Case No. 82078

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellant,

vs.

NATIONSTAR MORTGAGE, LLC, A DELAWARE LIMITED LIABILITY COMPANY,

Respondent.

Electronically Filed
Nov 29 2021 12:03 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

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

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

According to the Supreme Court of the United States, the structure of the FHFA violates the separation of powers and is therefore, unconstitutional. Under *Collins*,[1] decisions made by the director under this unconstitutional structure, such as the decision to significantly change the prior policy of consent to the operation of state super lien laws while maintaining a policy of hiding the potential application of 12 U.S.C. §§4617(j)(3) without any means to obtain consent even if the purported interest were not hidden. SFR has long maintained that the sudden change in position by the FHFA, long after most of these foreclosures had occurred—indicating the FHFA does not and has never consented—is contrary to the provisions in the relevant guides and contradictory to the actions taken by the FHFA during the relevant time periods. The decision in *Collins* provided SFR with a constitutional mechanism for challenging that shift in policy. Because SFR can raise a structural constitutional question at any time, including this argument at this juncture is appropriate and is not waived. Thus, to the extent Nationstar Mortgage, LLC ("Nationstar") is determined to have adequately proven ownership by Federal Home Loan Mortgage Corporation ("Freddie Mac") and a servicing relationship between Freddie Mac and Nationstar, the unconstitutional structure of the FHFA requires

[1] *Collins* v. *Yellen*, 594 U.S. __, 141 S. Ct. 1761, 1788-1789, 210 L.Ed.2d 432 (2021).

remand for consideration of damages caused by the actions of the Director.

However, this Court may never need to reach the *Collins* issue, because the District Court abused its discretion in denying SFR's renewed motion to strike and declaring its motion to compel moot. The failure of Freddie Mac and Nationstar to adequately cooperate in the additional discovery ordered by the District Court after remand from this Court—remand for the exact purpose of determining whether Nationstar's failure to timely disclose Dean Meyer as a witness was substantially justified or harmless—should have resulted in striking Meyer and his declaration.[2] Nationstar's and Freddie Mac's refusal to fully participate in the additionally ordered discovery after remand should have resulted in a finding that the failure to disclose was not harmless, nor substantially justified and that Nationstar's and Freddie Mac's refusal to participate in discovery meant that the harm could not be mitigated.

By denying SFR's renewed motion to strike and relying on the evidence that SFR sought to strike in making its decision that Freddie Mac owned the loan at the time of the foreclosure sale and Nationstar serviced the loan on behalf of Freddie Mac, the District Court improperly deprived SFR of the complete discovery necessary to mitigate any harm caused by the original failed disclosure by Nationstar. The District Court's use of evidence that should have been stricken was

[2] *See* Opening Brief at pp. 7-10, 24-27.

an abuse of discretion—an abuse further exacerbated by the District Court's refusal to consider SFR's Motion to Compel additional testimony and production of documents despite contradictions between documents produced and testimony elicited that cast doubt on Freddie Mac's alleged ownership interest at the time of the foreclosure sale—something Nationstar had the burden to prove.

Even with consideration of the evidence that should have been stricken, this Court should not have granted Nationstar's Motion for Summary Judgment. In addition to the admissibility problem and conflicting evidence in the form of MERS documents and questionable screenshots, this Court's recent opinion in *Morning Springs*,[3] relying on the Ninth Circuit's opinion in *M&T Bank*,[4] suggests something more than what was required to prove ownership under *Daisy Trust*[5] is now necessary. These opinions change the analysis with regard to what is required to prove an ownership interest and servicing relationship in a §4617(j)(3) claim. *M&T Bank* and *Morning Springs* changed the focus on the ownership question, and should

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

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

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

be read to require the production of the original wet-ink signature promissory note in order for a servicer to establish the ownership element.

ARGUMENT

I. THE *COLLINS* ISSUES ARE BOTH TIMELY AND RELEVANT, MAKING REMAND NECESSARY HERE.

Remand to consider SFR's damages for actions taken by the director is proper here because the *Collins* opinion calls into question every decision made by the director of the FHFA. This includes the FHFA's significant shift in policy to invalidate state property law through the use of 12 U.S.C. §4517(j)(3) while maintaining a policy of keeping any FHFA interest a secret and failing to provide any mechanism to request consent even if sought.

