IN THE SUPREME COURT OF NEVADA

Case No. 78661

SATICOY BAY LLC

SERIES 133 MCCLAREN,

Appellant,

vs.

GREEN TREE SERVICING LLC; THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE FOR THE CERTIFICATE-HOLDERS OF CWABS MASTER TRUST, REVOLVING HOME EQUITY LOAN ASSET BACKED NOTES, SERIES 2004-T,

Respondents.

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

BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF RESPONDENT AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT

Leslie Bryan Hart, Esq. (SBN 4932)
John D. Tennert III, Esq. (SBN 11728)
FENNEMORE CRAIG, P.C.
300 E. Second St., Suite 1510
Reno, Nevada 89501
Tel: (775) 788-2228 Fax: (775) 788-2229
lhart@fclaw.com
jtennert@fclaw.com

Attorneys for Amicus Curiae
FEDERAL HOUSING FINANCE AGENCY

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Federal Housing Finance Agency ("FHFA") respectfully supports Respondent Ditech Financial f/k/a Green Tree Servicing, LLC ("Ditech") in this appeal. The district court's award of judgment after trial to Ditech was correct, and this appeal will directly affect the interests of entities operating under FHFA's conservatorship—the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, the "Enterprises")—and FHFA's interests as the Enterprises' Conservator and regulator.

The Enterprises are federally chartered entities that Congress created to enhance the nation's housing-finance market. They own millions of mortgages nationwide, including hundreds of thousands in Nevada.

In 2008, Congress enacted the Housing and Economic Recovery Act ("HERA"), which established FHFA as an independent agency of the federal government and as the Enterprises' regulator. *See* 12 U.S.C. § 4511 *et seq*. HERA vests FHFA with the power to place the Enterprises into conservatorship or receivership under statutorily defined circumstances, mandating that, as Conservator, FHFA succeeds to all "rights, titles, powers, and privileges" of an entity in conservatorship with respect to its assets. 12 U.S.C. § 4617(b)(2)(A). On

September 6, 2008, FHFA's Director placed the Enterprises into FHFA's conservatorship, where they remain today.

When FHFA acts in its capacity as Conservator, its actions are deemed non-governmental for many substantive purposes. While this brief addresses FHFA's statutory powers as Conservator, FHFA submits the brief exclusively in its capacity as an agency of the United States.[1] In that capacity, FHFA has an interest in this case because if Appellant Saticoy Bay LLC Series 133 McClaren ("Saticoy Bay") prevails on appeal and this Court reverses, it would effectively nullify the absolute federal statutory property protections Congress provided to FHFA conservatorships, affecting several hundred cases pending in Nevada state courts. These protections are crucial to the Enterprises' ability to fulfill their congressionally mandated mission, which is under FHFA's regulatory purview.

[1] Under the Nevada Rules of Appellate Procedure, FHFA is permitted, as an agency of the United States, to file this amicus curiae brief without consent of the parties or leave of court, and without a corporate disclosure statement. Nev. R. App. P. 26.1, 29(a).

INTRODUCTION

This case involves a fact pattern familiar to the Court: a Nevada homeowners association's non-judicial foreclosure and sale of real property for unpaid dues owed by the former homeowner (the "HOA Sale").[2] Under Nevada law, such HOA sales, if properly conducted, can extinguish all other preexisting lien interests in the underlying property, including deeds of trust. *See* NRS 116.3116(2) (the "State Foreclosure Statute"). But a federal statute precludes that result here. Under 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar"), while an Enterprise is in FHFA's conservatorship, its "property," including lien interests, is not "subject to . . . foreclosure." And at the time of the HOA Sale, Fannie Mae owned a deed of trust encumbering the property (the "Deed of Trust").

The district court correctly concluded that the HOA Sale did not extinguish the Deed of Trust at issue in this case, although it did so on a ground other than the Federal Foreclosure Bar. Specifically, the district court held that Ditech, the record beneficiary of the Deed of Trust, tendered the amount of the HOA's superpriority lien to the HOA before the HOA Sale. APP000165-70. Yet the district court incorrectly rejected Ditech's Federal Foreclosure Bar-based argument because it

[2] This brief adopts the defined terms in Ditech's Respondent's Answering Brief (RAB).

deemed Ditech's evidence insufficient to prove that Fannie Mae owned the loan. APP000166-68.

