IN THE SUPREME COURT OF NEVADA

Case No. 82078

SFR INVESTMENTS POOL 1, LLC,

Appellant,

vs.

NATIONSTAR MORTGAGE, LLC,

Respondent.

Appeal from the Eighth Judicial District Court
The Honorable Mary Kay Holthus, District Judge
District Court Case No. A-13-684715-C

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

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Federal Housing Finance Agency ("FHFA") respectfully supports Appellee Nationstar Mortgage, LLC ("Nationstar") in this appeal. The district court correctly entered summary judgment in favor of Nationstar. If Appellant SFR Investments Pool 1 LLC ("SFR") prevails in its request for a remand to address new and irrelevant arguments and reconsider Nationstar's evidence, it would directly affect the interests of entities operating under FHFA's conservatorship—the Federal Home Loan Mortgage Corporation ("Freddie Mac") and the Federal National Mortgage Association ("Fannie Mae") (together, the "Enterprises")—as well as FHFA's interests as the Enterprises' Conservator and regulator.

The Enterprises are federally chartered entities that Congress created to enhance the nation's housing-finance market. They own millions of mortgages nationwide, including hundreds of thousands in Nevada. In 2008, Congress enacted the Housing and Economic Recovery Act ("HERA"), which established FHFA as an independent agency of the federal government and as the Enterprises' regulator. *See* Pub. L. No. 110-289, 122 Stat. 2654 (codified at 12 U.S.C. § 4511 *et seq*.). HERA vests FHFA's Director with the power to place the Enterprises into conservatorship or receivership under statutorily defined circumstances, mandating that, as Conservator, FHFA succeeds to all "rights, titles, powers, and privileges" of

an entity in conservatorship with respect to its assets. 12 U.S.C. § 4617(b)(2)(A). On September 6, 2008, FHFA's Director placed the Enterprises into FHFA's conservatorship, where they remain today.

While this brief addresses FHFA's statutory powers as Conservator, FHFA submits the brief in its distinct capacity as regulator, *i.e.*, as an agency of the United States.[1] In that capacity, FHFA has an interest in this case because if this Court were to reverse the district court's ruling and remand this case for consideration of SFR's new, irrelevant arguments or for further consideration of Nationstar's evidence that proves that Freddie Mac owned the loan at issue at the time of the HOA Sale, that decision would hamper FHFA in effectuating its regulatory powers to ensure that Freddie Mac is supporting the secondary mortgage market effectively and fulfilling its statutory mission. As a federal agency, FHFA is permitted to file this amicus curiae brief without consent of the parties or leave of court, and without a corporate disclosure statement. NRAP 26.1, 29(a).

[1] When FHFA acts in its capacity as Conservator, its actions are deemed non-governmental for many substantive purposes.

INTRODUCTION

This Court is familiar with cases arising from Nevada homeowners associations' non-judicial foreclosures and sales of real property for unpaid dues by former homeowners. In this case, a purchaser of property sold at a homeowners association's foreclosure sale (the "HOA Sale") claims that under Nevada law, the HOA Sale extinguished all preexisting lien interests in the underlying property, including a first deed of trust. *See* NRS 116.3116(2).

But an entity in FHFA conservatorship owned that deed of trust, and a federal statute therefore prevented its extinguishment. Under 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar"), while an Enterprise is in FHFA's conservatorship, its "property," including lien interests, is not "subject to … foreclosure" without FHFA's consent. The district court correctly concluded that at the time of the HOA Sale, Freddie Mac owned the deed of trust encumbering the property (the "Deed of Trust"), FHFA did not consent to extinguish the Deed of Trust, and the Federal Foreclosure Bar thus applied to preserve it. *See* 14 JA_3220-28.

