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

Electronically Filed
Sep 11 2019 08:00 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 REPLY BRIEF

Abran E. Vigil
Nevada Bar No. 7548
Holly Ann Priest
Nevada Bar No. 13226
BALLARD SPAHR LLP
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135
(702) 471-7000
vigila@ballardspahr.com
priesth@ballardspahr.com

Matthew D. Lamb
Nevada Bar No. 12991
BALLARD SPAHR LLP
1909 K Street, Northwest, 12th Floor
Washington, D.C. 20006
(202) 661-2200
lambm@ballardspahr.com

Attorneys for Appellant

NRAP 26.1 DISCLOSURE STATEMENT

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

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

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

Dated: September 11, 2019.

BALLARD SPAHR LLP

By: /s/ Matthew D. Lamb
Abran E. Vigil
Nevada Bar No. 7548
Holly Ann Priest
Nevada Bar No. 13226
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135

Matthew D. Lamb
Nevada Bar No. 12991
1909 K Street, Northwest
Washington, D.C. 20006

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

SFR's answering brief repeats the district court's flawed conclusion that Chase's Federal Foreclosure Bar argument is time-barred under HERA's three-year limitations period for tort claims. To the contrary, Chase's Federal Foreclosure Bar argument is a legal theory not subject to a limitations period and was timely raised under *any* limitations period. In any event, the argument was timely raised under HERA's statutory limitations provision or under the applicable state-law periods. The argument is also timely because it relates back to the original complaint. For these reasons, and because Chase's evidence demonstrates that Freddie Mac owned the Loan at the time of the Sale, this Court should reverse, remand, and direct the district court to enter judgment in favor of Chase.

ARGUMENT

I. Chase's Federal Foreclosure Bar argument is not barred by a statute of limitations.

A. Chase's Federal Foreclosure Bar argument is a legal theory supporting its quiet-title claim.

The Court need not decide the statute of limitations question, because Chase invoked the Federal Foreclosure Bar as a theory supporting its quiet-title claim. SFR argues that Chase "waived its legal theory argument" by not raising it below. Amended Respondent's Answering Brief ("Am. Ans. Br.") at 18. Wrong. Chase has consistently maintained that the Federal Foreclosure Bar is a *theory* supporting its quiet-title claim. Chase moved to amend because "*theories*"—such as the Federal Foreclosure Bar—have "developed extensively" in the courts. 1 AA 052-53 (emphasis added). Chase's amended complaint did not state the Federal Foreclosure Bar as a new cause of action, but as support for its quiet-title claim. 1 AA 077-79. And in Chase's opposition to SFR's summary judgment motion, Chase reiterated that it was "not asserting a new claim, but rather *a new basis* for its original quiet title claim." 3 AA 544-545; *compare* Am. Ans. Br. 18. Because this point was urged in the trial court, it can and should be considered on appeal. *Cf. Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981).

Chase is aware of no authority supporting the proposition that legal theories can be time-barred. Op. Br. 27-28.

B. Chase timely asserted the Federal Foreclosure Bar.

SFR argues that Chase "waived its argument that relation back applies to motions by failing to properly raise it below." Am. Ans. Br. 18. SFR confuses two arguments: (1) that Chase timely asserted the Federal Foreclosure Bar because it gave notice of that argument in its motion to amend, Op. Br. 19-26; and (2) that Chase's amended complaint relates back, Op. Br. 28-30. SFR appears to raise a waiver argument as to the former. This Court should consider Chase's argument even though it was not raised below.

This Court has allowed parties to make arguments on appeal that were "not specifically argue[d]" below when they are a form of a general argument that *was* litigated. *Premier One Holdings, Inc. v. Red Rock Financial Services, LLC*, No. 73369, 2018 WL 5617923, *2 n.2 (Nev. Oct. 29, 2018) (unpublished disposition). SFR's basis for distinguishing *Premier One* is that Chase is "chang[ing]" its relation back argument. Am. Ans. Br. 20. Wrong. Chase merely supplements its statute of limitations rebuttal by pointing out that the proper date for calculating the limitations period runs from the date of filing of the motion to amend, not the date the motion is granted. Although Chase did not specifically argue that point below, it is a form of a general argument that was litigated: the statute of limitations. There is no waiver.

SFR does not convincingly rebut Chase's argument that it timely raised the Federal Foreclosure Bar in its motion to amend the complaint, filed less than three years after the Sale—and *before* any asserted limitations period ran. Op. Br. 19-26. SFR warns that treating the filing of Chase's motion to amend as the operative date under Rule 15(c) will "encourage[] delay and ambiguity in the system." Am. Ans. Br. 21. But the consequences of SFR's argument are worse; a litigant filing a motion to amend within the statutory period will find herself at the mercy of the court's docket. If the motion to amend is not granted within the limitations period, the litigant will *lose her right* to bring the new claim or raise the new defense. As other jurisdictions have recognized, this cannot be the law. Op. Br. 20-21.

