Case No. 82078

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. NATIONSTAR MORTGAGE, LLC, A DELAWARE LIMITED LIABILITY COMPANY, Respondent.	Electronically Filed Jul 28 2021 02:24 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable MARY KAY HOLTHUS, District Judge
District Court Case No. A-13-684715-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

Appellant, SFR Investments Pool 1, LLC, is a privately held limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

In district court, SFR Investments Pool 1, LLC ("SFR") was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana S. Ebron, Esq. and Karen L. Hanks, Esq. of Kim Gilbert Ebron. Jacqueline A. Gilbert, Esq. and Diana S. Ebron, Esq. represent SFR on appeal.

DATED this 28th day of July, 2021.

KIM GILBERT EBRON

/s/Jacqueline A. Gilbert
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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to NRAP 3A, as the Order granting Nationstar Mortgage LLC's Motion for Summary Judgment and Denying SFR's Motion to Strike, was entered on October 6, 2020 (14JA_3233-3244), notice of entry of which was entered the same day (14JA_3216-3231), disposed of all claims remaining following remand.[1] SFR timely appealed on November 5, 2020. (14JA_3252-3254.)

ROUTING STATEMENT

This appeal is presumptively retained by the Nevada Supreme Court because it raises questions of statewide public importance.[2] Further, this case should remain with the Nevada Supreme Court pursuant to NRAP 17 (a)(13)-(14), because it raises issues of first impression.

On Wednesday, June 23, 2021, the Supreme Court of the United States issued its opinion in *Collins v. Yellen*,[3] determining that the FHFA's structure as set forth in HERA violates the separation of powers and is therefore, unconstitutional. The U.S. Supreme Court remanded to determine what remedy was available under the

[1] The prior judgment of this Court was vacated and the matter remanded to this court for proceedings consistent with the Order Vacating and Remanding entered on October 24, 2019, in Nevada Supreme Court Case No. 75890.

[2] *See* NRAP 17(a)(2).

[3] *Collins v. Yellen*, Case No. 19-422, 594 U.S. __ (2021).

constitutional claim. This Court must decide whether remand is appropriate to determine damages to SFR caused by the unconstitutional structure of the FHFA.

Besides the constitutional issue that requires remand, this appeal addresses the question whether Nationstar met its burden to prove and conclude that Freddie Mac had the required ownership interest and servicing relationship with the deed of trust beneficiaries/servicers required under *Berezovsky*[4] such that 12 U.S.C. §4617(j)(3) applied, especially in light of this Court's opinion in *Morning Springs*,[5] relying on the Ninth Circuit's opinion in *M&T Bank.*[6] Further, this appeal addresses whether SFR was improperly denied discovery into these essential elements and whether Freddie Mac and Nationstar's refusal to fully cooperate in discovery should have resulted in striking of the Declaration of Dean Meyer.

Here, the district court in making its findings and conclusions on the record stated Nationstar had an interest in the Property through its contractual servicing relationship with Freddie Mac and as the beneficiary of record of the Deed of Trust, but it refused to compel production of the actual contract evidencing the relationship

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[4] *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017).

[5] *JPMorgan Chase Bank, National Association v. SFR Investments Pool 1, LLC*, 136 Nev. Adv. Op. 68, 475 P.3d 52 (2020) ("*Morning Springs*").

[6] *M&T Bank v. SFR Invs. Pool 1, LLC*, 963 F.3d 854, 858 (9th Cir. 2020), *cert. denied sub nom. SFR Invs. Pool 1, LLC v. M&T Bank*, No. 20-908, 2021 WL 1602655 (U.S. Apr. 26, 2021).

or to force Nationstar and Freddie Mac to cooperate in discovery, which would have provided SFR the opportunity to challenge the business records submitted by Nationstar to evidence said relationship.[7]

In making its findings and conclusions, the district court also concluded that, at the time of the Association Foreclosure Sale ("Sale"), Freddie Mac was the owner of the Deed of Trust ("DOT") and Promissory Note ("Note"), using Freddie Mac's business records and the Dean Meyer testimony, despite the harm caused by Nationstar/Freddie Mac's obstructive behavior regarding discovery into the issue. (14JA_3233-3244.) While evidence similar to that proffered by Nationstar has been accepted by this Court as sufficient to prove Freddie Mac's property interest, this Court recent ruling in *Morning Springs*, relying on the Ninth Circuit's opinion in *M&T Bank*,[8]—that claims such as those herein are wholly dependent on contracts in the form of the deed of trust and the promissory note it secures—altered the legal landscape. SFR filed a motion to compel production of the DOT and Promissory

[7] SFR sought to compel production of the Note, any contract(s) showing the agency relationship, and complete testimony regarding all deposition topics, among other things. Alternatively, SFR sought additional discovery or to have the declaration of Freddie Mac's undisclosed witness and related documents stricken to limit the harm caused by Nationstar/Freddie Mac's obstructive behavior regarding discovery. The District Court determined any failed disclosure was harmless, declined to address the obstruction and declared SFR's motion to compel moot. (14JA_3233-3244.)

[8] *M&T Bank*, 963 F.3d at 858.