This Court may affirm the district court's decision on the Federal Foreclosure Bar ground if it finds it helpful or necessary to do so; that argument was fully briefed in the district court, and, contrary to Saticoy Bay's contentions, Ditech has standing to raise the Federal Foreclosure Bar. If the Court considers Ditech's Federal Foreclosure Bar argument, it will first have to determine whether Ditech submitted sufficient evidence to prove Fannie Mae's ownership of the loan while its servicer, Ditech, served as beneficiary of record. The record contains undisputed evidence of the sort this Court has found sufficient to support judgment in other substantively similar cases with virtually identical records. Next, the Court would have to consider Saticoy Bay's attempts to evade the Federal Foreclosure Bar by relying on the statute of frauds and Nevada's bona fide purchaser doctrine. Neither of these doctrines inhibits the Federal Foreclosure Bar's application in this case. Under the circumstances, considerations of judicial economy and substantial justice fully support affirmance based on the Federal Foreclosure Bar.

ARGUMENT

I. Nothing Prevents the Court from Affirming under the Federal Foreclosure Bar

A. The Federal Foreclosure Bar Provides an Alternative Ground for Affirming the District Court's Decision

This Court may affirm judgment if the district court reached the correct result, albeit on different grounds. *Holcomb v. Georgia Pac., LLC*, 289 P.3d 188, 200 (Nev. 2012); *accord, e.g.*, *Burroughs Corp. v. Century Steel, Inc.*, 664 P.2d 354, 356 n.1 (Nev. 1983) ("It is established that this court can affirm a lower court's ruling on different grounds."). The Federal Foreclosure Bar provides the Court with an alternative basis for affirmance. The issue was squarely before the court at trial, *see* SA0325, and the record amply supports affirmance based on the Federal Foreclosure Bar. Therefore, although the district court based its decision on state-law grounds, this Court may, if it chooses to do so, affirm the district court's judgment on the basis of the federal statute.

B. Ditech May Invoke the Federal Foreclosure Bar as Fannie Mae's Loan Servicer

When the Federal Foreclosure Bar prevented the extinguishment of the Deed of Trust, it did not merely preserve Fannie Mae's ownership interest, it also preserved Ditech's parallel interests as the record beneficiary of the Deed of Trust and servicer of the loan for Fannie Mae. Contrary to Saticoy Bay's assertion to the contrary, Appellant Opening Brief ("AOB") at 38-39, 54-55, Ditech has standing

because the Federal Foreclosure Bar preserved its interest in the Deed of Trust as record beneficiary, and it has a contractual responsibility as Fannie Mae's servicer to protect Fannie Mae's interest in litigation relating to the Loan.

The Court adopted this position in *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 396 P.3d 754 (Nev. 2017). *Nationstar v. SFR* holds that an Enterprise's loan servicer may raise the Federal Foreclosure Bar without joining FHFA or the Enterprise as parties. *Id.* at 758. The Court reaffirmed that holding in another recent published decision, noting that it had already held "that a loan servicer has standing to assert the Federal Foreclosure Bar on behalf of Freddie Mac or Fannie Mae." *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 847 n.1 (Nev. 2019) (en banc) (citing *Nationstar v. SFR*, 396 P.3d at 757). The Ninth Circuit found *Nationstar v. SFR* persuasive and held that the Enterprises' authorized servicers may raise the Federal Foreclosure Bar to defend Enterprise property interests in litigation. *Saticoy Bay, LLC v. Flagstar Bank, FSB*, 699 F. App'x 658, 658-59 (9th Cir. 2017).

The evidence in this case confirms that Fannie Mae is the owner of the Loan and that Ditech is Fannie Mae's contractually authorized servicer. An Enterprise's business records, along with testimony from an employee authenticating those records and relevant provisions of Fannie Mae's Single-Family Selling and Servicing Guides (the "Guides"), are sufficient to demonstrate the existence of a

contractual relationship between an Enterprise and its servicer. *See e.g.*, *Daisy Trust*, 445 P.3d at 849-50; *CitiMortgage, Inc. v. SFR Invs. Pool 1, LLC*, No. 70237, 2019 WL 289690, at *1 (Nev. Jan. 18, 2019) (unpublished disposition) (no requirement to proffer servicing contract); *JPMorgan Chase Bank, N.A. v. Guberland LLC-Series 2*, No. 73196, 2019 WL 2339537, at *2 (Nev. May 31, 2019) (unpublished disposition) (same). In *Daisy Trust*, for example, this Court upheld the district court's conclusion that Enterprise and servicer declarations and business records, combined with the Freddie Mac Single-Family Seller/Servicer Guide ("Freddie Mac Guide"), "were sufficient to show that Wells Fargo was in fact Freddie Mac's loan servicer with authority to assert the Federal Foreclosure Bar on Freddie Mac's behalf." 445 P.3d at 850.

