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.	Case No. 82078

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APPEAL
From the Eighth Judicial District Court, Clark County
The Honorable Mary Kay Holthus, District Judge
District Court Case No. A-13-684715-C

RESPONDENT'S ANSWERING BRIEF

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Docket 82078 Document 2021-27815

NRAP 26.1 DISCLOSURE STATEMENT

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

Nationstar Mortgage LLC, a Delaware limited liability company, is an indirect, wholly-owned subsidiary of a publicly-traded company, Mr. Cooper Group Inc. (formerly known as WMIH Corp.), a Delaware corporation. Nationstar is directly owned by two entities: (1) Nationstar Sub1 LLC (Sub1) (99%) and (2) Nationstar Sub2 LLC (Sub2) (1%). Both Sub1 and Sub2 are Delaware limited liability companies. Sub1 and Sub2 are both 100% owned by Nationstar Mortgage Holdings Inc. NSM Holdings is a wholly-owned subsidiary of Mr. Cooper. More than 10% of the stock of Mr. Cooper is owned by KKR Wand Investors Corporation, a Cayman Islands corporation.

These representations are made so this court may evaluate possible disqualification or recusal.

Dated: September 27, 2021 AKERMAN LLP

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(1). The Order granting Respondent Nationstar Mortgage, LLC's (**Nationstar**) Motion for Summary Judgment was entered on October 6, 2020, and notice of entry was served that same day. 14JA_3216–31. That Order resolved all claims remaining on remand. SFR Investments Pool 1, LLC (**SFR**) timely appealed on November 5, 2020. 14JA_3252–54; *see* NRAP 4(a)(1) (notice of appeal must be filed "no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served").

ROUTING STATEMENT

This appeal is presumptively retained by this Court because it raises a question of statewide public importance. NRAP 17(a)(12). SFR agrees that this appeal raises questions of statewide public importance, though it cites to the wrong subsection of the Rules in support of that statement. *See* Appellant's Opening Br. (**AOB**) at vii & n.2 (citing NRAP 17(a)(2), which discusses ballot or election questions). SFR also claims that the Court should hear this case because it raises "issues of first impression," incorrectly citing NRAP 17(a)(13)–(14). *Id.* The correct provision is NRAP 17(a)(11). Nationstar does not agree with the substantive arguments and assertions SFR makes in its routing statement. *See id.* at vii–x.

INTRODUCTION

This appeal involves a fact pattern familiar to the Court: A purchaser of property sold at a homeowners' association foreclosure sale contends that it acquired free-and-clear title because, under NRS 116.3116, the HOA sale purportedly extinguished a deed of trust encumbering the property at the time of the foreclosure. But because the Federal Home Loan Mortgage Corporation (**Freddie Mac**) owned the deed of trust (**Deed of Trust**) at the time of the foreclosure sale, a federal statute precludes that result here. Specifically, the Housing and Economic Recovery Act of 2008 (**HERA**), Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq*.), provides that property, including lien interests, of Freddie Mac and the Federal National Mortgage Association (**Fannie Mae**, and together with Freddie Mac, the **Enterprises**) cannot be extinguished by any foreclosure process without the Federal Housing Finance Agency's (**FHFA** or the **Conservator**) consent while the Enterprises are under FHFA's conservatorship. 12 U.S.C. § 4617(j)(3) (the **Federal Foreclosure Bar**).

The district court correctly entered judgment for Nationstar (Freddie Mac's loan servicer) after concluding that the Federal Foreclosure Bar protected the Deed of Trust from extinguishment. 14JA_3220–28. The district court's holding was based on its determination that Freddie Mac owned the Deed of Trust at the time of the foreclosure sale and that FHFA did not consent to the Deed of Trust's

extinguishment. *Id*. The court thus properly concluded that SFR's property interest is "subject to the [Deed of Trust]." 14JA_3228.

On appeal, SFR offers a new argument that was not pressed or passed on below, because it pertains to a claim SFR never asserted. Specifically, SFR cites a provision in HERA stating that FHFA's Director can be removed only for cause, which the Supreme Court held unconstitutional in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), because it violated separation-of-powers principles. According to SFR, that element of FHFA's structure somehow harmed SFR in relation to the property at issue and might entitle it to a monetary award. Not so. The removal provision is irrelevant to this case, and SFR's attempt to leverage it to prolong this litigation is procedurally improper and substantively unfounded. The Court should decline SFR's invitation to remand the case on that issue.

SFR also asserts several evidentiary challenges related to the district court's ruling that the Federal Foreclosure Bar protected the Deed of Trust. Those arguments are similarly unavailing. *First*, SFR misreads two recent decisions to purportedly require Nationstar to produce the original wet-ink promissory note and servicing agreement to establish Freddie Mac's ownership of the loan and relationship with its loan servicers. *Second*, SFR misapplies the rules of discovery when it argues that the district court erred in considering the declaration of Freddie

Mac witness Dean Meyer, which was submitted as an exhibit to Nationstar's motion for summary judgment.

Additionally, the HOA's trustee never sent Nationstar the Notice of Sale, and the sale should alternatively set aside for equitable reasons because the HOA sold the property for a grossly inadequate price at an unfair sale.

This Court should affirm.

STATEMENT OF THE ISSUES

I. *Collins*-Based Arguments

A. Whether SFR may inject a new issue into this litigation where it did not present that issue at any point in the district court proceedings.

B. Whether the case should be remanded for consideration of a new claim, irrelevant to those SFR has asserted thus far in this litigation: namely, that HERA's for-cause removal provision harmed its interest in the property.

II. Evidentiary Arguments Regarding the Federal Foreclosure Bar

A. Whether Nationstar must produce the wet-ink promissory note or loan-specific servicing agreements between Freddie Mac and its servicers to establish Freddie Mac's loan ownership and relationship with those servicers.

B. Whether the district court abused its discretion in admitting Nationstar's evidence establishing Freddie Mac's property interest.

III. State Law Grounds

A. Whether equity provides an alternative ground for affirmance where the HOA's trustee never sent Nationstar the Notice of Sale and the HOA sold the property for a grossly inadequate price at an unfair sale.

STATEMENT OF THE CASE

In the district court, the parties presented a garden-variety Federal Foreclosure Bar case. SFR asserted no claim, and offered no argument, regarding FHFA's structure. The district court found that at the time of the HOA foreclosure sale, Freddie Mac owned the promissory note and Deed of Trust on the subject property that secured repayment of the note, and that FHFA did not consent to the extinguishment of the Deed of Trust through the HOA foreclosure sale. Applying the same reasoning this Court has endorsed in several decisions—including *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846 (Nev. 2019) (en banc), and *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 417 P.3d 363 (Nev. 2018) (en banc)—the district court held that because the Federal Foreclosure Bar protected Freddie Mac's Deed of Trust from extinguishment, SFR took title subject to the Deed of Trust. 14JA_3220–28.

This appeal followed.

STATEMENT OF FACTS

I. The Secondary Mortgage Market

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). Freddie Mac's federal statutory charter authorizes it to purchase and deal only in secured "mortgages," not unsecured loans. *See* 12 U.S.C. §§ 1451(d), 1454.

Freddie Mac does not directly manage many of the practical aspects of mortgage relationships, such as day-to-day borrower interactions; instead, it contracts with servicers to act on its behalf. In that role, servicers often appear as record beneficiaries of deeds of trust. *See Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 757–58 (Nev. 2017) (acknowledging servicers' role); *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 in the secondary mortgage market designate their servicer to be assignee of the mortgage); Freddie Mac's Single-Family Seller/Servicer Guide (the **Guide**) at 1101.2(a) (discussing Freddie Mac's relationship with servicers to manage the loans Freddie Mac purchases).[1] In

[1] Relevant portions of the Guide were submitted with Nationstar's motion for summary judgment. *See* 6JA_1337–1419. This Court may also take judicial notice of the Guide. *E.g.*, *Daisy Trust*, 445 P.3d at 849 n.3 (taking judicial notice of Freddie Mac's servicing guide on appeal). The Guide is "generally known," especially by members of the mortgage lending and servicing industry in Nevada,

Footnote continues on next page.

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.*, *In re Montierth*, 354 P.3d 648, 650–51 (Nev. 2015) (en banc); *Daisy Trust*, 445 P.3d at 849.

