–58 (Nev. 2017) (acknowledging servicers' role); restatement (Third) of property: Mortgages § 5.4 (the **restatement**) cmt. c (discussing the common practice where investors in the secondary mortgage market designate their servicer to be assignee of the mortgage); Fannie Mae's Single-Family Selling Guide at A2-1-01 and Fannie Mae's Single-Family Servicing Guide ("Guide") at F-1-11 (discussing Fannie Mae's relationship with servicers to manage the loans Fannie Mae purchases).[3] In such situations, the note owner remains a

[3] Relevant portions of the Guide were submitted at trial. *See* 1 SA 0078–163. This Court may also take judicial notice of the Guide. *E.g.*, *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 849 n.3 (Nev. 2019) (taking judicial notice of Freddie Mac's servicing guide); *see also Mack v. Estate of Mack*, 206 P.3d 98, 105 (Nev. 2009) (taking judicial notice on appeal); *Berezovsky*, 869 F.3d at 932, n.9. The Guide is "generally known," especially by members of the mortgage lending and servicing industry in Nevada, and "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." NRS 47.130(2). The Guide is publicly available on Fannie Mae's website. An interactive version is available at https://www.fanniemae.com/content/guide/servicing/index.html, and archived prior versions of the Guide are available at that URL by clicking "Show All" in the left-hand column of that site. While some sections of the Guide have been amended over the course of Fannie Mae's ownership of the Loan, none of these amendments have materially changed the relevant sections. A static, PDF copy of the most recent version of the Guide is available at https://www.fanniemae.com/content/guide/svc091119.pdf.

secured creditor with a property interest in the collateral, even if the recorded deed of trust names only the loan servicer. *See, e.g.*, *Montierth v. Deutsche Bank*, 354 P.3d 648, 650–51 (Nev. 2015) (en banc); *Daisy Trust*, 445 P.3d at 849; *M&T Bank v. Wild Calla St. Tr.*, 2019 WL 1423107, No. 74715, at *2 (Nev. Mar. 28, 2019) (unpublished).

Fannie Mae and its servicers also work with Mortgage Electronic Registration Systems, Inc. (**MERS**). The Ninth Circuit has noted that while "MERS, as the 'nominee' of the lender and of any assignee of the lender, is designated . . . as the 'beneficiary' . . . under the deed of trust," a "lender *owns* the home loan borrower's . . . promissory note." *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 776 (9th Cir. 2014) (emphasis added). The "obvious advantage" of the system is that "it allows residential lenders to avoid the bother and expense of recording every change of *ownership* of promissory notes." *Id.* at 776–77 (emphasis added); *see also Higgins v. BAC Home Loans Servicing, LP*, 793 F.3d 688, 689 (6th Cir. 2015) (holding that sale of note to new owner while MERS remains beneficiary of record of a mortgage does not trigger Kentucky recordation requirement). The owner of the loan is the lender, its successor, or its assignee—not MERS. *See Cervantes*, 656 F.3d at 1039.

II. Statutory Background.

The Housing and Economic Recovery Act of 2008 (**HERA**), Pub. L. No. 110-289, 122 Stat. 2654, *codified at* 12 U.S.C. § 4511 *et seq.*, established FHFA as the

regulator of Fannie Mae and the Federal Home Loan Mortgage Corporation (**Freddie Mac**) (together with Fannie Mae, the enterprises), authorized FHFA's Director to place the enterprises into conservatorships in certain circumstances, and enumerated the powers, privileges, and exemptions FHFA possesses as Conservator. Under HERA, when FHFA placed the enterprises into conservatorships, FHFA succeeded immediately and by operation of law to "all rights, titles, powers, and privileges" of the enterprises "with respect to [their] assets," thereby making all Enterprise assets "property of the Agency" for the duration of the conservatorship. *See* 12 U.S.C. § 4617(b)(2)(A). The Federal Foreclosure Bar—a broad statutory "exemption," captioned "property protection"—provides that when the enterprises are under FHFA conservatorship, "[n]o property of the Agency shall be subject to . . . foreclosure . . . without the consent of the Agency . . . ." 12 U.S.C. § 4617(j)(3).

III. Facts Specific to the Property at Issue.

A. Charles and Tara Wight execute a deed of trust.

This case involves a deed of trust securing a $220,000.00 promissory note (the **note**) on real property located at 133 McLaren Street, Henderson, NV 89074 (the **property**). 2 SA 0328–55. The deed of trust, recorded on November 23, 2004, lists Charles J. Wight and Tara J. Wight as borrowers, Countrywide Home Loans, Inc. as the lender, and MERS as beneficiary solely as nominee for lender and lender's successors and assigns (the **deed of trust**) (together with the note, the **loan**). 2 SA

0329. Fannie Mae purchased the loan in December 2004 and thereby acquired an ownership interest in the deed of trust. 2 APP 000260–64, 000271–75, 000282–98, 000322–92; 2 SA 0385–87, 0457–58; 3 SA 0459–708; 4 SA 0709–21. At the time of the HOA sale on November 22, 2013, Fannie Mae maintained its ownership of the loan, and Ditech was the servicer of the loan for Fannie Mae. *See id.*

B. The HOA refuses BANA's offer to pay the superpriority portion of its lien and conducts a foreclosure sale on its lien.

On January 14, 2011, Nevada Association Services, Inc. (**NAS**), as agent for Hillpointe Park Maintenance (the **HOA**), recorded a notice of delinquent assessment lien against the property stemming from unpaid HOA assessments. 1 SA 0168. NAS then recorded a notice of default and election to sell on September 9, 2011. 1 SA 0170–71. After the notice of default was recorded, BANA, as the servicer of the loan at the time, contacted NAS through counsel at Miles, Bauer, Bergstrom & Winters, LLP, and requested a payoff statement so that it could satisfy the superpriority amount of the HOA lien. 1 SA 0177–78; 1 APP 000221–22. NAS failed to respond to this request. 1 APP 000222. BANA used a statement of account it previously obtained for another property subject to the same HOA to calculate the superpriority amount. 1 SA 0180–81. The Statement of Account provided that the HOA's quarterly assessment amount was $92.25, meaning nine months of assessments would total $276.75. 1 SA 0180–81. At trial, the HOA's witness confirmed that this was the

correct quarterly amount for the property.[4] 2 APP 000241. On or about December 16, 2011, BANA tendered $276.75 to the HOA, through NAS. 1 SA 0183–85; *see also* 1 APP 000223–28 (Miles Bauer trial testimony). NAS refused delivery of the check. 1 SA 0187–91; 1 APP 000223.

On October 29, 2013, NAS on behalf of the HOA, recorded a notice of foreclosure sale. 2 SA 0361–62. A foreclosure deed recorded on November 26, 2013, states that the property was sold to Saticoy Bay at an HOA foreclosure sale on November 22, 2013, for $10,200. 2 SA 0363–65.

At no time did the conservator consent to the extinguishment of Fannie Mae's interest in the deed of trust. 2 APP 000264, 287, 377, 379. To the contrary, FHFA has publicly stated that it "has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection with HOA foreclosures of super-priority liens." 2 SA 0390 (FHFA's Statement on HOA Super-Priority Lien Foreclosures (**FHFA Statement**) (Apr. 21, 2015)).

