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

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 SUPPLEMENTAL RESPONSIVE BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

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

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

Dated: September 24, 2020.

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INTRODUCTION

Appellant JPMorgan Chase Bank, N.A. ("Chase") respectfully submits this supplemental responsive brief pursuant to the Court's September 3, 2020 order.

Rather than attempt to distinguish *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020), SFR argues that *M&T Bank* is flat-out wrong. *M&T Bank* holds that a quiet-title claim invoking the Federal Foreclosure Bar is more akin to a contract claim than a tort claim for purposes of deciding which of two periods in the HERA Limitations Provision applies. 963 F.3d at 858. SFR contends that Chase's assertion of the Federal Foreclosure Bar was untimely under the statute's three-year limitations period for tort claims.

SFR's arguments are unpersuasive. SFR ignores that the Ninth Circuit based its *M&T Bank* holding on *federal* law, not state law. SFR provides no reason for this Court to reject the Ninth Circuit on a point of federal law. This Court traditionally accords Ninth Circuit (and other federal court) decisions "great weight as persuasive authority" on points of federal law, *Brooks v. Dewar*, 106 P.2d 755, 763 (Nev. 1940), *rev'd on other grounds*, 313 U.S. 354 (1941), and should follow *M&T Bank* here.[1]

[1] SFR cites two Federal Foreclosure Bar-related appeals that have been stayed pending resolution of questions certified in *U.S. Bank, Inc. v. Thunder Props., Inc.*, 958 F.3d 794 (9th Cir. 2020). Supp. Br. 2. But both appeals were stayed *sua sponte* by the Clerk of Court under Ninth Circuit Rule 27-7, not by panels, and the denials of motions to lift the stays were likewise issued by the Clerk. Orders, *Ocwen v. SFR*,

ARGUMENT

I. Federal Law Controls the Characterization of Claims for Purposes of Applying the HERA Limitations Provision.

SFR incorrectly assumes that Nevada law governs whether a claim is more akin to a contract claim or tort claim for purposes of § 4617(b)(12). *See* Supp. Br. 1. But the Ninth Circuit correctly relied on federal precedent to conclude that quiet-title claims implicating the Federal Foreclosure Bar "are 'contract' claims under 12 U.S.C. § 4617(b)(12)(A)(i)." 963 F.3d at 858.[2] *M&T Bank* is one of many cases in which a federal court has interpreted and applied federal law without relying on state-law characterizations or labels. Most notably, in applying an analogous federal limitations statute to a state-law claim that was not clearly a contract claim or a tort claim, the Ninth Circuit held that "[t]he characterization of the claim as one in tort, contract or quasi-contract must … be a matter of federal law[,] since the uniform limitations established by the [federal] statute would be compromised if limitations varied according to the labels attached to identical causes of action by different states." *United States v. Neidorf*, 522 F.2d 916, 919 n.6 (9th Cir. 1975) (applying

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No. 19-16889 (Dkts. No. 24, 27, 30); Order, *Bank of America v. SFR*, No. 19-16922 (Dkt. No. 29). Those orders are not persuasive here.

[2] *See also Freddie Mac v. SFR Invs. Pool 1, LLC*, 810 F. App'x 589, 590 (9th Cir. 2020); *Nationstar Mortg. LLC v. Keynote Props., LLC*, 810 F. App'x 570, 571-72 (9th Cir. 2020); and *Bourne Valley Ct. Tr. v. Wells Fargo Bank, NA*, 810 F. App'x 492, 493 (9th Cir. 2020).

28 U.S.C. § 2415); *see also FDIC v. Former Officer & Directors of Metro. Bank*, 884 F.2d 1304, 1306-07 (9th Cir. 1989) (in applying comparable statute of limitations, the "*court* generally must characterize the action." (emphasis added)) (citing *Neidorf*).

The *Neidorf* decision rests on sound policy, advancing Congress's purpose of establishing uniform minimum limitations periods for claims brought under HERA or comparable federal statutes. HERA created the Federal Housing Finance Agency ("FHFA") as an independent federal agency with regulatory and oversight authority over Fannie Mae and Freddie Mac (together, the "Enterprises"). The law empowers FHFA to place the Enterprises into conservatorships and grants FHFA an array of powers, privileges, and exemptions from otherwise applicable laws when it acts as Conservator. If state law controlled the characterization of claims under the HERA Limitations Period, substantively identical claims might be subject to different limitations periods depending upon which state's law governed.