Freddie Mac and its servicers also work with Mortgage Electronic Registration Systems, Inc. (**MERS**), whose parent company MERSCORP Holdings, Inc. owns and operates the MERS® System, 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). For loans tracked in the MERS® System, MERS is the lien holder of record in the land records for the security instrument that secures the loan. 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

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and "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." NRS 47.130(2). An interactive version of the current Guide is publicly available on Freddie Mac's website at https://guide.freddiemac.com/app/guide. A static, PDF copy of the current Guide is available at https://guide.freddiemac.com/ci/okcsFattach/get/1002095_2 and archived prior versions of the Guide are available at https://guide.freddiemac.com/app/guide/archive. While the cited sections of the Guide have been amended over the course of Freddie Mac's ownership of the Loan, none of these amendments have materially changed the relevant sections.

deed of trust. *See In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 776 (9th Cir. 2014); *Daisy Trust*, 445 P.3d at 849.

II. Statutory Background

HERA established FHFA as the Enterprises' regulator, authorized its Director to place the Enterprises into conservatorships in certain circumstances, and enumerated the powers, privileges, and exemptions FHFA possesses as Conservator. In September 2008—at the height of the financial crisis—FHFA's Director placed the Enterprises into conservatorships, where they remain today. *See Nationstar*, 396 P.3d at 755.

The Federal Foreclosure Bar—a broad statutory "exemption," captioned "Property protection," within HERA's conservatorship provision—mandates that when the Enterprises are under FHFA conservatorship, "[n]o property of the Agency shall be subject to … foreclosure … without the consent of the Agency …." 12 U.S.C. § 4617(j)(3). Another HERA provision mandates that upon the inception of conservatorship, FHFA succeeds immediately and by operation of law to "all rights, titles, powers, and privileges" of the entity in conservatorship "with respect to [its] assets," thereby making all conservatorship assets "property of the Agency" for the duration of the conservatorship. *See* 12 U.S.C. §§ 4617(b)(2)(A), (j)(3).

III. Facts Specific to the Property at Issue

This case involves a Deed of Trust securing a $271,638 promissory note (the **Note**) (together with the Deed of Trust, the **Loan**) on property located at 668 Moonlight Stroll Street in Henderson, Nevada, 89015 (the **Property**).[2] 1JA_108–131. The Deed of Trust, recorded in July 2005, lists Ignacio A. Gutierrez (**Borrower**) as the borrower, KB Home Mortgage Company (**Lender**) as the lender, and MERS as beneficiary "acting solely as a nominee for Lender and Lender's successors and assigns." 1JA_109. Freddie Mac purchased the Loan in August 2005, thereby acquiring ownership of the Note and Deed of Trust.[3] 1JA_133–39 ¶ 5(d); 1JA_141. In April 2012, MERS assigned the Deed of Trust to Bank of America, N.A. (**BANA**). 1JA_143; 1JA_145; 2JA_290–91. In November 2012, BANA recorded an assignment of the Deed of Trust to Nationstar. 2JA_293.

According to a Foreclosure Deed recorded on April 8, 2013, SFR purchased the Property at a homeowners' association foreclosure sale (**HOA Sale**) on April 5, 2013 for $11,000. 2JA_307–08. At the time of the HOA Sale, Freddie Mac

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[2] SFR states that the property is located at 663 Moonlight Stroll Street. AOB at 1. Nationstar presumes this is a typo; the Deed of Trust reflects that the correct address is 668 Moonlight Stroll Street. *See* 1JA_108–31.

[3] SFR states that the term "Freddie Mac" as used throughout its brief refers to the "Federal National Mortgage Corporation." AOB at 2. Nationstar presumes this is a scrivener's error; it is the Federal Home Loan Mortgage Corporation that owns the Loan at issue in this case.

owned the Loan and Nationstar served as record beneficiary of the Deed of Trust in its capacity as Fannie Mae's Loan servicer. *See* 1JA_133–47; 2JA_290–91; 2JA_293; 2JA_295–97. Nationstar continues to service the Loan for Freddie Mac today. *Id*.

At no time did the Conservator consent to the HOA Sale extinguishing or foreclosing Freddie Mac's interest in the Deed of Trust. To the contrary, FHFA has publicly stated that it "has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection with HOA foreclosures of super-priority liens." 2JA_356 (FHFA's Statement on HOA Super-Priority Lien Foreclosures (**2015 Statement**) (Apr. 21, 2015), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx).

IV. Relevant Procedural History

In July 2013, Borrower filed a complaint against SFR and other parties seeking a declaratory judgment setting aside the HOA Sale. 1JA_1–10. SFR then filed a third-party complaint against Nationstar seeking to quiet title to the Property. 1JA_12–26. Nationstar raised the Federal Foreclosure Bar as an affirmative defense in its Answer. 1JA_70–75. The district court entered summary judgment for SFR on the grounds that Nationstar lacked standing to assert the Federal Foreclosure Bar. *Nationstar*, 396 P.3d at 756. This Court

reversed, holding that HERA allows an authorized servicer to raise the Federal Foreclosure Bar on FHFA's behalf, and remanded for a determination as to the nature of Nationstar's relationship with Freddie Mac. *Id.* at 757–58.

In July 2017, the district court reopened discovery for a 90-day period. 1JA_77–81. Nationstar and SFR filed cross-motions for summary judgment. SFR then moved to strike certain evidence on which Nationstar relied: a declaration by a Freddie Mac witness (Dean Meyer) explaining and authenticating Freddie Mac's business records. The district court entered summary judgment for Nationstar and denied SFR's motion for summary judgment, without explicitly denying SFR's motion to strike. 5JA_1128–30. SFR appealed. In October 2019, this Court vacated and remanded, holding that although Nationstar submitted evidence "sufficient to satisfy NRS 51.135's standard for admissibility," the Court could not determine whether summary judgment was appropriate given that the district court did not provide grounds for denying SFR's motion to strike. *See* Order Vacating and Remanding, *SFR Invs. Pool 1, LLC v. Nationstar Mortg. LLC,* No. 75890 (Nev. Oct. 24, 2019).

On remand, the parties agreed to reopen discovery and SFR deposed Mr. Meyer. In July 2020, Nationstar again moved for summary judgment. 6JA_1270–90. SFR renewed its countermotion to strike Freddie Mac's declaration, requested Rule 56(d) relief in the alternative, and moved to compel additional materials.

7JA_1538–54. On October 6, 2020, the district court entered summary judgment for Nationstar on Federal Foreclosure Bar grounds. 14JA_3220–28. The court also denied SFR's motion to strike or for NRCP 56(d) relief in the alternative because Nationstar's belated disclosure of Freddie Mac's witness was harmless, and it denied SFR's motion to compel as moot because the evidence was sufficient to establish the Enterprise's ownership of the loan. *Id.*

STANDARD OF REVIEW

This Court reviews a district court's decision to enter summary judgment and its conclusions of law de novo. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005). A motion for summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Id*.; NRCP 56(c).

SFR did not discuss the standards for review of motions to strike or for NRCP 56(d) relief in its opening brief, so Nationstar includes those standards here. A district court's decisions on motions to strike and for Rule 56(d) relief are reviewed under an abuse of discretion standard. *Thomas v. Hardwick*, 126 Nev. 142, 152–54 (2010) (reviewing for an abuse of discretion a district court's denial of a motion to strike evidence); *JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC* (*Chase v. SFR*), 475 P.3d 52, 57 (Nev. 2020) (holding that "the district court

did not abuse its discretion in granting SFR's motion to strike the untimely disclosed evidence"); *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118 (2005) (reviewing continuance motions under NRCP 56(f) (which was later relocated to NRCP 56(d)) for an abuse of discretion); *Las Vegas Dev. Grp., LLC v. Nationstar Mortg., LLC*, 487 P.3d 834 (Nev. App. 2021) (affirming district court where appellate court "cannot conclude that the district court abused its discretion in denying NRCP 56(d) relief").

SUMMARY OF ARGUMENT

The district court correctly held that the Federal Foreclosure Bar protected Freddie Mac's Deed of Trust from extinguishment through the HOA Sale. SFR's arguments on appeal are meritless, and this Court should reject them.