IV. Procedural Background.

In January 2014, Saticoy Bay filed a complaint seeking to quiet title to the property. 1 APP 000001–05. In June 2015, Ditech filed an amended answer and

[4] It is also undisputed that there were no nuisance and abatement charges for the Property prior to the HOA Sale. *See* 2 APP 000418; 1 SA 0180.

counterclaims for quiet title and declaratory relief. 1 APP 000028–46. Ditech and Saticoy Bay filed competing motions for summary judgment. 1 SA 0001–0250, 2 SA 0251–88. On September 11, 2018, the district court denied both motions, holding that "there are issues of fact regarding tender, the federal foreclosure bar and [bona fide purchaser] status to be determined at trial." 1 APP 000084–85. On March 25, 2019, the district court entered judgment in Ditech's favor following a bench trial, holding that the deed of trust was not extinguished by the HOA sale because BANA previously tendered and satisfied the superpriority portion of the HOA lien. 1 APP 000157–62. The district court did, however, reject Ditech's Federal Foreclosure Bar argument and found that Ditech's evidence failed to prove Fannie Mae's interest in the loan. 1 APP 000158–60.

Notice of entry of the order was served on March 25, 2019. 1 APP 000163–64. Saticoy Bay noticed this appeal on April 22, 2019. 1 APP 000171–72.

SUMMARY OF ARGUMENT

The district court's decision should be upheld because it correctly granted summary judgment in favor of Ditech on the ground that BANA's tender extinguished the superpriority portion of the HOA's lien. The ruling below can easily be affirmed under *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113 (2018), *as amended on denial of reh'g* (Nov. 13, 2018) (***Bank of America***). In *Bank of America*, this Court confirmed that the delivery of a check in an amount

sufficient to pay the superpriority portion of the association's lien "cure[s] the default and prevent[s] foreclosure as to the superpriority portion of the HOA's lien by operation of law." 427 P.3d at 116. The check in *Bank of America* was accompanied by precisely the same cover letter at issue in this case, and this Court held that it did not contain any impermissible conditions. *Id.* at 118. *Bank of America* controls here.

Saticoy Bay's efforts to avoid application of *Bank of America* fall flat, and in fact, involve arguments that this Court squarely rejected in that case. For example, Saticoy Bay argues that the letter accompanying Bank of America's check was impermissibly conditional, but there is no basis in the record that the alleged "conditions" played any role in NAS's rejection of the tender. Saticoy Bay's retroactive attempts to conjure objections that NAS or the HOA *might* have made to the terms of the tender are speculation. But more importantly, Saticoy Bay's attempt to insert "conditions" into BANA's tender letter is the result of its misrepresentation of the letter's contents by selectively quoting certain portions of the letter. Similarly, Saticoy Bay's efforts to invoke equitable considerations or the HOA's alleged good faith rejection of the tender in order to negate the legal effect of the tender also fail as a matter of law. This Court confirmed in *Bank of America* that neither equitable principles nor the HOA's rejection of BANA's tender (in good faith or otherwise) affects the validity of the tender.

But the Court should also find that the district court erred in finding Ditech's evidence insufficient to invoke the Federal Foreclosure Bar. Under *Daisy Tree* and many of this Court's other decisions in similar cases, the district court's ruling that Ditech had not sufficiently supported the Federal Foreclosure Bar's application is incorrect. The Court should affirm the judgment in Ditech's favor on the alternative ground that the Federal Foreclosure Bar protected the deed of trust from extinguishment. The district court's ruling that the evidence was not "competent" or sufficient to establish Fannie Mae's interest in the deed of trust, 1 APP 000157–60, is most properly viewed as a legal conclusion subject to de novo review. Nevertheless, given that Ditech's evidence was probative, admissible, credible, and material to the issue, the district court's finding on this issue would be reversible under any standard.

STANDARD OF REVIEW

This Court reviews a district court's findings of fact to see if they are supported by substantial evidence. *Cty. of Clark v. Sun State Properties, Ltd.*, 72 P.3d 954, 957 (Nev. 2003); *see also In re Estate of Bethurem*, 313 P.3d 237, 242 (Nev. 2013) (findings of fact reviewed for substantial evidence.) "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion," *Jones v. SunTrust Mortg., Inc.*, 274 P.3d 762, 764 (Nev. 2012) (internal quotation

marks omitted). A district court's conclusions of law are reviewed de novo. *Cty. of Clark*, 72 P.3d at 957; *Paige v. State*, 995 P.2d 1020, 1021 (Nev. 2000).

ARGUMENT

I. The District Court Correctly Entered Judgment in Ditech's Favor Due to BANA's Tender of the Superpriority Amount.

The district court correctly ruled that the deed of trust survived the HOA sale because BANA's tender of the superpriority amount extinguished that portion of the HOA lien. In *Bank of America*, this Court confirmed that BANA's delivery of a check in an amount sufficient to pay the superpriority portion of an association's lien extinguished the lien and caused the purchaser to take title subject to the deed of trust. 427 P.3d at 121. This case is nearly identical to *Bank of America*, and the district court correctly applied it here. *See id.*

On appeal, Saticoy Bay raises five primary arguments that BANA's tender was ineffective to cure the superpriority portion of the HOA's lien: (1) BANA's tender was not effective because the HOA rejected the tender based on a good faith belief that the superpriority amount included collection costs, (2) BANA's tender was conditional, (3) BANA was required to record its tender to be effective because Saticoy Bay is a bona fide purchaser, (4) the foreclosure deed's recitals invalidate

BANA's tender and (5) equitable relief is inappropriate because BANA can pursue damages against the HOA.[5] None of these arguments has merit.

A. BANA's Tender Extinguished the HOA's Superpriority Lien.

In *Bank of America*, BANA delivered a check to the homeowners association's agent in an amount sufficient to pay nine months of assessments, along with a letter, nearly identical in wording to the Miles Bauer letter at issue here, that the association's acceptance of the check constituted an "express agreement that [BANA's] financial obligations toward the [association] in regards to the [property at issue] have now been 'paid in full.'" *Id*. at 116. The Nevada Supreme Court held that, despite the agent's rejection of BANA's check, the tender operated to discharge the superpriority lien. *Id.* at 118. The Court expressly rejected the argument that the tender was invalid because it did not cover the association's entire lien, as it was sufficient to pay the full statutory superpriority amount. *Id.* at 118–19. In so holding, the Court explicitly rejected the purchaser's arguments that BANA was required to record its tender, holding that "[b]y its plain text, NRS 111.315 does not apply to [BANA's] tender." *Bank of America*, 427 P.3d at 119.

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[5] Saticoy Bay also halfheartedly argues that Ditech waived its tender defense by failing to plead it as an affirmative defense. AOB 11. Saticoy Bay failed to present this argument in the district court, and as a result, it has been waived. *See, e.g.*, *Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Here, just as in *Bank of America*, BANA (through its counsel at Miles Bauer) tendered payment for the HOA's superpriority lien. After receiving the Notice of Default, Miles Bauer sent NAS a letter that offered to pay the superpriority portion. 1 SA 0177–78; 1 APP 000221–22. After NAS failed to respond, Miles Bauer used a Statement of Account for a different property within the HOA that identified the monthly assessment amount for the relevant period as $92.25 quarterly (or $30.75 monthly). 1 SA 0180; 1 APP 000222–24. At trial, the HOA's representative confirmed that this was the correct quarterly amount for the property.[6] 2 APP 000241. In December 2011, prior to the HOA sale, Miles Bauer sent NAS a check for $276.75, an amount equal to nine months of assessments, along with a letter explaining that BANA "has authorized [Miles Bauer] to make payment to [NAS] in the amount of $276.75 to satisfy [BANA's] obligations to the HOA as a holder of the first deed of trust against the [P]roperty." 1 SA 0183–85; *see also* 1 APP 000223–28 (Miles Bauer trial testimony). This amount equaled nine months of monthly assessments and exceeded the six-month superpriority amount of $184.50 for a Fannie Mae-owned loan. *See* NRS 116.3116 (3)(c).

