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 RESPONSE TO MOTION TO STAY REMITTITUR

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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: January 13, 2021.

BALLARD SPAHR LLP

By: /s/ Matthew D. Lamb

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INTRODUCTION

SFR has not satisfied the conditions permitting a stay of issuance of a remittitur because it points to no petition for a writ of certiorari in this case. Its motion should be denied on that basis.[1]

Even if that condition were no barrier to the motion, SFR has not established why a stay is merited. SFR's petition for a writ of certiorari challenging the Ninth Circuit's *M&T Bank* decision is unlikely to be granted; it identifies no split on the statute of limitations issue resolved in that case, nor can it demonstrate that the issue is sufficiently important to warrant Supreme Court review. SFR also cannot rely on the *Collins* appeal as a basis to stay; it waived the issue in that case by never raising it either in this appeal or below. And the Supreme Court's resolution of that appeal has no conceivable bearing on this appeal in any event.

Finally, the equities do not favor a stay. It would impede final judgment and encourage similar stays in dozens of other cases pending before the courts of Nevada. Such stays would give SFR and purchasers at homeowner association foreclosure sales a windfall at the expense of the Enterprises and judicial economy.

Chase respectfully requests that the Court deny SFR's motion.

ARGUMENT

I. SFR Has Not Satisfied the Standard for a Stay, As There Is No Pending Petition for Review of this Case

This Court allows a party to seek a stay of remittitur under only limited circumstances where the parties have not yet exhausted their opportunities to seek

[1] Capitalized terms are defined in Chase's merits briefing in this appeal.

relief on appeal; one is when a party has made an "application to the Supreme Court of the United States for a writ of certiorari." NRAP 41(b)(3). SFR has not filed such an application in connection with this case, nor does its motion suggest that it intends to do so. Accordingly, it has not satisfied the requirements for the imposition of a stay, and its motion should be denied on this basis alone.

Instead, SFR informs the Court that it has filed a petition for a writ of certiorari in *another* appeal, seeking review of the decision of the Ninth Circuit in *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020). *See* Motion at 1. SFR also cites to a totally unrelated case before the U.S. Supreme Court, *Collins v. Mnuchin*, No. 19-422. *See id.* Neither of those appeals seeks the U.S. Supreme Court's review of this Court's decision in *this* appeal, and therefore cannot serve as a basis to stay the issuance of a remittitur. SFR cites no case where this Court has stayed the issuance of a remittitur based on other appellate cases or certiorari petitions, and counsel for Chase have not identified any.

To allow the pendency of or developments in *other* cases to serve as a basis for a stay of the issuance of a remittitur would add delay to the final resolution of disputes and provide an opportunity for gamesmanship. This is especially true in a case like this one, where this Court ruled against SFR in an *en banc* decision, and subsequently denied SFR's petition for rehearing.

In its supplemental merits briefing, SFR already raised the fact that it intended to file a petition for a writ of certiorari in the *M&T Bank* appeal. SFR neglected to mention the *Collins* case in that briefing, although the writ of certiorari had been granted in that case months before. Despite having an opportunity to do so in that

briefing, SFR never suggested that the Court should stay its decision to await the resolution of either appeal. In any event, this Court proceeded to a decision and correctly reversed the judgment of the district court with instructions to enter judgment in favor of Chase.

Later, in its November 2020 petition for rehearing, SFR both informed the Court of the pending *Collins* case and reminded the Court of its petition for a writ of certiorari in *M&T Bank*. For the first time, SFR requested that the Court stay resolution of this case. But the Court declined to do so; denying the rehearing petition less than a month later. Thus, the Court has heard the arguments SFR makes again in its motion to stay, and has already rejected them.

This is not a circumstance where the Court's rules allow the issuance of a stay of remittitur. *See* NRAP 41. SFR has not suggested that it intends to petition for a writ of certiorari, nor has it presented a reason for the Court to ensure that it does not divest itself of jurisdiction. SFR has exhausted all its opportunities to argue the merits of this case and to suggest why the resolution of other appeals should affect this Court's analysis. This Court already found those arguments wanting.

The Court should thus deny SFR's attempt to take yet another bite at the apple and delay the final resolution of this case. To do otherwise would invite parties before this Court to use motions for a stay of the issuance of a remittitur as another opportunity to raise arguments concerning yet-to-be-decided appeals in other courts and to forestall final judgment.

II. SFR's Petition for a Writ of Certiorari in *M&T Bank* Lacks Merit

Even if a stay of remittitur could be appropriate under these circumstances, it would not be here, as SFR has very little chance of prevailing in its petition for a writ of certiorari in *M&T Bank*. The question SFR presented to the U.S. Supreme Court in that case, concerning the statute of limitations applicable to quiet title claims such as those in this case, does not satisfy Supreme Court Rule 10: Petitions for certiorari are "granted only for compelling reasons," typically involving at least one of the following factors: (1) the existence of a circuit split on an important matter; (2) a split in authority between two state supreme courts, or between a state supreme court and a federal circuit court; or (3) the existence of "an important question of federal law that has not been, but should be, settled by" the Supreme Court, or the resolution of a question of federal law "in a way that conflicts with relevant" Supreme Court precedent. S. Ct. R. 10. SFR failed to carry its burden of establishing that its petition falls within any of these categories.

