IN THE SUPREME COURT OF NEVADA

Case No. 79324

DANIEL LAKES,

Appellant,

vs.

U.S. BANK TRUST, TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,

Respondent.

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Appeal from the Eighth Judicial District Court, Clark County
The Honorable Ronald J. Israel, District Judge
District Court Case No. A-17-759016-C

BRIEF OF AMICUS CURIAE FEDERAL HOME LOAN MORTGAGE CORPORATION

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Federal Home Loan Mortgage Corporation ("Freddie Mac") files this brief in response to the Court's request for additional briefing on the questions of:

> (1) whether Nevada's race notice statutory scheme, NRS 111.310-.3655, applies to deed of trust assignments and how, if at all, the provisions of NRS 106.210 impact that analysis; and, assuming that the race notice statutory scheme does apply, (2) what effect an unrecorded assignment has on the status of a purchaser who took title with record notice of the deed of trust but without notice of the deed of trust's assignment.

Order Directing Supplemental Briefing, p. 1 (Nev. Apr. 26, 2021).

Freddie Mac is a federally chartered entity that Congress created to enhance the nation's housing-finance market. It owns millions of mortgages nationwide, including hundreds of thousands in Nevada. Freddie Mac has an interest in the questions raised in the Court's Order Directing Supplemental Briefing because they arguably sit adjacent to well-established precedent that the Court should take care not to disturb.

Specifically, the Court has repeatedly confirmed that when a contractually authorized servicer or nominee of Freddie Mac appears as the beneficiary of record of a deed of trust, (1) Nevada's recording statutes do not require that "any assignment to [Freddie Mac] needed to be recorded" for Freddie Mac's interest to be valid against third parties (citing NRS 106.210 and 111.325); and (2) a "deed of

trust d[oes] not have to be 'assigned' or 'conveyed' to [Freddie Mac] in order for [Freddie Mac] to own the secured loan." *Daisy Trust v. Wells Fargo, N.A.*, 445 P.3d 846, 847-49 (Nev. 2019) (en banc). In deciding this case, the Court can and should avoid any resolution that would disturb that authority, and Freddie Mac urges the Court to craft its decision to avoid any inadvertent ambiguity on the point. Otherwise, the Court's decision could further prolong the already long-running litigation about the effect of HOA foreclosure sales on pre-existing deeds of trust, and could significantly hinder Freddie Mac's ability to fulfill its statutory missions by calling into question its property interests in thousands of mortgage loans in Nevada.

To be clear, Freddie Mac has no direct interest in the outcome of this case. While Freddie Mac did, previously, own the subject loan, it no longer has any interest in the loan, the deed of trust, or the underlying property. Rather, Freddie Mac's interest is in the impact this Court's decision might have on *other* secured interests, and Freddie Mac files this brief to clarify that nothing in the analysis necessary to answer the two questions posed in the order requires this Court to deviate from its holding in *Daisy Trust* and related precedents.

ARGUMENT

I. This Court Has Confirmed That Freddie Mac Maintains a Secured Property Interest When Its Contractually Authorized Representatives Serve as Record Beneficiaries of Deeds of Trust

This Court, interpreting Nevada law, has confirmed that a loan owner maintains a cognizable interest in the collateral property when it makes use of the common and commercially efficient arrangement where a loan owner's contractually authorized representative, such as a loan servicer or Mortgage Electronic Registration Systems, Inc. ("MERS'), serves as record beneficiary of the deed of trust on behalf of the loan owner. *Daisy Trust v. Wells Fargo, N.A.*, 445 P.3d 846, 849 (Nev. 2019) (en banc) (citing *In re Montierth*, 354 P.3d 648, 650-51 (Nev. 2015)). In applying that principle in the HOA-sale context, the Court relied on its earlier decision in *Montierth*, which explained 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 perfected security interest in the collateral property. 354 P.3d at 651.

