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 NOTICE OF SUPPLEMENTAL AUTHORITIES IN SUPPORT OF SFR'S MOTION TO STAY

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Attorneys for Appellant

SFR suggests that two orders staying briefing in pending Ninth Circuit appeals support its Motion to Stay the Remittitur here.[1] Not so.

First, the procedural posture of both appeals where stays have been entered differs materially from that of this case. There, neither appellant had filed an opening merits brief, so the stay orders merely paused the briefing calendars at the outset.[2] Here, by contrast, SFR seeks a stay of the issuance of the remittitur. This Court has entered a decision in Chase's favor after merits and supplemental briefing, and has also considered and denied SFR's petition for rehearing. The burden on SFR to support a stay now—when the merits of this case have been fully resolved after SFR has had several chances to make its arguments—is not the same as for pausing briefing before it has begun. *Compare* NRAP 41(b)(3)(permitting a stay of the issuance of a remittitur only when a party has made an "application to the Supreme Court of the United States for a writ of certiorari"), *with Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (a stay of briefing is appropriate when efficient for the court and the parties). And as Chase explained in its opposition to SFR's Motion to Stay, the conditions for staying

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

2 *See* Ex. A, Order, *FHFA v. GR Invs., LLC*, No. 20-16317 (9th Cir. Feb. 10, 2021); Ex. B, Docket, *GR Invs.*, No. 20-16317; Exhibit C, Order, *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 20-16585 (9th Cir. Feb. 11, 2021); Exhibit D, Docket, *SFR Invs.*, No. 20-16585.

issuance of a remittitur under NRAP 41—which were irrelevant to the Ninth Circuit appeals SFR cites, and therefore not evaluated in those orders—have not been met.

Second, SFR neglects to mention that both orders it cites were issued by the Clerk of Court, not a judge or motions panel. *See* Ex. A, Ex. C. FHFA, the Enterprises, and their servicers in those cases have filed motions for reconsideration of those stay orders.[3] And there is reason to believe those clerk-issued orders will be overturned, as no judge or panel of judges on the Ninth Circuit has ever granted one of SFR's numerous motions to stay its many appeals in Federal Foreclosure Bar cases. While SFR has previously succeeded in securing stay orders from the Ninth Circuit Clerk of Court, no motions or merits panel ever granted such a stay. *See, e.g.*, Ex. G, *Ditech Fin. LLC v. SFR Invs. Pool 1, LLC*, No. 20-15498 (Oct. 19, 2020) (motions panel denying SFR's motion to stay appeal). And when FHFA and an Enterprise's servicer moved for reconsideration of an order of the Clerk of Court imposing a stay, that motion was granted, and the stay of briefing lifted. *See* Ex. H, Mtn. for Reconsideration, *Bank of Am. v. Saticoy Bay LLC Series 5328 Lochmor*, No. 20-15582 (9th Cir., filed Oct. 13, 2020); Ex. I, Order, *Lochmor*, No. 20-1552 (Oct. 30, 2020).

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[3] *See* Ex. E, Mtn. for Reconsideration, *GR Invs.*, No. 20-16317 (filed Feb. 25, 2021); Ex. F, Mtn. for Reconsideration, *SFR Invs.*, No. 20-16585 (filed Feb. 25, 2021). Ninth Circuit Local Rule 27-10 allows for motions for reconsideration of clerk-issued orders, permitting review of such orders by an appellate commissioner or motions panel.

Finally, SFR omits that each of the two orders it cites granted only *part* of the requested stay. The appellants in those cases, like SFR here, sought a stay pending both the resolution of SFR's petition for a writ of certiorari 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), and the resolution of *Collins v. Yellen*, No. 19-422. The orders stayed those appeals pending only *Collins*, not *M&T Bank*. Therefore, the orders do not support SFR's Motion here insofar as it seeks a stay pending *M&T Bank*.

Moreover, as Chase explained in its opposition to the stay here, not only can the Supreme Court's resolution of *Collins* have no conceivable bearing on this appeal, but SFR has waived the constitutional issue presented in *Collins* by never raising it here—all the way through its merits appellate briefing, supplemental briefing, and petition for rehearing.

[*Signature block on next page*]

Dated: February 26, 2021.

BALLARD SPAHR LLP

By: /s/ Matthew D. Lamb

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on February 26, 2021, I filed Appellant's Response to Notice of Supplemental Authorities in Support of SFR's Motion to Stay. Service will be made on the following through the Court's electronic filing system:

Jacqueline A. Gilbert
KIM GILBERT EBRON

Counsel for Respondent

/s/ Adam Crawford
An Employee of Ballard Spahr LLP

EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 10 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FEDERAL HOUSING FINANCE AGENCY; et al.,

Plaintiffs-Appellees,

v.

GR INVESTMENTS, LLC; SILVERSTONE, LLC,

Defendants-Appellants.

No. 20-16317

D.C. No. 2:17-cv-03005-JAD-EJY
District of Nevada,
Las Vegas

ORDER

Appellants' opposed motion (Docket Entry No. 12) to stay appellate proceedings is granted in part. The previously established briefing schedule is vacated.

Appellate proceedings are stayed until resolution of *Collins v. Yellen*, Sup. Ct. Dkt. No. 19-422, or until further order of this court.

Appellants shall file a status report on May 11, 2021 and every 90 days thereafter while *Collins v. Yellen* remains pending. Status reports should include any change in the status of the case and the estimated date of resolution, if known.

Appellants shall notify the court by filing a status report within 7 days of the resolution of *Collins v. Yellen*.

Failure to file a status report may terminate the stay of appellate proceedings.

SSR/Pro Mo

The briefing schedule will be reset in a future order.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Sofia Salazar-Rubio
Deputy Clerk
Ninth Circuit Rule 27-7

EXHIBIT B

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 20-16317 **Docketed:** 07/08/2020
Nature of Suit: 3290 Other Real Property Actions
FHFA, et al v. GR Investments, LLC, et al
Appeal From: U.S. District Court for Nevada, Las Vegas
Fee Status: Paid

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0978-2 : 2:17-cv-03005-JAD-EJY
Court Reporter: Amber Mary McClane
Trial Judge: Jennifer A. Dorsey, District Judge
Date Filed: 12/06/2017

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
06/04/2020	06/04/2020	07/06/2020	07/06/2020

Prior Cases:
None

Current Cases:
None

FEDERAL HOUSING FINANCE AGENCY Plaintiff - Appellee,	Howard N. Cayne, Attorney [COR NTC Retained] Arnold & Porter Kaye Scholer LLP 601 Massachusetts Avenue, NW Washington, DC 20001 Leslie Bryan Hart, Attorney Direct: 775-788-2228 [COR NTC Retained] Fennemore Craig, P.C. 7800 Rancharrah Parkway Reno, NV 89511 Michael A. Johnson Direct: 202-942-5654 [COR NTC Retained] Arnold & Porter Kaye Scholer LLP 601 Massachusetts Avenue, NW Washington, DC 20001 Christina Miller Direct: 702-706-1408 [COR NTC Retained] Wright, Finlay & Zak, LLP 7785 W. Sahara Avenue Suite 200 Las Vegas, NV 89117 Asim Varma, Esquire Direct: 202-942-5180 [COR NTC Retained] Arnold & Porter Kaye Scholer LLP 601 Massachusetts Avenue, NW Washington, DC 20001
FEDERAL HOME LOAN MORTGAGE CORPORATION Plaintiff - Appellee,	Howard N. Cayne, Attorney [COR NTC Retained] (see above) Leslie Bryan Hart, Attorney

	Direct: 775-788-2228 [COR NTC Retained] (see above) Michael A. Johnson Direct: 202-942-5654 [COR NTC Retained] (see above) Christina Miller Direct: 702-706-1408 [COR NTC Retained] (see above) Asim Varma, Esquire Direct: 202-942-5180 [COR NTC Retained] (see above)
NATIONSTAR MORTGAGE, LLC Plaintiff - Appellee,	Christina Miller Direct: 702-706-1408 [COR NTC Retained] (see above)
v.	
GR INVESTMENTS, LLC Defendant - Appellant,	Diana S. Ebron, Attorney Direct: 702-485-3300 [COR NTC Retained] Kim Gilbert Ebron 7625 Dean Martin Drive Suite 110 Las Vegas, NV 89139 Jacqueline A. Gilbert, Esquire, Attorney Direct: 702-485-3300 [COR NTC Retained] Kim Gilbert Ebron 7625 Dean Martin Drive Suite 110 Las Vegas, NV 89139 Jason Martinez, Esquire, Attorney Direct: 702-485-3300 [COR NTC Retained] Kim Gilbert Ebron 7625 Dean Martin Drive Suite 110 Las Vegas, NV 89139
SILVERSTONE, LLC Defendant - Appellant,	Diana S. Ebron, Attorney Direct: 702-485-3300 [COR NTC Retained] (see above) Jacqueline A. Gilbert, Esquire, Attorney Direct: 702-485-3300 [COR NTC Retained] (see above) Jason Martinez, Esquire, Attorney Direct: 702-485-3300 [COR NTC Retained] (see above)

FEDERAL HOUSING FINANCE AGENCY; FEDERAL HOME LOAN MORTGAGE CORPORATION; NATIONSTAR MORTGAGE, LLC,

Plaintiffs - Appellees,

v.

GR INVESTMENTS, LLC; SILVERSTONE, LLC,

Defendants - Appellants.