NAS refused delivery of the check but did not provide a reason for doing so. *See* 1 SA 0187–91; 1 APP 000223. Notably, Saticoy Bay does not dispute that the

[6] It is undisputed that there were no nuisance and abatement charges for the Property prior to the HOA Sale. *See* 2 APP 000418; 1 SA 0180.

amount of BANA's check covered the full superpriority portion of the HOA lien, or that NAS received BANA's tender check. *See* AOB 11 (noting check was rejected by NAS). As the Nevada Supreme Court has confirmed, NAS and the HOA's rejection of BANA's check does not negate the legal effect of BANA's tender. *Bank of America*, 427 P.3d at 120. As a result, BANA's tender of an amount equal to nine months of monthly assessments was sufficient to extinguish the superpriority portion of the HOA lien.

B. BANA's Tender Did Not Fail on Account of Any Purported Conditions.

Saticoy Bay separately argues that BANA's tender contained impermissible conditions relating to the HOA's acceptance of the "facts" stated in Miles Bauer's tender letter, and therefore, was ineffective to extinguish the superpriority portion of the HOA lien. This argument has also been squarely rejected by this Court's binding precedent in *Bank of America*. *See* 427 P.3d at 118.

The Nevada Supreme Court has repeatedly analyzed the very language of the Miles Bauer letter at issue in this case and concluded that the conditions in the letter were conditions upon which BANA had a right to insist, and thus the delivery of the check was a valid tender. In evaluating a materially identical communication accompanying a check in the *Bank of America* case, the Court held that the "condition" with a tender that "acceptance of the tender would satisfy the

superpriority portion of the lien" and "preserv[e] [BANA's] interest in the property" was a valid condition upon which BANA "had a right to insist." 427 P.3d at 118.

Although Saticoy Bay does not assert there were actually any nuisance-abatement or maintenance charges or that NAS ever raised any objection concerning such charges, it argues that the Miles Bauer tender was nevertheless invalid on the basis that it linked the HOA's acceptance of the check to agreement with BANA's interpretation of NRS 116.3116, alleging that the letter asserts that the HOA was only entitled to be compensated for nine months of delinquent HOA assessments and nothing further. AOB 16–24. However, Saticoy Bay's argument is based on a selective, misleading quotation of the Miles Bauer letter.

Both Miles Bauer's initial letter offering to pay the superpriority portion of the lien and the subsequent letter enclosing the tender check specifically (and correctly) note which charges were *not* given superpriority status under NRS 116.3116:

> While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust *to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, services charges and interest.*

1 SA 0184 (emphasis added). That was exactly right; the superpriority amount of the lien does not include "fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest" associated with delinquent

assessment liens. That was the very point of *Horizons at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 373 P.3d 66 (Nev. 2016).

Saticoy Bay would like the Miles Bauer letter to have stated that the HOA's lien was "junior to the extent it included charges and fees associated with nuisance abatement and maintenance under NRS 116.310312." Indeed, that statement would have been incorrect, as the Nevada Supreme Court indicated in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A., as Trustee*, 334 P.3d 408, 411 (Nev. 2014) and *Ikon Holdings*, 373 P.3d at 69. While that likely would not have made a difference here, because neither the HOA nor NAS mentioned a concern about nuisance abatement charges, it is at least conceivable that someone could have objected to the misinterpretation of the statute. But that is not what the letters say, no matter how badly Saticoy Bay wants to misread them.

As the Nevada Supreme Court has repeatedly concluded, any conditions in Miles Bauer's letter were conditions upon which Miles Bauer had the right to insist. Saticoy Bay's retroactive efforts to gin up objections to BANA's tender fail.

C. The Bona Fide Purchaser Doctrine Has No Relevance to BANA's Tender.

Saticoy Bay erroneously argues that BANA's tender was ineffective on the basis of the bona fide purchaser defense. AOB 37–38. In *Bank of America*, this Court held that "[a] party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void." 427 P.3d at 121. The Court specifically applied

that rule to the situation of a tender to an HOA for the superpriority portion of its lien: "Because [BANA's] valid tender discharged the superpriority portion of the HOA's lien, the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion. Accordingly, the HOA could not convey full title to the property, as [BANA's] first deed of trust remained after foreclosure." *Id.*

There is no authority to support Saticoy Bay's notion that a discharged lien springs back into existence if an HOA sale purchaser can qualify as a bona fide purchaser.[7] Thus, Saticoy Bay's purported status as a bona fide purchaser is irrelevant where, as here, BANA's tender voided the superpriority portion of the HOA lien. The bona fide purchaser defense cannot validate a void sale. *See Bank of America*, 427 P.3d at 121.

D. No Notice of BANA's Tender Had to Be Recorded.

Saticoy Bay also contends that its title to the property cannot be encumbered by the deed of trust because the tender was not recorded. AOB 24–34. The crux of Saticoy Bay's argument seems to be that BANA's tender subrogated the HOA's superpriority lien to BANA, rather than extinguishing that portion of the lien.[8] *See*

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[7] As set forth below, Saticoy Bay is not a bona fide purchaser. *See* discussion *infra* Section II(D)(1).

[8] Even if Saticoy Bay were correct (it is not) that the tender resulted in an assignment of the superpriority portion of the HOA's lien, this would not help its appeal. If the superpriority portion had been assigned to BANA before the

id. The argument is underdeveloped (mainly consisting of quotations from the restatement (Third) of Property: Mortgages), and can be disregarded on that basis alone. However, it would be a non-starter even if adequately developed.

The *Bank of America* decision explicitly rejected the argument that the superpriority tender caused an assignment to the deed of trust holder: "Tendering the superpriority portion of an HOA lien does not create, alienate, *assign*, or surrender an interest in land." *Bank of America*, 427 P.3d at 119 (emphasis added). This Court has confirmed that BANA did not have to record its tender in numerous unpublished decisions following *Bank of America*. *See, e.g., Zixiao Chen v. Bank of America, N.A.*, 2019 WL 295672, at *1 (Nev. Jan. 17, 2019) (unpublished) ("[The HOA-sale purchaser] contends that . . . Bank of America needed to record evidence of the tender . . . but we recently rejected similar arguments [in *Bank of America*]."); *Fiducial, LLC v. Bank of New York Mellon Corp. as Trustee for Certificate Holder of CWALT, Inc.*, 432 P.3d 718 (Table), 2018 WL 6617727, at *2 (Nev. Dec. 11, 2018) (unpublished) (same). BANA did not have to record its tender to protect the deed of trust from extinguishment here.

foreclosure sale, then the HOA would have had no right to foreclose on the superpriority portion.