On appeal, SFR raises an argument never before asserted in this case: that it has somehow been harmed by an FHFA Director's action. SFR implies that this harm could have been avoided but for the statute providing that the President can remove the FHFA Director only for cause—a provision the U.S. Supreme Court held unconstitutional in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). As Nationstar

discussed in its merits brief, SFR is procedurally barred from making this new argument. *See* Resp't Ans. Br. ("RAB") at 15-18. While FHFA endorses Nationstar's position as to the procedural flaws of SFR's new argument, FHFA submits this brief to provide its perspective on why SFR's new theory fails on the merits. The removal provision is irrelevant to any claim or defense at issue in this case, and even if SFR could belatedly amend its complaint, SFR's reliance on *Collins* as a last-ditch effort to obtain free-and-clear title would fail. *See* RAB at 18-31.

SFR also challenges the district court's entry of summary judgment on evidentiary grounds. FHFA agrees with Nationstar's arguments concerning the evidence presented in this case. *See* RAB at 31-48. In this brief, FHFA explains the practical reasons why this Court has correctly (and repeatedly) confirmed in similar cases that evidence virtually identical to Nationstar's evidence here—*i.e.*, Freddie Mac's business records, a supporting employee declaration, and relevant provisions of Freddie Mac's Seller/Servicer Guide ("Guide")—is sufficient to establish Freddie Mac's ownership of a deed of trust at the time of an HOA foreclosure sale.

Accordingly, FHFA supports Nationstar's request that this Court affirm the judgment in Nationstar's favor.

ARGUMENT

Nationstar's brief aptly summarizes the new argument that SFR seeks to inject into this case for the first time on appeal, and FHFA endorses Nationstar's arguments for why SFR's new allegation is both procedurally improper and substantively meritless. *See* RAB at 15-31. FHFA respectfully submits this brief to provide its perspective as a party to other cases where, unlike here, the constitutional challenge was properly presented. FHFA also supports Nationstar's arguments that SFR's evidentiary challenges lack merit in light of this Court's precedent, and that remand is unwarranted. FHFA notes that the primary practical effects of SFR's position would be to prolong the litigation needlessly and thereby to benefit SFR economically.

I. SFR's Belated Constitutional Argument Is Irrelevant to This Case and Rooted in a False Premise

SFR's *Collins*-based arguments cannot succeed, for three reasons: (1) they are irrelevant to the claims and defenses SFR actually pled in the district court and pertain to an entity (FHFA) that is not a party to this case; (2) there is no evidence that any FHFA Director ever implemented or changed a policy of consent with respect to the impact of an HOA foreclosure on Enterprise liens; and (3) Nevada's super-priority-lien foreclosures do not implicate HERA's for-cause removal provision. *First*, Nationstar is correct that none of SFR's claims and defenses could be affected by the holding in *Collins* that the FHFA Director's for-cause removal

protection is unconstitutional, making SFR's citation to that decision inapposite. *See* RAB at 18-20. FHFA has litigated a number of actions in recent years where, in the course of challenging an FHFA decision, opposing parties have raised the argument that the statutory provision governing the President's ability to remove FHFA's Director is unconstitutional. In each case, these challengers have named FHFA as a defendant and pled claims concerning a particular FHFA decision. Here, however, SFR did not name FHFA as a defendant, or assert any claim or counterclaim challenging an FHFA decision or the constitutionality of the Director's for-cause removal protection.

SFR cannot plausibly claim it was impossible for it to have done so: In several cases challenging FHFA Directors' actions, plaintiffs alleged that FHFA's structure was unconstitutional, and that issue eventually made its way to the U.S. Supreme Court in *Collins*. But here, over the eight years of this litigation, SFR's claims and defenses have primarily turned on whether the Federal Foreclosure Bar applies to the property at issue. That is a question of straightforward statutory interpretation, as SFR has not alleged any action taken by the FHFA Director that could have altered the Federal Foreclosure Bar's application. SFR cannot send this case back to square one—years into the litigation and after the district resolved all of the claims SFR chose to assert—by bringing in new claims never before pled or argued despite the fact that the FHFA Director's decision that SFR alleges harmed it was purportedly

adopted in late 2014 or early 2015, around the time that SFR filed its answer. *See* 10 JA_0064.