SFR appeals the entry of summary judgment against it, largely on grounds that were neither presented to nor passed upon by the district court: that the U.S. Supreme Court's decision in *Collins* provides a basis for remand so that the district court may "consider[] … damages caused by the actions of [FHFA's] Director." AOB at 11. SFR's attempt to introduce the question into this litigation fails as a procedural matter; SFR cannot raise that new argument on appeal. Regardless, the new argument would not succeed even if the Court were inclined to consider it, because SFR never pled a claim or defense that turns on an action taken by the FHFA Director. And any attempt to amend the pleadings on remand would be

futile because SFR cannot link the removal provision to anything that happened in this case. FHFA's Director neither took any affirmative action with respect to the Deed of Trust nor effectuated any "policy change" that might have been different but for the removal provision.

SFR also challenges the evidentiary basis for the district court's ruling that the Federal Foreclosure Bar protected the Deed of Trust from extinguishment through the HOA Sale. *First*, SFR argues that recent decisions by this Court and the Ninth Circuit render "production of the Note … essential" to establishing Freddie Mac's ownership of the loan. But recent case law has not altered the evidentiary requirements this Court set out in *Daisy Trust*, where it concluded that neither a promissory note nor a servicing contract had to be produced to establish an Enterprise's loan ownership or relationship with its loan servicer. *See Daisy Trust*, 445 P.3d at 850–51. *Second*, SFR argues that the district court erred in denying its motion to strike Mr. Meyer's declaration, insisting that the belated disclosure of that particular witness was not harmless. That argument fails; SFR suffered no prejudice from the belated disclosure of Freddie Mac's declarant. The business records Mr. Meyer authenticates in his declaration were disclosed during discovery, SFR had the same opportunity to depose Mr. Meyer that it would have had if the declaration had been disclosed prior to summary judgment, and SFR is

by now well versed in interpreting Freddie Mac records and did not need Mr. Meyer's testimony to understand what those records show.

This case has been pending for far too long. SFR has done everything it can to avoid the conclusion this Court has reached in many other cases raising the same questions based on the same evidence: that the Federal Foreclosure Bar applied to preserve Freddie Mac's deed of trust. The evidence and legal issues pled and argued in the district court (and twice in this Court) demonstrate that the same outcome is warranted here. Yet SFR continues to draw out this litigation by manufacturing evidentiary objections and declaring prejudice. In addition to those well-worn and discredited tactics, SFR now asserts a constitutional claim it has never argued nor pled and that has nothing to do with this case. SFR has run out of arguments that have even a thin veneer of plausibility, and this Court should promptly bring this action to a final conclusion by affirming the district court's decision.

ARGUMENT

I. The Case Should Not Be Remanded for Consideration of a Belated Constitutional Argument That Is Irrelevant to the Claims Asserted

A. SFR Has Forfeited the Argument

SFR's Opening Brief sketches out a new argument that relies on *Collins v. Yellen*, a U.S. Supreme Court decision voiding, based on separation-of-powers principles, HERA's "for-cause" removal provision applicable to FHFA's Director.

141 S. Ct. at 1787 (describing 12 U.S.C. § 4512). The Supreme Court nevertheless confirmed that this structural defect left "no basis for concluding that any head of the FHFA lacked authority to carry out the functions of the office," because each Director was properly appointed. *Id.* at 1788. SFR nevertheless now contends that it "has standing to challenge [FHFA's] decisions and to seek retroactive damages for decisions made under [FHFA's] unconstitutional structure," including a purported decision to "significantly change the prior policy of consent" to the foreclosure of Enterprise interests through super-priority lien laws. *See* AOB at 10–11.

SFR never offered this argument in its district court pleadings or briefing: Not once did SFR suggest that FHFA's structure might be defective, much less that any such defect caused it harm. Indeed, SFR has not asserted any claim against FHFA, which is not a party to this case. Nor does SFR explain why it could not have challenged the removal provision in the district court, as the *Collins* appellants (and other parties in similar litigation) did years ago. SFR could have challenged FHFA's purported decision not to consent to the foreclosure of Enterprise liens through HOA sales—which SFR alleges took place in "late-2014/early-2015," *id.* at 17, after SFR had acquired title to the Property through the

2013 HOA Sale—any time thereafter.[4] The fact that the Supreme Court had not yet ruled on the constitutionality of the removal clause did not preclude SFR from challenging FHFA's decision on separation-of-powers grounds.

This Court does not consider arguments raised for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52 (1981). This Court's rule is common to appellate practice, broken only in exceptional circumstances necessary to prevent manifest injustice. *See, e.g.*, *Padgett v. Wright*, 587 F.3d 983, 986 (9th Cir. 2009) (citing *Int'l Union of Bricklayers & Allied Craftsman Loc. Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985)). SFR does not claim such exceptional circumstances here, and none exist. All the facts necessary to plead a claim or assert an argument relating to the removal provision have been available since HERA was enacted in 2008, long before SFR commenced this action. SFR is a sophisticated and experienced litigant in cases like this that surely knew it could plead such a claim, and that it needed to plead the claim to preserve it. SFR never did so.

[4] Nationstar does not mean to suggest that such a challenge would have been proper or meritorious if asserted immediately after FHFA announced its position on non-consent. For the reasons explained herein, that claim would still have been meritless if SFR had timely raised it.

Having failed to assert the removal-provision argument in the district court, SFR forfeited it. The Court should not countenance SFR's attempt to prolong this litigation by entertaining the argument now.

B. *Collins* Is Irrelevant to the Claims and Defenses in this Case

Even without SFR's forfeiture, a remand to assess whether SFR may recover "retroactive damages for decisions made under [FHFA's] unconstitutional structure," AOB at 10–11, would be unwarranted, because that argument has nothing to do with any claim or defense raised in this case. Nor can SFR amend its pleadings to find a way out of the problem—any theory that the removal clause caused SFR harm by preventing it from obtaining free-and-clear title to the Property through the HOA Sale would fail as a matter of law.

1. SFR Has Not Pled Any Claim or Defense Related to the For-Cause Removal Provision

SFR contends that under *Collins*, it may challenge FHFA's purported decision to "go against previous policies and practices of implicit consent to foreclosure under state super lien laws." *See id.* at 17. But those arguments are irrelevant to this case—SFR has not pled any claim or defense relating to the Director's decisions or FHFA's structure, and it has not alleged any harm flowing from the removal provision. Critically, SFR has not asserted *any* claim against FHFA, the party that—under SFR's new theory—took the action that supposedly

caused SFR harm. SFR cannot seek damages from an entity that is not a party to any claim, nor can it pursue damages against Nationstar for FHFA's actions.

Furthermore, a party cannot seek relief for a claim or defense it has not pled. Nevada is a notice-pleading jurisdiction that requires claims to be "sufficiently definite to give 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'" *Taylor v. State*, 73 Nev. 151, 152 (1957). A party must set forth "the facts which support his complaint." *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578–79 (1995); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (to survive a motion to dismiss, a plaintiff must plead factual allegations that "raise a right to relief above the speculative level"). Similarly, "an affirmative defense not raised in the pleadings is ordinarily deemed waived" unless the opposing party is given reasonable notice and an opportunity to respond. *Whealon v. Sterling*, 121 Nev. 662, 665–66 (2005).

SFR's pleadings provide no notice that it would make an argument related to FHFA Director action or the removal provision. That argument never appeared in SFR's answer, counterclaim, or third-party complaint (*see* 1JA_11–24), or in subsequent district court briefing. And it was not mentioned in SFR's notice of appeal or its case appeal statement. *See* 14JA_3245–54. SFR's attempt to graft a constitutional issue onto this appeal must fail in light of the counterclaims it *did*

assert: state-law claims for unjust enrichment, injunctive relief, and to quiet title. 1JA_15–24.

2. SFR Cannot Add a *Collins*-Based Claim or Defense Now

Even if SFR were to move to amend the complaint on remand to assert a new claim and join a new party, that request would be denied as belated, prejudicial, and futile. *See MEI-GSR Holdings, Inc. v. Peppermill Casinos, Inc.*, 134 Nev. 235, 239 (2018) (describing factors for denying motion to amend).