The *Collins* opinion that the FHFA's structure as set forth in HERA violates the separation of powers, and is therefore unconstitutional, raises doubt and question regarding every decision made by the Director of the FHFA. While the U.S. Supreme Court did not void **every** action taken by the Director under the unconstitutional structure, it did find that the parties may be entitled to retrospective relief. It explained,

> Although an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's

enactment), it is still possible for an unconstitutional provision to inflict compensable harm.[6]

In *Collins*, the U.S. Supreme Court remanded for the district court to consider any remedy for compensable harm inflicted by the unconstitutional provision in HERA.[7] This includes the exact harm inflicted on SFR as a result of the Director's decision in late-2014/early-2015 to go against previous policies and practices of implicit consent to foreclosure under state super lien laws.[8] Prior to this significant shift in policy, the policy and practice of the FHFA as conservator was NOT to invalidate state property law through the use of §4617(j)(3), but rather to consent to operation of state super lien laws.[9] Generally, the expectation was that the servicers would protect the priority of any liens. This expectation provides the explanation for

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[6] *Collins*, 141 S. Ct. at 1788-1789.

[7] *Id*.

[8] https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx (last accessed November 4, 2021); https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx (last accessed November 24, 2021).

[9] *See* May 12, 2016 Letter to Mel Watts, FHFA Director, from Senator Elizabeth Warren and other Members of Congress, https://www.warren.senate.gov/files/documents/2016-5-12_MA_delegation_ltr_to_FHFA.pdf (last accessed November 2, 2021) ("Letter"); *see also*, Press Release, https://www.warren.senate.gov/newsroom/press-releases/massachusetts-congressional-delegation-urges-fhfa-to-delay-new-policy-on-and-147super-lien-and-148-laws-affecting-homeowners-in-community-associations (last accessed November 2, 2021) ("Press Release").

why the FHFA maintained a practice of actively hiding any interest in real property in the public record and did not implement a procedure to obtain consent. Simply put, the FHFA consented to the extinguishment of liens pursuant to state property law and put the ball in the court of the servicers to ensure that the priority of any of its liens was protected.

A. SFR has properly presented before this Court the issue of whether remand is necessary for further proceedings to determine compensable harm to SFR caused by the unconstitutional structure of the FHFA.

The recent United States Supreme Court decision in *Collins* provided the power behind an argument SFR has already made repeatedly—the FHFA did not have a policy of non-consent to the operation of state super lien laws, but rather a policy of consent backed up by its guidelines and recording policies and practices. The backdrop of this argument is not new. What is new is the fact that there is now an existing Supreme Court case that validates what SFR has been arguing all along—the FHFA's director improperly implemented a new policy of non-consent to the operation of state super lien laws with statements issued after many of the affected foreclosures, including this one, had taken place. The *Collins* opinion simply provides the support for SFR to present the structural constitutional question—something it is permitted to do at any time.

At bottom, the Supreme Court of the United States in *Collins* makes it clear that decisions and actions taken by the Director of the FHFA under its unconstitutional structure are called into question. While every action is not automatically void, the unconstitutional provision can give rise to compensable harm. Accordingly, this Court should remand for further proceedings regarding the compensable harm to SFR in this case.

B. *Collins* is wholly relevant to the claims and defenses in this case.

But for the unconstitutional actions taken by the Director—namely the significant shift in FHFA policy from generally consenting to foreclosure under state super lien laws to the director issuing a blanket statement that the FHFA does not nor did it ever consent[10]—SFR would have been able to show it acquired the Property at foreclosure auction free and clear of the Deed of Trust. Throughout the relevant time period, the expectation was on Servicers, based on their agency relationship, to protect the priority. If Servicers did not do what they were required to do under with regard to protecting lien priority, the dispute is between Servicers and the FHFA—it should not change the outcome of the foreclosure sale. And, FHFA actions prior to the "shift in policy" (i.e., non-recording in Freddie Mac's name, not having a mechanism for consent) each show that FHFA policy was, in

[10] *See* fn. 8, supra.

fact, to consent to operation of super lien statutes as expected. In other words, prior to statements issued and actions taken by the FHFA director, albeit prepared likely in response to litigation and arguably now deemed unconstitutional, the FHFA's general policy was to consent to foreclosure and extinguishment of liens such as those provided for in Nevada law.

