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SUPREME COURT

STATE OF NEVADA

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 TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR THE CERTIFICATE-HOLDERS OF CWABS MASTER TRUST, REVOLVING HOME EQUITY LOAN ASSET BACKED NOTES, SERIES 2004-T, Respondent.	No. 78661

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

1. Plaintiff/appellant, Saticoy Bay LLC Series 133 McLaren, is a Nevada limited-liability company.

2. The manager for Saticoy Bay LLC, Series McLaren is Bay Harbor Trust.

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

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Defendant Green Tree's failure to record notice of its claim that the superpriority lien had been discharged made that claim void as to plaintiff.

The HOA's reason for rejecting the conditional tender is relevant.

Defendant Green Tree was not entitled to equitable relief against plaintiff altering the legal effect of the conclusive foreclosure deed.

12 U.S.C. § 4617(j)(3) does not apply to the present case because FHFA did not appear in or act in the case.

Defendant Green Tree did not prove that the "writing" required by NRS 111.205(1) existed on November 22, 2013.

Plaintiff has standing to assert the statute of frauds in NRS 111.205(1).

Plaintiff is protected as a good faith purchaser from the unrecorded claim that Fannie Mae owned the deed of trust.

/ / /

ARGUMENT

1. NAS's rejection of Miles Bauer's conditional tender did not extinguish the HOA's superpriority lien.

At page 13 of its Brief, defendant Green Tree states that "[t]his case is nearly identical" to Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev. 604, 427 P.3d 113 (2018), and "the district court correctly applied it here."

Defendant Green Tree, however, does not identify any evidence that proved it was entitled to equitable relief from NRS 116.31166(1)(a) and the "conclusive" recital of "default" in the foreclosure deed. *See* pages 34 to 38 of Appellant's Opening Brief.

At page 16 of its Brief, defendant Green Tree states that Miles Bauer's tender of only $276.75 "was sufficient to extinguish the superpriority portion of the HOA lien."

On the other hand, "the law of real property" expressly provides that a tender made by "one who holds an interest in the real estate subordinate to the mortgage but is not primarily responsible for performance" can never extinguish a lien, but instead entitles the person making the payment to receive "an appropriate assignment . . . in recordable form." *See* subsections e, f and g of Restatement (Third) of Prop.: Mortgages, § 6.4 (1997).

At page 15 of its Brief, defendant Green Tree states that "NAS refused delivery of the check **but did not provide a reason for doing so**." (emphasis added) Neither the runner slip for Legal Wings (1 SA 0187) nor the computer screenshot (1 SA 0191) include any such language. Mr. Jung's testimony that he did not "hear anything from NAS regarding the amount of the check" (JA1, pg. 223) does not prove that a reason was not provided to the unidentified person who delivered the check.

At page 16 of its Brief, defendant Green Tree states that "NAS and the HOA's rejection of BANA's check does not negate the legal effect of BANA's tender." On the other hand, as demonstrated at pages 32 to 34 of Appellant's Opening Brief, the portion of Bank of America, N.A. v. SFR Investments Pool 1, LLC cited by defendant Green Tree is contradicted by "the law of real property" that supplements NRS Chapter 116 pursuant to NRS 116.1108.

As discussed at pages 13 and 14 of plaintiff's 7.27 pre-trial memorandum (JA1, pgs. 119-120) and pages 25 to 29 of Appellant's Opening Brief, a tender made by "one who holds an interest in the real estate subordinate to the mortgage [superpriority lien] but is not primarily responsible for performance, does not extinguish the mortgage [superpriority lien], but redeems the interest of the person performing from the mortgage [superpriority lien] and entitles the person performing

to subrogation to the mortgage [superpriority lien] under the principles of § 6.7." Restatement (Third) of Prop.: Mortgages, § 6.4 (e) (1997).

NRS Chapter 116 does not contain any language that is "inconsistent" with this established principle of "the law of real property."

2. NRS Chapter 116 does not contain any language that permits a lender to unilaterally override an HOA's "good faith" belief that more was owed.

At page 16 of its Brief, defendant Green Tree states that in Bank of America, N.A. v. SFR Investments Pool 1, LLC, this court held that the conditions imposed by Miles Bauer on its conditional tender of only $276.75 were "conditions upon which BANA had a right to insist."

This court, however, did not address the "good-faith rejection argument" because "SFR did not present its good-faith rejection argument to the district court." 427 P.3d at 118.

