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 APPENDIX – VOLUME 4

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Docket 77010 Document 2019-16225

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Document	Filing Date	Volume and Bates Number(s)
Complaint	November 27, 2013	1 AA 001-007
Proof of Service of Summons and Complaint	March 11, 2014	1 AA 008-010
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Amended Answer, Counterclaim and Cross-Claim	March 20, 2014	1 AA 024-034
Scheduling Order	June 29, 2015	1 AA 035-037
Answer to Amended Counterclaim	August 11, 2015	1 AA 038-048
Motion for Leave to Amend Complaint	February 2, 2016	1 AA 049-068
Order Granting Motion for Leave to Amend the Complaint	March 8, 2016	1 AA 069-070
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Excerpts from JPMorgan Chase Bank N.A.'s First Supplement to N.R.C.P. 16.1 Disclosures	May 6, 2016	1 AA 118-129
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Notice of Appeal	September 17, 2018	4 AA 640-642

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Notice of Appeal	September 17, 2018	4 AA 640-642
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CERTIFICATE OF SERVICE

I certify that on April 12, 2019, I filed **Appellant's Appendix – Volume 4**. Service will be made on the following through the Court's electronic filing system:

Jacqueline A. Gilbert
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company; DOES 1 through 10; and ROE BUSINESS ENTITIES 1 through 10, inclusive,

Defendants.

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Counter-Claimant,

vs.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association; ROBERT M. HAWKINS, an individual; CHRISTINE V. HAWKINS, an individual; DOES 1 10 and ROE BUSINESS ENTITIES 1 through 10 inclusive,

Counter-Defendant/Cross-Defendants

Case No. A-13-692304-C

Dept. No. XXIV

SFR INVESTMENTS POOL 1, LLC'S OPPOSITION TO JP MORGAN CHASE BANK N. A.'S MOTION FOR SUMMARY JUDGMENT

AND

COUNTERMOTION TO STRIKE

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SFR Investments Pool 1, LLC ("SFR") hereby files its Opposition to JP MORGAN CHASE BANK, NATIONAL ASSOCIATION's (the "Bank[1]") Motion for Summary Judgment pursuant to NRCP 56(c). This response is based on the papers and pleadings on file herein, the following memorandum of points and authorities, SFR's Motion for Summary Judgment, and such evidence and oral argument as may be presented at the time of hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Bank is in breach of a negotiated agreement with SFR, on which this Court signed off. Due to this breach, SFR is seeking a countermotion to strike Bank's arguments that relate to the validity of the foreclosure sale. SFR previously filed a Motion for Summary Judgment on or about July 22, 2016. SFR **prevailed on all issues**. However, one of those issues was the standing of the Bank to raise 12 U.S.C. § 4617(j)(3) as a defense or claim. *See* Findings of Fact and Conclusions of Law filed on October 26, 2016. The Bank filed a Notice of Appeal ("NOA") on or about November 22, 2016. *See* NOA filed with this Court. Based on the Nevada Supreme Court's opinion in *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. ___, 396 P.3d 754(Nev. 2017) ("*Nationstar*") The parties stipulated to remand back to District Court to brief **only the issues related** to §4617(j)(3) before the District Court. *See* Stipulation and Order, pg. 3 ¶ 10, filed on September 18, 2017, attached to SFR's MSJ as Exhibit B. *See also*, Stipulation to Remand filed with Nevada Supreme Court attached to SFR's MSJ as Exhibit C. To be clear, SFR did not need to agree to stipulate to remand. SFR agreed **only** because the Court's findings regarding the validity of the sale would remain. As such, the Bank's actions breach the heart of the agreement.

Additionally, the Bank served SFR with its "Third Supplemental Disclosures" on or about April 13, 2018 and the close of discovery was on or about **May 2, 2016**. *See* Scheduling Order filed June 29, 2015. While the parties stipulated to extend the dispositive the motion

[1] Herein the Bank refers to JP Morgan Chase Bank, N. A.

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deadline and allow the Bank to take SFR's deposition, these agreements were not made for the Bank to then one year later without leave of the court or by mutual agreement of the parties to serve the third supplemental disclosures. Further, this Court told the parties that if they wanted to reopen discovery after remand, it would entertain a motion. The Bank filed, then withdrew a motion to reopen. As such, this Court should not consider any evidence, facts, or arguments related to the documents disclosed late.

The Bank's motion can be denied for the following reasons: **(1)** the Bank's claims under 12 U.S.C. § 4617(j)(3) is barred by statute of limitations; (**2)** the Bank's motion is not supported by admissible evidence; **(3)** the Bank has failed to prove that FHFA/Freddie has an ownership interest; and (**4)** the Bank has failed to establish that it is a servicer for the FHFA/Freddie. As such, summary judgment can be granted in favor of SFR.

II. ARGUMENT

III. STATEMENT OF UNDISPUTED[2] AND DISPUTED FACTS REGARDING CLAIMS AND DEFENSES RELATED SPECIFICALLY TO 12 U.S.C. § 4617(J)(3).

Disputed Fact #1: "On September 27, 2006, Freddie Mac ("Freddie") purchased the loan thereby becoming successor to the Lender and acquiring ownership of the Deed of Trust ("DOT") and the Note. See Ex. 7." See Bank's MSJ pg. 7 ¶ 2.

This is disputed for the following reasons. **First**, Exhibit 7 of Bank's MSJ is an affidavit of Dean Meyer, with exhibits attached to it, which was not disclosed during the course of discovery. Dean Meyer was not timely disclosed as a witness during the course of discovery in this case, and the exhibits attached to his affidavit were also not timely disclosed during the course of discovery. The parties did not stipulate to allow a late disclosure. As such, SFR will not respond to Dean Meyer's affidavit or the exhibits attached to his affidavit. **Second**, if the Affidavit and Exhibits are not considered by this Court, then what is left is unsubstantiated

[2] SFR incorporates by reference its Statement of Undisputed Facts contained in its MSJ as if stated herein.

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statements that contradict the recorded documents, which conclusively establish that Freddie did not own the note or DOT. *See* NRS 47.240(2), *see also* section C *infra*.

Pursuant to the Scheduling Order filed with this Court, the close of discovery was on or about May 2, 2016, and Dean Meyer and the exhibits attached to his affidavit were disclosed on or about April 13, 2018, which is well past the deadline. Pursuant to NRCP 37 37(c)(1) "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**." *Id*. (Emphasis added).

Here, the Bank filed its Notice of Appeal and the parties agreed to remand **only** the issues related to U.S.C. § 4617(j) (3), which was memorialized in the parties Stipulation and Order and attached as Exhibit B to SFR's MSJ. The remand was **not an** opportunity to reopen discovery and SFR did not agree to reopen discovery. Further, *Nationstar* did not change anything. The Bank has been claiming that it is a servicer for Freddie Mac yet waits more than two years after the close of discovery to produce this witness and documents attached. By making this argument, SFR is not waiving any rights or stating that the documents establish anything. Rather SFR is asserting that the witness and documents were disclosed too late for this Court to consider.

Additionally, on or about January 9, 2018, the parties appeared in Court for a status check. At that hearing the Bank discussed that it circulated a stipulation and order to extend discovery but that counsel for SFR would not sign. The Court then set a briefing schedule on the issue of whether to extend discovery. *See* minutes from hearing. Next, the Bank filed a motion to extend discovery, which it withdrew voluntarily following SFR filing its opposition. *See* Notice of Withdrawal filed February 1, 2018. More importantly, counsel for the Bank acknowledge this in the hearing on February 13, 2018, stating that the parties could not come to an agreement and had withdrawn their motion. *See* minutes from hearing. The Bank chose to withdraw its motion to extend discovery knowing that it had failed to disclose what it believes to

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be relevant documents. Yet, the Bank still disclosed documents to SFR late,[3] despite the fact that discovery was closed. Because the Bank knew that Freddie's interest and its standing were at issue prior to the appeal, and because the Bank failed to obtain a discovery extension, the Bank is **without substantial justification to rely** on these undisclosed documents in its MSJ. As a result, the Court should not consider the late disclosed documents in support of the Bank's MSJ.

If this Court agrees with SFR and does not consider the Meyer Affidavit and exhibits attached, all that is presented is mere argument of counsel without admissible evidence which is contra to NRCP 56(c).

Disputed Fact #2: "The relationship between Chase, as the servicer of the loan, and Freddie Mac as the owner of the loan…" *See* Bank's MSJ, pg. 7 ¶ 5.

This is disputed because the Dean Meyer Affidavit, and the guide were not disclosed during the course of discovery in this matter. As a result, without waiving any arguments, SFR will not address the sum and substance of these assertions.

While the disputes over these facts defeat the Bank's motion for summary judgment, the truth or falsity of these facts have no bearing on SFR's Motion for Summary Judgment, which can still be granted even if these facts were true.

IV. COUNTER-MOTION TO STRIKE (1) FACTS AND ARGUMENTS RELATING TO THE VALIDITY OF THE SALE AND (2) FACTS AND ARGUMENTS BASED ON LATE DISCLOSED DOCUMENTS.

The Parties entered into an agreement, which was memorialized in the Stipulation to Remand and in the Stipulation Requesting Reconsideration and Certification (at ¶ 11) attached as Exhibit A to the Stipulation to Remand. *See* Exhibit B attached to SFR's MSJ. The essence of the agreement was to remand **only** issues relating to 12 U.S.C. § 4617(j)(3) as a defense or claim. As such, the Bank's arguments regarding the validity of the sale have already been decided by the Court in SFR's favor and this court should not consider them (Bank's Mot.,

[3] The following exhibits were not disclosed to SFR during the course of discovery, which are attached to the Bank's MSJ and must be struck: Meyer Affidavit, which is Exhibit 7; and all exhibits attached to said Affidavit, Exhibit 7-1 through 7-8, as well Exhibit 10, Exhibit 11, Exhibit 24 and Exhibit 27.

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Heading II, pp 21 section C - D). *See* Order Granting SFR's Motion for Summary Judgment filed on October 26, 2013.

Additionally, SFR requests this Court strike any facts and arguments presented in the Bank's motion for summary judgment that rely on documents not disclosed during discovery. The following exhibits were not disclosed to SFR during the course of discovery, which are attached to the Bank's MSJ and must be struck: The Meyer Declaration Exhibit 7,and all Exhibits attached to Exhibit 7, 7-1 through 7-9, as well as Exhibit 10, Exhibit 11, Exhibit 24 and Exhibit 27 was not disclosed during the course of discovery, and as a result should not be considered including Meyer declaration should also not be considered by the Court.

A. Motion for Summary Judgment Standard.

The primary purpose of a summary judgment procedure is to secure "just, speedy, and inexpensive determination of any action." *Albatross Shipping Corp. v. Stewart*, 326 F.2d 208, 211 (5th Cir. 1964); accord *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005). Although summary judgment may not be used to deprive litigants of trials on the merits where material factual doubts exist, summary judgment proceedings promote judicial economy and reduces litigation expenses associated with actions clearly lacking in merit. *Id.* Summary judgment enables the trial court to "avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried." *Id.*, quoting *Coray v. Home*, 80 Nev. 39, 40-41, 389 P.2d 76, 77 (1964). "Summary judgment is appropriate if, when view in light most favorable to the nonmoving party, the record reveals that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *DTJ Design, Inc. v. First Republic Bank,* 130 Nev. Adv. Op. 5, 318 P.3d 709, 710 (2014) (citing *Pegasus v. Reno Newspapers, Inc.,* 118 Nev. 706, 713, 57 P.3d 82, 87 (2002)).

The plain language of Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317,323, 106

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S.Ct. 2548, 2552 (1986) (adopted by Wood v. Safeway, Inc" 121 Nev. 724,731,121 P.3d 1026, 1031 (2005)). In such a situation, there can be "no genuine issue as to any material fact" because a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.* While the party moving for summary judgment must make the initial showing that no genuine issue of material fact exists, where, as here, the non-moving party will bear the burden of persuasion at trial, the party moving for summary judgment need only: "(1) submit [] evidence that negates an essential element of the nonmoving party's claim, or (2) 'point [] out ... that there is an absence of evidence to support the nonmoving party's case.'" *Francis v. Wynn Las Vegas, LLC,* 127 Nev. Adv. Op. 60,262 P.3d 705, 714 (2011). Once this showing is met, summary judgment must be granted unless "the nonmoving party [can] transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Cuzze v. Univ. & Cmty. ColI. Sys. of Nevada,* 123 Nev. 598, 603, 172 P.3d 131,134 (2007). Though inferences are to be drawn in favor of the non-moving party, an opponent to summary judgment must show that he can produce evidence at trial to support his claim. *Van Cleave v. Kietz-Mill Minit Mart,* 97 Nev. 414,417,633 P.2d 1220, 222 (1981). The Nevada Supreme Court has rejected the "slightest doubt" standard, under which any dispute as to the relevant facts defeats summary judgment. Wood v. Safeway, 121 Nev. at 731, 121 P.3d at 1031. A party resisting summary judgment "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 622 P.2d 610, 621 (1983) (quoting Halm v. Sargent, 523 F.2d 461,467 (lst Cif. 1975)). Rather, the non-moving party must demonstrate specific facts as opposed to general allegations and conclusions. *LaMantia v. Redisi*, 118 Nev. 27,29,38 P.3d 877, 879 (2002); *Wayment v. Holmes*, 112 Nev. 232,237,912 P.2d 816, 819 (1996). Indeed, an opposing party "is not entitled to have [a] motion for summary judgment denied on the mere hope that at trial he will be able to discredit movant's evidence; he must at the hearing be able to point out to the court something indicating the existence of a triable issue of fact." *Hickman v. Meadow Wood Reno*, 96 Nev. 782, 784,617 P.2d 871,872 (l980) (quoting *Thomas v. Bokelman,* 86 Nev. 10, 14,462 P.2d 1020, 1022-23 (1970)); see also

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Aldabe v. Adams, 81 Nev. 280,285,402 P.2d 34; 37 (1965) ("The word 'genuine' has moral overtones; it does not mean a fabricated issue.'), overruled on other grounds by *Siragusa v. Brown,* 114 Nev. 1384,971 P.2d 801 (1996); and *Elizabeth E. v. ADT Sec. Sys. W.,* 108 Nev. 889,892,839 P.2d 1308, 1310 (1992).

According to NRCP 56(c), "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c). The moving party has the burden of proving that no triable issues remain. *Harry v. Smith,* 111 Nev. 528, 532, 893 P.2d 372, 374 (1995).

Further, evidence in support of a motion for summary judgment must be admissible. NRCP 56(e); *Schneider v. Continental Assurance Co.*, 110 Nev. 1270, 1274, 885 P.2d 572, 575 (1994). This Court should deny the Bank's Motion because it is not supported with admissible evidence, and grant summary judgment in favor of SFR. Here, the close of discovery was May 2, 2016. *See* Scheduling Order filed on June 29, 2015. On or about April 13, 2018, the Bank served SFR with its Third Supplemental Disclosures ("late disclosure"). The late disclosure was served upon SFR one year eleven months and 12 days late. The late disclosure contains the exhibits on which the Bank is relying upon to support its motion for summary judgment, which it cannot. As a result, the Bank has an unsupported motion for summary judgment, which should be denied.

B. <u>The Recorded Documents Prove Freddie Mac Has Zero Interest in the Note/Deed of Trust.</u>

Pursuant to NRS 47.240(2) it is conclusive that "[t]he 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." This means the facts recited in the recorded documents are now conclusive; i.e., they cannot be contradicted. Here, the recorded documents establish that MERS as nominee beneficiary for GreenPoint Mortgage Funding, Inc. ("GreenPoint") originally had the interest in the Note and Deed of Trust. *See* DOT attached to SFR's MSJ at Ex. A-1. Then MERS, on behalf of GreenPoint assigned all its rights, title and interest in the Note/Deed of Trust to Chase. *See*

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Assignment attached to SFR's MSJ at Ex. A-2. While there is subsequent assignment from MERS to Chase again, this assignment makes little sense given that Chase was previously assigned the Note/Deed of Trust in 2009. *See* Assignment attached to SFR's MSJ at Exhibit A-6. Nevertheless, there are no assignments to Freddie Mac, and none of the documents refer to Chase as nominee beneficiary for Freddie Mac.