As this Court knows from *Daisy Trust* and related appeals, Freddie Mac's role in the secondary mortgage market is to provide liquidity and stability by investing in secured residential mortgage loans, *see* 12 U.S.C. §§ 1451(d), 1454, but it leaves day-to-day management of loans to its servicers. *See, e.g., Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 757-58 (Nev. 2017)

(acknowledging servicers' role); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011) (describing servicers' role); Restatement (Third) of Property: Mortgages § 5.4 cmt. c (discussing the common practice where investors designate servicers to be assignees of their mortgages); *see generally* Freddie Mac's Single-Family Seller/Servicer Guide (discussing Freddie Mac's relationship with servicers).

To better fulfill that responsibility, servicers often appear as record beneficiaries of Freddie Mac's deeds of trust. Accordingly, *Daisy Trust*'s application of the principles articulated in *Montierth* are crucial to the efficient management of Freddie Mac's loan portfolio in Nevada.

Of particular relevance here, in *Daisy Trust*, the Court held that "Nevada's recording statutes did not require Freddie Mac to publicly record its ownership interest as a prerequisite for establishing that interest." 445 P.3d at 849; *see also, e.g.*, *SFR Invs. Pool 1, LLC v. Fannie Mae*, No. 77544, 2020 WL 1328987, at *1 (Nev. Mar. 18, 2020) (unpublished disposition). Thus, the Court confirmed that for a secured loan owner like Freddie Mac to maintain its property interest, Nevada's recording statutes do not require anything above and beyond what this Court has held to be sufficient in *Montierth* and *Daisy Trust*. All that is required is recordation of the deed of trust, or an assignment of that deed of trust, in the loan owner's name or the name of its contractually authorized representative.

In *Daisy Trust*, for instance, this Court held that, "consistent with … *Montierth*, 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, meaning that neither NRS 106.210 nor NRS 111.325 was implicated." 445 P.3d at 849. This Court also emphasized that "[r]egardless" of whether the pre-2011 or post-2011 version of NRS 106.210 applies, Nevada law does not require that a "beneficial interest in the deed of trust need[s] to be 'assigned' or 'conveyed' to Freddie Mac in order for Freddie Mac to acquire ownership of the loan." *Id*.

Since issuing *Daisy Trust*, this Court has repeatedly confirmed that Nevada's recording statutes do not require Freddie Mac (together with the Federal National Mortgage Association, the "Enterprises") to record its interest in its own name and that one cannot claim to be a bona fide purchaser and avoid a recorded deed of trust just because the loan owner's servicer rather than the loan owner itself appears as record beneficiary. *E.g., CitiMortgage, Inc. v. Saticoy Bay Series 3084 Bellavista Lane*, No. 71606, 2019 WL 4390765, at *1 (Nev. Sept. 12, 2019) (unpublished disposition) ("Nevada law does not require [an Enterprise] … to publicly record its ownership interest in the subject loan."); *CitiMortgage, Inc. v. TRP Fund VI, LLC*, 435 P.3d 1226 (Nev. 2019); *Premier One Holdings, Inc. v. Ditech Fin., LLC*, 462 P.3d 1230 (Nev. 2020). The Ninth Circuit, citing this Court's precedent, has done the same. *E.g.*, *Saticoy Bay LLC Series 452 Crocus*

Hill v. Quality Loan Serv. Corp., 826 F. App'x 610, 614 (9th Cir. 2020) (citing *Daisy Trust*); *Freddie Mac v. T-Shack, Inc.*, 806 F. App'x 575, 577 (9th Cir. 2020) (rejecting bona fide purchaser argument). Adherence to the *Daisy Trust* decision has allowed both Nevada state and federal courts to efficiently resolve the hundreds of HOA foreclosure litigation cases that had been pending in those courts and will further the resolution of the remaining cases.

II. Resolving the Two Questions Posed by This Court Does Not Require Revisiting *Daisy Trust*

In the Court's Order Directing Supplemental Briefing, this Court asks whether Nevada's race notice statutory scheme applies to deed of trust assignments and if so, whether the provisions of NRS 106.210 impact that analysis. To be clear, *Daisy Trust* fully and completely resolved the issue of whether a loan owner continues to have a secured property interest where its contractual representative serves as beneficiary of record of the corresponding deed of trust. As previously stated, this Court has made clear that Nevada's recording statutes do not require that "any assignment to [Freddie Mac] needed to be recorded" for Freddie Mac's interest to be valid against third parties (citing NRS 106.210 and 111.325); and (2) a "deed of trust d[oes] not have to be 'assigned' or 'conveyed' to [Freddie Mac] in order for [Freddie Mac] to own the secured loan." *Daisy Trust*, 445 P.3d at 847-49.