As quoted at pages 17 and 18 of Appellant's Opening Brief, the Kansas Supreme Court stated in Smith v. School Dist. No. 64 Marion County, 131 P. 557, 558 (Kan. 1913), that "[w]here it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if coupled with such conditions that acceptance of it as tendered involves an admission on the part of the

person accepting it that no more is due."

This is the exact improper condition imposed by Miles Bauer on its conditional tender of only $276.75 made on December 16, 2011. (2 SA0377)

As quoted at page 19 of Appellant's Opening Brief, this court stated in Hardy Cos., Inc. v. SNMARK, LLC, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010), that "the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed unless an intention to do so plainly appears by express declaration or necessary implication."

NRS Chapter 116 does not contain any language that is "inconsistent" with the long-established principle of the law of real property that prohibited Miles Bauer from making the demand at page 2 of its letter, dated December 16, 2011. (1 SA0184)

At page 17 of its Brief, defendant Green Tree states that Miles Bauer's initial letter correctly describes the language in NRS 116.3102(1)(j) through (n).

On the other hand, Miles Bauer's letter is inaccurate because those portions of the statute do not include any language regarding the priority of those charges in relationship to a "first security interest" described in NRS 116.3116(2)(b).

At the bottom of pages 17 and 18 of its Brief, defendant Green Tree quotes from Horizons at Seven Hills v. Ikon Holdings, 132 Nev. 362, 373 P.3d 66 (2016),

but that opinion was not issued until April 28, 2016. In December of 2011, Advisory Opinion 2010-01 issued by the CCICCH on December 10, 2010 gave the HOA and NAS a "good faith" reason to believe that Miles Bauer's interpretation of the statute was incorrect.

At page 18 of its Brief, defendant Green Tree does not cite any evidence that proves that "neither the HOA nor NAS mentioned a concern about nuisance abatement charges."

Arguments made by counsel are not evidence and do not establish the facts of a case. Nevada Association Services, Inc. v. Eighth Judicial District Court, 130 Nev. 949, 957, 338 P.3d 1250, 1255-56 (2014).

3. Defendant Green Tree's failure to record notice of its claim that the superpriority lien had been discharged made that claim void as to plaintiff.

The two sentences quoted by defendant Green Tree from Bank of America, N.A. v. SFR Investments Pool 1, LLC at pages 18 and 19 of its Brief are directly contradicted by "the law of real property" that supplements NRS Chapter 116.

Defendant Green Tree states that "[t]here 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."

On the other hand, the superpriority lien does not have to spring "back into existence" because the law of real property expressly provides that a tender made by a subordinate lienholder can never "extinguish" a prior lien. Restatement (Third) of Prop.: Mortgages, § 6.4(f)(1997).

At page 20 of its Brief, defendant Green Tree states that plaintiff's argument is "underdeveloped (mainly consisting of quotations from the restatement (Third) of Property: Mortgages), and can be disregarded on that basis alone." Defendant Green Tree does not cite any authority, and this argument ignores the cases cited at pages 13 to 16 of plaintiff's 7.27 pre-trial memorandum (JA1, pgs. 119-122) and at pages 25 to 28 of Appellant's Opening Brief.

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, 427 P.3d at 119, this court did not address "the law of real property" stated in Sections 6.4 (e), (f) and (g) of Restatement (Third) of Prop.: Mortgages (1997) and the established body of case law regarding equitable subrogation.

Because the "appropriate assignment of the mortgage [superpriority lien] in recordable form" described in Section 6.4(f) is a "conveyance" as defined in NRS 111.010(1), the failure to record that "conveyance" prior to the HOA foreclosure deed makes that unrecorded conveyance void against plaintiff. NRS 111.325.

The amendment made to NRS 116.31164(2) in 2015 that requires "a record of such satisfaction" to be recorded "not later than 5 days before the date of sale" is "persuasive evidence" that the Nevada Legislature "originally intended" that any claim of tender be recorded as required by "the law of real property." Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dep't, 124 Nev. 138, 157, 179 P.3d 542, 554-555 (2008).

At page 20 of its Brief, defendant Green Tree cites two unpublished orders that cannot be cited as precedent. NRAP 36(c)(3). Like Bank of America, N.A. v. SFR Investments Pool 1, LLC, neither order addresses "the law of real property" and the long-established distinction between a tender made by "one who holds an interest in the real estate subordinate to the mortgage but is not primarily responsible for performance" and a tender made "by a person who is primarily responsible for payment of the mortgage obligation."

4. The HOA's reason for rejecting the conditional tender is relevant.

At page 21of its Brief, defendant Green Tree again cites Bank of America,N.A. v. SFR Investments Pool 1, LLC, but as noted above, this court did not address the "good-faith rejection argument" because "SFR did not present its good-faith rejection argument to the district court." 427 P.3d at 118.