As a result, it is conclusively established that Freddie Mac does not and did not have an interest in the subject Note/Deed of Trust at the time of the Association foreclosure sale. Because this is summary judgment, the Bank need more than proclamations to establish this fact. As the non-moving party, they must demonstrate specific facts as opposed to general allegations and conclusions. *LaMantia v. Redisi*, 118 Nev. 27, 29, 38 P.3d 877, 879 (2002).

If the recorded assignments were not enough, which they are, the Bank has not even established Freddie Mac's interest through the production of the wet-ink promissory note. The proper method of transferring a mortgage note is governed by Article 3 of the Uniform Commercial Code—Negotiable Instruments, because a mortgage note is a negotiable instrument.[4] *Leyva v. Nat'l Default Servicing Corp.,* 127 Nev. 470, 255 P.3d 1275, 1279–81 (2011) (citing *Birkland v. Silver State Financial Services, Inc.,* No. 2:10–CV–00035–KJD, 2010 WL 3419372, at *4 (D. Nev. Aug. 25, 2010)). *See also,* NRS 104.3301; *In re Veal*, 450 B.R. 897, 920, at *16 (B.A.P. 9th Cir. June 10, 2011) (holding that a purported servicer, did not prove that it was the party entitled to enforce, and receive payments from, a mortgage note because it "presented no evidence as to who possessed the original Note.)

[4] *See* NRS 104.3102 (1) which applies to negotiable instruments like mortgage notes under Nevada's adoption of UCC Article 3. Transfer of a mortgage note must be done in accordance to NRS 104.3109 (note payable to bearer or order) and properly transferred or negotiated to a subsequent holder by proper endorsement if required. *See* NRS 104.3109; 104.3201; 104.3204; *see also Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, __, 255 P.3d 1275, 1280 (Nev. 2011).

If the note is payable to the order of an identifiable party but is then sold or otherwise assigned to a new party, it must be endorsed by the party to whom it was originally payable for the note to be considered properly negotiated to the new party. *Leyva*, 255 P.3d at 1280. "When endorsed in blank, an instrument becomes payable to bearer...." NRS 104.3205(2). Further, "a note initially made payable 'to order' can become a bearer instrument, if it is endorsed in blank." *Bank of New York v. Raftogianis,* 418 N.J.Super. 323, 13 A.3d 435, 439 (N.J.Super.Ct.Ch.Div.2010); *see also* U.C.C. § 3–205 cmt. 2 (2004). A party wishing to enforce a note must demonstrate it was validly negotiated or transferred by proper endorsement or proving the transaction through which, the note was acquired. *Leyva*, 127 Nev. at ___, 255 P.3d at 1281 citing NRS 104.3203(2) and U.C.C. § 3-202 cmt 2.

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"An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." UCC § 3–203(a). "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument. ..." UCC § 3–203(b). While the failure to obtain the endorsement of the payee or other holder does not prevent a person in possession from being the "person entitled to enforce" the note, the possessor does not have the presumption of a right to enforce. *Branch Banking & Trust Co. v. Smoke Ranch Dev., LLC*, No. 2:12-CV-00453-APG-NJK, 2014 WL 4796939, at *4 (D. Nev. Sept. 26, 2014). Rather, the possessor of the note must demonstrate both the fact and the purpose of the delivery of the note to the transferee in order to qualify as the "person entitled to enforce." *Leyva*, 255 P.3d at 1281.

Here, there is no evidence showing that Freddie Mac possesses the Note. Although to be clear, possession of both the Note and an interest in the Deed of Trust is required. *1597 Ashfield Valley Trust v. Federal National Mortgage Association*, 2015 WL 4581220 at 8 (D. Nev. July 28, 2015) (finding that possession of "note does not qualify as in property subject to protection under 12 U.S.C. § 4617(j)(3)"). As noted in *Ashfield*, "[a] promissory note connected with a home mortgage loan is not an interest in the real property encumbered by the deed of trust." *Id.* at *8 *citing Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 254 (Nev. 2012). This is so because "the holder of the note is only entitled to repayment and does not have the right under the deed to use the property as means of satisfying repayment." *Edelstein*, *citing Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011). Thus, in order for the Bank to show that 4617 even applies, it has to prove Freddie Mac has both an interest in the Note and Deed of Trust. The undisputed evidence belies this, and as such, 4617(j)(3) is not in play.

C. <u>The Bank's Claims are Time-Barred</u>.

1. The statute of limitations under § 4617(b)(12).

The statute that governs the statute of limitations in this context is 12 U.S.C. 4617(b)(12) which provides:

(12) Statute of limitations for actions brought by conservator or receiver

(A) In general. Notwithstanding any provision of any contract, the

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> applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver shall be—
>
> (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). The statute of limitations in Nevada for a wrongful foreclosure claim three years. NRS 11.190(3)(a).

By asserting § 4617(j)(3), the Bank is claiming the Association's foreclosure was wrongful because it occurred without the Federal Housing Finance Agency's ("FHFA") consent.[5] A claim for wrongful foreclosure is a tort claim. *Collins v. Union Federal Sav. & Loan Ass'n*, 99 Nev. 284, 300, 662 P.2d 610, 620 (1983). This means under § 4617(j)(12), said claim carries a **three-year statute of limitations**. To that end, the Bank's claim accrued on the date of the sale i.e. March 1, 2013,[6] which means that Bank had **until March 1, 2016**, to bring this claim. The Banks First Amended Complaint was filed on or about March 9, 2016, which is after the expiration of the statute of limitations. Thus, the Bank is time barred in bringing this claim.

If the Bank tries to argue that a five-year statue of limitation applies, that is incorrect. The Nevada Supreme Court has not addressed which statute of limitations applies in these circumstances. Under Nevada rules of statutory interpretation, the Court must first look to the statute's plain language. *Clay v. Eighth Jud. Dist. Ct.*, 305 P.3d 898, 902 (Nev. 2013). If the statute's, "language is clear and unambiguous," the Court must enforce it "as written." *Id.* (quotation omitted). The Court must "avoid[] statutory interpretation that renders language meaningless or superfluous," and "interpret a rule or statute in harmony with other rules and statutes." *Id.* (quotation omitted).

[5] To the extent the Bank claims only FHFA can consent that argument fails, because the Nevada Supreme Court has already determined that a servicer, if it can prove ownership by Fannie or Freddie and a contractual relationship between the servicer and the enterprise, has authority to litigate 4617(j)(3) on behalf of FHFA. *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev., Adv. Op. 34, 396 P.3d 754 (2017).

[6] *See* Foreclosure Deed attached to SFR's MSJ at Exhibit A-4.

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With these principles in mind, NRS 11.070 and 11.080 do not apply to the Bank's claim.

NRS 11.070 provides as follows:

> No cause of action or defense to an action, founded upon the title to real property,…shall be effectual, unless it appears that the person prosecuting the action or making the defense…was **seized or possessed** of the premises in question within 5 years before the committing of the act in respect to which said action is prosecuted or defense made.

NRS 11.070 (emphasis added)

NRS 11.070 does not apply to the Bank's claims because the Bank purports to hold only a lien interest; it has no claim to title to the property, and it seeks only to validate its lien rights. The Bank's claim is thus not "founded upon the title to real property," nor was the Bank "seized or possessed of the premises."

NRS 11.080 likewise deals with seisen/possession. Specifically, the statute states in relevant part:

> NRS 11.080 **Seisin within 5 years**; **when necessary in action for real property.**
>
> No action for the **recovery** of real property, or for the **recovery** of the possession thereof . . . shall be maintained, unless it appears that the plaintiff . . . **was seized or possessed of the premises in question**, within 5 years before the commencement."

NRS 11.080 (Emphasis added.)

Seisen is defined as "possession of a freehold estate in land; ownership." Black's Law Dictionary at 1362 7th Ed. 1999. The term is centuries-old and refers to possession under a claim of freehold ownership. The Ninth Circuit acknowledges this very precise and well settled meaning:

> "Seisen and possession, as now understood, mean the same thing. **To constitute seisen in fact, there must be an actual possession of the land**; **for a seisen in law there must be a right of immediate possession** according to the nature of the interest, whether corporeal or incorporeal. 1 Wash.Real Prop. 62. Under this view there can be no seisen in law where there is not a present right of entry. . . ."

Carlson v. Sullivan, 146 F. 476, 478, 77 C.C.A. 32, 2 Alaska Fed. 552, 557 (9th Cir. 1906) (*quoting Savage v. Savage*, 19 Or. 112, 116 23 Pac. 890, 891, 20 (1890)) (emphasis added).

Here, under no set of circumstances can the five-year statute of limitation of NRS 11.080

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apply because the Bank was not "**seized or possessed** of the premises in question." Additionally, the Bank's invocation of the words "quiet title" to describe its claim does not morph it into a seisen claim as this claim only applies to a person who has legal title. In fact, every case that has dealt with the five-year statute of limitation in the context of a quiet title action involved the homeowner, i.e. the person with legal title. In that regard, those cases implicated 11.070 and 11.080. In fact, the Bank may attempt to rely on *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.*, 133 Nev. Adv. Op. 3, 388 P.3d 226 (Jan. 26, 2017), which implicated NRS 11.080 only because Saticoy was the record title holder. (finding that the five-year statute of limitations applied to **record title holder's claim**). But of course, this is true for a homeowner because the homeowner does have a seisen/possessory claim. This is not true, however, for the Bank.

2. The Amended Complaint does not relate back to the original filing date.

The amended complaint does not relate back to the original complaint. Nothing in the original complaint put SFR on notice of any claimed interest by Freddie Mac or that 12 U.S.C. § 4617(j)(3) was implicated. *See Wilson v. Fairchild Republic Co.*, 143 F.3d 733, 738 (2d Cir. 1998) ("The pertinent inquiry, in this respect, is whether the original complaint gave the defendant fair notice of the newly alleged claims." (*citing Baldwin County Welcome Center v. Brown*, 466 U.S. 147,149 n.3, 104 S. Ct 1723 (1984)). overruled on other grounds by *Slayton v. Am. Express Co.,* 460 F.3d 215, 227–28 (2d Cir.2006) (adopting *de novo* standard of review for Rule 15(c)). The Bank knew or should have known of the facts related to Freddie's alleged interest and made the allegations when filing its original complaint.

The Bank cannot even assert 4617(j)(3) as a defense because this too is time barred. *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1035-36 (9th Cir. 2003) (barring City's defense under statute of limitations because defenses were "mirror images of time-barred claims"). In *Evans*, the 9th Circuit, noted that a party cannot "engage in a subterfuge to characterize a claim as a defense in order to avoid a temporal bar." *Evans*, citing *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1488 (1983) (holding that laches barred a pre-enforcement declaratory judgment action alleging that a price regulation was invalid). *See also Gilbert v. City of Cambridge*, 932

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F.2d 51, 58 (1st Cir. 1991) (holding that temporal bar cannot be sidestepped by asserting a defensive declaratory judgment claim); *Clark v. Slack Steel & Supply Co.*, 611 P.2d 80, 83 (Alaska 1980) (dismissing, as barred by statute of limitations, plaintiff's affirmative claim that a contract be declared void because it was formed under duress). As the *Evans* Court noted, "statutes of limitations 'are aimed at lawsuits, not at the consideration of particular issues in lawsuits....'" 344 F.3d at 1035 (*quoting Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 118 S.Ct. 1408 (1998)). At the end of the day, the statute of limitations applies regardless of whether the Bank couches its 4617(j)(3) assertion as a claim or defense. As the *Evans* Court put it, "[n]o matter what gloss [the Bank] puts on its defenses, they are simply time-barred claims masquerading as defenses and are likewise subject to the statute of limitations bar." *Evans*, at 1036.

Following this analysis, another court within the district held that the three-year statute of limitations was applicable and that based thereon, "the allegation of a federal foreclosure bar action under 12 U.S.C. Sec. 4617(j)(3) is time barred." *See* Decision and Order in *River Glider Avenue Trust v. Citimortgage, Inc.*, District Court Case No. A-13-680532-C (January 29, 2018) attached as Exhibit B to SFR's MSJ. Based thereon, the Bank's purported claim under 12 U.S.C. § 4617 is time-barred.

D. <u>Agency Did Not Succeed to Mortgages Held in Trust, Therefore, 4617(j)(3) Does Not Apply.</u>

12 U.S.C. 4617(j)(3) reads as follows:

> **No property of the Agency** shall be subject to levy, attachment, garnishment, **foreclosure**, or sale **without the consent** of the Agency…
> (Emphasis added.)

Without waiving its stated objections set forth above, it is irrelevant that the Bank asserts that Freddie owns the loan or it is Freddie's servicer, because if the loan was held in trust, then it is not the property of the Agency. The threshold question when dealing with 4617(j)(3) is "property of the agency." Because 4617(j)(3) only applies if "property of the agency" is involved, it stands to reason if "property of the agency" is not implicated then 4617(j)(3) has no application whatsoever. SFR knows from other discovery conducted on Freddie that Freddie securitizes the majority of the loans it acquires, i.e. holds them in trust. But Congress specifically

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excluded mortgages held in trust from the Agency's general power of succession. *See* 4617(b)(19)(B). Section 4617(b)(2)(A-K) lists the general powers of the Agency as conservator or receiver. These general powers include a wide-range of items, with the first being succession. **4617(b)(2)(A) reads, in relevant part, as follows:**

> **(2) General Powers**
>
> **(A) Successor to regulated entity** The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to—
> **(i)** all rights, titles, powers, and privileges of the regulated entity…and the assets of the regulated entity…

But Congress limited the General Powers by including General Exceptions. Specifically, section (b)(19)(B) excludes, "mortgages held in trust" from the Agency's general powers, including succession. Section 4617(b)(19)(B) states:

> **(19) General exceptions**
>
> **(B) Mortgages held in trust**
>
> **(i) In general**
> Any mortgage, pool of mortgages, or interest in a pool of mortgages held in trust, custodial, or agency capacity by a regulated entity for the benefit of any person other than the regulated entity shall not be available to satisfy the claims of creditors generally, except that nothing in this clause shall be construed to expand or otherwise affect the authority of any regulated entity.
>
> **(ii) Holding of mortgages**
>
> Any mortgage, pool of mortgages, or interest in a pool of mortgages described in clause (i) shall be held by the conservator or receiver appointed under this section for the beneficial owners of such mortgage, pool of mortgages, or interest in accordance with the terms of the agreement creating such trust, custodial, or other agency arrangement.
>
> **(iii) Liability of conservator or receiver**
>
> The liability of the conservator or receiver appointed under this section for damages shall, in the case of any contingent or unliquidated claim relating to the mortgages held in trust, be estimated in accordance with the regulations of the Director.