Here, Ditech produced undisputed evidence—in the form of Fannie Mae's business records and Fannie Mae employee testimony explaining and authenticating those records—confirming the current servicing relationship between Fannie Mae and Ditech. *See* SA0460 ¶ 9-12; SA0544-56. Ditech also proffered relevant excerpts from the Fannie Mae Selling and Servicing Guides.[3]

[3] In *Daisy Trust*, this Court took judicial notice of the Freddie Mac Guide, noting that it "governs Freddie Mac's relationship with its loan servicers," and "contemplates Freddie Mac being the note holder while its loan servicer remains the recorded deed of trust beneficiary." 445 P.3d at 849 n.3; *see Nationstar Mortg., LLC v. Guberland LLC-Series 3*, No. 70546, 2018 WL 3025919, at *2 (Nev. June 15, 2018) (unpublished disposition) (relying upon the "publicly

See SA0544-551. Under its contract with Fannie Mae, Ditech has authority to represent Fannie Mae's interest in litigation with respect to the loans Ditech services. *See, e.g.*, *id.* (Guides at Section E-1.3, E-3.1); *cf. Berezovsky v. Moniz*, 869 F.3d 923, 933 n.3 (9th Cir. 2017) (recognizing that the Freddie Mac Guide defines its agency relationship with its servicers). By contrast, Saticoy Bay submitted no evidence to call Fannie Mae and Ditech's relationship into doubt. Ditech has standing to invoke the Federal Foreclosure Bar here.

The ability of authorized servicers like Ditech to assert the Federal Foreclosure Bar affords FHFA maximum flexibility to pursue the important mission of fulfilling the Enterprises' federal statutory charters and advances FHFA's policy goals as the Enterprises' regulator and conservator. Servicers play an especially critical role in the business models and practices of the Enterprises. The Enterprises own millions of loans nationwide. Many of those loans are the subject of litigation in federal and state courts, including many cases where, as here, a purchaser at an HOA sale alleges that the HOA sale extinguished an Enterprise's deed of trust. Given both the extraordinary number of FHFA and Enterprise assets and the amount of litigation generated by their loans, precluding servicers like Ditech from asserting the Federal Foreclosure Bar to protect the

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available" Guide in a similar case). The Ninth Circuit has likewise taken judicial notice of an Enterprise's Guide and explained that it governs the relationship between the Enterprise and its servicers. *Berezovsky*, 869 F.3d at 933 & n.9.

Enterprises' property interests would be massively inefficient. Requiring either FHFA or the Enterprises to be a party to each case would divert substantial FHFA and Enterprise resources away from fulfilling their statutory role of increasing the availability of mortgages and toward managing litigation.

Nor would it be sensible to require FHFA to participate directly in every case in which the Federal Foreclosure Bar is raised. To the contrary, allowing servicers to assert the Federal Foreclosure Bar advances important policy goals. It conserves resources, as it would be duplicative and wasteful for FHFA to intervene in hundreds of cases to assert substantially the same statutory argument. Moreover, servicers have dedicated employees and attorneys experienced in efficiently managing litigation involving individual mortgage loans like the one at issue here. Given FHFA's limited resources and the substantial number of loans the Enterprises owns and manages, the Enterprises' reliance on contractually authorized servicers and their servicers' ability to assert the Federal Foreclosure Bar is essential to the efficient achievement of FHFA's and the Enterprises' missions.