E. The HOA's Basis for Rejecting BANA's Tender is Irrelevant.

Finally, Saticoy Bay argues that BANA's tender was ineffective because NAS rejected BANA's tender out of a good faith belief that the superpriority amount contained reasonable collection costs.[9] AOB 11–17. This argument has also been repeatedly rejected by this Court.

In *Bank of America*, this Court explicitly "reject[ed] [the investor's] claim that the HOA's asserted 'good faith' in rejecting [BANA's] tender allowed the HOA to proceed with the sale, thereby extinguishing [BANA's] first deed of trust."[10] 427 P.3d at 119. This Court's unpublished opinions following that decision have repeatedly cited *Bank of America* for the holding that an HOA's alleged subjective good faith in rejecting a tender is not a basis for invalidating the effect of the tender. *See, e.g., Sage Realty LLC Series 2 v. Bank of New York Mellon as Tr. for Certificateholders of the CWABS, Inc.*, 432 P.3d 191 (Table), No. 73735, 2018 WL 6617730, at *1 (Nev. Dec. 11, 2018) (unpublished) (holding that a "subjective good faith [basis] for rejecting [a] tender is *legally irrelevant*, as the tender cure[s] the

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9 There is no evidence in the record regarding NAS's actual reasons for rejecting BANA's tender in this case. In fact, Rock Jung testified on behalf of Miles Bauer that NAS never challenged the amount of BANA's tender in this case. 1 APP 000223. Any suggestion by Saticoy Bay as to NAS's reasoning is pure speculation.

10 Although the Court did note that the investor failed to present this argument in the district court, the Court rejected this argument on the merits rather than on the basis of waiver. *Bank of America*, 427 P.3d at 119.

default as to the superpriority portion of the HOA's lien by operation of law"); *Bank of America, N.A. v. BDJ Investments, LLC,* No. 69856, 2018 WL 6433115, at *1 (Nev. Dec. 4, 2018) (unpublished) (same); *SFR Investments Pool 1, LLC v. Mortgage Elec. Reg. Sys., Inc.*, 431 P.3d 55 (Table), 2018 WL 6433003, at *1 (Nev. Dec. 4, 2018) (same); *see also Pawlik v. Bank of New York Mellon as Trustee,* No. 71681, 2018 WL 6617724, at *1 (Nev. Dec. 11, 2018) (unpublished) ("Because the superpriority portion of the HOA's lien was no longer in default following the tender, the ensuing foreclosure sale was void as to the superpriority portion of the lien, and the basis for rejecting the tender could not validate an otherwise void sale in that respect."). Thus, "NAS's basis for rejecting the tender could not validate an otherwise void sale[.]" *BDJ Investments*, 2018 WL 6433115, at *1 (citing *Bank of America*, 427 P.3d at 121).

F. The Deed Recitals Do Not Invalidate the Effect of the Tender.

Finally, Saticoy Bay advances another undeveloped argument, again using selective quotations from various cases, that the recitals in the Trustee's Deed received by it at the HOA sale were "conclusive" and insulated the sale from the effect of BANA's tender. AOB 34–38. This argument fails.

As this Court has held, under NRS 116.31166, the recitals in an association's trustee's deed only "implicate compliance only with the statutory prerequisites to foreclosure." *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1112

(Nev. 2016). But where a tender cures the default as to the superpriority portion of an HOA's lien, a "foreclosure sale on a mortgage lien after valid tender satisfies that lien is void, as the lien is no longer in default." *Bank of America*, 427 P.3d at 121. The recitals in the deed regarding compliance with the statutory prerequisites to foreclosure cannot operate to validate a void sale. Saticoy Bay's suggestion to the contrary ignores (and fails to even acknowledge) this Court's binding precedent.

G. Saticoy Bay's Argument Regarding Equitable Relief is Inapplicable Here.

Finally, Saticoy Bay asserts that respondents should be denied declaratory relief because they can seek damages against other parties. This argument has no support under existing law.

Saticoy Bay begins by citing this Court's decision in *Las Vegas Valley Water District v. Curtis Park Manor Water Users Ass'n* for the proposition that equitable relief is never appropriate if the party seeking that relief can pursue damages against another party. 646 P.2d 549, 551 (Nev. 1982). In *Curtis Park*, however, this Court was referring to a party seeking injunctive relief, rather than a declaratory judgment regarding that party's rights. *Id.* Even if *Curtis Park* stood for this extraordinarily broad proposition that parties are never entitled to declaratory relief if they can seek damages against another party, Saticoy Bay's argument still fails. This argument is based on the assumption that respondents would be successful in pursuing any claims against the HOA or NAS, that the additional cost of such litigation would not

be prohibitive, and the further assumption that any subsequent judgment would be collectible. Contrary to Saticoy Bay's suggestion, respondents are entitled to choose their own remedy, and Saticoy Bay cannot force respondents to elect the remedy that benefits Saticoy Bay the most.

Saticoy Bay then cites five additional Nevada Supreme Court decisions (without providing any sort of explanation or discussion) that supposedly support this same proposition regarding limitations on equitable relief. However, a quick review of these cases belies Saticoy Bay's assertion that those cases are applicable or supportive of Saticoy Bay's position in any way. Contrary to Saticoy Bay's assertions, *Washoe Cty. v. City of Reno* applied only to whether *mandamus* was an appropriate remedy where there was an adequate remedy at law, not equitable relief in general. 155, 360 P.2d 602, 603 (Nev. 1961). Saticoy Bay's scattershot citation of decisions from this Court fails to accurately describe the current state of the law regarding equitable relief.

Rather, all that is required for respondents to assert a claim for declaratory judgment are (1) a justiciable controversy, (2) between adverse parties, (3) the party seeking relief must have a protectable legal interest in the controversy, and (4) the issue must be ripe for determination. *Nevada Mgmt. Co. v. Jack*, 75 Nev. 232, 235, 338 P.2d 71, 73 (1959). There is no disputing that all of these elements are satisfied. Respondents have a justiciable controversy in a legally protectable interest between

adverse parties that is ripe for judicial determination because the parties dispute whether the deed of trust was extinguished by the HOA sale, and both parties claim an interest in the property. Respondents are not required to seek a damages claim against third parties when the deed of trust was preserved from extinguishment *as a matter of law*, and it is entitled to a declaratory judgment to that effect. Saticoy Bay's arguments to the contrary are specious.

In short, Saticoy Bay gives no reason to disturb the district court's holding that BANA made a valid tender of the superpriority portion of the HOA's lien, thereby preserving the deed of trust from extinguishment.

II. The Court May Alternatively Affirm on the Basis of the Federal Foreclosure Bar.

The record provides an independent ground for this Court to rule that Saticoy Bay did not take free-and-clear title to the Property: The Federal Foreclosure Bar protected Fannie Mae's deed of trust from extinguishment. The Court should affirm on both grounds.

It is well established that this Court "can affirm a lower court's ruling on different grounds." *Burroughs Corp. v. Century Steel, Inc.*, 664 P.2d 354, 356 n.1 (Nev. 1983). The Court "will affirm the order of the district court if it reached the correct result, albeit for different reasons." *Rosenstein v. Steele*, 747 P.2d 230, 233 (Nev. 1987). The Federal Foreclosure Bar was fully briefed in the district court and provides an alternative ground on which Ditech can prevail.