07/08/2020	☐ 1 28 pg, 983.35 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Appellants GR Investments, LLC and Silverstone, LLC Mediation Questionnaire due on 07/15/2020. Transcript ordered by 08/05/2020. Transcript due 09/04/2020. Appellants GR Investments, LLC and Silverstone, LLC opening brief due 10/14/2020. Appellees Federal Home Loan Mortgage Corporation, Federal Housing Finance Agency and Nationstar Mortgage, LLC answering brief due 11/13/2020. Appellant's optional reply brief is due 21 days after service of the answering brief. [11746100] (JBS) [Entered: 07/08/2020 01:42 PM]
07/15/2020	☐ 2 2 pg, 116.39 KB	Filed (ECF) Appellants GR Investments, LLC and Silverstone, LLC Mediation Questionnaire. Date of service: 07/15/2020. [11753734] [20-16317] (Gilbert, Jacqueline) [Entered: 07/15/2020 11:57 AM]
07/15/2020	☐ 3	The Mediation Questionnaire for this case was filed on 07/15/2020. To submit pertinent **confidential** information directly to the Circuit Mediators, please use the following **link**. Confidential submissions may include any information relevant to mediation of the case and settlement potential, including, but not limited to, settlement history, ongoing or potential settlement discussions, non-litigated party related issues, other pending actions, and timing considerations that may impact mediation efforts.[11753829]. [20-16317] (AD) [Entered: 07/15/2020 12:44 PM]
07/21/2020	☐ 4 5 pg, 172.06 KB	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Assessment Conference, 08/06/2020, 11:00 a.m. PACIFIC Time. The briefing schedule previously set by the court remains in effect. See order for instructions and details. [11761224] (CL) [Entered: 07/21/2020 05:33 PM]
08/06/2020	☐ 5 1 pg, 97.63 KB	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Conference w/ counsel for appellees only, 08/13/2020, 11:00 a.m. Pacific Time. See order for details. [11779699] (CL) [Entered: 08/06/2020 11:50 AM]
08/14/2020	☐ 6 1 pg, 98.87 KB	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Conference w/ counsel for appellants only, 08/18/2020, 3:00 p.m. Pacific Time. See order for details. [11790360] (CL) [Entered: 08/14/2020 08:22 PM]
09/21/2020	☐ 7 1 pg, 31.69 KB	Filed order MEDIATION (SJS): This case is RELEASED from the Mediation Program. The briefing schedule previously set by the court is amended as follows: appellants' opening brief is due November 13, 2020; appellees' answering brief is due December 14, 2020; appellants' optional reply brief is due within 21 days from the service date of the answering brief. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant settlement discussions. [11831694] (AF) [Entered: 09/21/2020 04:41 PM]
11/06/2020	☐ 8	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellants GR Investments, LLC and Silverstone, LLC. New requested due date is 12/14/2020. [11884446] [20-16317] (Gilbert, Jacqueline) [Entered: 11/06/2020 11:16 AM]
11/06/2020	☐ 9	**Streamlined request [8] by Appellants GR Investments, LLC and Silverstone, LLC to extend time to file the brief is approved. Amended briefing schedule: Appellants GR Investments, LLC and Silverstone, LLC opening brief due 12/14/2020. Appellees Federal Home Loan Mortgage Corporation, Federal Housing Finance Agency and Nationstar Mortgage, LLC answering brief due 01/13/2021. The optional reply brief is due 21 days from the date of service of the answering brief.** [11884658] (DLM) [Entered: 11/06/2020 12:54 PM]
12/07/2020	☐ 10 5 pg, 173.26 KB	Filed (ECF) Appellants GR Investments, LLC and Silverstone, LLC Unopposed Motion to extend time to file Opening brief until 01/13/2021. Date of service: 12/07/2020. [11917823] [20-16317] (Gilbert, Jacqueline) [Entered: 12/07/2020 05:15 PM]
12/08/2020	☐ 11 1 pg, 93.08 KB	Filed clerk order (Deputy Clerk: th): Granting Unopposed Motion [10] (ECF Filing) filed by Appellants to extend time to file opening brief. Appellants GR Investments, LLC and Silverstone, LLC opening brief due 01/13/2021. Appellees Federal Home Loan Mortgage Corporation, Federal Housing Finance Agency and Nationstar Mortgage, LLC answering brief due 02/12/2021. The optional reply brief is due 21 days after service of the answering brief. [11919087] (TH) [Entered: 12/08/2020 02:41 PM]
01/06/2021	☐ 12 6 pg, 145.77 KB	Filed (ECF) Appellants GR Investments, LLC and Silverstone, LLC Motion to stay appellate proceedings. Date of service: 01/06/2021. [11954533] [20-16317] (Martinez, Jason) [Entered: 01/06/2021 02:11 PM]
01/19/2021	☐ 13 16 pg, 50.63 KB	Filed (ECF) Appellee FHFA response to motion ([12] Motion (ECF Filing), [12] Motion (ECF Filing) motion to stay appellate proceedings). Date of service: 01/19/2021. [11968871] [20-16317] (Johnson, Michael) [Entered: 01/19/2021 06:40 PM]
01/26/2021	☐ 14 7 pg, 200.87 KB	Filed (ECF) Appellants GR Investments, LLC and Silverstone, LLC reply to response (motion to stay appellate proceedings,). Date of service: 01/26/2021. [11981823] [20-16317] (Martinez, Jason) [Entered: 01/26/2021 01:17 PM]
02/10/2021	☐ 15 2 pg, 127.5 KB	Filed clerk order (Deputy Clerk: SSR): Appellants' opposed motion (Docket Entry No. [12]) to stay appellate proceedings is granted in part. The previously established briefing schedule is vacated. Appellate proceedings are stayed until resolution of Collins v. Yellen, Sup. Ct. Dkt. No. 19-422, or until further order of this court. Appellants shall file a status report on May 11, 2021 and every 90 days thereafter while Collins v. Yellen remains pending. Status reports should include any change in the status of the case and the estimated date of resolution, if known. Appellants shall notify the court by filing a status report within 7 days

		of the resolution of Collins v. Yellen. Failure to file a status report may terminate the stay of appellate proceedings. The briefing schedule will be reset in a future order. [12000074] (AF) [Entered: 02/10/2021 05:56 PM]
02/24/2021	☐ 16 17 pg, 53.93 KB	Filed (ECF) Appellee FHFA motion for reconsideration of non-dispositive Clerk Order of 02/10/2021. Date of service: 02/24/2021. [12016007] [20-16317] (Johnson, Michael) [Entered: 02/24/2021 05:42 PM]

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- (•) **Documents and Docket Summary**
- ( ) **Documents Only**

[x] **Include Page Numbers**

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Billable Pages:	3	**Cost:**	0.30

EXHIBIT C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 11 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff-counter-defendant-Appellee,

v.

SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION,

Defendant,

and

SFR INVESTMENTS POOL 1, LLC,

Defendant-counter-claimant-cross-claimant-Appellant,

v.

KEN YAO-HUI KWONG,

Cross-claim-defendant.

No. 20-16585

D.C. No. 2:17-cv-01750-APG-BNW
District of Nevada,
Las Vegas

ORDER

Appellants' opposed motion (Docket Entry No. 12) to stay appellate proceedings is granted in part. The previously established briefing schedule is vacated.

Appellate proceedings are stayed until resolution of *Collins v. Yellen*, Sup. Ct. Dkt. No. 19-422, or until further order of this court.

SSR/Pro Mo

Appellants shall file a status report on May 11, 2021 and every 90 days thereafter while *Collins v. Yellen* remains pending. Status reports should include any change in the status of the case and the estimated date of resolution, if known.

Appellants shall notify the court by filing a status report within 7 days of the resolution of *Collins v. Yellen*.

Failure to file a status report may terminate the stay of appellate proceedings.

The briefing schedule will be reset in a future order.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Sofia Salazar-Rubio
Deputy Clerk
Ninth Circuit Rule 27-7

EXHIBIT D

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 20-16585 **Docketed:** 08/18/2020
Nature of Suit: 4290 Other Real Property Actions
FNMA/Fannie Mae v. SFR Investments Pool 1, LLC, et al
Appeal From: U.S. District Court for Nevada, Las Vegas
Fee Status: Paid

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0978-2 : 2:17-cv-01750-APG-BNW
Trial Judge: Andrew P. Gordon, District Judge
Date Filed: 06/26/2017

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
07/17/2020	07/17/2020	08/17/2020	08/17/2020

Prior Cases:
None

Current Cases:
None

FEDERAL NATIONAL MORTGAGE ASSOCIATION Plaintiff-counter-defendant - Appellee,	Christina Miller Direct: 702-706-1408 [COR NTC Retained] Wright, Finlay & Zak, LLP 7785 W. Sahara Avenue Suite 200 Las Vegas, NV 89117
v.	
SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION Defendant,	
SFR INVESTMENTS POOL 1, LLC Defendant-counter-claimant-cross-claimant - Appellant,	Diana S. Ebron, Attorney Direct: 702-485-3300 [COR NTC Retained] Kim Gilbert Ebron 7625 Dean Martin Drive Suite 110 Las Vegas, NV 89139 Jacqueline A. Gilbert, Esquire, Attorney Direct: 702-485-3300 [COR NTC Retained] Kim Gilbert Ebron 7625 Dean Martin Drive Suite 110 Las Vegas, NV 89139 Karen Hanks, Attorney Direct: 702-485-3300 [COR NTC Retained] Kim Gilbert Ebron 7625 Dean Martin Drive Suite 110 Las Vegas, NV 89139
v.	
KEN YAO-HUI KWONG Cross-claim-defendant,	

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff-counter-defendant - Appellee,

v.

SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION,

Defendant,

and

SFR INVESTMENTS POOL 1, LLC,

Defendant-counter-claimant-cross-claimant - Appellant,

v.

KEN YAO-HUI KWONG,

Cross-claim-defendant.