II. The Federal Foreclosure Bar Provides an Adequate, Independent Basis To Affirm

The Federal Foreclosure Bar incorporates three statutorily required elements: (1) Fannie Mae had to be in FHFA's conservatorship at the time of the HOA Sale; (2) Fannie Mae had to own the Loan at that time; and (3) the HOA Sale

purchaser must not have secured FHFA's affirmative consent to the extinguishment of Fannie Mae's property interest. Saticoy Bay and the trial court did not contest FHFA conservatorship or the fact that FHFA never affirmatively consented to any extinguishment of Fannie Mae's interest. Therefore, the only remaining element at issue is whether sufficient evidence was presented to prove that Fannie Mae owned the loan. Ditech sufficiently established Fannie Mae's interest at trial and Fannie Mae maintained that interest while its servicer, Ditech, served as the Deed of Trust's beneficiary of record.

A. Ditech Submitted Ample, Uncontroverted Evidence that Fannie Mae Owned the Deed of Trust

To establish an Enterprise's property interest, a servicer like Ditech need only submit business records and employee testimony to prove an Enterprise's ownership of the loan secured by the property in question. In *Daisy Trust*, this Court held that the district court did not abuse its discretion "in determining that [the servicer] sufficiently established Freddie Mac's ownership of the loan" based on evidence substantially similar to the evidence proffered here, without requiring additional documentation. 445 P.3d at 850-51. Contrary to Saticoy Bay's contention that this evidence is not admissible, AOB at 48-50, this Court noted in *Daisy Trust* that the Enterprise and servicer declarations were "probative" on the issue of Freddie Mac's ownership, and that the Enterprise and servicer database records "met the requirements of the business-records exception" under NRS

51.135. 445 P.3d at 850-51; *see also* Respondent's Answer Brief ("RAB") at 35-38 (explaining that the evidence presented at trial was admissible). In *CitiMortgage v. SFR*, the Court again held that an Enterprise's business records, supported by employee testimony, "establish[ed] that [the Enterprise] owned the loan at the time of the HOA foreclosure sale." *CitiMortgage v. SFR*, 2019 WL 289690, at *1 & n.1; *see also, e.g., M&T Bank v. Wild Calla*, No. 74715, 2019 WL 1423107, at *2 (Nev. Mar. 28, 2019) (unpublished disposition) (Enterprise's employee affidavit, database records, its seller/servicer guide, and the deed of trust were sufficient to establish Enterprise's property interest).

Similarly, the Ninth Circuit has recognized that an Enterprise's database records are admissible business records that, along with a declaration from an Enterprise's employee, are sufficient to prove its ownership of a mortgage loan. *Berezovsky v. Moniz*, 869 F.3d 923, 932 n.8 (9th Cir. 2017); *see also Williston Inv. Grp., LLC v. JPMorgan Chase Bank, NA*, 736 F. App'x 168, 169 (9th Cir. 2018) (noting that "similar evidence was sufficient in *Berezovsky*" in concluding that an Enterprise established an interest in the property).

Here, Ditech submitted evidence materially identical to that evaluated by this Court in *Daisy Trust*, *CitiMortgage v. SFR*, and over a dozen other cases, and by the Ninth Circuit in *Berezovsky*. Ditech proffered Fannie Mae's business records and testimony by Ditech and Fannie Mae employees. APP000281-82, 341;

SA0459-77. The declaration and testimony also describe Fannie Mae's Guides, which are central documents governing the contractual relationship between Fannie Mae and its loan sellers and servicers nationwide, including Ditech. *See* APP000286, 296 (testimony regarding Guide requirements); *see also* SA0461, ¶ 11 (declaration from Fannie Mae employee). The declaration, testimony, and records are substantially similar to those submitted, and upheld as sufficient, in *Daisy Trust*. *See* 445 P.3d at 848, 850-51.

The district court's decision that Ditech needed to submit additional evidence runs contrary to *Daisy Trust* and its progeny. While the district court and Saticoy Bay suggest that Ditech must produce a "servicing contract" or "tri-party-custodial agreement," APP000159; *see also* AOB at 39, 43-44, this Court has rejected the argument that more evidence is required to establish an Enterprise's interest or the Enterprise-servicer relationship. In *Daisy Trust*, the Court held that a servicer was not required to produce "the actual loan servicing agreement" or the "original promissory note" where, as here, the servicer had already provided admissible and uncontroverted business records and sworn statements establishing an Enterprise's ownership of the loan and its relationship with the servicer. 445 P.3d at 848-51. *See also Zaisan Enters., LLC v. Green Tree Servicing, LLC*, No. 75958, 2019 WL 4740526, at *1 (Nev. Sept. 26, 2019) (unpublished disposition) (rejecting "arguments challenging the sufficiency and admissibility" of servicer

evidence, noting that the Court "recently addressed and rejected similar arguments with respect to similar evidence" in *Daisy Trust*); *Guberland II*, 2019 WL 2339537, at *2 (rejecting argument that servicer needed to produce an "actual loan servicing agreement" to demonstrate servicer standing to raise the Federal Foreclosure Bar).