In footnote 10 at page 21 of its Brief, defendant Green Tree states that "the Court rejected this argument on the merits rather than on the basis of waiver." This court, however, did not address the established body of law quoted at pages 16 to 18 of Appellant's Opening Brief. Defendant Green Tree also does not cite any authorities that contradict "the law of real property" that required proof that the HOA's rejection of Miles Bauer's conditional tender was "unjustified" or "refused without adequate excuse." Hohn v. Morrison, 870 P.2d 513, 517-518 (Colo. App. 1993).

At pages 21 and 22 of its Brief, defendant Green Tree cites four unpublished orders that cannot be cited as precedent. NRAP 36(c)(3). Like Bank of America, N.A. v. SFR Investments Pool 1, LLC, none of the orders mention the authorities that support plaintiff's good-faith rejection argument.

5. Defendant was not entitled to equitable relief against plaintiff altering the legal effect of the conclusive foreclosure deed.

At page 23 of its Brief, defendant states that the principle applied in Las Vegas Valley Water District v. Curtis Park Manor Water Users Ass'n, 98 Nev. 275, 278, 646 P.2d 549, 551 (1982), does not apply to a claim for "a declaratory judgment." Defendant's counterclaim, however, necessarily seeks "equitable relief" from the "conclusive" recital of default in the foreclosure deed. NRS 116.31166(1)(a).

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016), this court stated that the recitals in a conclusive-or presumptive-effect recital statute are "conclusive, *in the absence of grounds for equitable relief*." (*quoting* Holland v. Pendleton Mortg. Co., 61 Cal. App. 2d 570, 143 P.2d 493, 496 (Cal. Ct. App. 1943)."

As stated at page 34 of Appellant's Opening Brief, in Bank of America v. SFR Investments Pool 1, LLC, this court confirmed that when tender is alleged, the challenge is to the default. 134 Nev. at 612, 427 P.3d at 121. As discussed at page 36 of Appellant's Opening Brief, but for invoking the inherent powers of equity, neither this court, nor any other court, could ever look behind the conclusive recital of default.

At the bottom of page 23 and 24 of its Brief, defendant Green Tree identifies three "assumptions" that it claims justify equitable relief in the present case. This court rejected each of these claimed justifications in County of Washoe v. City of Reno, 77 Nev. 152, 360 P.2d 602, 604 (1961):

> In answer to this suggestion, however, it is necessary to say only that our concern is with the existence of a remedy and not whether it will be unproductive in this particular case, Hughes v. Newcastle Mutual Insurance Co., 13 U.C.Q.B. (Ont.) 153, or inconvenient, Gulf Research & Development Co. v. Harrison, 9 Cir., 185 F.2d 457, or ineffectual, United States ex rel. Crawford v. Addison, 22 How. 174, 63 U.S. 174, 16 L.Ed. 304.

Defendant Green Tree also states that the decisions cited by plaintiff fail "to accurately describe the current state of the law regarding equitable relief."

On the other hand, the opinion in Nevada Management Co. v. Jack, 75 Nev. 232, 235, 338 P.2d 71, 73 (1959), does not contain any language that discusses the limitation on the availability of equitable relief that was subsequently reaffirmed by this court in County of Washoe v. City of Reno in 1961 and in Las Vegas Valley Water District v. Curtis Park Manor Water Users Ass'n in 1982.

6. 12 U.S.C. § 4617(j)(3) does not apply to the present case because FHFA did not appear in or act in the case.

At page 27 of its Brief, defendant Green Tree cites Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC, 133 Nev. 247, 396 P.3d 754 (2017), but defendant does not identify in the record on appeal the "Mortgage Selling and Servicing Contract" required by Section 201 of the Fannie Mae Single Family 2012 Servicing Guide (hereinafter "Guide").

Defendant Green Tree cites testimony by Christy Christensen of Ditech Financial, LLC (JA2, pgs. 281-282), but her testimony was based on computer records that were not identified or authenticated and a letter sent to the borrower in October of 2011. (Trial Exhibit 43 at 5 SA 1152-1155)

Claudette Carr based her testimony (JA2, pgs. 321-364) on a Loan Detail

retrieved from SIR (Trial Exhibit 25), a schedule of mortgages (Trial Exhibit 26), and four pages from SIR that re-classified the Wight loan on July 1, 2013. (Trial Exhibit 27)

As quoted at page 39 of Appellant's Opening Brief, Section 201 of the Fannie Mae Single Family 2012 Servicing Guide (hereinafter "Guide") (*See* pg. 263 in Trial Exhibit 25) requires that the parties sign a "Lender Contract" and a "Mortgage Selling and Servicing Contract."

