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SUPREME COURT

STATE OF NEVADA

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT, Appellant, vs. NATIONSTAR MORTGAGE, LLC, Respondent.	No. 82449

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Plaintiff/respondent, Saticoy Bay LLC, Series 4641 Viareggio Ct, is a Nevada limited-liability company.

2. The manager for Saticoy Bay LLC, Series 4641 Viareggio Ct is Bay Harbor Trust.

3. The trustee for Bay Harbor Trust is Iyad Haddad a/k/a Eddie Haddad.

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The order granting defendant's motion for summary judgment is appealable under NRAP 3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The order granting defendant's motion for summary judgment was entered on January 4, 2021. Notice of entry of the findings of fact, conclusions of law, and judgment granting defendant's motion for summary judgment was served and filed on January 5, 2021.

(C) Plaintiff filed its notice of appeal on February 3, 2021.

ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for plaintiff/appellant therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale held on August 22, 2013 extinguished the deed of trust assigned to Nationstar Mortgage, LLC (hereinafter "defendant").

2. Whether Nevada law controls whether the Federal Home Loan Mortgage Corporation (hereinafter "Freddie Mac") held any enforceable interest in the real property commonly known as 4641 Viareggio Court, Las Vegas, Nevada (hereinafter "Property") on August 22, 2013.

3. Whether Freddie Mac complied with Nevada law to hold an enforceable interest in the Guillory deed of trust on August 22, 2013.

4. Whether the opinions in In re Monteirth and Daisy Trust excuse Freddie Mac's failure to comply with the mandatory language in NRS 111.205(1) and NRS 111.315.

5. Whether FHFA consent was required even though Freddie Mac did not hold any enforceable interest in the Guillory deed of trust.

6. Whether Saticoy Bay LLC Series 4641 Viareggio Ct. (hereinafter "plaintiff") has standing to assert the separate statute of frauds in NRS 111.205(1).

7. Whether NRS 111.325 protected plaintiff from defendant's unrecorded claim that Freddie Mac held an interest in the Guillory deed of trust.

8. Whether 12 U.S.C. § 4617 preempts Nevada's recording statutes that make any interest in the deed of trust claimed by Freddie Mac void as to plaintiff.

9. An order granting summary judgment is reviewed de novo without deference to the findings of the lower court.

STATEMENT OF THE CASE

On September 25, 2013, plaintiff filed a complaint asserting four claims for relief: 1) entry of an injunction prohibiting defendant from foreclosing a deed of trust recorded on January 25, 2007 against the real property commonly known as 4641 Viareggio Court, Las Vegas, Nevada (hereinafter "Property"); 2) entry of a judgment pursuant to NRS 40.010 determining that plaintiff was the rightful owner of the Property and that the defendants had no right, title, interest or claim to the Property; 3) entry of a declaration that title to the Property was vested in plaintiff free and clear of all liens and that the defendants be forever enjoined from asserting any right, title, interest or claim to the Property; and 4) entry of a writ of restitution restoring possession of the Property to plaintiff. (Appellant's Appendix ("AA"), Vol. 1, AA000001-AA000007)

On March 13, 2015, defendant filed an answer and counterclaim in response to plaintiff's complaint. (AA Vol. 1, AA000016-AA000167)

On March 19, 2015, plaintiff filed a motion to dismiss counterclaim. (AA Vol. 1, AA000168-AA000197)

On April 20, 2015, defendant filed an opposition to plaintiff's motion to dismiss counterclaim and a countermotion for summary judgment. (AA Vol. 2, AA000198-AA000332)

On April 29, 2015, Naples Community Homeowners Association (hereinafter "HOA") filed a motion to dismiss defendant's counterclaim as to the HOA. (AA Vol. 2, AA000333-AA000394)

On May 4, 2015, plaintiff filed a reply in support of plaintiff's motion to dismiss counterclaim and opposition to countermotion for summary judgment. (AA Vol. 2, AA000395-AA000407)

On May 18, 2015, defendant filed an opposition to the HOA's motion to dismiss defendant's counterclaim. (AA Vol. 2, AA000408-AA000447)

On June 11, 2015, the HOA filed a reply in support of its motion to dismiss defendant's counterclaim. (AA Vol. 3, AA000448-AA000453)

On July 28, 2015, the court entered an order granting plaintiff's motion to dismiss and denying defendant's countermotion for summary judgment. (AA Vol. 3, AA000454-AA000468)

On August 12, 2015, the court entered an order granting the HOA's motion to dismiss defendant's counterclaim without prejudice. (AA Vol. 3, AA000469-AA000477)

On May 15, 2017, plaintiff filed a motion for summary judgment. (AA Vol. 3, AA000478-AA000646)

On July 31, 2017, plaintiff filed a motion for default judgment against Monique Guillory (hereinafter "Guillory").(AA Vol. 3, AA000647-AA000657)

On August 10, 2017, defendant filed an opposition to plaintiff's motion for summary judgment. (AA Vol. 4, AA000658-AA000814)

On August 29, 2017, plaintiff filed a motion for voluntary dismissal against defendant Cooper Castle Law Firm, LLP. (AA Vol. 5, AA000951-AA000954)

On September 12, 2017, the court entered findings of fact, conclusions of law, and judgment granting plaintiff's motion for summary judgment and quieting the title held by plaintiff. (AA Vol. 5, AA000955-AA000967)

On September 13, 2017, plaintiff served and filed notice of entry of the findings of fact, conclusions of law, and judgment. (AA Vol. 5, AA000968-AA000982)

On September 25, 2017, the court entered a default judgment against Guillory.

(AA Vol. 5, AA000983-AA000985)

On September 26, 2017, plaintiff served and filed notice of entry of default judgment. (AA Vol. 5, AA000986-AA000990)

On October 2, 2017, defendant filed a motion for reconsideration, motion for relief, and motion to alter or amend judgment. (AA Vol. 5, AA000991-AA001011)

On October 5, 2017, the court entered an order granting motion for voluntary dismissal as to defendant Cooper Castle Law Firm, LLP. . (AA Vol. 5, AA001012-AA001013)

On October 5, 2017, plaintiff served and filed notice of entry of the order granting motion for voluntary dismissal. (AA Vol. 5, AA001014-AA001017)

On October 17, 2017, plaintiff filed an opposition to defendant's motion for reconsideration, motion for relief, and motion to alter or amend judgment. (AA Vol. 5, AA001018-AA001024)

On December 19, 2017, defendant filed an amended opposition to plaintiff's motion for summary judgment. (AA Vol. 7, AA001161-AA001317)

On January 11, 2018, plaintiff filed a reply to opposition to motion for summary judgment. (AA Vol. 8, AA001318-AA001430)

On December 11, 2018, the court entered findings of fact, conclusions of law,

and judgment granting plaintiff's motion for summary judgment and entering judgment in favor of plaintiff on its quiet title claim. (AA Vol. 8, AA001431-AA001436)

On December 14, 2018, defendant served and filed notice of entry of the findings of fact, conclusions of law, and judgment. (AA Vol. 8, AA001437-AA001446)

On January 7, 2019, defendant filed a notice of appeal. (AA Vol. 8, AA001447-AA001449)

