IN THE SUPREME COURT OF NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Appellant, v. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Respondent.	Supreme Court No. 77010

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APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Appellant JPMorgan Chase Bank, N.A. is wholly owned by JPMorgan Chase & Co. No publicly held company owns 10% or more of JPMorgan Chase & Co.'s stock.

BALLARD SPAHR LLP appeared on appellant's behalf in the district court and is expected to appear on appellant's behalf in this Court.

Dated: April 12, 2019.

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By: /s/ Matthew D. Lamb

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JURISDICTIONAL STATEMENT

The Court has jurisdiction under NRAP 3A(b)(1) because this is an appeal from a final judgment. The operative complaint filed by JPMorgan Chase Bank, N.A. ("Chase") names SFR Investments Pool 1, LLC ("SFR") as a defendant. Appellant's Appendix, Volume 1 at 001-007 ("1 AA 001-007"). SFR's counterclaim originally named Chase, Robert M. Hawkins, and Christine V. Hawkins as counter-defendants. 1 AA 024-034. SFR later stipulated to dismiss Mr. and Mrs. Hawkins. The district court entered summary judgment for SFR on the claims between SFR and Chase. 4 AA 625-630. Notice of entry of the summary judgment order was served on August 16, 2018. 4 AA 631-639. Chase filed a timely notice of appeal on September 17, 2018. 4 AA 640-642.

ROUTING STATEMENT

This appeal is presumptively retained by the Nevada Supreme Court because it raises a question of statewide public importance—namely, the applicable statute of limitations for a quiet title claim brought by the servicer of a loan owned by the Federal Home Loan Mortgage Corporation ("Freddie Mac") or the Federal National Mortgage Association ("Fannie Mae") after an HOA foreclosure sale. *See* NRAP 17(a)(12).

STATEMENT OF THE ISSUES

1. **Did the district court err by holding that Chase's argument under 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar"), a provision of the Housing and Economic Recovery Act ("HERA"), was "untimely" under 12 U.S.C. § 4617(b)(12)?**

    a. Does the date when Chase moved for leave to amend its complaint, thereby putting SFR and the district court on notice it would assert the Federal Foreclosure Bar, rather the date the district court allowed the amended complaint to be formally filed, drive the limitations analysis?

    b. Did Chase's assertion of the Federal Foreclosure Bar constitute a new claim to which a statute of limitations applies rather than a theory supporting Chase's existing quiet-title claim?

    c. Did Chase's amended complaint relate back to the original complaint?

    d. Did the district court apply the correct limitations provision, and if not, was the amended complaint timely under the applicable provision?

2. **Did the district court err to the extent it held that SFR's purported bona fide purchaser status overrode the effect of the Federal Foreclosure Bar?**

    a. Does SFR qualify as a bona fide purchaser under Nevada law?

    b. If Nevada's bona fide purchaser doctrine would negate the Federal Foreclosure Bar's effect, would it be preempted?

3. To the extent that SFR's counter-motion to strike under N.R.C.P. 37(c)(1) was material to the parties' motions for summary judgment, did the district court err by granting the counter-motion?

a. Did the evidence that was not subject to SFR's counter-motion independently show that Freddie Mac owned the subject loan and that Chase was servicing the loan at the time of the subject foreclosure sale?

b. If not, did the district court err by striking the relevant documents without considering whether the alleged non-disclosure was harmless and without applying the governing legal standard for case-dispositive discovery sanctions?

4. Is Chase entitled to summary judgment in its favor?

INTRODUCTION

This case involves circumstances familiar to the Court from dozens of other appeals in similar cases. Appellee SFR purchased property at a homeowners' association foreclosure sale (the "Sale"). Appellant Chase submitted evidence showing that Freddie Mac owned a Deed of Trust encumbering the property at that time, and argued that the Federal Foreclosure Bar therefore preempted state law that might otherwise have allowed the foreclosure sale to extinguish the Deed of Trust.

The district court "adopt[ed] the arguments and reasoning in Chase's opposition to SFR's Motion for Summary Judgment…where Chase asserted Freddie Mac's ownership of the note at the time of the [HOA] foreclosure sale" and noted that Freddie Mac's conservator, the Federal Housing Finance Agency ("FHFA"), did not consent to the extinguishment of Freddie Mac's Deed of Trust. 3 AA 536-542; 4 AA 627 ¶ 10. But instead of holding that the Federal Foreclosure Bar protected Freddie Mac's property interest, the district court awarded summary judgment to SFR, ruling that Chase's assertion of the Federal Foreclosure Bar was time-barred. 4 AA 628-629 ¶¶ B-E.

The district court's statute-of-limitations analysis is incorrect and should be reversed.

First, the simplest and narrowest ground for reversal is that the district court erred in concluding that Chase "did not raise the HERA claim" within three years—

the interval the district court incorrectly applied as the limitations period. The Sale took place on March 1, 2013, and Chase moved for leave to file its amended complaint (expressly referencing the Federal Foreclosure Bar and attaching the proposed amended complaint as an exhibit) on February 2, 2016—nearly a month *before* the three-year interval closed.

Second, the district court erred in undertaking a limitations analysis at all in relation to Chase's assertion of Federal Foreclosure Bar. Chase properly and timely pleaded a claim for quiet-title, for which the Federal Foreclosure Bar is a supporting *legal theory*. Statutes of limitation apply to claims, not theories, and a plaintiff is not required to plead the legal theories upon which it bases its claims.

Third, the district court erred in failing to relate the amended complaint back to Chase's initial pleading. Even if Chase's assertion of the Federal Foreclosure Bar constituted a free-standing claim, relation back would apply because the amended complaint asserts claims arising out of the same transaction or occurrence—the Sale—Chase initially pleaded.

Fourth, the district court applied the wrong limitations period. If asserting the Federal Foreclosure Bar amounts to a free-standing claim, HERA's six-year limitations period for claims not sounding in tort governs, both under the plain language of the statute and as a matter of federal policy. But even if HERA's tort-claim limitations provision applied, Chase's claim would still be timely—that provision specifies *the longer of* three years or the applicable state law period, which is at least four years here.

The district court's decision includes a cursory statement arguably suggesting that SFR was protected by Nevada's bona fide purchaser doctrine. That is not correct. SFR does not qualify as a bona fide purchaser, but even if it did, the Federal Foreclosure Bar would preempt any state-law protection that would otherwise result.

The district court also granted SFR's motion to strike a portion of Chase's evidence because it was not disclosed in discovery. 4 AA 629 ¶¶ G-H. Even without the stricken evidence, the record supports an award of summary judgment in favor of Chase. To the extent the Court believes the stricken evidence is necessary, any late disclosure was harmless and could not support a case-dispositive sanction.

As the district court found, Freddie Mac owned the Deed of Trust and FHFA did not consent to release Freddie Mac's interest. The Federal Foreclosure Bar thus preserved Freddie Mac's deed of trust, notwithstanding the Sale. This Court should reverse the district court's decision and enter judgment for Chase.

STATEMENT OF THE CASE

Chase challenges the district court's order in favor of SFR's claims for quiet title and declaratory relief arising out of SFR's purchase of the subject property at the Sale. At the time of the Sale, Freddie Mac owned a deed of trust encumbering the property and its associated promissory note, and Chase served as the beneficiary of record of the deed of trust as Freddie Mac's contractually authorized servicer. Chase filed this lawsuit seeking a declaration that Freddie Mac's deed of trust survived the Sale. SFR contends that the Sale extinguished Freddie Mac's deed of trust.

After a hearing on the parties' motions for summary judgment, the district court adopted Chase's arguments that Freddie Mac owned the deed of trust at the time of the Sale and that FHFA did not consent to the extinguishment of Freddie Mac's property interest. However, the district court concluded that Chase's "HERA claim" was subject to a three-year limitations period under 12 U.S.C. § 4617(b)(12) because it amounted to a "tort action." The court reasoned that because Chase raised its "HERA claim" in its amended complaint—filed more than three years after the Sale—and the amended complaint did not relate back, Chase's claim was time-barred. Accordingly, the district court granted SFR's motion for summary judgment and denied Chase's motion for summary judgment. The district court also granted SFR's counter-motion to strike Freddie Mac's declaration and certain attached documents that SFR argued were not disclosed in discovery, and briefly discussed Nevada's bona fide purchaser doctrine. This appeal followed.

STATEMENT OF FACTS

I. The Secondary Mortgage Market

Congress created Freddie Mac and Fannie Mae (together the "Enterprises") to support a nationwide secondary mortgage market. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). Freddie Mac's federal statutory charter authorizes it to purchase and deal only in secured "mortgages," not unsecured loans. *See* 12 U.S.C. §§ 1451(d), 1454; *see also Lightfoot v. Cendant Mortg. Corp*., 137 S. Ct. 553, 557 (2017) (discussing Fannie Mae's role as purchaser of mortgages); *FHFA v. Nomura Holding Am., Inc.*, 873 F.3d 85, 105 (2d Cir. 2017) (same); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599-600 (D.C. Cir. 2017) (same). Freddie Mac has purchased millions of mortgages nationwide, including hundreds of thousands of mortgages in Nevada.

Although Freddie Mac owns a large number of mortgage loans through its purchases on the secondary market, it is not in the business of managing the mortgages themselves, such as handling day-to-day borrower communications. Instead, Freddie Mac contracts with servicers to act on its behalf; in that role, servicers often appear as record beneficiaries of deeds of trust. *See Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 757-58 (Nev. 2017) (acknowledging servicers' role); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011) (describing servicers' role); Restatement § 5.4 (the

"Restatement") cmt. c (discussing common practice where investors in secondary mortgage market designate servicer to be assignee of mortgage). In such situations, the note owner remains a secured creditor with a property interest in the collateral even if the recorded deed of trust names only the loan servicer. *E.g.*, *CitiMortgage, Inc. v. TRP Fund VI, LLC*, No. 71318, 2019 WL 1245886, at *1 (Nev. Mar. 14, 2019) (unpublished disposition) ("[T]his Court has recognized that the record beneficiary need not be the actual owner of the loan."); *Berezovsky v. Moniz*, 869 F.3d 923, 932 (9th Cir. 2017).