II. Chase's claim is timely under any applicable limitations provision.

The district court erred in holding that HERA's three-year limitations period for tort claims applies to Chase's "HERA claim." 4 AA 628. SFR is likewise wrong in arguing that "HERA's three-year statute of limitations applies to any assertion of 4617(j)(3) in the context of a foreclosure sale." Am. Ans. Br. 10. HERA's six-year limitations period for contract-based actions provides the applicable time bar. Even if the Court concludes that Chase's Federal Foreclosure Bar argument sounds in tort, the Court must apply the *longer* of the three-year period or the state-law period. As the applicable state-law period is either five years under NRS 11.070 or 11.080, or four years under NRS 11.220, Chase's invocation of the Federal Foreclosure Bar was timely.

A. HERA's six-year statute of limitations governs.

SFR argues that Chase "failed to properly raise" its argument that HERA's six-year statute of limitations governs because Chase first presented that argument in its summary judgment reply brief. RB 5-6, 21-24. That is wrong.[1] Chase's reply

---

[1] Throughout its brief, SFR argues that several of Chase's arguments are waived, and that such arguments are "likewise waived as to amici." *See* RB 53-54. Because Chase did not waive any of the arguments presented in its Opening Brief, the Court should consider all related points made by amici.

brief simply presented a more fully developed analysis of § 4617(b)(12)(A)'s statute-of-limitations provision, which Chase cited in full in its opposition to SFR's summary judgment motion, 3 AA 543, and the first prong of which SFR conveniently and continuously ignores. Am. Ans. Br. 11; 3 AA 528. Chase's reply presented no new statutory text, no new evidence, and no new claim. Instead, it offered an alternative interpretation supporting a claim it previously made: that HERA's three-year statute of limitations did not apply. 3 AA 543. SFR was not "in effect ambushed" by Chase's reliance on the contract prong of the HERA statute. Am. Ans. Br. 23.

Furthermore, SFR could have sought supplemental briefing, requested permission to file a sur-reply, or responded to Chase's oral argument, 4 AA 607-08 (Tr. 8:22-9:14). Instead, SFR chose to do nothing more than note at the hearing that it "never had the opportunity to address the six-year statute of limitations argument." 4 AA 613 (Tr. 14:15-18).

Even if it considers the argument untimely, the Court should exercise its prerogative to consider Chase's argument for practical reasons. *Cf. Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 n.3 (Nev. 2011) (considering issue raised for the first time in appellate reply brief and reversing on that issue). To determine which of HERA's statute-of-limitations provisions applies to Chase's quiet-title claim, the Court will have to "consider[] [HERA's] provisions as a whole," *see S.*

Nev. Homebuilders Ass'n v. Clark Cty., 117 P.3d 171, 173 (Nev. 2005) (internal quotation marks omitted), and "construe the language of the statute so as to give it force and not nullify its manifest purpose," *Hughes Props., Inc. v. State*, 680 P.2d 970, 971 (Nev. 1984). Accordingly, the Court must consider the contract-claim *and* the tort-claim prongs of the statute to render a decision that accords with congressional intent. *See id.* As the Court has the benefit of informed appellate briefing on the issue, it should exercise its discretion to consider Chase's argument.

SFR's reliance on *Valley Health Sys., LLC v. Eighth Judicial Dist. ex rel. Cty. of Clark*, 252 P.3d 676 (Nev. 2011), is unavailing. Am. Ans. Br. 21-24. In *Valley Health*, the petitioner first raised a privilege objection *after* the discovery commissioner recommended that the petitioner produce documents. *Id.* at 678. Here, Chase argued for the six-year limitations period in its reply brief and at a hearing *before* the court awarded summary judgment to SFR. Chase did not "wait[] until the outcome is determined, then add[]or switch[] to alternative arguments before [this] [C]ourt." *See id.* at 679. And because no discovery commissioner was involved, the Court's concerns about "making an end run around" the commissioner are irrelevant. *Id.* at 679-80; *see* Am. Ans. Br. 23.

1. The Federal Foreclosure Bar argument is subject to HERA's six-year limitations period.

Chase agrees with SFR that HERA's limitations provision applies here. Am. Ans. Br. 12-13, 39-40; Op. Br. 32-36 (explaining that FHFA need not be a party for

HERA's statute of limitations to apply).[2] But the district court erred in concluding—and SFR wrongly argues on appeal—that the three-year "tort" prong of HERA's limitations provision applies to Chase's "HERA claim." 4 AA 628; Am. Ans. Br. 10-11. Indeed, federal courts have held that the six-year "contract" prong applies to cases implicating the Federal Foreclosure Bar. *E.g. FHFA v LN Mgmt. LLC, Series 2937 Barboursville*, 369 F. Supp. 3d 1101, 1109-10 (D. Nev. 2019).

