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.	Electronically Filed Nov 30 2020 02:23 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

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTRODUCTION

SFR Investments Pool 1, LLC ("SFR") hereby petitions the Court for rehearing of this matter pursuant to Rules 40(a)(2) and 40(c)(2) of the Nevada Rules of Appellate Procedure (the "Petition"). Despite acknowledging no contract exists between SFR and the Bank, despite the Bank's stance during discovery the Note was irrelevant, despite the Bank's refusal to produce the Note, and despite neither the district court nor this Court having ever analyzed the Note, this Court held the Bank's quiet title claim, which challenged the Association foreclosure sale on the basis of 12 U.S.C. 4617(j)(3), was "entirely 'dependent' upon Freddie Mac's lien," which was created by a contract, and therefore was governed by HERA's six-year statute of limitations.[1] This Court even went so far as to find the lien interest was the "hook" that allowed the Bank to seek a declaration that the Federal Foreclosure Bar prevented extinguishment. (Opinion, at p. 7.)

Rehearing is appropriate for several reasons. **First**, the Court substituted a standing analysis, i.e. what allows the Bank to seek a declaration, with what is really at issue for a statute of limitation analysis, namely, what drives the claim. While the Note and resulting lien interest gives the Bank standing to even be in Court, this is not what drives the quiet title claim; what drives the quiet title claim is a federal

[1] Opinion, at p. 7 citing *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854, 858 (9th Cir. 2020).

statute. **Second**, this Court, in error, relied on a narrower definition of tort, when Congress intended the broader, common law definition to control.[2] In so doing, this Court gave great weight to the terms "injury" and "damages" when neither of these terms are used in the common law definition of tort. What is more, this Court flipped the analysis and used the contract category as a catch-all, finding that because the Bank's quiet title claim had none of the usual hallmarks of a tort, it must fall within the contract category. Yet the Bank's quiet title claim has zero hallmarks of a contract claim, a fact even admitted by the Bank and the Agency.

Third, this Court disregarded the persuasive guidance offered in *Megapulse.*[3] Without doubt *Megapulse* engaged in the analysis of whether a claim sounds in contract, and found merely because the origin of the parties' relationship was created by contract did not automatically morph the claim as one dependent upon that contract.[4] **Fourth**, this Court erred in finding, alternatively, a close question existed and therefore deferring to the longer statute of limitations.

Finally, this Court's opinion should be vacated, or at the very least held, because the constitutionality of the FHFA's structure is presently before the U.S. Supreme Court in *Collins v. Mnuchin*, No. 19-422.[5] In *Collins*, the U.S. Supreme

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[2] *United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975).
[3] *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982).
[4] *Megapulse*, 672 F.2d at 968.
[5] Oral argument is set for December 9, 2020.

Court granted certiorari to decide whether the FHFA's single-director structure violates the Appointments Clause and, if so, whether certain actions taken by the agency, while unconstitutionally structured, must be set aside. Thus, *Collins* has the potential of holding the FHFA was unconstitutionally structured at the time of the conservatorship decision and call into question whether the conservatorship was validly imposed (and, if the conservatorship was not validly imposed, then the foreclosure bar should not have applied to this case).

I. THIS COURT CONFLATED A STANDING ANALYSIS WITH A STATUTE OF LIMITATIONS ANALYSIS

This Court made three statements that evidences the Court conflated standing with a statute of limitations analysis. Specifically, this Court found the key distinction between a tort and contract action was "whether the alleged harm could have been realized without a contract." (Opinion, p. 7.) In so making this statement, the Court focused on what gave rise for the Bank to even be in Court, not what drove the Bank's claim. SFR does not dispute the lien interest is what gives the Bank the necessary connection to even file a claim in the first instance, i.e. standing, but this cannot be confused with what drives the basis of the quiet title claim.

After all, neither the Note nor the deed of trust, drive the quiet title claim. Put another way, the mere existence of the Note and deed of trust does not serve as the

basis to challenge the sale. The *SFR*[6] decision tells us this. To drive the point home even more, if all a bank had was a Note and deed of trust, but no basis to challenge the sale, the bank would have standing to file a quiet title claim, but the claim itself would not withstand a motion to dismiss because it would be meritless. Thus, the harm here is not realized because of the existence of the Note and deed of trust, but because the existence of NRS 116, which gives the association at true super-priority lien.

The same analysis applies to this Court's statement that the lien is the "hook" that allows the servicer to seek a declaration. (Opinion, at p. 7.) Again, this is as standing analysis. But whether the claim sounds in tort or contract has nothing to do with what gives the servicer the ability to file a lawsuit. The Court asked and answered the wrong question. The question is not what allows a servicer to get into the courtroom doors, but rather, what serves as the basis for the claim. Certainly, the Bank's claim was not based on the mere existence of a lien. If it were, SFR would have won easily. Instead, the basis of the claim was the existence of a federal statute that preempted a state statute. That is the very common law definition of tort, a violation of something imposed by law.