First, there is no circuit split. In fact, the opposite is true. *M&T Bank* confirms that a *federal*-law limitations provision, 12 U.S.C. § 4617(b)(12)(A), governs cases involving quiet-title claims implicating the Federal Foreclosure Bar. *M&T Bank* follows the decisions of several other federal circuits that have considered related issues. *See FHFA v. UBS Americas Inc.*, 712 F.3d 136, 143 (2d Cir. 2013) (holding 12 U.S.C. § 4617(b)(12) provides a comprehensive limitations period for all actions brought by FHFA as Conservator); *FDIC v. Bledsoe*, 989 F.2d 805, 809 (5th Cir. 1993) (holding that the FDIC's similarly worded limitations period also applied to actions brought by a private entity acting as an assignee for the federal agency);

Smith v. FDIC, 61 F.3d 1552, 1561 (11th Cir. 1995) ("[B]ecause a mortgage lien is an interest in property created by contract, an action to enforce that lien is clearly a contract action.").

SFR's only hint that a split might exist—it never expressly claims one—is its reliance on *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982). *See M&T Bank* Pet. at 22-23. But in *Megapulse*, the issue was whether a claim against the United States was "founded upon contract" for the purposes of the Tucker Act, which waives sovereign immunity as to contract claims against the United States. *See* 28 U.S.C. §§ 1346(a)(2),1491(a)(1). As a waiver of sovereign immunity, that statute is construed narrowly. *See Lane v. Pena*, 518 U.S. 187, 192 (1996). The *Megapulse* court concluded that the claim at issue in that case was not a contract claim, but it also nowhere categorized the claim as a "tort," and in fact *refuted* any suggestion that the claim at issue sounded in tort. As the Ninth Circuit correctly concluded, *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. The *Megapulse* inquiry, strictly defining which claims are "'clearly' a contract claim," has no bearing on the analysis here, where courts must characterize *all* claims as either "contract" or "tort" solely for purposes of a statute of limitations provision. *See id.*

Second, SFR does not allege any split in authority between *M&T Bank* and any decision of this Court or the highest court of any other state. Again, the opposite is true: In this very case, the Court agreed with the analysis of *M&T Bank*. The Court held that while quiet-title claims relying on the Federal Foreclosure Bar are neither contract nor tort, when required to choose one of those two categories for the

purpose of selecting the applicable statute of limitations, such claims "sound more in contract than in tort." Opinion at 3. This Court also noted that "to the extent there is any lingering doubt about whether [the servicer's] claims are better characterized as sounding in contract or tort, federal law dictates that [courts] cede to the characterization that results in the longer limitations period"—the six-year period for contract-like claims. *Id.*

Third, SFR identifies neither any important federal question nor any ruling that conflicts with Supreme Court precedent on an issue of federal law. SFR suggests that the narrow statute of limitations analysis conducted by the Ninth Circuit in *M&T Bank* would somehow cause havoc in Nevada's tort law. Pet. at 25-26. SFR does not explain how this can be so, when the analysis is applicable only to claims by FHFA as Conservator, the Enterprises, and their servicers, and to a relatively narrow set of cases, most of which were filed well within the period that even SFR concedes is timely. Moreover, SFR suggests that the Ninth Circuit's decision would disrupt Nevada law without mentioning that this Court, finding no such problem, already reached the same conclusion as *M&T Bank* in this appeal.[2] Accordingly, there is no significant issue of federal law at issue in this matter that would be warrant a grant of certiorari by the Supreme Court.

III. *Collins* Has Nothing to Do With the Issues in This Case and Provides No Basis to Stay Remittitur

SFR has also failed to establish that the Supreme Court's upcoming decision in *Collins* stands to have any bearing on this Court's resolution of this appeal.

[2] A notable omission, as this Court's decision in this case preceded SFR's petition for a writ of certiorari in *M&T Bank* by over a month.

The issues in *Collins* are whether a provision in the Housing and Economic Recovery Act ("HERA") providing that a Senate-confirmed FHFA Director may only be removed by the President for cause violates the federal constitutional separation of powers, and, if so, whether a particular agency action taken by FHFA in 2012 duly challenged in the complaint in *Collins* can or should be invalidated as a result. *See* Cert. Pet. at 1, *Collins*, No. 19-422 (U.S., filed Sept. 15, 2019).

SFR has waived any argument related to the issues in *Collins* by never asserting such an argument below or in the proceedings before this Court. SFR attempts to excuse its waiver by citing to case law suggesting that it is somehow impossible to waive an Appointments Clause claim. *See* Mot. at 3 (citing *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991)). Even assuming that SFR has correctly characterized those authorities, they are inapposite here: there is no Appointments Clause claim or issue in *Collins*. The constitutional defect that the Enterprise shareholders raise in that appeal is not whether FHFA's Director is constitutionally appointed. Rather, they contend that the for-cause removal clause applicable to the Director of FHFA violates the separation of powers because it insulates the Director from Presidential authority. SFR cites no authority that a separation-of-powers challenge to a removal clause can be introduced into a case for the first time in a petition for rehearing of an appellate court decision.