Section 4617(b)(12)(A) provides, as a limitations period:

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

Chase's Federal Foreclosure Bar argument fits more naturally into HERA's contract category because it supports the continued existence of a contractually created interest in the Property. Op. Br. 36-39. Specifically, Freddie Mac's property interest is grounded in the contractual relationship and obligations between the

---

[2] SFR states in passing that Chase "***never*** proved it is a contractually authorized servicer of Freddie Mac for the subject loan." RB 39. But Chase submitted the same evidence this Court has repeatedly found sufficient to prove an Enterprise-servicer relationship, including Freddie Mac's and Chase's business records and employee declarations, and the Freddie Mac Guide. *See, e.g.*, *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 849-50 (Nev. 2019); AOB 57-58.

borrower and Lender as embodied in the Loan. Chase's argument is therefore subject to the six-year statute of limitations. Because the Sale took place on March 1, 2013, and Chase filed its quiet-title claim in November 2013, Chase's invocation of the federal statute was timely.[3]

SFR contends that because the Federal Foreclosure Bar is a "statutory provision," and there is no contract between Chase and SFR, the cause of action "clearly constitute[s] a 'wrong independent of contract'" to which the three-year limitations period purportedly applies. Am. Ans. Br. 10 & n.29, 24-25 (citing *Bernard v. Rockhill Dev. Co.*, 734 P.2d 1238, 1240 (Nev. 1987), and *David v. Hett*, 270 P.3d 1102, 1114 (Kan. 2011)). Wrong. The fact that Chase's claim is supported by a federal statute does not make the claim a tort, and SFR does not allege any tort here. A tort is a "civil wrong ... for which the court will provide a remedy in the form of an action for damages," *Szekeres v. Robinson*, 715 P.2d 1076, 1077 (Nev. 1986) (internal quotation marks omitted), and generally involves a "breach of duty that the law imposes on persons who stand in a particular relation to one another," *Tort*, Black's Law Dictionary (11th ed. 2019).

---

[3] Chase's argument is timely even if the period is calculated from March 9, 2016, the date the district court granted Chase's motion to amend the complaint. 1 AA 069-70. The amended complaint asserted the Federal Foreclosure Bar as an argument supporting its quiet-title claim. 1 AA 058-67.

Here, neither Chase nor SFR allege a civil "wrong" or duty that was breached, and neither seeks damages. The parties' primary request is that this Court determine their rights and interests in the Property. 1 AA 019-21, 77-79. The existence or non-existence of a statute or a contract thus cannot be the end of the analysis.

Nor does SFR provide any reason why the absence of a contract between SFR and Chase makes the action "appropriately categorized as a tort" under Nevada law. Am. Ans. Br. 10, 24-25. Indeed, the Court could just as easily adopt the opposite position: Because Chase's claim is not tort-related, it necessarily falls under HERA's contract provision. As explained above, federal policy in fact supports the adoption of the contract provision as the default limitations period.

Finally, SFR provides no persuasive authority to support its contention that the Federal Foreclosure Bar argument is similar to a tort claim. Perhaps that is because it bears no significant similarity to any tort-based claim. Op. Br. 37-38. In any event, neither of the cases SFR cites sheds light on the question before the Court: whether invocation of a federal statute that automatically protects Enterprise property fits more reasonably into the contract or tort category of a limitations provision that governs all claims but expressly offers only those two choices.[4] In

[4] As *Bernard* and *Hett* make clear, contract and tort claims each seek relief for breach of a legal duty—a duty undertaken privately for contract claims, and a duty imposed at law for tort claims. *See Bernard*, 734 P.2d at 1240; *Hett*, 270 P.3d at 1114. By contrast, the quiet-title claim here seeks only a declaration of the parties' respective rights to a given property, not relief for a breach of any duty.

Bernard and *Hett*, this Court and the Kansas Supreme Court considered whether a defendant's duty to the plaintiff was contractual or arose from a duty independent of the parties' agreement. *Bernard*, 734 P.2d at 1240; *Hett*, 270 P.3d at 1115. Here there is no agreement between the parties, and no allegation that either party had any duty to the other arising from or relating to the federal statutory protection of the Deed of Trust. Those cases are inapposite.

2. If HERA's limitations provision is ambiguous, the Court must apply the longer limitations period.

If the Court concludes that it must look outside the statutory text to determine which prong of the HERA provision governs this case, it must apply *federal policy*—because this is a *federal statute*—which mandates the six-year limitations period. Op. Br. 38-39. SFR fails to meaningfully distinguish *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 2010), or *FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304, 1307 (9th Cir. 1989). SFR argues that *Wise* is distinguishable because the court was not "trying to determine the actual nature of the claim," and in *FDIC* the claims were based on contracts "***between the parties***." Am. Ans. Br. 26-27. Those facts have nothing to do with the federal policy supporting the application of the longer of two potentially-applicable limitations periods. *Wise* is particularly on point—the Ninth Circuit noted that there was "a substantial question as to whether FDIC's claims sounded in tort or contract" before applying the longer of the relevant statutes of limitations. *See* 884 F.2d at 1307.