A court may deny a motion to amend if the moving party unduly delayed in moving to amend or if amendment would seriously prejudice the opposing party. *See Kantor v. Kantor*, 116 Nev. 886, 891 (2000) (denying motion to amend filed on the eve of trial); *Performance Steel, Inc. v. Wallner Tooling/Expac, Inc.*, No. 79993, 2021 WL 2432537, at *5 (Nev. June 11, 2021) (unpublished disposition) (motion to amend may be denied if it would cause "serious prejudice").

a. Any Attempt to Amend Would Be Untimely and Prejudicial

SFR's amendment would be belated because it could have raised a challenge to FHFA's purported 2014 or 2015 decision not to consent to extinguish Enterprise liens through HOA sales any time after SFR alleges that decision was made. SFR likewise was free to challenge the removal provision at any time after it purchased the Property in 2013; the for-cause removal provision had already been enacted as part of HERA in 2008. And as all the facts necessary to raise such a claim were

public, SFR has no excuse for its delay. It is far too late to add new claims or to join FHFA as a party.

Compounding the unfairness of allowing SFR to introduce a new argument at this stage is the fact that any delay in final judgment allows SFR to rent out the Property at market rates, while Freddie Mac receives no return on its investment in the defaulted Loan the Property secures. *See* Respondent's Supplemental Appendix 1-6, Order, *Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, No. 19-17043 (9th Cir. Aug. 26, 2021) (recognizing that HOA sale purchaser "ha[d] a strong financial incentive to file appeals, even if those appeals are frivolous, because it continues to reap the economic benefit of holding title to the properties during prolonged litigation").

b. Any Attempt to Amend Would Be Futile

In addition to the procedural obstacles noted above, remand would be futile because SFR's new argument cannot succeed as a matter of law. *See Allum v. Valley Bank of Nev.*, 109 Nev. 280, 302 (1993) (holding that there is no abuse of discretion in denying motion for leave to amend when the proposed amendment would be futile). SFR contends that the FHFA Director "action" that should be evaluated following *Collins* is the "decision to change from a policy of consent to the operation of state super-lien laws" to a "new policy to run over state super priority laws with § 4617(j)(3)." AOB at 18. But SFR cannot deploy *Collins* as a

basis for a claim here because FHFA never made the "decision" SFR contends should be challenged, never took any action with respect to the Deed of Trust, and never changed its position on whether the Agency will consent to extinguish Enterprise liens through HOA foreclosures. Nor does SFR explain how such a decision would have caused it harm, or demonstrate that the decision would have been different but for the removal provision.

i. No FHFA Director's Action Caused SFR Harm

SFR's alleged harm—its inability to acquire free-and-clear title to the Property through the HOA Sale—results from the automatic operation of a federal statute, not from a FHFA Director's decision. The Federal Foreclosure Bar set a default rule: By law, Enterprise liens are automatically protected from extinguishment via a foreclosure, absent FHFA's affirmative consent. 12 U.S.C. § 4617(j)(3). The Federal Foreclosure Bar, enacted in 2008, thus prevented the 2013 HOA Sale from extinguishing the Deed of Trust and providing SFR with clear title as a matter of law.

This Court acknowledged the point in confirming that Federal Foreclosure Bar-based claims and defenses do not turn on FHFA action. In *Christine View*, the Court held that "'the Federal Foreclosure Bar does not require [the FHFA] to actively resist foreclosure,'" because the statute "cloaks the FHFA's 'property with Congressional protection unless or until the FHFA affirmatively relinquishes it.'"

Christine View, 417 P.3d at 368 (alterations omitted) (quoting *Berezovsky v. Moniz*, 869 F.3d 923, 929 (9th Cir. 2017)). The Court has reaffirmed that point in several decisions. *E.g., BDJ Invs., LLC v. Ditech Fin. LLC*, 472 P.3d 194 (Nev. 2020). And just as FHFA had no duty to "actively resist foreclosure" for the Federal Foreclosure Bar to apply, Freddie Mac and its servicer did not need to defend against the foreclosure sale. *M&T Bank v. Wild Calla St. Tr.*, 437 P.3d 1054 (Nev. 2019). Thus, neither FHFA nor its Director needed to act for the Deed of Trust to survive the HOA Sale, and neither did.

Moreover, SFR does not, because it cannot, point to any decision by FHFA to either start or stop consenting to the extinguishment of Enterprise liens; instead, it contends that a public statement made by FHFA articulated a change in policy from "implicit consent" to express non-consent. AOB at 17. But the FHFA statement contradicts SFR's argument directly. It reads: "FHFA *confirms that it has not consented*, and will not consent in the future, to the foreclosure or other extinguishment of any [Enterprise] lien or other property interest in connection with HOA foreclosures of super-priority liens." 2015 Statement (emphasis added); *see also Ditech Fin. LLC v. T-Shack, Inc.*, 850 F. App'x 529, 530 (9th Cir. 2021) (citing the 2015 Statement to support holding that FHFA "has declared publicly that it has not consented" to extinguish Enterprise liens). The 2015 Statement, which SFR relies on to support its contention that there was a change in policy,

AOB at 17, in fact says the opposite: that FHFA's practice would continue unchanged. Nor is it plausible that FHFA would ever have had a policy of consenting to extinguish Enterprise liens, as such a policy would effectively cede valuable property interests for no consideration.

In any event, even if the Court assumes—contrary to the plain language of the 2015 Statement—that FHFA broke its silence to adopt a new policy of non-consent, that "change" would be illusory and without legal effect. Because only "affirmative consent" can waive the Federal Foreclosure Bar's protection, *Christine View*, 417 P.3d at 368, both implicit consent and express non-consent lead to the same result: protection of the Enterprise lien. Accordingly, FHFA's purported abandonment of a policy of "implicit consent" would have no legal effect, and thus could not cause SFR any harm.

SFR claims that FHFA also "maintain[s] a policy of actively hiding any involvement with deeds of trust in the public record" and implies that such policy harmed it. AOB at 14; *see also id.* at 18–19. The supposed "policy" of which SFR complains is that the Enterprises (both before and throughout the conservatorship) often list their loan servicers or MERS as record beneficiaries of the deeds of trust they own to allow the servicers to manage the loans more effectively. FHFA does not have such a policy. In any event, there is no duplicity in that commonplace practice, and it complies with Nevada law—as this Court has affirmed time and

again. *E.g.*, *Daisy Trust*, 135 Nev. at 234; *Saticoy Bay LLC Series 1405 S. Nellis Blvd. #2121 v. Ditech Fin. LLC*, No. 81196, 2021 WL 1964227, at *1 (Nev. May 14, 2021) (unpublished disposition). The proper forum for SFR to advocate for a change in that practice is the Nevada Legislature.

SFR's argument would not succeed even if FHFA *did* espouse a "policy" of permitting loan servicers to be listed as record beneficiaries of Enterprise deeds of trust, because SFR never suggests that an FHFA Director implemented or changed such a "policy," or that the practice would have been different under a Director of a President's choosing. To the contrary, SFR alleges that FHFA "had and continues to maintain" that "policy." AOB at 14.

ii. SFR's Purported Evidence Does Not Establish That FHFA Changed Any Policy Regarding Consent

SFR's purported evidence of a shift in FHFA's policy of non-consent—none of which was issued or endorsed by FHFA—does not establish that such a policy change relating to consent ever took place.

First, SFR cites to a letter from a congressional delegation describing FHFA's non-consent position as a "new policy." AOB at 17–18. A congressional delegation's assertion that an FHFA policy has changed is beside the point. FHFA speaks for itself, and it has neither stated nor acted as if its policy changed.

In any event, the congressional letter does not cite any evidence of a policy change or point to any examples of FHFA expressly consenting to extinguish an Enterprise lien. Instead, it states that FHFA "appeared to *implicitly* acknowledge that super lien laws could be used to foreclose on properties" that serve as collateral for Enterprise liens.[5] Letter from Sen. Elizabeth Warren et al. to FHFA Director M. Watt ("Warren Letter") at 2 (May 12, 2016) (emphasis added), https://www.warren.senate.gov/files/documents/2016-5-12_MA_delegation_ltr_to_FHFA.pdf. That assertion is based primarily on the letter's contention that "FHFA did not assert" that the Federal Foreclosure Bar preempted super-priority lien laws until 2014, and on a flawed analysis of Fannie Mae's servicing guide provisions (addressed below), *id.*, each of which could amount at most to *implied* consent. But *express* consent is required to waive the Federal Foreclosure Bar's protections. Even taken on its own terms, the Warren Letter offers nothing to suggest FHFA ever had a policy of *effectively—i.e., expressly*—consenting. It thus does not support SFR's claim that FHFA changed its consent policy.