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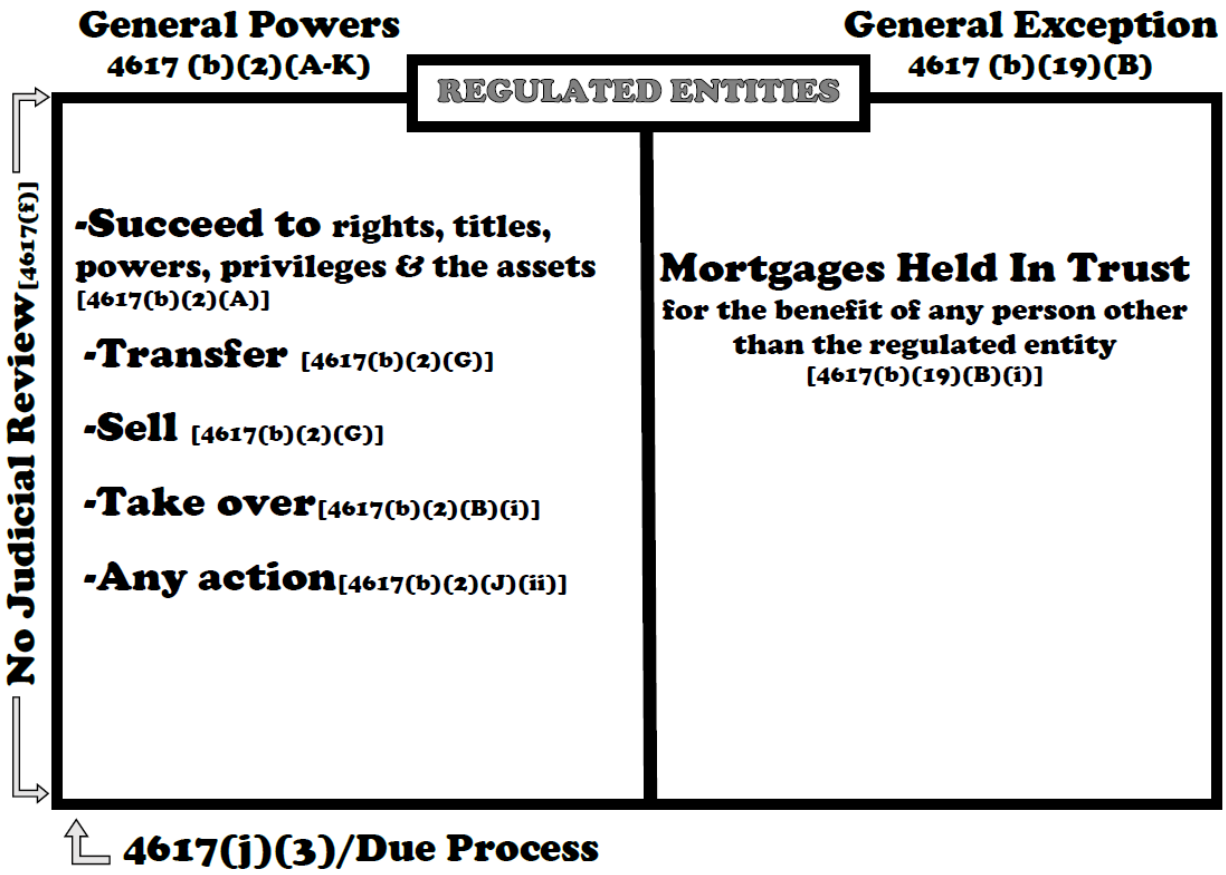
12 U.S.C. 4617(b)(19)(B).



As the Ninth Circuit noted, "FHFA's powers as conservator are not limitless…" *County of Sonoma v. Federal Housing Finance Agency*, 710 F.3d 987, 993 (9th Cir. 2013). Because Congress explicitly limited the Agency's general powers through the general exception excluding mortgages held in trust, mortgages held in trust are not property of the Agency.

Freddie's claim that it owned the subject mortgage/loan is irrelevant: ownership is not the question, succession is. In fact, that is what makes this case different from *Berezovsky*. *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017). In *Berezovsky*, Berezovsky did not argue succession and neither did the parties in *Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Association*, No. 69419 (Nev. March 21, 2018) (unpublished disposition). *Berezovsky*, 869 F.3d at 923. Moreover, *Berezovsky*, waived his right to conduct discovery. *Berezovsky*, 869 F.3d at FN 8 (noting that "[a]lthough discovery had not yet opened, Berezovsky himself moved for summary judgment and agreed to the district court's resolving

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the motions without further discovery).

In that regard, *Berezovsky* is not dispositive. The succession argument set forth here is currently pending before the 9th Circuit with the matter having been fully argued and submitted.[7]

Again, because 4617(j)(3) only applies to property of the agency, and not to loans held in trust. Thus, the Bank must prove that the subject loan was "property of the Agency," and was not held in trust to even implicate 4617(j)(3). The Bank provided no such evidence. Thus, this Court cannot rely on 4617(j)(3) to grant judgment in favor of the Bank.

E. Agency Has Rendered 4617(j)(3) Procedurally Unconstitutional.

Here, if the Court disagrees on the issue of held in trust, 4617(j)(3) still cannot apply because an unconstitutional law cannot preempt state law. *Alden v. Maine*, 527 U.S. 706, 731 (1999). The Agency violated SFR's due process rights. Under the Fifth Amendment, "No person shall be…deprived of…property, without due process of law. Nev. Const. Art. 1, Sec. 8; U.S. Const. amend. V. In order to trigger due process, a litigant must have a constitutionally protected "property." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). "Property" interests attain "constitutional status by virtue of the fact that they have been initially recognized and protected by state law…" *Paul v. Davis*, 424 U.S. 693, 710 (1976). Even when state and federal law interact, state law's recognition of an interest establishes the existence of "property" so as to implicate due process. *Id.*; *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260 (1987); *Ralls Corp. v. CFIUS*, 758 F.3d 296, 316 (D.C. Cir. 2001); *Pillsbury Co. v. FTC*, 354 F.2d (5th Cir. 1966).

Under Nevada law, "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." *SFR Investments Pool 1, LLC v. U.S.*

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[7] *See* **United States Court of Appeals for the Ninth Circuit Notice of Docket Activity** The following transaction was entered on 04/11/2018 at 12:59:21 PM PDT and filed on 04/11/2018

Case Name: FHLMC/Freddie Mac, et al v. SFR Investments Pool 1, LLC, et al

Case Number: 16-15962

Docket Text:

Argued and submitted TO M. Margaret Mckeown, Kim Mclane Wardlaw and Gary S. Katzmann. [10832808] (SME)

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Bank, 334 P. 3d. 408, 419 (Nev. 2014). Hence, Nevada law recognizes SFR's property interest in the subject property as being free and clear of the deed of trust to which Freddie claims an interest. The recognition of this interest in the first instance is what triggers due process. This is true even where, later the federal law might trump.

Due process constrains "governmental decisions" that deprive people of property. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "Deprivation" occurs when a government actor's decision alters or extinguishes a state-recognized interest. *Paul*, 424 U.S. at 711. It is the "alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to involve" due process. *Id.*; *Ralls*, 758 F.3d at 316. In the present case, Freddie claims that 4617(j)(3) overrides Nevada law and keeps in tack the deed of trust recorded against the property because the Agency did not consent to the extinguishment of the deed of trust. This "decision" not to consent constitutes a deprivation without due process. Specifically, the Agency lacks a process to request/obtain consent and also has no procedure for challenging its "decision" not to consent. As such, there is no opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). Due process' "root requirement" is "an individual be given an opportunity for a hearing before he is deprived of" property. *Loudermill*, 470 U.S. at 542; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). There is no dispute that the Agency did not give SFR an opportunity to be heard. To make matters worse, the Agency does not give SFR a post-deprivation remedy i.e. an opportunity to contest the decision not to consent. The absence of pre-deprivation procedures coupled with the lack of a post-deprivation remedy establishes that Agency deprived SFR of its property without due process. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). But for the Agency's lack of consent, SFR's property interest as initially recognized by Nevada law would be unaltered.

In addition to the lack of process, the Agency also failed to afford SFR notice that it even claimed an interest such that SFR could even be on notice it needed to obtain consent. Such failure to provide notice constitutes a deprivation without due process. *Mullane*, 339 U.S. at 314; *Jones v. Flowers*, 547 U.S. 220, 230, 234 (2006). because of the failure to provide SFR due

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process, 4617(j)(3) cannot preempt in this case.

F. Agency Consented to Extinguishment.

Should the Court disagree with SFR and find that the subject mortgage/loan was in Freddie's portfolio, i.e. never held in trust, and this Court does not find that either due process is triggered or that the Agency deprived SFR of due process, then 4617(j)(3) does not conflict because the Agency "affirmatively relinquished the cloak" of 4617(j)(3). *Berezovsky*, 869 F.3d at 929. There is evidence that the Agency or its purported servicer has consented to foreclosure. In *Trademark Properties of Michigan, LLC v. Federal National Mortgage Association,* 308 Mich.App.132 (Mich.App.), property owned by Freddie Mac was foreclosed upon by an association, and not once throughout the litigation did Freddie Mac raise 4617(j)(3). In *Trademark*, Freddie Mac had purchased the property on May 11, 2010 at a lender foreclosure sale. Thereafter, Freddie Mac failed to pay its assessments. As a result, the HOA foreclosed on February 15, 2011. This foreclosure was upheld, and at no time did Freddie Mac allege 4617(j)(3) prohibited the foreclosure. Given this example, it likely occurred in this case. SFR is currently in trial in case No. A-13-678094-C, SFR Investments Pool 1, LLC v. Federal National Mortgage Association, dba Fannie Mae, and in trial, Fannie Mae admitted to accepting excess proceeds from the foreclosure sale. If this occurred here, then Freddie consented to extinguishment.

In sum, even if the Court disagrees with SFR, Freddie likely consented to extinguishment.

V. CONCLUSION

For the reasons stated, the Bank's motion should be denied.

DATED this 4th day of May, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of May, 2018, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the **SFR INVESTMENTS POOL 1, LLC'S OPPOSITION TO JP MORGAN CHASE BANK, N. A.'S MOTION FOR SUMMARY JUDGMENT AND COUNTERMOTION TO STRIKE**, to the following parties:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Plaintiff, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company; DOES 1 through 10; and ROE BUSINESS ENTITIES 1 through 10, inclusive, Defendants.	Case No. A-13-692304-C Dept. No. XXIV **SFR INVESTMENTS POOL 1, LLC'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Counter-Claimant, vs. JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association; ROBERT M. HAWKINS, an individual; CHRISTINE V. HAWKINS, an individual; DOES 1 10 and ROE BUSINESS ENTITIES 1 through 10 inclusive, Counter-Defendant/Cross-Defendants	

SFR Investments Pool 1, LLC ("SFR") hereby files its Reply in Support of its Motion for Summary Judgment against JP MORGAN CHASE BANK, NATIONAL ASSOCIATION (the "Bank") pursuant to NRCP 56(c). This Reply is based on the papers and pleadings on file herein,

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the following memorandum of points and authorities, and such evidence and oral argument as may be presented at the time of hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The 4617(j)(3) claim is barred by the statute of limitations. The FHFA, the GSEs and its cohort sub-servicer banks successfully argued to the Nevada Supreme Court that the GSEs and the sub-servicer banks can assert 4617(j)(3) on behalf of the FHFA. *See Nationstar v. SFR Investments Pool 1, LLC*, 396 P.3d 754 (Nev. 2017). That is the whole reason why the parties are now re-briefing the FHFA issue before this Court. The Bank cannot now claim the statute of limitations found in 4617(12) does not apply to it. Either the Bank has standing to assert 4617 or it does not. Because it does, it lives and dies by everything 4617 says, which includes the statute of limitations.

If that was not enough, the Bank's opposition is not supported by admissible evidence,[1] which makes the Opposition just argument of counsel, and speculation, which is insufficient at the summary judgment stage. But the real issue is not ownership, its succession because 4617(j)(3) only applies to property of the Agency (aka FHFA). Because the Agency did not success to mortgages held in trust, 4617(j)(3) does not apply. Alternatively, the Agency has rendered 4617(j)(3) procedurally constitutional, and an unconstitutional law cannot preempt state law.

II. THE BANK DOES NOT DISPUTE SFR'S FACTS

SFR incorporates fully herein by reference its Statement of Undisputed Facts in SFR's Motion for Summary Judgment. Nowhere does the Bank dispute the facts in SFR's Mot. Pursuant to EDCR 2.20(c), the Bank has conceded all the facts stated in SFR's Motion.

III. LEGAL ARGUMENT

A. The 4617(j)(3) Claim is Time Barred.

Shockingly, the Bank argues that the statute of limitations found in 4617(12) only applies

[1] SFR's Opposition to Bank's MSJ contained a countermotion to strike the Bank's exhibits because the witness and exhibits were disclosed outside of discovery. SFR affirms this request should this Court consider the Bank's MSJ even though the Bank does not incorporate its MSJ.

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to the FHFA, suggesting that only if the FHFA asserts 4617(j)(3) does the statute of limitations apply. This is ridiculous. The only reason we are here before this Court is the FHFA, the GSEs and the banks, like Chase, successfully convinced the Nevada Supreme Court that the GSEs and the sub-servicing banks have standing to assert 4617(j)(3); that it is not an exclusive defense. *See Nationstar v. SFR Investments Pool 1, LLC*, 396 P.3d 754 (Nev. 2017). Now, in complete contravention of that argument and decision, the Bank claims that only parts of 4617 extend to it, and this Court should ignore the statutory limitations period found in 4617(12). But assuming for the sake of argument Freddie Mac owns the mortgage/loan in question (a point that SFR does not concede) the Bank only asserts 4617(j)(3) on **behalf** of the FHFA. In other words, the claim does not belong to Chase, it belongs to FHFA, but in light of *Nationstar,* Chase has standing to raise it. Thus, the same statute of limitations that would apply as if the FHFA was before this Court equally applies to the Bank. To find any other way, would be in direct contravention of the *Nationstar* decision.

The Bank does not dispute that the proper statute of limitation for a 4617(j)(3) claim is three years. This point is conceded. As a result, because the Bank did not assert the claim until March 9, 2016 and the statute ran on March 1, 2016, the claim is time barred.

Finally, the relation back provision of NRCP 15(c) does not save the day for the Bank. "Where the original pleading does not give a defendant 'fair notice of what the plaintiff's [amended] claim is and the grounds upon which it rests,' the purpose of the statute of limitations has not been satisfied and it is 'not an original pleading that [can] be rehabilitated by invoking Rule 15(c).'" *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 n. 3, 104 S.Ct. 1723 (internal marks and citation omitted). *Glover v. F.D.I.C.*, 698 F.3d 139, 146 (3d Cir. 2012). In other words, the analysis under NRCP 15(c) is "whether the *original* complaint adequately notified the defendants of the basis for liability the plaintiffs would later advance in the amended complaint." *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 866 (D.C. Cir. 2008) (emphasis added). Here, the Bank's original complaint made zero allegations of a federal interest, let alone an assertion that 4617(j)(3) pre-empted the legal effect of the sale as recognized by Nevada law. Additionally, the Bank's citation to *Jackson v. Groenendyke*, 369 P.3d 362 (Nev. 2016) is

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misplaced. That case dealt with analyzing whether the civil rules allowing amendments should also apply in the context of NRS 533.170, which deals with procedures for filing exceptions to State Engineer's Final Order of Determination. *Id.* at 366. Nowhere did the Nevada Supreme Court abrogate *Nelson v. City of Las Vegas*, 665 P.2d 1141 (Nev. 1983). In fact, *Jackson* cites *Nelson* with approval. In *Nelson*, the Court noted that, "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, as the opposing party has not been put on notice concerning the facts in issue." *Id.* at 557. In support of this idea, the Court noted the following

> [t]he liberality with which Rule 15 is to be viewed applies mainly to the manner in which the court's discretion shall be exercised in permitting amended pleadings. [Citation omitted.] It does not permit us to so liberalize limitation statutes when new facts, conduct and injuries are pleaded, that the limitation statutes lose their meaning. [Citations omitted.]

Id. quoting *Raven v. Marsh*, 94 N.M. 116, 607 P.2d 654, 656 (N.M.App.1980).

What is more, the *Nelson* court affirmed the district court's decision to deny the motion to amend finding that "[a]ppellants' original complaint and first amended complaint gave absolutely no indication that a claim for battery existed. They did not allege any physical contact whatsoever between the officers and Kathleen Nelson." *Nelson*, at 557. The same analysis applies here. The Bank's general claim that its deed of trust was not extinguished does not even come close to a 4617(j)(3) allegation. As such, the Bank's claim does not relate back to its original complaint.

