Case No. 77010

IN THE SUPREME COURT OF NEVADA

JP MORGAN CHASE BANK, National Association, a national association

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

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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

SFR INVESTMENTS POOL 1, LLC'S SUPPLEMENTAL BRIEF IN RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITIES

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Appellant SFR Investments Pool 1, LLC ("SFR") hereby submits its supplemental brief addressing JPMorgan Chase Bank, N.A.'s (the "Bank") supplemental authorities cited in the notice of supplemental authorities filed on July 28, 2020.

INTRODUCTION

With respect to *M&T*,[1] just like *Bourne Valley*,[2] the Ninth Circuit again erred in interpretating Nevada law. A quiet title claim brought by a lienholder to challenge an association foreclosure sale is not a contract action, whether based on HERA, tender, noticing or unfairness. The *M&T* Court's analysis regarding the applicable statute of limitations is based on a faulty premise—the mere existence of the promissory note, a contract, morphs all claims brought by the Bank into contract claims, despite relying entirely on a statutory right (12 U.S.C. § 4617(j)(3)). This is directly refuted by *Megapulse*,[3] and is contrary to the treatment of quiet title actions throughout the country. Thus, this Court should not follow the rationale in *M&T Bank*.

[1] *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020).
[2] *Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016).
[3] *Megapulse, Inc. v Lewis*, 672 F.2d 959 (D.C. Cir. 1982)

I. THE BANK'S RELIANCE UPON *M&T* IS MISPLACED.

M&T is not binding on this Court, as this Court has the final say on whether a Nevada quiet title claim is a contract claim or a tort claim. In any event, the rationale applied in *M&T* is faulty for a variety of reasons.[4] SFR also notes that even post-*M&T*, panels of the 9th Circuit have stayed cases or denied motions to lift stay pending this Court's answer to the questions certified to this Court as Case No. 81129, *U.S. Bank, N.A. v. Thunder Properties, Inc*.[5]

A. Nevada's Definitions of Contract and Tort Clearly Demonstrate A Claim Based Upon 4617(j)(3) is Characterized as Tort; Use of Any Other Definitions Is Error

Although the specific definition used by the Ninth Circuit is not expressly stated, it appears the definition includes a requirement of "damages," as well as a "breach of duty resulting in injury to person or property," characterized by the *M&T* Court as "traditional hallmarks of tort actions."[6] Such a definition is erroneous as neither of these "elements" exist within the common law definition of tort—the definition Congress intended be used for purposes of HERA.[7] The common law

[4] SFR intends to file a petition for certiorari in *M&T Bank*.

[5] *See*, e.g., *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 19-16889, DktEntry 24, 27, 30; *Bank of America, N.A. v. Santa Barbara Homeowners Association*, Case No. 19-16922, DktEntry 29. While the orders do not provide the reason to stay or deny lifting stay, it can be presumed that those Panels believe this Court's decision could affect *M&T Bank* as to which statute of limitations applies to claims based on §4617(j)(3).

[6] *M&T*, 963 F.3d at 858.

[7] *United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975) (citing *United States v.*

definition of tort is simply a violation of a duty imposed by law, as opposed to a contract, while contract involves a violation of a duty imposed by agreement between the parties.[8] Even the case cited by the Ninth Circuit recognized that torts are "civil wrong[s], other than breach of contract."[9] This bears noting because plaintiffs in *M&T* made much to do about the word "duty," however, both definitions include that word. Thus, the definitions are not distinct in terms of duty vs. no duty, but rather, where the duty emanates—law or agreement between the parties. In that regard, the common law definitions are mutually exclusive, such that if the duty **does not** emanate from agreement between the parties, it is a "wrong independent of contract"[10] and is appropriately characterized as tort.

Put simply, where there is no contract between the parties, the action is "strictly and solely ex delicto [tort]."[11] In *M&T*, plaintiffs and the Agency admitted

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Neidorf, 522 F.2d 916, 919 (9th Cir. 1975)).

[8] *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (quoting *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 552 P.2d 885, 888 (1976)) (emphasis added).

[9] *M&T*, 963 F.3d at 858, *citing United States v. Burke*, 504 U.S. 229, 234-35, 112 S. Ct. 1867, 1871, 119 L. Ed. 2d 34 (1992).

[10] *Bernard*, 103 Nev. at 135, 734 P.2d at 1240.