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

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

§ 4617(b)(2)(A), thereby rendering all of the Enterprises' assets "property of the Agency" for the duration of the conservatorship, *id.* § 4617(j)(3). These statutory provisions exist to protect the conservatorships and, ultimately, U.S. taxpayers.

NRS 116.3116(2) grants homeowners' associations a superpriority lien for up to nine months of unpaid HOA dues (six months when the property is encumbered by an Enterprise lien). The statute permits properly conducted foreclosure sales of superpriority HOA liens to extinguish all junior interests, including prior-recorded security interests. *SFR Invs. Pool 1, LLC v. U.S. Bank*, 334 P.3d 408, 419 (Nev. 2014).

II. Facts Specific to the Property

In June 2006, Robert M. Hawkins and Christine V. Hawkins executed a promissory note memorializing their commitment to repay a $240,000 loan from GreenPoint Mortgage Funding, Inc. for the purchase of a property located at 3263 Morning Springs Drive in Henderson, Nevada (the "Property"). 3 AA 354. The note was secured by a deed of trust recorded against the Property on June 12, 2006 (the "Deed of Trust" and together with the corresponding note, the "Loan"). 3 AA 332. The Deed of Trust named Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary of record solely as nominee for Lender and Lender's successors and assigns. *Id.* MERS, as nominee for Lender and Lender's successors and assigns, recorded an assignment of its interest in the Deed of Trust to Chase in October 2009. 3 AA 516-517.

As evidenced by authenticated business records from both Freddie Mac and Chase, Freddie Mac purchased the Loan in September 2006 and has owned it ever since. 3 AA 320-330, 359-370, 508-514. The Sale at which SFR purchased the Property occurred on March 1, 2013. 3 AA 519. At the time of the Sale, Chase was the record beneficiary of the Deed of Trust in its capacity as Freddie Mac's servicer. 3 AA 320-330, 359-370, 508-514. Chase is the current record beneficiary of the Deed of Trust and continues to service the Loan for Freddie Mac.

At no time did FHFA consent to the extinguishment or foreclosure of Freddie Mac's property interest through the Sale. 3 AA 523 ("FHFA confirms that it has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection with HOA foreclosures of super-priority liens.").

III. Procedural History

On November 27, 2013, Chase filed a complaint seeking a declaration that the Deed of Trust survived the Sale. 1 AA 001-007. SFR filed a counterclaim asserting that the Sale extinguished the Deed of Trust. 1 AA 024-034. On February 2, 2016, Chase moved for leave to amend its complaint; the motion expressly referenced the Federal Foreclosure Bar and included as an exhibit the proposed amended complaint, which directly invoked the Federal Foreclosure Bar as a theory supporting the previously pleaded quiet-title claim. 1 AA 049-068. The amended complaint referenced Freddie Mac's Single-Family Seller/Servicer Guide (the "Guide") and provided a link to an online version of the Guide. 1 AA 060-061 ¶ 13. The district court granted the motion as unopposed on March 8, 2016. 1 AA 069-070. Chase formally filed the amended complaint on March 9, 2016. 1 AA 071-081.

On April 21, 2016, SFR deposed Chase's N.R.C.P. 30(b)(6) representative, who repeatedly testified that Freddie Mac owned the Loan. 1 AA 094-101. On May 2, 2016, Chase served discovery responses stating that "the Federal Home Loan Mortgage Corporation owns the [Deed of Trust] and the loan at issue." 1 AA 109 (Response to Request No. 4). Also on May 2, 2016, Chase supplemented its N.R.C.P. 16.1 disclosures to include Freddie Mac's corporate representative. 1 AA 122.[1] The supplement also disclosed business records from Chase's internal recordkeeping system demonstrating that Freddie Mac owned the Loan and that Chase was Freddie Mac's servicer (the "Chase Records"). 1 AA 124 (Item No. 25).[2]

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[1] Due to an error, several pages of Chase's May 2, 2016 supplement were omitted. Chase re-served the full supplement on May 6, 2016. The version included in Chase's appendix is the latter version.

[2] Chase disclosed the Chase Records with the intention of producing copies after a protective order was entered. 1 AA 124, n.7. Chase ultimately produced copies on July 26, 2016 during summary judgment briefing. 2 AA 195-201. Pursuant to N.R.C.P. 16.1(a)(1)(A)(ii), Chase satisfied any disclosure obligation on May 2, 2016 when it identified the Chase Records by "category and location."

Further, the supplement included business records from Freddie Mac that independently showed that Freddie Mac owned the Loan and Chase serviced the Loan (the "Freddie Mac Records"). 1 AA 127-129. The Freddie Mac Records primarily consisted of screenshots from Freddie Mac's MIDAS recordkeeping system. 1 AA 127-128. Discovery closed on May 2, 2016. 1 AA 036. SFR did not subpoena Freddie Mac for documents or testimony at any point. On June 28, 2016, Chase and SFR agreed to a stipulation to extend the dispositive motion deadline. 1 AA 130-133. Under the heading of "Discovery that Remains to be Completed," the parties listed the item "Supplement initial disclosures." 1 AA 131.

In July 2016, both Chase and SFR moved for summary judgment. 1 AA 134-190. To demonstrate that Freddie Mac owned the Loan and that Chase serviced the Loan, Chase submitted the previously disclosed Chase Records. 2 AA 195-201. The Chase Records were authenticated by a declaration from Evan L. Grageda, a Chase employee (the "Grageda Declaration"). 2 AA 203-206. Chase also submitted the previously disclosed Freddie Mac Records. 2 AA 241-248. The Freddie Mac Records were authenticated by a declaration from Dean Meyer, Director of Loss Mitigation for Freddie Mac (the "Meyer Declaration"). 2 AA 235-240. The Meyer Declaration referred to the previously disclosed Guide, among other things, to explain the relationship between Freddie Mac and its servicers. 2 AA 236-239 ¶¶ 2, 5.d, 5.h, 5.i, 5.j. SFR made various arguments in response to Chase's evidence but did not raise any objections under N.R.C.P. 37(c)(1). Nor did SFR argue that Chase's arguments under the Federal Foreclosure Bar were precluded by 12 U.S.C. § 4617(b)(12) or any other statute of limitations.

The district court ruled in SFR's favor, holding that Chase lacked standing to raise the Federal Foreclosure Bar. 2 AA 258-267. Chase then appealed to this Court. *See JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, No. 71337. Following this Court's decision in *Nationstar Mortgage*, the parties agreed to dismiss the appeal upon the district court's reconsideration of its order.

On remand, SFR again chose not to seek any discovery from Freddie Mac. When Chase moved to reopen discovery, 2 AA 268-274, SFR filed an opposition, 2 AA 275-286. Chase ultimately withdrew the motion. 2 AA 287-289. The parties filed cross-motions for summary judgment on April 13, 2018. 2 AA 290-314, 3 AA 524-533. Chase submitted the same copies of the Chase Records it had used in 2016. 3 AA 319-325. Chase also resubmitted the Grageda Declaration from 2016. 3 AA 327-330. For purposes of its 2018 motion, Chase obtained reprinted copies of the Freddie Mac Records. Therefore, the Freddie Mac Records attached to Chase's 2018 motion show different retrieval dates than the copies of those records attached to Chase's 2016 motion. However, the 2018 copies are substantively identical to the 2016 copies. *Compare* 2 AA 241-248 *with* 3 AA 365-370, 507-508. Chase also submitted an updated but largely identical version of the Meyer Declaration. 3 AA

359-364. There were no relevant changes to the portions of the declaration discussing the Freddie Mac Records. In addition to the Freddie Mac Records, the 2018 Meyer Declaration included relevant sections of the Guide as exhibits. 3 AA 371-506. As noted above, Chase had disclosed the Guide and provided a link to the Guide in its amended complaint filed in 2016. Finally, the Meyer Declaration included a new document: a Mortgage Payment History Report. 3 AA 510-514. The document showed that Chase was reporting payment information for the Loan to Freddie Mac at the time of the Sale. *Id.* Thus, it served as another piece of evidence that Freddie Mac owned the Loan and Chase serviced the Loan at the time of the Sale. 3 AA 363-364 ¶ 5.k.

SFR filed a counter-motion to strike various exhibits to Chase's 2018 summary judgment motion, claiming that they were not disclosed in accordance with N.R.C.P. 16.1. 4 AA 553. Notably, SFR's motion did not seek to strike the Chase Records or the Grageda Declaration. The only items that SFR moved to strike and that are potentially relevant to this appeal are the 2018 Meyer Declaration and the exhibits attached to it. As noted above, these exhibits included the previously-disclosed Freddie Mac Records, certain sections of the previously-disclosed Guide, and the Mortgage Payment History Report. 3 AA 365-514.[3]

[3] SFR also moved to strike several other documents that are not material to the 2018 summary judgment motions or the current appeal.

After full briefing and a hearing, the district Court granted SFR's motion for summary judgment, granted SFR's counter-motion to strike, and denied Chase's motion for summary judgment. 4 AA 625-630. The district court agreed with Chase that Freddie Mac owned the Loan at the time of the Sale and that the Federal Foreclosure Bar applied. 4 AA 627, ¶ 10. However, the district court agreed with SFR that Chase's "HERA claim" was time-barred under 12 U.S.C. § 4617(b)(12). 4 AA 628-629, ¶¶ B-E. The district court also granted SFR's counter-motion to strike to the extent that it was material to the parties' summary judgment motions. 4 AA 615, 629 ¶¶ G-H. Chase filed this timely appeal. 4 AA 640-642.