Settled law from this Court confirms that the Federal Foreclosure Bar conflicts with, and thus preempts, the State Foreclosure Statute to the extent that a foreclosure sale would otherwise extinguish an Enterprise's deed of trust. *Daisy Trust*, 445 P.3d at 847; *Christine View*, 417 P.3d at 367.[11] The Ninth Circuit has held the same. *E.g.*, *Berezovsky v. Moniz*, 869 F.3d 923, 930–31 (9th Cir. 2017); *FHFA v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136, 1146–47 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1618 (Apr. 29, 2019). In its opening brief before this Court, Saticoy Bay offers four arguments why the Federal Foreclosure Bar purportedly does not apply here, but none has merit.

First, Saticoy Bay claims that Ditech may not raise the Federal Foreclosure Bar because neither FHFA nor Fannie Mae is a party to the case. *Second*, Saticoy Bay trumpets the district court's incorrect conclusion that Ditech did not submit sufficient evidence to prove that Fannie Mae owned the loan. In making this argument, Saticoy Bay points to the fact that Ditech was the deed of trust's record

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[11] *See also also, e.g.*, *CitiMortgage, Inc. v. Saticoy Bay LLC Series 3084 Bellavista Lane*, No. 71606, 2019 WL 4390765, at *1 (Nev. Sep. 12, 2019) (unpublished); *JP Morgan Chase Bank, N.A. v. Guberland LLC-Series 2*, No. 73196, 2019 WL 2339537, at *1 (Nev. May 31, 2019) (unpublished); *M&T Bank v. Wild Calla Street Trust*, No. 74715, 2019 WL 1423107, at *1 (Nev. Mar. 28, 2019) (unpublished); *CitiMortgage, Inc. v. TRP Fund VI, LLC*, No. 71318, 2019 WL 1245886, at *1 (Nev. Mar. 14, 2019) (unpublished); *CitiMortgage, Inc. v. SFR Invs. Pool 1, LLC*, No. 70237, 2019 WL 289690, at *2 (Nev. Jan. 18, 2019) (unpublished); *SFR Invs. Pool 1, LLC v. Green Tree Serv'g, LLC*, No. 72010, 2018 WL 6721370, at *2 (Nev. Dec. 17, 2018) (unpublished); *Nationstar Mortgage, LLC v. Guberland LLC-Series 3*, No. 70546, 2018 WL 3025919, at *2 (Nev. June 15, 2018) (unpublished).

beneficiary. *Third*, Saticoy Bay claims that the Statute of Frauds prevents application of the Federal Foreclosure Bar in this case. And, *fourth*, Saticoy Bay claims that it is protected by Nevada's bona fide purchaser doctrine. Each of these arguments fails as a matter of law.

A. Ditech Had Standing to Assert the Federal Foreclosure Bar.

Saticoy Bay argues that Ditech cannot assert the Federal Foreclosure Bar in this litigation to protect the deed of trust because neither FHFA nor Fannie Mae is a party to this case and because Ditech "did not prove that it complied with the Guide to be a servicer." AOB 38–39, 54–55. This Court has already rejected these arguments. In *Nationstar v. SFR*, this Court unequivocally held that "the servicer of a loan owned by [an Enterprise] may argue that the Federal Foreclosure Bar preempts NRS 116.3116" without joining either FHFA or an Enterprise as a party. 396 P.3d at 758; *accord Daisy Trust*, 445 P.3d at 847 n.1 (citing *Nationstar*).

Evidence consisting of declarations, business records, and "authorizations in the Guide that are generally applicable to [an Enterprise's] loan servicers" is "sufficient to show that [a servicer] was in fact [the Enterprise's] loan servicer with authority to assert the Federal Foreclosure Bar on [the Enterprise's] behalf." *Daisy Trust*, 445 P.3d at 849–50 (holding that the district court did not abuse its discretion in determining that such evidence, without more, established the Freddie Mac-servicer relationship). The evidence in this case—business records and sworn

testimony from Fannie Mae's and Ditech's corporate witnesses, and the relevant Guide provisions (2 APP 000281–82, 000341; 5 SA 1152–55)—confirms that Ditech is Fannie Mae's contractually authorized servicer for the loan with standing to assert the Federal Foreclosure Bar. *See also* 3 SA 0544–56 (guide provisions relating to servicer authority to represent Fannie Mae's interest in litigation). Furthermore, FHFA has publicly supported invocation of the Federal Foreclosure Bar by servicers in litigation such as this. 2 SA 0388. Saticoy Bay has not presented and cannot present contrary evidence to create a genuine dispute about these facts. Ditech properly invoked the Federal Foreclosure Bar.

Saticoy Bay's claim that Ditech "did not prove that it complied with the Guide to be a servicer," is equally flawed. AOB 54–55. The evidence in the record proves Ditech's relationship with Fannie Mae, and the existence of a Fannie Mae-servicer relationship does not turn on a servicer's compliance with the Guide. *See, e.g.*, 3 SA 0526–28 (Guide A1-1-03) (breach of duties permits, but does not require, Fannie Mae to terminate servicing in whole or in part).

B. The District Court's Ruling on, and Saticoy Bay's Arguments about, Application of the Federal Foreclosure Bar Were Incorrect as a Matter of Law.

Following trial, the district court ruled that Ditech did not provide "any real evidence indicating Fannie Mae's interest in the loan." 1 APP 000158–160. In reaching its decision, the district court relied in part on the fact that Ditech "is the

recorded beneficiary of the deed of trust." 1 APP 000159. On appeal, Saticoy Bay cites the district court's erroneous conclusions and also argues that Ditech's evidence was inadmissible because the witnesses lacked personal knowledge. AOB 38–39, 43–51. Yet the district court's decision and Saticoy Bay's arguments are incorrect as a matter of law; this Court has found that evidence materially identical to the evidence presented by Ditech warrants entering judgment in its favor.

1. Ditech Submitted Sufficient Evidence to Establish Fannie Mae's Loan Ownership.

The district court's holding, and Saticoy Bay's claim, that Ditech's evidence was insufficient to support judgment in its favor stands in direct opposition to this Court's prior decisions that the same kind of uncontroverted evidence submitted here suffices to establish an Enterprise's property interest. Specifically, Ditech submitted business-record data derived from Fannie Mae's Servicer & Investor Relations ("SIR") system—a database that Fannie Mae uses every day to track millions of loans it acquires and owns nationwide. 3 SA 0464–77. The data in SIR is entered at or near the time of the events recorded by, or from information transmitted by, persons with knowledge. 3 SA 0460 ¶ 3. The SIR records show that the "acquisition date" on which Fannie Mae acquired ownership of the loan was in December 2004—long before the November 22, 2013 HOA sale. 3 SA 0464. The SIR records also demonstrate Fannie Mae's continued ownership of the loan at the time of the HOA sale. 3 SA 0460 ¶¶ 4–7.

Fannie Mae's business records and testimony also reflect that MERS was the record beneficiary of the deed of trust at the time of the HOA sale, and that Ditech, the current beneficiary of record, is also the current Loan servicer. 2 APP 000281–82, 000341; 5 SA 1152–55. Fannie Mae's SIR records were properly admitted and explained by Claudette Carr, a Fannie Mae employee qualified to testify regarding the contents of Fannie Mae's business records. 2 APP 000336–39.