No witness testified that these required documents existed for the Wight loan.

Likewise, no witness demonstrated that he or she had the personal knowledge required by NRS 50.025(1)(a) to prove that these required documents existed.

At page 30 of its Brief, defendant Green Tree cites Daisy Trust v. Wells Fargo Bank, N.A., 135 Nev. Adv. Op. 30, 445 P.3d 846, 850 (2019), but this court stated that NRS 51.135's business records exception requires that a qualified witness attest "that the database entries contained in the printouts were made (1) at or near the time of the event being recorded, (2) **by a person with knowledge of the event**, and (3) in the course of the business's regularly conducted activity." (emphasis added)

30B Charles Alan Wright & Jeffrey Bellin, *Federal Practice and Procedure* § 6863 (2017), states in relevant part:

> Consequently, the typical witness is someone with an intimate familiarity with the organization's record keeping. The question of the sufficiency of the foundation witness' knowledge centers on the witness' familiarity with the organization's record keeping practices, not any particular record.

Neither Christy Christensen nor Claudette Carr proved either had "intimate familiarity" with the "record keeping practices" used by the unnamed persons who made the data entries in the computer database upon which each based her testimony.

In the present case, neither Christy Christensen nor Claudette Carr stated that the Lender Contract and the MSSC required by the Guide must exist before a data entry is made in the computer database upon which each based her testimony.

According to Section 201 of the Guide, a servicing relationship is not created by having an unidentified person using an unidentified process make a data entry in a private database on an unidentified date.

At page 30 of its Brief, defendant cites JPMorgan Chase Bank, N.A. v. Guberland LLC-Series 2, No. 73196, 2019 WL 2339537 (Nev. May 31, 2019) (unpublished disposition), and CitiMortgage, Inc. v. SFR Investments Pool 1, LLC, No. 70237, 433 P.3d 262 (Table), 2019 WL 289690 (Nev. Jan. 18, 2019) (unpublished disposition), but neither case may be cited as binding precedent. NRAP 36(c)(2).

At page 31 of its Brief, defendant Green Tree states that "Saticoy Bay

submitted no evidence to contradict or undermine the reliability or trustworthiness of Fannie Mae's business records." On the other hand, the corporate assignment of deed of trust by MERS to defendant Green Tree that was recorded on May 28, 2013 (JA1, pg. 92, ¶6) proves that both the deed of trust and the underlying obligation were transferred to defendant Green Tree on May 28, 2013. Restatement (Third) of Prop.: Mortgages, § 5.4 (b) (1997).

As quoted at pages 8 and 9 of plaintiff's 7.27 pretrial memorandum (JA1, pgs. 114-115), NRS 47.240(3) includes a "conclusive" presumption that entitled plaintiff to rely on the recorded assignment of deed of trust.

As quoted at pages 41 and 42 of Appellant's Opening Brief, in Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011), this court stated that "Wells Fargo needed to provide a signed writing from MortgageIT demonstrating that transfer of interest, and "the statement from Wells Fargo itself is insufficient proof of assignment."

In the present case, defendant Green Tree failed to produce the "signed writing" from the Lender, Countrywide Home Loans, Inc., or the Lender's nominee, MERS, transferring the deed of trust to Fannie Mae.

At page 4 of its judgment (JA1, pg. 160), the district court concluded that

"Fannie Mae has failed in its burden to establish an interest in the loan, and consequently, the Federal Foreclosure Bar would not apply, to prevent the foreclosure sale of the subject property." This finding regarding defendant Green Tree's failure of proof is not "manifestly contrary to the evidence." *See* Avery v. Gilliam, 97 Nev. 181, 625 P.2d 1166, 1168 (1981).

Defendant Green Tree cites Koff v. United States, 3 F.3d 1297 (9th Cir. 1993), but in that case, the government produced all documents required by 26 U.S.C. § 6203 to the taxpayer. In the present case, defendant Green Tree did not produce either the "Lender Contract" or the "Mortgage Selling and Servicing Contract" required by Section 201 of the Guide for the Wight loan.

At page 32 of its Brief, defendant Green Tree cites Daisy Trust v. Wells Fargo Bank, N.A. as authority that "servicers need not produce these documents to establish the requisite relationship." The Guide, however, does not state that a servicing relationship can exist if the "Lender Contract" and the "Mortgage Selling and Servicing Contract" required by Section 201 of the Guide do not exist.