On April 10, 2020, the court of appeals entered an order that cited Daisy Trust v. Wells Fargo Bank, N.A., 135 Nev. 230, 233-34, 445 P.3d 846, 849 (2019), as authority that "a deed of trust need not be assigned to a regulated entity like Freddie Mac in order for it to own the secured loan," and the court of appeals vacated the judgment entered on December 11, 2018 and remanded the case to the district court. (AA Vol. 9, AA001666-AA001668)

On November 9, 2020, defendant filed a motion for summary judgment. (AA Vol. 9, AA001460-AA001668)

On November 23, 2020, plaintiff filed an opposition to defendant's motion for summary judgment. (AA Vol. 10, AA001669-AA001822)

On December 8, 2020, defendant filed a reply supporting its motion for summary judgment. (AA Vol. 10, AA001823-AA001839)

On January 4, 2021, the court entered an order granting defendant's motion for summary judgment. (AA Vol. 10, AA001864-AA001873)

On January 5, 2021, defendant served and filed notice of entry of the order granting defendant's motion for summary judgment. (AA Vol. 10, AA001874-AA001884)

On February 3, 2021, plaintiff filed its notice of appeal. (AA Vol. 10, AA001891-AA001893)

STATEMENT OF FACTS

Plaintiff obtained title to the Property by entering and paying the high bid of $5,563.00 at a public auction held on August 22, 2013. *See* copy of foreclosure deed recorded on September 6, 2013 at AA Vol. 10, AA001695-AA001697.

The public auction arose from a delinquency in assessments due from Guillory to the HOA pursuant to NRS Chapter 116.

Defendant is the beneficiary by assignment of a deed of trust recorded as an encumbrance against the Property on January 25, 2007. *See* deed of trust at AA Vol. 9, AA001601-AA001627, corporation assignment of deed of trust to Aurora Loan

Services LLC (hereinafter "Aurora"), recorded on February 11, 2011, at AA Vol. 9, AA001629-AA001630, and assignment of deed of trust to defendant, recorded on October 18, 2012, at AA Vol. 9, AA001632.

Paragraph (C) at page 1 of the deed of trust identified First Magnus Financial Corporation as the "Lender." (AA Vol. 9, AA001601, ¶(C))

On August 19, 2011, Leach Johnson Song & Gruchow (hereinafter "foreclosure agent") mailed to Guillory a copy of the notice of delinquent assessment lien for $1,288.86 that was recorded against the Property on August 18, 2011. (AA Vol. 10, AA001729-1743)

On January 24, 2012, the foreclosure agent recorded a notice of default and election to sell for $2,361.35 against the Property. (AA Vol. 10, AA001748-1749)

On January 31, 2012, the foreclosure agent mailed copies of the notice of default to Guillory, to MERS and to Aurora. (AA Vol. 10, AA001750-1786)

On July 24, 2012, the foreclosure agent mailed copies of a notice of foreclosure sale for $3,647.16 to Guillory, to MERS and to Aurora. (AA Vol. 10, AA001795-1816)

On July 30, 2012, the foreclosure agent recorded the notice of foreclosure sale for $3,647.16 against the Property. (AA Vol. 10, AA001788-1790)

On September 13, 2012, a copy of the notice of foreclosure sale was served Guillory by the posting of a copy of the notice in a conspicuous place on the Property. (AA Vol. 10, AA001818, AA001820)

Beginning on September 13, 2012, copies of the notice of foreclosure sale were posted for 20 days successively in three public places in Clark County, Nevada. (AA Vol. 10, AA001819)

The notice of foreclosure sale was published in the Nevada Legal News on September 20, 2012, September 27, 2012 and October 4, 2012. (AA Vol. 10, AA001822)

SUMMARY OF THE ARGUMENT

The HOA foreclosure sale held on August 22, 2013 extinguished the deed of trust assigned to defendant.

Nevada law controls whether Freddie Mac held any enforceable interest in the Property on August 22, 2013.

Freddie Mac did not comply with Nevada law to hold any enforceable interest in the Guillory deed of trust on August 22, 2013.

The opinions in In re Montierth and Daisy Trust do not excuse Freddie Mac's failure to comply with the mandatory language in NRS 111.205(1) and NRS

111.315.

FHFA consent was not required because Freddie Mac did not hold any enforceable interest in the Guillory deed of trust.

Plaintiff has standing to assert the separate statute of frauds in NRS 111.205(1).

NRS 111.325 expressly protects plaintiff from defendant's unrecorded claim that Freddie Mac held an interest in the Guillory deed of trust.

12 U.S.C. § 4617 does not preempt Nevada's recording statutes that make any interest in the Property claimed by Freddie Mac void as to plaintiff.

STANDARD OF REVIEW

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this Court stated that it "reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court."

ARGUMENT

1. The HOA foreclosure sale held on August 22, 2013 extinguished the deed of trust assigned to defendant.

NRS 116.3116 (2) provides that an HOA's assessment lien is "prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the

assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien. . . ."

The first deed of trust, recorded on January 25, 2007, falls squarely within the description in NRS 116.3116(2)(b).

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 758, 334 P.3d 408, 419 (2014), this court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust.

The foreclosure deed included specific recitals regarding default, the mailing of each required notice and the posting and publication of the notice of sale.(AA Vol. 10, AA001695-1696)

Exhibits 6 to 10 to plaintiff's opposition also proved that all required notices were timely served, posted, recorded and published as required by Nevada law. (AA Vol. 10, AA001747-AA001822)

The sole exception to the conclusive recitals would be in the case of fraud or other grounds for equitable relief. Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. 49, 56-59, 366 P.3d 1105, 1110-

1112 (2016)(hereinafter "Shadow Wood"). Defendant did not prove that any such grounds exist in the present case.

The foreclosure of the HOA's super priority lien extinguished any estate, right, title, interest or claim in the Property created by the subordinate deed assigned to defendant. SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 757, 334 P.3d at 419.

Title to the real property therefore vested in plaintiff free of the extinguished deed of trust.

2. Nevada law controls whether Freddie Mac held any enforceable interest in the Property on August 22, 2013.

By its express terms, 12 U.S.C. § 4617(j)(3) only protects "property of the Agency." 12 U.S.C. § 4502(2) defines the term "Agency" to mean the Federal Housing Finance Agency.

In the present case, paragraph (J) at page 2 of the deed of trust (AA Vol. 10, AA001700, ¶(J))and Paragraph 16 at page 11 of the deed of trust (AA Vol. 10, AA001709, ¶16) expressly provide that all rights held in the Guillory deed of trust are "subject to" the "requirements and limitations" of Nevada law.

In Butner v. United States, 440 U.S. 48, 55 (1979), the Supreme Court stated that "[p]roperty interests are created and defined by state law."

In Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017), the court of appeals acknowledged that its determination of whether Freddie Mac held an interest in the deed of trust was controlled by Nevada law. The court stated:

> **Here, we look to the Nevada Supreme Court's resolution of these issues**. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). (emphasis added)

869 F.3d at 931.

In High v. Ignacio, 408 F.3d 585, 590 (9th Cir. 2005), the court stated that "[t]his court accepts a state court ruling on questions of state law." In addition, the Supreme Court stated in Arizonans for Official English v. Arizona, 520 U.S. 43, 48 (1997), that "[f]ederal courts lack competence to rule definitively on the meaning of state legislation."