Under this Court's prior decisions, Ditech's evidence is sufficient to prove Fannie Mae's Loan ownership. This Court recently issued a published decision confirming that a proffer of similar evidence to that submitted here—database records, sworn testimony, and relevant Guide provisions (2 SA 0385–87, 0457–58; 3 SA 0459–708; 4 SA 0709–21; 2 APP 000260–64, 000271–75, 000282–98, 000322–92)—"sufficiently demonstrated that [the Enterprise] owned the loan on the date of the foreclosure sale." *Daisy Trust*, 445 P.3d at 851. And in *JP Morgan Chase Bank, N.A. v. Guberland LLC-Series 2* (***Guberland II***), the Court reversed the district court's decision, holding that Freddie Mac's ownership interest was established by an employee declaration and "the supporting computer printouts," both of which were admissible under Nevada's business-records exception. No. 73196, 2019 WL 2339537, at *1 (Nev. May 31, 2019) (unpublished) (citing NRS 51.135). This Court also recently agreed that similar evidence "establish[es] that Fannie Mae owned the loan at the time of the HOA foreclosure sale" and affirmed

summary judgment. *CitiMortgage v. SFR*, 2019 WL 289690, at *1 & n.1. Indeed, this Court vacated and remanded a district court decision that failed to apply the Federal Foreclosure Bar to a Fannie Mae loan where the evidence in the record consisted only of Fannie Mae's business records and a supporting declaration. *Nationstar Mortg., LLC v. Guberland LLC-Series 3* (***Guberland I***), No. 70546, 2018 WL 3025919, at *2 (Nev. June 15, 2018) (unpublished).

Saticoy Bay submitted no evidence to contradict or undermine the reliability and trustworthiness of Fannie Mae's business records. This Court has recognized that where there is no contrary evidence submitted into the record on a material point, it may reverse where a decision is manifestly contrary to the evidence. *See Avery v. Gilliam*, 625 P.3d 1166, 1168 (Nev. 1981) ("[W]e have not hesitated to [reverse a decision] where there is no substantial conflict in the evidence on any material point and the verdict or decision is manifestly contrary to the evidence."); *cf. Koff v. United States*, 3 F.3d 1297, 1298 (9th Cir. 1993) (recognizing that some probative evidence of a fact is sufficient "in the absence of contrary evidence"). Such is the case here. Ditech submitted reliable business records and testimony proving the material facts of this case, and Saticoy Bay failed to proffer any evidence undermining or contradicting those facts. Ditech's evidence proves Fannie Mae's ownership of the loan and establishes the Fannie Mae-Ditech servicing relationship.

2. Ditech Was Not Required to Produce Additional, Cumulative Evidence.

In its ruling, the district court specifically took exception with the fact that Ditech did not produce three different forms of additional evidence related to Fannie Mae's ownership of the loan. 1 APP 000159–160, *see also* AOB 39, 43–44. All three of its calls for evidence have either been rejected by this Court as a matter of law or are clearly erroneous given the evidence that was submitted at trial.

First, the district court erred in lending weight to the fact that Ditech did not produce a "servicing contract" between it and Fannie Mae or "tri-party-custodial agreement" between it, Fannie Mae, and the custodian. 1 APP 000159. But after the district court issued its opinion, this Court held in a published, en banc opinion that servicers need not produce these documents to establish the requisite relationship. *Daisy Trust*, 445 P.3d at 849–50. In *Daisy Trust*, this Court held that evidence substantially similar to that submitted here—Freddie Mac's business records, corresponding declaration, and the Freddie Mac Guide—sufficiently establish the contractual relationship between an Enterprise and its servicer. 445 P.3d at 850. Since then, the Court has issued several decisions making clear that a servicer can establish its relationship with an Enterprise—and thus its standing to raise the Federal Foreclosure Bar—based on essentially the same evidence. *See e.g.*, *Bellavista Lane*, 2019 WL 4390765, at *1.

This Court's pre-*Daisy Trust* rulings confirm that similarly situated Freddie Mac's business records and declarations, "combined with the authorizations in the Freddie Mac Servicing Guide," are "sufficient to show that . . . [the servicer] was authorized to assert the Federal Foreclosure Bar on Freddie Mac's behalf." *Guberland II*, 2019 WL 2339537, at *2; *CitiMortgage v. SFR*, 2019 WL 289690, at *1. The Court also held that additional evidence, such as "the actual servicing contract," is not necessary for a servicer to prove that it has standing to raise the Federal Foreclosure Bar. *Guberland II*, 2019 WL 2339537, at *2; *see also CitiMortgage v. TRP Fund VI*, 2019 WL 1245886, at *1.[12]

Second, the district court erred in ruling that Ditech had not established Fannie Mae's interest because it did not introduce "financial records indicating that the servicer collects mortgage payments, retains a portion for its servicing charge, and submits the rest to Fannie Mae." 1 APP 000159. The district court's insistence that these documents must be introduced in order for a servicer to prevail contradicts this Court's precedent, as this Court has found in *Daisy Trust* and its progeny that these

[12] Saticoy Bay's attempt to discredit Fannie Mae's testifying employees because they had not seen the MSSC or lender contract, AOB 45, fails for similar reasons: Neither of those documents is necessary to establish the Fannie Mae-Ditech relationship, *see Daisy Trust*, 445 P.3d at 849–50, and their knowledge of the Fannie Mae-Ditech relationship is based on and supported by other admissible evidence, such as Ditech's and Fannie Mae's business records, and the Guide.

documents are not necessary to prove Fannie Mae's interest when other competent evidence, such as the Fannie Mae and servicer business records submitted at trial here, prove Fannie Mae's interest. Neither the district court nor Saticoy Bay provided any reason why these cumulative documents would be necessary or dispositive to prove Fannie Mae's interest or its relationship with Ditech.

Lastly, the district court suggested that Ditech failed to introduce evidence that it was contractually precluded "from selling or otherwise transferring all interest in that loan to another entity." 1 APP 000160. That is clearly erroneous. Fannie Mae's witness testified unequivocally that the contractual requirement of the Guide precludes servicers from transferring Fannie Mae's interests except when so directed by Fannie Mae. 2 APP 000375. That testimony and the Guide embodied competent, unrebutted testimony on the point. Specifically, the Guide states that "Fannie Mae is at all times the owner of the mortgage note." 1 SA 0130. Any servicer retaining documents related to a particular loan, such as a deed of trust, has "no right to possess these documents and records except under the conditions specified by Fannie Mae." 1 SA 0119. The district court apparently understood that, yet deemed the evidence insufficient anyway. 2 APP 000376.

3. Saticoy Bay's Arguments That the Evidence is Inadmissible Fail.

Saticoy Bay goes further than the district court's decision by alleging Fannie Mae's business records are inadmissible.[13] AOB 48–50. Its arguments are flawed.

Saticoy Bay first claims that the "unidentified person(s) who entered the data regarding the [Wight] loan in SIR" could not authenticate Fannie Mae's business records because they never confirmed the existence of "the documents that must exist for Fannie Mae to own the [Loan]." *Id.* at 49. But—as explained above—the additional evidence Saticoy Bay demands is not necessary to prove Fannie Mae's ownership interest. *See* discussion *supra* Section II(B)(2). Moreover, the knowledge of "the individual who entered the data" is irrelevant to the case; Ms. Carr was called at trial to discuss the SIR records as Fannie Mae's corporate representative. Her testimony regarding Fannie Mae's record-keeping system met the standards for admissibility under NRS 51.135.