To apply the three-year limitations period here, where the claim is not clearly grounded in contract or tort, would subvert HERA's limitations provision, which is designed to set a limitations-period floor while mandating that FHFA and the Enterprises under conservatorship take advantage of longer state-law periods when possible. *See* 12 U.S.C. § 4617(b)(12)(A). Accordingly, if a claim is *arguably* contractual, and clearly not a tort, the Court should apply the longer limitations period to further congressional intent to preserve HERA claims.

B. The applicable state-law limitations period is five years.

Even if HERA's "tort" prong applies, the statute specifies "the longer of" three years or the otherwise-applicable state-law period. 12 U.S.C. § 4617(b)(12)(A)(ii). Contrary to SFR's contention that "the extender provision of HERA has no application here because there is no analogous state law," Am. Ans. Br. 29 n.73, NRS 11.070 and 11.080 govern the limitations period for Chase's quiet-title action.

SFR provides no compelling arguments in support of its conclusion that NRS 11.070 and 11.080 do not apply here. Am. Ans. Br. 28-38. *First*, SFR contends that the state-law provisions are "standing statutes" setting forth "a condition precedent which gives a party standing to bring an action **or** defend an action." *Id.* at 28-30, 33-34. Wrong. For one thing, both NRS 11.070 and 11.080 appear in Chapter 11 of the Nevada Revised Statutes, titled "Limitation of Actions." "Civil actions can only be commenced within the periods prescribed in [that] chapter," unless a statute (like HERA) provides otherwise. *See* NRS 11.010. For more than a century this Court has characterized NRS 11.070 and 11.080 as "statutes of limitation" that set forth time bars for real-property actions. *See, e.g.*, *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.*, 388 P.3d 226, 232 (Nev. 2017) ("NRS 11.080 provides for a five-year statute of limitations for a quiet title action"); *Bentley v. State*, Nos. 64772, 66303, 66932, 2016 WL 3856572, at *10 (Nev. Jul. 14, 2016) (unpublished disposition) (acknowledging 11.070 is a statute of limitations for quiet title actions); *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 365, 368 (1867) (describing prior codification of 11.070 as "[t]he fifth section of our statute of limitations").

Second, SFR argues that 11.070 and 11.080 do not apply because Chase is not "seized or possessed of the property" and "does not seek to vindicate the title rights of the prior homeowner." Am. Ans. Br. 31-35. In fact, SFR accuses Chase of "purposeful[ly] misrepresenti[ng]" that a plaintiff need not have "title or possessory interest in the property" under those statutes. *Id*. 35-38. But NRS 11.070 and 11.080 grant a five-year limitations period to any "person" or "plaintiff" where the "grantor" of the person or plaintiff was seized of the real property in question, regardless of whether the litigation is on behalf of the "grantor." NRS 11.070, 11.080. Courts have thus applied the limitations provisions to "anyone with an interest in the property to sue to determine adverse claims," "even if that person does not have title to or possession of the property." *See Nationstar Mortg. LLC v. Amber Hills II Homeowners Ass'n*, No. 2:15-cv-01433-APG-CWH, 2016 WL 1298108, at *3-4 (D. Nev. Mar. 31, 2016). And a "grantor" under 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)). Chase's quiet title claim is "founded upon the title to" the Property, and Chase's "grantors" were "seized or possessed of the premises" at the time of the Sale.[5]

SFR's reading of the statute to require that the grantor be "prosecuting or defending for the title rights of the person who was seized or possessed of the property" does not comport with the statutory language. Am. Ans. Br. 33. The statute plainly states that the "grantor" of the person making the defense—here, the Borrower on the Deed of Trust, of which Chase is record beneficiary and defender—is the one who must be "seized and possessed of the premises in question." NRS 11.070. And SFR fails to distinguish the cases Chase relies on, Am. Ans. Br. 35-38; none of those cases states or even implies that the five-year limitations statutes apply

[5] Chase does not dispute that lien and title interests are different. Am. Ans. Br. 32, 34-35 (citing *Hamm v. Arrowcreek Homeowners Ass'n*, 183 P.3d 895 (Nev. 2008)).

only to quiet-title claims where the claimant has a "title [or] possessory interest" in the Property. *Id.*

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

C. The minimum statutory limitations period is four years.

If the Court concludes that HERA's six-year statute of limitations does not apply and declines to apply Nevada's quiet-title limitations periods, Nevada's four-year "catch-all" limitations period would still render Chase's argument timely. Although Chase did not specifically cite NRS 11.220 in briefing the timeliness issue below, Am. Ans. Br. 38-39, asserting it here is proper because the statute provides support to an argument Chase did make: that its quiet-title action was timely filed. *Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim.").