SUMMARY OF ARGUMENT

The district court erred in holding that Chase did not timely invoke the Federal Foreclosure Bar and in suggesting that SFR could take advantage of Nevada's bona fide purchase doctrine. Further, to the extent that SFR's counter-motion to strike was material to the parties' summary judgment motions, the district court abused its discretion by granting the counter-motion.

The district court's holding that Chase's Federal Foreclosure Bar argument was time-barred under 12 U.S.C. § 4617(b)(12) because Chase purportedly "did not raise the HERA claim" within three years of the Sale is incorrect for four primary reasons, each of which independently warrants reversal.

First, Chase *did* "raise the HERA claim" within three years. The Sale took place on March 1, 2013, and Chase moved for leave to file its amended complaint (expressly referencing the Federal Foreclosure Bar and attaching the proposed amended complaint as an exhibit) on February 2, 2016—nearly a month *before* the three-year interval closed. Notice is the touchstone of timeliness, and this Court should adopt the majority rule that the date of the motion for leave (which places the defendant on notice of the amended claims)—not the date leave is granted and the amended pleading filed (which is irrelevant to notice)—drives the limitations analysis.

Second, Chase asserted a quiet-title claim against SFR in its initial complaint, filed on November 27, 2013, less than a year after the March 1, 2013 Sale. The amended complaint invoked the Federal Foreclosure Bar as a legal theory supporting the quiet-title claim Chase asserted in its initial pleading—not as a new, free-standing claim. Thus, a proper statute-of-limitations analysis would consider only the interval between the Sale and the date of Chase's *initial* pleading asserting a quiet-title claim.

Third, even if the date leave is granted (rather than the date leave is sought) is what matters for timeliness purposes, and even if Chase's invocation of the Federal Foreclosure Bar were deemed tantamount to a new claim and therefore relevant to a statute-of-limitations analysis, that "claim" arises out of the same transaction or occurrence alleged in Chase's original pleading—the Sale and its purported effect on the Deed of Trust—and thus relates back.

Fourth, even if there were no relation back, Chase's quiet-title claim would be timely under 12 U.S.C. § 4617(b)(12), either under the six-year minimum period specified for non-tort claims, or under the tort provision's adoption of the state-law period whenever it is "longer" than three years, as it is here.

No matter what analytical route the Court follows, Chase's assertion of the Federal Foreclosure Bar cannot be deemed untimely. Accordingly, this Court should reverse the district court's limitations ruling.

To the extent the district court made any ruling on Nevada's bona fide purchaser doctrine, that doctrine cannot negate the Federal Foreclosure Bar. SFR does not qualify as a bona fide purchaser, but even if it did, the Federal Foreclosure Bar would still supersede any state-law doctrine that would negate Freddie Mac's interest.

As for the order granting SFR's counter-motion to strike the Meyer Declaration and the exhibits attached to it, the Court need not review this ruling. The Chase Records and the Grageda Declaration—which are not affected by the counter-motion—independently show that Freddie Mac owned the Loan and that Chase serviced the Loan. However, to the extent the Court believes it is necessary to consider the Meyer Declaration and its exhibits, the Court should reverse the grant of SFR's counter-motion. The district court abused its discretion when it failed to consider whether Chase's alleged violation of N.R.C.P. 16.1 was harmless and when it failed to apply the governing legal standard for case-dispositive discovery sanctions. Under any reasonable application of these standards, it was inappropriate to exclude the Meyer Declaration and its exhibits.

Given the district court's correct finding that Freddie Mac owned the Loan at the time of the Sale and that FHFA did not consent to the extinguishment of Freddie Mac's property interest, this Court should conclude that the Federal Foreclosure Bar applies and enter judgment in favor of Chase.

STANDARD OF REVIEW

An order denying summary judgment is reviewed de novo. *Physicians Ins. Co. of Wis., Inc. v. Williams*, 279 P.3d 174, 175 (Nev. 2012); *Wood v. Safeway*, 121 P.3d 1026, 1030 (Nev. 2005). A district court's decision to exclude evidence under N.R.C.P. 37(c) is reviewed for abuse of discretion. *See Young v. Johnny Ribeiro Bldg., Inc.*, 787 P.2d 777, 779 (Nev. 1990). However, "a somewhat heightened standard of review" applies to case-concluding sanctions. *Id.*

ARGUMENT

I. Chase's Federal Foreclosure Bar arguments were not time-barred.

The district court incorrectly ruled that Chase's assertion of the Federal Foreclosure Bar was time-barred. The district court reasoned that (1) "Chase did not raise the HERA claim" until March 9, 2016—a few days more than three years after the Sale—when the district court granted Chase's motion to file an amended complaint; (2) the amended complaint did not relate back to the original complaint; and (3) the three-year default limitations period that HERA specifies for tort claims applied. 4 AA 628-629 (citing 12 U.S.C. § 4617(b)(12)). Every element of that analysis is erroneous, and as a result, the judgment should be reversed.

A. Chase asserted the Federal Foreclosure Bar *within* three years of the Sale.

The simplest and narrowest reason that the district court's time-bar ruling is incorrect is that the district court incorrectly computed the interval between the Sale and Chase's assertion of the Federal Foreclosure Bar.

The record leaves no doubt that Chase expressly asserted the Federal Foreclosure Bar, and thereby put SFR and the district court on notice of the argument, when Chase filed its motion to amend the complaint on February 2, 2016—*before* three years had passed since the March 1, 2013 Sale. Although the district court did not grant that motion and thereby deem the amended complaint formally filed until a few days *after* three years had passed, a proper limitations analysis turns on the date Chase filed the motion for leave—not the date the district court granted that motion—rendering the claim timely. Thus—even under the district court's flawed premises that invoking the Federal Foreclosure Bar amounts to offering a new claim, that relation back does not apply, and that the applicable limitations period was three years (all of which are discussed below)—Chase's assertion of the Federal Foreclosure Bar "claim" was timely.

Although Chase is not aware of any cases in which this Court has addressed the timeliness of an amended complaint in these precise circumstances, "[a] number of courts have addressed the situation where the petition for leave to amend the complaint has been filed prior to the expiration of the statute of limitations, while the entry of the court order and the filing of the amended complaint have occurred after the limitations period has expired." *Mayes v. AT&T Information Sys., Inc.*, 867 F.2d 1172, 1173 (8th Cir. 1989) (citing cases). "In such cases, the amended complaint is deemed filed within the limitations period." *Id.*; *accord Pimentel v. Cty. of Fresno*, No. 1:10-cv-01736, 2011 WL 350288, at *4 (E.D. Cal. Feb 2, 2011) ("Pursuant to California law, the filing of a motion to amend along with a proposed amended complaint tolls the statute of limitations."). That rule is sensible; "[a]s a party has no control over when a court renders its decision regarding the proposed amended complaint," it follows that the statute of limitations is properly tolled when a motion for leave to amend is filed. *Moore v. Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993).

The same notions of fairness and justice undergirding those cases apply under Nevada law. N.R.C.P. 15(a) allows amendment as of right within a certain time period and instructs courts to permit amendment "freely" where "justice so requires." Furthermore, this Court has endorsed the view that "NRCP 15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had." *Gardner v. Eighth Judicial Dist. Ct.*, 405 P.3d 651, 654 (Nev. 2017) (citation omitted). In fact, this Court has gone further than the federal and California cases cited above, permitting a plaintiff to amend even though it filed the relevant motion *after* the statute of limitations had run. For example, in *Tehansky v. Wilson*, the Court allowed the plaintiff to amend to correct a non-jurisdictional and inadvertent defect in the complaint "in the interest of justice." 428 P.2d 375, 375 (Nev. 1967) (quotation omitted).

Where a plaintiff moves to amend its pleading before any applicable statute of limitations has run, the plaintiff should not be barred from pursuing the amended complaint simply because the court did not decide the motion in time to avoid the statute of limitations. Where, as here, developments in the law make clear that a plaintiff's claim is supported by an alternative legal theory, such a construction puts the plaintiff in a worse position than it would have been had it waited and filed its original complaint on the day it filed its motion to amend. That cannot be the law. Nevada's "basic underlying policy [is] to have each case decided upon its merits" unless a procedural rule clearly precludes it. *See Franklin v. Bartsas Realty, Inc.*, 598 P.2d 1147, 1149 (Nev. 1979) (citation omitted). And Nevada's "rules of civil procedure are intended to allow the court to reach the merits of claims, rather than to dispose of claims on technical niceties." *Jackson v. Groenendyke*, 369 P.3d 362, 365 (Nev. 2016) (internal quotation marks and citation omitted). As such, the Rules ought not be construed to countenance a judicial "pocket veto" of a motion to amend. To rule otherwise could foreclose a plaintiff's meritorious claims based not on its own conduct or on any factor within its control, but on the vagaries of the presiding judge's docket and schedule.

The rule the district court implicitly adopted—that the timeliness of a claim turns on the date an amended complaint is formally filed, regardless of whether the plaintiff put the defendant and the court on notice of the claim by moving for leave to amend (and attaching the proposed amended complaint) before the limitations period ran out—would distort the civil litigation process and waste judicial resources. Without the assurance that a motion to amend will toll the statute of limitations, plaintiffs will have to take drastic measures to attempt to protect their claims if there is any possibility that the motion to amend will not be ruled on prior to the running of the limitations period. A plaintiff in such circumstances would be all but forced either to file a separate, parallel action that would have to be consolidated with the first, or to dismiss the initial case without prejudice under N.R.C.P. 41(a)(1) and re-file a *new* complaint within the limitations period.[4] The legal system was not designed to require plaintiffs to limbo under the statute of limitations though such procedural contortions; a straightforward rule that considers an amended complaint to be timely if a proper motion to amend was filed within the limitations period is more efficient, more economical, and more just.