Black's Law Dictionary (10th ed. 2014) defines the word "probative" to mean "[t]ending to prove or disprove."

It is impossible for testimony based on computer screenshots to be "probative"

of the existence of an unproduced document unless some person testifies that the "unproduced document" must exist before an unidentified person makes a data entry in SIR.

As quoted at page 48 of Appellant's Opening Brief, in U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040, 1044 (9th Cir. 2009), the court stated that in order to prove that "the database . . . was compiled in the ordinary course of business," a party must prove that "the persons who entered the data had knowledge of the payment event."

Applying this standard to the present case, defendant Green Tree must prove that the person who identified defendant Green Tree as a servicer in SIR had "knowledge of" the servicing relationship. That would necessarily require that the person had "knowledge of" the MSSC required by Section 201 of the Guide.

This required evidence, however, does not exist in the record on appeal.

A data entry made by a person who has never seen the MSSC required by Section 201 of the Guide is not "probative" evidence that the required MSSC exists.

At page 34 of its Brief, defendant Green Tree cites portions of the Guide at 1SA 119, 130, but none of these sections mention the Wight loan. These portions of the Guide are also irrelevant because Section 201 of the Guide states that "[t]he

MSSC establishes the basic legal relationship between a lender/servicer and Fannie Mae." 1 SA 78.

Because no language in the Guide states that the Guide governs a relationship where no MSSC exists, defendant Green Tree cannot rely on language in the Guide to prove that "Fannie Mae is at all times the owner of the mortgage note." *See* 1 SA 0130.

In footnote 13 at page 35 of its Brief, defendant Green Tree states that "Saticoy Bay also failed to object to the admissibility of these documents at trial." Plaintiff, however, made a specific objection to admission of pages "297 through the end of the exhibit" in Exhibit 25 because they are dated 2017, which is years after the sale held on November 22, 2013. (JA2, pg. 364, l. 21 to pg. 365, l. 17)

At page 34 of its Brief, for example, defendant Green Tree cites Section A2-5.1-02 that was not adopted until December 19, 2017. *See* 1 SA 0119. Defendant Green Tree also cites Section A2-1-04, which is dated 06/21/2017 and includes a reference to "F-1-33, Servicing eMortgages (10/19/2016)." *See* 1 SA 130.

When defendant Green Tree's counsel moved to admit pages 297 through 348 of Exhibit 25 (JA2, pg. 375, ll. 21-24), the court responded that "[t]he objection was that it's a later edition. It doesn't apply to the sale in this case." (JA2, pg. 375, l. 25

to pg. 376, l. 2) The court concluded that "I don't know that this later edition of the guide is relevant. I'm not going to admit this." (JA2, pg. 376, ll. 17-20)

As a result, plaintiff did not waive its objection to the portions of the 2017 version of the Guide upon which defendant Green Tree bases its argument.

At page 35 of its Brief, defendant Green Tree states that "the knowledge of 'the individual who entered the data' is irrelevant to the case," but a foundational element of NRS 51.135 is that the data entries be "made at or near the time by, or from information transmitted by, **a person with knowledge**." (emphasis added)

Because defendant Green Tree claims that the data entry in SIR is "probative" evidence of the servicing relationship between defendant Green Tree and Fannie Mae, defendant Green Tree must prove that the unidentified person who made the data entry had "personal knowledge" of the MSSC that must exist before that relationship can exist. Such knowledge would be the equivalent of the "knowledge of the payment event" discussed in U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040, 1044 (9th Cir. 2009). No such evidence exists in the record on appeal.

At page 35 of its Brief, defendant Green Tree cites Thomas v. State, 114 Nev. 1127, 967 P.2d 1111, 1124-1125 (1998), as authority that a "qualified person" includes "anyone who understands the record-keeping system involved." In that case,

however, this court stated that both Johnson and Edwards "knew that the documents were kept in the ordinary course of business **and the procedures for completing those writings**." (emphasis added)

At the bottom of page 35 and top of page 36 of its Brief, defendant Green Tree states that Claudette Carr, a mortgage operations manager with Fannie Mae, "explained how Fannie Mae's records of its regularly conducted business activities are created and maintained," but defendant Green Tree cites the pages for all of Ms. Carr's testimony and not any specific testimony regarding Ms. Carr's knowledge of the procedures used to make the data entries in SIR. *See* JA2, pgs. 321-392.

In this regard, Ms. Carr testified that "servicers" and not Fannie Mae are responsible for inputting the information in SIR. (JA2, pg. 337) Ms. Carr also testified that "[o]n a monthly basis there is a reconciling process, where the servicers are expected to reconcile their portfolios." (JA2, pg. 338, ll. 8-10)

Ms. Carr did not testify that any person confirms the existence of the MSSC required by Section 201 of the Guide before an entity is identified in SIR as the servicer for a particular loan.