B. <u>The Recorded Documents Belie Freddie Mac's Alleged Claim of Interest.</u>

SFR incorporates by reference its arguments on the issue of the recorded documents and note, as stated in SFR's MSJ, Opposition and Countermotion to strike, as though fully set forth herein. Because ownership is not even the real issue, SFR will not belabor the recorded documents/note argument any further. That being said it bears noting that in *1597 Ashfield Valley Trust v. Federal National Mortgage Association*, 2015 WL 4581220 at 8 (D. Nev. July 28, 2015) (finding that possession of "note does not qualify as in property subject to protection under 12 U.S.C. § 4617(j)(3)"), the only reason Judge Mahan ruled that 4617(j)(3) applied was Fannie Mae

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was the recorded beneficiary at the time of the Association sale. This is not true for this case.

Finally, the Bank misapplies *In re Montierth*, 354 P.3d 648 (Nev. 2015) and the Restatement. *Montierth* had a narrow and specific ruling that concerned two certified questions from the U.S. Bankruptcy Court: (1) what happens when a note and deed of trust remain split at the time of foreclosure; and (2) whether the recordation of an assignment constitutes a ministerial act that does not violate the automatic stay. *Id.* at 649. The gist of the issue in *Montierth* was whether the beneficiary on a deed of trust could foreclose on behalf of the holder of a promissory note during an automatic bankruptcy stay. The *Montierth* Court never addressed the validity of a property interest or what was required to prove ownership because the trail of the ownership interest in *Montierth* was undisputed, linear and clear: the recorded deed of trust there went from Deutsche Bank to MERS and back to Deutsche Bank.

Nothing in *Montierth* applies to the evidentiary issues at play here. In *Montierth*, the parties did not contest that the Bank owned the Note and MERS held the Deed, and that a principal and agent relationship existed between the two entities. Here, on the other hand, the recorded DOT started with MERS and ended with Chase. At no time, prior to the Association foreclosure did Freddie Mac appear in the chain of recordings. The facts of *Montierth* are inapplicable here, and nothing about the unpublished order in *Ohfuji Investments, LLC v. Nationstar Mortg., LLC*, No. 72676 (Mar. 15, 2018 unpublished order) changes this either.

C. 4617(j)(3) Does Not Apply to Securitized Mortgages.

12 U.S.C. 4617(j)(3) does not apply because mortgages held in trust are not "property of the agency." Again, for a full analysis if this issue, SFR refers this court to SFR's Opposition to the Bank's MSJ which SFR incorporates as though fully set forth herein. Simply put, because the subject loan was held in trust, 4617(j)(3) does not apply because the Agency did not succeed to mortgages held in trust. As such, summary judgment in favor of SFR is appropriate.

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D. The Agency Has Rendered 4617(j)(3) Procedurally Unconstitutional.

Here, if the Court disagrees on the issue of "held in trust" (although there is no basis to disagree), 4617(j)(3) still cannot apply because an unconstitutional law cannot preempt state law. *Alden v. Maine*, 527 U.S. 706, 731 (1999). SFR incorporates by reference as if stated herein, its arguments from its Opposition to the Banks' MSJ. Because the Agency did not afford SFR due process, 4617(j)(3) cannot preempt Nevada law.

V. CONCLUSION

For these reasons, the Court should enter summary judgment in favor of SFR, again, stating that (1) the deed of trust was extinguished when the Association foreclosed its lien containing super priority amounts; and (2) the Bank, and any agents acting on its behalf, are permanently enjoined from any conduct that would interfere with SFR's fee simple rights to the Property.

DATED this 18th day of May, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May, 2018, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system the foregoing **SFR INVESTMENTS POOL 1, LLC'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to the following parties.

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DISTRICT COURT

CLARK COUNTY, NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Plaintiff, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company; DOES 1 through 10, ROE BUSINESS ENTITIES 1 through 10, inclusive, Defendants.	CASE NO. A-13-692304-C DEPT NO. XXIV
SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Counter-Claimant, vs. JP MORGAN CHASE BANK National Association, a national association; ROBERT M. HAWKINS, an individual; CHRISTINE V. HAWKINS, an individual; DOES 1-10 and ROE BUSINESS ENTITIES 1 through 10, inclusive, Counter-Defendant/Cross Defendants.	

JPMORGAN CHASE BANK N.A.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

As described in Chase's Motion for Summary Judgment ("MSJ"), while Freddie Mac is in conservatorship under FHFA, none of its property "shall be subject to . . . foreclosure . . . without the consent of [FHFA]." 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar").[1] In this case, at the time of the HOA Sale, Freddie Mac owned the Deed of Trust encumbering the Property. As the Nevada Supreme Court, and multiple federal and state courts, including the Ninth Circuit, have held in dozens of cases, the Federal Foreclosure Bar protects Freddie Mac's interest, precluding SFR from acquiring a free and clear interest in the Property. *See Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, No. 69419, 134 Nev. Adv. Op. 36, at 2 (Nev. May 17, 2018) (en banc) ("the Federal Foreclosure Bar invalidates any purported extinguishment of a[n Enterprise's] property interest while under the FHFA's conservatorship, unless the FHFA affirmatively consents.");[2] *see also* MSJ at 11-12 (citing cases).

SFR's Opposition repeats many of the same arguments that it raised in its Motion for Summary Judgment, which Chase addressed in its response. *See generally* Chase's Opposition ("Opp."). Specifically, SFR argues that (1) Freddie Mac did not have an interest in the Property protected by the Federal Foreclosure Bar, (2) FHFA impliedly consented to extinguish Freddie Mac's Property interest, (3) the operation of the Federal Foreclosure Bar is unconstitutional, and (4) Chase's quiet title claim is time-barred. As explained below, SFR's arguments are meritless; numerous courts have rejected similar arguments on summary judgment motions. This Court should do the same here.

SFR also asks this Court to strike certain evidence and arguments by Chase as untimely or improper. As explained further below, the evidence that SFR claims

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[1] Terms not defined herein shall take on the definition in Chase's Motion for Summary Judgment ("MSJ").

[2] The Nevada Supreme Court originally issued its decision in *Christine View* in an unpublished order on March 21, 2018, but, on May 17, 2018, the court reissued the order as precedential opinion.

was untimely was disclosed in 2016. Thus, to the extent SFR could even raise a timeliness objection, it has waived that right because it has known the identity of Mr. Meyer and the referenced documents for approximately two years.

ARGUMENT

I. Freddie Mac Had a Secured Property Interest Protected by the Federal Foreclosure Bar at the Time of the HOA Sale

A. Freddie Mac Owned the Note and Deed of Trust Under Nevada Law

SFR continues to erroneously argue that the "recorded documents . . . conclusively establish that Freddie did not own the note or [Deed of Trust]" at the time of the HOA Sale. Opp. at 4, 8-10. As explained in Chase's Opposition to SFR's Motion for Summary Judgment, SFR's argument misunderstands Nevada law and disregards the three Ninth Circuit decisions that have rejected this argument. *See* Chase's Opp. at 3-7.

The Nevada Supreme Court's decision in *In re Montierth*, 354 P.3d 648 (Nev. 2015) provides the legal principle relevant to this case: an entity that owns a loan remains a secured creditor when an agent or contractually-authorized third-party is the beneficiary of record of the deed of trust securing the loan. Applying Nevada law under similar circumstances, the Ninth Circuit held that Freddie Mac, as a loan owner, does not need to appear as record beneficiary to have a protected property interest. *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017); *Elmer v. JPMorgan Chase & Co.*, 707 F. App'x 426 (9th Cir. 2017); *see also Saticoy Bay, LLC v. Flagstar Bank, FSB*, 699 F. App'x 658 (9th Cir. 2017). Indeed, "[a]lthough the recorded deed of trust here omitted Freddie Mac's name, Freddie Mac's property interest is valid and enforceable under Nevada law," *Berezovsky*, 869 F.3d at 932, because "the record beneficiary of [the] deed of trust is a party acting on Freddie Mac's behalf." *Elmer*, 707 F. App'x at 428.

To be sure, Nevada's recording statutes do not require public recording of changes in the ownership of a loan in order for a party to have a legal property

interest through that ownership. *See* NRS 106.210 (discussing only recording of assignments of beneficial interests). The recording statutes require only the recording of a "conveyance" of a deed of trust itself or an assignment of a deed of trust, not its subsequent acquisition by an investor through its purchase of a loan. If Nevada's recording statutes required all *loan ownership* interests to be recorded, a loan owner would always also need to serve as beneficiary of record of a deed of trust. Under such a rule, the loan owner in *Montierth* would not have had a secured property interest, and the Nevada Supreme Court would have ruled that MERS could not act as record beneficiary as nominee for the lender.

The requirements of the Nevada recording statutes are consistent with those in Kentucky, which the Sixth Circuit recently held did not require a separate recording anytime a party purchased a loan, so long as the beneficiary of record remained the same entity, as is the case here. *See Higgins v. BAC Home Loans Servicing, LP*, 793 F.3d 688, 689 (6th Cir. 2015). Nevada's recording statutes are also consistent with a number of Ninth Circuit decisions regarding MERS and its role in the mortgage industry. *See In re Mortgage Elec. Registration Sys., Inc.*, 754 F.3d 772, 776-77 (9th Cir. 2014); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1038-39 (9th Cir. 2011).

Moreover, also explained in Chase's Opposition to SFR's Motion for Summary Judgment, the evidence before the court unequivocally proves that Freddie Mac owned the note and Deed of Trust at the time of the HOA Sale. *See* Chase's Opp. at 7-9. Freddie Mac's business records show that Freddie Mac acquired ownership of the Loan in September 2006 and continued to own the Loan in March 2013, at the time of the HOA Sale. *See* MSJ, Exs. 4 (Chase Decl.),7 (Freddie Mac Decl.). Freddie Mac's business records and employee testimony also show that Chase was Freddie Mac's servicer at the time of the HOA Sale. *See* MSJ, Exs. 7, 7-1, 7-6. Consistent with Freddie Mac's business records, Chase produced its business records and an employee declaration confirming that it did not own the Loan at the

time of the HOA Sale. *See* MSJ, Ex. 4. The Second Circuit recently held that the contractual relationship between a servicer and Freddie Mac was established by testimony alone. *U.S. ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 653-54 & n.5 (2d Cir. 2016). Additionally, Freddie Mac's Guide provides evidence of the content of the relationship between Freddie Mac and Chase. The terms of the Guide match the relationship described in *Montierth* to secure Freddie Mac's interest in the Deed of Trust. *Berezovsky*, 869 F.3d at 932.

SFR has failed to raise any genuine issue of material fact and offers no evidence contrary to these business records and declarations.

B. Securitization Is Irrelevant to the Federal Foreclosure Bar's Protection

SFR contends that the Federal Foreclosure Bar does not protect Freddie Mac's Property interest "if" the Loan was transferred to a securitization trust because FHFA as Conservator does not succeed to the ownership of securitized loans. Opp. at 14-17. SFR's argument fails because the Loan was not securitized at the time of the HOA Sale. Even if it had been securitized, it would have no bearing on the Federal Foreclosure Bar's protection because Freddie Mac owns the mortgage loans it securitizes, and FHFA succeeds to that interest during conservatorship.

First, SFR's securitization argument is irrelevant because the Loan was *not* securitized at the time of the HOA Sale. While Freddie Mac placed the mortgage Loan here into a securitization trust after acquisition, the Loan was removed from that trust and transferred to Freddie Mac's unsecuritized portfolio of loans in on or about February 15, 2010, long before the HOA Sale in March 2013. *See* Decl. of Meyer at ¶8, attached hereto as Ex. 1. The Loan has not been securitized since. *Id.* SFR presents no contrary evidence.

Second, as a matter of law, the Enterprises own the loans that they securitize, because those loans are deposited into common-law trusts of which the

Enterprise is the trustee. *See* Ex. 1-1 (PC Master Trust Agreement) at 1, 5 (defining Freddie Mac as the trustee), Section 1.01 (stating mortgages are transferred to Freddie Mac in its capacity as trustee, not to an independent legal entity).

As the Seventh Circuit explained in a case involving securitized assets, "[i]n American law, a trustee is the legal owner of the trust's assets." *Paloian v. LaSalle Bank, N.A.*, 619 F.3d 688, 691 (7th Cir. 2010). Courts in New York—the jurisdiction governing the execution of Freddie Mac trust agreements—confirm that a common-law trust is not a legally cognizable entity capable of owning property, but instead can act only through a trustee, which holds legal title to trust property. *S.E.C. v. Am. Bd. of Trade, Inc.*, 654 F. Supp. 361, 366 (S.D.N.Y.), *aff'd*, 830 F.2d 431 (2d Cir. 1987) ("A trustee . . . holds legal or equitable title to the property placed in his possession."); *see also* 76 Am Jur. 2d Trusts § 3 (2005). Thus, "a traditional common law trust is a legal relationship between legal entities, not a legal entity in-and-of-itself . . . . A trust is not a legal 'person' which can own property . . . ." *Lane v. Wells Fargo Bank, N.A.*, No. 3:12-cv-00015-RCJ-VPC, 2012 WL 4792914, at *6 (D. Nev. Oct. 8, 2012). Accordingly, Freddie Mac's common-law securitization trusts are not legal entities that have the capacity to own property.

Nor are the beneficiaries of the trust the legal owners of the loans. The "'beneficiary of a trust' signifies one who has an equitable interest in property subject to a trust and who enjoys the benefit of the administration of the trust by the trustee. *A beneficiary, however, has no present ownership of, or lien on, the general assets of the trust.*" 24 Am. Jur. Pl. & Pr. Forms Trusts § 173 (emphasis added); *see also Orff v. United States*, 358 F.3d 1137 (9th Cir. 2004) ("A trust beneficiary has no legal title or ownership interest in the trust assets.").

Third, contrary to SFR's contention, Opp. at 14-17, FHFA, as Conservator, succeeds to the securitized mortgages Freddie Mac owns. 12 U.S.C. § 4617(b)(2)(A)(i) (the "Succession Provision"). SFR argues that a provision of

HERA—12 U.S.C. § 4617(b)(19)(B) (the "Trust Protection Provision")—provides an exception to the Succession Provision for securitized trusts because FHFA is purportedly only capable of "holding" mortgages in trust. SFR's argument thus is rooted in an assertion that the word "holding" must be read as an exception to "succession," an assertion unsupported by the statute itself.

Indeed, the Ninth Circuit gave this argument short shrift, holding that the plain language of the Trust Protection Provision "prohibits creditors from drawing on assets held in trust to satisfy creditors' claims; it does not bar the Agency from succeeding to [an Enterprise's] interest in the assets." *Elmer*, 707 F. App'x at 429. This plain-language interpretation lays bare that the logic of SFR's argument breaks down because "to succeed" and "to hold" are not mutually exclusive.

SFR's proffered reading of the Trust Protection Provision also makes no practical sense. The provision specifies that (i) securitized mortgages are off-limits to the Enterprises' creditors, (ii) that the Conservator must hold them according to the terms of the trust agreements, and (iii) that FHFA can promulgate regulations to cabin the damages available on claims relating to such mortgages. This reflects Congress's aim of stabilizing the nation's housing-finance system.

Yet SFR contends that this Trust Protection Provision—to which the Succession Provision makes no reference, and which itself makes no reference to the Succession Provision—somehow supersedes and nullifies the Succession Provision as it would apply to the Enterprises' securitized loans, thereby leaving that class of asset, and *only* that class, unprotected by the Federal Foreclosure Bar. That is wrong. SFR's interpretation would leave securitized mortgages with *less* protection than that afforded to unsecuritized loans, flouting Congress's intent to preserve the Enterprises' securitization function—and thereby destabilizing the secondary mortgage market.[3]

[3] If Congress intended the Trust Protection Provision to negate the Succession Provision (which it positioned some 17 subsections and 4,000-plus words away) one might have expected Congress to say so, or to at least offer some perceptible hint. Congress did not, and instead used different language in different sections to

SFR also places much reliance on the heading "General Exceptions." "But headings and titles are not meant to take the place of the detailed provisions of the text" of a statute. *N.L.R.B. v. Fresh & Easy Neighborhood Mkt., Inc.*, 805 F.3d 1155, 1160 (9th Cir. 2015) (citation omitted). SFR ignores that the text of the Trust Protection Provision does not fully exempt *any* property from *all* conservator powers, but rather delineates a far more limited exception: it directs the Conservator to manage securitized mortgages according to the terms of the underlying trust instruments, and places those mortgages off-limits to the Enterprises' general creditors.