08/18/2020	☐ 1 28 pg, 981.98 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Appellant SFR Investments Pool 1, LLC Mediation Questionnaire due on 08/25/2020. Appellant SFR Investments Pool 1, LLC opening brief due 10/16/2020. Appellee Federal National Mortgage Association answering brief due 11/16/2020. Appellant's optional reply brief is due 21 days after service of the answering brief. [11793048] (JBS) [Entered: 08/18/2020 10:59 AM]
08/27/2020	☐ 2 2 pg, 96.26 KB	MEDIATION ORDER FILED: The court of appeals' records do not indicate that appellant has filed a mediation questionnaire in accordance with Cir. R. 3-4. Within seven (7) days of the filing date of this order, appellant shall file a Mediation Questionnaire or dismiss the appeal voluntarily. [11804803] (LW) [Entered: 08/27/2020 11:29 AM]
08/28/2020	☐ 3 2 pg, 116.54 KB	Filed (ECF) Appellant SFR Investments Pool 1, LLC Mediation Questionnaire. Date of service: 08/28/2020. [11805769] [20-16585] (Gilbert, Jacqueline) [Entered: 08/28/2020 08:59 AM]
08/28/2020	☐ 4	The Mediation Questionnaire for this case was filed on 08/28/2020. To submit pertinent **confidential** information directly to the Circuit Mediators, please use the following **link**. Confidential submissions may include any information relevant to mediation of the case and settlement potential, including, but not limited to, settlement history, ongoing or potential settlement discussions, non-litigated party related issues, other pending actions, and timing considerations that may impact mediation efforts.[11806195]. [20-16585] (AD) [Entered: 08/28/2020 12:44 PM]
09/02/2020	☐ 5 5 pg, 168.69 KB	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Assessment Conference, 09/21/2020, 3:00 p.m. PACIFIC Time. The briefing schedule previously set by the court remains in effect. See order for instructions and details. [11810755] (CL) [Entered: 09/02/2020 11:45 AM]
09/22/2020	☐ 6 2 pg, 121.85 KB	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Conference, 10/13/2020, 2:00 p.m. Pacific Time. The briefing schedule previously set by the court is amended as follows: Appellant SFR Investments Pool 1, LLC opening brief due 11/16/2020. Appellee Federal National Mortgage Association answering brief due 12/16/2020. Appellant optional reply brief is due within 21 days afer service of the answering brief. See order for details. [11833566] (CL) [Entered: 09/22/2020 07:14 PM]
10/14/2020	☐ 7 2 pg, 91.52 KB	MEDIATION ORDER FILED: This case is RELEASED from the Mediation Program. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant settlement discussions while the appeal is pending. [11858807] (CL) [Entered: 10/14/2020 03:08 PM]
11/09/2020	☐ 8	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellant SFR Investments Pool 1, LLC. New requested due date is 12/16/2020. [11887063] [20-16585] (Gilbert, Jacqueline) [Entered: 11/09/2020 03:42 PM]
11/09/2020	☐ 9	**Streamlined request [8] by Appellant SFR Investments Pool 1, LLC to extend time to file the brief is approved. Amended briefing schedule: Appellant SFR Investments Pool 1, LLC opening brief due 12/16/2020. Appellee Federal National Mortgage Association answering brief due 01/15/2021. The optional reply brief is due 21 days from the date of service of the answering brief.** [11887277] (JN) [Entered: 11/09/2020 04:41 PM]
12/09/2020	☐ 10 5 pg, 171.09 KB	Filed (ECF) Appellant SFR Investments Pool 1, LLC Unopposed Motion to extend time to file Opening brief until 01/15/2021. Date of service: 12/09/2020. [11920095] [20-16585] (Gilbert, Jacqueline) [Entered: 12/09/2020 11:09 AM]
12/10/2020	☐ 11 2 pg, 93.51 KB	Filed clerk order (Deputy Clerk: LKK): (ECF Filing) filed by Appellant SFR Investments Pool 1, LLC; Granting Motion [10] (ECF Filing) motion to extend time to file brief filed by Appellant SFR Investments Pool 1, LLC. Appellant SFR Investments Pool 1, LLC opening brief due 01/15/2021. Appellee Federal National Mortgage Association answering brief due 02/16/2021. The optional reply brief is due 21 days after service of the answering brief. [11922745] (LKK) [Entered: 12/10/2020 01:54 PM]
01/08/2021	☐ 12 6 pg, 143.13 KB	Filed (ECF) Appellant SFR Investments Pool 1, LLC Motion to stay appellate proceedings. Date of service: 01/08/2021. [11957035] [20-16585] (Gilbert, Jacqueline) [Entered: 01/08/2021 11:55 AM]
01/19/2021	☐ 13 15 pg, 369.33 KB	Filed (ECF) Appellee FNMA/Fannie Mae response opposing motion ([12] Motion (ECF Filing), [12] Motion (ECF Filing) motion to stay appellate proceedings). Date of service: 01/19/2021. [11968534] [20-16585] (Miller, Christina) [Entered: 01/19/2021 04:06 PM]
01/26/2021	☐ 14 6 pg, 199.8 KB	Filed (ECF) Appellant SFR Investments Pool 1, LLC reply to response (). Date of service: 01/26/2021. [11981830] [20-16585] (Gilbert, Jacqueline) [Entered: 01/26/2021 01:18 PM]
02/11/2021	☐ 15 2 pg, 127.48 KB	Filed clerk order (Deputy Clerk: SSR): Appellants' opposed motion (Docket Entry No. [12]) to stay appellate proceedings is granted in part. The previously established briefing schedule is vacated. Appellate proceedings are stayed until resolution of Collins v. Yellen, Sup. Ct. Dkt. No. 19-422, or until further order of this court. Appellants shall file a status report on May 11, 2021 and every 90 days thereafter while Collins v. Yellen remains pending. Status reports should include any change in the status of the case and the estimated date of resolution, if known. Appellants shall notify the court by filing a status report within 7 days of the resolution of Collins v. Yellen. Failure to file a status report may terminate the stay of appellate proceedings. The briefing schedule will be reset in a future order. [12000641] (JPD) [Entered: 02/11/2021 11:40 AM]

02/24/2021	☐ 16 17 pg, 360.42 KB	Filed (ECF) Appellee FNMA/Fannie Mae motion for reconsideration of non-dispositive Clerk Order of 02/11/2021. Date of service: 02/24/2021. [12015678] [20-16585] (Miller, Christina) [Entered: 02/24/2021 03:14 PM]

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PACER Login:	ballardric	**Client Code:**	00175348
Description:	Docket Report (filtered)	**Search Criteria:**	20-16585
Billable Pages:	2	**Cost:**	0.20

EXHIBIT E

No. 20-16317

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOUSING FINANCE AGENCY, FEDERAL HOME LOAN MORTGAGE CORPORATION, AND NATIONSTAR MORTGAGE, LLC
Plaintiffs-Appellees,

v.

GR INVESTMENTS, LLC AND SILVERSTONE, LLC,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Nevada

APPELLEES' MOTION FOR RECONSIDERATION OF ORDER STAYING APPEAL

Christina V. Miller, Esq.
WRIGHT, FINLAY & ZAK, LLP
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Attorneys for Plaintiff-Appellee Nationstar Mortgage, LLC

Leslie Bryan Hart, Esq.
John D. Tennert, Esq.
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This appeal involves a fact pattern familiar to the Court: A subsequent purchaser of property sold at a homeowners' association ("HOA") foreclosure sale contends that it acquired free-and-clear title because, under a Nevada statute, the sale purportedly extinguished a deed of trust encumbering the property at the time of the foreclosure. But at the time of the HOA's sale, the Federal Home Loan Mortgage Corporation ("Freddie Mac") owned the deed of trust and was under the Federal Housing Finance Agency's ("FHFA") conservatorship. Therefore, 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar**"**), protected that property interest from extinguishment. *See Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017).

On February 10, 2021, the Clerk partially granted Defendant-Appellants' motion to stay this appeal, staying proceedings until the resolution of *Collins v. Yellen*, No. 19-422 (U.S.) ("Order"). Plaintiff-Appellees FHFA, Freddie Mac, and Nationstar Mortgage, LLC, respectfully move for reconsideration. As Circuit Rule 27-10—which governs such motions—requires, Plaintiffs respectfully submit that the Order "overlook[s] or misunderst[ands]" certain "points of law or fact," specifically, the relationship between the facts and law at issue in this case and in *Collins*, which provides no basis to stay this appeal.

The Order is in error insofar as the Clerk credited Defendants' arguments concerning whether *Collins* could affect this appeal. Defendants' characterization

of the issues in *Collins* is inaccurate, and no remotely possible outcome of *Collins* will have any effect on this appeal.

Collins involves a constitutional challenge to the statutory provision governing the President's ability to remove FHFA's Director from that position. The Supreme Court has not been asked to retroactively terminate FHFA's existence, to undo FHFA's conservatorships of Fannie Mae and Freddie Mac, or to invalidate any of the statutory powers or protections applicable to FHFA as Conservator, such as the Federal Foreclosure Bar. Nor could the Supreme Court plausibly do any of that under existing precedent even if a party had requested such relief. And even if Defendants' speculation about possible outcomes of *Collins* were plausible, Defendants could not rely on its holding because they have waived the issue presented in that case.

The error embodied in the Order does not merely affect this case; Defendants and other similarly situated HOA sale purchasers are attempting to leverage the Order to stay a large number of cases before this Court, the District of Nevada, and Nevada state courts. If successful, this will have the effect of significantly delaying the resolution of the Federal Foreclosure Bar-related litigation that has for years burdened this Court and the District of Nevada, and which this Court has demonstrated an inclination to conclude swiftly. Defendants prefer to freeze all progress, as that would give them and other similarly situated

parties an economic windfall at the expense of the federal conservatorships of Fannie Mae and Freddie Mac.

The Clerk of Court issued the Order under Circuit Rule 27-7. Accordingly, Plaintiffs move for reconsideration under Circuit Rule 27-10 and request that the Court deny Defendants' Motion to Stay.

LEGAL STANDARD

While this Court has not, to Plaintiffs' knowledge, articulated a standard for motions to stay an appeal, the Court has the inherent discretionary power to manage its docket in the interest of substantial justice and efficiency for the parties and the Court. *See Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) ("The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.) (internal quotation marks and citation omitted).

Under Circuit Rule 27-7, "the Court may delegate to the Clerk or designated deputy clerks … authority to decide motions filed with the Court. Orders issued pursuant to this section are subject to reconsideration pursuant to Circuit Rule 27-10." Circuit Rule 27-10 specifies that a party may move for reconsideration of an Order issued by a deputy clerk by "stat[ing] with particularity the points of law or fact which … the Court has overlooked or misunderstood." Such a motion will be

evaluated first by the deputy clerk who issued the underlying order, and then, if he or she is "disinclined to grant" the motion, it "is referred to an appellate commissioner." Cir. R. 27-10(b). Such orders may also be referred to a motions panel. *Id.*

RELEVANT BACKGROUND

Defendants appeal from a June 4, 2020 district court order holding that the Federal Foreclosure Bar protected Freddie Mac's deed of trust from extinguishment through a state-law HOA foreclosure sale. At no point in the briefing before the district court did Defendants raise a constitutional challenge to the removal provision concerning FHFA's Director.

Defendants filed their notice of appeal on July 8, 2020, and the appeal was released from the mediation program on September 21, 2020. Defendants twice requested, and received, extensions of the deadline for their opening brief. One week before the expiration of their second extended deadline, Defendants filed a Motion to Stay this appeal pending resolution of the pending petition for a writ of certiorari challenging this Court's decision in *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854, 858-59 (9th Cir. 2020), and the resolution of *Collins*. The Clerk of Court partially granted the Motion on February 10, 2021, staying proceedings only pending the resolution of *Collins*. *See* Order.

ARGUMENT

The primary issues in this appeal are whether the Federal Foreclosure Bar protected Freddie Mac's deed of trust and whether Plaintiffs' quiet-title claim based on the Federal Foreclosure Bar is timely under 12 U.S.C. § 4617(b)(12)(A) (the "HERA Limitations Provision"). Both issues are controlled by published decisions of this Court—decisions which have been echoed in numerous unpublished decisions of this Court and both published and unpublished decisions of the Nevada Supreme Court.

Neither issue is presented in, or could be informed by, the *Collins* case pending before the U.S. Supreme Court; conversely, *Collins* concerns facts and legal issues never raised in this case. Accordingly, reconsideration of the Order staying this appeal pending *Collins* is warranted.

Moreover, the Order may harm judicial economy far beyond this case: it is already being cited by Defendants' counsel, and others, to seek stays of a large number of cases pending before this Court, the District of Nevada, and the Nevada Supreme Court. Such stays will financially benefit HOA sale purchasers like Defendants to the detriment of the federal conservatorships that have prevailed in every case concerning the issues before this Court. Accordingly, the equities do not favor a stay, and do favor reconsideration of the Order.

The Court should reconsider its Order, lift the stay, reinstate the briefing

calendar, and resolve this appeal promptly under the Court's normal procedures.

I. *Collins* Has Nothing to Do With the Issues in This Case and Provides No Basis to Stay this Appeal

The Order does not provide a rationale for staying this appeal pending the Supreme Court's decision in *Collins*, but it seems to accept at least some of Defendants' arguments that *Collins* might have some material effect on this appeal. There is no basis for this conclusion, making reconsideration appropriate.

First, there is no overlap between the issues pending in *Collins* and those before the Court here. The only thing that connects the two cases is that they generally involve FHFA and the Enterprises under its conservatorship, Fannie Mae and Freddie Mac. Beyond that, their subject matter is unrelated.