An original document need only be produced "where the actual contents of that document are at issue . . . ." *Young v. Nevada Title Co.*, 744 P.2d 902, 904 (Nev. 1987). This case does not present a question regarding the actual contents of the original loan documents or the servicing contract. Rather, the central factual questions in this case are who owned the loan at the time of the HOA Sales and whether Ditech is Fannie Mae's contractually authorized servicer of this loan. *See Daisy Trust*, 445 P.3d at 850-51. None of the documentation Saticoy Bay seeks is necessary to address these central issues; Fannie Mae's authenticated business records and the Guide sufficiently establish that Fannie Mae owned the loan at the time of the HOA Sales and that Ditech is Fannie Mae's servicer. Saticoy Bay does not explain how the documents it seeks are more probative of the relevant facts than the business records that Fannie Mae uses to keep track of loans it owns or the Guides, which are the "central documents governing the contractual relationship between Fannie Mae and its loan sellers and servicers nationwide, including . . . Ditech." SA0461, ¶ 11.

The district court and Saticoy Bay's calls for Ditech to submit additional evidence, including "financial records indicating that the servicer collects mortgage payments, retains a portion for its servicing charge, and submits the rest to Fannie Mae," and evidence that Ditech was contractually precluded "from selling or otherwise transferring all interest in that loan to another entity," are similarly contrary to law. APP000159-60. Under *Daisy Trust*, neither of these types of evidence is required for a party asserting the Federal Foreclosure Bar to prevail. 445 P.3d at 848, 850-51. And, as Ditech explained in its opening brief, Ditech actually did submit evidence at trial that explained its relationship with Fannie Mae and its powers to transfer interest in the property. RAB at 34.

Requiring Fannie Mae to submit more than its business records, an employee declaration or sworn testimony, and the Guide to establish its protected property interest and Ditech's standing to invoke the Federal Foreclosure Bar on its behalf, *see* AOB at 38-39, 43-50, would impose a pointless and burdensome requirement for duplicative evidence. It would also "ignore[] the realities of modern business litigation, where many business records are kept in databases, and parties query these databases" to gather evidence. *Health All. Network, Inc. v. Cont'l Cas. Co.*, 245 F.R.D. 121, 129 (S.D.N.Y. 2007), *aff'd*, 294 F. App'x 680 (2d Cir. 2008). The burdens are particularly acute in the context of litigation involving FHFA and the Enterprises—entities that have been involved in hundreds

of cases in federal and state courts where purchasers of property conveyed at HOA foreclosure sales seek declarations that those HOA sales extinguished the Enterprises' deeds of trust. The production of cumulative evidence would increase litigation costs and require the Enterprises to divert substantial resources toward record retrieval and away from fulfilling their statutory roles of increasing the availability of mortgages. It would also be disproportionate to the needs of these cases, especially when Fannie Mae's reliable and authenticated business records provide more complete information than the kind of evidence Saticoy Bay seeks here.

Nevada law confirms that business records and Enterprise employees' testimony suffice to establish an Enterprise's interest in the property at issue; the law requires nothing more. The burdens Saticoy Bay seeks to foist onto Fannie Mae and FHFA are particularly unwarranted in the conservatorship context, where taxpayer resources are at stake.

B. Fannie Mae Maintained Its Property Interest While Ditech Was Record Beneficiary of the Deed of Trust

Fannie Mae's acquisition of the loan at issue and its use of a contractually authorized servicer to act on its behalf as the record deed-of-trust beneficiary conform to routine procedures that institutional mortgage investors follow in connection with their investments in millions of loans worth trillions of dollars. While Saticoy Bay argues to the contrary, AOB at 39, 45-48, 50-51, these

procedures follow black-letter property law to ensure that the investor—here, Fannie Mae—acquires a loan *secured* by an interest in property; that is, ownership of both the promissory note (which represents the borrower's personal financial obligation) and the deed of trust (which embodies a non-possessory property interest in the real estate securing repayment).