[11] *Hampton by Hampton v. Fed. Exp. Corp.*, 917 F.2d 1119, 1123 (8th Cir. 1990) (*citing* W. Keeton, Prosser and Keeton on the Law of Torts § 92 (5th ed. 1984)) (emphasis added). *See also Guardian Tr. & Deposit Co. v. Fisher*, 200 U.S. 57, 67 (1906) (recognizing actions "where there is no contract … are strictly and solely actions ex delicto [tort]."); *Guardian Tr. & Deposit Co. v. Greensboro Water Supply Co.*, 115 F. 184, 189–90 (C.C.W.D.N.C. 1902) (recognizing common law division of actions as ex contractu (contract) and ex delicto (tort)).

"[t]he premise that this is not a formal contract-enforcement action is self-evident and uncontested."[12] Plaintiffs and the Agency admitted plaintiffs' quiet title claim was not a true contract claim because SFR owed no duties to plaintiffs or Agency and there was no agreement between plaintiffs and SFR, or the Agency and SFR. The Ninth Circuit even acknowledged there is no agreement between the parties. The inquiry should have ended there because without an agreement, express or implied, between the parties, the very definition of a contract action can not apply.

Instead, the Ninth Circuit used a narrow definition of tort and even went so far as to put great emphasis on the traditional hallmarks of torts, while ignoring the critical hallmark of a contract action—an actual contract between the parties. Nothing about the common law definition of tort deals with damages or injury to person or property. While these may be elements of types of torts, they do not make up the common law definition of tort. Nevertheless, even money damages are not exclusive to tort. Contract actions equally involve money damages. In that regard, simply because plaintiffs sought declaratory relief as opposed to money damages does not mean the claim does not sound in tort, and therefore sounds in contract. Even so, the requested declaratory relief still has monetary value. After all, the Bank seeks to insulate a money encumbrance valued in excess of $200,000.

Likewise, the lack of injury to person or property does not mean the claim

[12] *M&T*, No. 18-17395, Dkt. 26, RAB at 17.

sounds in contract. Again, injury is just an element of *some* torts, it is not the lynchpin of the common law definition of tort. Even so, there is injury to property in *M&T* and here. Bank's and *M&T's* plaintiffs' property interest was extinguished by virtue of a foreclosure sale, and but for 4617(j)(3), each would have lost their property interest.

In the end, *M&T* failed to use the common law definitions, when Congress intended the common law definition to prevail. Under those definitions, plaintiffs' quiet title claim sounds in tort, not contract. This Court should reject the conclusion based on this tortured analysis and apply an appropriate statute of limitations under Nevada law.

B. It Cannot Be the Law in Nevada that Actions Concerning Real Property Are Contract Actions

Irrespective of *M&T's* faulty logic and the definitions set forth above, it simply is not, should not and cannot be the law in Nevada that any action affecting real property sounds in contract solely because a contract exists in the background. The implications stretch much farther than HERA here.

Specifically, the Ninth Circuit found that because the claims were dependent upon Freddie Mac's lien on the property, an interest created by contract, as the determinative factor in categorizing the quiet title claims as contract claims.[13] The

[13] *M&T*, 963 F.3d at 858.

Ninth Circuit did so despite recognizing that no contract existed between SFR and plaintiffs, thereby hinging the categorization of the quiet title claims solely upon the mere existence of the promissory note. Adopting that approach here would affect the legislature's timelines set forth in NRS 107 foreclosures, such as the time to challenge a bank foreclosure due to faulty noticing under NRS 107.080(6), which is 90 days. After all, the challenge circles around a bank's use of a security interest (deed of trust) to collect on its contractual rights (promissory note), and without that, there would be nothing to challenge.

This would similarly affect all wrongful foreclosure claims, which traditionally carry a three-year statute of limitations in Nevada. In that circumstance, a homeowner who failed to file a timely wrongful foreclosure claim could simply assert a quiet title action challenging the sale in the exact same fashion and reap the benefit of a six-year statute of limitations. Under *M&T*'s faulty logic, such a claim would be timely under the six-year statute of limitations for contract claims because the underlying interest is contractual.

The adoption of *M&T* will not limit its application to only quiet title claims brought by the Agency. This will apply to cases beyond that specific circumstance expanding to all lienholders, if not all quiet title claims. This would run contrary to the legislature's intent when assigning statutes of limitations to actions involving real property, such as NRS 11.070 and 11.080 for property owners. Adoption of

M&T would give lienholders six years to quiet title, wherein the actual property owner only has five (NRS 11.070/080). This is not, should not, and cannot be the law in Nevada, and this Court should reject any such suggestion.