In *Collins*, shareholders of the Enterprises contend that a provision in the Housing and Economic Recovery Act ("HERA") providing that a Senate-confirmed FHFA Director may be removed by the President only for cause violates the federal constitutional separation of powers. If the provision is held to be unconstitutional, the shareholders in *Collins* contend that a particular agency action taken by FHFA in 2012—an amendment to the 2008 agreement between FHFA and the Department of Treasury concerning Treasury's investment in the Enterprises—should be invalidated. *See* Cert. Pet. at 1, *Collins*, No. 19-422 (U.S., filed Sept. 15, 2019).

These issues are not before this Court. Unlike in *Collins*, Defendants do not

attack any particular agency *action*, but rather contend that the automatic operation of the Federal Foreclosure Bar, a federal *statute* passed by Congress, does not apply to a deed of trust that encumbers a property they purchased. At no point in any pleading or any briefing on the merits of this case have the Defendants argued that an action taken by FHFA is invalid, much less that an FHFA action is invalid because of a constitutional defect in the FHFA Director removal provision.

Defendants do not appear to suggest that any such constitutional defect would somehow render all of HERA (including the Federal Foreclosure Bar) invalid. Nor could they make such an argument, as the Supreme Court has already rejected a similar contention in another removal-restriction case. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020) (finding "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"). Even the plaintiffs in *Collins* concede that under *Seila Law*, with one

isolated exception that is not implicated here,[1] the removal-provision is severable from all of HERA's other provisions. *See* Collins Br. at 77-78.

Rather, Defendants postulate in their Motion that a holding in *Collins* 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. Motion at 9. That suggestion is implausible, as it contemplates that in deciding *Collins* the Supreme Court would reach issues not presented to it—*i.e.*, determining that the remedy for an unconstitutional removal provision includes unwinding the conservatorships themselves. No party in *Collins* challenges the decision to place the Enterprises into conservatorships; rather, the relief the plaintiffs seek in *Collins* is predicated on the conservatorships' existence. And there is no cause to believe that the Supreme Court would grant such relief even if any party in *Collins* had asked it to; that Court has already rejected a similar call to strike down a law authorizing the establishment and operations of an independent federal agency with years of activity in *Seila Law*, and declined to do

[1] The *Collins* plaintiffs contend that only 12 U.S.C. § 4617(b)(2)(J)(ii), which gives FHFA the power to "take any action authorized by this section [of HERA], which the Agency determines is in the best interest of the [Enterprises] or the Agency" should be abrogated. That provision is irrelevant to this appeal; even if it were abrogated, it would not alter the protection provided by the separate Federal Foreclosure Bar. Indeed, no one has cited to it in this case, or, so far as Plaintiffs know, in any other Federal Foreclosure Bar case.

so. Such an outcome is not even remotely plausible in *Collins* and Defendants assert this contrived argument because of the economic benefit to them that results from delays in this and other Federal Foreclosure Bar cases. *See infra* at 10-15. Moreover, the outcome in *Collins* Defendants hope for would have enormous economic and political consequences, as it would require the unwinding of 13 years of conservatorship operations over Enterprises critical to the Nation's housing and financial markets; together the Enterprises account for more than $5 trillion worth of mortgages. It is not clear that a retroactive alteration of years of economic and political reality—let alone one of such magnitude—is even feasible.

Second, Defendants have waived any argument related to the issues in *Collins* by never before asserting such an argument in this case. At no point in this case have Defendants ever challenged FHFA's decision to put Fannie Mae and Freddie Mac under conservatorship or argued that the terms of the Director's removal conflict with Article II of the Constitution; they cannot do so for the first time on appeal. Even absent a waiver, Defendants could not raise such a challenge now—13 years after the fact—as the time to challenge those decisions has long since expired. *See* 12 U.S.C. § 4617(a)(5); 28 U.S.C. § 2401. Moreover, Defendants—who are third parties to the decisions to place the Enterprises into conservatorship—lack standing to challenge the imposition of the conservatorships at all. *See* 12 U.S.C. § 4617(a)(5).

Defendants attempted to excuse their 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 Defendants have correctly characterized the authorities they cite, 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 was 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 accountability to the President. Defendants cite no authority that a separation-of-powers challenge to a removal clause can be introduced into a case for the first time in a motion to stay appellate proceedings in a case where the removal-clause issue would be immaterial anyway.

II. The Interests of Judicial Economy and Substantial Justice Are Best Served By Lifting the Stay

The equities favor reconsideration of the Order. Not only should the resolution of this appeal proceed on the usual schedule of this Court, but the Order should be reversed so that it can no longer be cited by Defendants and similarly situated HOA sale purchasers to halt a substantial number of pending cases.

Allowing this appeal to proceed would serve the interests of judicial economy and substantial justice. Defendants are represented by the same counsel

as SFR, a party which frequently appears in similar cases before this Court and others pending in the District of Nevada and Nevada state courts. SFR and parties like it have already cited the Order to support motions to stay over a dozen other cases on appeal or in the midst of dispositive motion briefing.[2] If the Order is not reversed, SFR and similarly situated parties likely will ask for a stay of more than three dozen appeals now pending before this Court alone.[3] Moreover, courts in the District of Nevada and the Nevada Supreme Court may be persuaded by the Order to grant SFR and others' pending motions to stay the dozens of cases before them

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[2] *See, e.g.*, Motion to Stay, *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, No. 81315 (Nev. filed Feb. 23, 2021); Motion to Stay, *FHFA v. Las Vegas Dev't Grp. LLC*, No. 20-15658 (9th Cir. filed Feb. 23, 2021); Motion to Stay, *Las Vegas Dev't Grp., LLC v. Nationstar Mortg., LLC*, No. 80826 (Nev. filed Feb. 17, 2021); Motion to Stay, *Bank of Am. N.A. v, SFR Invs. Pool 1, LLC*, No. 2:16-cv-2764-RFB (D. Nev., filed Feb. 12, 2021); Notice of Supp. Authorities in Support of Motion to Stay, *SFR Invs. Pool 1, LLC v. JPMorgan Chase Bank N.A.*, No. 79313 (Nev., filed Feb. 11, 2021); Notice of Supp. Authorities in Support of Motion to Stay, *SFR Invs. Pool 1, LLC v. Nationstar Mortg. LLC*, No. 80586 (Nev., filed Feb. 11, 2021).

[3] *See, e.g.*, *Bank of America, N.A. v. SFR Invs. Pool 1, LLC*, No. 19-15919; *Bank of America, N.A. v. LVDG, LLC, DBA LVDG Series 109*, No. 19-16447; *Ocwen v. SFR*, No. 19-16889; *Nationstar Mortg. LLC v. 312 Pocono Ranch Tr.*, No. 19-17504; *Bank of America v. SFR*, No. 19-16922; *Ditech Fin. LLC v. Dutch Oven Ct. Tr.*, No. 20-15066; *FHFA v. Las Vegas Dev. Grp.*, No. 20-15658; *Bank of Am., N.A. v. Saticoy Bay LLC Series 5328*, No. 20-15582; *Vegas Prop. Servs., Inc. v. Fannie Mae*, No. 20-16320; *Fannie Mae v. Saticoy Bay Series 8324 Charleston*, No. 20-16359; *Ditech Fin. LLC v. Park Bonanza East Townhouse Owners Ass'n*, No. 20-16575; *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 20-16585; *RH Kids, LLC v. Bank of America, N.A.*, No. 20-16731; *Nationstar Mortg. LLC v. SFR Invs. Pool 1, LLC*, No. 20-16893; *TRP Fund VIII, LLC v. NewRez LLC*, No. 20-17129.

as well. All progress toward resolution of potentially dozens of cases concerning hundreds of properties suffering from clouded property interests will grind to a halt.

This Court has expended effort to move long-running and wide-ranging litigations through its docket efficiently and expeditiously. For that reason, this Court has previously rejected efforts by HOA sale purchasers represented by Defendants' counsel to draw out appeals in similar circumstances. *See, e.g.*, Order Denying Motion to Stay Appellate Proceedings, *Ditech Financial LLC v. SFR Invs. Pool 1, LLC*, No. 20-15498 (9th Cir. Oct. 19, 2020); Order, *FHFA v. SFR Invs. Pool 1, LLC*, No. 19-15910 (9th Cir. May 26, 2020) (denying Appellant's emergency motion to stay appeal); Order Granting Motion to Lift Stay of Mandate, *Freddie Mac v. SFR Invs. Pool 1, LLC*, No. 16-15962 (9th Cir. Aug. 14, 2018).[4] The Court has also recently been resolving each similar appeal without oral argument, often issuing a decision mere days after the case was submitted for

[4] *See also* Order, *Nationstar Mortg. LLC v. Keynote Props.*, No. 19-15287 (9th Cir. May 26, 2020) (denying Appellant's emergency motion to stay appeal); Order, *Bourne Valley Court Trust v Wells Fargo Bank NA*, No. 19-15253 (9th Cir. May 26, 2020) (same); Order, *M&T Bank v. SFR Invs. Pool 1, LLC*, No. 18-17395 (9th Cir. May 26, 2020) (same). Defendants will likely cite instances where motions filed by its counsel on behalf of HOA sale purchasers have been granted. However, all such motions were granted by the Clerk of Court. When identical motions to stay on the same grounds were resolved by motions or merits panels, they have always been denied.

disposition without oral argument. *See, e.g.*, *Fannie Mae v. Ferrell St. Tr.*, No. 20-15156, 2021 WL 461943, at *1 (9th Cir. Feb. 9, 2021) (opinion issued four days after appeal submitted on the briefs).[5] These Orders demonstrate that this Court is not inclined to further delay the resolution of this set of cases, which have been clogging the dockets of the District of Nevada and this Court for more than six years.

The fact that the Order has emboldened HOA sale purchasers like Defendants' campaign to seek stays of many similar cases, *see supra* at 11 & n.2, reflects the economic circumstances at play; any delay in judgment accrues to their benefit. Having acquired their properties for far less than fair market value, Defendants and others like them continue to reap substantial profits by renting the properties at market rates. Meanwhile, the Enterprises—which made substantially larger, market-priced investments in the loans secured by the properties—receive no return whatsoever. Until these cases are resolved, Defendants and similar HOA sale purchasers will collect additional unjust economic returns from the Enterprises' invested capital, thereby undermining the Conservator's statutory

[5] *Nationstar Mortg. LLC v. Vegas Prop. Servs., Inc.*, No. 20-15054, 2021 WL 461936, at *1 (9th Cir. Feb. 9, 2021) (opinion issued four days after appeal submitted on the briefs); *Fannie Mae v. Casa Mesa Villas Homeowners Ass'n*, No. 19-17133, 2020 WL 7075503 (9th Cir. Dec. 3, 2020) (opinion issued two weeks after appeal submitted on the briefs); *Fannie Mae v. Haus*, 819 F. App'x 563 (9th Cir. 2020) (opinion issued two days after appeal submitted on the briefs).

power to "preserve and conserve" Enterprise assets. *See* 12 U.S.C. §§ 4617(b)(2)(B)(iv), 4617(b)(2)(D)(ii).