SFR contends that the applicable state-law period is a three-year limitations period for "liability arising from a statute" because Chase's claim "rests entirely on § 4617(j)." Am. Ans. Br. 11 (citing NRS 11.190.3(a)). That argument is unpersuasive; the Federal Foreclosure Bar is not a statute that "create[s]" a liability. *See* NRS 11.190.3(a). Section 4617(j) operates to *protect* an existing lien interest, preempting an *effect* of the Sale. It does not create a liability arising out of the Sale. Accordingly, Nevada federal courts have rejected the argument that 11.190 applies to a claim involving the Federal Foreclosure Bar. *E.g.*, *Barboursville*, 369 F. Supp. 3d at 1111.

Given that no plausible argument supports a limitations period shorter than four years, Chase's assertion of the Federal Foreclosure Bar was timely.

III. Chase's Federal Foreclosure Bar argument relates back to its initial complaint.

Alternatively, Chase's Federal Foreclosure Bar argument relates back to the initial complaint. Op. Br. 28-30. SFR wrongly asserts that the Court reviews this ruling for abuse of discretion. Am. Ans. Br. 13. The Court exercises *de novo* review in cases where a district court grants summary judgment on the ground that the amended pleading did not relate back and was thus time-barred. *See Costello v. Casler*, 254 P.3d 631, 634-36 (Nev. 2011). The case SFR cites in support of abuse of discretion review, *State, Univ. & Comm. College Sys. v. Sutton*, 103 P.3d 8, 19 (Nev. 2004), describes the standard of review for a motion to amend under NRCP 15(b), and Chase does not challenge the grant of its motion to amend here.

SFR alleges that Chase's initial complaint gave it no notice of Chase's intent to invoke HERA and thus the amendment cannot relate back. Am. Ans. Br. 15. SFR takes too narrow a view of Rule 15(c)'s requirement that the new claim or defense "[arise] out of the conduct, transaction, or occurrence set out" in the initial pleading.

N.R.C.P. 15(c)(1). *Jackson v. Groenenyke*, 369 P.3d 362, 365-66 (Nev. 2016), suggests that courts take a broad view of what constitutes the "same facts and circumstances" for the purposes of Rule 15(c). SFR's efforts to distinguish *Jackson* are unconvincing: just as the assertion of water rights includes reasonable action to ensure the flow of water, the assertion of a continued lien interest includes automatic protection of that interest through a federal statute. SFR's warning that interpreting the "'transaction' [to be] the [HOA] sale itself" would defy the purpose of Rule 15 is nonsensical. Am. Ans. Br. 16-17. It is logical that the transaction or occurrence is the Sale; that single event spurred Chase to file a quiet-title claim and triggered the Federal Foreclosure Bar.

SFR's citation to *Nelson v. City of Las Vegas*, 665 P.2d 1141 (Nev. 1983), to support its allegations is unconvincing. Am. Ans. Br. 15, 17. *Nelson* makes clear that NRCP 15(c) prohibits relation back for "a *new cause of action* that describes a *new and different source of damages*" where there is no "fair notice of the fact situation from which the new claim for liability arises." 665 P.2d 1146 (emphases added). None of those conditions is present here. The cause of action (quiet title) is the same in the original and amended complaint, and the Federal Foreclosure Bar argument does not change the basic facts or request for relief in this case.

IV. Because Chase's evidence demonstrates that Freddie Mac owns the Loan, and because SFR did not provide contrary evidence, Chase is entitled to summary judgment.

As explained in Chase's opening brief, once the Court determines that Chase's arguments under the Federal Foreclosure Bar are not time-barred, the Court should direct the district court to enter judgment for Chase. There is no genuine dispute that Freddie Mac owned the Deed of Trust at the time of the Sale. Therefore, the Federal Foreclosure Bar protected the Deed of Trust. SFR's counter-motion to strike the Meyer Declaration and its exhibits does not alter this result because (1) the Chase Records and the Grageda Declaration independently show that Freddie Mac owned the Loan; (2) SFR did not comply with the meet-and-confer requirement of N.R.C.P. 37; and (3) any alleged violation of N.R.C.P. 16.1 was harmless. Alternatively, the district court erred in striking the Meyer Declaration because a case-dispositive sanction was not warranted under *Young v. Johnny Ribeiro Bldg., Inc.*, 787 P.2d 777 (Nev. 1990). Therefore, in the alternative, the Court should remand with instructions to enter non-case-concluding sanctions.

A. Based on the Chase Records, Chase is entitled to summary judgment without any need to consider SFR's counter-motion to strike.