At page 37 of its Brief, defendant Green Tree states that "[t]he 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." Defendant Green Tree does not cite any evidence that proves this statement is true.

Furthermore, as quoted at pages 41 and 42 of Appellant's Opening Brief, this court stated in Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011), that NRS 111.205(1) required that Wells Fargo "provide a signed writing from MortgageIT demonstrating that transfer of interest" and that "the statement from Wells Fargo itself is insufficient proof of assignment."

Not only did defendant Green Tree fail to produce the "signed writing" required by NRS 111.205(1), defendant Green Tree did not prove that any person confirmed that the "signed writing" existed before an unidentified person using an unidentified procedure made the database entries upon which defendant Green Tree's witnesses based their testimony that Fannie Mae "acquired an ownership interest in the deed of trust." *See* page 8 of Respondent's Answering Brief.

At page 8 of Respondent's Answering Brief, defendant Green Tree also cites screenshots attached as exhibits to defendant Green Tree's motion for summary judgment, filed on July 16, 2018, instead of evidence admitted at trial.

An interest in Nevada real property cannot be created by having an unidentified person using an unidentified procedure make a database entry in a

private database. Yet, that is the only testimony that defendant Green Tree used to prove Fannie Mae's "ownership" of the Wight deed of trust on November 22, 2013.

7. Defendant Green Tree did not prove that the signed "writing" required by NRS 111.205(1) existed on November 22, 2013.

At page 38 of its Brief, Defendant Green Tree quotes the district court's statement that "[t]he Court does not require that Fannie Mae have a recorded interest in order to establish an interest in the loan." (JA1, pg. 159)

As discussed at pages 42 to 46 of Appellant's Opening Brief, because any transfer of an interest in the Wight deed of trust to Fannie Mae would be a "conveyance" as defined in NRS 111.010(1), Fannie Mae's failure to record that conveyance prior to November 22, 2013 as required by NRS 111.315 makes that conveyance "void" against plaintiff pursuant to NRS 111.325.

At pages 38 and 39 of its Brief, defendant Green Tree selectively quotes from In re Montierth (Montierth v. Deutsche Bank), 131 Nev. 543, 354 P.3d 648, 650-651 (2015), and states that because the security interest in that case "attached *and was perfected* before bankruptcy," the security interest was "therefore effective 'against third parties.'"

In its parenthetical description, defendant cites "Restatement § 5.4 cmts. c , e," but these comments only discuss the rules that apply when no third party is affected

by the unrecorded transfer of ownership.

The opinion in Montierth does not discuss the effect of NRS 111.010(1), NRS 111.205, NRS 111.315 and NRS 111.325 on an unrecorded claim by a regulated entity to hold an interest in a deed of trust recorded in the name of a third party.

The opinion in Montierth instead focused only on "the legal effect on a foreclosure when the promissory note and the deed of trust are split at the time of foreclosure" and whether "recordation of an assignment of a deed of trust" to the holder of the note would violate the automatic stay provided by 11 U.S.C. § 362. 354 P.3d at 649.

The only parties involved in the Montierth case were the debtors (who signed the note and deed of trust) and the creditor (to whom the note was transferred). As quoted at page 45 of Appellant's Opening Brief, this court stated:

> "[A]n unrecorded deed is valid immediately between the mortgagor and the mortgagee." 59 C.J.S. Mortgages § 256 (2009). In Nevada, "perfection of a deed of trust occurs upon proper execution and recordation." *In re Madrid*, 725 F.2d 1197, 1200 (9th Cir.1984), superseded by statute on other grounds, Bankr. Amendments & Fed. Judgeship Act of 1984, Pub.L. No. 98-353, 98 Stat. 333, as recognized in *In re Ehring*, 900 F.2d 184, 187 (9th Cir.1990). Thus, a security interest attaches to the property as between the mortgagor and mortgagee upon execution **and as against third parties upon recordation.** (emphasis added)
>
> 334 P.3d at 650.

Later in the opinion, this court stated:

> Because the security interest attached and was perfected before bankruptcy, **and separation of the note from the deed of trust did not alter the interests of the parties in this instance**, see *Phillips*, 491 B.R. at 275; *In re Corley*, 447 B.R. 375, 380-81 (Bankr. S.D.Ga. 2011) (explaining that MERS, as the designated nominee of the note holder, had a "fully-secured, first priority deed to [the] secure debt"), we conclude that Deutsche Bank was a secured creditor when the Montierths filed for bankruptcy. (emphasis added)

354 P.3d at 651.

In In re Phillips, 491 B.R. 255 (Bankr. D. Nev. 2013), there was a recorded assignment of the deed of trust to Fannie Mae. Id. at 274-275.