Indeed, the fact that Defendants have every incentive to defer final resolution of every case as long as possible is evident from the litigation strategy pursued by SFR and other acquirers represented by the same counsel in appeals before this Court. Seeking a stay here is consistent with such parties' frequent requests for stays and efforts to petition for rehearing of related cases.[6] These actions threaten judicial economy and discourage settlements that reasonably reflect the legal landscape this Court's decisions have created.

Moreover, proceeding with this appeal will not impose any harm on Defendants. Even if Defendants' fanciful projections about *Collins* come true, Defendants could raise that in briefing before this Court reaches a decision, or a letter pursuant to Federal Rule of Appellate Procedure 28(j). Stays of appeals are the exception, not the rule, and it is not inequitable to require Defendants to pursue their appeal in due course. Defendants even have the option to retain the property

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[6] *See, e.g.*, Motion to Stay Appeal, *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 20-16585 (9th Cir. filed Jan. 8, 2021); Motion to Stay Appeal, *Ditech Fin. LLC v. SFR Invs. Pool 1, LLC*, No. 20-15498 (9th Cir. filed Sept. 14, 2020); Emergency Motion to Stay Appeal/Oral Argument, *Freddie Mac v. SFR Invs. Pool 1, LLC*, No. 19-15910 (9th Cir. filed May 21, 2020); Motion for Abstention or in the Alternative for Stay, *Bank of America, N.A. v. SFR Invs. Pool 1, LLC*, No. 2:17-cv-2566-GMN-CWG (D. Nev. filed Oct. 3, 2018).

at issue even in the event of a loss in this appeal: Defendants could elect to pay off Freddie Mac's lien or purchase the property at any sale accompanying the foreclosure proceedings in connection with Freddie Mac's deed of trust. If Defendants elect not to pay off the lien or purchase the property, that is their choice. But that choice means they should not reap the returns to which a free-and-clear title holder is entitled. The only way Defendants will be put to the choice, though, is for the proceedings in this appeal to continue.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reconsider the Order and deny Defendants' Motion to Stay.

Dated: February 24, 2021

Respectfully submitted,

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EXHIBIT F

No. 20-16585

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL NATIONAL MORTGAGE ASSOCIATION
Plaintiff-Counter-Defendant-Appellee,

v.

SFR INVESTMENTS POOL 1, LLC,
Defendant-Counterclaimant-Appellant.

On Appeal from the United States District Court
for the District of Nevada, Case No. 2:17-cv-01750-APG-BNW

APPELLEE'S MOTION FOR RECONSIDERATION OF ORDER STAYING APPEAL

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Federal National Mortgage Association

This appeal involves a fact pattern familiar to the Court: A subsequent purchaser of property sold at a homeowners' association ("HOA") foreclosure sale contends that it acquired free-and-clear title because, under a Nevada statute, the sale purportedly extinguished a deed of trust encumbering the property at the time of the foreclosure. But at the time of the HOA's sale, the Federal National Mortgage Association ("Fannie Mae") owned the deed of trust and was under the Federal Housing Finance Agency's ("FHFA") conservatorship. Therefore, 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar"), protected that property interest from extinguishment. *See Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017).

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The Order is in error insofar as the Clerk credited SFR's arguments concerning whether *Collins* could affect this appeal. SFR's characterization of the

issues in *Collins* is inaccurate, and no remotely possible outcome of *Collins* will have any effect on this appeal.

Collins involves a constitutional challenge to the statutory provision governing the President's ability to remove FHFA's Director from that position. The Supreme Court has not been asked to retroactively terminate FHFA's existence, to undo FHFA's conservatorships of Fannie Mae and Freddie Mac, or to invalidate any of the statutory powers or protections applicable to FHFA as Conservator, such as the Federal Foreclosure Bar. Nor could the Supreme Court plausibly do any of that under existing precedent even if a party had requested such relief. And even if Defendant's speculation about possible outcomes of *Collins* were plausible, Defendant could not rely on its holding because it has waived the issue presented in that case.

The error embodied in the Order does not merely affect this case; Defendant and other similarly situated HOA sale purchasers are attempting to leverage the Order to stay a large number of cases before this Court, the District of Nevada, and Nevada state courts. If successful, this will have the effect of significantly delaying the resolution of the Federal Foreclosure Bar-related litigation that has for years burdened this Court and the District of Nevada, and which this Court has demonstrated an inclination to conclude swiftly. Defendant prefers to freeze all progress, as that would give it and other similarly situated parties an economic

windfall at the expense of the federal conservatorships of Fannie Mae and Freddie Mac.

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RELEVANT BACKGROUND

Defendant appeals from a June 11, 2020 district court order holding that the Federal Foreclosure Bar protected Fannie Mae's deed of trust from extinguishment through a state-law HOA foreclosure sale. At no point in the briefing before the district court did Defendant raise a constitutional challenge to the removal provision concerning FHFA's Director.

SFR filed its notice of appeal on August 17, 2020, and the appeal was released from the mediation program on October 14, 2020. SFR twice requested, and received, extensions of the deadline for its opening brief. One week before the expiration of their second extended deadline, SFR filed a Motion to Stay this appeal pending resolution of the pending petition for a writ of certiorari challenging this Court's decision in *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854, 858-59 (9th Cir. 2020), and the resolution of *Collins*. The Clerk of Court partially granted the Motion on February 11, 2021, staying proceedings only pending the resolution of *Collins*. *See* Order.

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The primary issues in this appeal are whether the Federal Foreclosure Bar protected Fannie Mae's deed of trust and whether Fannie Mae's quiet-title claim based on the Federal Foreclosure Bar is timely under 12 U.S.C. § 4617(b)(12)(A) (the "HERA Limitations Provision"). Both issues are controlled by published decisions of this Court—decisions which have been echoed in numerous unpublished decisions of this Court and both published and unpublished decisions of the Nevada Supreme Court.

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Moreover, the Order may harm judicial economy far beyond this case: it is already being cited by SFR and other similar parties to seek stays of a large number of cases pending before this Court, the District of Nevada, and the Nevada Supreme Court. Such stays will financially benefit HOA sale purchasers like SFR to the detriment of the federal conservatorships that have prevailed in every case concerning the issues before this Court. Accordingly, the equities do not favor a stay, and do favor reconsideration of the Order.

The Court should reconsider its Order, lift the stay, reinstate the briefing calendar, and resolve this appeal promptly under the Court's normal procedures.

I. *Collins* Has Nothing to Do With the Issues in This Case and Provides No Basis to Stay this Appeal

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In *Collins*, shareholders of the Enterprises contend that a provision in the Housing and Economic Recovery Act ("HERA") providing that a Senate-confirmed FHFA Director may be removed by the President only for cause violates the federal constitutional separation of powers. If the provision is held to be unconstitutional, the shareholders in *Collins* contend that a particular agency action taken by FHFA in 2012—an amendment to the 2008 agreement between FHFA and the Department of Treasury concerning Treasury's investment in the Enterprises—should be invalidated. *See* Cert. Pet. at 1, *Collins*, No. 19-422 (U.S., filed Sept. 15, 2019).

These issues are not before this Court. Unlike in *Collins*, SFR does not attack any particular agency *action*, but rather contend that the automatic operation of the Federal Foreclosure Bar, a federal *statute* passed by Congress, does not apply to a deed of trust that encumbers a property it purchased. At no point in any pleading or any briefing on the merits of this case has SFR argued that an action taken by FHFA is invalid, much less that an FHFA action is invalid because of a constitutional defect in the FHFA Director removal provision.

SFR does not appear to suggest that any such constitutional defect would somehow render all of HERA (including the Federal Foreclosure Bar) invalid. Nor could it make such an argument, as the Supreme Court has already rejected a similar contention in another removal-restriction case. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020) (finding "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 's' 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"). Even the plaintiffs in *Collins* concede that under *Seila Law*, with one isolated exception that

is not implicated here,[1] the removal-provision is severable from all of HERA's other provisions. *See* Collins Br. at 77-78.

Rather, SFR postulates in their Motion that a holding in *Collins* 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. Motion at 9. That suggestion is implausible, as it contemplates that in deciding *Collins* the Supreme Court would reach issues not presented to it—*i.e.*, determining that the remedy for an unconstitutional removal provision includes unwinding the conservatorships themselves. No party in *Collins* challenges the decision to place the Enterprises into conservatorships; rather, the relief the plaintiffs seek in *Collins* is predicated on the conservatorships' existence. And there is no cause to believe that the Supreme Court would grant such relief even if any party in *Collins* had asked it to; that Court has already rejected a similar call to strike down a law authorizing the establishment and operations of an independent federal agency with years of activity in *Seila Law*, and declined to do so. Such an outcome is not even remotely plausible in *Collins* and SFR asserts this

[1] The *Collins* plaintiffs contend that only 12 U.S.C. § 4617(b)(2)(J)(ii), which gives FHFA the power to "take any action authorized by this section [of HERA], which the Agency determines is in the best interest of the [Enterprises] or the Agency" should be abrogated. That provision is irrelevant to this appeal; even if it were abrogated, it would not alter the protection provided by the separate Federal Foreclosure Bar. Indeed, no one has cited to it in this case, or, so far as Fannie Mae knows, in any other Federal Foreclosure Bar case.

contrived argument because of the economic benefit to it that results from delays in this and other Federal Foreclosure Bar cases. *See infra* at 10-15. Moreover, the outcome in *Collins* SFR hopes for would have enormous economic and political consequences, as it would require the unwinding of 13 years of conservatorship operations over Enterprises critical to the Nation's housing and financial markets; together the Enterprises account for more than $5 trillion worth of mortgages. It is not clear that a retroactive alteration of years of economic and political reality—let alone one of such magnitude—is even feasible.

Second, SFR has waived any argument related to the issues in *Collins* by never before asserting such an argument in this case. At no point in this case has SFR ever challenged FHFA's decision to put Fannie Mae and Fannie Mae under conservatorship or argued that the terms of the Director's removal conflict with Article II of the Constitution; it cannot do so for the first time on appeal. Even absent a waiver, SFR could not raise such a challenge now—13 years after the fact—as the time to challenge those decisions has long since expired. *See* 12 U.S.C. § 4617(a)(5); 28 U.S.C. § 2401. Moreover, SFR—who is a third party to the decisions to place the Enterprises into conservatorship—lacks standing to challenge the imposition of the conservatorships at all. *See* 12 U.S.C. § 4617(a)(5).

SFR attempted 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 the authorities it cites, 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 was 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 accountability to the President. 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 motion to stay appellate proceedings in a case where the removal-clause issue would be immaterial anyway.

II. The Interests of Judicial Economy and Substantial Justice Are Best Served By Lifting the Stay

The equities favor reconsideration of the Order. Not only should the resolution of this appeal proceed on the usual schedule of this Court, but the Order should be reversed so that it can no longer be cited by SFR and similarly situated HOA sale purchasers to halt a substantial number of pending cases.

Allowing this appeal to proceed would serve the interests of judicial economy and substantial justice. SFR frequently appears in similar cases before this Court and others pending in the District of Nevada and Nevada state courts.