Thus, when the Court said the Bank's claim was dependent upon Freddie Mac's lien interest, it was wrong. The Bank's claim was dependent upon the existence of

[6] *SFR Investments Pool 1, LLC v. U.S. Bank*, 130 Nev. 742, 334 P.3d 408 (2014).

4617(j)(3). Without this statue, the Bank's claim would fail as a matter of law, and that remains true irrespective of Freddie Mac's lien interest. This cements the notion that the Note and deed of trust do not drive the basis of the claim, and because this is the only point of focus when determining whether a claim sounds in tort or contract, the Court erred when it shifted the analysis to standing.

But even if the Court still insists on focusing (wrongfully) on the lien interest, in Nevada, we have a claim that not only involves a contract, but requires the existence of a contract as one of the elements, and still the claim is considered a tort as opposed to a contract claim: intentional interference with a contract. *See J.J. Industries, LLC v. Bennett*, 119 Nev. 269, 71 P.3d 1264 (2003). Nevada considers this claim a tort despite revolving entirely around a contract because what drives the claim is not necessarily the contract itself (although a requisite element), but rather the act of one interfering with the contract. Here, the Bank's claim is even more tenuously related to the contract. For one, the existence of the contract is not a requisite element of the Bank's quiet title claim. But most importantly, it is not the contract that functions as the basis for the claim; it is the existence of the federal statute that serves as the entire basis of the claim. Without the federal statute, the Bank's claim would fail. This is similar to an intentional interference with a contract clam. While the existence of the contract is required, it is the interference with that contract on the part of a third party

that drives the claim and without this interference, merely having the contract would not be enough to prevail on the claim.

Recently, this Court, in affirming a dismissal of a breach of contract claim brought by an NRS 116 purchaser, acknowledged "the HOA foreclosure process is governed strictly by statute, not by two parties entering into negotiations that are consumated by written agreement." *LN Management LLC Series 3732 Russell Peterson v. Shadow Hills Master Association*, 474 P.3d 333 (Nev. Oct. 16, 2020) (unpublished disposition). This Court further noted, the quintessential requirement for a contract claim is the existence of a contract between the parties. *Id.* at 2. The same analysis that drove the *LN Managemen*t Court should have applied here.

II. NEVADA'S DEFINITIONS OF CONTRACT AND TORT CLEARLY DEMONSTRATE THE BANK'S QUIET TITLE CLAIM IS CHARACTERIZED AS TORT; USE OF ANY OTHER DEFINITIONS WAS ERROR

Although the Court does not expressly state the specific definition of tort used, 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 this Court as "traditional hallmarks of tort actions."[7] This was error as neither of these "elements" exist within the common law definition of tort, the definition Congress intended be used for purposes of HERA.[8] Again, the common law definition of tort is simply a

[7] Opinion at p. 7.
[8] *Limbs*, 524 F.2d at 801 (citing *United States v. Neidorf*, 522 F.2d 916, 919 (9th Cir. 1975)).

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.[9] It bears noting both tort and contract definitions include the word "duty." 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] This Court even acknowledged there is no agreement between the parties. The inquiry should have ended there because without an agreement between the parties, the very definition of a contract action cannot apply.

Instead, this Court 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

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[9] *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).

[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 the common law division of actions as ex contractu (contract) and ex delicto (tort)).

"quintessential" hallmark of a contract action—an actual contract between the parties. *See LN Management, supra*. 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 the Bank 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 Bank's declaratory relief still has monetary value. After all, the Bank seeks to insulate a money incumbrance valued in excess of $240,000.

Likewise, the lack of injury to person or property does not mean the claim 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 here. The Bank's property interest was extinguished by virtue of the Association's foreclosure sale, and but for 4617(j)(3), the Bank would have lost its property interest. Certainly, the loss of a lien interest/money encumbrance to the tune of $240,000 is an injury to property.

In the end, this Court put too much emphasis on a more narrow definition of tort, when Congress intended the common law definition to prevail. Under the

common law definitions of both tort and contract, the Bank's quiet title claim sounds in tort, not contract. Therefore, this Court should reconsider its decision.

III. *MEGAPULSE* IS INSTRUCTIVE, AND THIS COURT IGNORED IT IN ERROR.

This Court ignored *Megapulse* despite this case providing an informative roadmap as to whether a claim sounds in contract. The Government and Megapulse's relationship arose from a contract, and the impetus for the Government obtaining proprietary information from Megapulse was also the contract between the parties. Based on this, the Government argued, just like the Bank did here, 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.

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 contract."[12] 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).[13]

The same can be said here. Sure, the origin of the 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 the quiet title claim against SFR that challenges the effect of the foreclosure sale. Put another way, 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

[12] *Megapulse*, 672 F.2d at 968.
[13] *Id*.

transform an action based upon [tort] into one on the contract."[14] But here, the gap is even wider than it was in *Megapulse* because nothing about the Bank's quiet title claim requires the court to rule on a contract issue.