Second, SFR points to Fannie Mae's 2012 servicing guide, which required Fannie Mae's loan servicers to pay HOA assessments if necessary to protect the

[5] To be clear, FHFA has not argued that the Federal Foreclosure Bar precludes HOAs from foreclosing on and selling properties under state super-priority lien laws. Rather, the Federal Foreclosure Bar prevents any Enterprise deeds of trust encumbering those properties from being extinguished through any such foreclosure.

priority of Fannie Mae's liens, as evidence that FHFA "intend[ed] for state super lien laws to [extinguish Enterprise liens]." *See* AOB at 18. Fannie Mae's servicing guide has no bearing on Nationstar's actions with respect to this Property, because it does not apply to the entities involved in this case—Freddie Mac and its loan servicers. But even assuming Fannie Mae's servicing guide did govern here, it applies to servicer practices *whether or not* the Enterprise is in conservatorship, and therefore does not undermine the default protection the Federal Foreclosure Bar provides *during* conservatorship. And the fact that Fannie Mae directed servicers to pay HOA assessments when necessary to protect the priority of its liens in no way implies that FHFA had adopted a policy of implied consent. Tellingly, the current servicing guide, which was last updated in 2020—well after the purported policy change—contains the same requirement. *See* Fannie Mae Servicing Guide B-1-01, https://servicing-guide.fanniemae.com/1040879711 ("The servicer must … pay the necessary amount [to clear an association's claim of lien] prior to the foreclosure sale date …"). That would not be the case if, as SFR suggests, the 2012 servicing guide demonstrated that FHFA had a "prior policy" of implied consent that it abandoned in 2014 or 2015.

In addition, this Court and the Ninth Circuit already have considered, and declined to adopt, arguments that Enterprise servicing guides indicate implicit consent. *Compare* Appellant's Opening Br., *Christine View*, 2016 WL 1604989, at

*25–27 (making same argument regarding servicing guide), *with Christine View*, 417 P.3d at 368 (rejecting implicit consent argument); *and compare* Appellant's Opening Br., *Alessi & Koenig, LLC v. Saticoy Bay LLC Series 10250 Sun Dusk Lane*, 2018 WL 4677417, at *9–10 (making same argument regarding servicing guide), *with Sun Dusk*, 804 F. App'x 475, 477 (9th Cir. 2020) (rejecting implicit consent argument).

SFR's argument also confuses concepts: It is consistent for Fannie Mae to direct its servicers to protect the *priority* of its liens even when the Federal Foreclosure Bar protects those liens from *extinguishment*. The risk of a junior priority status and the risk of extinguishment are not the same; a lien can become junior to another (with a greater risk of not being repaid in the event of a default) without being extinguished. At no point does Fannie Mae's 2012 servicing guide suggest that Fannie Mae perceived a risk that its interest might be *extinguished* by an HOA foreclosure sale, much less reflect FHFA's consent to such extinguishment.

iii. *Collins* Does Not Affect the Validity of FHFA Actions That Lack a Direct Causal Connection to the Removal Provision

SFR insists that *Collins* casts doubt upon any actions FHFA has taken "under its unconstitutional structure," including in relation to Nevada HOA foreclosures. *See* AOB at 19; *see id.* at 14. But as SFR acknowledges, the U.S.

Supreme Court did not hold that "every [Director] action is … automatically void," *id.* at 19, instead confirming that "because [a]ll the officers who headed the FHFA during the time in question were *properly* appointed," there is "no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office," *Collins*, 141 S. Ct. at 1787–88.

The fact that the for-cause removal provision is unconstitutional thus does not provide any basis for overturning FHFA action unless a claimant demonstrates a causal link between that provision and specific, tangible harm. *See id.* at 1789 (relief may be possible if "the unconstitutional removal restriction caused any … harm"). That causal requirement ensures that "actions the President supports—which would have gone forward whatever his removal power—will remain in place" and cannot support a claim for relief. *Id.* at 1801–02 (Kagan, J. concurring in part). And "[w]hen an agency decision would not capture a President's attention, his removal authority could not make a difference …." *Id.* at 1802 (Kagan, J. concurring in part); *see also id.* at 1795 ("[A]bsent an unlawful act, the [*Collins* plaintiffs] are not entitled to a remedy.") (Thomas, J., concurring).

Thus, to prevail on a *Collins*-based claim, SFR would have to show that FHFA would have maintained a supposed policy of consent but for the removal provision. SFR would have to allege either that (1) a President would have replaced the FHFA Director and the new Senate-confirmed Director would have

adopted (or maintained) a policy of consenting to extinguish Enterprise liens, or (2) the FHFA Director would have altered the policy under the threat of removal. SFR has not alleged any connection between the for-cause removal provision and its inability to obtain clear title to the Property.

SFR could not plausibly make such allegations. The specific policy SFR posits FHFA would have adopted—consenting to extinguish valuable property interests for no consideration—would be irrational and would contradict Congress's intent in protecting Enterprise liens through the Federal Foreclosure Bar. Nor are super-priority lien issues of sufficient profile to make the removal provision relevant in any event. Such liens affect a minority of Enterprise assets, and Federal Foreclosure Bar cases in Nevada involve no more than a few hundred properties. By contrast, the Enterprises own mortgages on millions of homes across the nation, and FHFA's purview includes solving systemic issues facing the housing market. Regardless, nothing supports SFR's implicit position that FHFA would have done anything different but for the removal provision. FHFA's Director at the time was appointed by the sitting President, whose public statements give no indication any of concern with the 2015 Statement, let alone

any indication that the President would have fired the Director over it absent the removal provision.[6]

II. The Evidence and Case Law Establish That the Federal Foreclosure Bar Applies Here

SFR's two evidentiary arguments as to why Nationstar failed to establish Freddie Mac's valid property interest under Nevada law—that recent case law requires Nationstar to produce the promissory note and servicing agreement, and that the district court incorrectly admitted Freddie Mac's declaration—lack merit. The district court properly held that the Federal Foreclosure Bar preserved the Deed of Trust because Freddie Mac owned the Loan at the time of the HOA Sale and FHFA did not consent to waive the Federal Foreclosure Bar's protection. 14JA_3225–27 ¶¶ 4–10.

A. The District Court Did Not Abuse Its Discretion in Denying SFR's Argument That Nationstar Must Produce the Wet-Ink Note and Servicing Agreement

The district court correctly, and without abusing its discretion, denied SFR's motion to compel and its countermotion to strike or in the alternative for Rule 56(d) relief. 14JA_3220–28. An abuse of discretion occurs only when "no reasonable judge could reach a similar conclusion under the same circumstances."

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[6] The Obama White House archives reflect that the White House did not make any statements or issue any press releases related to FHFA's 2015 Statement. *See generally Briefing Room: Statements and Releases*, THE WHITE HOUSE, https://obamawhitehouse.archives.gov/realitycheck/briefing-room/statements-and-releases/ (last visited Sept. 23, 2021).

Leavitt v. Siems, 130 Nev. 503, 509 (2014). Here, the district court followed precedent in holding that Nationstar's evidence proved its ownership of the Loan and its relationship with Freddie Mac. SFR argues that the Court's decisions in *Chase v. SFR* and in *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020), "completely altered the legal landscape" by characterizing Federal Foreclosure Bar-based claims "as sounding in contract," therefore "creat[ing] an absolute need to allow for inspection of the Note, as well as production of the actual servicing agreements between Freddie Mac and Nationstar" in order to establish the Federal Foreclosure Bar's application. AOB 20–21, 24; *see generally id*. at viii–ix, 21–24.