SFR's contention that the HERA Limitations Provision must adopt a state-law characterization of claims conflicts not only with *Neidorf* but also with Congress's apparent purpose of establishing uniform minimum limitations periods for all claims the Conservator might bring. The rule that federal law governs the categorization of claims provides the Conservator with certainty, allowing it to focus its efforts on reducing the Enterprises' operational and credit risks and stabilizing the mortgage

and housing markets, rather than scouring state judicial decisions to determine how a claim has been characterized for state-law purposes.

The characterization of Chase's quiet-title claim as a "tort" claim or "contract" claim under the HERA Limitations Provision is a *federal law* inquiry.

II. *M&T Bank* Confirms that Chase's Claim Falls into the HERA Limitations Provision's Contract Category.

Because federal law governs, *M&T Bank* resolves the question of how to characterize the claim at issue here: As a matter of federal law, it is deemed contractual for purposes of the HERA Limitations Provision. And *M&T Bank's* interpretation of a federal statute is highly persuasive; when construing "an act of Congress," this Court has noted that decisions of lower federal courts are "entitled to great weight as persuasive authority." *Brooks*, 106 P.2d at 763.

In *M&T Bank*, the Ninth Circuit held that a quiet-title claim invoking the Federal Foreclosure Bar was subject to HERA's six-year limitations period for contract claims, rather than the three-year period for tort claims, specifically holding "that the claims in this action are 'contract' claims under 12 U.S.C. § 4617(b)(12)(A)(i)." 963 F.3d at 858. The court stated that although "there was no contract" between the parties, "quiet title claims are entirely 'dependent' upon [the Enterprise's] lien on the Property, an interest created by contract," leading it to conclude the claims properly sounded in contract. *Id*. The court reasoned that the claim could not reasonably be characterized as a tort, because it "[did] not seek

damages or claim a breach of duty resulting in injury to person or property, two of the traditional hallmarks of a torts action." *Id*.

SFR responds that it "cannot be the law in Nevada that any action affecting real property sounds in contract solely because a contract exists in the background." Supp. Br. 5. But the Ninth Circuit did not purport to decide an issue of Nevada law, it did not cite any Nevada cases in reaching its holding, and it did not purport to characterize the claim for any purpose other than the HERA Limitations Provision. *See* 963 F.3d at 858. Accordingly, SFR's rhetoric about the impact of *M&T Bank*'s holding on "all quiet title claims," and "all wrongful foreclosure claims," Supp. Br. 6, is baseless. This Court's adoption of *M&T Bank*'s narrow ruling would affect only quiet-title claims implicating the Federal Foreclosure Bar, and only for the limited purpose of applying the HERA Limitations Provision.

III. Chase's Claim Does Not Fit with the HERA Limitations Provision's Tort Category.

SFR's efforts to shoehorn Chase's claim into the HERA Limitations Provision's tort category depend on the false premise that any claim not formally sounding in contract must sound in tort. Supp. Br. 2-7. SFR takes issue with the Ninth Circuit's definition of a "tort" as requiring damages or a breach of duty resulting in injury to person or property, asserting that a tort does not require either element, but rather "is simply a violation of a duty imposed by law, as opposed to

contract." *See id*. at 2-3.[3] To the extent SFR admits that a tort claim alleges the existence and breach of a duty, it has conceded that Chase's quiet-title claim does not sound in tort. Chase does not allege that SFR owed or breached any duty, and this Court has held that quiet-title claims do not require any particular elements, let alone duty and breach. *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev. 314, 1318 (2013) ("A plea to quiet title does not require any particular elements …").

To the extent SFR questions whether tort claims require a duty, a breach, and damages, this Court has held that they do. *See K-Mart Corp. v. Ponsock*, 103 Nev. 39, 49 (1987) ("A tort … requires the presence of a duty created by law…"); *Szekeres v. Robinson*, 715 P.2d 1076, 1077 (Nev. 1986) (a tort is a "civil wrong ... [seeking] remedy in the form of an action for damages") (internal quotation marks omitted). SFR has identified no plausible definition under which the quiet-title claim here would qualify as a tort, and Chase is aware of none.