In Blanton v. North Las Vegas Municipal Court, 103 Nev. 623, 748 P.2d 494, 500 (1987), this court stated:

> We note initially that the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court. United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075–76 (7th Cir.1970), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 140 (1971). Even an *en banc* decision of a federal circuit court would not bind Nevada to restructure the court system of this state.

In addition, this court has stated that the Ninth Circuit's interpretation of Nevada statutes on a matter of state law does not constitute mandatory precedent, but

may be construed as persuasive authority. *See* In re Nevada State Engineer Ruling No. 5823, 128 Nev. 232, 277 P.3d 449, 456 (2012); Custom Cabinet Factory of New York, Inc. v. District Ct., 119 Nev. 51, 54, 62 P.3d 741, 742-743 (2003).

3. Freddie Mac did not comply with Nevada law to hold any enforceable interest in the Guillory deed of trust on August 22, 2013.

As discussed at pages 6 to 11 of plaintiff's opposition (AA Vol. 9, AA001674-AA001679), Freddie Mac did not comply with Nevada law to hold an enforceable interest in the Guillory deed of trust on August 22, 2013.

Under Nevada law, any transfer of an interest in a deed of trust is a conveyance of land that must comply with the statute of frauds found in NRS 111.205(1).

NRS 111.205(1) expressly provides that Freddie Mac could not hold any interest in the Guillory deed of trust unless there is a "deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

NRS 111.010(1) broadly defines the word "conveyance" to include "every instrument in writing, except a last will and testament, **whatever may be its form**, and **by whatever name it may be known** in law, **by which any interest in lands** is **created,** aliened, **assigned** or surrendered." (emphasis added)

In Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011), this court stated:

> A deed of trust is an instrument that "secure[s] the performance of an obligation or the payment of any debt." NRS 107.020. This court has previously held that a deed of trust "constitutes a conveyance of land as defined by NRS 111.010." Ray v. Hawkins, 76 Nev. 164, 166, 350 P.2d 998, 999 (1960). The **statute of frauds governs** when a conveyance creates **or assigns** an interest in land:
>
> > **No estate or interest in lands,** ... nor any trust or power over or concerning lands, or in any manner relating thereto, **shall be created, granted, assigned,** surrendered or declared ..., **unless ... by deed or conveyance, in writing, subscribed by the party** creating, granting**, assigning,** surrendering or declaring **the same**, or by the party's lawful agent thereunto authorized in writing.
>
> NRS 111.205(1) (emphases added).Thus, to prove that MortgageIT properly assigned its interest in land via the deed of trust to Wells Fargo, Wells Fargo **needed to provide a signed writing from MortgageIT demonstrating that transfer of interest**. No such assignment was provided at the mediation or to the district court, and **the statement from Wells Fargo itself is insufficient proof of assignment.** Absent a proper assignment of a deed of trust, Wells Fargo lacks standing to pursue foreclosure proceedings against Leyva. (emphasis added)

The "conveyance, in writing" required by NRS 111.205(1) is not limited to a deed of trust or an assignment of deed of trust, but includes every "conveyance, in writing" by which defendant claims that Freddie Mac acquired an interest in the Guillory deed of trust before August 22, 2013.

In Occhiuto v. Occhiuto 97 Nev. 143, 147, 625 P.2d 568, 570 (1981), this court unequivocally stated:

> The law of this state specifically precludes the creation of any interest in land except by a properly executed written instrument. NRS 111.205(1).

NRS 111.315 states that "[e]very conveyance of real property. . . **shall** be recorded. . . ." (emphasis added)

Because the signed writing required by NRS 111.205(1) for Freddie Mac to hold any interest in the Guillory deed of trust is a "conveyance," NRS 111.315 required that the signed writing be recorded.

At page 10 of its motion (AA Vol. 9, AA001469) , defendant stated that "[t]he Federal Foreclosure Bar necessarily protects Freddie Mac's Deed of Trust," but the declaration by Freddie Mac's employee, Dean Meyer, only stated that as indicated by the "Funding Date" in Freddie Mac's MIDAS system, "Freddie Mac acquired ownership of the Loan, which specifically includes the Note and the Deed of Trust, on or about March 29, 2007 and has owned it ever since." (AA Vol. 9, AA001482, ¶5(d))

Mr. Meyer did not state that the "conveyance, in writing" to Freddie Mac required by NRS 111.205(1) existed for the Guillory loan.

Consequently, defendant's argument rested entirely upon the unstated assumption that "ownership" of a loan necessarily grants the "owner" of the loan an enforceable interest in a deed of trust that secures the payment of the loan.

No binding authority supports defendant's unstated assumption.

At page 2 of its motion (AA Vol. 9, AA001461), defendant cited Daisy Trust v. Wells Fargo Bank, N.A., 135 Nev. 230, 445 P.3d 846 (2019)(hereinafter "Daisy Trust"), but in that case, this court focused on the amendment made to NRS 106.210 that became effective on July 1, 2011. On the other hand, the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 has existed since 1861, and NRS 111.315 was last amended in 1995.

The opinion in Daisy Trust also focused on whether Nationstar had presented sufficient evidence of Nationstar's servicing relationship with Fannie Mae and Fannie Mae's "ownership" of the loan.

However, even if that servicing relationship did exist, Freddie Mac's "ownership" of the Guillory loan could not convey an enforceable interest in the Property or the Guillory deed of trust to Freddie Mac because Freddie Mac did not comply with NRS 111.205(1) and NRS 111.315 to hold such an interest.

Furthermore, the extinguishment of the deed of trust assigned to defendant (and not to Freddie Mac) did not affect Freddie Mac's contract rights against Guillory under the note. Nevada law expressly provides that where "the security has been lost by a foreclosure of the senior lienor, the policy of the law permits a personal action on the promissory note.". McMillan v. United Mortgage Co., 84

Nev. 99, 102, 437 P.2d 878, 879 (1968).

The extinguishment of the deed of trust assigned to defendant also did not affect Freddie Mac's contract rights against defendant for breaching its obligation under the Freddie Mac Single-Family Seller/Servicer Guide to timely pay the amount of the HOA's superpriority lien.

At page 2 of its motion (AA Vol. 9, AA001461), defendant also cited Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Ass'n, 134 Nev. 270, 417 P.3d 363, 466 (2018). In that case, however, this court stated that "Fannie Mae was subsequently assigned the deed of trust."

The record on appeal in Christine View proves that a **written** assignment of deed of trust to Fannie Mae was recorded on October 19, 2012, which was more than ten (10) months before the HOA foreclosure sale was held on September 6, 2013. *See* assignment of deed of trust at JA1b, pgs. APP000197-APP000198 in Case No. 69419, and foreclosure deed at JA1b, pgs. APP000055-APP000057 in Case No. 69419.

In the present case, on the other hand, the HOA foreclosure sale was held on a date when no recorded "deed or conveyance, in writing" revealed that Freddie Mac held any interest in the Guillory deed of trust. Pursuant to the mandatory language

in NRS 111.325, that unrecorded interest was "void" as to plaintiff because the HOA foreclosure deed was "first duly recorded."