If the Court is unwilling to adopt that approach—which the great majority of American jurisdictions follow[5]—it should instead apply the doctrine of equitable

[4] Such extraordinary measures would not only be inefficient, they could also be ineffective, leaving the plaintiff with no practical way to assert an unquestionably timely claim. For example, if a plaintiff has already taken a dismissal, it may not voluntarily dismiss the action without prejudice by right. N.R.C.P. 41(a)(1). And where, as here, jurisdiction is *in rem*, a parallel action arguably could be jurisdictionally barred and the underlying complaint arguably could be deemed a legal nullity. A rule that could, in any circumstances, leave a plaintiff with no practical vehicle to assert an indisputably timely claim would be plainly inconsistent with fundamental fairness and substantial justice.

[5] To Chase's knowledge, the only jurisdictions to have clearly held that the date of an amended complaint's formal filing controls even where a motion for leave to amend was filed within the limitations period are Virginia and Mississippi. *See Ahari v. Morrison*, 654 S.E.2d 891, 893 (Va. 2008) ("[U]ntil the circuit court granted leaved for Ahari to amend her complaint, the statute of limitations continued to run with regard to the cause of action asserted against the new defendants."); *Wilner v.*

tolling and hold that Chase's Federal Foreclosure Bar argument was timely. "Equitable tolling operates to suspend the running of a statute of limitations when the only bar to a timely filed claim is a procedural technicality," there is no prejudice to the defendant, and "the interests of justice so require." *State Dept. of Taxation v. Masco Builder Cabinet Grp.*, 265 P.3d 666, 671 (Nev. 2011) (quotation omitted).

Each element is met here. The only basis for dismissal of Chase's claim is a procedural technicality—the district court did not rule on the motion to amend until eight days after the statute of limitations expired. There is no danger of prejudice to SFR, because SFR was made aware of the Federal Foreclosure Bar argument before the limitations period expired, and the tolling of the statute for a period of seven days—during which time Chase was merely waiting for the district court to rule—did not materially impact SFR's ability to litigate this case. Finally, the interests of justice require tolling: Chase was diligent in pursuing an amendment to incorporate the evolving legal landscape relating to HERA cases, and it did not control the

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White, 929 So.2d 315, 319 (Miss. 2006) ("The filing of a motion to amend does not toll the statute of limitations until the trial court rules on the motion.").

Despite their broad language, those decisions are readily distinguishable and probably would not control in the circumstances presented here, as each involved an amendment that purported to add new defendants to a case, not to assert a new theory or claim against an existing defendant. As a result—and unlike here—it is not at all clear that the parties against which the claims were asserted received timely notice. In any event, neither the Virginia court nor the Mississippi court grounds its analysis in any notion of substantial justice, and Nevada should not adopt their highly formalist, outlier approach.

district court's timing in ruling on the motion to amend. Accordingly, the Court should find that the three-year period, if applicable, was equitably tolled.

The fact that Chase did not make this particular argument below does not preclude this Court from ruling in Chase's favor. This Court routinely allows litigants to assert new and different theories and authority to support the basic legal positions they took in district court proceedings. *See, e.g.*, *Premier One Holdings, Inc. v. Red Rock Financial Services, LLC*, No. 73369, 2018 WL 5617923, at *2 n.2 (Oct. 29, 2018) (unpublished disposition). In that case, this Court rejected the argument that "respondents waived any nonmutual claim preclusion arguments on appeal because they did not specifically argue nonmutual claim preclusion or discuss [the governing precedent] below," in part because respondent did "generally raise the issue of claim preclusion below, and…nonmutual claim preclusion is a form of claim preclusion." *Id.* Here, likewise, Chase generally argued its claim was timely, though it did not specifically argue that the motion for leave to amend made it so.

Premier One is one of many decisions by this Court confirming that the waiver rule "is not absolute." *Archon Corp. v. Eighth Judicial Dist. Ct.*, 407 P.3d 702, 708 (Nev. 2017). Courts have the authority to make an exception to the waiver rule if, for instance, the issue presented is purely legal and does not depend on a fully developed factual record. *Bastidas v. Chappell*, 791 F.3d 1155, 1161 (9th Cir. 2015); *see also State ex rel. State Bd. of Equalization v. Barta*, 188 P.3d 1092, 1098 n.24 (Nev. 2008) (recognizing that "exceptions to the rule of waiver exist for purely legal or constitutional issues"). Because the question of whether the date of the motion for leave or the date of the amended complaint's filing controls is a purely legal question, this Court should exercise its discretion to review and decide the issue.

It is also "well established" that this Court has the discretion to "consider relevant issues *sua sponte* in order to prevent plain error." *Bradley v. Romeo*, 716 P.2d 227, 228 (Nev. 1986). That discretion is appropriately exercised in cases such as this one, where allowing the district court's judgment to stand "would be plain error," *W. Indus., Inc. v. General Ins. Co.*, 533 P.2d 473, 478 (Nev. 1975), and where the party's substantial rights would otherwise be adversely affected, *see Thomas v. Hardwick*, 231 P.3d 1111, 1112 (Nev. 2010). The district court's error here is plain: the timeliness of Chase's Federal Foreclosure Bar argument turns on the date it filed its motion to amend and proposed amended complaint, not the date on which the amended complaint became operative by court order. That error substantially impacts Chase's rights because it deprives Chase of dispositive legal arguments that were timely asserted.

B. Because the Federal Foreclosure Bar is a legal theory, not a claim, Chase's amended pleading is not relevant to a statute of limitations analysis.

The district court considered Chase's HERA argument under an incorrect premise, labeling the argument a "HERA claim," when in fact Chase asserted HERA as a *legal theory* supporting its existing quiet-title claim. Claims are subject to limitations periods; legal theories are not. *See Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578 (1995) ("'Notice pleading' requires plaintiffs to set forth the facts which support a legal theory, but does not require the legal theory relied upon to be correctly identified.").

In fact, this Court has rejected an argument that invoking the Federal Foreclosure Bar as a defense was equivalent to asserting a standalone claim; in *Nationstar Mortgage*, where the issue was whether a servicer had standing to raise a perceived violation of a federal law (HERA), the Court concluded that Nationstar was "not attempting to use the Supremacy Clause to assert an action against SFR," but rather "Nationstar ha[d] merely argued that Freddie Mac's property is not subject to foreclosure while it is in conservatorship under federal law." 396 P.3d at 757. Because SFR's quiet title claim was properly before the court, there was no question that the court could evaluate the merits of the argument that the Federal Foreclosure Bar provided the rule of decision. *Id*. The same is true for Chase's assertion of the Federal Foreclosure Bar as a legal theory here.

It is undisputed that Chase timely pleaded a quiet-title claim in its initial complaint, filed less than a year after the Sale. There is also no question that quiet title is a proper cause of action under Nevada law. *See Chapman v. Deutsche Bank Nat'l Trust. Co.*, 302 P.3d 1103, 1105-07 (Nev. 2013). Chase is entitled to assert any legal theory to support that claim in later briefing or at trial. Because Chase's quiet-title claim was properly before the district court, the district court could evaluate the merits of Chase's argument that the Federal Foreclosure Bar provided the rule of decision in deciding that claim. *Id.* Chase cannot be time-barred from asserting any legal theory, including the Federal Foreclosure Bar, in support of its claim.

C. Chase's arguments under the Federal Foreclosure Bar relate back to its initial complaint.

Chase's invocation of the Federal Foreclosure Bar would be timely even if it had been asserted as a new claim, or is deemed to constitute one, because the amendment would relate back to the original, timely filed complaint.

"Whenever the claim or defense asserted in the amended pleading [arises] out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." N.R.C.P. 15(c) (2018). In determining whether an amendment "relates back" to a party's original pleadings, the Nevada Supreme Court considers whether those initial pleadings provided "fair notice of the fact situation" that gave rise to the amendment.

Nelson v. City of Las Vegas, 665 P.2d 1141, 1146 (Nev. 1983). Stated differently, where an "amendment states a *new cause of action* that describes *a new and entirely different source of damages*, the amendment does not relate back…" *Id*. (emphasis added). Finally, "NRCP 15(c) is to be liberally construed to allow relation back of the amended pleading where the amended party will be put to no disadvantage." *Costello v. Casler*, 254 P.3d 631, 634 (Nev. 2011).

Chase's initial complaint asserted a claim for quiet title. 1 AA 006. Chase's invocation of the Federal Foreclosure Bar as a basis for its quiet-title claim arises from precisely the same transaction or occurrence that triggered its initial pleading—the Sale—and asks the court to answer the same question: whether the Sale extinguished the Deed of Trust. Thus, Chase's original pleadings put SFR on notice of Chase's claim that the Deed of Trust survived the Sale. The amendment relates back.

This Court's recent decision in *Jackson* is instructive. In *Jackson*, the court considered whether a party in a water rights dispute could amend its pleadings to include property-access claims. The court noted that, barring statutory authority preventing a district court from hearing related claims, "the rules of civil procedure are intended to allow the court to reach the merits of claims, rather than dispose of claims on 'technical niceties.'" 369 P.3d at 365 (quoting *Costello*, 254 P.3d at 634). The court held that because the party's new property-access claim "arises out of the same facts and circumstances of the original action, namely the determination of water rights, the district court has jurisdiction to consider those claims." *Id*. at 366. The situation here is even more compelling. Because Chase is not asserting a new claim but rather a new *basis* for its original quiet-title claim, its invocation of the Federal Foreclosure Bar necessarily arises out of the same facts as the original action—a determination of the effect of the Sale on the Deed of Trust.