SFR and parties like it have already cited the Order to support motions to stay over a dozen other cases on appeal or in the midst of dispositive motion briefing.[2] If the Order is not reversed, SFR and similarly situated parties likely will ask for a stay of more than three dozen appeals now pending before this Court alone.[3] Moreover, courts in the District of Nevada and the Nevada Supreme Court may be persuaded by the Order to grant SFR and others' pending motions to stay the dozens of cases before them as well. All progress toward resolution of potentially dozens of cases concerning hundreds of properties suffering from clouded property interests will

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[2] *See, e.g.*, Motion to Stay, *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, No. 81315 (Nev. filed Feb. 23, 2021); Motion to Stay, *FHFA v. Las Vegas Dev't Grp. LLC*, No. 20-15658 (9th Cir. filed Feb. 23, 2021); Motion to Stay, *Las Vegas Dev't Grp., LLC v. Nationstar Mortg., LLC*, No. 80826 (Nev. filed Feb. 17, 2021); Motion to Stay, *Bank of Am. N.A. v, SFR Invs. Pool 1, LLC*, No. 2:16-cv-2764-RFB (D. Nev., filed Feb. 12, 2021); Notice of Supp. Authorities in Support of Motion to Stay, *SFR Invs. Pool 1, LLC v. JPMorgan Chase Bank N.A.*, No. 79313 (Nev., filed Feb. 11, 2021); Notice of Supp. Authorities in Support of Motion to Stay, *SFR Invs. Pool 1, LLC v. Nationstar Mortg. LLC*, No. 80586 (Nev., filed Feb. 11, 2021).

[3] *See, e.g.*, *Bank of America, N.A. v. SFR Invs. Pool 1, LLC*, No. 19-15919; *Bank of America, N.A. v. LVDG, LLC, DBA LVDG Series 109*, No. 19-16447; *Ocwen v. SFR*, No. 19-16889; *Nationstar Mortg. LLC v. 312 Pocono Ranch Tr.*, No. 19-17504; *Bank of America v. SFR*, No. 19-16922; *Ditech Fin. LLC v. Dutch Oven Ct. Tr.*, No. 20-15066; *FHFA v. Las Vegas Dev. Grp.*, No. 20-15658; *Bank of Am., N.A. v. Saticoy Bay LLC Series 5328*, No. 20-15582; *Vegas Prop. Servs., Inc. v. Fannie Mae*, No. 20-16320; *Fannie Mae v. Saticoy Bay Series 8324 Charleston*, No. 20-16359; *Ditech Fin. LLC v. Park Bonanza East Townhouse Owners Ass'n*, No. 20-16575; *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 20-16585; *RH Kids, LLC v. Bank of America, N.A.*, No. 20-16731; *Nationstar Mortg. LLC v. SFR Invs. Pool 1, LLC*, No. 20-16893; *TRP Fund VIII, LLC v. NewRez LLC*, No. 20-17129.

grind to a halt.

This Court has expended effort to move long-running and wide-ranging litigations through its docket efficiently and expeditiously. For that reason, this Court has previously rejected efforts by HOA sale purchasers represented by SFR's counsel to draw out appeals in similar circumstances. *See, e.g.*, Order Denying Motion to Stay Appellate Proceedings, *Ditech Financial LLC v. SFR Invs. Pool 1, LLC*, No. 20-15498 (9th Cir. Oct. 19, 2020); Order, *FHFA v. SFR Invs. Pool 1, LLC*, No. 19-15910 (9th Cir. May 26, 2020) (denying Appellant's emergency motion to stay appeal); Order Granting Motion to Lift Stay of Mandate, *Freddie Mac v. SFR Invs. Pool 1, LLC*, No. 16-15962 (9th Cir. Aug. 14, 2018).[4] The Court has also recently been resolving each similar appeal without oral argument, often issuing a decision mere days after the case was submitted for disposition without oral argument. *See, e.g.*, *Fannie Mae v. Ferrell St. Tr.*, No. 20-15156, 2021 WL 461943, at *1 (9th Cir. Feb. 9, 2021) (opinion issued four days

[4] *See also* Order, *Nationstar Mortg. LLC v. Keynote Props.*, No. 19-15287 (9th Cir. May 26, 2020) (denying Appellant's emergency motion to stay appeal); Order, *Bourne Valley Court Trust v Wells Fargo Bank NA*, No. 19-15253 (9th Cir. May 26, 2020) (same); Order, *M&T Bank v. SFR Invs. Pool 1, LLC*, No. 18-17395 (9th Cir. May 26, 2020) (same). SFR will likely cite instances where motions filed by its counsel on behalf of HOA sale purchasers have been granted. However, all such motions were granted by the Clerk of Court. When identical motions to stay on the same grounds were resolved by motions or merits panels, they have always been denied.

after appeal submitted on the briefs).[5] These Orders demonstrate that this Court is not inclined to further delay the resolution of this set of cases, which have been clogging the dockets of the District of Nevada and this Court for more than six years.

The fact that the Order has emboldened HOA sale purchasers like SFR's campaign to seek stays of many similar cases, *see supra* at 11 & n.2, reflects the economic circumstances at play; any delay in judgment accrues to their benefit. Having acquired their properties for far less than fair market value, SFR and others like them continue to reap substantial profits by renting the properties at market rates. Meanwhile, the Enterprises—which made substantially larger, market-priced investments in the loans secured by the properties—receive no return whatsoever. Until these cases are resolved, SFR and similar HOA sale purchasers will collect additional unjust economic returns from the Enterprises' 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), 4617(b)(2)(D)(ii).

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[5] *Nationstar Mortg. LLC v. Vegas Prop. Servs., Inc.*, No. 20-15054, 2021 WL 461936, at *1 (9th Cir. Feb. 9, 2021) (opinion issued four days after appeal submitted on the briefs); *Fannie Mae v. Casa Mesa Villas Homeowners Ass'n*, No. 19-17133, 2020 WL 7075503 (9th Cir. Dec. 3, 2020) (opinion issued two weeks after appeal submitted on the briefs); *Fannie Mae v. Haus*, 819 F. App'x 563 (9th Cir. 2020) (opinion issued two days after appeal submitted on the briefs).

Indeed, the fact that SFR has every incentive to defer final resolution of every case as long as possible is evident from the litigation strategy it and other acquirers represented by the same counsel have pursued in appeals before this Court. Seeking a stay here is consistent with such parties' frequent requests for stays and efforts to petition for rehearing of related cases.[6] These actions threaten judicial economy and discourage settlements that reasonably reflect the legal landscape this Court's decisions have created.

Moreover, proceeding with this appeal will not impose any harm on SFR. Even if SFR's fanciful projections about *Collins* come true, SFR could raise that in briefing before this Court reaches a decision, or a letter pursuant to Federal Rule of Appellate Procedure 28(j). Stays of appeals are the exception, not the rule, and it is not inequitable to require SFR to pursue its appeal in due course. SFR even has the option to retain the property at issue even in the event of a loss in this appeal: SFR could elect to pay off Fannie Mae's lien or purchase the property at any sale accompanying the foreclosure proceedings in connection with Fannie Mae's deed of trust. If SFR elects not to pay off the lien or purchase the property, that is its

[6] *See, e.g.*, Motion to Stay Appeal, *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 20-16585 (9th Cir. filed Jan. 8, 2021); Motion to Stay Appeal, *Ditech Fin. LLC v. SFR Invs. Pool 1, LLC*, No. 20-15498 (9th Cir. filed Sept. 14, 2020); Emergency Motion to Stay Appeal/Oral Argument, *Freddie Mac v. SFR Invs. Pool 1, LLC*, No. 19-15910 (9th Cir. filed May 21, 2020); Motion for Abstention or in the Alternative for Stay, *Bank of America, N.A. v. SFR Invs. Pool 1, LLC*, No. 2:17-cv-2566-GMN-CWG (D. Nev. filed Oct. 3, 2018).

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 proceedings in this appeal to continue.

CONCLUSION

For the foregoing reasons, Fannie Mae respectfully requests that the Court reconsider the Order and deny SFR's Motion to Stay.

Dated this 24th day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2021, I electronically filed the following **APPELLEE'S MOTION FOR RECONSIDERATION OF ORDER STAYING APPEAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Faith Harris
An Employee of Wright Finlay Zak, LLP

EXHIBIT G

FILED

OCT 19 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DITECH FINANCIAL LLC,

Plaintiff-counter-defendant-Appellee,

v.

SPRING MOUNTAIN RANCH HOA,

Defendant,

and

SFR INVESTMENTS POOL 1, LLC,

Defendant-counter-claimant-cross-claimant-Appellant,

v.

MICHELLE BOWSER; JERRY BOWSER,

Cross-claim-defendants.

No. 20-15498

D.C. No.
2:15-cv-00630-APG-NJK
District of Nevada,
Las Vegas

ORDER

Before: W. FLETCHER and BYBEE, Circuit Judges.

Appellant's motion to stay appellate proceedings (Docket Entry No. 14) is denied. Appellant's alternative request to certify a question to the Nevada Supreme Court, and appellees' response, are referred to the panel assigned to consider the merits of this appeal.

Appellant's motion to extend time to file the opening brief (Docket Entry

No. 14) is granted. The opening brief is due November 30, 2020; the answering brief is due December 30, 2020; and the optional reply brief is due within 21 days after service of the answering brief.

EXHIBIT H

No. 20-15582

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BANK OF AMERICA, N.A.,
Plaintiff-Appellee,

v.

SATICOY BAY LLC SERIES 5328 LOCHMOR,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Nevada
The Honorable Richard F. Boulware, II, No. 2:16-cv-00917-RFB-BNW

APPELLEE'S AND AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY'S JOINT MOTION FOR RECONSIDERATION OF SUA SPONTE ORDER STAYING APPEAL

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On September 28, 2020, the Clerk entered a sua sponte order staying this appeal pending the Nevada Supreme Court's resolution of certain state-law limitations questions certified in *U.S. Bank, Inc. v. Thunder Properties, Inc.*, 958 F.3d 794 (9th Cir. 2020) ("Order"). Appellee Bank of America, N.A. and *amicus curiae* Federal Housing Finance Agency ("FHFA") respectfully and jointly move for reconsideration because the Order overlooks or misunderstands the facts of this case or the governing law, which together make the *state-law* questions certified in *Thunder Properties* irrelevant to this appeal, in which *federal law* controls. The Clerk of Court issued the Order under Circuit Rule 27-7. Accordingly, Bank of America and FHFA move under Circuit Rule 27-10.

On the surface, *Thunder Properties* and this case appear similar: Each involves a purchaser of property sold at a homeowners' association foreclosure sale contending that it acquired free-and-clear title because, under state law, the sale purportedly extinguished the deed of trust encumbering the property.