Nevada law confirms that a loan owner maintains a cognizable interest in the collateral property when it makes use of this common and commercially efficient arrangement. *Daisy Trust*, 445 P.3d at 849 (citing *Montierth v. Deutsche Ban*k, 354 P.3d 648, 650-51 (Nev. 2015) (en banc)). *Montierth* explains that where the record beneficiary of the deed of trust has contractual or agency authority to foreclose on the note owner's behalf, the note owner maintains a security interest in the collateral property. 354 P.3d at 651.

This Court has confirmed its holding in *Montierth*, applying it consistently in a variety of contexts. In *Daisy Trust*, the Court restated *Montierth*'s principle that even if a note and deed of trust are split, "the note nevertheless remains fully secured by the deed of trust when the record deed of trust beneficiary is in an agency relationship with the note holder," and applied *Montierth* to hold that Freddie Mac owned the deed of trust while its servicer was record beneficiary of the deed of trust. 445 P.3d at 849; *see also, e.g.*, *Wild Calla*, 2019 WL 1423107, at *2 (citing *Montierth* in concluding that an Enterprise "need not be the beneficiary

of record on a deed of trust" for the Federal Foreclosure Bar's protections to apply); *CitiMortgage v. SFR*, 2019 WL 289690, at *1 (holding that a servicer's "status as the recorded deed of trust beneficiary does not create a question of material fact regarding whether Fannie Mae owns the subject loan, as this court has recognized that such an arrangement is acceptable and common").

Requiring Fannie Mae to appear as record beneficiary on all of the loans it owns not only is unnecessary under Nevada law, but also would undermine sound public policy. Congress chartered Fannie Mae to facilitate liquidity in 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). Congress noted that "the continued ability of [Fannie Mae] and [Freddie Mac] to accomplish their public missions is important to providing housing in the United States and the health of the Nation's economy." 12 U.S.C. § 4501. In furtherance of that statutory mission, Fannie Mae owns millions of mortgages across the country. Indeed, it would be difficult to overstate the importance of the stability of these assets to the national economy. On July 30, 2008, "[c]oncerned that a default by Fannie and Freddie would imperil the already fragile national economy," *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017), Congress enacted HERA, creating

FHFA with broad powers to place the Enterprises into conservatorships and fulfill its role as conservator.

Fannie Mae's business model is premised on maintaining security interests in property; it is not in the business of investing in unsecured promissory notes. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 557 (2017) (discussing Fannie Mae's role as a purchaser of mortgages); *Perry Capital*, 864 F.3d at 599-600 (discussing Enterprises' role in purchasing mortgage loans). Indeed, under its charter, Fannie Mae may acquire *only* "mortgages"—which are, by definition, loans secured by an interest in real property—not other forms of debt. *See* 12 U.S.C. § 1717(b). Fannie Mae can operate more efficiently as a mortgage investor, and thereby more effectively fulfill its federal statutory mission, by contracting with servicers such as Ditech to handle the day-to-day administration of the mortgages Fannie Mae owns. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038-39 (9th Cir. 2011) (describing how loan owners contract with servicers and the servicers' role). This includes maintaining relationships with the borrowers under those loans, such as accepting payments, sending notices, and handling borrower inquiries. To perform these duties effectively, Fannie Mae's servicers may appear as the record beneficiaries of the deeds of trust that secure the promissory notes Fannie Mae owns.

III. Saticoy Bay's Attempts to Avoid the Federal Foreclosure Bar Fail

Saticoy Bay argues that Nevada's statute of frauds and bona fide purchaser doctrine prevent application of the Federal Foreclosure Bar in this case. This Court's decisions make clear that Saticoy Bay cannot rely on these doctrines to avoid the Federal Foreclosure Bar here.[4]

A. The Statute of Frauds Does Not Invalidate Fannie Mae's Interest

Saticoy Bay contends that Ditech's evidence does not satisfy Nevada's statute of frauds. AOB at 41-43. But, as Ditech explained in its brief, RAB at 41-43, Saticoy Bay cannot invoke the statute of frauds because that doctrine applies only "where there is a definite possibility of fraud." *Azevedo v. Minister*, 471 P.2d 661, 663 (Nev. 1970). Saticoy Bay provides no evidence, or even a plausible theory, to suggest that any entity other than Fannie Mae owned the loan at the time of the HOA Sale. Saticoy Bay is also barred from asserting the statute of frauds because it was not a party to the purchase of the loan and because the sale was fully performed by the parties.