Nor does it matter that the amendment invoked a statute that applies to Chase's claim by virtue of Chase's status as the contractual representative of Freddie Mac, the party whose interests the Federal Foreclosure Bar protects. Even assuming that fact is relevant, and that Chase's assertion of the Federal Foreclosure Bar is the procedural equivalent of amending to add a party asserting the same underlying claim,[6] such amendments are still governed by the "same transaction or occurrence test" and are routinely granted. *Costello*, 254 P.3d at 636 ("[W]hen…a plaintiff timely files a complaint that names a deceased defendant instead of the decedent's estate, the decedent's insurer had notice and knowledge of the action within the statute of limitations, and there is no resulting prejudice to the decedent's estate, an amended complaint naming the estate will relate back to the date of the original pleading.").

[6] To be clear, this Court has squarely and correctly held that neither Freddie Mac nor FHFA must be a party to claims in which the Federal Foreclosure Bar is asserted. *Nationstar Mortgage*, 396 P.3d at 758.

D. Chase's claim is timely under HERA's six-year period for non-tort claims or the state-law period HERA's tort provision would adopt.

The district court erred in concluding that Chase's "HERA claim" was untimely under HERA's three-year limitations period for tort claims. Chase's claim is instead subject to HERA's six-year limitations period for contract-based actions. Even if this Court concludes that Chase's claims sound in tort they are still timely; HERA requires that the Court apply the *longer* of the three-year period or the state-law period. The applicable state-law period is the five-year limitation period for quiet-title claims provided under NRS 11.070 or 11.080, or the four-year "catch-all" period under NRS 11.220. As Chase filed its original complaint and the amended complaint well within the four-year period, its assertion of the Federal Foreclosure Bar is timely.

1. HERA's six-year limitations period for non-tort claims governs.

The district court held that HERA's three-year statute of limitations provision applies to Chase's claims. *See* 12 U.S.C. § 4617(b)(12). That is wrong. The district court's flawed conclusion ignored the plain text of the statute, which confirms that HERA's *six-year* limitations period is applicable here. Section 4617(b) discusses the powers and duties of FHFA when acting as conservator or receiver, and Section 4617(b)(12)(A) provides a limitations period applicable to FHFA in those roles:

> [T]he applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver shall be—

> (i) in the case of any contract claim, the longer of—
>
> (I) the 6-year period beginning on the date on which the claim accrues; or
>
> (II) the period applicable under State law; and
>
> (ii) in the case of any tort claim, the longer of—
>
> (I) the 3-year period beginning on the date on which the claim accrues; or
>
> (II) the period applicable under State law.

12 U.S.C. § 4617(b)(12)(A).

Two interpretive questions arise. The first is whether HERA's statute of limitations applies where a servicer, rather than FHFA itself, asserts the Federal Foreclosure Bar. The second is whether Chase's quiet-title claim is properly categorized as a "contract" or a "tort" claim for the purposes of 2 U.S.C. § 4617(b)(12)(A).

a. FHFA need not be a party to a case for HERA's statute of limitations to apply.

Neither Chase nor SFR has appealed the district court's conclusion that HERA's limitations provision applies even though FHFA is not a party to the case, but to the extent SFR may change course and dispute the point now, the district court was correct that FHFA need not be a party. 4 AA 628. While HERA's limitations provision refers to actions "brought by the Agency as conservator," 12 U.S.C. § 4617(b)(12), courts routinely apply the substantively identical statute applicable to FDIC receiverships to claims in which some other party—typically an assignee—

asserts a statutory protection that attached to property of the conservatorship or receivership.

In the leading case, the Fifth Circuit held that "assignees of the FDIC…are entitled to the same six year period of limitations as the FDIC [receiver]" under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. *FDIC v. Bledsoe*, 989 F.2d 805, 811 (5th Cir. 1993); *see also Nat'l Enters., Inc. v. Barnes*, 201 F.3d 331 (4th Cir. 2000) (citing *Bledsoe*); *Remington Invs., Inc. v. Kadenacy*, 930 F. Supp. 446, 450 (C.D. Cal. 1996) (same). After carefully analyzing one of the few contrary decisions, the Ninth Circuit adopted the *Bledsoe* rule. *U.S. v. Thornburg*, 82 F.3d 886, 891 (9th Cir. 1996) (adopting *Bledsoe* and declining to follow *Wamco, III, Ltd. v. First Piedmont Mortg. Corp.*, 856 F. Supp. 1076 (E.D. Va. 1994)).

Bledsoe specifically rejects the position that the "plain statutory language" prohibits parties other than the conservator or receiver from invoking the limitations provision. 989 F.2d at 809. And in adopting the *Bledsoe* rule in *Thornburg*, the Ninth Circuit notes that *Wamco*—the contrary case the Ninth Circuit rejected—purports to rely on the FDIC statute's "plain terms." 82 F.3d at 891 (quoting *Wamco*, 856 F. Supp. at 1086). Other cases adopting the *Bledsoe* rule have similarly considered and rejected the "plain language" analysis. *E.g.*, *Remington Invs.*, 930 F. Supp. at 450 (rejecting argument that "plain language of the statute" limits provision to claims brought by FDIC); *Inv. Co. v. Reese*, 875 P.2d 1086 (N.M. 1994) (rejecting "plain language" argument that because statute "refers only to the FDIC in its capacity as conservator or receiver…[and] makes no mention of any subsequent holders, assigns, transferees, private parties or anyone else," only FDIC is entitled to invoke provision); *Tivoli Ventures, Inc. v. Baumann*, 870 P.2d 1244, 1248-49 (Colo. 1994) (rejecting argument that "the plain language of the federal statute clearly limits the statute to actions brought by the [FDIC] and does not extend to private [parties].").

Thus, even where protected property has been *assigned out* of a conservatorship or receivership, any party that is entitled to assert statutory protections that attached while the property was *still in* the conservatorship or receivership is *also* entitled to the benefit of the limitations provision—regardless of whether the conservator or receiver joins that action as a party. The decisions typically speak in terms of the relationship between the assignee and the assignor, often stating that the assignee "stands in the shoes" of the assignor. *E.g.*, *Bledsoe*, 989 F.2d at 810. But the same concept is equally apt when expressed in terms of the right attaching to the protected property, *i.e.*, "running with the land." *See East Lake Towers Corporate Center L.P. v. Scott Paper Co.*, 347 F. Supp. 2d 629, 633 (E.D. Wisc. 2004) (right that "automatically transfers to the purchaser" is one that "runs with the land").

This case is even stronger than assignment-based decisions; here, unlike in those cases, the protected property—Freddie Mac's Deed of Trust—remains *in the conservatorship*. *See Thornburg*, 82 F.3d at 891 (fact that protected entity maintains at least some interest in protected property "presents an even more compelling" case than where entirety of protected entity's interest has been assigned, as in *Bledsoe*). And as with the FDIC limitations provision, recognizing that HERA's statute of limitations-extender provision attaches to property protected by the Federal Foreclosure Bar "facilitate[s] Congress' policy of protecting failed institutions' assets." *See Bledsoe*, 989 F.2d at 811.

Indeed, restricting HERA's limitations provision to claims brought directly by the Conservator would "serve only to shrink the private market for the assets of [the entities in conservatorship, and] would require [FHFA] to hold onto and prosecute all [claims] for which the state statute of limitations has expired because [the underlying] obligations would be worthless to anyone else." *Id.*; *see also Interim Capital LLC v. Herr Law Grp., Ltd.*, No. 2:09-cv-01606-KJD-LRL, 2011 WL 7047062 at *10 (D. Nev. Oct. 21, 2011) (similarly analyzing and applying *Bledsoe*'s reasoning). That undesirable outcome would burden FHFA and undermine Congress's goals in creating FHFA—"foster[ing] liquid, efficient, competitive, and resilient national housing finance markets." *See* 12 U.S.C. § 4617(b)(2)(B)(iv).

At bottom, there is no sound legal or policy rationale to require the Conservator to participate directly in every case when other parties have ample standing to invoke the Federal Foreclosure Bar, as Freddie Mac and Chase unquestionably do here. Indeed, this Court has definitively held that "the servicer of a loan owned by [Freddie Mac]" may raise the Federal Foreclosure Bar, and that "neither Freddie Mac nor the FHFA need be joined as a party." *Nationstar Mortgage*, 396 P.3d at 758.

b. Chase's quiet-title claim is properly considered a contract claim under HERA's statute of limitations.

HERA's statute of limitations provision expressly acknowledges only two categories of claims—contract claims and tort claims. The Second Circuit, citing Section 4617(b)(12)'s broad language, has nevertheless held that "Congress intended to prescribe *comprehensive* time limitations for '*any action*' that the Agency might bring as conservator." *See FHFA v. UBS Americas Inc.*, 712 F.3d 136, 143, 144 (2d Cir. 2013) (emphases in original). Accordingly, courts must determine whether any claim to which the provision applies is best classified as arising in contract or in tort. *See In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 900 F. Supp. 2d 1055, 1067-68 (C.D. Cal. 2012).[7]

[7] Chase is not aware of any federal or state case law that classifies a quiet-title claim as a subcategory of either tort or contract claims. To the contrary, several courts have expressly distinguished between these three categories of claims. *See Heyman v. Kline*, 344 F. Supp. 1081, 1086 (D. Conn. 1970).

Chase's quiet-title claim fits more naturally into HERA's contract category because it seeks to validate a contractually created interest in the Property. The mortgage lien here "is an interest in property created by contract," which secures the grantor's contractual obligation to repay the amount owed. *Smith v. FDIC*, 61 F.3d 1552, 1561 (11th Cir. 1995). Although Chase's action to protect the Deed of Trust is not one to enforce the contract directly, it arises from the same contractual relationship and obligations. Indeed, the claim is grounded in the contractual relationship between the borrower and the lender when creating the Loan.