In sum, this Court should follow *Elmer* by reading the Succession and Trust Protection Provisions according to their plain text and the clear Congressional intent to provide more protection to securitized asserts during the conservatorship, not less. The Federal Foreclosure Bar protects the Enterprises' securitized loans just as it protects their other assets.

II. FHFA Did Not Consent to Extinguish Freddie Mac's Deed of Trust

In another attempt to defeat summary judgment, SFR briefly argues FHFA impliedly consented to extinguish Freddie Mac's Property interest. Opp. at 19. As the Nevada Supreme Court and the Ninth Circuit have already held, it is SFR's burden to prove that FHFA *expressly* consented to extinguish Freddie Mac's property interest. *See Christine View*, 134 Nev. Adv. Op. 36, at 7 ("The Federal Foreclosure Bar cloaks the FHFA's 'property with Congressional protection unless or until [the FHFA] affirmatively relinquishes it.'" (quoting *Berezovsky*, 869 F.3d at 929)).[4] SFR cannot meet its burden because FHFA has stated unequivocally that it

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achieve different results. In contrast to the broad terms of the Succession Provision, the Trust Protection Provision articulates a narrow directive concerning the management and extra protection of securitized loans from creditors.

[4] For this reason, SFR's argument that a servicer can consent on FHFA's behalf is also wrong. Opp. at 11 n.5. By HERA's plain language and the Nevada Supreme Court's interpretation, FHFA must "affirmatively relinquish" Congress' protection of its property interest.

has not and will not consent to extinguish Freddie Mac's property interests. *See* MSJ at 21, Ex. 22.

SFR oddly cites to *Fannie Mae*'s apparent decision not to advance a federal preemption defense in a Michigan state court action to argue that this evidences FHFA's consent here. Opp. at 19 (citing *Trademark Prop. of Mich., LLC v. Fannie Mae*, 863 N.W.2d 344 (Mich. App. 2014)). Whether Fannie Mae raised various alternative arguments, but not the Federal Foreclosure Bar, in an entirely different action, in a different state, under different factual circumstances has no bearing on whether FHFA has consented to extinguish Freddie Mac's interest here.

III. The Federal Foreclosure Bar Does Not Violate Due Process

SFR argues that the Federal Foreclosure Bar's protection of Freddie Mac's lien interest deprives SFR of property without adequate procedural protections. Opp. at 17-18. This argument has been rejected before: "the protections of [the Federal Foreclosure Bar] were already in effect," therefore HOA sale purchasers "all purchased real property subject to FHFA's lienhold interest, and there was no deprivation of property." *Skylights LLC v. Byron*, 112 F. Supp. 3d 1145, 1154 n.4 (D. Nev. 2015); *see also Nationstar Mortg. LLC v. Tow Props., LLC II*, No. 2:17-cv-01770-APG-VCF, 2018 WL 2014064, at *5 (D. Nev. Apr. 27, 2018) (similar).

When SFR bought its interest in the Property, that purchase was governed by *both* federal and state law. The "existing rules and understandings and background principles" that "define the dimensions of the requisite property rights" for purposes of constitutional protections are "derived from an independent source, such as state, *federal,* or common law . . . ." *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1362 (Fed. Cir. 2009) (emphasis added) (internal quotation omitted). Indeed, "[f]ederal law, no less than state law, can provide the rules or understandings that create and define property interests." *Hardison v. Cohen*, 375 F.3d 1262, 1268 (11th Cir. 2004) (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). Accordingly, any interest SFR acquired at the time of the HOA

Sale was, from the outset, subject to Freddie Mac's preexisting property interest, because the Federal Foreclosure Bar had already been enacted and protected Freddie Mac's property, thereby limiting the interest that SFR could acquire at the HOA Sale. SFR cannot be deprived of an interest it never had.

SFR attempts to avoid this conclusion by contending that the Federal Foreclosure Bar only is effective when FHFA makes some case-by-case "'decision' not to consent." Opp. at 18. This contention has no support in the record, and this is not how FHFA operates. Moreover, SFR's argument contemplates that the Federal Foreclosure Bar does not automatically protect Enterprise property, an interpretation contrary to its statutory text and the Nevada Supreme Court's interpretation, which held that, "[a]bsent the FHFA's *affirmative relinquishment*," a purchaser at an HOA sale's "interest in the property is subject to [Freddie Mac's] deed of trust." *Christine View*, 134 Nev. Adv. Op. 36, at 8 (emphases added). Preservation of Freddie Mac's property interest is the default rule, with no action necessary from the Conservator for the statute to prevent the HOA Sale from extinguishing a lien.

The cases SFR cites do not support its due process argument—they undermine it. For example, *Ralls* helps illustrate the distinction between a deprivation of an existing right and a right never having been acquired in the first place under prevailing law. *Ralls Corp. v. CFIUS*, 758 F.3d 296 (D.C. Cir. 2014) (cited at Opp. at 17). In *Ralls*, it was undisputed that the plaintiff first acquired a property right in an Oregon farm. *Id.* at 315. The President subsequently nullified Ralls's purchase pursuant to the Defense Protection Act ("DPA").[5] The default legal regime was thus that Ralls had a property right, and it was only at the President's option that this property right could be cancelled; the DPA operated as a potential qualification on Ralls's vested property rights, not a condition precedent to the

[5] The DPA provides that the President "may take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States." 50 U.S.C. § 4565(d)(1).

vesting of such rights. *Id.* at 316. If the President had taken no action, Ralls would have continued to enjoy rights under Oregon law in perpetuity. *Id.* at 316-17.

The Federal Foreclosure Bar operates in the opposite manner—once it was enacted and the Enterprises entered conservatorship, HOA sales could not extinguish their pre-existing interests and deliver to purchasers like SFR free and clear title. If FHFA takes no action to give consent, then the Enterprises' property rights remain undisturbed. Unlike the DPA, the Federal Foreclosure Bar does not give FHFA the option to cancel a property right SFR has already acquired; rather, FHFA's consent is a *prerequisite* for SFR to obtain free and clear title.

The other cases cited by SFR are similarly distinguishable; in each, the parties complaining of a due process violation had already acquired a property interest *before* government action purported to take away that interest. For example, *United States v. James Daniel Good Real Property* concerned a civil forfeiture law that would deprive a homeowner of a property that the homeowner already owned prior to the seizure—under such circumstances, due process was required. 510 U.S. 43, 47-48 (1993). None of these cases considers a federal statute that, as here, protects one party's property from being extinguished and thereby prevents from the outset the complainant's acquisition of an interest in the property.

However, even assuming that an adjustment of property rights somehow occurred, that would not salvage SFR's argument. The action that "purportedly deprived . . . property was the enactment of HERA, which was undertaken by Congress in the normal manner prescribed by law." *Skylights*, 122 F. Supp. 3d at 1156; *see also Tow*, 2018 WL 2014064, at *5. "When the action complained of is legislative in nature, due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law." *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012) (citation omitted). Thus, even if SFR had been deprived of some property interest, "the deprivation of

property rights effected by [the Federal Foreclosure Bar] occurred with due process of law." *Skylights*, 112 F. Supp. 3d at 1154.

IV. Chase's Claim Is Not Time-Barred

SFR incorrectly argues that Chase's quiet title claim is time-barred under HERA. Opp. at 10-14. Chase's quiet title claim is not time-barred because the claim is subject to Nevada's five year limitations period under NRS 11.070 or 11.080. HERA's statute of limitations provision is not applicable here. Assuming March 1, 2013 is the date of accrual, as SFR contends, Opp. at 11, Chase's March 9, 2016 claim is timely filed.

A. NRS 11.070's Five-Year Statute of Limitations Applies to Chase's Quiet Title Claims

SFR contends that NRS 11.070 cannot govern Chase's claim because Chase does not claim title to the Property, nor does it claim to have been in possession of the real property. Opp. at 12-13. However, SFR's narrow interpretation of NRS 11.070 runs contrary to the plain text of the statute and applicable case law.

NRS 11.070's five-year limitations period applies to claims or defenses "*founded upon the title* to real property," where "*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." (emphases added). Accordingly, the statute does not specify that the claimant—here, Chase—*itself* have a claim to title or to have been in possession of the property. Rather, all that is required is that (1) title to the property is foundational to the claim and (2) the claimant or one of several other entities—specifically including the claimant's "grantor"—had possession within the last five years.

Chase's claim readily satisfies each of the two statutory requirements. *First*, the claim is "founded upon . . . title." The claim, after all, is denominated quiet *title*, reflecting the substance of the dispute, which is whether the HOA conveyed

clear *title* to SFR, or whether Freddie Mac's Deed of Trust continued to encumber SFR's *title*. Thus, courts routinely apply NRS 11.070 to quiet-title claims brought by lienholders seeking to confirm the validity of security interests, as Chase does 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).[6] As a matter of law and logic, a claim whose legal "purpose" is to "quiet title to . . . [p]roperty" is necessarily "founded upon . . . title" to the property. *Id.* Had the legislature intended to limit NRS 11.070 narrowly to *claims of title* rather than to apply more broadly to any claim *founded upon title*, it could easily have done so, but it did not. In enacting the broader language, the legislature encompassed within NRS 11.070's scope all claims to determine the validity of deed-of-trust encumbrances on title.

Second, the "grantor" is the former homeowner/borrower—a person who was unquestionably "seized or possessed of the premises" at the time of the HOA 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 the loan). There is no dispute here that the borrower on the note and grantor of the deed of trust, which Chase is beneficiary of record, had possession of the Property up until the HOA Sale on March 1, 2013, less than five years before the amended complaint was filed. Because NRS 11.070 applies where *either* a quiet title plaintiff itself, "*or the … grantor of such person,* was seized or possessed of the premises in question," whether Chase was "seized or possessed of the premises," is irrelevant. NRS 11.070 (emphasis added).

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[6] *See also 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).

Moreover, the Nevada Supreme Court's sole citation to NRS 11.070 in the last 40 years confirms that the statute covers claims where the claimant has a property interest other than title. In that case, *Bentley v. State*, the court considered the claims of intervenors whose dispute concerned *water rights*, not title. *See* No. 64773, 2016 WL 3856572 (Nev. 2016) (unpublished). The parties against whom the intervenors asserted their claims, the Bentleys, had built a structure diverting a greater share of the contested water to their property than they had drawn before. *Id.* at *10. The Nevada Supreme Court calculated the timeliness of the intervenors' claims based on the date that *the Bentleys* seized that larger amount of the water flow; it did not consider when the *intervenors* had possession to any of the claimed flow of water. *Id.* Thus, not only did the Nevada Supreme Court apply NRS 11.070 to claims involving property interests that were *not* title to real property, but it also calculated the limitations period based on when the target of the claim, not the claimant, had acquired possession of that property interest. Under SFR's interpretation of NRS 11.070, either fact would make the statute inapplicable to the claims of the intervenors in *Bentley*.

Nevada's lower courts have similarly followed the expansive reading of NRS 11.070, and have applied it to claims involving disputes over whether a lien continued to encumber a property, the same issue in dispute here. *E.g.*, *Raymer v. U.S. Bank N.A.*, No. 16-A-739731-C, 2016 WL 10651933, at *2 (Nev. Dist. Ct. Dec. 28, 2016). Similarly, the Ninth Circuit has cited to NRS 11.070 as providing a five-year limitations period to disputes between title owners and lienholders over the continuing existence of a lien, rather than the underlying title in the property. *See, e.g.*, *Weeping Hollow Ave. Tr. v. Spencer*, 831 F.3d 1110, 1113 (9th Cir. 2016); *Scott v. MERS, Inc.*, 605 Fed. App'x 598, 600 (9th Cir. Feb. 17, 2015); *Bank of New York Mellon v. Traccia Cmty. Ass'n*, No. 2:17-cv-1802-JCM-CWH, 2018 WL 1459127, at *4 (D. Nev. Mar. 23, 2018); *Sifre v. Wells Fargo Bank*, No. 3:10-CV-00572-RCJ, 2011 WL 221816, at *2 (D. Nev. Jan. 19, 2011).

B. Chase's Quiet Title Claim Would Also Be Subject to the Five-Year Period Provided by NRS 11.080

SFR's assertion that the five-year statute of limitations provided under NRS 11.080 also does not apply to Chase's quiet title claim, Opp. at 12-13, is similarly belied by the plain language of the statute:

> 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.

NRS 11.080. The text suggests that the limitations period applies to disputes about property interests other than title, as it encompasses "recovery of the possession thereof *other than mining claims*." Mining claims are not a subset of title to real property, but rather a distinct form of property interest. *See Mills v. United States*, 742 F.3d 400, 403 (9th Cir. 2014) (discussing different owners of legal title, mining rights, and possessory rights in land). The same is true of other property interests, such as a mortgage lien represented by a deed of trust, but those are not exempted from the statute. That the Nevada legislature expressly exempted a non-title interest from the statute confirms that it applies to disputes about a variety of property interests, not just legal title.

This interpretation is confirmed by decisions of the Nevada courts. Most recently, the Nevada Supreme Court cited NRS 11.080 in a case involving a dispute between a lienholder and a purchaser at an HOA Sale, 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. *See Scott*, 605 Fed. App'x at 600; *Bank of Am., N.A. v. Desert Canyon Homeowners Ass'n*, No. 2:17-cv-0663-MMD-NJK, 2017 WL 4932912, at *2 (D. Nev. Oct. 31, 2017); *Nationstar Mortg., LLC v. Falls at Hidden Canyon*

Homeowners Ass'n, No. 2:15-cv-1287-RCJ-NJK, 2017 WL 2587926, at *3 (D. Nev. June 14, 2017).

These decisions adopt a broad interpretation of NRS 11.080 to cover quiet title claims, such as that brought by Chase here, that seek to confirm the continuing existence of a deed of trust after an HOA Sale, as opposed to governing only title itself or possession of real property. Thus, the Court should reject SFR's claim that NRS 11.080 does not apply to Chase's quiet title claim.

C. Chase's Claim Is Not Subject to HERA's Three-Year Statute of Limitations

SFR contends that Chase's quiet title claim is actually a wrongful foreclosure tort claim subject to the three-year limitations period under 12 U.S.C. § 4617(b)(12)(A). Opp. at 10-11. As Chase explained in its Opposition to SFR's Motion for Summary Judgment, the provision SFR cites, 12 U.S.C. § 4617(b)(12)(A), only applies to claims filed by FHFA, not Freddie Mac or its servicers; FHFA is not a party here. *See* Chase's Opp. at 10-13. Even assuming that a three-year period applied, Chase timely pled its claims because the amended complaint relates back to the original complaint. *Id.* at 12. In any event, even if 12 U.S.C. § 4617(b)(12)(A) applied to Chase's claim, the statute of limitations for quiet title claims under that provision is six years, not three, because Chases' quiet title claim is most similar to a contract claim and is not a wrongful foreclosure action.

Chase's quiet title claim is not a tort under a theory of wrongful foreclosure. "A wrongful foreclosure claim challenges the authority behind the foreclosure." *McKnight Family, LLP v. Adept Mgmt. Servs.*, 310 P.3d 555, 559 (Nev. 2013). Here, Chase is not challenging the HOA's authority to conduct the HOA Sale, but rather the effect of the HOA Sale on its lien. The federal statute only protects the property interests of the Enterprises, not that of a borrower; when an Enterprise owns a deed of trust encumbering a property, as here, the statute does not preclude an HOA from foreclosing on its lien or change the limited superiority of that lien,

which allows the HOA to convey the borrower's title to an HOA sale purchaser. Rather, the Federal Foreclosure Bar merely protects Freddie Mac's property interest—here, the Deed of Trust—from extinguishment and thus preempts only one effect of the HOA Sale, not the HOA Sale itself. Accordingly, Chase challenges the *effect* of the HOA Sale on Freddie Mac's lien, not the HOA's authority to conduct the HOA Sale or whether the HOA Sale could convey title to SFR.