Note in this case, and likewise demanded their production by way of NRCP 56(f) relief (7JA_1538-1672), but this request was denied (14JA_3240), resulting in an abuse of discretion that prejudiced SFR because the ownership element was unresolved based on the unproduced Note.

ISSUES PRESENTED FOR REVIEW

1. Whether this Court should remand for further proceedings to determine compensable harm to SFR caused by the unconstitutional structure of the FHFA?
2. Whether the District Court erred in allowing and relying on evidence in the form of the Declaration of Dean Meyer and related documents as proof of Freddie Mac's ownership of the loan and servicing relationship with Nationstar, denying SFR's Motion to Strike and determining the untimely disclosure of Dean Meyer was harmless despite Nationstar/Freddie Mac's obstructive behavior regarding discovery.
3. Whether the District Court erred in declaring SFR's Motion to Compel Moot and concluded that Freddie Mac owned the loan, even though Nationstar/Freddie Mac refused to produce the original wet-ink signature promissory note with any endorsements ("Note")—this despite the fact that the Note was made directly relevant to the question of Freddie Mac's

ownership by this Court's holding in *Morning Springs* relying on the principle in *M&T Bank*, that claims such as those made by Nationstar here were entirely dependent on the property interest created by the Note.

4. Whether the District Court erred in determining Nationstar met its burden to prove Fannie Mae had a contractual servicing relationship with Nationstar during all relevant times by relying only on the Guide and not requiring proof in the form of the actual servicing agreement.

STATEMENT OF THE CASE

The real property located at 663 Moonlight Stroll Street, Henderson, Nevada 89002 (the "Property") was subject to foreclosure pursuant to the provisions of Nev. Rev. Stat. § ("NRS") 116.3116, *et seq*. (14JA_3234.) Specifically, Horizon Heights Homeowners Association (the "Association"), through its foreclosure agent, Nevada Association Services, Inc. ("NAS") foreclosed on its lien for delinquent homeowner's association assessments on April 5, 2013, resulting in a sale at public auction to SFR Investments Pool 1, LLC ("SFR") as the highest bidder. (14JA_3236.)

On July 8, 2013, former homeowner, Ignacio Gutierrez ("Gutierrez"), filed its Complaint against SFR, NAS, the Association, and original lender KB Home Mortgage Company for wrongful foreclosure and declaratory relief. (1JA_0001-0010). On August 2, 2013, SFR filed an Answer to Complaint, Counterclaim against Gutierrez, and Third Party Complaint against Nationstar Mortgage, LLC ("the Bank")[9] and Countrywide Home Loans, Inc. ("Countrywide") for Quiet Title, Unjust Enrichment and Injunctive Relief. (1JA_0012-0026.) Bank of America ("BANA"), claiming it was successor in interest to third-party defendant

[9] Unless otherwise stated, "the Bank" includes Nationstar and its predecessors in interest.

Countrywide, filed an Answer to SFR's Third Party Complaint on October 8, 2014. (1JA_0065-0068.).) Although later alleging that Federal National Mortgage Corporation ("Freddie Mac") had owned the loan and the deed of trust since August of 2005, and that MERS as nominee assigned the deed of trust to BANA, BANA, who was allegedly an agent of Freddie Mac, did not assert any of these facts or an affirmative defense of 12 U.S.C. §4617(j)(3) ("Federal Foreclosure Bar" or "Bar"). (1JA_0065-0068.) It was not until Nationstar filed its answer, almost a year later, that the Bank asserted that the Deed of Trust as to this Property was precluded from extinguishment by the Bar. (1JA_0070-0075.).)

The district court originally entered summary judgment in favor of SFR concluding that Nationstar lacked standing to raise the Bar as a defense.[10] The Bank appealed.[11] This Court authored a published opinion in that case, holding a servicer of a regulated entity (such as Freddie Mac) has standing to raise the Bar.[12] However, the Court remanded for the district court to determine (1) whether Freddie Mac had an ownership interest in the loan and (2) whether there was an actual, contractual

[10] *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. 247, 249, 396 P.3d 754, 756 (2017).

[11] *Id.*

[12] *Id*. at 758.

relationship between Nationstar and Freddie Mac.[13] The Court also remanded to allow Nationstar to introduce evidence to support any equitable claim.[14]

Following remittitur, and over SFR's objection, on July 19, 2017, the district court granted the Bank's motion to reopen discovery for 90 days—until October 17, 2017—to allow it to supplement disclosures and therefore, allow SFR to depose additional witnesses based on those disclosures. Despite having this extra time, the Bank failed to disclose Dean Meyer, an employee of Freddie Mac, or his Declaration. (4JA_0886-00962.)

On November 15, 2017, the Bank filed a Motion for Summary Judgment against SFR SFR's claims. (1JA_0083-2JA_0356.) In it, the Bank relied on Mr. Meyer's undisclosed declaration in an attempt to authenticate Freddie Mac's computer screen shots. (1JA_083-2JA_0356.) On November 16, 2017, SFR filed its Motion for Summary Judgment against the Bank on its claims and against the Bank's claims. (2JA_0358-4JA_0872.) On December 14, 2017, SFR opposed the Bank's Motion for Summary Judgment and filed a Countermotion to Strike the belatedly disclosed Declaration of Dean Meyer, employee of Freddie Mac, and all arguments related to it. (4JA_0886-0962.) The declaration executed on November

[13] *Id.*

[14] *Id.*

10, 2017, well after the close of the extended discovery period and well before it was ultimately belatedly disclosed on November 29, 2017, after hours, almost 45 days after the end of extended discovery. (*See* 1JA_0133-2JA_0288.)