A "qualified person" for the purpose of authenticating 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). Ms. Carr is qualified. She explained how Fannie Mae's records of its regularly conducted

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[13] Saticoy Bay also failed to object to the admissibility of these documents at trial, and as a result, its objections have been waived. *Old Aztec Mine, Inc.*, 623 P.2d at 983; 2 APP 000257–59, 000339–43.

business activities are created and maintained, and testified that Fannie Mae's business records prove: (1) Fannie Mae purchased the loan in December 2004 and continues to own the loan; and (2) Ditech was Fannie Mae's servicer at the time of the HOA sale, and is currently servicing the loan on Fannie Mae's behalf. 2 APP 000321–92. Nothing more is required. Contrary evidence, rather than "metaphysical doubt," is necessary to overcome evidence materially identical to that presented here. *Nationstar*, 396 P.3d at 759 (Stiglich, J., concurring); *Berezovsky*, 869 F.3d at 933.

Indeed, this Court has repeatedly credited documentary evidence supported by substantially the same testimony, notwithstanding the witness's lack of personal knowledge about specific servicing agreements. In *Daisy Trust*, the Court found the Freddie Mac and servicer declarants "were qualified to lay a foundation for the admissibility of [business records] under NRS 51.135," and that the documents "met the requirements of the business-records exception." 445 P.3d at 850; *see also Guberland II*, 2019 WL 2339537, at *1 (holding similarly and citing a treatise for the proposition that "[t]he question of the sufficiency of the foundation witness's knowledge centers on the witness's familiarity with the organization's record keeping practices, not any particular record.").[14]

[14] For this reason, Saticoy Bay's citation to NRS 50.025(a)(1) does not establish that Ms. Carr must have personal knowledge of the documents supporting the database entries. *See* AOB 45.

The Court in *Daisy Trust* also considered, and rejected, Saticoy Bay's other evidentiary arguments. *First*, the Court rejected Saticoy Bay's argument that Fannie Mae's business records are not admissible under *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040 (9th Cir. 2009), and cited *U-Haul* in holding that the evidence "was not inadmissible simply because neither [declarant] personally entered the information" into the Enterprise's database "or had firsthand knowledge of the events being entered into the database." *Daisy Trust*, 445 P.3d at 859.

Second, the Court rejected Saticoy Bay's claim (AOB 49) that Fannie Mae's business records were prepared for the purposes of litigation. *Daisy Trust*, 445 P.3d at 851 n.4. *Lastly*, Saticoy Bay erroneously implies that Fannie Mae's business record printouts are unreliable or inadmissible because they were printed "years after the HOA foreclosure sale." AOB 50. The appellant in *Daisy Trust* made this argument, 2017 WL 4220733, at *15-16 and the Court rejected it along with the Appellant's other admissibility-related arguments. 445 P.3d at 851 n.4. The date of printing of the records is irrelevant; it has nothing to do with the relevant fact under NRS 51.135, which is when the information in the database was *recorded*. The data showing when Fannie Mae purchased the loan and from whom the loan was purchased are static database entries that do not change over time. And Saticoy Bay has not argued, nor could it prove, that Fannie Mae has falsified or incorrectly recorded information in its SIR database. Indeed, the database records must be

accurate, reliable, and consistent in order for Fannie Mae to conduct its everyday business.

4. Fannie Mae Has a Valid Property Interest Under Nevada Law.

While the district court correctly noted that "the Court does not require Fannie Mae have a recorded interest in order to establish an interest in the loan," 1 APP 000159, Saticoy Bay argues the opposite to this Court. AOB 39, 45–48, 50–51. Saticoy Bay wrongly interprets Nevada law. This Court has repeatedly rejected the argument that a loan owner must appear as record beneficiary to maintain a legally recognized interest in collateral property, including in cases materially identical to this one.

a) *Montierth* and *Daisy Trust* Control This Case.

Montierth established that a foreclosure on a mortgage can proceed when a note owner is not the beneficiary named in the recorded deed of trust, so long as the named beneficiary had authority to foreclose on the noteholder's behalf. *Montierth*, 354 P.3d at 650–51. This Court concluded that the note owner's "security interest attached *and was perfected* before bankruptcy," while its authorized representative was record beneficiary. *Id*. at 650 (emphasis added). A security interest is perfected only if it is properly recorded. *See id.* at 651. Under the Nevada law principles *Montierth* articulates, the holding that Deutsche Bank's interest "was perfected"

necessarily means that Deutsche Bank's interest was properly recorded and therefore effective "against third parties." *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 arguments fail.

b) Fannie Mae Complied With Nevada Law In Maintaining Its Property Interest.

Saticoy Bay claims it is significant that Ditech never assigned the deed of trust to Fannie Mae and that Fannie Mae cannot prove that the note "was ever transferred to Fannie Mae in a way that complied with Nevada law." *See* AOB 47–48, 50–51. Saticoy Bay's presumption seems to be that Ditech had to assign its beneficial interest in the deed of trust and endorse the note to Fannie Mae to transfer ownership of those instruments. That is wrong.

In this case, the assignment merely transferred record beneficiary status and a right to *enforce* the deed of trust. *Cf.* NRS 104.3301(2) ("A person may be . . . entitled to enforce [a promissory note] even though the person is not the owner of the [note]."). Moreover, Ditech had no ownership interest to transfer after Fannie Mae purchased the loan in 2004. This Court has explained that once an Enterprise acquires a loan, any subsequent assignments of the deed of trust by a servicer cannot transfer an ownership interest, because "the assigning entities lack[] authority to transfer the promissory note." *Bellavista Lane*, 2019 WL 4390765, at *1 n.2. When Fannie Mae purchased the loan, it succeeded the originating lender as the loan owner. MERS could not transfer an interest it did not hold—an ownership interest—when it assigned the deed of trust to Ditech. And because Fannie Mae could maintain ownership while MERS served as record beneficiary, no assignment to Fannie Mae was necessary. *See Daisy Trust*, 445 P.3d at 849.

The statutory presumptions cited by Saticoy Bay also do not undermine Fannie Mae's ownership claim. While Saticoy Bay argues that the presumptions render Ditech's identity as the lender in the Deed of Trust presumptively true, AOB at 50–51, that argument ignores that the Deed of Trust expressly states that the Note, along with the Deed of Trust, "can be sold one or more times without prior notice to Borrower." 2 SA 0340. Moreover, the Deed of Trust is marked as a "Fannie Mae/Freddie Mac UNIFORM INSTRUMENT," 2 SA 0328, a well-known indicator

that the Loan is intended for sale to the Enterprises. Saticoy Bay's argument would lead to the absurd conclusion that Fannie Mae was required to undertake the pointless act of re-recording the same deed of trust that had already been recorded. Such an act would contradict the longstanding, common-sense maxim that "[t]he law does not require a vain and useless thing to be done . . . ." *Eureka Min. & Smelting Co. v. Way*, 11 Nev. 171, 177 (Nev. 1876). Accordingly, the factual presumptions that Saticoy Bay attempts to establish are defeated by the plain language of the Deed of Trust.