The FHFA's general policy of consent, and to agree to abide by local foreclosure law, can be further evidenced by cases such as *Trademark Props. Of Mich., LLC v. Fed. Nat'l Mortg. Ass'n*, 308 Mich. App. 132, 863 N.W.2d 344 (Mich. App. 2014). There, a property owned by Fannie Mae through a deed of trust foreclosure was actually foreclosed upon by the homeowners association to which the property was subject, based on a delinquent assessment lien. If §4617(j)(3) applies to a deed of trust, it certainly applies to actual physically owned property of the agency. Yet, Fannie Mae did not even raise the specter of §4617(j)(3) in that litigation, losing the property to foreclosure. This is just one example demonstrating that the FHFA has, in fact, impliedly consented before. The expectation of anything more than implied consent during the relevant time frame is unrealistic, given the policy to keep any interest of Fannie Mae and/or the FHFA secret and providing no mechanism to request and/or obtain consent.

But for the blanket statement issued by the Director that the FHFA does not nor has it ever given consent, there is no reason to doubt the existence of the FHFA's

consent to state super lien and association foreclosure laws and the FHFA's expectation that Servicers, like Nationstar, would protect the FHFA from loss of any lien as a result of a foreclosure under such state laws. At bottom, everything in the records indicate the onus was on Servicers to take whatever action was necessary to protect the FHFA—the recorded interest in their name, the fact that they were the ones with all the knowledge and ability to protect any FHFA interests—and the Servicers failed. The FHFA's problem is with the Servicers and SFR should not be penalized by an arguably unconstitutional shift in policy that occurred directly as a result of Servicers' failure to do what they were contracted to do.

C. The FHFA Director's action caused harm to SFR—the extent of which is to be determined on remand.

Nationstar is mistaken in its argument that SFR's harm results from the automatic operation of a federal statute, not from a FHFA director's decision. Simply put, but for the FHFA director's abrupt change in the FHFA's general policy to consent to the operation of state super lien laws—including NRS 116.3116(2) that provides for extinguishment of a first lien if the superpriority portion of an Association lien is not satisfied prior to an Association foreclosure sale on a property—consent for the operation of state super lien laws would have continued. In the end, with the general consent provided by the FHFA and its expectation under

its guide that servicers would protect the priority of its liens, SFR would have acquired the Property in question here free and clear of the Deed of Trust.

In its answering brief, Nationstar puts considerable effort into arguing whether or not SFR was damaged and to what extent, proposing that remand is inappropriate because SFR cannot prove a change in policy that caused damage. However, it is not for this Court to evaluate the evidence to the existence of and the extent of damages to SFR as a result of the Director in the instant matter. Rather, that is for the lower court to evaluate on remand. This is so because "[a]n appellate court is not particularly well-suited to make factual determinations in the first instance."[11] Just as the banks in this ongoing homeowners association foreclosure litigation have repeatedly been permitted to bring claims that were never argued once certain case law suggested a new claim or changed the way a Court viewed an issue (i.e. §4617(j)(3) , tender, homeowner payment, futility, etc.), after losing on a prior issue (i.e. constitutionality of the statutes), there is no reason to restrict SFR from similarly raising the *Collins* issue here.

SFR does not have to prove its case here in the appellate court. Just like the *Collins* shareholders, SFR should be able to go back on remand and develop the case as it relates to the actions of the director and the potential damages caused to SFR as

[11] *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012).

a result of those actions. The United States Supreme Court opened this door and SFR should be permitted to go in. *Collins* permits the remand and the Warren letter lends full credibility to SFR's concerns about the director's actions. Additionally, it was well known that President Trump planned to privatize the GSEs and take them out of the control of FHFA's conservatorship. Perhaps if he had had the opportunity to replace the Director immediately when he took office, rather than have to wait for the expiration of Mr. Watt's term, the additional two years would have given his chosen director time to put into place the necessary policies to privatize the GSEs and make HERA unavailable to them for this litigation. For example, as President Trump's nominee for Secretary of the Treasury stated: "We've got to get Fannie and Freddie out of government ownership. It makes no sense that these are owned by the government and have been controlled by the government for as long as they have."[12]

But these are things to be fleshed out during additional briefing and discovery into the issues. What the Bank cannot do is say SFR suffered no harm, or cannot prove harm. In fact, the question remains as to whose burden it is; SFR's to show it would not have been harmed under a constitutional make-up of the Agency or the Bank's to show nothing would have changed? SFR is simply requesting this Court to order additional briefing on the issues and them in the first instance.

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[12] *Mnuchin: Get Fannie Mae, Freddie Mac out of government ownership*, FOX BUSINESS NEWS, at 00:06 to 00:16 (Nov. 30, 2016), https://bit.ly/3iKDZUc.