According to Black's Law Dictionary (10th ed. 2014), the word "void" means "[o]f no legal effect; to null" and that "*void* can be properly applied to those provisions that are of no effect whatsoever – those that are an absolute nullity."

NRS 111.315 contains the mandatory language that connects the requirement that Freddie Mac comply with the statute of frauds in NRS 111.205(1) with the express protection provided to plaintiff as a "subsequent purchaser, in good faith and for a valuable consideration" whose "own conveyance shall be first duly recorded."

This court does not decide issues that are not raised in an appellant's opening brief. Powell v. Liberty Mutual Fire Insurance Co., 127 Nev. 156, 161, n. 3, 252 P.3d 668, 672, n. 3 (2011).

This court's opinion in Daisy Trust did not decide the arguments raised by plaintiff in the present case because the appellant in Daisy Trust did not cite NRS 111.315 in its opening brief. The relationship between the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 as they relate to Freddie Mac's unrecorded claim to hold an interest in the Property is instead an issue that this court must still decide.

At page 2 of its motion (AA Vol. 9, AA001461), defendant also cited Collegium Fund LLC Series 7 v. Ditech Financial, LLC, No. 76168, 466 P.3d 527 (Table), 2020 WL 3469189, at *1 (Nev. June 24, 2020)(unpublished disposition), and CitiMortgage, Inc. v. River Glider Avenue Trust, No. 75294, 464 P.3d 1038 (Table), 2020 WL 3415781 (Nev. June 19, 2020) (unpublished disposition), but those orders do "not establish mandatory precedent." (NRAP 36(c)(2)) The orders have no persuasive value because they do not discuss the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 that made Freddie Mac's unrecorded interest in each case "void" as to the HOA foreclosure sale purchaser.

Defendant also cited four opinions by the Ninth Circuit that are not binding interpretations of the requirements of Nevada law for Freddie Mac to hold an enforceable interest in the Guillory deed of trust.

In Federal Home Loan Mortgage Corp. v. SFR Investments Pool 1, LLC, 893 F.3d 1136 (9th Cir. 2018), the court quoted language from Berezovsky v. Moniz, 869 F.3d 923, 932 (9th Cir. 2017), that Nevada law "does not mandate that the recorded instrument identify the note owner by name."

The court in Berezovsky v. Moniz cited NRS 106.210 and In re Montierth (Montierth v. Deutsche Bank), 131 Nev. 543, 354 P.3d 648, 650-51 (2015), but the

court did not discuss at all the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325. The court also acknowledged that "[h]ere, we look to the Nevada Supreme Court's resolution of these issues." 869 F.3d at 932.

This statement is consistent with the U.S. Supreme Court's statement that "[p]roperty interests are created and defined by state law." Butner v. United States, 440 U.S. 48, 55 (1979).

Defendant also cited M&T Bank v. SFR Investments Pool 1, LLC, 963 F.3d 854 (9th Cir. 2020), but the first line in that opinion states that "[t]he sole contested issue in this appeal is whether under 12U.S.C. § 4617(b)(12)(A), a quiet title action is a 'contract' claim or a 'tort' claim."

Defendant also cited Federal Home Loan Mortgage Corp. v. T-Shack, Inc., 806 Fed. Appx. 575 (9th Cir. 2020)(unpublished disposition), but the court's order simply cited Daisy Trust and Berezovsky and did not discuss at all the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 that contradicts the court's description of Nevada law.

In Ditech Financial LLC v. Saticoy Bay LLC Series 829 Cornwall Glen, 794 Fed. Appx. 667, 668-69 (Mem)(9th Cir. 2020)(unpublished disposition), the court cited Berezovsky, but did not discuss the mandatory language in NRS 111.205(1),

NRS 111.315 anid NRS 111.325.

At page 5 of defendant's reply supporting its summary judgment motion (AA Vol. 10, AA001827), defendant quoted from Ditech Financial LLC v. SFR Investments Pool 1, LLC, 793 Fed. Appx. 490, 492 (9th Cir. 2019)(unpublished disposition), that "Nevada's recording statutes do not require that Fannie Mae be identified as the beneficiary on the publicly recorded deed of trust to establish its ownership interest in the subject loan."

Plaintiff, however, did not argue that Freddie Mac had to be identified as the "beneficiary" in the deed of trust. NRS 111.315 instead requires that Freddie Mac record the "deed or conveyance, in writing" required by NRS 111.205(1) for Freddie Mac to hold an "estate or interest" in the Property.

At page 6 of defendant's reply supporting its summary judgment motion (AA Vol. 9, AA001828), defendant stated that "while the assignment to Nationstar transferred the beneficial interest under the Deed of Trust, the assignment does not contradict Freddie Mac's ownership of the Deed of Trust." As discussed above, however, the controlling legal principle is whether Freddie Mac complied with the mandatory requirements of Nevada law to hold an enforceable interest in the Guillory deed of trust on August 22, 2013 and not whether Freddie Mac held an

"ownership interest in the subject loan" on that date.

As discussed in further detail at page 25 below, the "law of real property " in comment b to Restatement (Third) of Prop.: Mortgages, § 5.4, pg. 381 (1997) expressly provides that plaintiff was "entitled to rely on the record."

At page 4 of its motion (AA Vol. 9, AA001463), defendant described the "obvious advantage" of working with MERS, but MERS publicly assigned both the deed of trust and the underlying note to Aurora on February 11, 2011.(AA Vol. 9, AA001629-AA001630)

Defendant also did not cite any authority that permits an entity like Freddie Mac to contract around the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325.

12 U.S.C. § 4617(b)(2)(A)(i) states that the Agency shall immediately succeed to "all rights, titles, powers and privileges of the regulated entity" and "the assets of the regulated entity." No language in 12 U.S.C. § 4617 purports to treat an "unrecorded" interest that is "void" under state law as an "asset" of the "regulated entity," i.e. Freddie Mac.

12 U.S.C. § 4617 also does not state that the Agency succeeds to a servicer's interest in real property.

In addition, 12 U.S.C. § 4617(j)(3) does not contain any language that prevented defendant's recorded interest in the deed of trust from being extinguished by the HOA foreclosure sale.

Although the contractual relationship between Freddie Mac and defendant may permit defendant to nonjudicially foreclose the deed of trust on behalf of an undisclosed principal like Freddie Mac, the law of real property does not permit a hidden interest to be enforced against a "subsequent purchaser, in good faith" like plaintiff.

As quoted at page 18 of plaintiff's opposition (AA Vol. 10, AA001686), NRS 47.240 includes two "conclusive presumptions" that are relevant in this case:

> 2. The truth of the fact recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title, but this rule does not apply to the recital of a consideration.
>
> 3. Whenever a party has, by his or her own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, the party cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.

In the present case, the assignment of deed of trust recorded on October 18, 2012 (AA Vol. 9, AA001632) creates a "conclusive" presumption that the beneficial interest in the Guillory deed of trust was held by defendant on August 22, 2013 and not by Freddie Mac.