SFR's assertion that *Chase v. SFR* and *M&T Bank* increased the burden for establishing an Enterprise's loan ownership and servicing relationship by "classifying the claims in this case as sounding in contract," *see* AOB 24, is incorrect. In *Chase v. SFR*, this Court answered the narrow question of "what statute of limitations, if any, applies to an action brought to enforce the Federal Foreclosure Bar." 475 P.3d at 54; *see also M&T Bank*, 962 F.3d at 856. In answering that narrow question, each court held that while "claims in the underlying action do not fit either category, … they are best described as sounding in contract for purposes of the HERA statute of limitations." *Chase v. SFR*, 475 P.3d at 54; *see M&T Bank*, 963 F.3d at 858. Although there was no contract

between SFR and the plaintiffs, the Court held that "the *quiet title claims* are entirely 'dependent' upon Freddie Mac's lien on the Property, an interest created by contract." *Id*. at 56 (emphasis added) (quoting *M&T Bank*, 963 F.3d at 858).

Contrary to SFR's interpretation, neither *Chase v. SFR* nor *M&T Bank* concluded that quiet-title actions like the one here are *actually* contract actions. Rather, they held that for the purposes of determining the applicable limitations period under HERA—which groups claims into two categories, *see* 12 U.S.C. § 4617(b)(12)—such actions must be construed as more similar to a contract claim than to a tort claim. As a federal district court has held, "*M&T Bank* does not transform the plaintiffs' declaratory relief claims into contract claims." *Nationstar Mortg. LLC v. S. Highlands Cmty. Ass'n*, No. 2:16-cv-02771-APG-NJK, 2020 WL 5097511, at *2 (D. Nev. Aug. 28, 2020). Nothing in *Chase v. SFR* or *M&T Bank* altered the evidence necessary to prevail when invoking the Federal Foreclosure Bar.

SFR contends that "*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.'" AOB 15 (quoting *Berezovsky*, 869 F.3d at 932). To the extent SFR suggests that the Federal Foreclosure Bar applies only if an Enterprise is the record beneficiary of a deed of trust or is otherwise entitled to enforce the instrument *itself* rather than through a servicer or other representative, *Berezovsky* says no such

thing. The Ninth Circuit merely explained that where the recorded deed of trust lists an entity besides the note owner, "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 the owner's behalf. 869 F.3d at 932. *Berezovsky* applied that principle in holding that "[a]lthough the recorded deed of trust here omitted [the Enterprise's name], [the Enterprise's] property interest is valid and enforceable under Nevada law" because the servicer listed as record beneficiary was in a contractual relationship with the Enterprise. *See id.* at 932–33. What matters is whether Freddie Mac owned the Deed of Trust, not whether Freddie Mac could *enforce* the Note itself. *See* 12 U.S.C. § 4617(j)(3).

Moreover, in *Daisy Trust*—an on point, precedential decision—this Court confirmed that production of the actual promissory note is not necessary, or even helpful, to establish an Enterprise's property interest when that interest has been established through Enterprise business records and testimony. *See Daisy Trust*, 445 P.3d at 850. Specifically, the Court held that "producing the actual note or having [servicer or Enterprise employee declarant] attest that they inspected the note would not help establish when Fannie Mae obtained ownership of the loan or that it retained such ownership as of the date of the foreclosure sale." *Id.* Such

uncontroverted evidence was and remains sufficient to prove an Enterprise's ownership of the Loan.

Subsequent decisions confirm that the promissory note and servicing agreement are irrelevant to resolving the question whether an Enterprise owns a particular Loan. Enterprise and servicer business records, sworn declarations, and the Enterprise servicing guides establish those facts. *See, e.g.*, *Saticoy Bay LLC Series 1405 S. Nellis Blvd. #2121 v. Ditech Fin. LLC*, No. 81196, 2021 WL 1964227, at *1 (Nev. May 14, 2021) (unpublished disposition) (confirming that similar evidence "sufficiently demonstrates Fannie Mae's ownership of the loan"); *Ditech Fin. LLC v. T-Shack, Inc.*, 850 F. App'x 529 (9th Cir. 2021) ("Business records and sworn declarations by employees of Fannie Mae and Ditech sufficiently establish that, in 2013, Fannie Mae owned the note."). Indeed, in cases where the HOA sale purchaser has argued that an Enterprise or servicer must produce a servicing agreement to prevail on the Federal Foreclosure Bar, this Court has repeatedly rejected such arguments.[7] The Ninth Circuit has repeatedly reached

[7] *Compare* Appellant's Opening Br., *Saticoy Bay LLC Series 1405 S. Nellis Boulevard #2121 v. Ditech Fin. LLC*, No. 81196, 2021 WL 6261371, at *37–39 (Nev. Sep. 25, 2020) *with Saticoy Bay LLC Series 1405 S. Nellis Boulevard #2121 v. Ditech Fin. LLC*, No. 81196, 2021 WL 1964227, at *1 & n.2 (Nev. May 14, 2021) (unpublished disposition); *compare* Appellant's Opening Br., *Saticoy Bay LLC Series 9004 Spotted Trail Ave. v. Wells Fargo Bank, N.A.*, No. 78539, 2020 WL 2041466, at *22–23 (Nev. Mar. 9, 2020) *with Saticoy Bay LLC Series 9004 Spotted Trail Ave. v. Wells Fargo Bank, N.A.*, No. 78539, 2020 WL 6743140, at

Footnote continues on next page.

the same conclusion. *E.g.*, *Berezovsky*, 869 F.3d at 932–33 & n.8; *Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, 996 F.3d 950, 956–57 (9th Cir. 2021).

SFR nevertheless insists that the Note is required to prove Freddie Mac's interest in the Deed of Trust because "[b]asic legal principles dictate that a litigant involved in an action based on contract ... must produce said contract," and "if there is a problem with the Note, Freddie Mac's lien interest … will be non-existent." AOB 21–22. This is not an action based on contract. And SFR's unsupported speculation that there could be "a problem with the Note" is at best a request for duplicative evidence in light of Freddie Mac's business records and declaration, which state that Freddie Mac has owned the Loan since August 2005 and confirm that Nationstar was the Loan servicer at the time of the HOA Sale. 6JA_1318–20 ¶¶ 5(d)–(e), 5(h)–(i); 6JA_1323–30.

SFR's argument also ignores Freddie Mac's business records, which demonstrate that Freddie Mac acquired the Loan and received continuous servicing reports in the years following its acquisition of the Loan. 6JA_1319–21 ¶¶ 5(e), 5(j); 6JA_1331–36. This reporting on the Loan occurred before, at the time of, and

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*1–2 & n.3 (Nev. Nov. 13, 2020); *compare* Appellant's Opening Br., *7713 Curiosity Ave. Tr. v. Nationstar Mortg., LLC*, No. 78933, 2019 WL 6174924, at *35–37 (Nev. Oct. 16, 2019) *with 7713 Curiosity Ave. Tr. v. Nationstar Mortg., LLC*, No. 78933, 2020 WL 6743913, at *1 n.3 (Nev. Nov. 13, 2020).

after the HOA Sale—which could not and would not have happened if Freddie Mac did not own the Loan. Indeed, Freddie Mac had been receiving monthly reports on the Loan for nearly eight years from its servicers by the time of the HOA Sale. The fact that Freddie Mac owned the Loan at the time of the HOA Sale is amply supported by years of data in Freddie Mac's business records, which were properly authenticated by Mr. Meyer. SFR's metaphysical doubts raise no genuine dispute of material fact as to Freddie Mac's Loan ownership.

Nationstar need not produce additional evidence to rebut SFR's conjecture that the Note could somehow be "invalid." *See* AOB 22. SFR does not argue that the Note actually is "a nullity" or that its "endorsements" and "any allonge" actually contradict Freddie Mac's ownership, instead raising them as "possibilit[ies]." *Id.* at 22–23. But mere "possibility" is not enough to require the production of duplicative evidence. *See id.* at 22. SFR has provided no reason to believe that the question of ownership of the Deed of Trust was not "definitively answered" by Freddie Mac's records and supporting declaration. *See id.* at 23.

SFR's contention that "[t]he other records in the case cannot provide the essential information provided by the Note" such as who holds the Note and to whom it is endorsed, AOB 23, raises questions that are immaterial to this case. Nationstar is not trying to prove the *contents* of the Note. Rather, Nationstar need only prove that Freddie Mac *owned* the Note on the date of the HOA Sale, a fact

evidenced by Freddie Mac's business records, and not necessarily by the Note itself (which would instead establish the *holder today*, rather than the *owner* at the *time of the HOA Sale*). Because under Nevada's version of the Uniform Commercial Code the entity that owns the note and the entity holding the note need not be the same, *see* NRS 104.3301(2), requiring production of the original note will not necessarily prove who owns it. As SFR recognizes, any endorsements on the Note might indicate the entity that "held and possessed the … note," AOB at 22—not that anyone other than Freddie Mac owned it.