At bottom, further discovery is needed to unveil whether or not the director would have been removed and replaced with one that would not have changed course on the consent to foreclosure and acceptance of state lien laws. And, despite Nationstar's argument otherwise, it does not matter that the FHFA and/or Freddie Mac are not currently a party to the case because the courts have overwhelmingly decided that their presence in these cases is unnecessary—over SFR's objections, courts, including this Court in this case, have found that GSE's and their servicers, such as Nationstar here, stand in the shoes of the FHFA for purposes of this litigation.[13]

The appropriate resolution would be to remand for the lower court to hear argument on the full impact of *Collins* and the potential harm caused to SFR as a result of the Director's actions.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING SFR'S RENEWED MOTION TO STRIKE BY FAILING TO ANALYZE THE HARM CAUSED BY NATIONSTAR'S FAILURE TO PROPERLY DISCLOSE DEAN MEYER IN LIGHT OF NATIONSTAR AND FREDDIE MAC'S OBSTRUCTION OF ADDITIONALLY ORDERED DISCOVERY.

Nationstar argues that it properly disclosed Freddie Mac's corporate witness,

[13] Interestingly enough, despite vehemently representing that servicers can and do adequately represent their interest, the FHFA and the GSE's do not hesitate to step in and represent something different from the servicers if they decide they do not like how or what the servicers are arguing with regard to certain topics.

albeit inadvertently late, and that the disclosure of Dean Meyer through a declaration with previously disclosed documents did not prejudice SFR. However, despite this case being on remand specifically to consider the harm caused to SFR by the late disclosure of the Dean Meyer and his declaration, and the District Court's attempt to allow Nationstar and Freddie Mac to cure any harm by permitting further discovery in the form of a Meyer deposition, the prejudice to SFR is clear here. Not only was SFR initially harmed by the initial failed disclosure, but on remand that harm to SFR was exacerbated by Nationstar and Freddie Mac's repeated obstruction of the discovery process.

On remand, Nationstar provided zero explanation as to how failure to disclose the witnesses during discovery was substantially justified or harmless. Instead, further discovery was ordered. However, from the moment further discovery was ordered, Nationstar and Freddie Mac made it all but impossible for SFR to conduct the additional discovery necessary to gather the evidence to call into question the screenshots and cast doubt on the Meyer declaration.

Initially, Nationstar and Freddie Mac placed an obstacle in SFR's way of deposing Dean Meyer by requiring he, as well as any documents, be subpoenaed. Nationstar argues this is proper because "it was SFR who chose not to name Freddie

Mac as a defendant."[14] Of course, as previously mentioned, Nationstar makes this argument despite its claimed position as the agent/servicer acting on behalf/stepping in the shoes of Freddie Mac/FHFA and being in "possession, custody or control" of the documents. It is disingenuous for Nationstar to argue in one breath that it stands in the shoes of Freddie Mac/FHFA for litigation purposes, then in the next breath to argue that SFR has to jump through unnecessary procedural hoops to get information that should be in Nationstar's possession and to depose a witness that Nationstar can easily request to appear—all this despite discovery being ordered for the precise purpose of deposing Freddie Mac's witness and obtaining any necessary supporting documents.

When a deposition was finally arranged and conducted, SFR was unable to adequately challenge the "evidence" ultimately relied on to prove Freddie Mac ownership of the loan and a servicing relationship between Nationstar and Freddie Mac because Dean Meyer came unprepared for certain deposition topics and Freddie Mac refused to provide documents related to said topics. If Nationstar/Freddie Mac wanted to be protected from the topics, it should have filed a motion for protective order. Simply refusing to properly prepare put SFR at a disadvantage because SFR was unable to obtain answers from Meyer regarding the many of the facts and issues

[14] See Nationstar's Answering Brief at p. 43.

in this case, which were essential to be able to challenge the evidence on which the District Court ultimately relied. The lack of meaningful discovery obtained as a direct result of the behavior of Nationstar and Freddie Mac make the harm to SFR by the initial non-disclosure, as well as the lack of mitigation, readily apparent. The District Court did not even contemplate the obstruction by Nationstar and Freddie Mac in denying SFR's Motion to Strike and determining no harm was caused to SFR because a deposition was ultimately conducted. This failed analysis by the District Court is an abuse of discretion warranting reversal of the summary judgment in favor of Nationstar. This is especially true given that the District Court relied primarily on Dean Meyer's declaration and the corresponding docs to make its determination that Freddie Mac owned the loan at the time of the Sale and Nationstar serviced the loan at all relevant times, despite conflicting information in MERS records and in the screenshots. Nationstar attempts to discredit SFR's argument as to the inconsistencies in the record, but the MERS milestones in this case clearly contradict the assertion that Freddie Mac obtained ownership in 2005, rather clearly reflecting a transfer of loan ownership from BANA to Freddie Mac did not occur until 2012 at the earliest. This, combined with other confusing or questionable notations in the screen shots and Freddie Mac's obstructionist actions at deposition most certainly warranted either striking Dean Meyer's declaration and/or further mandated discovery.