4. The opinions in In re Montierth and Daisy Trust do not excuse Freddie Mac's failure to comply with the mandatory language in NRS 111.205(1) and NRS 111.315.

At page 4 of its motion (AA Vol. 9, AA001463), defendant stated that comment c to Restatement (Third) of Prop.: Mortgages, § 5.4 (1997), discussed "the common practice where investors in the secondary mortgage market designate their servicer to be assignee of the mortgage."

Defendant also cited In re Montierth (Montierth v. Deutsche Bank), 131 Nev. 543, 354 P.3d 648, 650-51 (2015), as authority that this court "recognized the importance of these relationships by adopting the Restatement approach."

Defendant's argument, however, is inconsistent with Section 5.4(b) of Restatement (Third) of Prop.: Mortgages, which states that "a transfer of the mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise."

As discussed at page 10 of plaintiff's opposition (AA Vol. 10, AA001678), comment b to Restatement (Third) of Prop.: Mortgages, § 5.4, pg. 381 (1997) provides:

> Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it. **However, assignees are well advised to record.** One reason is that, if the assignment is not recorded, the original mortgagee appears in the public records to continue to hold the mortgage. If the mortgagee and mortgagor subsequently enter into and record a purported discharge or

> modification of the mortgage without the assignor's knowledge or involvement, **and the real estate is then transferred to a good faith purchaser for value, the latter is entitled to rely on the record.** (emphasis added)

In the present case, the recorded assignments proved that after the date that Dean Meyer stated that "Freddie Mac acquired ownership of the loan" on or about March 29, 2007 (AA Vol. 9, AA001482, ¶ 5(d)), MERS publicly assigned both the deed of trust and "all moneys now owing or that may hereafter become due or owing in respect thereof" to Aurora on February 11, 2011 (AA Vol. 9, AA001629-1630), and Aurora publicly assigned both the deed of trust and "all moneys now owing or that may hereafter become due or owing in respect thereof" to defendant on October 18, 2012. (AA Vol. 9, AA001632)

Neither assignment mentioned Freddie Mac or conveyed any interest in the Guillory deed of trust to Freddie Mac.

Because the Restatement provides that plaintiff was "entitled to rely on the record," and because Freddie Mac's unrecorded purchase of the Guillory loan did not appear in any publicly recorded document, "the law of real property" that supplements NRS Chapter 116 pursuant to NRS 116.1108 provides that neither Freddie Mac nor FHFA could enforce that unrecorded interest against plaintiff.

Furthermore, as discussed at page 10 of plaintiff's opposition (AA Vol. 10,

AA001678), the parties in Montierth complied with the mandatory language in NRS 111.205(1) because the parties prepared a written assignment of the deed of trust from MERS to Deutsche Bank. The issue presented in Montierth was whether Deutsche Bank could comply with the mandatory language in NRS 111.315 and record the written assignment of deed of trust without violating the automatic stay created by the borrower's bankruptcy. 131 Nev. 543, 545-546, 354 P.3d 648, 650.

Moreover, because the Montierth case did not involve a "subsequent purchaser, in good faith and for a valuable consideration" whose "own conveyance" was "first duly recorded," this court did not discuss the legal effect of the mandatory language in NRS 111.325.

In Montierth, this court stated that "a security interest attaches to the property as between the mortgagor and mortgagee upon execution **and as against third parties upon recordation**." 131 Nev. at 547, 354 P.3d at 650. (emphasis added) This language is consistent with the mandatory language in NRS 111.315 and NRS 111.325.

No matter what label defendant places on the "deed or conveyance, in writing" required by Nevada's statute of frauds, that "writing" must be recorded or it is "void" as to plaintiff.

In addition, this court stated in Montierth:

> Because the security interest attached and was perfected before bankruptcy, **and separation of the note from the deed of trust did not alter the interests of the parties in this instance**, see *Phillips*, 491 B.R. at 275; *In re Corley*, 447 B.R. 375, 380-81 (Bankr. S.D.Ga. 2011) (explaining that MERS, as the designated nominee of the note holder, had a "fully-secured, first priority deed to [the] secure debt"), we conclude that Deutsche Bank was a secured creditor when the Montierths filed for bankruptcy. (emphasis added)

131 Nev. at 547-548, 354 P.3d at 651.

In the present case, on the other hand, defendant claims that the unwritten and unrecorded transfer of "ownership" of the Guillory loan to Freddie Mac removed the HOA's ability to foreclose its superpriority lien rights without first obtaining FHFA's consent. The present case is unlike Montierth for that reason alone.

At page 3 of defendant's reply supporting its summary judgment motion (AA Vol. 9, AA001825), defendant stated that "[i]n *Daisy Trust*, the Nevada Supreme Court confirmed that *Montierth*'s holding applies in a case involving materially the same facts **and identical legal issues as here**, rejecting any claim that an Enterprise must appear in the land records for it so have a property interest under Nevada law. *Daisy Trust*, 445 P.3d at 849-50." (emphasis added)

At page 5 of defendant's reply (AA Vol. 9, AA001827), defendant described Daisy Trust as "a precedential and binding decision on this Court."

As discussed at page 19 above, however, the opinion in Daisy Trust did not

involve "identical legal issues as here" because the appellant in Daisy Trust did not cite the mandatory language in NRS 111.315 in any brief filed with the court.

At page 6 of defendant's reply supporting its summary judgment motion (AA Vol. 9, AA0018278), defendant admitted that "the court did not expressly cite NRS 111.315."

This court also had no reason to discuss the mandatory language in NRS 111.315 in Montierth because MERS complied with NRS 111.315 by recording the written assignment of the deed of trust to Deutsche Bank. 131 Nev. at 550-551, 354 P.3d at 653.

In Daisy Trust, this court stated that "under the applicable version of NRS 106.210, there was no requirement that any assignment to Freddie Mac needed to be recorded." 135 Nev. at 233, 445 P.3d at 849. Plaintiff, however, did not base its argument in the present case on NRS 106.210.

In Daisy Trust, this court also stated that "consistent with *Edelstein* and *Montierth*, the deed of trust did not have to be 'assigned' or 'conveyed' to Freddie Mac in order for Freddie Mac **to own the secured loan**, meaning that neither NRS 106.210 nor NRS 111.325 was implicated." Id. (emphasis added)

As discussed at page 17 above, however, "ownership" of the Guillory loan is

not relevant because the extinguishment of the deed of trust assigned to defendant did not affect Freddie Mac's contract rights against Guillory under the note. McMillan v. United Mortgage Co., 84 Nev. 99, 102, 437 P.2d 878, 879 (1968).

In addition, as discussed at page 19 above, because this court does not decide issues that are not raised in an appellant's opening brief (Powell v. Liberty Mutual Fire Insurance Co., 127 Nev. 156, 161, n. 3, 252 P.3d 668, 672, n. 3 (2011)). neither Daisy Trust nor Montierth can be cited as precedent for legal issues that were not presented to or decided by this court in those cases. These undecided issues include the application of the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325 to the facts of the present case.

Nevada is a race notice state. *See* Buhecker v. R.B. Petersen & Sons Const. Co., Inc., 112 Nev. 1498, 929 P.2d 937 (1996).