HERA's statute of limitations provision recognizes only two categories of claims—contract claims and tort claims. The Second Circuit, citing Section 4617(b)(12)'s broad language, has 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 brought by the Conservator 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]

While a quiet title claim does not fit neatly into the "contract" or "tort" category, it has more in common with a contract claim. Relationships formed in contract, creating legal rights and interests in property, undergird actions for quiet title, even if the quiet title action does not require interpretation of these contracts. *See, e.g.*, *Smith v. FDIC*, 61 F.3d 1552, 1561 (11th Cir. 1995) (explaining that "a mortgage lien is an interest in property created by contract."). Here, Chase's assertion of the Federal Foreclosure Bar as a basis for its quiet title action is grounded in the contractual relationship between Freddie Mac, as the owner of the Loan, and Chase, as Freddie Mac's servicer of the Loan and record beneficiary of the Deed of Trust at the time of the HOA Sale. That relationship is governed by the contractual provisions of Freddie Mac's Guide. Therefore, even if Section

[7] There is no 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).

4617(b)(12)(A) applied to Chase's quiet title claim, the claim would be subject to HERA's six-year statute of limitations for contract claims, and accordingly is timely.

V. Chase's Opposition to SFR's Motion to Strike

In addition to contesting Freddie Mac's ownership of the note and Deed of Trust, SFR seeks to exclude arguments related to the validity of the sale and documents disclosed in support of Chase's motion for summary judgment. Opp. at 12. SFR's arguments lack merit.

First, SFR argues that this Court should not consider Chase's argument regarding the validity of sale, erroneously claiming that this Court's prior October 26, 2013 order already addressed this issue. *See* Opp. at 5:24-6:2. However, this appears to be a sloppy copy/paste job on the part of SFR from another case as there is no such prior "October 26, 2013" order, and Chase's MSJ is premised entirely on the Federal Foreclosure Bar. Accordingly, Chase provides no further response to this argument.

SFR also argues that this Court should strike any facts and arguments that rely upon Mr. Meyer's declaration because, according to SFR, neither Mr. Meyer nor the documents were disclosed during discovery. *See* Opp. at 6:3-9. Again, SFR is incorrect. As part of its First Supplement to N.R.C.P. 16.1 Initial Disclosures ("First Supplement"), Chase identified a "Corporate Representative of Federal Home Loan Mortgage Corporation ("Freddie Mac")" as someone possessing discoverable information. *See* Exhibit 2, attached hereto. Mr. Meyer also provided a declaration in support of the Chase's motion for summary judgment filed on July 26, 2016. In support of the 2016 motion for summary judgment, Chase attached all of the same exhibits that SFR now contests (Exs. 7, 7-1 through 7-9, 10, 11, 24, and 27).

Chase maintains that these disclosures were timely, but even if they were not, such failure was harmless. *See* N.R.C.P. 37(c)(1). SFR did not object to these exhibits during the 2016 dispositive motion briefing, thus waiving its right to do so

now. Furthermore, SFR has not shown—and cannot show—how it has been harmed by these purported "untimely disclosures." SFR cannot claim it has been deprived of the ability to conduct discovery related to these documents when it has known about their existence for two years and vehemently opposed any efforts to re-open discovery following the remand of this case.

CONCLUSION

Chase respectfully requests that the Court grant its Motion for Summary Judgment.

DATED this 25th day of May, 2018.

BALLARD SPAHR LLP

By: /s/ Sylvia O. Semper
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CERTIFICATE OF MAILING

Pursuant to N.R.C.P. 5, I hereby certify that on the 25th day of May, 2018, an electronic copy of the **JPMORGAN CHASE BANK N.A.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served on the following counsel of record via the Court's electronic service system:

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/s/ C. Bowman
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Plaintiff, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company; DOES 1 through 10; and ROE BUSINESS ENTITIES 1 through 10, inclusive, Defendants.	Case No. A-13-692304-C Dept. No. XXIV **SFR INVESTMENTS POOL 1, LLC'S REPLY IN SUPPORT OF COUNTER-MOTION TO STRIKE**
SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Counter-Claimant, vs. JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association; ROBERT M. HAWKINS, an individual; CHRISTINE V. HAWKINS, an individual; DOES 1 10 and ROE BUSINESS ENTITIES 1 through 10 inclusive, Counter-Defendant/Cross-Defendants	

SFR Investments Pool 1, LLC ("SFR") hereby files its Reply in Support of its Counter-Motion to strike. This Reply is based on the papers and pleadings on file herein, the following memorandum of points and authorities, and such evidence and oral argument as may be presented

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Case Number: A-13-692304-C

at the time of hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

SFR's countermotion to strike can be granted because the Bank has not provided the Court with a valid reason to deny. In fact, the Bank's arguments against striking undisclosed witness and documents concede SFR's point, that these exhibits and witness were not disclosed pursuant to rules. As a result, SFR's countermotion should be granted.

II. PROCEDUREAL HISTORY

Pursuant to the Scheduling Order filed with this Court, the close of discovery was on or about May 2, 2016. The Bank served SFR with its First Supplemental Disclosures on May 6, 2016, which is after May 2, 2016, and late. The Bank served SFR with Second Supplemental Disclosures on July 26, 2016, which is also late as it is after the deadline. Finally, on April 13, 2018, the Bank yet again served SFR with supplemental disclosures, which are after the deadline expired and are late. SFR did not need to contest the whether the exhibits attached to the 2016 were properly before the Court because SFR had its ace, standing, which SFR won summary judgment. *See* Findings of Fact and Conclusions of Law filed on October 26, 2016. The Bank filed a Notice of Appeal ("NOA") on or about November 22, 2016. *See* NOA filed with this Court. Based on the Nevada Supreme Court's opinion in *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. ___, 396 P.3d 754(Nev. 2017) ("*Nationstar*") The parties stipulated to remand back to District Court to brief **only the issues related** to §4617(j)(3) before the District Court. *See* Stipulation and Order, pg. 3 ¶ 10, filed on September 18, 2017, attached to SFR's MSJ as Exhibit B. *See also*, Stipulation to Remand filed with Nevada Supreme Court attached to SFR's MSJ as Exhibit C. To be clear, SFR did not need to agree to stipulate to remand. SFR agreed **only** because the Court's findings regarding the validity of the sale would remain. S

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III. LEGAL ARGUMENT

The Bank's Witness Must Be Denied as Untimely, Improper and Prejudicial.

The Bank's assertion that the witness and exhibits were used in a prior pleading before the Court is acceptable is false. SFR objections because the witness and exhibits were not disclosed properly pursuant to the rules. Here, discovery closed on May 2, 2016. The Bank produced a first supplemental disclosure on May 6, 2016, and a second disclosure on July 26, 2016, and a third supplemental disclosure April 13, 2018. These disclosures are all late as they are all after the May 2, 2016 deadline. This is prejudicial to SFR, because it was information that the Bank knew all along. The Bank states in its MSJ, that at time of the sale (March 1, 2013[1]) the FHFA had an interest in the note. *See* Bank's 2018 MSJ.

If this is true, then all witnesses and documents should have been timely disclosed, i.e. part of the Bank's initial disclosures. This is inherently prejudicial to SFR because it is a material change in the case, with information the Bank is now saying it knew all along. The Bank was forcing SFR in a position to file a motion to strike the late disclosures, when SFR was in possession of its ace, the argument that SFR won its 2016 summary judgment on, that the Bank did not have standing. SFR chose a strategy which, worked, SFR prevailed on summary judgment. To now, in 2018, have the Bank be allowed to use information that was not properly disclosed is prejudicial and harmful. NRCP 37(c)(1) provides the following:

> 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.

NRCP 37(c)(1).

Here, SFR was deprived of an opportunity to defend itself on information that the Bank is stating it knew at the time of the sale, March 1, 2013, FHFA had an interest, yet waited until close of discovery to name a NRCP 30(b)(6) witness and did not name the witness properly. Pursuant

[1] *See* Foreclosure Deed attached to SFR's 2018 MSJ as Exhibit A-4.

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to the rules, the literal name of the witness needs to be in the disclosure, the Bank did not do that. SFR was deprived of the opportunity to defend itself. SFR was unable to notice the deposition of this witness, which is not harmless. Essentially, if the Court does not strike the witness, this is depriving a party of the chance to defend itself against information that the Bank knew all along. Thus, the Bank is without substantial justification for its failure to provide SFR with this information. NRCP 37(c)(1).

SFR faced an uphill battle in conducting discovery. The Bank failed to timely disclose information it claims in its msj that it knew all along. The witness and documents should have been produced by the Bank in its initial disclosures. *See* NRCP 16.1(a)(1)(B) and *see also*, NRCP 26(b). Pursuant to NRCP 26(b) (1) "Parties may obtain discovery regarding any matter…which is relevant to the subject matter involved in the pending action…" *Id*. As stated, these are germane to the Bank's claims. To the extent that there is any suggestion that SFR waived its objection, is baseless and not supported by any authority. *CF Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n. 38 (2006) (observing that a party is responsible for supporting its arguments with salient authority.) As such, the Bank should have produced them timely. Allowing the Bank to disclose this on the last day of discovery is akin to late because SFR was deprived of meaningful opportunity to defend itself, when it is information the Bank is stating it knew all along.

V. CONCLUSION

For these reasons, the Court should grant SFR's countermotion to strike

DATED this 29th day of May, 2018.

KIM GILBERT EBRON

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May, 2018, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system the foregoing **SFR INVESTMENTS POOL 1, LLC'S REPLY IN SUPPORT OF ITS COUNTER-MOTION TO STRIKE** to the following parties.

Select All Select None

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TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

JP MORGAN CHASE BANK NATIONL ASSOCIATION, Plaintiff, vs. SFR INVESTMENTS POOL 1 LLC, ET AL, Defendants.	)	Case No. A-13-692304-C Dept. No. 24

MOTIONS

Before the Honorable Jim Crockett

Tuesday, June 5, 2018, 9:00 a.m.

Reporter's Transcript of Proceedings

REPORTED BY:

BILL NELSON, RMR, CCR #191
CERTIFIED COURT REPORTER

APPEARANCES:

For the Plaintiff: Sylvia Semper, Esq.

For the Defendants: Karen Hanks, Esq.
Caryn Schiffman, Esq.

Las Vegas, Nevada, Tuesday, June 5, 2018

* * * * *

THE COURT: JP Morgan Chase Bank versus SFR Investments.

MS. HANKS: Karen Hanks here on behalf of SFR.

MS. SEMPER: Sylvia Semper on behalf of JP Morgan Chase Bank.

THE COURT: All right.

MS. HANKS: Karen Hanks and Caryn Schiffman.

THE COURT: Tell me, with regard to Cross-Defendants Christine and Robert Hawkins, are they out of the case now as it exists?

They were listed as being represented by Howard Kim.

MS. HANKS: We would have never represented them, Your Honor.

THE COURT: Right, it doesn't say you did.

My only concern was, that since they are not here today, I realize this is pretty much confined to just the people who are represented, but I just wondered what their status was.

MS. HANKS: Your Honor, I'm going to take a

guess that they were taken care of, otherwise the bank would not be able to appeal, but I don't have that knowledge firsthand, but that's my guess we would have gotten an order to show cause.

THE COURT: Okay.

So we have Plaintiff JP Morgan Chase Bank's motion for summary judgment and Defendant SFR's motion for summary judgment.

And then in addition to filing an opposition to JP Morgan's motion for summary judgment, SFR also fired a counter-motion to strike regarding the affidavit of I think his name was Myers and the documents that were attached.

It's probably a good motion to strike on the basis of the information was not disclosed in discovery, but I don't know that we need to get there.

In JP Morgan's opposition to SFR's motion for summary judgment first I think that JP Morgan is correct in their argument that they did own the loan and in accordance with the case of In Re: Montierth, M-o-n-t-i-e-r-t-h, the restatement third of property mortgages Section 5.4, I think that JP Morgan also had a property interest.

So I adopt the arguments and reasoning in

JP Morgan's opposition at pages 3 through 9 that Freddie Mac tolled the note and deed of trust at the time of the sale, rendering the federal foreclosure bar applicable at the time of the non-judicial HOA foreclosure sale.

Next we turn to the timeliness issue and whether or not the federal foreclosure bar is prevented from being asserted due to timeliness issues.

JP Morgan argues that the statute of limitations is no bar to JP Morgan because the statute of limitations they say applies to claims brought by the agency, which is to say FHFA, and since FHFA is not a party, the statute of limitations doesn't apply, only the quiet title statute of limitations applies.

So JP Morgan says that the three year or six-year statute of limitations only applies to claims that are brought by FHFA, all caps, not us, JP Morgan.

JP Morgan says, our claims are for quiet title, and that's a five-year statute of limitations.

Alternatively, JP Morgan says, if the three-year statute of limitations does apply, we claim that the doctrine of relation back protects us,

but SFR I think correctly argues that the federal foreclosure bar or facts and circumstances that would give rise to putting the Defendant on notice of it wasn't asserted in the original complaint.

So relation back doesn't save the day for JP Morgan.

It would be a new claim.

It would not be a restatement, or revision, or refinement of a claim that was originally made, so relation back doesn't help.

So I think that SFR is correct on their statute of limitations argument set forth in the reply brief, actually reiterated in the reply brief pages 3 through 4.

One of the reasons for that is, I think it's a compelling reason, it's logic.

If JP Morgan's position was correct, they are saying that if FHFA was a party, then the three-year statute would apply, and it's true that would bar this case from going forward, but FHFA is not a party.

We are, we claim the right to assert the federal foreclosure bar because we're a servicer acting in a representative capacity to the FHFA.

So the problem with that logic in my way of

thinking is this:

It would mean that the servicer who claims a derivative right to assert the federal foreclosure bar is actually in a superior position immune from the statute of limitations argument, and that would actually encourage the FHFA to not be a party and litigate its interests because to do so they would be foreclosed by the statute of limitations.

Instead, they step back and say, well we don't want to be a party because the statute of limitations would shut us out, but you guys go ahead and assert it in your capacity as your derivative representative capacity.

That would be like giving in a subrogation case the insurance company who is subrogating to the Plaintiff's claim a superior position to the Plaintiff, that just doesn't make sense.

So what that means is, that the federal foreclosure bar, even though it was applicable at the time of this sale, does not invalidate the HOA sale in this case.

The only opposition that JP Morgan had to SFR's motion for summary judgment was this ownership property, which I agree with JP Morgan, they did have the ownership property interest, and their second

objection was the statute of limitations.

JP Morgan I think is right on the ownership and property issue, but I believe that they are wrong on the statute of limitations.

So my inclination is to grant SFR's motion for summary judgment, since those are the only two things that JP Morgan objected to in terms of SFR's motion for summary judgment.

And by granting SFR's motion for summary judgment, the negates and renders moot JP Morgan's motion for summary judgment, so JP Morgan's motion for summary judgment would be denied too.

So that's my analysis, and I'm happy to hear from counsel for JP Morgan as to anything they would like to bring up that is not contained in their brief.

MR. SEMPER: Thanks, Your Honor.

One thing I wanted to clarify is that we have never conceded that the three-year rule would apply for FHFA, the three-year rule.

THE COURT: Okay.

Then tell me what would be the statute of limitations for FHFA.

MS. SEMPER: Six years, because it's a contract claim, not a tort claim.

The three years is a tort claim, that would be inapplicable here because it's not a tort claim, it's a claim for quiet title, and that essentially would rise out of the contractual right under the note and deed of trust.

So if we were to use FHFA's time line, it would be the six year, and that is included in our briefing, the three-year rule doesn't apply.