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

All told, the District Court should not have considered Meyer's declaration. The Nevada Supreme Court recently affirmed a District Court's order that declined to consider a declaration that was not provided during the discovery period.[15] And in doing so, affirmed that Nationstar could not invoke §4617(j)(3) to its benefit. This Court should remand with instructions to the District Court to reevaluate Nationstar's claims without consideration of the undisclosed declarant, as well as after compelling production of the original wet-ink signature promissory Note and any relevant servicing contracts/agreements.

III. NATIONSTAR'S MISREADING OF *M&T BANK* AND *BEREZOVSKY* UNDERSCORES THE DISTRICT COURT'S ABUSE OF DISCRETION IN DENYING SFR'S MOTION TO COMPEL.

Nationstar devotes a large portion of its answering brief to minimizing the significance of *Morning Springs* and *M&T Bank*, and to rewriting *Berezovsky*[16] to mean something other than what it says. Their attempt fails.

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

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

A. *Berezovsky* Makes Operation of §4617(j)(3) Dependent on an Enterprise's "Enforceable Property Interest," But Does Not Define the Contours of That Interest.

Nationstar argues Freddie Mac's power to enforce the note is irrelevant to the application of 12 U.S.C. §4617(j)(3), and that this Court in *Berezovsky* somehow held the inquiry required to determine if §4617(j)(3) applies is limited solely to "whether Fannie Mae owned the deed of trust."[17] This is incorrect. Nationstar's argument is based on a willfully blind misreading of *Berezovsky*. It is the power to enforce, and not mere "ownership" per se, that controls.

In *Berezovsky*, after finding §4617(j)(3) preempted state law, this Court analyzed the seminal issue Berezovsky raised, *i.e.*, that even if §4617(j)(3) applied, "Freddie Mac did not prove beyond dispute that it holds **an enforceable property interest**."[18] Thus, this Court framed the operation of §4617(j)(3) as wholly contingent upon Freddie Mac demonstrating not merely "ownership," but rather an *enforceable* property interest.

To address the question of whether Freddie Mac proved such interest in a case identical to that here—*i.e.*, where the deed of trust ("DOT") and note are split—this Court looked to Nevada law and reasoned in a manner which contradicts

[17] *Nationstar's Opening Brief* at p. 34.

[18] *Berezovsky*, 869 F.3d at 931-932 (emphasis added).

Nationstar's rewriting of *Berezovsky*. The subsequent analysis that: (1) the question of whether §4617(j)(3) applies is wholly contingent upon an Enterprise's power to enforce its purported interest; (2) this interest is the "interest under the security instrument," *i.e*., the DOT; and (3) the proof of agency relationship requirement established in *Berezovsky* is fully dependent upon the Enterprise's ability to *enforce* its purported interest:

> Under these circumstances—that is, where the note is "split" from the deed of trust—an "agency relationship" with the recorded beneficiary **preserves the note owner's power to enforce its interest under the security instrument**, because **the note owner can direct the beneficiary to foreclose on its behalf**. *See id*. An agency relationship exists if the **note owner has the ability to reclaim the deed of trust from the beneficiary by ordering that the beneficiary make an assignment**.[19]
>
> Nevada law thus recognizes that, **in an agency relationship, a note owner remains a secured creditor with a property interest in the collateral even if the recorded deed of trust names only the owner's agent**. ...[20]
>
> Although the recorded deed of trust here omitted Freddie Mac's name, Freddie Mac's **property interest** is valid and **enforceable** under Nevada law….[21]

Thus, while *Berezovsky* is often characterized as requiring an ownership element and an agency element for invocation of §4617(j)(3) when the note and

[19] *Id*. at 651.

[20] *Id*.

[21] *Id*. at 932 (citations omitted, emphasis added).