Following full briefing and a hearing held on January 17, 2018, the district court took the matter under advisement, and issued its detailed minute order on January 31, 2018. (5JA_1128-1130.) The district court found that Nationstar was Freddie's servicer based on screen shots from Nationstar's computer system, and that SFR had not shown that FHFA had consented to the foreclosure and, therefore, the Bar applied. (5JA_1128-1140.).) Thus, it concluded that SFR took title to the Property subject to the deed of trust. (5JA_1132-1140.) As to the equity claims, the district court found that the Bank failed to provide actual evidence of fraud, oppression or unfairness as to the conduct of the sale and, therefore the sale was "commercially reasonable," that there was no basis to set aside the sale. (5JA_1138-1140.) The District Court also denied as moot SFR's Countermotion to Strike, based on its decision to determine Freddie's ownership based on the form deed of trust. (5JA_1130).

SFR appealed the District Court decision and ultimately this Court issued an order vacating and remanding the matter for further proceedings. This Court determined it could not affirm the District Court's summary judgment based solely

on the evidence provided similar to that in *Daisy Trust*[15]and the existing record in this case,[16] specifically because SFR sought to strike Dean Meyer as a witness and his accompanying declaration due to its late disclosure, and the District Court did not explicitly base its denial of SFR's motion to strike on a conclusion that the delayed disclosures were substantially justified or harmless.

On remand the parties filed supplemental briefing. (5JA_1165-6JA_1268.) After a hearing, the parties stipulated to reopen discovery. After some difficulty, SFR was eventually able to depose Dean Meyer, though Mr. Meyer willfully ignored and refused to prepare for multiple deposition topics. (7JA_1568-1571.) Nationstar moved for summary judgment (6JA1270-1536) and SFR opposed, also filing a renewed motion to strike based on Nationstar and Freddie Mac's refusal to fully cooperate in discovery, arguing that an ill-prepared deponent creating an obstacle to meaningful discovery into the declaration and summary screen shots did not mitigate the harm that had been caused by Nationstar's failure to disclose in the first place. (7JA_1538-9JA_2076.) In other words, SFR argued that the whole purpose of the second remand was to determine if the Court found Nationstar's

[15] *Daisy Trust v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 445 P.3d 846 (2019).

[16] Nationstar provided compute printouts from Freddie Mac's database and attempted to authenticate those printouts with a declaration from Dean Meyer, similar to what was deemed acceptable in *Daisy Trust*. However, in this case there were issues regarding the admissibility of said evidence.

failure to disclose Freddie Mac "harmless" and based on what had occurred since remand, not only was the failure disclosure NOT harmless, the harm had not been mitigated by additional discovery. (7JA_1538-9JA_2076.)

SFR explained Nationstar first refused to produce Freddie Mac without a subpoena. (7JA1538-1554; 1568-1571; 7JA1674-9JA2076.) Then, without obtaining a protective order, Freddie Mac refused to produce the documents SFR subpoenaed and refused to prepare for the topics listed in the notice. (7JA1538-1554, 1568-1571; 7JA1674-9JA2076.) SFR posited that if this Court did not intend for SFR to have the opportunity to challenge the "screen shots" upon which the late declaration had been based, it would not have remanded. (7JA1538-1554.) Nationstar and Freddie Mac's refusal to cooperate in discovery warranted striking the Meyer declaration. (7JA1538-1554.) SFR requested the Court find the failure to disclose was not harmless, nor substantially justified. (7JA1538-1554.) SFR further requested their refusal to participate in discovery meant that harm could not be mitigated. (7JA1538-1554.)

Finally, SFR argued it would still need to complete additional discovery even if the Meyer declaration and documents were not stricken, seeking 56(d) relief and asking the Court to compel production of the original, wet-ink signature promissory note, the production of the subpoenaed documents by Freddie Mac and further deposition testimony regarding the subpoenaed documents. (7JA_1556-1672.)

Upon consideration of the summary judgment briefing, as well as SFR's renewed motion to strike and motion to compel, the District Court concluded the late disclosure of Dean Meyer was harmless as SFR was permitted to depose Mr. Meyer during a reopened discovery period; but, the District Court did not address SFR's argument regarding the obstructionist behavior of Nationstar and Freddie mac during the reopened discovery period. (14JA_3233-3244.) Based on the same evidence it considered prior to the second remand, the District Court further concluded Freddie Mac was the owner of the Deed of Trust and Note at the time of the foreclosure sale and Nationstar was its servicer at relevant times. (14JA_3233-3244.) Finally, the District Court deemed SFR's motion to compel additional testimony and documents moot and therefore denied. (14JA_3240.)