Because Freddie Mac did not comply with the mandatory language in NRS 111.205(1) and NRS 111.315 before the HOA foreclosure deed was recorded, Freddie Mac did not hold an interest in the Guillory deed of trust that could be enforced against plaintiff. NRS 111.325 instead states that any such unrecorded interest was "void" as to plaintiff.

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5. FHFA consent was not required because Freddie Mac did not hold any enforceable interest in the Guillory deed of trust.

At page 16 of its motion (AA Vol. 9, AA001475), defendant stated that "[b]ecause Freddie Mac had a protected property interest at the time of the HOA foreclosure sale, the Federal Foreclosure Bar precluded Nationstar or its predecessor in interest from acquiring free-and-clear title unless it obtained FHFA's consent to extinguish Freddie Mac's interest."

At page 14 of its reply (AA Vol. 10, AA001836), defendant stated that "[t]he Federal Foreclosure Bar thus protects FHFA's and the Enterprises' property interests automatically without requiring any action by FHFA, the Enterprises, or their servicers."

As discussed above, however, defendant did not produce any admissible evidence that proved Freddie Mac complied with the mandatory language in NRS 111.205(1) and NRS 111.315 to hold an enforceable interest in the Guillory deed of trust on August 22, 2013.

As a result, neither the HOA nor plaintiff had any obligation to obtain "consent" from FHFA because the foreclosure sale held on August 22, 2013 did not levy, attach, garnish, foreclose or sell any "property of the Agency."

Moreover, even if Freddie Mac complied with Nevada law to "own" the

Guillory note, 12 U.S.C. § 4617(j)(3) is not implicated because the HOA foreclosure sale did not affect Freddie Mac's alleged ownership of the note. In particular, as stated at page 17 above, as a "sold-out junior lienor," Freddie Mac could still file "a personal action on the promissory note." McMillan v. United Mortgage Co., 84 Nev. 99, 437 P.2d 878, 879 (1968).

6. Plaintiff has standing to assert the statute of frauds in NRS 111.205(1).

At page 10 of defendant's reply supporting its summary judgment motion (AA Vol. 10, AA001832), defendant quoted from Azevedo v. Minister, 86 Nev. 576, 580, 47 P.2d 661, 663 (1970), that the statute of frauds applies only "where there is a definite possibility of fraud." That case, however, applied NRS 104.2201 to an oral contract to purchase hay and did not involve an interest in real property covered by NRS 111.205(1).

Defendant also cited Harmon v. Tanner Motor Tours of Nevada, Ltd., 79 Nev. 4, 377 P.2d 622 (1963), but that case involved the separate and independent statute of frauds in NRS 111.220(1) that governs an "agreement which, by its terms, is not to be performed within one year from the making thereof." In that case, "the Board assured Tanner that a formal written agreement would be prepared for signature," and "[i]n reliance, Tanner continued to provide limousine services at the airport."

79 Nev. at 16, 377 P.2d at 628. Based on that evidence, this court stated:

> We conclude, therefore, that the Board, in the instant case, is estopped to rely upon NRS 111.220 as a defense to this action,
>
> 79 Nev. at 16, 377 P.2d at 628–29.

The present case involves an "estate or interest in lands" that is expressly described in NRS 111.205(1) and does not involve an "agreement which, by its terms, is not to be performed within one year from the making thereof" that is described in NRS 111.220(1).

Defendant also cited Easton Business Opportunities, Inc. v. Town Executive Suites-Eastern Marketplace, LLC, 126 Nev. 119, 23 P.3d 827 (2010), which involved a brokers commission. This court cited NRS 645.320(1) and Restatement (Second) of Contracts § 144 (1982), and stated:

> The parties make no argument that NRS 645.320(1), as a type of statute of frauds, required Century 21's assignment of commission rights to Easton to be in writing. Given the general law that, while statute of frauds provisions may "prevent enforcement against an assignor unless there is a memorandum in writing or some substitute formality, ... they cannot ordinarily be asserted by third persons, including the obligor of an assigned right," Restatement (Second) of Contracts § 324 cmt. b (1981), we decline to find a writing requirement based on NRS 645.320(1) sua sponte. *See also* In re Circle K Corp., 127 F.3d 904, 908 (9th Cir.1997) (rejecting the argument that the obligor could assert a valid statute of frauds objection to his obligee's undocumented transfer of its interest to its assignee; "[t]he parties to the assignments do not challenge their validity; it would be for them, not [the obligor], to raise the statute of frauds as a defense to enforcement of the assignments if they so chose") (citing Restatement (Second) of Contracts § 144 (1982)).

126 Nev. at 127, n. 4, 23 P.3d at 832 n. 4.

The contract principles discussed in Easton Business Opportunities, Inc. do not control the outcome of the present case because "[t]he very purpose of the recording statutes is to impart notice to a subsequent purchaser." *See* SFR Investments Pool 1, LLC v. First Horizon Home Loans, 134 Nev. 19, 22, 409 P.3d 891, 893 (2018). NRS 111.315 and NRS 111.325 have both been part of Nevada's "recording statutes" since 1861.

Defendant also cited In re Circle K Corp., 127 F.3d 904 (9th Cir. 1997), but that case relied on Restatement (Second) of Contracts § 144 (1982) and involved leases for six gasoline stations that were assigned through "a series of corporate mergers and acquisitions." Id. at 908. The mandatory language in NRS 111.205(1) is separate and independent from any principles of contract law.

In Shults v. Faulkiner (In re Faulkiner), 594 B.R. 426 (Bankr. D. Nev. 2018), the court provided a detailed history of the statute of frauds. The court stated:

> In Nevada, **a specific Statute of Frauds exists for the creation of estates in land, see NRS 111.205**, for land sale or lease contracts for periods longer than one year, see NRS 111.210, and for the assumption of liabilities by personal representatives of a decedent's estate. See NRS 147.230. **A more general Statute of Frauds exists under NRS 111.220**, which provides as follows . . . .

594 B.R. at 436-437. (emphasis added)

According to this court, "it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally." Sierra Life Ins. Co. v. Rottman, 95 Nev. 654, 656, 601 P.2d 56, 57-58 (1979) (*citing* W.R. Co. v. City of Reno, 63 Nev. 330, 172 P.2d 158 (1946)).

This court applied this rule in Nevada Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999), when it held that NRS 455.240 (imposing liability for damages caused by contact with an overhead power line) took precedence over the general provision in NRS 616B.612 (granting immunity to an employer who has provided workers' compensation coverage to an injured employee).

In Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dep't, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008), this court stated that "**we consider multiple legislative provisions as a whole**, construing a statute so that **no part is rendered meaningless**." (emphasis added)

Consequently, the principles of contract law discussed in the Harmon and Easton Business Opportunities cases cannot be interpreted in a manner that renders meaningless the Nevada recording statutes that govern estates in land and expressly protect plaintiff from Freddie Mac's unwritten and unrecorded claim to hold an

interest in the Guillory deed of trust, *i.e.* NRS 111.205(1), NRS 111.315 and NRS 111.325.

NRS 111.205(1), NRS 111.315, and NRS 111.325 must be read according to their "plain meaning," or it "would implicate the separation of powers." Pope v. Motel 6, 121 Nev. 307, 314, 114 P.3d 277, 282 (2005).