DOT are split, there actually is only one element, proof of an *enforceable* property interest, and an example given is the power to foreclose, *i.e.*, to enforce the DOT. Proof of agency is merely an extension of the proof of *enforceable property interest* element that comes into play when note and DOT are split. The conclusion of *Berezovsky* bears this out:

> Because Freddie Mac **possessed an enforceable property interest** and was under the Agency's conservatorship at the time of the homeowners association foreclosure sale, the Federal Foreclosure Bar served to protect the deed of trust from extinguishment.[22]

However, *Berezovsky* does not describe the precise contours of this required "enforceable property interest," where and how it is derived, its relationship to an Enterprise's claims, and what documents might affect it. The closest *Berezovsky* comes is to state "Nevada law requires recording of a lien for it to be enforceable," presumably referring to the DOT, and to note this does not mandate the recorded instrument identify the note owner by name.[23] The Court also explains that an agency relationship with the recorded beneficiary can cure the issue of the note owner not being so identified.[24]

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[22] *Id*. at 933 (emphasis added).

[23] *Id*. at 932.

[24] *Id*.

But beyond this, *Berezovsky* does not specifically discuss the Enterprise's quiet title claim or where such claim is derived from in the context of §4617(j)(3) .. *Berezovsky* makes clear this enforceable property interest is derived from the "note owner's power to enforce its interest under the [deed of trust]" based on its power to "direct the beneficiary to foreclose on its behalf," but *Berezovsky* does not specifically address how this "enforceable property interest" that is the basis for an Enterprise's quiet title claim is affected by the validity or ownership of the underlying note.[25] This is not surprising, as "discovery had not yet opened, [and] Berezovsky himself moved for summary judgment and agreed to the district court's resolving the motions without further discovery."[26]

B. ***Morning Springs*** **and** ***M&T Bank*** **changed the legal landscape by explicitly finding that the "Enforceable Property Interest" required under** ***Berezovsky*** **is based solely on contractual rights ultimately derived from and dependent upon the Note.**

Nationstar argues *Morning Springs* and *M&T Bank* did not change the legal landscape of the application of §4617(j)(3) .[27] This argument is untenable.

While *Berezosky* established an Enterprise must prove the enforceable property interest element for §4617(j)(3) to apply—including the implicit agency

[25] *Id*.

[26] *Id.* at 933 n.8.

[27] *Nationstar's Answering Brief* at p. 27.

element when note and DOT are split—*Berezovsky* did not address precisely how that enforceable property interest must be established. Importantly, *Berezovsky* does not discuss or contain the term "contract," and does not address the implication or relevance of the specific provisions of the DOT that relate to the note. In fact, *Berezovsky* nowhere addresses the specific provisions of the DOT at issue there, other than noting Freddie Mac's name did not appear in the DOT.[28] *M&T Bank* changed this.

M&T Bank is this Court's first published opinion to address the contours of *Berezovsky's* "enforceable property interest" element, finally defining the fact that this is *solely a contractual interest wholly dependent upon the* ***validity*** *and* ***enforceability*** *of the Enterprise's purported lien on the property*:

> We conclude that the claims in this action are "contract" claims under 12 U.S.C. § 4617(b)(12)(A)(i). Although there is no contract between SFR and the plaintiffs, **the quiet title claims are entirely "dependent" upon Freddie Mac's lien on the Property, an interest created by contract**. *See Stanford Ranch, Inc. v. Md. Cas. Co*., 89 F.3d 618, 625 (9th Cir. 1996) ("If a claim is dependent upon the existence of an underlying contract, the claim sounds in contract, as opposed to tort.") (applying California law); *see also Smith v. FDIC*, 61 F.3d 1552, 1561 (11th Cir. 1995) ("[B]ecause a mortgage lien is an interest in property created by contract, an action to enforce that lien is clearly a contract action.").[29]

[28] *Berezovsky*, 869 F.3d at 932.

[29] *M&T Bank*, 963 F.3d at 858 (emphasis added).

Considering *M&T Bank's* holding, and *Morning Spring's* endorsement of that holding, that an Enterprise's quiet title claims—and therefore its "enforceable property interest"—are dependent upon the "lien" created by the DOT which is an "interest created by contract," the provisions of the DOT must be examined to determine whether that "lien" interest is valid or even existed at the time of sale. This examination reveals that the Enterprise's purported lien—and therefore its "enforceable property interest"—is itself wholly dependent upon a legally valid note owned, controlled, and/or possessed by the proper party in order for §4617(j)(3) to thwart Nevada's superpriority foreclosure statutes.