STATEMENT OF FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

After this matter was remanded the second time, as a measure to mitigate the harm caused by Nationstar's failure to timely disclose Dean Meyer and his declaration and supporting documents, SFR was permitted additional discovery into Freddie Mac's alleged ownership of the loan and the servicing relationship between Freddie Mac and the record beneficiaries of the Deed of Trust. (14JA_3237.) Despite further discovery being ordered, upon request by SFR to Nationstar to produce Freddie Mac for deposition, Nationstar refused without a subpoena. (7JA_1538-1554, 1568-1571.) Due to the pandemic, it took additional time to subpoena Freddie

Mac, as well as MERS for documents needed to challenge the information contained in screen shots from Freddie Mac's system. (7JA_1568-1571.)

When a deposition was finally scheduled for Freddie Mac and topics in the deposition notice were provided, neither Nationstar nor Freddie Mac sought to meet and confer to object to any of the topics. (7JA_1538-1554, 1568-1571; 14JA_3191-3200.) Nor did either party seek or obtain a protective order for the deposition or subpoena duces tecum. (7JA_1538-1554, 1568-1571; 14JA_3191-3200.) Nonetheless, at the deposition, SFR was faced with a deponent in Mr. Meyer that intentionally did not prepare for topic 2 and 3 (contracts between Nationstar and Freddie Mac and custodial agreements between Freddie Mac and any document custodian related to the original promissory note). (7JA_1538-1554, 1568-1571; 14JA_3191-3200.) Similarly, Freddie Mac refused to produce documents related to the same topics. (7JA_1538-1672; 14JA_3191-3200.)

Based on Freddie Mac's and Nationstar's refusal to cooperate in discovery, SFR renewed its motion to strike the Meyer declaration, requesting the District Court find that the failure to disclose was not harmless, nor substantially justified and that Nationstar's and Freddie Mac's refusal to participate in discovery meant that the harm could not be mitigated. (7JA_1538-1554, 1568-1571.) SFR further sought 56(d) relief as an alternative, compelling production of the original Note and servicing contracts. (7JA_1556-1672.) SFR took the position that to be able to

meaningfully challenge the summary screen shots attached to the Meyer Declaration, SFR needed access to the actual contracts upon which the screen shots were based. (7JA_1538-1672.) This was particularly true because, in the limited discovery SFR was able to obtain, SFR received a portion of the documents it subpoenaed from MERS regarding the loan.[17] (7JA_1571.) MERS is the registration and tracking system that banks use instead of recording every assignment of the Deed of Trust in the public records. (7JA_1666-162.) The MERS system tracks both the transfer of servicing rights and the transfer of the investor rights. (7JA_1666-162.) The investor is the owner of the loan. The servicer is the entity that conducts the day-to-day operation of the loan, interacting with the borrower, collecting payments, and protecting the deed of trust. (7JA_1538-1554, 1666-1672.) **The MERS milestones in this case contradict the Meyer Declaration in that it does not show Freddie Mac obtaining an interest in 2005**. (7JA_1666-1672.) The loan in this case was originated by KB Home Mortgage Corporation. According to the MERS milestones, in 2005, the beneficial rights were transferred from KB Home Mortgage Company to Bank of America, N.A., not Freddie Mac. (7JA_1666-1672.) The servicing rights were not transferred from KB Home Mortgage Company to

[17] Due to problems beyond SFR's control including problems obtaining a subpoena from Virginia during the pandemic and subsequent service issues that SFR only became aware of after it was too late to reserve the subpoena.

Bank of America, N.A. until 2007. (7JA_1666-1672.) In addition, there was no transfer in the MERS system to Freddie Mac until April 24, 2012. (7JA_1666-162.) Nationstar is not mentioned anywhere in the MERS milestones. (7JA_1666-162.)

Further, summary screen shots show the loan as "inactive" beginning in 2012. (1JA_083-2JA_0356.) According to the servicing guide, "Inactivation is the process the Servicer may complete to suspend remitting funds to Freddie mac for a Mortgage in foreclosure." (2JA_0155-0241.) However, there are no publicly recorded documents evidencing a foreclosure.

Finally, the screen shot purporting to show Nationstar as the current servicer contradicts Nationstar's sworn testimony that it purportedly has a written power of attorney with Freddie Mac. *See* (1JA_0146-0147.) (noting "NO" next to "Power of Attorney). The purported "Loan Status *Manager* Mortgage Payment History Report" attached as Ex. 5 to Bank's Ex. B (1JA_0148-0153), has disappearing columns, numbers that simply do not add up and was also generated in July 2017. Further, the same document shows the loan as "inactive" in November 2012, before the foreclosure sale and shortly after Nationstar was supposed to have become the servicer. (1JA_0148-0153.)

SUMMARY OF ARGUMENT

According to the Supreme Court of the United States, the structure of the FHFA violates the separation of powers and is therefore, unconstitutional. Under

Collins, SFR has standing to challenge decisions and to seek retroactive damages for decisions made under this unconstitutional structure, including the decision to significantly change the prior policy of consent to the operation of state super lien laws while maintaining a policy of hiding the potential application of §4617(j)(3) without any means to obtain consent even if the purported interest were not hidden. To the extent Nationstar proves ownership by Fannie Mae and a servicing relationship, the unconstitutional structure of the FHFA requires remand for consideration of damages caused by the actions of the Director.