I would urge this Court that based on Great Eagle what the proper statute of limitations really is the five years under NRS 11.080, that's the one that we know the Nevada Supreme Court already decided it's five years, we're talking here about a quiet title claim.

I think it's all a red herring --

THE COURT: I know you are talking about a quiet title claim, and I know the statute of limitations for a quiet title claim is five years, but the problem is that it's predicated on what you contend is an improper non-judicial foreclosure sale that shouldn't have gone forward because it was invalidate by the federal foreclosure law, that's not breach of contract.

MS. SEMPER: Our remedies -- Or our right to the property arises from a contractual --

Obviously we haven't asserted the wrongful foreclosure, we're saying that there was never -- the sale that took place never extinguished our deed of trust, it's not wrongful foreclosure terms, we're saying what was conveyed through that sale was subject to the federal -- Freddie Mac's interest in the loan.

And then to the extent I understand that the argument with the relation back, but again I think that what is clear is that we never asserted a new claim, we are simply asserting a different basis.

Our claim was always from day one that the HOA sale did not extinguish Freddie Mac's property interest, the owner's interest.

What we did when we amended was --

THE COURT: Did you ever mention Freddie Mac or Fannie Mae in there?

MS. SEMPER: Freddie -- I understand the federal foreclosure bar is what we amended to explicitly include, but they were on notice from day one that we were asserting the sale didn't extinguish, and we basically clarified the basis for that, that's why that relates back, it wasn't a new claim, it wasn't a claim under a different set of rules, it was always the same argument, just a

different basis.

THE COURT: You know, given the Supreme Court's recent ruling that there has to be an affirmative relinquishment by FHFA, or Fannie Mae and Freddie Mac, it has to be an affirmative relinquishment, wouldn't that have been the issue to go on from the get go to stop the sale from going forward, enjoined it as an unauthorized and inappropriate mechanism to foreclose on this?

MS. SEMPER: I'm not sure exactly.

THE COURT: You say, it's not a new claim, you have been taking this position all the time?

MS. SEMPER: Correct.

THE COURT: Is there something in your brief that says that was your position all along?

MS. SEMPER: I think with a notice pleading state I think it was sufficient enough for the bank to say that the sale did not extinguish, that reasoning, and the basis.

I don't think we needed to set out our entire case in a pleading stage.

THE COURT: Here's why I think you have to to more than you did:

Because you say, we were claiming that that sale did not extinguish the first the deed of trust.

You go, okay that's the result you are looking for, it didn't extinguish it, but what's your theory?

I don't think notice was given to SFR if your theory was federal foreclosure bar.

MS. SEMPER: They knew at the time of the sale that there was a writ that could have been owned by --

THE COURT: I'm not talking about what they knew because that requires knowledge that goes beyond what is in the pleadings.

I'm saying, whether or not your pleading put them on notice, and I know your argument is they knew this, maybe you are right, but what I have to look at is, what did the pleading put them on notice of, and I don't think the Complaint put them on notice, that's why the relation back doctrine doesn't help you, it's whether or not the Supreme Court says the five-year or six-year statute of limitations applies, I think that is where it's going to pivot.

I think it's a three-year statute, and I don't think that the servicer can put itself in an elevated superior position to the FHFA in terms of the time limit.

MS. SEMPER: And I understand that, Your

Honor, but I also would urge the Court to look at Great Eagle on the fact their Court already said, it's five years, and it's a quiet title claim, they are within those parameters.

THE COURT: The difference in Great Eagle, it was the purchaser who was seeking to quiet title.

MS. SEMPER: I think that distinction is without a difference at the end of the day whether or not which party needs to quiet title, at the end of the day we're seeking a determination by the Court of our respective rights to the property, who is it that brings that I think is irrelevant, as long as it deals with the rights of the parties on that property.

THE COURT: Well, you can't say, whoever brings it is relevant, because if the party who brings it is subject to a shorter statute of limitations than the five-year quiet title statute, it's relevant who brings it, and I think that is what we're bumping up against here.

MS. SEMPER: Right.

And I think the main point is, that we have never conceded the three-year rule, nor do we think it applies because that is for tort claims, this is not a tort claim case, this is a quiet title case,

and I think it's clear under Great Eagle that we are dealing with a five-year statute of limitations.

THE COURT: You may by right, but I disagree.

Anything else?

MS. HANKS: Just for the record, for the appeal, Chase did not raise any argument as to an alternative statute of limitations in their opposition to our motion for summary judgment.

So that is why we put in our reply, the first time you see any alternate statute of limitations in their reply is in support of their motion for summary judgment.

So I want to make sure the record's clear if we go on appeal, SFR never had an opportunity to address the six-year statute of limitations argument because it was raised for the first time in the reply.

THE COURT: I agree.

MS. HANKS: I want to make sure that is clear when we go up we have to address that.

THE COURT: I think that is self-evident in the pleadings, but you are more than welcome to make this record regarding that.

Miss Semper.

MS. SEMPER: I would just like to add that in our opposition on page 10 we do specifically highlight this entire statute, and we do add in the case of the contract claim the longer of six years, so it's there.

I don't know how we get around the fact it wasn't there when it is there, we did include it in our opposition and did it on page 10 of our opposition to SFR's motion for summary judgment.

THE COURT: Anything else?

MS. HANKS: No, Your Honor.

THE COURT: I'm granting SFR's motion for summary judgment.

I'm denying JP Morgan's.

I'll ask counsel for SFR to prepare the order, ten days after you receive the transcript.

Is that sufficient?

MS. HANKS: Thank you, Your Honor.

THE COURT: All right.

Then I'd like you to circulate it to Miss Semper for approval as to form and content understanding full well you disagree with the ruling, but just the order accurately reflects what took place here today.

So ten days after you get the transcript

have the order in my office for my signature.

And anything else?

MS. HANKS: No, Your Honor.

MS. SEMPER: No.

THE COURT: Thank you.

THE CLERK: Your Honor, it looks like SFR has a counter-motion to strike.

THE COURT: I think the reason we don't need to get to that is that I do agree that Myers, and the documents he references, were apparently not disclosed in discovery, and I guess JP Morgan doesn't really contest, that they take the position, well, it's still a timely disclosure, even though it wasn't disclosed in discovery, so I don't know that it's necessary, but if it is necessary for me to rule on the motion to strike, I would grant the motion to strike as to the Myers affidavit, and as to the documents that were referenced by Myers that were not disclosed.

I just can't remember if there was more to it than that.

MS. HANKS: The motion to strike, no, that was the motion.

THE COURT: Okay.

So a separate order on that, okay?

MS. HANKS: Okay.

Thank you.

THE COURT: All right.

Miss Semper, did you want to address that?

MS. SEMPER: I would just say, the same is in our briefing, the fact is that we disclosed it back in July of 2016, they've known about it for more than two years, didn't object at that time.

They waived their right to object at this point, they've been aware.

When we were before Your Honor, we requested to reopen discovery, gave them opportunities to do so, and they opposed that, and now for them to say they are prejudiced belies logic when they had the opportunity to take discovery, and we would have been open with that.

So I don't think there was any prejudice or harm to them, the fact that was disclosed more than two years ago.

THE COURT: Let me just clarify.

Was Myers disclosed as a witness?

MS. SEMPER: He was, Your Honor, in our reply brief to our motion for summary judgment we did attach.

THE COURT: No, no, I mean within the

discovery cut off?

MS. SEMPER: Yes, in May of '16, so two months before the close of discovery, and before the dispositive motions were filed we served our first supplement, the initial disclosures, and we listed corporate representative of Freddie Mac.

THE COURT: So Myers wasn't disclosed by name?

MS. SEMPER: Correct, Your Honor.

However, he is a corporate representative, and to the extent they knew --

THE COURT: Were the documents he references in his affidavit disclosed?

MS. SEMPER: We noted the documents verifying Chase's status of servicer were pursuant to the rules, we did identify they existed, but we also said that we would agree to produce them once a protective order was entered.

So it's our opinion that we put them on notice that they existed, and that we were not willing to disclose them because they are proprietary and -- proprietary information, and then we did redact that information when we attached them, but it was available to them.

So yeah, there's no harm or prejudice

because they were aware those documents did exist.

THE COURT: So Myers was not disclosed by name within the discovery cut off, and the documents were not provided within the discovery cut off?

MS. SEMPER: A corporate representative was, correct, but not by name, but I don't think the rules require us to name every single witness, I think a corporate representative -- the rules allow us to essentially designate a corporate representative.

THE COURT: All right.

So a separate order on the motion to strike granting the motion to strike.

MS. HANKS: Thank you, Your Honor.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

I, Bill Nelson, a Certified Court Reporter in and for the State of Nevada, hereby certify that pursuant to NRS 2398.030 I have not included the Social Security number of any person within this document.

I further Certify that I am not a relative or employee of any party involved in said action, not a person financially interested in said action.

_____/s/ Bill Nelson_____

Bill Nelson, RMR, CCR 191

C E R T I F I C A T E

STATE OF NEVADA)
) ss.
CLARK COUNTY)

I, Bill Nelson, RMR, CCR 191, do hereby certify that I reported the foregoing proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place.

/s/ Bill Nelson

Bill Nelson, RMR, CCR 191
Certified Court Reporter
Las Vegas, Nevada

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DISTRICT COURT

CLARK COUNTY, NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Plaintiff, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company Defendants.	CASE NO. A-13-692304-C DEPT NO. XXIV
SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Counter-Claimant, vs. JPMORGAN CHASE BANK NATIONAL ASSOCIATION, a national association; ROBERT M. HAWKINS, an individual; CHRISTINE V. HAWKINS, an individual; DOES 1-10 and ROE BUSINESS ENTITIES 1 through 10, inclusive, Counter-Defendant/Cross-Defendants.	

(MS)

☐ Voluntary Dismissal	☒ Summary Judgment
☐ Involuntary Dismissal	☐ Stipulated Judgment
☐ Stipulated Dismissal	☐ Default Judgment
☐ Motion to Dismiss by Deft(s)	☐ Judgment of Arbitration

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT IN FAVOR OF SFR INVESTMENTS POOL 1, LLC

This matter came before the Court for hearing on June 5, 2018 on SFR Investments Pool 1, LLC's ("SFR") Motion for Summary Judgment and Counter-Motion to Strike, and JPMorgan Chase Bank, N.A.'s ("Chase") Motion for Summary Judgment. Karen L. Hanks, Esq. and Caryn Schiffman, Esq. appeared on behalf of SFR. Sylvia Semper, Esq. appeared on behalf of Chase.

Having reviewed and considered the full briefing and arguments of counsel, for the reasons stated on the record and in the pleadings, and good cause appearing, this Court makes the following findings of fact and conclusions of law.[1]

FINDINGS OF FACT

1. On September 20, 2017, a Notice of Entry of Stipulation Requesting Reconsideration and Certification was filed with the Court.

2. As part of that Stipulation, the parties agreed that in light of *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, ____ Nev. _____, 396 P.3d 754 (Nev. 2017), this Court's earlier grant of summary judgment in favor of SFR, on the issue of whether (1) 12 U.S.C. § 4617(j)(3) preempts NRS Chapter 116; (2) whether Freddie Mac had a valid and enforceable property interest at the time of the Association foreclosure sale; and (3) whether Chase had a servicing agreement with Freddie Mac at the time of the Association foreclosure sale would be vacated.

3. The parties further stipulated that all other aspects of the Court's summary judgment ruling in favor of SFR would remain in place, with Chase retaining the right to challenge those other aspects in any future appeal.

4. As a result of this stipulation, on April 13, 2018, SFR and Chase filed summary judgment motions on the HERA issue.

5. On March 9, 2016, Chase filed its First Amended Complaint. This was the first time Chase alleged Freddie Mac had a property interest in the subject

[1] While Chase submitted this order to memorialize the Court's ruling, Chase does not concede or waive any argument it raised in its filed briefs or during oral argument.

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property commonly known as 3263 Morning Springs Drive, Henderson, Nevada 89074.

6. The Association foreclosure sale took place on March 1, 2013.

7. In support of its Motion for Summary Judgment Chase attached a declaration from Dean Meyer, with attached exhibits that were not disclosed during the course of discovery. Chase never disclosed Dean Meyer as a witness during the course of discovery. The documents attached as Ex. 10, 11, 24 and 27 to Chase's Motion were also never disclosed during the course of discovery.

9. As a result, SFR filed a counter-motion to strike these documents and the affidavit of Dean Meyer.

10. However, the Court adopts the arguments and reasoning in Chase's opposition to SFR's Motion for Summary Judgment at pages 3 through 9 where Chase asserted Freddie Mac's ownership of the note at the time of the Association foreclosure sale, which renders 12 U.S.C. § 4617(j)(3) applicable at the time of the Association foreclosure sale.

CONCLUSIONS OF LAW

Standard

A. Summary judgment is appropriate "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Additionally, "[t]he purpose of summary judgment 'is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment as a matter of law.'" *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005) *quoting Coray v. Hom*, 80 Nev. 39, 40-41, 389 P.2d 76, 77 (1964). Moreover, the non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against

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[it]." *Wood*, 121 Nev. at 732, 121 P.3d at 1031. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Id.* Rather, the non-moving party must demonstrate specific facts as opposed to general allegations and conclusions. *LaMantia v. Redisi*, 118 Nev. 27, 29, 38 P.3d 877, 879 (2002); *Wayment v. Holmes*, 112 Nev. 232, 237, 912 P.2d 816, 819 (1996). Though inferences are to be drawn in favor of the non-moving party, an opponent to summary judgment, must show that it can produce evidence at trial to support its claim or defense. *Van Cleave v. Kietz-Mill Minit Mart,* 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981).

Statute of Limitations

B. Under 12 U.S.C. § 4617(b)(12), any tort actions brought by the FHFA must be brought within three years from the date the claim arose. Here, the Association sale took place on March 1, 2013. As such, any tort claim brought by FHFA under HERA expired on March 1, 2016. Chase did not raise the HERA claim until March 9, 2016. Such claim is time-barred.

C. Chase argues that 12 U.S.C. § 4617(b)(12) only applies if FHFA is a party. Chase, however, claims that because Chase, rather than FHFA is asserting HERA in this case, then the three-year statute of limitations does not apply. The Court rejects this argument.

D. The problem with this argument is it would mean that a servicer who claims a derivative right to assert the federal foreclosure bar is actually in a superior position immune from the statute of limitations, and that would actually encourage the FHFA to not be a party and litigate its interests because to do so they would be foreclosed by the statute of limitations.

E. Alternatively, Chase argues that its amended complaint should relate back to its original complaint. The Court rejects this argument. As SFR correctly points out, nothing in the original complaint alleged the federal foreclosure bar or facts and circumstances regarding a claimed federal interest that would put SFR on

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notice that HERA was at issue in this case. *See Wilson v. Fairchild Republic Co.*, 143 F.3d 733, 738 (2d Cir. 1998) ("The pertinent inquiry, in this respect, is whether the original complaint gave the defendant fair notice of the newly alleged claims." (*citing Baldwin County Welcome Center v. Brown*, 466 U.S. 147,149 n.3, 104 S. Ct 1723 (1984)). overruled on other grounds by *Slayton v. Am. Express Co.*, 460 F.3d 215, 227–28 (2d Cir.2006) (adopting *de novo* standard of review for Rule 15(c)).

Motion to Strike

G. Chase attached a declaration from Dean Meyer, with attached exhibits that were not disclosed during the course of discovery. The documents attached as Ex. 10, 11, 24 and 27 to Chase's Motion were also never disclosed during the course of discovery. Chase never disclosed Dean Meyer as a witness during the course of discovery.