C. ***Megapulse* is Instructive, And the Ninth Circuit Discarded it in Error.**

M&T wrongfully discarded *Megapulse* on the obscure basis the *Megapulse* Court did not ultimately characterize the claim as tort. *M&T* completely ignores the fact that, while not directly analyzing the characterization of the claim, *Megapulse* still provides the informative roadmap in deciding whether a claim sounds in contract.

The primary question in *Megapulse* was the *categorization of the claims* to determine if the lower court had subject matter jurisdiction.[14] The secondary question was whether the lower court's jurisdiction was limited in any way by sovereign immunity.[15] In answering these questions, the D.C. Circuit rejected the overly broad approach by the lower court that "any case requiring some reference to or incorporation of a contract" means the claims sounds in contract.[16]

In *Megapulse*, the Government and Megapulse's relationship arose from a contract, and the impetus for the Government obtaining proprietary information

[14] *Megapulse*, 672 F.3d at 964.
[15] *Id*.
[16] *Id*. at 967-68.

from Megapulse was also the contract between the parties. Based on this, the Government argued, just like the *M&T* plaintiffs did and the Bank does here,[17] that because the origin of the relationship draws from contract, Megapulse's claims for improper disclosure of proprietary information sounded in contract, and therefore the Court of Claims had exclusive jurisdiction over the case. But the *Megapulse* Court **rejected** the Government's argument. In other words, the origin of the relationship and even the contract that led to the very information Megapulse claimed the Government improperly disseminated, was not enough to turn Megapulse's claims into one sounding in contract. Of course, SFR and the Bank are even further removed from the contract analysis because there is no agreement between SFR and the Bank, but even so, *Megapulse's* guidance dovetails perfectly with Nevada's definitions of tort versus contract. In other words, by finding the claim was not contract, it necessarily found the claim was something other than contract, *i.e.* tort.

But again, the lack of the word "tort" in the *Megapulse* decision does not negate the analysis. The *Megapulse* court was careful to look beyond the origin of the parties' relationship, *i.e.* the contract. In fact, the court noted "[c]ontract issues may arise in various types of cases where the action itself is not founded on a

[17] SFR's position that the Bank's attempt to argue the six-year statute of limitations under HERA was waived below and the district court's striking of same was correct. By responding here, SFR does not waive the waiver. *See* RAB at 21-23.

contract."[18] As examples, the *Megapulse* court identified a license (a contract) as a defense in an action for trespass (a tort), or a purchase agreement (a contract) to counter an action for conversion (a tort).[19]

The same can be said here. Sure, the origin of Bank's lien interest is the Note, which is a contract, but other than creating the interest in the Property that was foreclosed, the contract has nothing to do with Bank's challenge. Put differently, the Note does not serve as the basis to challenge the foreclosure sale, instead, that emanates from 4617(j)(3), *i.e.* emanates from law, not a contract.

Consider this: if the foreclosure sale occurred prior to the enactment of 4617(j)(3), would the promissory note independently provide this challenge to the foreclosure sale? The answer is undoubtedly **no**, despite the promissory note being the common denominator in that scenario, as well as now. This distinction is clear and emphasized by *Megapulse*—"the mere fact that a court may have to rule on a contract issue does not, by triggering some mystical metamorphosis, automatically transform an action based upon [tort] into one on the contract."[20] But here, the gap is even wider than it was in *Megapulse* because nothing about Bank's quiet title claim requires the court to rule on a contract issue.

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[18] *Megapulse*, 672 F.2d at 968.

[19] *Id.*

[20] *Id.*

D. *Wise* and *Metro Bank* Have No Application in *M&T* Because There is No Close Question

Wise[21] and *Metro Bank*[22] both stem from the premise there are multiple potentially **applicable** statutes of limitations; however, as noted above, Bank's quiet title claim sounds in tort. Therefore, *M&T's* application of deference was error.

[21] *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180 (9th Cir. 2010).

[22] *Fed. Deposit Ins. Corp. v. Former Officers & Dirs. Of Metro. Bank*, 884 F.2d 1304 (9th Cir. 1989).

CONCLUSION

Based thereon, the supplemental authorities do not bolster Bank's position nor do they provide this Court with reason to Affirm.

DATED this 17th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

1. I certify that this supplemental brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this supplemental brief complies with the page or type-volume limitations set forth in the Order Granting Motion filed September 3, 2020 because it is proportionately spaced, has a typeface of 14 points or more and contains 2,333 words.
3. I hereby certify that I have read this supplemental brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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

DATED this 17th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2020, I filed the foregoing **SUPPLEMENTAL BRIEF**, which shall be served via electronic service from the Court's eFlex system to:

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