By contrast, Chase's quiet-title claim bears no significant similarity to any tort-based claim, including a claim for wrongful foreclosure. Those two claims involve different elements, different parties, and different remedies. Regarding elements, "[t]o prevail on a wrongful foreclosure tort claim, a plaintiff must prove that *the foreclosing party did not have a legal right to foreclose on the property*." *Hines v. Nat'l Default Servicing Corp.*, No. 62128, 2015 Nev. Unpub. LEXIS 973, at *5 (July 31, 2015) (emphasis added). The Federal Foreclosure Bar does not affect the HOA's "legal right to foreclose on the property"—it prescribes the effect a proper foreclosure can have on certain interests in the property—and Chase therefore does not argue and need not prove that the HOA "did not have a legal right to foreclose." As to parties, a wrongful foreclosure claim necessarily involves the foreclosing party—here, the HOA—but the quiet-title claim here is pleaded against the title-holder, not the foreclosing HOA. And as to remedy, a wrongful foreclosure claim may support monetary relief, *see* 59 C.J.S. Mortgages § 650, while a quiet-title claim seeks only a declaration of superior title to a property interest, *see McKnight Family, LLP v. Adept Mgmt.*, 310 P.3d 555, 559 (Nev. 2013). As Chase's quiet-title claim lacks any material similarity to a wrongful-foreclosure claim, the claim cannot plausibly be characterized as more tort-like than contract-like.

But even assuming Chase's quiet-title claim could plausibly fall into *either* the tort or the contract category, the contract provision would govern. This Court must look to *federal* policy—because HERA is a *federal* statute—to determine which limitations period applies. *See Vincent Murphy Chevrolet Co., Inc. v. U.S.*, 766 F.2d 449, 451 (10th Cir. 1985) ("Title 28 U.S.C. § 2409a, because it is a federal statute, must be interpreted in accordance with principles of federal law, and while federal courts may properly look to state law as an aid in…[their interpretation of federal statutes], such state law should be compatible with the purpose of the legislation so as to find the rule that will best effectuate federal policy.") (alterations and citations omitted); *cf. Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 316 (9th Cir. 1988) (rejecting argument that deference was owed to state interpretation of federal statute).

As the Ninth Circuit has explained, "[w]hen choosing between multiple potentially-applicable statutes, as a matter of federal policy the longer statute of limitations should apply." *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 2010) (noting that federal policy should determine which state statute of limitations applied to an ERISA benefits claim); *accord FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304, 1307 (9th Cir. 1989) (where there is a "'substantial question' which of two conflicting statutes of limitation to apply, the court should apply the longer") (citation omitted). Hence, even if the Court perceived some uncertainty as to whether Chase's quiet-title claim falls more neatly into the tort or the contract clause of HERA's limitations provision, federal policy would direct the Court to apply the contract clause.

Therefore, the six-year statute of limitations for contract claims under Section 4617(b)(12)(A) applies to Chase's quiet-title claim. Since the Sale took place in March 2013, and Chase filed its quiet-title claim in November 2013, Chase's claim is timely.[8]

2. Alternatively, the claim is timely under HERA's "tort" provision, which adopts the otherwise-applicable state-law period.

Even if HERA's "tort" provision is assumed to govern, it adopts "the longer of" the three-year period or the relevant period under state law. 12 U.S.C. § 4617(b)(12)(A)(ii). Here, state law specifies a five-year period, and there is no

[8] Chase's claim is still timely even if the period is calculated from the date of Case's amended complaint, which was filed on March 9, 2016.

credible argument for any period shorter than four years. Accordingly, Chase's claim is timely under Section 4617(b)(12)(A).

a. Nevada's five-year statute of limitations applies to Chase's quiet title claim.

Chase's quiet-title claim is timely under either NRS 11.070 or 11.080. Specifically, NRS 11.070 provides a five-year limitations period for quiet-title claims to allow "anyone with an interest in the property to sue to determine adverse claims," "even if that person does not have title to or possession of the property." *Nationstar Mortg. LLC v. Amber Hills II Homeowners Ass'n*, No. 2:15-cv-01433-APG-CWH, 2016 WL 1298108, at *3-4 (D. Nev. Mar. 31, 2016). Indeed, NRS 11.070 applies to claims (1) "*founded upon the title* to real property," where (2) "*the person prosecuting the action* or making the defense, *or* under whose title the action is prosecuted or the defense is made…*or* [*the*] *grantor of such person*, was seized or possessed of the premises in question" within five years before the challenged action. NRS 11.070 (emphases added).

Chase's claim readily satisfies each of the two statutory requirements. *First*, the claim is "founded upon…title" to the property. After all, the claim is denominated quiet *title*, reflecting the substance of the dispute: whether the Sale conferred clear *title* to SFR, or whether Freddie Mac's deed of trust continued to encumber SFR's *title*. Courts routinely apply NRS 11.070 to quiet-title claims brought by lienholders seeking to confirm the validity of security interests, as Chase did here. *E.g.*, *Bank of New York Mellon Trust Co., N.A. v. Jentz*, No. 2:15-cv-1167-RCJ-CWH, 2016 WL 4487841, at *2-3 (D. Nev. Aug. 24, 2016).[9]

Second, the "grantor" here is the former homeowner/borrower—a person who was unquestionably "seized or possessed of the premises" at the time of the Sale. A "grantor" in Nevada law includes a borrower who has executed a deed of trust to provide another party with a security interest in the property. *See* NRS 107.410 ("Borrower means a natural person who is a mortgagor or *grantor of a deed of trust under a residential mortgage loan*.") (emphasis added); *Rose v. First Fed. Sav. & Loan Ass'n of Nevada*, 777 P.2d 1318, 1319 (Nev. 1989) (grantor of deed of trust is party obligated to pay loan). There is no dispute here that the borrower on the note and grantor of the deed of trust had possession of the Property up until the Sale in March 2013, less than five years before Chase filed its complaint in November 2013.[10] Thus, NRS 11.070 applies to Chase's quiet-title claim here.

[9] *See also JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, No. 2:16-cv-02005-JCM-VCF, 2017 WL 3317813, at *2 (D. Nev. Aug. 2, 2017); *Wells Fargo Bank, N.A. v. United States*, No. 2:10-cv-1546-JCM-GWF, 2013 WL 2551518, at *3 (D. Nev. June 10, 2013); *Ocwen Loan Servicing, LLC v. Operture Inc.*, No. 2:17-cv-1026-GMN-CWH, 2018 WL 1092337, at *1 (D. Nev. Feb. 28, 2018). Some courts have incorrectly held otherwise, concluding that such claims were not "founded upon title." *See, e.g., Nationstar Mortg. LLC v. Keynote Props., Inc.*, No. 2:18-cv-0762, 2019 WL 266288 (D. Nev. Jan. 18, 2019) (rejecting argument that quiet-title claim is subject to NRS 11.070 or 11.080).

[10] Even considering March 9, 2016 as the relevant date, Chase's claim is timely.

Indeed, Nevada's lower courts and federal courts have applied NRS 11.070 to claims involving disputes over the continuing existence of a lien, the same issue in dispute here. *See, e.g.*, *Weeping Hollow Ave. Tr. v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016); *Raymer v. U.S. Bank N.A.*, No. 16-A-739731-C, 2016 WL 10651933, at *2 (Nev. Dist. Ct. Dec. 28, 2016).

Chase's claim is also timely under NRS 11.080's five-year statute of limitations, which states:

> No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof.

NRS 11.080's broad statutory language demonstrates that its scope includes various types of property-dispute claims, including lien disputes.

Indeed, this Court cited NRS 11.080 in a case involving a dispute between a lienholder and a purchaser at an HOA foreclosure, the same dispute central to this case. *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388 P.3d 226, 232 (Nev. 2017). Federal courts have cited NRS 11.080 in similar contexts. *E.g.*, *Scott v. MERS, Inc.*, 605 F. App'x 598, 600 (9th Cir. 2015). Such decisions adopt a broad interpretation of NRS 11.080 to cover quiet-title claims, such as Chase's claim, which seeks to confirm the survival of a deed of trust after an HOA foreclosure.

Thus, even if this Court were to conclude that Chase's quiet-title cause of action was a tort claim for the purposes of HERA—or indeed, if the Court were to conclude that the HERA statute of limitations did not apply at all—Chase's claim would be timely under the five-year state-law period under NRS 11.070 or 11.080.

b. In no event could the applicable limitations period be less than four years.

Even assuming for argument's sake that HERA's "tort" provision governs and that Nevada's quiet-title limitations periods do not apply, Nevada's four-year "catch-all" limitations period would still render Chase's claim timely. NRS 11.220 provides that "[a]n action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued." The statute thus sets a minimum statute of limitations "for all actions otherwise unprovided for." *Alper v. Clark Cty.*, 571 P.2d 810, 813 (Nev. 1977). Courts have held that quiet-title claims substantially similar to those raised by Chase were subject to this four-year provision in circumstances in which the servicer or Enterprise did not argue that HERA's provision applied, and the court erroneously determined that those claims were not subject to Nevada's five-year limitations provisions. *See, e.g., Ocwen Loan Serv'g, LLC v. SFR Invs. Pool 1, LLC*, No. 2:17-cv-01757-JAD-VCF, 2018 WL 2292807, at *4-5 (D. Nev. May 18, 2018); Order, *Fannie Mae v. Ayres*, No. 2:17-cv-01799-JAD-CWH, ECF No. 26, at *5-6 (D. Nev. Jun. 4, 2018).

No plausible argument supports a limitations period shorter than four years, and therefore under any potentially applicable rule, Chase's assertion of the Federal Foreclosure Bar was timely.