Nor must Nationstar produce the servicing agreement "that establishes the servicing relationship between Nationstar and Freddie Mac," as SFR argues. *See* AOB 20, 21 n.35, 24. This Court and the Ninth Circuit have rejected that argument, and this Court should do so again here. *E.g.*, *Daisy Trust*, 445 P.3d at 849–50 (holding that servicing agreement was unnecessary to establish a servicer's standing to assert the Federal Foreclosure Bar in light of similar evidence); *Millikan Ave.*, 996 F.3d at 956 (servicer "did not need to specifically produce the Mortgage Selling and Servicing Contract to establish [its] … servicing relationship with Fannie Mae").

SFR's argument runs into another, equally problematic roadblock: In *Chase v. SFR*, this Court confirmed that the production of "a sworn declaration from an employee familiar with [the loan servicer's] business records regarding the subject

loan," and authenticated servicer business records "showing the sale of the loan to Freddie Mac" were "sufficient to show Freddie Mac's ownership of the subject loan." 475 P.3d at 58. Having held that the evidence demonstrated the Federal Foreclosure Bar's application, this Court "remand[ed] for the district court to enter judgment in favor of [the servicer]." *Id.* If this Court really meant to suggest that a loan servicer "has to provide proof of … the underlying Note and relevant servicing agreements" in order to prevail on Federal Foreclosure Bar arguments, AOB at 24, it surely would have deemed the servicer's business records and declaration as insufficient in the very case in which it purportedly reached the conclusion SFR describes.

In their petitions for rehearing in *Bourne Valley* and *Freddie Mac v. SFR*, Bourne Valley (represented by SFR's counsel) and SFR made essentially the same argument SFR does here: that if *M&T Bank* was correctly decided, they should have been allowed to "review the promissory note—the very contract the Panel . . . deemed essential to [the servicer's] claims." Pet. for Rehearing or Rehearing En Banc at 1–2, *Freddie Mac v. SFR*, No. 19-15910 (9th Cir. 2020) (Dkt. 49-1); Pet. for Rehearing or Rehearing En Banc at 1–2, *Bourne Valley*, No. 19-15253 (9th Cir. 2020) (Dkt. 61-1). The Ninth Circuit denied both petitions.

In sum, neither this Court nor the Ninth Circuit require production of the promissory note or servicing agreement to establish Freddie Mac's ownership of

the Loan or its relationship with its Loan servicer. This Court should affirm the district court's conclusion that Freddie Mac owned the Deed of Trust at the time of the HOA Sale.

B. The District Court Did Not Abuse Its Discretion in Relying on Freddie Mac's Declaration

In its October 6, 2020 Order, the district court found that "the late disclosure of Dean Meyer was harmless" and did not prejudice SFR because "the documents relied upon by Mr. Meyer in his declaration were timely disclosed" and SFR was able to depose Mr. Meyer. 14JA_3238. The district court also found that the evidence was sufficient to establish the Enterprise's ownership of the loan and properly deemed SFR's motion to compel moot. The district court's determinations were correct, and in any case, did not constitute an abuse of discretion. SFR's arguments that it was harmed by Nationstar's allegedly belated disclosure of Mr. Meyer's declaration and that the district court should have stricken Mr. Meyer's declaration from the record and granted SFR's motion to compel, *see* AOB at 24–27 (citing NRCP 37(c)(1) and 16.1, 16.2 or 26(e)(2)), are unsupported by the record and applicable case law.[8]

[8] NRCP 16.2 applies to family law actions and is thus inapplicable here. NRCP 26(e)(2) is also inapplicable because it applies to testimony of expert witnesses. Mr. Meyer is a corporate declarant, not an expert witness.

First, no rule required Nationstar to produce Freddie Mac's declaration prior to close of discovery. Such declarations are often filed along with summary judgment motions after the discovery period closes. Indeed, Rule 56 provides that an affidavit or declaration may be submitted with a motion for summary judgment, if it "[is] made on personal knowledge, set[s] out facts that would be admissible in evidence, and show[s] that the affiant or declarant is competent to testify on the matters stated." NRCP 56(c)(1). There is no requirement that the affiant must be an individual disclosed under Rule 16.1. Mr. Meyer's declaration was properly submitted with Nationstar's summary judgment motion.

Even if the disclosure were considered untimely (and it was not), SFR cannot plausibly urge this Court to ignore the evidence of Freddie Mac's ownership on that basis. *See* AOB 24–27. This Court has rejected similar Rule 16.1 arguments in the Federal Foreclosure Bar context where the HOA sale purchaser suffered no prejudice or failed to alleviate any prejudice despite the opportunity to do so. For instance, in *Residential Credit Solutions, Inc. v. SFR Investments Pool 1, LLC*, No. 79306, 2020 WL 6742959 (Nev. Nov. 13, 2020) (unpublished disposition), the HOA sale purchaser argued that an Enterprise's affidavit should be stricken because the Enterprise declarant was not formally disclosed as a witness and the evidence was produced after the Enterprise's motion for summary judgment. Resp't's Ans. Br., *Residential Credit Sols., Inc. v. SFR*

Invs. Pool 1, LLC, No. 79306, 2020 WL 1033626, at *54 (filed Feb. 3, 2020). The Court rejected the HOA sale purchaser's argument, concluding that the purchaser "could have alleviated any alleged prejudice" by taking actions such as asking to reopen discovery or requesting supplemental briefing. *RCS v. SFR*, 2020 WL 6742959, at *1.

Here, SFR has suffered *no* prejudice. Nationstar properly and timely disclosed all of the business records that were the subject of Mr. Meyer's declaration. As SFR already conceded, "the documents attached to the Dean Meyer declaration [were] disclosed during discovery." 5JA_1203–04. Mr. Meyer's declaration served only to present, authenticate, and explain those timely disclosed business records. In its 2018 appeal, SFR named only one potential area of prejudice: the lack of an "opportunity to conduct discovery as to Mr. Meyer's Declaration or exhibits." 6JA_1211. It was given that opportunity after the parties stipulated to reopen discovery for 120 days following the second remand: SFR deposed Mr. Meyer on July 13, 2020, even though deposing Mr. Meyer was "[dis]proportional to the needs of the case," *see* NRCP 26(b)(1), because the declaration served only to authenticate and explain the business records that were properly disclosed. As SFR received the discovery opportunity it sought, SFR's claims of prejudice are baseless.

Similarly, Nationstar's disclosure of Mr. Meyer as Freddie Mac's witness did not prejudice SFR in the slightest. AOB at 11, 25. It is undisputed that Nationstar disclosed Freddie Mac's corporate representative as an individual with knowledge of Freddie Mac's ownership of the Loan on November 29, 2017. *See* JA_1918–19 ¶ 9). As Nationstar explained to the district court, its failure to disclose Freddie Mac's corporate witness prior to that time was inadvertent. *See* JA_1072–74 ¶ 10. Upon realizing its mistake, Nationstar supplemented its disclosures under Nevada Rule of Civil Procedure 26(e)(1). *Id.* As a repeat litigant in Nevada HOA foreclosure cases, SFR should have anticipated that a corporate representative was likely to testify in support of Freddie Mac's records. SFR has become well-versed in interpreting Freddie Mac's records, and did not need to rely on Mr. Meyer's explanation to understand what those records show.

Second, SFR's complaint that Nationstar or Freddie Mac somehow interfered with SFR's efforts to take discovery lacks merit. SFR argues that 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." AOB at 25. But it was SFR who chose not to name Freddie Mac as a defendant. It was incumbent on SFR to follow the proper procedures to obtain the evidence it sought from a non-party. There was no prejudice to SFR in any event, because Mr. Meyer appeared for a deposition.