The DOT identifies itself as the "Security Instrument," identifies the "Note," and defines the "Loan" as the debt evidenced by the note.[30] The DOT states it "**secures … the repayment of the Loan, and all renewals, extensions and modifications of the Note**; and … the performance of Borrower's covenants and agreements **under this Security Instrument and the Note**."[31] To effect this sole purpose of securing repayment of the note, the DOT transferred the property to the trustee, along with the power of sale and the right to exercise any of the interests transferred by the borrower under the DOT, including the right to foreclose and sell

[30] 2JA_0397-0398.

[31] 2JA_0399.

the property.[32] By the DOT's plain language, its sole purpose is to secure repayment of the debt created by the note, an uncontroversial proposition recognized by the Nevada Supreme Court.[33] This is highlighted by the fact the DOT explicitly directs reconveyance of the property "[u]pon payment of all sums secured by [the DOT]," *i.e.*, the sums due under the note.[34]

Thus, the Enterprise's purported "lien on the Property" referenced in *Morning Springs* and *M&T Bank* and described as "an interest created by contract" is indeed created by the DOT, but this DOT in turn exists *solely* to secure the debt created by the note—*i.e.*, a *separate contract* upon which the Enterprise's "enforceable property interest" is also wholly dependent and from which the Enterprise's purported "enforceable property interest" is derived.[35] If there is no note, no valid note, or a blank-endorsed note that is not owned, controlled, and/or in actual or construction possession of the Enterprise at all relevant times, §4617(j)(3) cannot apply. Viewed through the lens of *Morning Springs* and *M&T Bank*, the discussion

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[32] *Id*.

[33] *See Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 254 (Nev.2012) (""**The note represents the right to the repayment of the debt**, while the [deed of trust] ... represents the security interest in the property **that is being used to secure the note**.") (Emphasis added).

[34] 2JA_0409.

[35] *Berezovsky*, 869 F.3d at 933.

in *Berezovsky* as to proof of an agency relationship which "preserves **the note owner's power to enforce** its interest under the security instrument, because **the note owner can direct the beneficiary to <u>foreclose</u> on its behalf**" also makes perfect sense.[36] Even the agency relationship element is dependent on and derived from the note.

C. <u>In light of *M&T Bank*, SFR's Motion to Compel was improperly denied.</u>

In light of *Morning Springs*, a DOT securing a non-existent or legally invalid note, or one that was not enforceable by the relevant parties at the time of sale, is insufficient to demonstrate the "enforceable property interest" identified under *Berezovsky* as required invoke §4617(j)(3) 's protections.[37] If there is no valid note at time of sale enforceable by a party with proper authority to enforce—either directly or through an agency relationship—the DOT is securing nothing and there is no property interest at play under §4617(j)(3) . Similarly, in the case of a blank-endorsed note, the Enterprise or its proven agent must be in possession or control of it at time of sale for §4617(j)(3) to prevent extinguishment.

Nationstar offers nothing to overcome the fact that in light of *Morning Springs*, which adopted the reasoning in *M&T Bank*, this enforceable property

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[36] *Id*.

[37] *Berezovsky*, 869 F.3d at 932.

interest is dependent upon both the DOT and the note, and fully contradict themselves on this issue. After incorrectly asserting the power to enforce is irrelevant under *Berezovsky*, and stating it does not matter "whether Fannie Mae could enforce the Note itself,"[38] they take the opposite position. Specifically, they cite *Millikan* wherein this Court found that for §4617(j)(3) to apply, the evidence must establish "both an **enforceable property interest in the loan** and an agency relationship with the loan servicer."[39] If the note is legally invalid for any reason, or endorsed in blank and not held by the proper parties at time of sale, §4617(j)(3) cannot come into play because there is no "enforceable" property interest in the "loan." To argue the note creating the loan upon which the property interest is based is irrelevant, flies in the face of *Millikan*, *Berezovsky*, and *M&T Bank*.

Nationstar's arguments about *Bourne Valley*[40] and *Jessica Grove*[41] fall flat, particularly the notion that the elucidation set forth in *M&T Bank* raised in this case would somehow have been addressed in those cases or later cases where none of the

[38] AB at 15.

[39] *Nationstar Mortgage LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave. Tr*., 996 F.3d 950, 956 (9th Cir.2021) ("*Millikan*") (emphasis added).

[40] *Bourne Valley Ct. Tr. v. Wells Fargo Bank, NA*, 810 F. App'x 492, 493 (9th Cir.2020) ("*Bourne Valley*").