Besides the constitutional issue that requires remand, reversal is justified here for several reasons. First and foremost, the District Court erred in determining that Nationstar's failure to disclose Dean Meyer and his declaration was harmless, essentially mitigated by allowing additional discovery in the form of a deposition of Mr. Meyer. As explained herein, aside from making it extremely difficult to ensure Mr. Meyer's appearance at deposition, once he did appear, Mr. Meyer came intentionally unprepared to answer specific questions directly related to topics upon which SFR had noticed the deposition. Moreover, Freddie Mac refused to produce subpoenaed documents that SFR sought in its challenge to the summary screenshots and declaration upon which this Court primarily relied in making its decision. By denying SFR's renewed motion to strike and relying on the evidence that SFR sought to strike in making its decision that Freddie Mac owned the loan at the time of the

foreclosure sale and Nationstar serviced the loan on behalf of Freddie Mac, the District Court improperly deprived SFR of the complete discovery necessary to mitigate any harm caused by the original failed disclosure by Nationstar. The District Court's use of evidence that should have been stricken was in error. To add to that error, the District Court then concluded SFR's Motion to Compel production was moot and therefore denied the same.

After this appeal, this Court determined the applicable limitations period under HERA's statute-of-limitations provision for claims such as those made here is six (6) years.[18] While SFR disagrees with the ultimate conclusion in *Morning Springs*, the opinion changes the game with regard to what is required to prove an ownership interest and servicing relationship in a §4617(j)(3) claim. *Berezovsky* and other cases have found that evidence similar to that at issue here was sufficient to prove a GSE's property interest and its agency relationship; but, *M&T Bank* and *Morning Springs* changed the focus on the ownership question, and should be read to require the production of the original wet-ink signature promissory note in order for a servicer to establish the ownership element.

All told, at best, Nationstar has failed to prove via admissible evidence Freddie Mac's alleged ownership interest, which is Nationstar's burden to prove. At a

[18] *Morning Springs*, 475 P.3d at 58.

minimum, there are genuine issues of material fact which prevented this Court from granting summary judgment. Thus, even with consideration of the evidence that should have been stricken, this Court should not have granted Nationstar's Motion for Summary Judgment. In addition to the admissibility problem and conflicting evidence in the form of MERS documents, the most recent Nevada Supreme Court and Ninth Circuit decisions suggest something more than what was required to prove ownership under *Daisy Trust* is now necessary.

STANDARD OF REVIEW

While this Court reviews "summary judgment de novo, without deference to the findings of the lower court[,], "[19] summary judgment is only appropriate with the moving party is entitled to judgement as a matter of law.[20] In ruling on a motion for summary judgment the court must view all evidence and reasonable inferences drawn from it in the light most favorable to the non-moving party.[21]

The evidence in support of a motion for summary judgment must be admissible. NRCP 56(e).

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[19] *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[20] *Id.* at 731, 121 P.3d at 1031; *see also* NRCP 56(c).

[21] *Humphries v. New York-New York Hotel & Casino*, 133 Nev. 607, 609, 403 P.3d 358, 360 (2017), *citing Wood*, 121 P.3d at 1029.

ARGUMENT

12 U.S.C. §4617(j)(3), part of HERA, provides that "[n]o property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency." The Supreme Court of the United States recently found the structure of the FHFA as set forth in HERA violates the separation of powers, therefore making it unconstitutional. Even if this Court finds the District Court properly evaluated the evidence and found ownership by Freddie Mac and a servicing relationship with Nationstar, this case must still be remanded for further proceedings because of the damages, or harm, the unconstitutional structure caused SFR.

The decision by the Director of the FHFA to depart significantly from its previous policy of allowing state super lien laws to operate against deeds of trust caused harm to SFR. Not only was this significant change in policy decision made after the Association sale took place, but the FHFA had and continues to maintain a policy of actively hiding any involvement with deeds of trust in the public record without having any meaningful process to seek consent if anyone somehow stumbled across FHFA's involvement.

But before the district court reaches the constitutionality issue, it must first evaluate the evidence of Freddie Mac's alleged ownership and Nationstar's

purported servicing relationship. *Berezovsky* and its progeny are based on a simple principle: for a servicer to assert a §4617(j)(3) claim, it must prove Freddie Mac's purported "property interest is valid and enforceable under Nevada law," and this purported "interest" is that of the FHFA, based on the FHFA's acquisition of Fannie Mae's property interest.[22]

Berezovsky makes clear that invocation of §4617(j)(3) is contingent upon "the note owner's power to enforce its interest under the security instrument."[23] Proving Freddie Mac has "power to enforce" interest under the "security instrument"—*i.e.*, the DOT—means proving Freddie Mac has the power to foreclose. *Berezovsky* makes this clear when discussing cases such as the instant one where the Note and DOT are split: "an 'agency relationship' with the recorded beneficiary **preserves the note owner's power to enforce its interest under the security instrument, because the note owner can direct the beneficiary to foreclose on its behalf**."[24]

While *Berezovsky* and other cases have found that evidence similar to that at issue here was sufficient to prove a GSE's property interest and its agency relationship, *Morning Springs* and *M&T Bank* changed the legal landscape on the ownership question, and required the production of the original wet-ink signature

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[22] *Berezovsky*, 869 F.3d at 926-27, 932.

[23] *Id.* at 932.