The issue before the Court in *Daisy Trust* was whether the beneficiary of record had the requisite contractual relationship with the owner of the loan. Based on the record in this case, it does not appear that that issue is the crux of this case, instead this case focuses on whether, following the servicer's pre-sale tender, the subject deed of trust survived and continued to survive the HOA foreclosure sale under the dictates of *Bank of America, N.A.. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604 (2018) (en banc) and whether a bona fide purchaser analysis is relevant in such context. Furthermore, unlike *Daisy Trust* which involved a direct purchaser of property at an HOA foreclosure sale, the instant case involves a downstream purchaser of the property. Thus, this Court need not address its holding in *Daisy Trust* in determining the applicability of *Bank of America* and any related bona fide purchaser issues.

The second question posed by the Court is whether under the facts of the case, if a bona fide purchaser analysis is applicable, whether Daniel Lakes can establish bona fide purchaser status. Whether a downstream purchaser of the property can establish bona fide purchaser status when he or she was fully aware and on notice of a recorded deed of trust that had clearly survived the HOA foreclosure sale simply doesn't implicate the ruling enunciated in *Daisy Trust*. In fact, this Court made clear in *Daisy Trust* that after finding that NRS 106.210 or NRS 111.325 did not require Freddie Mac to record an assignment of a deed of

trust in its own name, it is not "necessary to address Daisy Trust's argument that it is protected as a bona fide purchaser from the Federal Foreclosure Bar's effect." *Daisy Trust,* 445 P.3d at 847-49. Thus, the bona fide purchaser doctrine is irrelevant to whether Freddie Mac can establish ownership of a deed of trust recorded in the name of its contractual relationship vis a vis a direct owner at an HOA foreclosure sale for federal pre-emption purposes.

In sum, the questions posed by this Court simply do not implicate the holding in *Daisy Trust* and Freddie Mac urges a careful, appropriately narrow ruling by this Court in this case that avoids calling into question this Court's ruling in *Daisy Trust.*

III. Requiring Freddie Mac to Re-Record a Lawfully Recorded Deed of Trust Would Undermine Sound Public Policy

A decision in this case that calls into question this Court's precedent that provided stability and certainty to the secondary mortgage market in Nevada and to courts applying Nevada law in cases concerning HOA foreclosure sales and the Enterprises would cause a great deal of disruption to an important sector of the Nevada economy. Requiring Freddie Mac to appear as record beneficiary on each of the millions of deeds of trust that it owns, including by re-recording a deed of trust that is already lawfully recorded at the time of Freddie Mac's acquisition, would undermine sound public policy. Such a ruling would place a substantial administrative burden on Freddie Mac, requiring it to record or re-record the

thousands of mortgages it purchases each day, in all 50 states and U.S. territories. Freddie Mac would be required to divert resources toward an act this Court has already deemed unnecessary, detracting from its ability to fulfill its statutory role of increasing liquidity in the secondary mortgage market. Freddie Mac's resources are better spent supporting the national economy.

In addition to the legal distinctions that should counsel against any decision here that would affect *Daisy Trust*, there are also compelling public policy reasons not to revisit the Court's controlling precedent in that and related appeals.

As this Court is well aware from prior appeals, Congress created Freddie Mac to support a nationwide secondary mortgage market. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). To advance its statutory mission, Freddie Mac owns millions of mortgages across the country, including in Nevada, and contracts with servicers to act on its behalf, including often having servicers appear as record beneficiaries of Freddie Mac's deeds of trust. *See supra* Section I. In such situations, the note owner remains a secured creditor with a property interest in the collateral, even if the recorded deed of trust names only the loan servicer. *See, e.g.*, *Daisy Trust*, 445 P.3d at 849; *In re Montierth*, 354 P.3d 648, 650-51 (Nev. 2015) (en banc).