Second, the premise underlying SFR's effort to latch onto *Collins*—that in 2014 or 2015 FHFA supposedly abandoned a policy of implicitly consenting to the extinguishment of Enterprise liens in connection with HOA foreclosure sales and adopted a new policy of non-consent—is unfounded and incorrect. To the contrary, FHFA's 2015 statement on HOA super-priority lien foreclosures does not articulate any change in policy. Instead, it states that "FHFA confirm[ed] 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." FHFA, Statement on HOA Super-Priority Lien Foreclosures ("2015 Statement") (Apr. 21, 2015), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-SuperPriority-Lien-Foreclosures.aspx. This language could not be any more clear: FHFA confirmed the continuation of the same practice of non-consent that predated the 2015 Statement. While the 2015 Statement may have been the first time FHFA issued a public press release concerning its policy not to consent to the extinguishment of Enterprise liens, FHFA did not announce any new policy or take any different course

of action on the question of consent at that time.[2] FHFA's policy of non-consent has not changed since the Federal Foreclosure Bar was enacted in 2008, and SFR has not (because it cannot) submitted evidence proving that it has.

Accordingly, as Nationstar correctly noted, the Massachusetts congressional delegation's letter to FHFA, sent more than a year *after* the 2015 Statement was issued, was mistaken when it characterized the statement of non-consent as a "new policy." *See* RAB at 25-26 (quoting Letter from Sen. Elizabeth Warren et al. to FHFA Director M. Watt at 2 (May 12, 2016), https://www.warren.senate.gov/files/documents/2016-5-12_MA_delegation_ltr_to_FHFA.pdf)). As explained above, FHFA's Statement did not announce any new policy or alter FHFA's practices. And the delegation did not follow up on its request that FHFA "delay implementation of [its] announcement" that it would contest foreclosures purporting to extinguish super-priority liens, indicating that the issue never became a priority for Congress.

This is unsurprising, given that FHFA's continued practice is in sync with the congressionally devised and enacted statute that protects the Enterprises' interests. The Federal Foreclosure Bar provides *automatic* protection to Enterprise property;

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[2] Moreover, SFR would be hard pressed to explain how it suffered harm from a purported change of policy in 2014 or 2015 when the HOA Sale at issue here occurred in 2013. SFR has never contended that it sought FHFA's consent to extinguish the Deed of Trust when it purchased the property at the HOA Sale. SFR could not have suffered harm by a later policy change given that FHFA had not consented to the earlier extinguishment of *this* Loan, the continued existence of which prevents SFR from obtaining a free-and-clear interest in the property.

a policy of lien preservation is the statutory default. In light of FHFA's role as the Enterprises' Conservator, there is no plausible reason why FHFA would willingly allow for the extinguishment of the Enterprises' liens for the financial benefit of HOA sale purchasers like SFR, who scoop up foreclosed-on properties for pennies on the dollar at HOA sales and then rent them out at market rates. For this reason, it is not surprising that since the Enterprises were placed into conservatorships in 2008, none of FHFA's Directors—including Directors serving under Presidents Bush, Obama, Trump, and Biden—have opted to forfeit HERA's default statutory protection by consenting to extinguish Enterprise liens.

Third, FHFA's approach to Nevada super-priority lien foreclosures does not plausibly implicate the removal provision. While the individual properties at issue in the Federal Foreclosure Bar cases have value to the Enterprises and to the other entities that have an interest them, they are limited in number—no more than a few hundred altogether. By contrast, FHFA has a broad purview as conservator and regulator, making decisions that have nationwide importance because they affect millions of homeowners and financial institutions that have invested trillions of dollars into the housing market.[3] In the context of such decisions with systemic

[3] For example, a recent White House statement indicates that "FHFA is announcing that it is raising the Enterprises' [Low-Income Housing Tax Credit Investment Cap] to $1.7 billion" in order to "support the development and preservation of affordable units in areas most in need." Fact Sheet: Biden Harris

Footnote continues on next page.

impacts on the U.S. housing market, the practice of non-consent at issue here does not plausibly implicate the removal provision.