[24] *Id*. (emphasis added).

promissory note in order for servicers to establish the ownership element. More importantly, in cases like this one, where there are serious issues as to the admissibility of the declaration upon which the Court relies almost entirely to determine Freddie Mac's ownership at the time of an association foreclosure sale, a court must evaluate whether the obstruction of discovery created an obstacle to discovery that precluded mitigation of any harm caused to SFR by Nationstar's initial failure to properly disclose its primary witness and supporting documentation of that witness.

The District Court here did not even address the roadblocks to discovery put forth by Nationstar and Freddie Mac. Nor did the District Court even discuss SFR's motion to compel. Consequently, this Court should remand to allow proper evaluation of Freddie Mac's ownership and Nationstar's servicing claims under the current authority and after full evaluation of Nationstar and Freddie Mac's obstructionist behavior and failed production of subpoenaed documents.

I. THE FHFA'S STRUCTURE IS UNCONSTITUTIONAL, REQUIRING REMAND FOR THE DISTRICT COURT TO CONSIDER SFR'S DAMAGES FOR ACTIONS TAKEN BY THE DIRECTOR, IF IN FACT, FHFA HAD ANY INTEREST SUBJECT TO 4617(j)(3).

On Wednesday, June 23, 2021, the Supreme Court of the United States issued its opinion in *Collins v. Yellen,* determining that the FHFA's structure as set forth in HERA violates the separation of powers and is therefore, unconstitutional. The U.S.

Supreme Court did not agree with the Fifth Circuit that the offending provision in §4617 should be severed from the rest of HERA. While the U.S. Supreme Court did not void every action taken by the Director of the FHFA under the unconstitutional structure, it did find that the parties may be entitled to retrospective relief. It explained,

> Although an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment), it is still possible for an unconstitutional provision to inflict compensable harm.[25]

In *Collins*, the U.S. Supreme Court remanded for the district court to consider any remedy for compensable harm inflicted by the unconstitutional provision in HERA.[26]

Here, SFR has been harmed by the Director's decision in late-2014/early-2015 to go against previous policies and practices of implicit consent to foreclosure under state super lien laws.[27]

In May 2016, Senator Elizabeth Warren and other members of Congress sent a letter to FHFA director, Mel Watts expressing concern over his decision to

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[25] *Collins*, Case No. 19-422, 594 U.S. __, p. 35.

[26] *Id*.

[27] https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx(last accessed July 26, 2021).

implement this new policy to run over state super priority laws with §4617(j)(3) in Nevada and across the nation.[28] As recognized in the letter, this decision represented a "significant shift in policy" with widespread impact.[29] This decision to change from a policy of consent to the operation of state super-lien laws is evidenced by the provisions in Fannie Mae's 2012 servicing guide requiring that its loan servicers must "protect the priority of the mortgage lien and[] clear all liens for delinquent homeowners' association dues and condo assessments."[30] The servicing guide also "required servicers to advance funds when the servicer is notified by [a community association] that the borrower is 60 days delinquent in the payment of assessments or charges levied by the association if necessary to protect the priority of Fannie Mae's mortgage lien."[31] It would not make sense that FHFA would require the loan servicers to protect the priority of its liens and reimburse them for doing it if FHFA did not intend for state super lien laws to operate. It would not make sense for the

[28] May 12, 2016 Letter to Mel Watts, FHFA Director, from Senator Elizabeth Warren and other Members of Congress, https://www.warren.senate.gov/files/documents/2016-5-12_MA_delegation_ltr_to_FHFA.pdf (last accessed July 1, 2021).

[29] *Id.*

[30] *Id.* at p. 2; *see also* Fannie Mae Servicing Guide Announcement SVC-2012-05, https://singlefamily.fanniemae.com/media/19006/display (last accessed July 1, 2021)

[31] *Id.*

FHFA to maintain a practice of actively hiding any interest in real property in the public record and to fail to implement a procedure to obtain consent if it did not intend for its servicers to protect the priority of any of its liens. This is because one of FHFA's obligations is to ensure that "the operations and activities of each regulated entity foster liquid, efficient, competitive, and resilient national housing finance markets." [32] This is particularly true because a GSE's ownership of loans is not limited to those secured by a first deed of trust.[33]

The Supreme Court of the United States makes it clear that decisions and actions taken by the Director of the FHFA under its unconstitutional structure are called into question. While every action is not automatically void, the unconstitutional provision can give rise to compensable harm. Accordingly, this Court should remand for further proceedings regarding the compensable harm to SFR in this case should the Nationstar prove Freddie Mac's ownership and their alleged agency relationship.

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[32] *Id.*

[33] *See* Nevada Supreme Court Case No. 79306

II. THE DISTRICT COURT ERRED IN FINDING FREDDIE MAC "OWNED THE LOAN" AND HAD A SERVICING RELATIONSHIP WITH NATIONSTAR SUCH THAT THE FEDERAL FORECLOSURE BAR APPLIED TO PRECLUDE EXTINGUISHMENT OF THE DOT.

A. Production of the Wet-Ink Signature Promissory Note and Any Servicing Agreements Between Freddie Mac and Servicers Is Required For Nationstar To Meet Its Burden To Prove The Applicability of §4617(j)(3).