Because Plaintiff is a "subsequent purchaser, in good faith and for a valuable consideration" whose foreclosure deed was "first duly recorded," plaintiff is the exact person that NRS 111.205(1), NRS 111.315 and NRS 111.325 are designed to protect.

At page 10 of its reply (AA Vol. 10, AA001832), defendant cited Ditech Financial LLC v. Saticoy Bay LLC Series 829 Cornwall Glen, 794 Fed. Appx. 667, 668-69 (Mem)(9th Cir. 2020), but the Ninth Circuit relied on the Easton Business Opportunities case and did not discuss the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325.

Defendant also cited Wells Fargo Bank, N.A. v. Pine Barren Street Trust, No. 2:17-cv-1517-RFB-VCF, 2019 WL 1446951, at *5 (D. Nev. Mar. 31, 2019), and Saticoy Bay LLC Series 452 Crocus Hill v. Green Tree Servicing, LLC, No. 2:15-cv-00977-RFB-CWH, 2019 WL 2425669 (D. Nev. June 10, 2019), but both of those

orders relied on Harmon v. Tanner Motor Tours of Nevada, Ltd. and did not address the difference between NRS 111.220(1) and NRS 111.205(1).

At page 11 of its reply (AA Vol. 10, AA001833), defendant cited NRS 104.2201(3)(c) that only applies to "a contract for the sale of goods for the price of $500 or more."

Defendant also cited Forsythe v. Brown, No. 3:10-cv-716, 2011 WL 5190673 (D. Nev. Oct. 27, 2011), which cited Edwards Industries v. DTE/BTE, Inc. 112 Nev. 1025, 923 P.2d 569 (1996). In that case, this court discussed the defense of part performance which respect to NRS 111.220, and stated:

> The statute of frauds precludes enforcement of the oral equipment lease because, by its terms, it could not be performed within one year. See NRS 111.220(1)

112 Nev. at 1032, 923 P.2d at 573.

Defendant also cited Micheletti v. Fugitt, 61 Nev. 478, 134 P.2d 99, 103 (1943), which involved the transfer of ownership of a business. This court stated that the evidence in that case showed that the agreements "were fully executed on the one side at least, and the buyer put into the possession of the property."

In the present case, Freddie Mac did not comply with the mandatory language in NRS 111.205(1), NRS 111.315 or NRS 111.325 because the "deed or

conveyance, in writing" granting an interest in the Guillory deed of trust to Freddie Mac does not exist, and it was not recorded before the HOA foreclosure deed.

In Evans v. Lee, 12 Nev. 393 (1877), this court did not mention the version of NRS 111.205(1) that was enacted in 1861.

Applying "the law of real property" to the present case, Freddie Mac did not hold an enforceable interest in the Property on the date of the HOA foreclosure sale because even if a signed "writing" by which Freddie Mac "acquired ownership" of the Guillory loan does exist, it was not recorded as required by the mandatory language in NRS 111.315.

Defendant's argument that only the parties who have failed to comply with the mandatory language in NRS 111.205(1) and NRS 111.315 have standing to object to their own violation of the recording statutes is not consistent with the rules of statutory interpretation because defendant's argument makes the protection granted to "any subsequent purchaser"by NRS 111.325 "meaningless." *See* Southern Nevada Homebuilders Ass'n v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

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7. NRS 111.325 expressly protects plaintiff from defendant's unrecorded claim that Freddie Mac held an interest in the Guillory deed of trust.

At pages 11 of its reply (AA Vol. 10, AA001833), defendant stated that plaintiff was not a bona fide purchaser because "[t]he Deed of Trust was recorded prior to the HOA Sale" and contained the words "NEVADA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS" in the footer on page 1 of the deed of trust. (AA Vol. 9, AA001601)

On the other hand, the footer on page 1 of the deed of trust and the language in paragraph 20 of the deed of trust stating that the deed of trust "can be sold one or more times without prior notice to the Borrower" (AA Vol. 9, AA001611, ¶20) did not grant any interest in the deed of trust to Freddie Mac.

An enforceable interest in Nevada real property is not created by "notice of [an Enterprise]'s potential interest in the property." NRS 111.315 instead requires that the "conveyance, in writing" required by NRS 111.205(1) be recorded.

Defendant did not prove that any "conveyance, in writing" that granted any interest in the Guillory deed of trust to Freddie Mac even exists.

Pursuant to 12 U.S.C. § 4617(b)(2)(A)(i), the Agency only succeeds to "all rights, titles, powers, and privileges of the regulated entity" and "the assets of the

regulated entity." The Agency does not succeed to interests that a regulated entity "might have."

The unpublished orders cited by defendant do "not establish mandatory precedent" (NRAP 36(c)(2)). The orders do not have any "persuasive value" because they do not address the statute of frauds in NRS 111.205(1).

In particular, the orders in CitiMortgage, Inc. v. TRP Fund VI, LLC, No. 71318, 435 P.3d 1226 (Table), 2019 WL 1245886 (Nev. Mar. 14, 2019) (unpublished disposition), Nationstar Mortgage, LLC v. Guberland LLC-Series 3, 134 Nev. 987, 420 P.3d 556 (Table), 2018 WL 3025919 (June 15, 2018)(unpublished disposition), did not discuss the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325, the holding in Leyva v. National Default Servicing Corp., or the holding in Occhiuto v. Occhiuto. The order in JPMorgan Chase Bank, N.A. v. GDS Financial Services, No. 2:17-cv-2451-APG-PAL, 2018 WL 2023123 (D. Nev. May 1, 2018), also did not address the mandatory language in those statutes. .

Likewise, "a significant chance" that a property may be "subject to an interest owned by one of the Enterprises" does not create an enforceable interest in Nevada real property.

Furthermore, even if that "significant chance" triggered a "duty to inquire," in Huntington v. Mila, Inc., 119 Nev. 355, 357, 75 P.3d 354, 356 (2003), this court stated that "[t]he authorities are unanimous in holding that he has **notice of whatever the search would disclose**." (emphasis added) In that case, a recorded Memorandum stated that "Song held title to the property as nominee 'pursuant to an unrecorded Real Estate Holding Agreement,'" and this court stated that Stewart Title "should have reviewed the Agreement." Id.

In the present case, on the other hand, any search by plaintiff would have disclosed that Freddie Mac never complied with the mandatory language in NRS 111.205(1) to hold any enforceable interest in the Guillory deed of trust. This is because the record on appeal does not contain the signed "deed or conveyance, in writing" required by NRS 111.205(1) for Freddie Mac to hold such an interest.

Furthermore, NRS 111.325 does not require that plaintiff be a "bona fide purchaser" in order for Freddie Mac's unrecorded interest in the Guillory deed of trust to be "void" as to plaintiff. NRS 111.180 specifically defines the term "bona fide purchaser." Because the words "bona fide purchaser" do not appear in NRS 111.325, the "plain meaning" of the words used in NRS 111.325 protect plaintiff even if plaintiff had constructive notice of defendant's unrecorded claim that it held

the Guillory deed of trust for Freddie Mac. *See* Southern Nevada Homebuilders Ass'n v. Clark County, 121 Nev. at 449, 117 P.3d at 173.