II. Nationstar's Evidence Proved Freddie Mac's Property Interest at the Time of the HOA Sale

Turning to the issues actually litigated in this case, SFR contests only whether Freddie Mac owned the Loan, contending that Nationstar's evidence was insufficient and should have been excluded. Appellant's Opening Br. ("AOB") at 20-27. That challenge has no basis in the law. Nationstar submitted evidence materially identical to that evaluated by this Court in similar appeals: business records from Freddie Mac's record-keeping systems, a supporting declaration from a Freddie Mac employee authenticating and explaining the business records, and excerpts from the Guide. *See Daisy Trust v. Wells Fargo, N.A.*, 445 P.3d 846, 849-51 (Nev. 2019) (en banc). Furthermore, SFR had the opportunity to depose Freddie Mac's declarant. Yet SFR was unable to identify any material fact genuinely in dispute or to marshal evidence in support of its allegation that Freddie Mac did not own the loan, instead

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Administration Announces Immediate Steps to Increase Affordable Housing Supply (Sept. 1, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/01/fact-sheet-biden-harris-administration-announces-immediate-steps-to-increase-affordable-housing-supply/. FHFA issued a parallel statement explaining that the policy change would help "support underserved markets" and better address the shortage of affordable rental housing. News Release, FHFA Announces Increase in the Enterprises' LIHTC Cap (Sept. 1, 2021), https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Increase-in-the-Enterprises-LIHTC-Cap.aspx.

relying on speculation and metaphysical doubt. That is not enough to preclude entry of summary judgment in light of the record evidence.

Accordingly, the district court correctly concluded that Nationstar's evidence was sufficient to establish Freddie Mac's ownership of the Deed of Trust and the Federal Foreclosure Bar's application. 14 JA_3227. That conclusion aligns with this Court's many decisions holding that substantially identical materials are admissible as records of regularly conducted activity under NRS 51.135's business-records exception and may establish an Enterprise's loan ownership. *See Daisy Trust*, 445 P.3d at 849-51. In fact, in cases involving at least one of the parties in this case—Nationstar and SFR—and the very same type of evidence, this Court has repeatedly resolved the same evidentiary challenges in Nationstar's favor or against SFR. *See, e.g., JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, 475 P.3d 52 (Nev. 2020); *7713 Curiosity Ave. v. Nationstar Mortg., LLC*, No. 78933, 2020 WL 674913 (Nev. Nov. 13, 2020) (unpublished disposition).[4] The result should be no different here.

To instead require Nationstar to submit additional evidence, as SFR demands, would impose a pointless and burdensome requirement to prove the one simple fact

[4] The Ninth Circuit has likewise found similar evidence to be sufficient to establish an Enterprise's property interest. *See, e.g., Berezovsky v. Moniz*, 869 F.3d 923, 932 n.8 (9th Cir. 2017); *Fannie Mae v. Casa Mesa Villas Homeowners Ass'n*, 839 F. App'x 45, 47 (9th Cir. 2020).

upon which the issues legitimately presented in this appeal turn: that Freddie Mac owned the Loan on the date of the HOA Sale. Doing so would "ignore[] the realities of modern business litigation, where many business records are kept in databases, and parties query these databases" to gather evidence. *Health All. Network, Inc. v. Cont'l Cas. Co.*, 245 F.R.D. 121, 129 (S.D.N.Y. 2007), *aff'd*, 294 F. App'x 680 (2d Cir. 2008).