Compelling production of the original wet-ink signature promissory Note when sought by SFR should have been required by the District Court. In light of the focus placed by this Court's decision in *Morning Springs* on the contracts related to this litigation, both the Note and any servicing contract that establishes the servicing relationship between Nationstar and Freddie Mac must be produced in this action before Nationstar can prevail. Requiring production of the original wet-ink signature promissory note and any servicing agreements is fully justified by *Morning Springs* as well as the Ninth Circuit's decision in *M&T Bank*.

Prior to *M&T Bank* and *Morning Springs*, evidence similar to that proffered by Nationstar here has accepted as sufficient to prove Freddie Mac's property interest.[34] But, the issuance of the *Morning Springs* and *M&T Bank* opinions

[34] Due to the factual and procedure differences in most of those cases as compared to *Berezovsky*, SFR disagrees that *Berezovsky* is dispositive on the issue of whether Rule 56(d) relief denial is properly within a district court's discretion, but that is not SFR's argument here. The argument in this case is based on a change in this Court's law and actual evidence presented in this case calling into question Fannie Mae's evidence.

completely altered the legal landscape—it changed the circumstances upon which the Bank and the Courts had previously relied upon to refuse to produce/compel production of the Note and to consider the Guide sufficient to establish an agency relationship between Freddie Mac and any servicer. Basic legal principles dictate that a litigant involved in an action based on contract—here, the Note—must produce said contract—the Note.[35] For this reason, remand is necessary for the District Court to compel production based on new authority.

In *Morning Springs*, this Court, relying on the Ninth Circuit's opinion in *M&T Bank* characterizing a quiet title claim based on §4617(j)(3) as a claim sounding in contract, and noting that "[a]lthough there is no contract between SFR and the plaintiffs, the quiet title claims are entirely 'dependent' upon Freddie Mac's lien on the Property, an interest created by contract,"[36] determined that claims seeking to enforce §4617(j)(3) sound more in contract than in tort.[37] This Court specifically focused on the concept that despite the lack of contract between the parties in

[35] Similar to the Note, Nationstar is required to prove its contractual relationship with Freddie Mac. To do so, Nationstar must provide the actual contract—the servicing agreement between the parties. Based on the premise in *Morning Springs* and *M&T Bank*, the Guide should not be considered sufficient to prove an actual contractual relationship between a particular servicer (Nationstar) and Freddie Mac.

[36] *M&T Bank*, 963 F.3d at 858 (citations omitted).

[37] *Morning Springs*, 475 P.3d at 56 (*citing M&T Bank*, 963 F.3d at 858).

Morning Springs, like in *M&T Bank*, "the quiet title claims [asserted by Nationstar] are entirely 'dependent' upon Freddie Mac's liens on the Property, an interest created by contract."[38] The lien on the property is the deed of trust—the deed of trust is the interest created by the "contract"—the contract is the promissory note. In other words, in a case like this one, Nationstar's claims are entirely dependent on the Deed of Trust, an interest created by the Note.

It follows that any fatal defect in the Note affecting the underlying debt that the DOT secures, will render the "interest" secured by the DOT, and Freddie Mac's purported interest, a nullity. In other words, if there is a problem with the Note, Freddie Mac's lien interest, upon which its declaratory relief claim is "entirely dependent," will be non-existent. If the Note is invalid for any reason, or if it shows on its face that Freddie Mac did not own, control, and/or have possession of the Note at the time of sale, it is clearly relevant to the ownership prong Servicers' have to prove for their invocation of §4617(j)(3) under *Berezovsky*. This includes the possibility that the note contains blank endorsements, dated or undated, that will require Servicers to show Freddie Mac—or its agent with sufficient proof of agency—held and possessed the blank-endorsed note at the time of sale. Combined with the uncertainty surrounding the declaration of Dean Meyer that potentially

[38] *Id.*

eliminates all the evidence generally proffered to establish Freddie Mac's purported ownership and a servicing relationship, production of the Note becomes even more essential.

Without the ability to inspect the original wet-ink Promissory Note, endorsements, and any allonge, the question of ownership at the time of the foreclosure sale cannot be definitively answered. And without Freddie Mac's ownership at the relevant time, §4617(j)(3) cannot be used to revive or preserve a deed of trust.

Thus, production of the Note is absolutely essential. The other records in the case cannot provide the essential information provided by the Note. Unlike other information within the servicing records (*i.e.*, the screenshots) used to prove Freddie Mac's purported ownership—which can potentially be fully discredited by the fact that the declaration and declarant obstructed further discovery into said documents—those screenshots and servicing records include nothing valid about who has possession, nor the endorsements on the Note. The endorsements on the Note, as well as who is in possession of same, is of the utmost importance in this context; if Nationstar/Freddie Mac either did not have possession of the Note, and/or the Note is specially endorsed to someone else, §4617(j)(3) is wholly inapplicable. As SFR was never given the opportunity to review the original, wet-ink promissory note here, it cannot verify this information.

At bottom, since *Morning Springs* is deemed authority, Nationstar has to provide proof of the applicability of §4617(j)(3) by way of the underlying Note and relevant servicing agreements. By classifying the Note as the "contract" upon which a §4617(j)(3) claim relies and thus determining such a claim is subject to a 6-year statute of limitations, and classifying the claims in the case as sounding in contract, these opinions created an absolute need to allow for inspection of the Note, as well as production of the actual servicing agreements between Freddie Mac and Nationstar.