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[4] In a recent HOA sale case in which an appellant asserted the statute of frauds as a basis for invalidating Freddie Mac's ownership interest, the Court noted that any arguments raised that were "not explicitly addressed in [its decision or in] *Daisy Trust*"—such as the statute of frauds—did not "convince [the Court] that the district court abused its discretion in admitting [the servicer's] evidence." *Chao Ma v. JP Morgan Chase Bank, N.A.*, No. 75398, 2019 WL 4390832 (Nev. Sept. 12, 2019) (unpublished disposition); Appellant's Opening Brief at 14-20, *Chao Ma v. JP Morgan Chase Bank, N.A.*, No. 75398 (Nev. Sept. 12, 2019), 2019 WL 461932 (raising the statute of frauds).

Permitting third parties such as Saticoy Bay to invoke the statute of frauds would ignore the purpose of such statutes and introduce uncertainty and inefficiencies into common commercial transactions, including those in the secondary mortgage market. The statute of frauds ensures that the parties to a transaction intended it to close; when one of the parties to a purported transaction disputes its validity, the statute of frauds ensures that the other side's oral testimony cannot bind the challenger to an arrangement to which it never assented. *In re Faulkiner*, 594 B.R. 426, 436 (Bankr. D. Nev. 2018). The defense is not available to third parties seeking to disrupt commercial transactions that the contracting parties intended to be binding and, upon completion, closed. *See Harmon v. Tanner Motor Tours of Nev., Ltd.*, 377 P.2d 622, 628 (Nev. 1963) (holding that "a stranger to the alleged agreement . . . is without standing to seek such a declaration."). If it were, transacting parties would be uncertain whether their commercial transactions would be subject to challenge by strangers despite their mutual agreement. Such a rule would undermine the efficiency of commerce and imperil the secondary mortgage market; it also would be detrimental to the federal goal of facilitating that market's role in reducing the costs of borrowing to homeowners through efficient allocation of capital.

B. Nevada's Bona Fide Purchaser Laws Do Not Apply Here

Saticoy Bay contends that it is a bona fide purchaser under Nevada law and that this status protects it from any claim based on Fannie Mae's interest in the Property. *See* AOB at 37, 51-54. But the plain language of Nevada's bona-fide-purchaser statute makes clear that Saticoy Bay was not a bona fide purchaser, as the Deed of Trust and its assignments were undisputedly recorded prior to the HOA Sale. *See* NRS 111.180; AOB at 5. And as noted above, this Court has specifically held that NRS 106.210 and 111.325 do not require Fannie Mae to record an assignment demonstrating its interest in the Deed of Trust. *Daisy Trust*, 445 P.3d at 849.

Further, it should have come as no surprise to Saticoy Bay that property sold at an HOA foreclosure sale might be subject to a mortgage owned by Fannie Mae. The Enterprises are by far the largest actors in the mortgage industry, especially in the aftermath of the recent housing crisis. In 2008, the Enterprises' "mortgage portfolios had a combined value of $5 trillion and accounted for nearly half of the United States mortgage market." *Perry Capital*, 864 F.3d at 599-600. Accordingly, "[t]he position held in the home mortgage business by Fannie Mae and Freddie Mac make[s] them the dominant force in the market." *Town of Babylon v. FHFA*, 699 F.3d 221, 225 (2d Cir. 2012) (internal quotation marks omitted). Given the Enterprises' prominent role in the mortgage industry, Saticoy

Bay cannot deny that there was a foreseeable risk that an Enterprise-owned lien encumbered the property interest it purchased subsequent to an HOA sale. Nor can Saticoy Bay claim to be ignorant of the federal law governing and protecting the conservatorships. *See del Junco v. Conover*, 682 F.2d 1338, 1342 (9th Cir. 1982). Allowing Saticoy Bay to cloak itself with bona fide purchaser status and ignore the significant chance that a property originally purchased at a foreclosure sale was subject to an Enterprise's interest would contravene Congress's clear and manifest goal of protecting the Agency's assets. *See Berezovsky*, 869 F.3d at 931.