[41] *Fed. Home Loan Mortg. Corp. v. SFR Invs. Pool 1, LLC*, 810 F. App'x 589, 591 (9th Cir.2020), *cert. denied sub nom. SFR Invs. Pool 1, LLC v. Fed. Home Loan*, No. 20-907, 2021 WL 1602653 (U.S. Apr. 26, 2021) ("*Jessica Grove*").

parties raised the issue. None of these cases was fully briefed or argued on the issue ultimately addressed in *M&T Bank—i.e*., that the "enforceable property interest" identified in *Berezovsky* is wholly dependent on the contractual rights established by both the DOT and the note it secures. *Bourne Valley* and *Jessica Grove* are unpublished, and in none of these cases, nor in any since, have parties fully raised and briefed in a lower court and on appeal the issue here of the change resulting from *M&T Bank*. The *post hoc* decisions denying rehearing or certiorari in *Bourne Valley* and *Jessica Grove* points more to this Court's unwillingness to explore unraised and unbriefed issues than it does to an indication that the argument was unpersuasive.[42]

Nationstar also points to *Daisy Trust* to establish production of the actual promissory note is not necessary or even helpful. But, Nationstar does not dispute that the issue raised here and made relevant by *Morning Springs* and *M&T Bank* was not raised in *Daisy Trust*, or that there is no evidence the purchaser in that case ever sought to inspect or demanded production of the note, and the dockets show no motion to compel or for Rule 56(d) relief or its state law equivalent.

[42] *See, e.g., Padgett v. Wright*, 587 F.3d 983, 986 (9th Cir.2009) (*citing Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20, AFL–CIO v. Martin Jaska, Inc*., 752 F.2d 1401, 1404 (9th Cir.1985)).

In short, the note should have been produced. The district court's denial of SFR's motion to compel was erroneous and requires reversal and remand for further discovery and briefing.

IV. THIS COURT SHOULD NOT ADDRESS NATIONSTAR'S EQUITY ARGUMENT.

Nationstar incorrectly suggests this Court can affirm on equity grounds under *Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 746, 405 P.3d 641, 646 (2017).

The issue of notice was fully briefed below. The district court explicitly found the sale proper and this Court has twice remanded solely to allow Nationstar to try to prove Freddie Mac's ownership and Nationstar's purported servicing relationship to FHFA. Despite this, Nationstar now argues that because NAS did not mail the notice of sale to it, the sale is void or is unfair. It cites *Resources Group* for this proposition.[43] The problem with this argument is that Nationstar does not assert it had no knowledge of the sale. It simply makes a blanket statement that it was prejudiced. But, that is not the standard. In *West Sunset 2050 Trust v. Nationstar Mortgage, LLC*, the Nevada Supreme Court held that a failure to allege prejudice as

[43] *U.S. Bank National Association ND v Resources Group, LLC*, 135 Nev. 199, 444 P.3d 442 (2019).

a result of the mailing deficit dooms its claim.[44] And, in *Schlieing v Cap One, Inc*., the court affirmed a district court's decision that the failure to prove prejudice from a notice defect corrected or made non-prejudicial the failure to mail.[45]

Nationstar admits that MERS and Bank of America, the previous beneficiary of the Deed of Trust received foreclosure notices from the Association. Yet, Nationstar claims the sale was "unfair and oppressive because the HOA failed to provide notice to Nationstar." **It is important to note that Nationstar is careful not to say that it did not receive the notice** before the sale. Nor does it claim that it would have done anything differently if the notice had been mailed directly to Nationstar instead of multiple entities required to forward the document to Nationstar. If the argument is to be considered at all, genuine issues of material fact remain precluding summary judgment as to actual knowledge and actions. Accordingly, the Bank has not demonstrated "unfairness" or "oppression."

CONCLUSION

For the reasons set forth above, the District Court's ruling should be reversed and the matter remanded to the District Court for further development and briefing regarding ownership of the loan, servicing relationships during all relevant times,

[44] *West Sunset 2050 Trust v. Nationstar Mortgage, LLC*, 134 Nev. 352, 354, 420 P.3d 1032, 1035 (2018).

[45] *Schlieing v Cap One, Inc*., 130 Nev. 323, 330-31, 326 P.3d 4, 8-9 (2014)

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

DATED this 29th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 29 pages long, and contains 6556 words.
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

…

…

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

Dated this 29th day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2021, I filed the foregoing **APPELLANT'S REPLY BRIEF**, which shall be served in accordance with the Master Service List found on the Court's eFlex system as follows:

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