This matter should be remanded to the District Court to address any issues created by *Morning Springs* and *M&T Bank* relating to production of documents and analysis of factual information regarding Nationstar's ability to prove Freddie Mac's ownership of the loan at the time of the foreclosure sale and to adequately prove an an agency relationship as required under *Berezovsky*.[39]

B. The District Court Failed to Properly Consider the Preclusion of Dean Meyer Based on Nationstar and Freddie Mac's Obstruction of the Discovery That Exacerbated the Exact Harm This Matter Was Remanded to Consider.

The district court allowed Nationstar and Freddie Mac to flout discovery rules with impunity. After remand to consider the harm caused to SFR by the late

[39] *Berezovsky*, 869 F.3d at 932-33.

disclosure of the Dean Meyer and his declaration, the District Court—in theory—allowed Nationstar and Freddie Mac to cure any harm by permitting further discovery. However, in reality, the harm to SFR was exacerbated by Nationstar and Freddie Mac's continued refusal to follow the rules.

NRCP 37(c)(1) prohibits the of the use of witnesses or evidence not properly disclosed pursuant to NRCP 16.1, 16.2 or 26(e)(2) without substantial justification or a showing is made that such failure to disclose was harmless. Despite the prohibition in NRCP 37(c)(1), Nationstar did not disclose Dean Meyer or his Declaration but nonetheless included the witness declaration in its motion for summary judgment. On remand to address the harm caused by SFR due to the failed disclosure, Nationstar provided zero explanation as to how failure to disclose the witnesses during discovery was substantially justified or harmless. Instead, further discovery was ordered. However, from the moment further discovery was ordered, Nationstar and Freddie Mac made it all but impossible for SFR to conduct the additional discovery necessary to gather the evidence to call into question the screenshots and cast doubt on the Meyer declaration.

Initially, Nationstar and Freddie Mac placed an obstacle in SFR's way of deposing Dean Meyer by requiring he, as well as any documents, be subpoenaed despite Nationstar's claimed position as the agent/servicer acting on behalf/stepping in the shoes of of Freddie Mac/FHFA and being in "possession, custody or control"

of the documents. Then, when a deposition was finally arranged and conducted, SFR was faced with a witness that intentionally avoided preparing for certain deposition topics and refused to provide documents related to said topics. If Nationstar/Freddie Mac wanted to be protected from the topics, it should have met and conferred in advance of the deposition and/or filed a motion for protective order. Simply refusing to properly prepare put SFR at a disadvantage because SFR was unable to obtain answers from Meyer regarding the many of the facts and issues in this case, which were essential to be able to challenge the evidence on which the District Court ultimately relied. The lack of meaningful discovery obtained as a direct result of the behavior of Nationstar and Freddie Mac make the harm to SFR by the initial non-disclosure, as well as the lack of mitigation, readily apparent. The fact is, the District Court did not even consider the obstruction by Nationstar and Freddie Mac is denying SFR's Motion to Strike and determining no harm was caused to SFR because a deposition was ultimately conducted. This failed analysis by the District Court warrants reversal of the summary judgment in favor of Nationstar. This is especially true given that the District Court relied primarily on Dean Meyer's declaration and the corresponding docs to make its determination that Freddie Mac owned the loan at the time of the Sale and Nationstar serviced the loan at all relevant times. The District Court erred in considering Meyer's declaration because Nationstar failed to follow the rules of civil procedure.

Besides, even with the Meyer information, *Morning Springs* created the need for further production of documents on the part of Nationstar. For that reason, the District Court should have considered SFR's motion to compel instead of deeming it moot and therefore denied.

All told, the District Court should not have considered Meyer's declaration. The Nevada Supreme Court recently affirmed a District Court's order that declined to consider a declaration that was not provided during the discovery period.[40] And in doing so, affirmed that Nationstar could not invoke §4617(j)(3) to its benefit. This Court should remand with instructions to the District Court to reevaluate Nationstar's claims without consideration of the undisclosed declarant, as well as after compelling production of the original wet-ink signature promissory Note and any relevant servicing contracts/agreements.

CONCLUSION

For the reasons set forth above, the District Court's ruling should be reversed and the matter remanded either to enter judgment in favor or SFR or for further development and briefing regarding ownership of the loan, servicing relationships during all relevant times, and the application of §4617(j)(3) without consideration of the Meyer Declaration and after compelling the Note and servicing agreements.

[40] *See Green Tree Servicing, LLC v. SFR Investments Pool 1, LLC,* 435 P.3d 666 (Nev. 2019) (unpublished disposition) ("*Grey Spencer*").

To the extent Nationstar proves §4617(j)(3) applies, the District Court should determine what damages were caused to SFR by the unconstitutional structure of HERA.

DATED this 28th day of July, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 28 pages long, and contains 6108 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), 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.

…

…

4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2021, I filed the foregoing **OPENING BRIEF FOR SFR INVESTMENTS POOL 1, LLC and JOINT APPENDICIES VOLUMES 1-14**, which shall be served in accordance with the Master Service List found on the Court's eFlex system.

/s/ *Candi Fay*
an employee of Kim Gilbert Ebron