As explained in Chase's opening brief, Chase provided two sets of business records to show that Freddie Mac owned the Loan. First, Chase provided the Meyer Declaration and the attached records created by Freddie Mac. Op. Br. 12-13. The district court struck these documents pursuant to SFR's counter-motion under N.R.C.P. 37. Second, Chase provided the Grageda Declaration and the Chase Records. Op. Br. 12. The latter documents *were not* struck because they *were not* encompassed by SFR's counter-motion. Op. Br. 13-14. These documents independently demonstrate Freddie Mac's ownership of the Loan. Op. Br. 47-48. Therefore, Chase is entitled to summary judgment without the need to consider SFR's counter-motion to strike. Op. Br. 48.

In its answering brief, SFR does not meaningfully address Chase's argument that the Grageda Declaration and the Chase Records entitle Chase to summary judgment. Instead, SFR argues that the Court "must remand for the District Court to make findings and conclusion[s]" because "[t]he District Court never expressly stated that it found Freddie [Mac] ownership in the absence of the Freddie [Mac] records and declaration." Am. Ans. Br. 53. SFR is incorrect. Where parties file cross-motions for summary judgment, and where the district court erroneously grants the first motion while erroneously denying the second motion, an appellate court may reverse the grant of the first motion *and* reverse the denial of the second motion in an appeal by the non-prevailing party. That is, the appellate court may direct the district court to enter judgment for the party that should have prevailed. *See GES, Inc. v. Corbitt*, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001) ("An order denying summary judgment is not independently appealable; however, we may review the propriety of the district court's summary judgment ruling because [appellant] has properly raised the issue in its appeal from the final judgment."); *Outboard Marine Corp. v. Schupbach*, 93 Nev. 158, 161, 561 P.2d 450, 452 (1977) ("Although not an appealable ruling per se, we may review the propriety of an interlocutory ruling following judgment if properly assigned as error.").

Chase presented the district court with the Chase Records and Grageda Declaration and requested summary judgment in its favor. SFR did not present any contrary evidence. Therefore, this Court should reverse the grant of SFR's summary judgment motion, reverse the denial of Chase's summary judgment motion, and direct the district court to enter judgment for Chase.

B. Even if the Meyer Declaration and its exhibits are necessary to Chase's claims, Chase is still entitled to summary judgment.

1. SFR failed to meet and confer before filing its counter-motion.

Even if the Court does not believe that the Chase Records and Grageda Declaration establish Freddie Mac's ownership interest—and therefore, that Chase must rely on the Meyer Declaration and its exhibits—Chase is still entitled to summary judgment. As explained in Chase's opening brief, SFR filed its counter-motion to strike the latter materials without certifying that it had met and conferred with Chase. Op. Br. 51; 4 AA 552-53. In its answering brief, SFR does not dispute that it violated the meet-and-confer requirement. Instead, SFR argues in passing that

Chase forfeited this issue because Chase did not explicitly raise it before the district court. Am. Ans. Br. 41.

SFR cites no legal authority for its position that a non-moving party can waive N.R.C.P. 37's meet-and-confer requirement and Chase is not aware of any such authority. Allowing for waiver under these circumstances would inappropriately shift the burden of complying with the requirement (and certifying compliance) from the moving party to the non-moving party. Because SFR did not satisfy this threshold requirement, the district court could not exclude the Meyer Declaration or enter any other sanction. *See Robinson v. Potter*, 453 F.3d 990, 995 (8th Cir. 2006) (motion to compel properly denied where moving party did not demonstrate any attempt to meet and confer); *Hager v. Graham*, 267 F.R.D. 486, 491-92 (N.D. W. Va. 2010) (failure to confer or attempt to confer is ground for denial of motion to compel); *Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001) (Rule 37(a)(1) certificate is "mandatory prerequisite" on motion to compel).

Because the district court could not exclude the Meyer Declaration and its exhibits, and because SFR did not present any contrary evidence, Chase is entitled to summary judgment. Therefore, the Court should direct the district court to enter judgment for Chase.

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

Even if the Court excuses SFR's failure to meet and confer, the fact remains that any alleged violation of N.R.C.P. 16.1 was harmless. Op. Br. 51-54. Therefore, the district court could not exclude the Meyer Declaration or enter any other sanction. *See* N.R.C.P. 37(c)(1) (2018) ("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.") (emphasis added).

In its answering brief, SFR claims that Chase forfeited its harmlessness argument because Chase failed to raise the argument below. Am. Ans. Br. 43. This contention is plainly incorrect and appears to have been copied from a different case. Chase explicitly argued in its 2018 summary judgment briefing that the alleged violation of N.R.C.P. 16.1 was harmless:

> 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.

4 AA 592-93. SFR responded by arguing at length that the alleged violation was not harmless. 4 AA 596-98. Clearly, this preserved harmlessness for purposes of this appeal. *See Nelson v. Adams USA Inc.*, 529 U.S. 460, 469, 120 S. Ct. 1579, 1586 (2000) (preservation "requires that the lower court be fairly put on notice as to the substance of the issue.").