But just beneath the surface lies a dispositive difference. In *Thunder Properties*, no party claims any federal statutory protection; that case therefore presents only *state-law* issues, and the claims will be subject to *state-law* limitations doctrine. In this case, by contrast, an entity in FHFA conservatorship, Fannie Mae (together with Freddie Mac, the "Enterprises"), owns the deed of trust, and a *federal* statute—12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar")—therefore

protected the deed of trust from extinguishment. *E.g.*, *Berezovsky v. Moniz*, 869 F.3d 923, 930-31 (9th Cir. 2017). A *federal* limitations statute—12 U.S.C. § 4617(b)(12)(A) (the "HERA Limitations Provision")—applies to claims based on the Federal Foreclosure Bar. *See M&T Bank v. SFR Invs. Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020). And in applying the HERA Limitations Provision—which requires courts to characterize all claims as either "tort" or "contract"—the characterization of state-law claims is a matter of *federal* law. *United States v. Neidorf*, 522 F.2d 916, 919 n.6 (9th Cir. 1975) (applying analogous statute). As a result, the limitations issues here are governed exclusively by *federal* law.

The Order contains no substantive explanation for the stay but could only make sense if the *state-law* limitations questions certified in *Thunder Properties* were relevant here. Bank of America and FHFA respectfully submit that this misunderstands the underlying facts or the controlling law. Because *M&T Bank* and *Neidorf* resolve the limitations issues in this case (and many others like it) as a matter of *federal* law, the *state-law* questions certified in *Thunder Properties* are irrelevant.

The Court should reconsider the Order, lift the stay, and proceed to the merits. This approach would be more equitable and efficient given the incentives facing the parties.[1]

[1] In the interest of efficiency and simplicity, FHFA joins Bank of America's motion rather than making a separate filing endorsing Bank of America's position.

RELEVANT BACKGROUND

Appellant Saticoy Bay Series 5328 Lochmor ("Saticoy Bay") appeals from a district court order holding that the Federal Foreclosure Bar protected Fannie Mae's deed of trust from extinguishment through a state-law HOA foreclosure sale (the "HOA Sale") at which Saticoy Bay purchased the property at issue. ER000002; *see* NRS 116.3116 (super-priority lien statute). The district court also held that Bank of America's quiet-title claim was timely under the six-year period set by the HERA Limitations Provision for claims better characterized as based in contract than in tort. ER000007 (applying 12 U.S.C. § 4617(b)(12)(A)(i)).[2]

On appeal, Saticoy Bay challenges the district court's order, including its statute-of-limitations ruling, arguing that the district court should have applied either the three-year period of the HERA Limitations Provision (for claims better characterized as based in tort) or a state law period for "[a]n action upon liability created by statute." *See* Appellant's Opening Br. ("AOB") at 12-20 (Dkt. 13) (citing 12 U.S.C. § 4617(b)(12)(ii); NRS 11.190(3)).

On May 1, 2020, this Court certified two questions to the Nevada Supreme Court in an unrelated case involving a dispute over the continued existence of a deed

[2] Bank of America acts as Fannie Mae's contractually authorized servicer for this loan, and as such has standing to assert the Federal Foreclosure Bar. *See Saticoy Bay, LLC, Series 2714 Snapdragon v. Flagstar Bank, FSB*, 699 F. App'x 658 (9th Cir. 2017).

of trust following a state-law HOA foreclosure sale, but *not* involving an Enterprise-owned deed of trust, and therefore *not* implicating the Federal Foreclosure Bar, the HERA Limitations Provision, or any other federal law. *Thunder Props.*, 958 F.3d at 796-97. The district court in *Thunder Properties* had ruled that Nevada's five-year statute of limitations for quiet-title claims barred the lienholder's claim. *Id.* In the ensuing appeal, this Court certified two state-law questions to the Nevada Supreme Court:

> 1. When a lienholder whose lien arises from a mortgage for the purchase of a property brings a claim seeking a declaratory judgment that the lien was not extinguished by a subsequent foreclosure sale of the property, is that claim exempt from statute of limitations under *City of Fernley v. Nevada Department of Taxation*, 132 Nev. 32, 366 P.3d 699 (2016)?
>
> 2. If the claim described in (1) is subject to a statute of limitations:
>
> a. Which limitations period applies?
>
> b. What causes the limitations period to begin to run?

Id.

On June 25, 2020, this Court issued a straightforward, published decision in *M&T Bank*. Relying on this Circuit's precedent, the panel held that the HERA Limitations Provision's six-year period for contract claims governs quiet-title claims that implicate the Federal Foreclosure Bar. *See* 963 F.3d at 858-59. Three other unpublished decisions issued the same day reached the same conclusion. *Freddie Mac v. SFR Invs. Pool 1, LLC*, 810 F. App'x 589 (9th Cir. 2020); *Nationstar Mortg.*

LLC v. Keynote Props., LLC, 810 F. App'x 570 (9th Cir. 2020); *Bourne Valley*, 810 F. App'x 492 (9th Cir. 2020).

On August 4, 2020, this Court denied the appellant's petition for rehearing of the *M&T Bank* decision. On August 10, 2020, that appellant, SFR, moved to stay the mandate in *M&T Bank* pending a writ of certiorari. The Court denied that motion the following day, without waiting for a response, and the mandate issued in due course on August 19, 2020.

On September 28, 2020, an order was issued that appears to have been executed by a Deputy Clerk on behalf of the Clerk of Court and the Court. The order stayed the proceedings in this appeal "pending the response of the Supreme Court of Nevada to this court's published order certifying two questions in [*Thunder Properties*]; or upon further order of this court." Order at 1 (Dkt. 29).

LEGAL STANDARD

Under Circuit Rule 27-7, "the Court may delegate to the Clerk or designated deputy clerks … authority to decide motions filed with the Court. Orders issued pursuant to this section are subject to reconsideration pursuant to Circuit Rule 27-10." While the Order here was issued *sua sponte*, not in response to any motion, its text expressly states that the Clerk of Court, through a deputy clerk, issued the order under authority delegated by Circuit Rule 27-7.

Circuit Rule 27-10 specifies that a party may move for reconsideration of an

Order issued by a deputy clerk by "stat[ing] with particularity the points of law or fact which … the Court has overlooked or misunderstood." Such a motion will be evaluated first by the deputy clerk who issued the underlying order, and then, if he or she is "disinclined to grant" the motion, it "is referred to an appellate commissioner." Cir. R. 27-10(b).

ARGUMENT

The Court's precedential decisions in *M&T Bank* and *Neidorf* confirm that none of the state-law limitations questions at issue in *Thunder Properties* are relevant to this appeal. Reconsideration of the Order is therefore warranted, because the Order reflects a misunderstanding of the facts and law that make the *Thunder Properties* questions irrelevant here.

M&T Bank confirms that the HERA Limitations Provision—a federal statute—provides the applicable limitations period for the quiet-title claim Bank of America asserted here. Because the HERA Limitations Provision supplies limitations periods for "all claims" regardless of label or underlying theory, but then enumerates only two alternatives labeled "contract" and "tort," the Court must characterize any claim that does not fall neatly into the contract or tort category as one or the other. *Neidorf*, in turn, confirms that the characterization of state-law claims for purposes of federal limitations statutes like the HERA Limitations Provision is a matter of federal law.

Together, *M&T Bank* and *Neidorf* exclude any possibility that the state-law questions certified in Thunder Properties could affect the limitations analysis here. Thus, the Court need not and should not wait for the Nevada Supreme Court to issue a decision on the certified state-law questions in *Thunder Properties*, because any such decision will be immaterial to the Court's analysis and resolution of the legal questions Saticoy Bay has raised in this appeal.

The Court should reconsider its Order, lift the stay, reinstate the briefing calendar, and resolve this appeal promptly under the Court's normal procedures.

I. Because the *Thunder Properties* Certified Questions Are Irrelevant to this Appeal, Imposing a Stay To Await Their Answer Reflects a Misunderstanding of the Facts and the Controlling Law.

The Order stays this case pending the Nevada Supreme Court's answers to questions certified in another appeal that will have no bearing on this one. The *Thunder Properties* appeal is limited to questions of *state* law—whether any Nevada statute of limitations applies to quiet-title claims not implicating the Federal Foreclosure Bar, and, if so, what limitations period governs and what triggers the period. This appeal, by contrast, turns on the application of a *federal* statute—HERA—which governs both the limitations analysis and the substantive question of whether Fannie Mae's deed of trust survived the HOA foreclosure sale. *M&T Bank* confirms that when a quiet-title claim is governed by the Federal Foreclosure Bar, the HERA Limitations Provision applies. *Neidorf* confirms that the Court looks to

federal law, not state law, to resolve the primary question presented when applying the HERA Limitations Provision—how to characterize the underlying claim.

Thus, there are no state-law questions that pose an obstacle to the resolution of this appeal; no matter how the Nevada Supreme Court answers the questions in *Thunder Properties*, it will have no effect on the issues here. Awaiting the Nevada Supreme Court's resolution of the certified state-law limitations questions would thus serve no purpose here, as the HERA Limitations Provision governs.

A. *M&T Bank* Confirms That a Stay Is Unnecessary Here.

M&T Bank confirms that federal law, not state law, provides the governing statute of limitations here. It is true that this appeal and *Thunder Properties* each involve: (1) whether a deed of trust was extinguished through foreclosure of an HOA's super-priority lien under NRS 116.3116; and (2) whether any claims arising from the HOA foreclosure sale were timely filed. But this appeal has a material distinguishing feature: The deed of trust at issue is an asset of an entity under FHFA's conservatorship and is thus subject to HERA's asset-protection provisions, *see* ER000007-10 (district court order finding that Fannie Mae owned the deed of trust and holding that the Federal Foreclosure Bar protected the deed of trust from extinguishment), as this Court has held in more than 20 similar cases. *E.g.*, *Berezovsky v. Moniz*, 869 F.3d 923, 930-31 (9th Cir. 2017) (affirming similar district court decision); *FHFA v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136, 1146 (9th Cir.

2018) (similar), *cert denied*, 139 S. Ct. 1618 (2019).[3]

HERA also includes a limitations provision that governs claims grounded in the provisions of that statutory scheme, including the Federal Foreclosure Bar. Specifically, the HERA Limitations Provision specifies the limitations periods applicable to all claims the Conservator could bring in relation to conservatorship assets. It reads:

> [T]he applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver shall be—
>
> (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.

12 U.S.C. § 4617(b)(12)(A).

In *M&T Bank*, the Court held that a quiet-title claim invoking the Federal Foreclosure Bar is subject to HERA's six-year limitations period as a matter of

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[3] *See also, e.g.*, *LN Mgmt., LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 950 (9th Cir. 2020) (same); *Ditech Fin., LLC v. Res. Grp., LLC*, --- F. App'x ---, 2020 WL 4917605, at *2 (9th Cir. Aug. 21, 2020); *Nationstar Mortg. LLC v. Haus*, 812 F. App'x 503 (9th Cir. 2020); *Freddie Mac v. SFR Invs. Pool 1, LLC*, 810 F. App'x 589, 591 (9th Cir. 2020); *Ditech Fin. LLC v. Saticoy Bay LLC Series 8829 Cornwall Glen*, 794 F. App'x 667, 668 (9th Cir. 2020); *Ditech Fin., LLC v. SFR Invs. Pool 1, LLC*, 793 F. App'x 490, 492 (9th Cir. 2019); *Williston Inv. Grp., LLC v. JPMorgan Chase Bank, NA*, -- F. App'x --, 2018 WL 4178105 (9th Cir. Aug. 31, 2018); *Saticoy Bay v. Flagstar Bank*, 699 F. App'x 658; *Elmer v. JP Morgan Chase & Co.*, 707 F. App'x 426, 428 (9th Cir. 2017).

federal law. 963 F.3d at 857-59. *First*, the Court confirmed that the HERA Limitations Provision applies to claims brought by Freddie Mac or its servicer, because Freddie Mac "'[stood] in the shoes of' the FHFA with respect to the claim to quiet title to the deed of trust, which is property of the conservatorship," and Freddie Mac's servicer "[stood] in the same shoes as its assignor," Freddie Mac. *Id.* at 857-58 (citations omitted).