H. The Court grants SFR's Motion to Strike.

ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that SFR's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that JPMorgan Chase Bank, N.A.'s Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Deed of Trust recorded in the Official Records of the Clark County Recorder as Instrument No. 20060612-0003526 was extinguished by the homeowners association foreclosure sale held on behalf of the Association.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Chase, its predecessors in interest and its successors and assigns, have no further right, title, or interest in real property located at 3263 Morning Springs Drive, Henderson, Nevada 89074, and are hereby permanently enjoined from taking any further action to enforce the now extinguished DOT, including but not limited to, clouding title, initiating, continuing to conduct, or taking any other action to foreclosure on, and

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from selling, or transferring the Property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that title to real property located at 3263 Morning Springs Drive, Henderson, Nevada 89074, APN 177-24-54-043 is hereby quieted in favor of SFR.

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that JUDGMENT be entered in favor of SFR pursuant to this ORDER.

IT IS SO ORDERED.

DATED this 14 day of Aug., 2018.

DISTRICT COURT JUDGE

Not Approved By:

KIM GILBERT EBRON

KAREN L. HANKS, ESQ.
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DISTRICT COURT

CLARK COUNTY, NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Plaintiff, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company Defendants.	CASE NO. A-13-692304-C DEPT NO. XXIV
SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Counter-Claimant, vs. JPMORGAN CHASE BANK NATIONAL ASSOCIATION, a national association; ROBERT M. HAWKINS, an individual; CHRISTINE V. HAWKINS, an individual; DOES 1-10 and ROE BUSINESS ENTITIES 1 through 10, inclusive, Counter-Defendant/Cross-Defendants.	

NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT IN FAVOR OF SFR INVESTMENTS POOL 1, LLC

Please take notice that on the 15th day of August, 2018, the Clerk of the Court entered the Findings of Fact and Conclusions of Law and Judgment in Favor of SFR Investments Pool 1, LLC in the above mentioned case, a copy of which is attached hereto.

DATED: August 16, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of August 2018, and pursuant to N.R.C.P. 5(b), a true and correct copy of the foregoing **NOTICE OF ENTRY FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT IN FAVOR OF SFR INVESTMENTS POOL 1, LLC** was served via the Court's Odyssey E-File and Serve electronic system on the following parties:

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DISTRICT COURT

CLARK COUNTY, NEVADA

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(MS)

☐ Voluntary Dismissal	☒ Summary Judgment
☐ Involuntary Dismissal	☐ Stipulated Judgment
☐ Stipulated Dismissal	☐ Default Judgment
☐ Motion to Dismiss by Deft(s)	☐ Judgment of Arbitration

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT IN FAVOR OF SFR INVESTMENTS POOL 1, LLC

This matter came before the Court for hearing on June 5, 2018 on SFR Investments Pool 1, LLC's ("SFR") Motion for Summary Judgment and Counter-Motion to Strike, and JPMorgan Chase Bank, N.A.'s ("Chase") Motion for Summary Judgment. Karen L. Hanks, Esq. and Caryn Schiffman, Esq. appeared on behalf of SFR. Sylvia Semper, Esq. appeared on behalf of Chase.

Having reviewed and considered the full briefing and arguments of counsel, for the reasons stated on the record and in the pleadings, and good cause appearing, this Court makes the following findings of fact and conclusions of law.[1]

FINDINGS OF FACT

1. On September 20, 2017, a Notice of Entry of Stipulation Requesting Reconsideration and Certification was filed with the Court.

2. As part of that Stipulation, the parties agreed that in light of *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, ____ Nev. _____, 396 P.3d 754 (Nev. 2017), this Court's earlier grant of summary judgment in favor of SFR, on the issue of whether (1) 12 U.S.C. § 4617(j)(3) preempts NRS Chapter 116; (2) whether Freddie Mac had a valid and enforceable property interest at the time of the Association foreclosure sale; and (3) whether Chase had a servicing agreement with Freddie Mac at the time of the Association foreclosure sale would be vacated.

3. The parties further stipulated that all other aspects of the Court's summary judgment ruling in favor of SFR would remain in place, with Chase retaining the right to challenge those other aspects in any future appeal.

4. As a result of this stipulation, on April 13, 2018, SFR and Chase filed summary judgment motions on the HERA issue.

5. On March 9, 2016, Chase filed its First Amended Complaint. This was the first time Chase alleged Freddie Mac had a property interest in the subject

[1] While Chase submitted this order to memorialize the Court's ruling, Chase does not concede or waive any argument it raised in its filed briefs or during oral argument.

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property commonly known as 3263 Morning Springs Drive, Henderson, Nevada 89074.

6. The Association foreclosure sale took place on March 1, 2013.

7. In support of its Motion for Summary Judgment Chase attached a declaration from Dean Meyer, with attached exhibits that were not disclosed during the course of discovery. Chase never disclosed Dean Meyer as a witness during the course of discovery. The documents attached as Ex. 10, 11, 24 and 27 to Chase's Motion were also never disclosed during the course of discovery.

9. As a result, SFR filed a counter-motion to strike these documents and the affidavit of Dean Meyer.

10. However, the Court adopts the arguments and reasoning in Chase's opposition to SFR's Motion for Summary Judgment at pages 3 through 9 where Chase asserted Freddie Mac's ownership of the note at the time of the Association foreclosure sale, which renders 12 U.S.C. § 4617(j)(3) applicable at the time of the Association foreclosure sale.

CONCLUSIONS OF LAW

Standard

A. Summary judgment is appropriate "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Additionally, "[t]he purpose of summary judgment 'is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment as a matter of law.'" *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005) *quoting Coray v. Hom*, 80 Nev. 39, 40-41, 389 P.2d 76, 77 (1964). Moreover, the non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against

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[it]." *Wood*, 121 Nev. at 732, 121 P.3d at 1031. The non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Id.* Rather, the non-moving party must demonstrate specific facts as opposed to general allegations and conclusions. *LaMantia v. Redisi*, 118 Nev. 27, 29, 38 P.3d 877, 879 (2002); *Wayment v. Holmes*, 112 Nev. 232, 237, 912 P.2d 816, 819 (1996). Though inferences are to be drawn in favor of the non-moving party, an opponent to summary judgment, must show that it can produce evidence at trial to support its claim or defense. *Van Cleave v. Kietz-Mill Minit Mart,* 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981).

Statute of Limitations

B. Under 12 U.S.C. § 4617(b)(12), any tort actions brought by the FHFA must be brought within three years from the date the claim arose. Here, the Association sale took place on March 1, 2013. As such, any tort claim brought by FHFA under HERA expired on March 1, 2016. Chase did not raise the HERA claim until March 9, 2016. Such claim is time-barred.

C. Chase argues that 12 U.S.C. § 4617(b)(12) only applies if FHFA is a party. Chase, however, claims that because Chase, rather than FHFA is asserting HERA in this case, then the three-year statute of limitations does not apply. The Court rejects this argument.

D. The problem with this argument is it would mean that a servicer who claims a derivative right to assert the federal foreclosure bar is actually in a superior position immune from the statute of limitations, and that would actually encourage the FHFA to not be a party and litigate its interests because to do so they would be foreclosed by the statute of limitations.

E. Alternatively, Chase argues that its amended complaint should relate back to its original complaint. The Court rejects this argument. As SFR correctly points out, nothing in the original complaint alleged the federal foreclosure bar or facts and circumstances regarding a claimed federal interest that would put SFR on

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notice that HERA was at issue in this case. *See Wilson v. Fairchild Republic Co.*, 143 F.3d 733, 738 (2d Cir. 1998) ("The pertinent inquiry, in this respect, is whether the original complaint gave the defendant fair notice of the newly alleged claims." (*citing Baldwin County Welcome Center v. Brown*, 466 U.S. 147,149 n.3, 104 S. Ct 1723 (1984)). overruled on other grounds by *Slayton v. Am. Express Co.*, 460 F.3d 215, 227–28 (2d Cir.2006) (adopting *de novo* standard of review for Rule 15(c)).

Motion to Strike

G. Chase attached a declaration from Dean Meyer, with attached exhibits that were not disclosed during the course of discovery. The documents attached as Ex. 10, 11, 24 and 27 to Chase's Motion were also never disclosed during the course of discovery. Chase never disclosed Dean Meyer as a witness during the course of discovery.

H. The Court grants SFR's Motion to Strike.

ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that SFR's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that JPMorgan Chase Bank, N.A.'s Motion for Summary Judgment is **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Deed of Trust recorded in the Official Records of the Clark County Recorder as Instrument No. 20060612-0003526 was extinguished by the homeowners association foreclosure sale held on behalf of the Association.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Chase, its predecessors in interest and its successors and assigns, have no further right, title, or interest in real property located at 3263 Morning Springs Drive, Henderson, Nevada 89074, and are hereby permanently enjoined from taking any further action to enforce the now extinguished DOT, including but not limited to, clouding title, initiating, continuing to conduct, or taking any other action to foreclosure on, and

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from selling, or transferring the Property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that title to real property located at 3263 Morning Springs Drive, Henderson, Nevada 89074, APN 177-24-54-043 is hereby quieted in favor of SFR.

IT IS FURTHER ORDERED, ADJUDED, AND DECREED that JUDGMENT be entered in favor of SFR pursuant to this ORDER.

IT IS SO ORDERED.

DATED this 14 day of Aug., 2018.

DISTRICT COURT JUDGE

Not Approved By:

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DISTRICT COURT

CLARK COUNTY, NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Plaintiff, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company Defendants.	CASE NO. A-13-692304-C DEPT NO. XXIV
SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Counter-Claimant, vs. JPMORGAN CHASE BANK NATIONAL ASSOCIATION, a national association; ROBERT M. HAWKINS, an individual; CHRISTINE V. HAWKINS, an individual; DOES 1-10 and ROE BUSINESS ENTITIES 1 through 10, inclusive, Counter-Defendant/Cross-Defendants.	

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NOTICE OF APPEAL

Plaintiff/Counter-Defendant JPMorgan Chase Bank, N.A. hereby appeals to the Nevada Supreme Court from the Findings of Fact and Conclusion of Law and Judgment in Favor of SFR Investments Pool 1, LLC entered August 15, 2018, Notice of Entry of Findings of Fact and Conclusion of Law and Judgment in Favor of SFR Investments Pool 1, LLC entered August 16, 2018, and from all interlocutory judgments and orders made appealable thereby.

Dated: September 17, 2018.

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CERTIFICATE OF SERVICE

I certify that on September 17th, 2018, a true copy of the foregoing **NOTICE OF APPEAL** was served upon each of the parties via electronic service through the United States District Court for the District of Nevada's CM/ECF filing system.

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DISTRICT COURT

CLARK COUNTY, NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Plaintiff, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability company; DOES 1 through 10; and ROE BUSINESS ENTITIES 1 through 10, inclusive; Defendants.	CASE NO. A-13-692304-C DEPT. NO. XXIV
SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Counter-Claimant, vs. JPMORGAN CHASE BANK N.A., NATIONAL ASSOCIATION, a national association; ROBERT M. HAWKINS, an individual; CHRISTINE V. HAWKINS, an individual; DOES 1 10; and ROE BUSINESS ENTITIES 1 through 10, inclusive; Counter-Defendants.	

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STIPULATION AND ORDER

Plaintiff/Counter-Defendant JPMorgan Chase Bank, N.A. ("Chase") and Defendant/Counter-Claimant SFR Investments Pool 1, LLC ("SFR" and together with Chase, the "Parties") stipulate as follows:

1. This is a quiet title action arising from a foreclosure sale of a residential property at 3263 Morning Springs Drive, Henderson, Nevada 89074 (the "Property").

2. Chase seeks a declaration that a Deed of Trust recorded against the Property as Instrument 20060612-0003526 survived an HOA foreclosure sale of the Property held on March 1, 2013. SFR seeks a declaration that the Deed of Trust was extinguished.

3. SFR filed a Motion for Summary Judgment on July 7, 2016. Chase filed an opposition on July 26, 2016 and SFR filed a reply on August 1, 2016 ("First MSJ").

4. The Court granted SFR's Motion for Summary Judgment in an order filed August 23, 2016.

5. Chase filed a notice of appeal on September 16, 2016 ("First Appeal").

6. On September 18, 2017, this Court signed and entered a stipulation for certification, certifying its intent to the Nevada Supreme Court to vacate the order on the First MSJs. See Foster v. Dingwall, 126 Nev. Adv. Op. 5, 228 P.3d 453, 454-55 (2010); Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585 (1978).

7. After the granting of the stipulation for certification, on September 19, 2017, the Parties stipulated to dismiss the First Appeal and remand the case to the District Court for further consideration.

8. On October 3, 2017, the Nevada Supreme Court dismissed the First Appeal and remanded the case to District Court for further proceedings.

9. After the dismissal of the First Appeal, the Parties filed new motions for summary judgment ("Second MSJs"). On August 15, 2018, the Court ruled in SFR's favor on the Second MSJs and the notice of entry of order was entered on August 16, 2018 ("Final Order").

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10. Subsequently, Chase filed a second appeal, which is currently pending ("Second Appeal").

11. In the Second Appeal, the Nevada Supreme Court issued an order to show cause on January 14, 2019 ("Show Cause Order"). In the order, the Nevada Supreme Court noted that although the District Court certified its intent to vacate the order on the First MSJs, the District Court never officially filed a document to vacate and as such, the order entered on August 23, 2016 still remains the final order in the case.

12. Accordingly, the Parties ask the Court to vacate the August 23, 2016 summary judgment order for the purpose of addressing the issues in the Order to Show Cause.

13. Further, the Parties agree to certify that the order entered on August 15, 2018, as final for purposes of appeal under N.R.C.P. 54(b).

Dated: January 30, 2019

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Dated: January 30, 2019

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ORDER

Based on the foregoing stipulation between plaintiff/counter-defendant JPMorgan Chase Bank, N.A. and defendant/counter-claimant SFR Investments Pool 1, LLC, and good cause appearing,

THE COURT HEREBY VACATES the order entered on August 23, 2016.

THE COURT FURTHER ORDERS that upon independent review of the papers on file herein and seeing no just cause for delay, the order entered on August 15, 2018 is final for purposes of appeal under N.R.C.P. 54(b).

Dated ~~January~~ FEB 5, 2019.

DISTRICT COURT JUDGE

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Submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Plaintiff, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability company; DOES 1 through 10; and ROE BUSINESS ENTITIES 1 through 10, inclusive; Defendants.	CASE NO. A-13-692304-C DEPT. NO. XXIV
SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Counter-Claimant, vs. JPMORGAN CHASE BANK N.A., NATIONAL ASSOCIATION, a national association; ROBERT M. HAWKINS, an individual; CHRISTINE V. HAWKINS, an individual; DOES 1 10; and ROE BUSINESS ENTITIES 1 through 10, inclusive; Counter-Defendants.	

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Case Number: A-13-692304-C

STIPULATION AND ORDER DISMISSING THIRD CAUSE OF ACTION (UNJUST ENRICHMENT) WITH PREJUDICE

Plaintiff/Counter-Defendant JPMorgan Chase Bank, N.A. ("Chase") and Defendant/Counter-Claimant SFR Investments Pool 1, LLC ("SFR" and together with Chase, the "Parties") stipulate and agree to dismiss the third cause of action of Chase's Amended Complaint – unjust enrichment – with prejudice.

This dismissal does not impact Chase's other causes of action, declaratory relief and quiet title, all of which were resolved via the Court's summary judgment order dated August 15, 2018, leaving no open parties or claims unresolved at the District Court level.

It is further stipulated and agreed that the Court may enter an order dismissing such cause of action with prejudice, with each party to bear its own costs.

Dated: February 11, 2019

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Dated: February 11, 2019

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ORDER

Based on the foregoing stipulation, the Court hereby order that Plaintiff/Counter-Defendant JPMorgan Chase Bank, N.A.'s third cause of action – unjust enrichment – be dismissed with prejudice and without costs to any party.

It is further ordered that this dismissal order is supplementary to the Court's Findings of Fact and Conclusions of Law dated August 15, 2018 and the Courts order dated February 6, 2019, such that there remain no unresolved claims by any party before this Court.

DATED: this 12 day of February 2019.

DISTRICT COURT JUDGE

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