As for the merits of the harmlessness issue, SFR claims that "[k]nowledge of a claim does not equate to knowing the evidence the claimant will produce." Am. Ans. Br. 49. However, the issue is not whether SFR could have predicted the evidence that Chase would introduce, but whether SFR could have obtained the evidence on its own. Once SFR knew that Chase argued the Loan was owned by Freddie Mac, SFR could have sought the information referenced in the Meyer Declaration (and its exhibits) through third-party discovery. *See Cash v. State Farm Fire & Cas. Co.*, 125 F. Supp. 2d 474, 477 (M.D. Ala. 2000) (party cannot "sleep on its rights" and wait until summary judgment to object to use of materials it has made no prior reasonable efforts to obtain). The fact that SFR chose not to do so suggests that SFR would have acted no differently if the documents had been disclosed earlier in discovery. *See Quatro v. Tehachapi Unified Sch. Dist.*, 742 F. App'x 340, 341 (9th Cir. 2018) ("Although the District says it was prejudiced, it has not identified any evidence it would have presented had it been afforded earlier notice of the testimony.") (citation omitted).

SFR makes the related argument that "[i]t is not SFR's duty or responsibility to seek evidence to prove Chase's claims; Chase bears that burden." Am. Ans. Br. 44. However, the mere fact that Chase bears the burden of proving Freddie Mac's ownership does not automatically preclude a finding of harmlessness with respect to a failure to disclose related information. This is especially true given that SFR had litigated virtually identical facts against the same parties in countless other lawsuits. *See Lakeman v. Otis Elevator Co.*, 930 F.2d 1547, 1554 (11th Cir. 1991) (not abuse of discretion to refuse to exclude expert evidence when other party's lawyer was "well versed" in relevant issues).

SFR also complains about the timing of Chase's amended complaint and argues that Chase should have explicitly raised HERA as an argument sooner. Am. Ans. Br. 45-46. SFR has waived any such argument because it did not oppose leave to amend. Further, the relevant inquiry under N.R.C.P. 37 is *not* the amount of time between the date of Chase's original complaint and the date of Chase's amended complaint. It is the amount of time between the date when SFR learned Chase was raising the Federal Foreclosure Bar (February 2, 2016 at the latest) and the dates when the parties litigated dispositive motions. By the time of the 2016 summary judgment briefing, SFR had known for several months that the Federal Foreclosure Bar was at issue; by the time of the 2018 summary judgment briefing, SFR had known for over two years. Therefore, SFR cannot claim to have been surprised by the relevant documents.[6]

SFR also claims that Chase's withdrawal of its motion to reopen discovery—a motion that SFR opposed—shows that "Chase *knew* that it did not timely disclose all the documents it needed to disclose." Am. Ans. Br. 5. As an initial matter, SFR's opposition to extending discovery shows that SFR was not genuinely interested in learning the facts of the case. SFR would have acted no differently if Chase had disclosed the relevant documents earlier. But more to the point, Chase ultimately decided not to seek a discovery extension in 2018 because it concluded that none was needed—it had already disclosed all of the relevant documents in 2016.

Finally, it should be noted that SFR does not appear to allege bad faith or intentional wrongdoing. This also weighs in favor of a finding of harmlessness. *See Lanard Toys, Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010) (court may

---

[6] SFR claims that "[s]urprise is not the issue." Am. Ans. Br. 50. However, prejudice is the single most important factor when deciding if an alleged non-disclosure is harmless. *See* 6 Moore's Federal Practice - Civil § 26.27 ("[T]he primary line of inquiry is whether the nondisclosure caused the other parties prejudice.").

consider whether there was "bad faith or willfulness involved in not timely disclosing the evidence"); *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003) (court should consider any "bad faith or willfulness involved in not disclosing the evidence at an earlier date").

To summarize, any violation of N.R.C.P. 16.1 was harmless, meaning the district court could not exclude the Meyer Declaration or enter any other sanction. Because the Meyer Declaration and its exhibits showed that Freddie Mac owned the Loan, and because SFR did not provide any contrary evidence, Chase is entitled to summary judgment. Therefore, the Court should direct the district court to enter judgment for Chase.

C. In the alternative, the Court should remand with instructions to enter lesser sanctions pursuant to *Young*.

Assuming for the sake of argument that (a) the Meyer Declaration and its attachments are necessary to show Freddie Mac's ownership, (b) SFR's failure to meet and confer was excusable, and (c) the alleged Rule 16.1 violation was not harmless, the Court should remand the case with instructions to impose lesser discovery sanctions. Case-dispositive sanctions were clearly not appropriate under *Young*.