Second, the Court concluded that under the HERA Limitations Provision, a six-year limitations period for "contract"-like claims, not the three-year limitations period for "tort"-like claims, applied. *See id.* at 858. The Court reasoned that the quiet-title claim was "entirely 'dependent' upon Freddie Mac's lien on the property, an interest created by contract," and noted that the plaintiffs did not "seek damages or claim a breach of duty resulting in injury to person or property, two of the traditional hallmarks of a tort action." *Id.*

Third, the Court held that "even if the question were closer," it would still apply the six-year period, because federal policy mandates that "'[w]hen choosing between multiple potentially-applicable statutes,'" the longer limitations period should apply. *Id.* at 858-59 (quoting *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1307 (9th Cir. 1989)). Accordingly, the Court held that Freddie Mac and its servicer "had at least six years to bring their claims after the foreclosure sale" under HERA's Limitations Provision. *Id.* at 859.

Finally, the parties in *M&T Bank* agreed that the lienholder's claim for quiet title under Nevada law accrued on the date the HOA foreclosure sale occurred or the resulting deed was recorded, and this Court adopted that position. *See id.* at 859 (noting the "accrual of the cause of action in 2012 on the date of the foreclosure sale"). To Bank of America's knowledge, no court has ever concluded otherwise and this is not a question disputed by the parties in this appeal; both agree that Bank of America's claim accrued in March 2018 when the HOA Sale took place and was promptly reflected in the property records.

Thus, regardless of how the Nevada Supreme Court resolves the certified *state-law* questions in *Thunder Properties*, HERA's six-year limitations period applies to Bank of America's Federal Foreclosure Bar-based quiet-title claim here.[4]

For the Order to stand, the certified questions in *Thunder Properties* would have to be relevant to this appeal. But the only way for *Thunder Properties* to become relevant would be for this Court to abandon *M&T Bank* and conclude that the "contract" prong of HERA's limitations provision is somehow inapplicable. In evaluating this Motion, the Court cannot assume that will happen; the Order is based

[4] It is theoretically possible that the Nevada Supreme Court could rule that Nevada law provides for a period *longer* than six years, or indeed for *no* limitations period, on quiet-title claims (such as those here and in *Thunder Properties*) brought by a lienholder rather than a title holder; in that event, HERA would adopt the longer, state-law period. But because Bank of America's assertion of the Federal Foreclosure Bar would be timely under the six-year floor HERA provides, such a ruling would not affect the outcome here.

on state-law questions certified to the Nevada Supreme Court, not on speculation about whether this Court might suddenly reverse itself on an issue of federal law. In any event, there is no reason to expect that to occur; *M&T Bank* is a unanimous decision that relies on longstanding Circuit precedent. 963 F.3d at 857-59 (citing *United States v. Thornburg*, 82 F.3d 886, 891 (9th Cir. 1996); *Stanford Ranch, Inc. v. Md. Cas. Co.*, 89 F.3d 618, 625 (9th Cir. 1996); and *Wise*, 600 F.3d at 1187 n.2). Moreover, the Court has denied both a petition for rehearing and a motion to stay the mandate in *M&T Bank*. *See* Orders, *M&T Bank*, No. 18-17395 (Aug. 4 & 11, 2020) (Dkt. Nos. 66, 68).

B. Under *Neidorf*, State Law Plays No Role in Characterizing Bank of America's Claim for the Purpose of the HERA Limitations Provision.

To whatever extent the questions certified in *Thunder Properties* might be read to encompass whether quiet-title claims are more akin to tort or to contract as a matter of *Nevada* law, a stay of this appeal to await the Nevada Supreme Court's answer would still not be warranted.

As an initial matter, that question is not presented in the *Thunder Properties* appeal—there, no party has argued that any of the state-law limitations periods potentially applicable to quiet-title claims *not* involving property of an entity under FHFA's conservatorship turn on characterizing those claims as more akin to tort or to contract. And with good reason: Nevada's statutory limitations scheme addresses

claims concerning title to and possession of real estate directly, without reference to contract or tort concepts. *See* NRS 11.070, 11.080.

But even if the question were one that the Nevada Supreme Court might address, the answer would have no bearing here, because *state law* does not control the characterization of claims for purposes of applying *federal* statutes of limitation like the HERA Limitations Provision. This Court's decision in *Neidorf* is directly on point. There, in applying a closely analogous federal limitations statute to a state-law claim that did not fall neatly into either tort or contract, this Court 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." 522 F.2d at 919 n.6 (applying 28 U.S.C. § 2415) (emphasis added).

Neidorf rests on sound policy, advancing Congress's purpose of establishing uniform minimum limitations periods for claims brought under HERA or comparable federal statutes. HERA empowers FHFA to place Freddie Mac, Fannie Mae, and other entities into conservatorships "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." 12 U.S.C. § 4617(a)(2). Accordingly, Congress granted FHFA an array of powers, privileges, and exemptions from otherwise applicable laws when acting as Conservator. If state law governed the

question of how to characterize claims brought under HERA and its limitations periods, substantively identical claims might be subject to different limitations periods depending upon which state's law governed and how *that* state characterizes the claim. The *Neidorf* rule provides the Conservator with certainty, allowing it to focus its efforts on rehabilitating the Enterprises 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.

Thus, how quiet-title claims, like the one here, should be characterized for the purposes of assigning them to a prong of the HERA Limitations Provision is controlled by federal law. And to the extent any question existed as to whether they are more properly characterized as contract or tort for that purpose, the Court resolved it in *M&T Bank*, holding that the claim is properly deemed contractual. *M&T Bank*, 963 F.3d at 858. There is no need to look to the Nevada Supreme Court for an irrelevant state-law perspective that, given *M&T Bank* and *Neidorf*, this Court could not adopt.

II. The Interests of Judicial Economy and Substantial Justice Are Best Served By Lifting the Stay.

Allowing this case to proceed to a decision on the merits would also serve the interests of judicial economy and substantial justice. At least twelve other appeals

raising the same or substantially similar issues are now pending before this Court,[5] and dozens more are being litigated in federal (and state) district courts. Staying this appeal pending the Nevada Supreme Court's resolution of the certified questions in *Thunder Properties* is unnecessary in light of *M&T Bank*'s unequivocal holding that HERA's six-year limitations provision applies to claims invoking the Federal Foreclosure Bar. The fact that this Court denied a petition for rehearing in *M&T Bank* and then—without awaiting an opposition—denied a motion to stay the mandate in that case undermines any contention that a petition for certiorari is likely to be meritorious. Indeed, the Supreme Court will almost certainly deny any petition for certiorari given that no circuit split or conflict with a state court of last resort exists. *See* Sup. Ct. R. 10.

Lifting the stay will also serve the interests of justice. There is no guarantee as to when the Nevada Supreme Court will resolve the certified questions—in the recent past, the Nevada Supreme Court has taken more than a year to issue a response

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[5] *Ocwen Loan Servicing, LLC v. SFR Invs. Pool 1, LLC*, No. 19-16889; *Nationstar Mortg. LLC v. Saticoy Bay LLC Series 9229 Millikan Ave.*, No. 19-17043; *Nationstar Mortg. LLC v. 312 Pocono Ranch Tr.*, No. 19-17504; *Bank of America, N.A. v. SFR Invs. Pool 1, LLC*, No. 19-16922; *Fannie Mae v. Ferrell St. Tr.*, No. 20-15156; *Ditech Fin. LLC v. Dutch Oven Ct. Tr.*, No. 20-15066; *FHFA v. Las Vegas Dev. Grp.*, No. 20-15658; *Ditech Fin. LLC v. SFR Invs. Pool 1, LLC*, No. 20-15498; *Wells Fargo Bank, N.A. v. Pine Barrens St. Tr.*, No. 20-15698; *Fannie Mae v. Yan Lin*, No. 20-15815; and *Nationstar Mortg. LLC v. Travertine Lane Trust*, No. 19-17197.

Footnote continued on next page

to a certified question.[6] And HOA sale purchasers like Saticoy Bay have every incentive to needlessly prolong the appeal process, as any delay in judgment accrues to its benefit. Having acquired this property for far less than fair market value, Saticoy Bay can reap substantial profits by renting out the property at market rates. Meanwhile, Fannie Mae—which made a substantially larger, market-priced investment in the now-defaulted loan secured by the property—receives no return whatsoever. Until the case is resolved, Saticoy Bay will collect additional, and unjust, economic returns from Fannie Mae'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), 4617(b)(2)(D)(ii).

CONCLUSION

Because the questions certified in *Thunder Properties* are not relevant to this appeal, the current stay to await their answer is grounded in a misunderstanding of fact or law and serves no legitimate purpose. That alone is sufficient grounds for reconsideration. As importantly, the delay that continuing the stay inevitably will entail undermines the parties' and the Court's interest in timely resolution of this case. Bank of America and FHFA therefore respectfully request that the Court

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[6] *See Magliarditi v. TransFirst Grp., Inc.*, No. 73889, 2019 WL 5390470 (Nev. Oct. 21, 2019) (unpublished disposition) (deciding question certified in September 2017); *Ditech Fin. LLC v. Buckles*, 401 P.3d 215 (Nev. 2017) (decision issued in September 2017 on question certified in May 2016).

reconsider its Order staying the appeal, lift the stay of proceedings, and reinstate a briefing schedule that will move this case efficiently to resolution on the merits.

Dated: October 13, 2020

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s): No. 20-15582

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APPELLEE AND AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY'S MOTION FOR RECONSIDERATION OF SUA SPONTE ORDER STAYING APPEAL PURSUANT TO CIRCUIT RULE 27-10

Signature /s/ Alex McFall **Date** October 13, 2020

EXHIBIT I

FILED

OCT 30 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BANK OF AMERICA, N.A.,

Plaintiff-counter-defendant-Appellee,

v.

LOS PRADOS COMMUNITY ASSOCIATION; NEVADA ASSOCIATION SERVICES, INC.,

Defendants,

and

SATICOY BAY LLC SERIES 5328 LOCHMOR,

Defendant-counter-claimant-Appellant.

No. 20-15582

D.C. No.
2:16-cv-00917-RFB-BNW
District of Nevada,
Las Vegas

ORDER

The joint motion to lift the stay of proceedings (Docket Entry No. 32) is granted. Principal briefing is complete. The optional reply brief is due December 1, 2020.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Jeffrey L. Fisher
Deputy Clerk
Ninth Circuit Rule 27-7