C. Saticoy Bay Cannot Invoke the Statute of Frauds.

Saticoy Bay asserts that Ditech did not provide the "writing" proving Fannie Mae's ownership of the loan, in violation of the statute of frauds. AOB 41–43 (citing NRS 111.205(1)). The statute of frauds applies only "where there is a definite possibility of fraud," and there is none here. *See Azevedo v. Minister*, 471 P.2d 661, 663 (Nev. 1970). No one other than Fannie Mae claims to own the loan.

Furthermore, Saticoy Bay lacks standing to raise a statute-of-frauds defense because it was not party to Fannie Mae's purchase of the loan. This Court has confirmed that "[t]he defense of the statute of frauds is personal, and available only to contracting parties or their successors in interest."[15] *Harmon v. Tanner Motor*

[15] While this Court and the Ninth Circuit have yet to address the statute of frauds argument in the Federal Foreclosure Bar context, federal district courts have rejected

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); *In re Circle K Corp.*, 127 F.3d 904, 908 (9th Cir. 1997). A "stranger to [an] alleged agreement" cannot challenge the legal sufficiency of the writings purportedly making up that agreement. *Harmon*, 377 P.2d at 628. Nothing in NRS 111.205 suggests that the legislature intended to usurp those principles only for transfers involving an "estate or interest in land." Saticoy Bay cannot try to invalidate the transaction on statute-of-frauds grounds because it was not a party to the transaction. *See, e.g.*, *Wells Fargo Bank, N.A. v. Pine Barrens Street Trust*, No. 2:17-cv-1517-RFB-VCF, 2019 WL 1446951, at *6 (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 is independently barred from invoking the statute of frauds because 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. The reason is simple: the statute of frauds is meant to ensure that the parties intended a

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it. *See, e.g., Wells Fargo Bank, N.A. v. Pine Barrens Street Tr.*, No: 2:17-cv-01517, 2019 WL 1446951, at *5 (D. Nev. Mar. 31, 2019).

transaction to close; the transaction's actual closing establishes that intention conclusively. Allowing 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 (1877). Fannie Mae's acquisition of the loan closed in 2004, long before the HOA sale.

D. Saticoy Bay Cannot Rely on Nevada's Bona Fide Purchaser Doctrine.

Saticoy Bay also argues that Nevada's bona fide purchaser laws support its claim to free-and-clear title to the property. AOB 37, 51–54 (citing NRS 111.325). But Saticoy Bay does not qualify as a bona fide purchaser under Nevada law, and even if it did, Nevada's bona fide purchaser laws would be preempted by the Federal Foreclosure Bar.

1. Saticoy Bay Is Not a Bona Fide Purchaser.

Saticoy Bay is not a bona fide purchaser because it was on actual or constructive notice that an Enterprise held an interest in the deed of trust encumbering the property. This Court has held that a purchaser cannot claim that it is "protected as a bona fide purchaser from the Federal Foreclosure Bar's effect" because, as a matter of law, an Enterprise need not record a deed of trust in its own name. *Daisy Trust*, 445 P.3d at 849; *see also Guberland II*, 2019 WL 2339537, at *2 (holding that because "the assignment of the deed of trust was recorded . . . and

Nevada law does not require the deed of trust to name the note owner," the HOA sale purchaser "had notice of the deed of trust and was not a bona fide purchaser.").

Saticoy Bay had adequate notice of Fannie Mae's interest regardless. Saticoy Bay acknowledges that the Deed of Trust was recorded at the time of the HOA Sale, AOB 5, constituting "actual knowledge, constructive notice of, or reasonable cause to know that there exist[] . . . adverse rights" in the Property. NRS 111.180. The Deed of Trust plainly states that the Note, along with the Deed of Trust, "can be sold one or more times without prior notice to Borrower," thus indicating that the Lender or its successors or assigns could convey the Loan to another party, including an Enterprise. 2 SA 0340. And this Court recently held that where, as here, the Deed of Trust's language states that it is a "Fannie Mae/Freddie Mac UNIFORM INSTRUMENT," *see* 2 SA 0328, this Court "cannot conclude that [the HOA sale purchaser] purchased the property without notice of Fannie Mae's potential interest in the property." *CitiMortgage v. TRP Fund*, 2019 WL 1245886, at *3. The Enterprises' "dominant" role in the secondary mortgage market is common knowledge in the industry and under the circumstances, Saticoy Bay assumed the risk that the Property was encumbered by an Enterprise lien. *See Town of Babylon v. FHFA*, 699 F.3d 221, 225 (2d Cir. 2012); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599–600 (D.C. Cir. 2017).

Saticoy Bay could have also reached out to FHFA to see if an Enterprise owned the loan. Indeed, 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.[16] Saticoy Bay, by contrast, did nothing. The more plausible explanation for that failure is that Saticoy Bay was *unaware* of the Federal Foreclosure Bar, not that it was *unable to determine* whether the Federal Foreclosure Bar might apply to protect the deed of trust.

This Court's *Shadow Wood* decision does not support Saticoy Bay's claim to bona fide purchaser status. AOB 52–53 (citing *Shadow Wood Homeowners Ass'n v. N.Y. Bancorp, Inc.*, 366 P.3d 1105 (Nev. 2016)). *Shadow Wood* did not resolve who had interests at the time of the HOA sale, instead considering whether the equities required an HOA foreclosure sale to be set aside. *See id*. at 1114–16. *Shadow Wood*'s equitable assessment is irrelevant to the "determin[ation] that the deed of trust survived the foreclosure sale by operation of law (i.e., the Federal Foreclosure Bar)." *Saticoy Bay LLC Series 1083 Sterling Peak v. JPMorgan Chase Bank, N.A.*, No. 76352, 2019 WL 4390646 (Nev. Sept. 12, 2019) (unpublished).

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[16] FHFA has publicly and repeatedly confirmed that, upon inquiry, it will state whether an entity in conservatorship holds an interest in a given property. *See, e.g.*, FHFA Amicus Br. 15-16, *Nationstar Mortgage* v. *Guberland, LLC - Series 3*, No. 70546 (Nev. 2018), Appellees' Suppl. Br. 6-7, *SFR Investments Pool 1, LLC* v. *Green Tree Servicing*, No. 72010 (Nev. 2018); Appellees' Br. 19 n.6, *Alessi & Koenig* v. *FHFA*, No. 18-16166 (9th Cir. 2018).

2. If Saticoy Bay Were a Bona Fide Purchaser, The Federal Foreclosure Bar Would Preempt Nevada Law.

If Saticoy Bay were a bona fide purchaser under Nevada law, the Federal Foreclosure Bar would preempt those statutes. As this Court 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). Many courts have since reached the same conclusion.[17] Saticoy Bay ignores these cases.

The reasoning behind these decisions is sound: Because the Federal Foreclosure Bar protects Fannie Mae's property interest regardless of whether Fannie Mae's 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. Any state statute that conflicts with the Federal Foreclosure Bar's protections must yield.

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[17] *See, e.g.*, *Nevada Sandcastles, LLC v. Nationstar 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), *appeal docketed*, No. 18-17208 (9th Cir. Nov. 15, 2018).

CONCLUSION

For all of these reasons, the district court's ruling that the deed of trust survived the foreclosure sale should be affirmed.

DATED this 30th day of October, 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 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 11,539 words.

FINALLY, I CERTIFY that I have read this **Respondents' Answering 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.

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 this 30th day of October, 2019.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on October 30, 2019, the foregoing **RESPONDENTS' ANSWERING 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