In In re Corley, 447 B.R. 375 (Bankr. S.D. Ga. 2011), no third party was affected by TBW's endorsement of the note in blank and TBW's role as servicer for Freddie Mac. Id. at 378.

In the present case, however, defendant Green Tree states that the unwritten and unrecorded transfer of "ownership" of the Wight loan to Fannie Mae removed the HOA's ability to foreclose its superpriority lien rights without first obtaining FHFA's consent. The present case is unlike Montierth for that reason alone.

As stated by this court in Montierth, Fannie Mae's rights against plaintiff can only exist "upon recordation." 354 P.3d at 650.

As quoted at page 44 of Appellant's Opening Brief, comment b to Restatement (Third) of Prop.: Mortgages, § 5.4, pg. 381 (1997), provides that plaintiff was "entitled to rely on the record."

Because no "writing" was recorded prior to the HOA foreclosure sale stating that Fannie Mae held an interest in the Wight deed of trust, that unrecorded claim is void as to plaintiff.

At page 39 of its Brief, defendant Green Tree quotes from a portion of the opinion in Daisy Trust v. Wells Fargo Bank, N.A., 135 Nev. Adv. Op. 30, 445 P.3d 846, 849 (2019), that only focused on the amendment made to NRS 106.210 that became effective on July 1, 2011. On the other hand, the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 has existed since 1861, and NRS 111.315 was last amended in 1995.

Under Nevada law, it is impossible for Fannie Mae to have held an enforceable interest in the Property on the date of the HOA foreclosure sale unless the "writing" by which defendant Green Tree claims that Fannie Mae "acquired ownership" of the Wight loan was recorded prior to November 22, 2013.

Because defendant Green Tree failed to submit admissible evidence proving that Fannie Mae complied with the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325, the subordinate deed of trust owned by defendant Green Tree was extinguished when plaintiff purchased the Property at the public auction held on November 22, 2013.

At page 40 of its Brief, defendant Green Tree stated that "assignment merely transferred record beneficiary status of the right to *enforce* the deed of trust." On the other hand, Restatement (Third) of Prop.: Mortgages, § 5.4(b) (1997) states that "a transfer of the mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise."

The record on appeal does not contain any admissible evidence proving that the parties agreed "otherwise" when MERS assigned the Wight deed of trust to defendant Green Tree on May 28 2013. (JA1, pg. 92, ¶6)

At page 40 of its Brief, defendant Bank quotes from CitiMortgage, Inc. v. Saticoy Bay LLC Series 3084 Bellavista Lane, No. 71606, 448 P.3d 573 (Table), at *1, n. 2, 2019 WL 4390765 (Nev. Sept. 12, 2019)(unpublished disposition), that once an Enterprise acquires a loan, "the assigning entities lack[ ] authority to transfer the promissory note."

Pursuant to NRAP 36(c)(2), this case "does not establish mandatory precedent." The case has no persuasive value because this court stated in Edelstein v. Bank of New York Mellon, 128 Nev. 505, 519, 286 P.3d 249, 258 (2012), that "MERS, as an agent for New American Funding **and its successors and assigns**, had authority to transfer the note on behalf of New American Funding **and its successors**

and assigns." (emphasis added)

As a result, even if Fannie Mae complied with Nevada law to own the Wight note, MERS retained the right as agent for Fannie Mae to transfer that interest to defendant Green Tree.

At page 40 of its Brief, defendant Green Tree states that the **conclusive** presumptions in NRS 47.240(2) and NRS 47.240(3) can be ignored because paragraph 20 of the deed of trust stated that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." Defendant Green Tree also states that the deed of trust is "marked" as a "Fannie Mae/Freddie Mac UNIFORM INSTRUMENT."

This language, however, does not excuse Fannie Mae from complying with NRS 111.205(1), NRS 111.315 and NRS 111.325. Plaintiff was entitled to rely on the recorded assignment of deed of trust as proof that defendant Green Tree, and not Fannie Mae, held all beneficial interest in the Wight deed of trust.

At page 41 of its Brief, defendant Green Tree states that Fannie Mae would be "required to undertake the pointless act of re-recording the same deed of trust that had already been recorded." NRS 111.205(1), NRS 111.315 and NRS 111.325 instead require that Fannie Mae record the "signed writing" by which Fannie Mae acquired

an interest in the Wight deed of trust.