Freddie Mac and its servicers also work with MERS which is "a subscription-based service that tracks changes in mortgage servicing rights and

beneficial ownership interests in loans secured by residential properties." *Perez v. MERS*, 959 F.3d 334, 336 n.1 (9th Cir. 2020). While "MERS, as the 'nominee' of the lender and of any assignee of the lender," is "recorded as the beneficiary under the deed of trust," the lender (or its successor or assignee) remains owner of the promissory note and corresponding deed of trust. *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 776 (9th Cir. 2014); *see Daisy Trust*, 445 P.3d at 849; *Cervantes*, 656 F.3d at 1039.

Freddie Mac's acquisition of loans and its use of its contractually authorized representative as record beneficiary of deeds of trust on its behalf conform to routine procedures that mortgage investors nationwide follow in connection with their investments in millions of loans. These procedures comply with black-letter property law to ensure that the investor—like Freddie Mac—acquires a loan secured by an interest in property; that is, the investor has ownership of both the 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).

It would be difficult to overstate the importance of the stability of Freddie Mac's assets to Nevada's economy–indeed the national economy–over the last fifty years. As noted above, Congress chartered Freddie Mac 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*, 775 F.3d at 1114. In enacting the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Congress found 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. Following the financial crisis in 2008, out of concern "that a default by Fannie and Freddie would imperil the already fragile national economy," *Perry Capital*, 864 F.3d at 599, Congress enacted the Housing and Economic Recovery Act ("HERA"), creating the Federal Housing Finance Agency ("FHFA") with broad powers to place the Enterprises into conservatorships and fulfill its role as conservator.

Freddie Mac's current market stabilization efforts include providing mortgage-relief options to homeowners experiencing financial hardship related to COVID-19, accelerating payment terms for small and diverse business suppliers to improve cash flow, and providing greater liquidity in the mortgage market by temporarily purchasing certain loans from lenders.[1]

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[1] Freddie Mac, *Extending help to homeowners impacted by COVID-19*, https://myhome.freddiemac.com/getting-help/relief-for-homeowners.html; Freddie Mac, *Freddie Mac Accelerates Payments to Assist Small and Diverse Businesses*, http://www.freddiemac.com/blog/notable/20200420_accelerates_payments_assist_businesses.page?; Freddie Mac, *Freddie Mac is Providing Greater Liquidity to the Mortgage Market*, http://www.freddiemac.com/media-room/greater_liquidity_mortgage_market.html.

Freddie Mac can operate more efficiently as a mortgage investor, and thereby more effectively fulfill its federal statutory mission, by contracting with servicers to handle the day-to-day administration of the mortgages it owns. *See Cervantes*, 656 F.3d at 1038-39 (describing how loan owners contract with servicers and the servicers' role). As noted above, to perform these duties most effectively, Freddie Mac's servicers often appear as the record beneficiaries of the deeds of trust that secure the loans Freddie Mac owns.

This well-established practice is "convenient because it facilitates actions that the servicer might take, such as releasing the mortgage, at the instruction of the purchaser." Restatement § 5.4 cmt. c; *see also Montierth*, 354 P.3d at 651. Accordingly, if—contrary to the black-letter law cited and described above—the appearance of Freddie Mac's servicer as record beneficiary of a deed of trust jeopardizes Freddie Mac's interests in the property securing the loans it owns, Freddie Mac's ability to fulfill its mission would be significantly impaired.

CONCLUSION

For the foregoing reasons, Freddie Mac requests that in its ruling, this Court not call into question *Daisy Trust* and related precedent that provided stability and certainty to the secondary mortgage market in Nevada and to courts applying Nevada law in cases concerning HOA foreclosure sales and the Enterprises, and leave its well-established precedent undisturbed that Nevada law does not require

recordation of a deed of trust in the owner's name in order for the ownership interest to be valid and that a note owner's interest is properly recorded where the deed of trust's record beneficiary is the note owner's contractually authorized representative. *See Daisy Trust*, 445 P.3d at 849; *see also Berezovsky v. Moniz*, 869 F.3d 923, 932 (9th Cir. 2017).

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on July 2, 2021, a true and correct copy of the BRIEF OF AMICUS CURIAE FEDERAL HOME LOAN MORTGAGE CORPORATION, was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

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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:

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Dated: July 2, 2021.

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