IV. *WISE* AND *METRO BANK* HAVE NO APPLICATION HERE BECAUSE THERE IS NO CLOSE QUESTION

Wise[15] and *Metro Bank*[16] both stem from the premise there are multiple potentially **applicable** statutes of limitations. Here, the Bank's quiet claim does not sound in contract, so contrary to this Court's finding there is no close question. Thus, the statute of limitations for contract claims is wholly inapplicable. This conclusion, in turn, renders the policy of deference wholly inapplicable. Therefore, this Court's application of deference was error.

V. THE COURT'S OPINION SHOULD BE VACATED

This Court's opinion should be vacated, or at the very least held, because the constitutionality of the FHFA's structure is presently before the U.S. Supreme Court in *Collins v. Mnuchin*, No. 19-422. In *Collins*, the U.S. Supreme Court granted certiorari to decide whether the FHFA's single-director structure violates the Appointments Clause and, if so, whether certain actions taken by the agency while unconstitutionally structured must be set aside. *See Collins* Pet. i. In the ongoing

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[14] *Id*.
[15] *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180 (9th Cir. 2010).
[16] *Fed. Deposit Ins. Corp. v. Former Officers & Dirs. Of Metro. Bank*, 884 F.2d 1304 (9th Cir. 1989).

merits briefing, the FHFA has conceded that its structure is unconstitutional in light of *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), which held the indistinguishable structure of the CFPB violated the Appointments Clause. *See Collins* Federal Parties Reply Br. 23-26. The *Collins* petitioners further argue that in "a long line of cases, the U.S. Supreme Court has repeatedly set aside the past actions of federal officials who were unconstitutionally insulated from oversight by the President or who otherwise served in violation of the Constitution's structural provisions." *Collins* Petr. Br. 62; *see also id.* at 62-66 (discussing authorities). The Government resists vacatur of the agency action at issue in *Collins*, although largely for case-specific reasons. *Collins* Federal Parties Reply Br. Br. 28-40.

As the Solicitor General has written, a hold is appropriate where the Court's decision in a pending case "could affect the analysis of [the] question" presented by the petition or if "it is possible that the Court's resolution of the question presented in [the pending case] could have a bearing on the analysis of petitioner's argument," even if the cases do "not involve precisely the same question." *U.S. BIO 7, Yang v. United States*, No. 02-136. Here, the lower court found the Association foreclosure sale failed to extinguish Freddie Mac's junior lien because the sale took place after FHFA put both regulated entities under conservatorship, thereby triggering the Foreclosure Bar.

Collins has the potential of holding the FHFA was unconstitutionally structured at the time of the conservatorship decision and call into question whether the conservatorship was validly imposed (and, if the conservatorship was not validly imposed, then the foreclosure bar should not have applied to this case).

That SFR did not raise an Appointments Clause challenge below does not preclude them from raising the issue now. The U.S. Supreme Court has "expressly included Appointments Clause objections" in the category of "nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). The U.S. Supreme Court has thus considered Appointment Clause challenges "despite the fact that [the challenge] had not been raised in the District Court or in the Court of Appeals." *Id.* at 879 (quoting *Glidden*, 370 U.S. at 536). In such cases, the "strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" outweighs any "disruption to sound appellate process entailed by entertaining objections not raised below." *Ibid.*

Nevertheless, because there is no material difference between the structure of the FHFA and the CFPB, SFR had no basis to raise an Appointments Clause challenge in this case until the U.S. Supreme Court overturned the Ninth Circuit's decision in *Seila Law*. *See Collins* Federal Parties Reply Br. 3, 23-24 (FHFA

conceding that its structure is indistinguishable from that of the CFPB for Appointments Clause purposes); *PHH Corp. v. CFPB*, 881 F.3d 75, 175-76 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (structure of FHFA "raises the same question we confront here" in Appointments Clause challenge to CFPB). The U.S. Supreme Court, however, did not overrule *Seila Law* until June 29, 2020, long after briefing was completed by the parties. *Seila Law LLC*, *supra* (2020) (decided on June 29, 2020)

Accordingly, if the Court does not grant the petition on the grounds enumerated in sections I through IV, it should at the very least hold the opinion pending the U.S. Supreme Court's decision in *Collins*, and then remand the case to the district court for reconsideration in light of this decision.

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CONCLUSION

This Court should grant SFR's request for rehearing, properly categorizing the Bank's quiet title claim as sounding in tort, and concluding such claim was time-barred. Alternatively, because HERA's structure is in question, and certain actions taken by the Agency may be voided by the U.S. Supreme Court, this Court should hold this case until the *Collins* decision issues.

DATED this 30th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

1. I 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 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 brief complies with the page-or type-volume limitations of NRAP 40(b)(3) because, excluding the pares of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 3,471 words.

3. I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

4. 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.

…

5. 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 30th day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on this 30th day of November, 2020. Electronic service of the foregoing PETITION FOR REHEARING shall be made in accordance with the Master Service.

/s/ *Karen L. Hanks*
An employee of Kim Gilbert Ebron