Even if SFR had not waived the argument, it is wholly lacking in merit. The complaint in *Collins* named FHFA as a defendant and targeted a particular agency action. In this case, by contrast, SFR has not sued FHFA and does not attack any FHFA action, just the automatic operation of the statute. SFR does not—because it

cannot—suggest that any constitutional defect in the FHFA Director removal provision would somehow render all of HERA (including the Federal Foreclosure Bar) invalid. In past removal-restriction cases, the Supreme Court has held exactly the opposite. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2209 (2020) (holding that "the [CFPB] Director's removal protection severable from the other provisions of Dodd-Frank that establish the CFPB"); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (rejecting plaintiffs' argument that unconstitutional removal provision "rendered [agency] 'and all power and authority exercised by it' in violation of the Constitution"); *see also Collins v. Mnuchin*, 938 F.3d 553, 592 (5th Cir. 2019) ("the appropriate—and most judicially conservative—remedy is to sever the 'for cause' restriction on removal of the FHFA director from the statute"). Plaintiffs in *Collins* concede that, with one isolated exception, the removal provision is severable from all of HERA's other provisions. *See Collins* Br. at 77-78, *Collins*, No. 19-422 (U.S., filed Sept. 16, 2020).

SFR postulates that a U.S. Supreme Court holding that the FHFA Director's for-cause removal protection is unconstitutional would have the effect of invalidating the 2008 decisions to place the Enterprises in conservatorships. Pet. at 9. That suggestion is fanciful for multiple reasons. No party in *Collins* challenges the conservatorship decisions; rather, the relief the *Collins* plaintiffs request is predicated on the conservatorships' existence. It is far too late, 13 years after the fact, to challenge those decisions. *See* 12 U.S.C. § 4617(a)(5); 28 U.S.C. § 2401. Moreover, SFR—a third party, not an Enterprise—may lack standing to challenge the imposition of the conservatorships at all. 12 U.S.C. § 4617(a)(5). And the

conservatorship decisions were made by a carryover director from a predecessor agency under a transitional provision that did not even include the removal protection at issue in *Collins*. 12 U.S.C. § 4512(b)(5). SFR's suggestion that the courts unwind 13 years of conservatorship operations critical to the Nation's housing and financial markets, based on a misunderstanding of the issue in *Collins*, provides no basis to stay the issuance of a remittitur in this appeal.

IV. A Stay Would Delay Judgment and Benefit SFR at Freddie Mac's Expense

Finally, SFR cannot establish good cause for a stay; indeed, the equities favor issuance of the remittitur per the usual schedule of this Court.

Allowing this case to conclude with the issuance of the remittitur and the entry of judgment by the district court would serve the interests of judicial economy and substantial justice. SFR has sought to stay issuance of a remittitur in at least three other appeals raising the same issues that are now pending before this Court, and if this motion is successful, SFR and similarly situated HOA sale purchasers would seek stays and similar relief in the dozens of other cases pending before this Court, the Court of Appeals, and the district courts.

HOA sale purchasers like SFR have every incentive to needlessly prolong the appeal process, as any delay in judgment accrues to their benefit. Having acquired the property for far less than fair market value, SFR continues to reap substantial profits by renting it out at market rates. Meanwhile, Freddie Mac—which made a substantially larger, market-priced investment in the loan secured by the property—receives no return whatsoever. Until the case is resolved, SFR will collect additional

unjust economic returns from Freddie Mac's invested capital, thereby undermining the Conservator's statutory power to "preserve and conserve" Enterprise assets. *See* 12 U.S.C. § 4617(b)(2)(B)(iv) & (b)(2)(D)(ii).

Indeed, the fact that SFR has every incentive to defer final resolution of every case as long as possible is evident from its litigation strategy in its appeals before this Court. Seeking a stay of the remittitur is consistent with its frequent requests for supplemental briefing and its effort to petition for rehearing in every appeal. These actions threaten judicial economy and discourage settlements that reasonably reflect the legal landscape this Court's decisions have created.

Moreover, in the unlikely event that the U.S. Supreme Court grants certiorari in *M&T Bank* or resolves *Collins* in such a way as to call into question Freddie Mac's ownership of the Deed of Trust, issuance of a remittitur here would not cause SFR to suffer irreparable harm. If SFR elects to pay off Freddie Mac's lien or purchase the property and then prevails in the Supreme Court, it will be able to assert a claim for its money to be returned to it. If SFR elects not to pay off the lien or purchase the property, that is its choice. But that choice means it should not reap the returns to which a free-and-clear title holder is entitled. The only way SFR will be put to the choice, though, is for the remittitur to issue. No inequitable result would befall SFR in either event.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that the Court deny SFR's motion to stay issuance of the remittitur.

Dated: January 13, 2021.

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CERTIFICATE OF SERVICE

I certify that on January 13, 2021, I filed **Appellant's Response to Motion to Stay Remittitur**. Service will be made on the following through the Court's electronic filing system:

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