SFR claims that its counter-motion was not governed by *Young* because SFR did not explicitly ask for case-ending sanctions or to strike Chase's complaint. Am. Ans. Br. 42. But if, *arguendo*, the Meyer Declaration and its exhibits were necessary to prove Freddie Mac's ownership interest, the district court's sanction changed the outcome of the case because it prevented Chase from showing that the Federal Foreclosure Bar protected the Deed of Trust. Therefore, the sanction was subject to the elevated standard of *Young*. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 612, 245 P.3d 1182, 1186 (2010) (case-concluding sanction is one that results in conclusion of case, offending party being "out of court," and appeal being offending party's only recourse); *see also R & R Sails, Inc. v. Ins. Co. of the State of Pa.*, 673 F.3d 1240, 1247 (9th Cir. 2012) (court was required to apply elevated standard for case-dispositive sanctions where, in "practical terms," discovery sanction "amounted to dismissal of a claim").

SFR also complains that Chase did not explicitly invoke *Young* before the district court. However, a party cannot "waive" the right to have a motion decided under the applicable legal standard. *See Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013) ("[I]n adjudicating a claim or issue pending before us, we have the authority to identify and apply the correct legal standard, whether argued by the parties or not") (citing *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 1718 (1991)); *see also Doan v. Wilkerson*, 130 Nev. Adv. Rep. 48, 327 P.3d 498, 501 (2014) (citations omitted) ("District court rulings supported by substantial evidence will not be disturbed absent an abuse of discretion. However, the district court must apply the correct legal standard.”).[7]

Even if the parties needed to “preserve” the governing legal standard, they did so by effectively addressing several of the *Young* factors in their 2018 summary judgment briefing. Chase argued that (a) Chase had disclosed a “Corporate Representative of Federal Home Loan Mortgage Corporation” in 2016; (b) Chase had submitted materially identical versions of the challenged documents with its 2016 summary judgment motion; (c) SFR had not objected to any of the relevant documents during the 2016 summary judgment briefing; and (d) SFR failed to show prejudice. 4 AA 592-593. In turn, SFR argued at length that the alleged violation of N.R.C.P. 16.1 was prejudicial and that Chase should have disclosed the information earlier. 4 AA 596-598. All of these factors are relevant under *Young*. *See Young*, 106 Nev. at 93, 787 P.2d at 780 (factors include, among other things, degree of willfulness, degree of prejudice that would be caused by lesser sanctions, seriousness of alleged violation, and feasibility of less severe sanctions). Therefore,

---

[7] Where a trial court does not apply the standard for case-dispositive sanctions, an appellate court must review the record independently to determine if the standard is met. *See Adriana Int’l Corp. v. Lewis & Co.*, 913 F.2d 1406, 1412 (9th Cir. 1990) (where trial court “fails to make explicit findings” as to relevant factors for case-dispositive sanctions under Rule 37, “the appellate court must review the record independently to determine whether the dismissal was an abuse of discretion.”).

the parties "preserved" the applicable legal standard to the extent they needed to do so.

As for the merits of this issue, an exclusion sanction was clearly excessive under *Young*. For the reasons explained in Chase's opening brief and in Section IV.B.2 above, this case does not present the extreme situation required for case-dispositive sanctions. Therefore, the district court could only impose non-case-concluding sanctions, such as an extension of the discovery period. *See SFR Invs. Pool 1, LLC v. Green Tree Servicing, LLC,* No. 71176, 2018 Nev. Unpub. LEXIS 1208 at *1 n.1 (Dec. 27, 2018) (unpublished disposition) (affirming district court's denial of motion to strike because SFR "could have requested an extension of the discovery deadline to conduct whatever discovery it believed necessary to counter this evidence."). Accordingly, if the Court does not accept Chase's arguments from Section IV.A-B, the Court should remand the case with instructions to enter a lesser sanction.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that this Court reverse, remand, and direct the district court to enter judgment for Chase. In the alternative, Chase requests that this Court vacate the judgment below and remand with instructions to enter a lesser, non-dispositive discovery sanction.

/ / /

Dated: September 11, 2019.

BALLARD SPAHR LLP

By: /s/ Matthew D. Lamb
Abran E. Vigil
Nevada Bar No. 7548
Holly Ann Priest
Nevada Bar No. 13226
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135

Matthew D. Lamb
Nevada Bar No. 12991
1909 K Street, Northwest
Washington, D.C. 20006

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 6,950 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

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

/ / /

Dated: September 11, 2019.

BALLARD SPAHR LLP

By: /s/ Matthew D. Lamb
Abran E. Vigil
Nevada Bar No. 7548
Holly Ann Priest
Nevada Bar No. 13226
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135

Matthew D. Lamb
Nevada Bar No. 12991
1909 K Street, Northwest
Washington, D.C. 20006

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on September 11, 2019, I filed **Appellant's Reply Brief**. Service will be made on the following through the Court's electronic filing system:

Jacqueline A. Gilbert
KIM GILBERT EBRON

Counsel for Respondent

/s/ Matthew D. Lamb
An Employee of Ballard Spahr LLP