8. Plaintiff has standing to assert the statute of frauds in NRS 111.205(1).

At page 41 of its Brief, defendant Green Tree quotes from Azevedo v. Minister, 86 Nev. 576, 47 P.2d 661 (1970), but that case involved an oral contract to purchase hay covered by NRS 104.2201 and not an interest in real property covered by NRS 111.205(1).

In Harmon v. Tanner Motor Tours of Nevada, Ltd., 79 Nev. 4, 377 P.2d 622, 628 (1963), this court applied NRS 111.220(1) to an "agreement which, by its terms, is not to be performed within one year from the making thereof" and not to "an estate or interest in lands" governed by NRS 111.205(1).

Neither Easton Business Opportunities, Inc. v. Town Executive Suites-Eastern Marketplace, LLC, 126 Nev. 119, 230 P.3d 827 (2010), nor In re Circle K Corp., 127 F.3d 904 (9th Cir. 1997), involved an interest in real property.

In Wells Fargo Bank, N.A. v. Pine Barrens Street Trust, No. 2:17-cv-1517-RFB-VCF, 2019 WL 1446951 (D. Nev. Mar. 31, 2019), Judge Boulware cited Harmon v. Tanner Motor Tours of Nevada, Ltd., without acknowledging the difference between NRS 111.220(1) and NRS 111.205(1).

The other cases cited at page 42 of defendant Green Tree's Brief relate to NRS

104.2201(3)(c), which applies to "a contract for the sale of goods for the price of $500 or more" and not to interests in real property.

NRS 116.1108 expressly provides that "the law of real property" supplements the provisions of NRS Chapter 116 "except to the extent inconsistent with this chapter." No language in NRS Chapter 116 is inconsistent with the mandatory language in NRS 111.205(1) that prevents Fannie Mae from holding any interest in the Property unless there is a signed "writing" that "granted" or "assigned" that interest to Fannie Mae.

Plaintiff is the exact person that NRS 111.205(1), NRS 111.315 and NRS 111.325 are designed to protect. *See* SFR Investments Pool 1, LLC v. First Horizon Home Loans, 134 Nev. 19, 409 P.3d 891, 893 (2018).

9. Plaintiff is protected as a good faith purchaser from the unrecorded claim that Fannie Mae owned the deed of trust assigned to defendant Green Tree.

At page 43 of its Brief, defendant Green Tree states that plaintiff "was on actual or constructive notice that an Enterprise held an interest in the Deed of Trust encumbering the Property," but defendant Green Tree does not identify any evidence that supports that statement.

Defendant Green Tree again cites Daisy Trust v. Wells Fargo Bank, N.A., 135

Nev. Adv. Op. 30, 445 P.3d 846, 849 (2019), but as discussed above, that case did not address the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 has existed since 1861.

Defendant Green Tree quotes from CitiMortgage, Inc. v. TRP Fund VI, LLC, 435 P.3d 1226 (Table), 2019 WL 1245888 (Nev. Mar. 14, 2019)(unpublished disposition), but the unpublished order does not discuss the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 that makes a "potential" interest void against an innocent purchaser like plaintiff.

At page 45 of its Brief, defendant Green Tree states that plaintiff "could have reached out to FHFA," but counsel's statements are not evidence and do not establish the facts of this case. Nevada Association Services, Inc. v. Eighth Judicial District Court, 130 Nev. 949, 957, 338 P.3d 1250, 1255-56 (2014). In footnote 16 at page 45, defendant Green Tree cites nonbinding orders that did not exist on November 22, 2013.

At page 46 of its Brief, defendant Green Tree states that "[i]f Saticoy Bay were a bona fide purchaser under Nevada law, the Federal Foreclosure Bar would preempt those statutes" and that "the Federal Foreclosure Bar protects Fannie Mae's property interest regardless of whether Fannie Mae's name appears in any recorded

documents."

On the other hand, 12 U.S.C. § 4617 does not contain any language that creates a "federal" method of creating an "ownership" interest in a deed of trust without complying with the recording laws of the State of Nevada. No language in 12 U.S.C. § 4617(b)(2)(A) states that FHFA succeeds to an interest in real property that is "void" under Nevada law.

CONCLUSION

Plaintiff respectfully requests that this court reverse the order granting defendant's motion for summary judgment.

DATED this 2nd day of December, 2019.

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CERTIFICATE OF COMPLIANCE

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

Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 6,977 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

DATED this 2nd day of December, 2019.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 2nd day of December, 2019, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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