Such an exercise would be particularly pointless in light of the nature of SFR's quibbles. SFR misreads this Court's recent authority to suggest that the Court has held that a quiet-title claim like Nationstar's is somehow an *actual* contract claim that is dependent upon the promissory note, rather than, as the Court clearly held, a claim best construed as more *contract-like* than tort-like for the purposes of HERA's statute-of-limitations provision, because the claim turns on the contractual relationships represented by the deed of trust. *See* RAB at 31-40 (discussing *JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, 475 P.3d 52 (Nev. 2020); *M&T Bank v. SFR Invs. Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020)). Finally, in a misunderstanding of the Nevada Rules of Civil Procedure, SFR complains that the district court abused its discretion in admitting and relying on a purportedly untimely disclosed Freddie Mac declaration, even though SFR did not show that it was harmed by any such delay. Indeed, the documents authenticated by the declaration were timely produced in discovery and SFR deposed Freddie Mac's declarant. *See id.* at

40-48. These are the types of arguments a party raises when it has run out of plausible challenges.

SFR's request for a remand on the basis of these unconvincing contentions is emblematic of its broader strategy to assert bottom-of-the-barrel arguments in Federal Foreclosure Bar-related cases in order to prolong the litigation. Requiring the production of cumulative evidence whenever a party raises such challenges would increase litigation costs and require the Enterprises to divert substantial resources toward record retrieval, and away from fulfilling their statutory roles of increasing the availability of mortgage loans. It would also be disproportionate to the needs of these cases, especially when the Enterprises' reliable and authenticated business records and supporting declarations provide the relevant information about the loans the Enterprises own and suffice to establish their ownership of their secured lien interests under Nevada law. The burdens that requiring additional evidence would foist onto the Enterprises and their servicers are particularly unwarranted in the conservatorship context, where taxpayer resources are at stake.

III. A Remand Would Undermine Judicial Economy in This Case and Other Similar Cases

Finally, FHFA urges the Court not to remand this case for exploration of SFR's belated and irrelevant arguments because such an Order would be used by SFR and other HOA sale purchasers to undermine judicial economy and substantial justice in dozens of cases. Specifically, an Order permitting remand for further

development of the *Collins*-based claim or SFR's evidentiary challenges will encourage SFR and other purchasers to seek remand or rehearing of cases on appeal or file motions for reconsideration (to the extent they have not already done so) on those grounds. FHFA has an interest in the litigation concerning Nevada HOA foreclosure sales affecting the property interests of both Freddie Mac and Fannie Mae, and thus has appreciated this Court's expeditious resolution of these appeals. But if SFR is successful here, progress toward resolution of dozens of cases concerning hundreds of properties could grind to a halt.

Because the Court has ruled in favor of FHFA, the Enterprises, and their servicers on the merits of these appeals, HOA sale purchasers like SFR have few remaining options but to seek to delay final resolution of pending actions. And they stand to benefit from such tactics: During the pendency of litigation they are able to continue collecting rental income on their de minimis investments.[5] On the other hand, because HOA Sale purchasers deny the validity of the liens, the Enterprises are unable to collect any return on their substantially larger investment in the loan. *See* 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]

[5] For example, SFR purchased the three-bedroom home at issue here for $11,000, 14 JA_3223, though its estimated market value is $397,000, and its estimated monthly rent is $2,395. *See* https://www.zillow.com/homes/668-Moonlight-Stroll-St-Henderson,-NV-89002_rb/66859183_zpid/ (last visited Sept. 30, 2021).

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"). Thus, any delay of the final resolution of these cases undermines FHFA's statutory power to "preserve and conserve" Enterprise assets. *See* 12 U.S.C. §§ 4617(b)(2)(B)(iv), 4617(b)(2)(D)(ii).

CONCLUSION

For these reasons, FHFA supports Nationstar's request that this Court affirm the entry of summary judgment in Nationstar's favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on October 4, 2021, a true and correct copy of the **BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF RESPONDENT AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT**, was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

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

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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

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

Dated: October 4, 2021.

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