II. SFR cannot rely on Nevada's bona fide purchaser statutes to avoid Freddie Mac's federally protected Deed of Trust.

A. SFR is not a bona fide purchaser under Nevada law.

The district court's decision includes a cursory statement suggesting that SFR may have been protected by Nevada's bona fide purchaser doctrine. That is not correct. SFR does not qualify as a bona fide purchaser, but even if it did, the Federal Foreclosure Bar would preempt any state-law protection that would otherwise result.

Because SFR had actual or constructive notice that an Enterprise held an interest in the Deed of Trust, it cannot be a bona fide purchaser. SFR acknowledges that the Deed of Trust and its assignments were recorded at the time of the Sale. 4 AA 555-556. The recorded instruments put SFR on notice of a potentially adverse Enterprise interest. The Deed of Trust stated that the note "can be sold one or more times without prior notice to Borrower." 3 AA 342. And the face of the Deed of Trust identifies it as a "**NEVADA**--Single Family--Fannie Mae/Freddie Mac **UNIFORM INSTRUMENT WITH MERS**," indicating that an Enterprise might have an interest in the instrument. 3 AA 332 (emphasis original). Absent any countervailing evidence, where the deed of trust is recorded and indicates it is an Enterprise "uniform instrument," there can be no "genuine dispute" that the bona fide purchaser statutes do not defeat the application of the Federal Foreclosure Bar. *See SFR Invs. Pool 1, LLC v. Green Tree Servicing, LLC*, No. 72010, 2018 WL 6721370, at *2 n.3.

Furthermore, to clarify whether the Deed of Trust was owned by an Enterprise, SFR could have reached out to FHFA, whose role as the Enterprises' Conservator was well-known. Indeed, HOA sale purchasers are now routinely asking FHFA whether a given property to be foreclosed on is encumbered by an Enterprise lien, and have received timely and complete answers to their inquiries. SFR, by contrast, did nothing.

B. Nevada's bona fide purchaser doctrine cannot supersede the Federal Foreclosure Bar.

Even if SFR qualified as a bona fide purchaser under Nevada law, the Federal Foreclosure Bar would preempt the Nevada statutes to the extent they would otherwise allow SFR to take title to the Property free-and-clear of Freddie Mac's deed of trust.

As this Court recently recognized, "authority suggest[s] that the Federal Foreclosure Bar would preempt Nevada's law on bona fide purchasers." *Nationstar Mortg., LLC v. Guberland LLC-Series 3*, No. 70546, 2018 WL 3025919, at *2 n.3 (Nev. June 15, 2018) (unpublished disposition) (citing *In re Montierth*, 354 P.3d 648 (Nev. 2015)). Federal courts have since concluded that the Federal Foreclosure Bar preempts Nevada's bona fide purchaser statutes under these circumstances. *See*, *e.g.*, *Nev. Sandcastles, LLC v. Nationstar Mortg., LLC*, No. 2:16-cv-1146-MMD-NJK, 2019 WL 427327, at *3 (D. Nev. Feb. 4, 2019); *U.S. Bank Home Mortg. v. Jensen*, No. 3:17-cv-0603-MMD-VPC, 2018 WL 3078753, at *2 (D. Nev. June 20, 2018) ("the Federal Foreclosure Bar preempts Nevada's bona fide purchaser statute").

The reasoning behind these decisions is compelling: Because the Federal Foreclosure Bar protects Freddie Mac's property interest regardless of whether Freddie Mac's name appears in any recorded documents, "[a]llowing Nevada's law on bona fide purchasers to control in this case would be 'an obstacle to Congress's clear and manifest goal of protecting the Agency's assets in the face of multiple potential threats, including threats arising from state foreclosure law.'" *JPMorgan Chase Bank, N.A. v. GDS Fin. Servs.*, No. 2:17-cv-02451-APG-PAL, 2018 WL 2023123, at *3 (D. Nev. May 1, 2018) (quoting *Berezovsky*, 869 F.3d at 931).

III. To the extent SFR's counter-motion to strike is material to the parties' motions for summary judgment, the Court should reverse the order granting the counter-motion.

For purposes of this appeal, the Court does not need to address whether the district court erred by granting SFR's counter-motion to strike the Meyer Declaration and its exhibits. As explained below, the Chase Records and the Grageda Declaration—which are not affected by the counter-motion—independently prove that Freddie Mac owned the Loan and that Chase serviced the

Loan. However, to the extent the Court believes it is necessary to consider the Meyer Declaration and its exhibits, the Court should reverse the grant of SFR's counter-motion. The district court abused its discretion when it failed to consider whether Chase's alleged violation of N.R.C.P. 16.1 was harmless and when it failed to apply the governing legal standard for case-dispositive discovery sanctions. Under any reasonable application of these standards, it was inappropriate to exclude the Meyer Declaration and its exhibits.

A. SFR's counter-motion is immaterial because the Chase Records and the Grageda Declaration independently prove that Freddie Mac owned the Loan.

Although SFR asked the district court to strike the Meyer Declaration and the attached exhibits, it did *not* ask the court to strike the Chase Records or the Grageda Declaration. The latter materials are sufficient by themselves to support summary judgment in favor of Chase. In his declaration, Grageda states that he is a Legal Specialist III for Chase and is therefore qualified to testify about Chase's recordkeeping systems and databases. 3 AA 328, ¶¶ 1-2. He also authenticates the Chase Records and confirms they are business records exempt from the hearsay rule. 3 AA 328-329, ¶¶ 3, 5(c)-(d); *see also* NRS 51.135. In turn, the document "Loan Transfer History" contained in the Chase Records shows that Freddie Mac acquired ownership of the Loan on or about October 1, 2006 and continued owning the Loan through the time of the Sale on March 1, 2013. 3 AA 320, 329 ¶ 5(c). The document

"MAS1/AQN1" contained within the Chase Records shows that Washington Mutual Bank, FA—Chase's predecessor in interest—began servicing the Loan on or about September 1, 2006 and that Chase continued servicing the loan through the time of the Sale. 3 AA 322-325, 329 ¶ 5(d).

Thus, Chase can establish that Freddie Mac owned the Loan and that Chase serviced the Loan through the Grageda Declaration and Chase Records. The district court implicitly recognized this by holding that Freddie Mac owned the Loan, 4 AA 627 ¶ 10, notwithstanding the fact that it granted SFR's counter-motion to strike the Meyer Declaration and its exhibits. Therefore, Chase is entitled to summary judgment without the need for this Court to review the district court's decision on the counter-motion.

B. To the extent the Meyer Declaration and its exhibits are necessary to show that Freddie Mac owned the Loan, the district court abused its discretion by excluding them.

To the extent the Court believes the Meyer Declaration and its exhibits are necessary to prove Freddie Mac's ownership of the Loan, the Court should reverse the order granting the counter-motion. The district court abused its discretion when it failed to consider whether Chase's alleged violation of N.R.C.P. 16.1 was harmless and when it failed to apply the elevated legal standard for case-dispositive discovery sanctions. Under a proper application of N.R.C.P. 37, the district court could not exclude the Meyer Declaration and its exhibits.

1. N.R.C.P 37(c)(1) strictly limits case-dispositive sanctions and precludes sanctions where the alleged non-disclosure is substantially justified or harmless.

A party must provide "[a] copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Rule 26(b)[.]" N.R.C.P. 16.1(a)(1)(B) (2018). The parties must provide these disclosures after their early case conference and must supplement them "at appropriate intervals[.]" N.R.C.P. 26(e)(1) (2018).

"If a party fails to make a disclosure required by Rule 16.1(a) or 16.2(a), any other party may move to compel disclosure and for appropriate sanctions." N.R.C.P. 37(a)(2)(A) (2018). "The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." *Id.* Rule 37(c)(1) identifies the remedies a court may impose for a party's failure to disclose:

> A party that *without substantial justification* fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, *unless such failure is harmless*, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions…

N.R.C.P. 37(c)(1) (2018) (emphasis added). Thus, a district court may not exclude evidence—or impose any other sanction—if the failure to disclose was substantially justified or harmless. "Limiting the automatic sanction to violations 'without substantial justification,' coupled with the exception for violations that are 'harmless,' is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties[.]" Fed. R. Civ. P. 37, 1993 Adv. Cmte. Note to subdivision (c). To determine whether a failure to disclose is substantially justified or harmless, courts consider such factors as the importance of the evidence, whether the party against whom it is offered is prejudiced or surprised, that party's ability to discover the evidence, whether the non-disclosure was willful or in bad faith, and whether exclusion of the evidence would disrupt trial. *See Lanard Toys Ltd. v. Novelty, Inc.*, 375 Fed. App'x 705, 713 (9th Cir. 2010); *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003); *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003).

Case-concluding sanctions under N.R.C.P. 37 "should be used only in extreme situations." *Nev. Power Co. v. Fluor Ill.*, 837 P.2d 1354, 1359 (Nev. 1992). Generally, these sanctions "must be supported by an express, careful and preferably written explanation of the court's analysis of certain pertinent factors that guide the district court in determining appropriate sanctions." *Blanco v. Blanco*, 311 P.3d 1170, 1174 (Nev. 2013) (internal quotation marks omitted). Nevada courts consider several factors when deciding whether to impose case-dispositive sanctions:

> The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Young, 787 P.2d at 780 (citations omitted). As explained below, neither SFR nor the district court engaged in any such analysis here.

2. SFR did not certify that it met and conferred with Chase before filing its counter-motion.

As an initial matter, the district court erred in granting SFR's counter-motion to strike because SFR did not certify that it had met and conferred with Chase before filing the counter-motion. *See* N.R.C.P. 37(a)(2)(A) (2018) ("The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action."). For this reason alone, the Court should reverse the order granting the counter-motion.