The cases SFR cites favor Chase. In asserting that "where there is no contract between the parties, the action is 'strictly and solely ex delicto [tort],'" SFR purports

[3] SFR also cites *United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975), for the proposition that breach of duty and damages are not "'elements' [that] exist within the common law definition of tort—the definition Congress intended [to] be used for the purposes of HERA." Supp. Br. 2. But nothing in *Limbs* suggests that tort claims do not require duty, breach, or damages. To the contrary, the court held that the claim could not properly be categorized as a tort because it was "not for damages suffered as a result of an injury." 524 F.2d at 801. And *Limbs* does not mention HERA, so it cannot support SFR's claim that Congress intended a particular definition to be "used for the purposes of HERA."

to quote *Hampton by Hampton v. Fed. Exp. Corp.*, 917 F.2d 1119 (8th Cir. 1990). *See* Supp. Br. 3. But *Hampton* does not contain the language SFR purports to quote, nor does it suggest that an action is a "tort" absent a contract between the parties. Rather, *Hampton* recognized that "[t]ort liability … arises from 'general obligations that are imposed by law … to avoid injury to others,'" 917 F.2d at 1123 (citing W. Keeton, *Prosser & Keeton on the Law of Torts* § 92 (5th ed. 1984)), and concluded that the defendant could not be liable under a tort theory because it "could not reasonably foresee the *injury* and *damages* that could be suffered," *id*. at 1126 (emphasis added).

Guardian Trust, which SFR also quotes for the proposition that actions that do not involve a contract must be tort actions, *see* Supp. Br. 3 (quoting *Guardian Tr. & Deposit Co. v. Fisher*, 200 U.S. 57, 67 (1906)), also supports Chase's argument when read in full: "[W]here there is no contract, and the *injuries result from a failure of the corporation to exercise reasonable care* in the discharge of the duties of its public calling, actions to recover therefor are strictly and solely actions *ex delicto*." 200 U.S. at 67 (first emphasis added). SFR's citation to *United States v. Burke*, 504 U.S. 229, 234 (1992), for the proposition that a tort is a "civil wrong[], other than breach of contract," Supp. Br. 3, likewise fails. *Burke* confirms that a tort is not merely an action not founded in contract; it is "a civil wrong, other than breach of

contract, *for which the court will provide a remedy in the form of an action for damages*." *Burke*, 504 U.S. at 234 (emphasis added).

And while SFR relies most heavily on *Megapulse Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982), that decision too favors Chase. SFR incorrectly claims that the *Megapulse* court "necessarily found [a] claim was something other than contract, i.e., tort," when it concluded that "the claim was not contract." Supp. Br. 8. But *Megapulse* nowhere categorizes the claim as a "tort," and in fact refutes any suggestion that the claim at issue—which was held not to sound in contract for jurisdictional purposes—sounded in tort. *Id*. The *Megapulse* court noted that plaintiff's claim was not a contract claim and was therefore properly brought under Administrative Procedures Act jurisdiction. *Id*. at 963, 971. Had the claim sounded in tort, as SFR contends, a different statute—the Federal Tort Claims Act—would have provided the exclusive basis for jurisdiction. *See* 28 U.S.C. § 1346 *et seq*. Accordingly, as the Ninth Circuit correctly concluded in *M&T Bank*, *Megapulse* does not suggest that a claim not sounding in contract must sound in tort. *See M&T Bank*, 963 F.3d at 857 n.2.

SFR's suggestion that "monetary value" or "injury to property" are at issue here and somehow implicate tort liability, *see* Supp. Br. 4-5, fail. Chase does not seek damages, but rather a declaration that Freddie Mac's deed of trust continues to encumber the property at issue, and the alleged extinguishment of a property interest

is not "injury to property" in the tort sense. SFR also contends that Chase's claim sounds in tort because the "basis to challenge the foreclosure sale," is not "the Note," but rather the Federal Foreclosure Bar, "*i.e.* [the challenge] emanates from law, not a contract." Supp. Br. 9. But Chase does not challenge the HOA Sale; it seeks a declaration that the Deed of Trust survived the foreclosure. That the Note is not the basis for Chase's claim does not somehow convert the claim into a tort.

Finally, if there were a serious question as to how Chase's claim should be categorized under the HERA Limitations Provision, that question must be resolved in favor of the longer limitations period as a matter of federal policy. *M&T Bank*, 963 F.3d at 858-59; see also Op. Br. 27-29. SFR's perfunctory treatment of the precedents the Ninth Circuit relied upon for the point—*Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 1989), and *Metro. Bank*—relies on the premise that Chase's "quiet title claim sounds in tort." Supp. Br. 10. As explained above, that is wrong—both as a matter of federal and state law.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that this Court consider and apply *M&T Bank*.

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Dated: September 24, 2020.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of this Court's September 3, 2020 Order, because it "does not exceed 5 pages or the equivalent type-volume limitation." The equivalent type-volume limitation for 5 pages is 2,333 words. This brief contains 2,326 words.

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 24, 2020.

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CERTIFICATE OF SERVICE

I certify that on September 24, 2020, I filed **Appellant's Supplemental Responsive Brief**. Service will be made on the following through the Court's electronic filing system:

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