SFR also suggests that Nationstar had the authority to order Freddie Mac to appear at a deposition and produce the requested documents because Nationstar has a "claimed position as the agent/servicer acting on behalf/stepping in the shoes of Freddie Mac/FHFA." AOB at 25; *see id.* at 6 ("Nationstar … refused to produce Freddie Mac [documents] without a subpoena"). That argument conflates the contractual relationship between Freddie Mac and Nationstar—the one necessary for an Enterprise to have a property interest where its servicer appears as record beneficiary of the deed of trust—with some type of expanded agency relationship giving Nationstar "possession, custody or control" over Freddie Mac's business records and the ability to require Freddie Mac to appear at a deposition. This argument is unsupported by any law or facts.

Third, SFR mischaracterizes the record by complaining that Mr. Meyer "intentionally avoided preparing" for his deposition and that Nationstar and Freddie Mac did not meet and confer with SFR prior to the deposition, which allegedly resulted in SFR's inability "to obtain answers from Meyer regarding [] many of the facts and issues in this case." AOB at 26. But the record reflects that on July 8, 2020, Freddie Mac objected to SFR's document requests as well as the deposition topics. 7JA_1597–1601. Freddie Mac was well within its rights to raise an objection, and had SFR wished to pursue these topics further, it could have sought a motion to compel Freddie Mac to produce the documents or provide the

testimony SFR sought. But SFR did not pursue that remedy and it proceeded to depose Mr. Meyer.[9] SFR's allegation that Mr. Meyer "intentionally did not prepare for topic[s] 2 and 3 … [regarding] contracts between Nationstar and Freddie Mac and custodial agreements between Freddie Mac and any document custodian," AOB at 8, are also unsubstantiated. Mr. Meyer confirmed that he was "prepared to testify about *all* of the topics," 7JA_1626 (emphasis added), and answered questions about Freddie Mac's custodial agreement and the documents relating to Freddie Mac's relationship with its servicers. 7JA_1640–47. If SFR is now dissatisfied with the results of its discovery efforts, that is its burden to shoulder. It cannot blame the district court for "not even consider[ing] the obstruction by Nationstar and Freddie Mac," especially as there is no record evidence that any obstruction occurred. AOB at 26.

Finally, the Court need not address the haphazard evidentiary arguments in SFR's Statement of Facts, AOB at 7–10, as those issues were not "adequately briefed" and supported with "relevant authority [or] cogent argument." *See*

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[9] For this reason, SFR's citation to *Green Tree Servicing, LLC v. SFR Invs. Pool 1, LLC*, 435 P.3d 666 (Nev. 2019) (unpublished disposition), AOB 27 & n.40, for the proposition that this Court "recently affirmed a District Court's order that declined to consider a declaration that was not provided during the discovery period" is inapposite; unlike here, no Enterprise witness in *Green Tree* was deposed during discovery. *See* Appellant's Reply Br., *Green Tree Servicing, LLC v. SFR Invs. Pool 1, LLC*, 2017 WL 5989303, at *10–11 (SFR "never sought to depose a representative from … [the Enterprise]").

Maresca v. State, 103 Nev. 669, 673 (1987). Nationstar addresses them here in any event because the answers are straightforward.

SFR's attempts to discredit evidence from MERS fails identify any genuine dispute concerning a material fact. SFR mischaracterizes the MERS® System Milestones as "not show[ing that] Freddie Mac obtain[ed] an interest in 2005" in an effort to manufacture a contradiction between the Milestones and Freddie Mac's business records. AOB at 9. But SFR cannot substitute a misreading of the evidence for what is clear from the document itself. The MERS® System Milestones reflect that a transfer of Loan ownership from BANA to Freddie Mac was reported to the MERS® System in August 2005, shortly after the original Lender transferred ownership of the Loan to BANA (also in August 2005).[10] 7JA_1672. This comports with Freddie Mac's records, which state that BANA

[10] SFR's confusion about the MERS® System records stems from its misreading of their contents. For example, SFR contends that "there was no transfer in the MERS[® System] to Freddie Mac until April 24, 2012." AOB at 10. First, the MERS® System merely tracks the transfer of servicing rights and beneficial ownership interests as those transfers are reported to the MERS® System. No such transfers actually occur in the MERS® System. Moreover, the transfer on that date in the MERS® System milestones shows a transfer of *servicing* rights from BANA to a "Non-MERS Member." The relevant entry that reflects when the transfer of loan *ownership* was reported to the MERS® System follows that entry, and it shows a transfer of ownership from BANA to Freddie Mac was reported to the MERS® System in August 2005. That entry shows that the transfer was *reported* and inputted into the MERS® System on April 14, 2011, but that does not change the fact that the MERS® Milestones are consistent with the evidence that Freddie Mac bought the Loan in August 2005. *See* 7JA_1672.

sold the Loan to Freddie Mac in August 2005. 6JA_1318–19. Moreover, that the MERS® System Milestone summary does not list current servicer "Nationstar" by name, AOB at 10, does not raise any inference that the records are unreliable; at most, it suggests that once the loan was reported to be deactivated in the MERS® System on April 24, 2012, the MERS® System ceased to track any interests in the loan and the MERS® System has had no information on the current servicer or owner of the loan since April 24, 2012. *See* 7JA 1671–72; *see also supra* n.10.

Similarly, SFR incorrectly suggests that the Mortgage Payment History Report's use of the term "inactive" with respect to the loan, *see* 3JA_642, must have required some foreclosure not evidenced in public documents. AOB at 10. SFR should know that the term "inactive" does not necessarily indicate that there was a foreclosure. As Mr. Meyer explained during his deposition, a servicer can use the inactive code to indicate to Freddie Mac that the servicer is "taking the option to not advance [the] interest [due] to [Freddie Mac] any longer." 7JA_1633. That understanding is also reflected in Guide Section 8303.21, which states: "Inactivation is the process to suspend remitting funds to Freddie Mac for a Mortgage that is 120 days delinquent." Guide at 8303.21. Whether there was a foreclosure is irrelevant to Freddie Mac's ownership in any event.

SFR also claims a purported conflict between the Freddie Mac records and Nationstar's testimony regarding the existence of a power of attorney. AOB at 10.

But that is immaterial and irrelevant. SFR does not explain why a power of attorney is necessary to prove Freddie Mac's Loan ownership or relationship with Nationstar. Indeed, no court has held that a power of attorney is required to establish either fact, and the Guide does not require that a power of attorney be executed as a condition of the contractual servicing relationship, *see* Guide at 8101.3. SFR's vague evidentiary arguments do not offer a sufficient basis to overturn the district court's ruling.

SFR has provided no material evidence that it was harmed by Nationstar's disclosure of Mr. Meyer.

III. Equity Provides an Alternative Ground for Affirming the Judgment

This court could also affirm the district court's judgment based on equity. *Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 746, 405 P.3d 641, 646 (2017) ("where the inadequacy of price is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought" (cleaned up)); *cf. Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (recognizing the court can affirm on alternative grounds).

SFR purchased the property for $11,000. 2JA_307–08. The fair market value of the property at the time of the sale was $138,000. 7JA_1496. SFR purchased the property for 8% of fair market value. This inadequacy of price was

palpable and great such that Nationstar need only present very slight additional evidence of unfairness. *Shadow Canyon*, 133 Nev. at 746, 405 P.3d at 646.

Nationstar can easily meet this low threshold because NAS failed to give Nationstar, the deed of trust beneficiary, statutorily required notice of sale. 7JA_1476; 2JA_1526–1529, 1531–1532. Instead NAS only provided notice of the sale to parties who no longer had interest in the property. *Id.* The inadequate price, combined with problems with the notice of sale, presents a "classic claim" for equitable relief under *Shadow Canyon*. *See U.S. Bank, Nat'l Ass'n v. Res. Grp., LLC*, 135 Nev. 199, 206, 444 P.3d 442, 448-49 (2019); *see also Shadow Canyon*, 133 Nev. 740, 749 n.11, 405 P.3d at 658 n.11 (recognizing one "irregularit[y] that may rise to the level of fraud, unfairness, or oppression" is "an HOA's failure to mail a deed of trust beneficiary the statutorily required notices.").

CONCLUSION

For the foregoing reasons, Nationstar respectfully requests that this Court affirm the district court's decision.

Dated: September 27, 2021

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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)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 11,646 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

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

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where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on September 27, 2021, the foregoing **RESPONDENT'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of AKERMAN LLP