3. Any violation of N.R.C.P. 16.1 was harmless.

The district court did not appear to consider whether Chase's allegedly late disclosure was harmless. The court apparently believed that any document disclosed in violation of N.R.C.P. 16.1 automatically had to be excluded. This failure to apply the governing legal standard is reason by itself to reverse the district court's judgment.

In any event, Chase's alleged violation of N.R.C.P. 16.1 was indeed harmless. Chase has asserted that Freddie Mac owns the Loan and has invoked the Federal Foreclosure Bar since at least February 2, 2016, when Chase moved for leave to amend its complaint. 1 AA 049-068. The amended complaint specifically referred to the Guide—one of the challenged exhibits to the Meyer Declaration—and provided a link to an online version of the Guide. 1 AA 060 ¶ 13. During subsequent discovery in 2016, Chase reiterated that Freddie Mac owned the loan through the testimony of Chase's N.R.C.P. 30(b)(6) witness and through written discovery responses. 1 AA 094-101, 109. On May 2, 2016, Chase disclosed Freddie Mac's corporate representative, the Freddie Mac Records, and the Chase Records (which are not in dispute). 1 AA 122-129. On June 28, 2016, Chase and SFR stipulated to extend the dispositive motion deadline and noted a need to supplement initial disclosures. 1 AA 131. When the parties filed their original summary judgment motions in July 2016, Chase attached copies of the Meyer Declaration and the Freddie Mac Records that are materially identical to the copies of those documents SFR is now challenging. 2 AA 241-248. By the time the first appeal was dismissed and the case was remanded, the Meyer Declaration, the Freddie Mac Records, and the Guide had been disclosed for roughly two years. The only document that is arguably material and that Chase did not disclose before the prior appeal was the Mortgage Payment History Report. However, the Court need not consider this document to enter summary judgment for Chase because the Meyer Declaration, the Freddie Mac Records, and the Guide are sufficient for that purpose. Further, any violation of N.R.C.P 16.1 involving the Mortgage Payment History Report was also harmless for the reasons explained above.

To summarize, SFR has known for more than three years that Chase is relying on the Federal Foreclosure Bar and that Freddie Mac's ownership of the Loan is a central issue. SFR sought and obtained discovery from Chase related to these issues. But for whatever reason, SFR declined to subpoena documents or deposition testimony directly from Freddie Mac. There is little reason to think that SFR would have behaved differently if Chase had disclosed the Meyer Declaration and Freddie Mac Records in early 2016 rather than mid-2016. Even if this delay in disclosing a subset of relevant documents was a violation of N.R.C.P. 16.1, any such violation was harmless. *See Capanna v. Orth*, 432 P.3d 726, 733-34 (Nev. 2018) (affirming denial of defendant's Rule 37(c)(1) motion to exclude evidence of future damages where defendant knew that plaintiff was seeking such damages and where defendant was able to challenge them); *Firefly Partners, LLC v. Reimann*, No. 69116, 2017 Nev. Unpub. LEXIS 962 (Oct. 30, 2017) (unpublished disposition) (where defendant "had notice of the future damages claimed by [plaintiff] and their amount before the close of discovery," district court properly denied N.R.C.P. 37(c)(1) motion to strike evidence of such damages).

Notably, SFR has extensive experience litigating the Federal Foreclosure Bar—experience which dates back to before the 2016 summary judgment briefing in this case. *See, e.g., Fed. Hous. Fin. Agency v. SFR Invs. Pool 1, LLC*, No. 2:15-cv-01338-GMN-CWH, 2016 U.S. Dist. LEXIS 59309, at *19-22 (D. Nev. Apr. 30, 2016) (entering summary judgment pursuant to Federal Foreclosure Bar); *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 2:14-cv-02046-JAD-PAL, 2015 U.S. Dist. LEXIS 133254, at *6-10 (D. Nev. Sep. 28, 2015) (citing Federal Foreclosure Bar in denying motion to dismiss by SFR). Freddie Mac and its servicers have routinely utilized Freddie Mac's business records in litigation against SFR for several years. SFR cannot claim to be surprised that such information exists and is being used here. Further, any "surprise" that SFR may have felt at the disclosure of the relevant information in 2016 has clearly dissipated in the intervening years.

4. Any violation of N.R.C.P. 16.1 clearly did not rise to a level that justified case-dispositive sanctions.

Even if Chase's alleged violation of N.R.C.P. 16.1 was not harmless, the district court still abused its discretion. As explained above, Chase argues that the Chase Records and the Grageda Declaration are independently sufficient to support summary judgment for Chase. But if, *arguendo*, the Meyer Declaration and its attachments are needed to prove Freddie Mac's ownership of the Loan, the district court's order striking these materials was necessarily a case-dispositive sanction. Therefore, the district court was required to consider the *Young* factors before it entered this sanction. The district court abused its discretion by failing to do so. Had the district court properly applied the *Young* factors, it would not have found that this case presents the "extreme" situation that justifies case-concluding sanctions. *See Nev. Power Co.*, 837 P.2d at 1359.

SFR has not shown that Chase willfully withheld evidence—indeed, Chase disclosed the Chase Records and Freddie Mac Records while discovery was still open. Chase later signaled its willingness to reopen discovery; however, SFR actively opposed the idea. Further, SFR would not be prejudiced by the imposition of a lesser sanction. For example, in lieu of striking the Meyer Declaration and its exhibits, the Court could simply permit SFR to take further discovery about Freddie Mac's interest in the Loan and the Property. This would allow SFR to fully explore the challenged documents, assuming that SFR is actually interested in doing so. Further, the severity of the district court's sanction is disproportionate to Chase's alleged violation of N.R.C.P. 16.1. Chase disclosed the Meyer Declaration, the Freddie Mac Records, and the Guide between February and July of 2016. Even if Chase was required to disclose all of this evidence in February 2016, when Chase first moved to amend its complaint, this does not support a sanction that singlehandedly changes the outcome of the case. Finally, the district court's order hinders Nevada's policy favoring adjudication on the merits.

As the Nevada federal district court explained when denying a very similar motion to strike filed by SFR, "having to litigate the case on the merits is not prejudice." *Capital One, Nat'l Ass'n v. SFR Invs. Pool 1, LLC*, No. 2:15-cv-01324-KJD-PAL, 2018 U.S. Dist. LEXIS 168658, at *4 (D. Nev. Sep. 28, 2018). The court in *Capital One* noted that the only "prejudice" SFR might suffer would be the inability to conduct additional discovery into the allegedly late-disclosed items. *See id.* The court also noted there had been extensive delays due to a litigation stay—in the same way there have been lengthy delays in this case due to the successive appeals. *See id.* In light of these facts, the court in *Capital One* denied SFR's request to strike the relevant documents while also giving the parties the option of submitting a motion or stipulation to reopen discovery. *See id.* at *4-5. Here, as in *Capital One*, SFR is trying to win the case on a technicality because it cannot win on the merits.

Therefore, to the extent that SFR's counter-motion to strike is material to the district court's summary judgment ruling, the Court should reverse the order granting the counter-motion.

IV. The district court should have entered summary judgment for Chase.

In cases presenting identical fact patterns, this Court, the Ninth Circuit, and dozens of state and federal trial courts in Nevada have held that an HOA foreclosure sale cannot extinguish the Enterprises' property interests while they are in conservatorship. *See Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 417 P.3d 363, 367-68 (Nev. 2018); *A&I LLC Series 3 v. Fannie Mae*, No. 71124, 2018 WL 3387787, at *1 (Nev. July 10, 2018) (unpublished disposition); *FHFA v. SFR*, 893 F.3d 1136, 1152 (9th Cir. 2018); *Berezovsky*, 869 F.3d at 930-31; *Elmer v. JPMorgan Chase & Co.*, 707 F. App'x 426, 427-28 (9th Cir. 2017) (unpublished); *Saticoy Bay, LLC, Series 2714 Snapdragon v. Flagstar Bank, FSB*, 699 F. App'x 658, 658-59 (9th Cir. 2017).

Further, this Court has recognized that Freddie Mac maintains its property interest as a loan owner when its servicer appears as the record beneficiary of the deed of trust. *See Montierth*, 354 P.3d at 651; *Guberland LLC-Series 3*, 2018 WL 3025919 at *2-3 (citing *Montierth*); Restatement § 5.4. Pursuant to these authorities, Freddie Mac's ownership of the loan and the appearance of its servicer, Chase, as record beneficiary at the time of the Sale ensured that Freddie Mac maintained a property interest.

In support of its underlying claim, Chase submitted the Chase Records, the Freddie Mac Records, and provisions of the Guide explaining the terms of the contractual relationship between Freddie Mac and its servicers, which established Freddie Mac's property interest. This evidence is admissible and is substantially identical to what this Court and the Ninth Circuit have held is sufficient evidence to establish an Enterprise's property interest. *See SFR v. Green Tree*, 2018 WL 6721370 at *1; *Berezovsky*, 869 F.3d at 933; *Elmer*, 707 F. App'x at 428.

Given that the uncontroverted evidence establishes the Federal Foreclosure Bar's applicability, this Court should reverse the district court's judgment and hold that the Federal Foreclosure Bar protected Freddie Mac's property interest from extinguishment here, such that SFR did not take title to the Property free-and-clear of Freddie Mac's deed of trust. *See Iliescu v. Steppan*, 394 P.3d 930, 936 (Nev. 2017) (reversing and remanding for judgment in favor of respondent); *Sloat v. Turner*, 563 P.2d 86, 90 (Nev. 1977) (similar).

CONCLUSION

This Court should reverse the district court and enter judgment in Chase's favor.

Dated: April 12, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 13,613 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

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

/ / /

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CERTIFICATE OF SERVICE

I certify that on April 12, 2019, I filed **Appellant's Opening Brief**. Service will be made on the following through the Court's electronic filing system:

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