In order for plaintiff to be protected from defendant's unrecorded claim that Freddie Mac held an unrecorded interest in the deed of trust, NRS 111.325 only required that Plaintiff be a "subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded."

As discussed at page 16 above, Dean Meyer stated that "Freddie Mac acquired ownership of the Loan, which specifically includes the Note and the Deed of Trust, on or about March 29, 2007 and has owned it ever since." (AA Vol. 9, AA001482, ¶5(d))

Plaintiff is a "subsequent purchaser" to that unrecorded claim of ownership.

In Shadow Wood, this court stated:

> Although, as mentioned, NYCB might believe that Gogo Way purchased the property for an amount lower than the property's actual worth, that Gogo Way paid "valuable consideration" cannot be contested. Fair v. Howard, 6 Nev. 304, 308 (1871) ("The question is not whether the consideration is adequate, but whether it is valuable."); see *also* Poole v. Watts, 139 Wash. App. 1018 (2007) (unpublished disposition) (stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).

132 Nev. at 65, 366 P.3d at 1115.

The $5,563.00 paid by plaintiff was "valuable consideration."

Because the foreclosure deed was "first duly recorded" on September 6, 2016 (AA Vol. 10, AA001695-AA001697), the unrecorded "conveyance" to Freddie Mac is "void" against plaintiff pursuant to NRS 111.325.

In Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev. 740, 746, 405 P.3d 641, 646 (2017), this court stated that the lender "has the burden to show that the sale should be set aside in light of Saticoy Bay's status as the record title holder." This court stated in Wells Fargo Bank, N.A. v. Radecki, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018), that "[w]e agree with the district court that Radecki has no obligation to establish BFP status."

In Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333, 335 (1957), the California Supreme Court stated:

> **The protection of such purchasers is consistent 'with the purpose of the registry laws,** with the settled principles of equity, **and with the convenient transaction of business.'** Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions. Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444. (emphasis added)

In Shadow Wood, this court stated:

> A subsequent purchaser is bona fide under common-law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." Bailey v. Butner, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); *see also* Moore v. De Bernardi, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that **the bona fide purchaser of a legal title is not affected by any latent equity** founded either on a trust, [e]ncumbrance, or otherwise, **of which he has no notice, actual or constructive."**). (emphasis added)

134 Nev. at 64-65, 366 P.3d at 1115.

The bona fide purchaser doctrine protects a purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172 (1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

Section 7:21 from 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* (6th ed. 2014), states that "[i]f the defect only renders the sale voidable, the redemption rights can be cut off if a bona fide purchaser for value acquires the land." Id. at 956-957.

As a matter of public policy, if the expectations of purchasers can be upset by unrecorded claims first asserted long after the foreclosure sale has been completed, then innocent buyers (who are entitled to rely on the recorded documents to determine what they are bidding to purchase) will cease to attend foreclosure sales, and the nonjudicial foreclosure process adopted by the Nevada Legislature will

become useless.

8. 12 U.S.C. § 4617 does not preempt Nevada's recording statutes that make any interest in the deed of trust claimed by Freddie Mac void as to plaintiff.

At page 13 of its reply (AA Vol. 10, AA001835), defendant stated that "[e]ven if Nevada's bona fide purchaser statutes were read to protect Saticoy Bay from Freddie Mac's property interest because Freddie Mac's servicer appeared as the Deed of Trust's record beneficiary, the Federal Foreclosure Bar would preempt the bona fide purchaser statutes."

As quoted at pages 12 and 13 above, however, both the United States Supreme Court in Butner v. United States, 440 U.S. 48, 55 (1979), and the Ninth Circuit in Berezovsky v. Moniz, 869 F.3d 923 (9th Cir. 2017), acknowledged that whether of not Freddie Mac held an enforceable interest in a particular deed of trust is controlled by Nevada law.

The reference to JPMorgan Chase Bank, N.A. v. GDS Financial Services, No. 2:17-cv-02451-APG-PAL, 2018 WL 2023123 (D. Nev. May 1, 2018), in footnote 3 to Nationstar Mortgage, LLC v. Guberland LLC-Series 3, 134 Nev. 987, 420 P.3d 556 (Table), 2018 WL 3025919, at *2, n. 3 (June 15, 2018) (unpublished disposition) has no "persuasive value" because the court in JPMorgan Chase Bank,

N.A. v. GDS Financial Services extended the holding in Berezovsky v. Moniz in a manner inconsistent with the mandatory language in NRS 111.205(1), NRS 111.315 and NRS 111.325.

Furthermore, in United States v. View Crest Garden Apts., Inc., 268 F.2d 380, 383 (9th Cir. 1959), the court stated that "state recording acts interfere with no federal policy as there is no federal recording system for the type of mortgages here involved."

Defendant also stated that "[t]he conflict between the Federal Foreclosure Bar and the bona fide purchaser statutes, as Saticoy Bay would interpret them, is obvious." Defendant, however, did not identify any language in 12 U.S.C. § 4617(j)(3) that conflicts with the mandatory language in NRS 111.205(1), NRS 111.315, and NRS 111.325.

In Valle del Sol Inc. v. Whiting, 732 F.3d 1006 (9th Cir. 2013), the court identified three classes of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption.

Express preemption does not apply because no provision in Title 12 of the U.S. Code purports to displace the recording laws of the State of Nevada and the inability under Nevada law to enforce an unrecorded property interest against a good

faith purchaser like plaintiff.

Field preemption does not apply because the United States Supreme Court recognized that "[p]roperty interests are created and defined by state law." Butner v. United States, 440 U.S. 48, 55 (1979).

Conflict preemption does not apply because compliance with the recording laws of the State of Nevada does not make it impossible for Freddie Mac to comply with 12 U.S.C. § 4617. Consequently, Nevada's recording laws do not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Valle del Sol Inc. v. Whiting, 732 F.3d at 1022-1023.

Defendant also stated that "[t]he Federal Foreclosure Bar automatically bars any nonconsensual extinguishment through foreclosure of **any interest in property held by Freddie Mac** while in conservatorship." (emphasis added)

On the other hand, because 12 U.S.C. § 4617 does not contain a "federal" method of holding an interest in Nevada real property, Freddie Mac could not hold "any interest in property" unless Freddie Mac complied with the mandatory language in NRS 111.205(1), NRS 111.315, and NRS 111.325 before the HOA foreclosure deed was recorded.

At page 14 of its reply (AA Vol. 10, AA001836), defendant stated that Federal

law precludes "extinguishment of Freddie Mac's Deed of Trust." On the other hand, because Freddie Mac did not comply with NRS 111.205(1) and NRS 111.315, the deed of trust cannot properly be described as "Freddie Mac's Deed of Trust." Freddie Mac's alleged interest in the deed of trust was instead "void" as to plaintiff pursuant to NRS 111.325.

VII. CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this court reverse the findings of fact, conclusions of law, and judgment granting defendant's motion for summary judgment.

DATED this 1st day of July, 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)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X9 14

point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 10,819 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)(1), 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.

DATED this 1st day of July, 2021.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 1st day of July, 2021, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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