Even if Saticoy Bay were assumed to qualify as a bona fide purchaser, applying state bona-fide-purchaser doctrine to extinguish Fannie Mae's federally protected interest would clearly conflict with the Federal Foreclosure Bar. Indeed, this Court has acknowledged federal court rulings that the Federal Foreclosure Bar preempts Nevada's bona fide purchaser statutes under these circumstances. *See Nationstar Mortg., LLC v. Guberland LLC-Series 3*, No. 70546, 2018 WL 3025919, at *2 n.3 (Nev. June 18, 2018) (unpublished disposition) (citing *JPMorgan Chase Bank, N.A. v. GDS Fin. Servs.*, No. 2:17-cv-02451, 2018 WL 2023123, at *3 (D. Nev. May 1, 2018)). The federal decision *Guberland* cites concluded that because Nevada's bona fide purchaser law was an obstacle to Congress's goal of protecting FHFA's assets, "Nevada's law on bona fide

purchasers is preempted by the federal foreclosure bar." *GDS Fin. Servs.*, 2018 WL 2023123, at *3.[5]

Accordingly, even if Saticoy Bay would otherwise qualify as a bona fide purchaser under Nevada law—and it would not—it could not rely on purported bona fide purchaser status to avoid the protection Congress provided Fannie Mae's interests during conservatorship. The Federal Foreclosure Bar preempts Nevada law to the extent it would otherwise permit the extinguishment of Fannie Mae's property interest while in FHFA conservatorship.

CONCLUSION

For these reasons, FHFA supports Ditech's request that this Court affirm the district court's decision, either on the grounds relied on by the district court, or on

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[5] Other federal courts have reached the same conclusion. *E.g.*, *Wells Fargo Bank, N.A. v. Pine Barrens St. Tr.*, No. 2:17-cv-01517-RFB-VCD, 2019 WL 1446951, at *6 (D. Nev. Mar. 31, 2019); *Bank of America, N.A. v. Palm Hills Homeowners Ass'n, Inc.*, No. 2:16-cv-614-APG-GWF, 2019 WL 958378, at *2 (D. Nev. Feb. 26, 2019).

Federal Foreclosure Bar grounds.

DATED: November 6, 2019.

Respectfully submitted,

FENNEMORE CRAIG, P.C.

By: */s/ Leslie Bryan Hart*

Leslie Bryan Hart, Esq. (SBN 4932)
John D. Tennert, Esq. (SBN 11728)
300 E. Second St., Suite 1510
Reno, Nevada 89501
Tel: (775) 788-2228
Fax: (775) 788-2229
lhart@fclaw.com; jtennert@fclaw.com

Attorneys for Amicus Curiae
Federal Housing Finance Agency

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on November 6, 2019, a true and correct copy of the **BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF RESPONDENT AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT**, was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

Role	Party Name	Represented By
Appellant	Saticoy Bay LLC Series 133 McClaren	Michael F. Bohn (Law Offices of Michael F. Bohn, Ltd.) Adam R. Trippiedi (Law Offices of Michael F. Bohn, Ltd.)
Respondent	Green Tree Servicing LLC	Darren T. Brenner (Akerman LLP/Las Vegas) Jared M. Sechrist (Akerman LLP/Las Vegas) Ariel E. Stern (Akerman LLP/Las Vegas) Natalie L. Winslow (Akerman LLP/Las Vegas)
Respondent	National Default Servicing Corp.	Darren T. Brenner (Akerman LLP/Las Vegas) Jared M. Sechrist (Akerman LLP/Las Vegas) Ariel E. Stern (Akerman LLP/Las Vegas) Natalie L. Winslow (Akerman LLP/Las Vegas)
Respondent	The Bank of New York Mellon	Darren T. Brenner (Akerman LLP/Las Vegas) Jared M. Sechrist (Akerman LLP/Las Vegas) Ariel E. Stern (Akerman LLP/Las Vegas) Natalie L. Winslow (Akerman LLP/Las Vegas)

/s/ Pamela Carmon
An Employee of Fennemore Craig, P.C.

ATTORNEY'S CERTIFICATE PURSUANT TO NEVADA RULE OF APPELLATE PROCEDURE 28.2

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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, 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 and volume number, if any, 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: November 6, 2019.

FENNEMORE CRAIG, P.C.

By: */s/ Leslie Bryan Hart*
Leslie Bryan Hart, Esq. (SBN 4932)

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