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Elizabeth A. Brown
Clerk of Supreme Court

10 IN THE SUPREME COURT OF THE STATE OF NEVADA

11 ***

12 AIRMOTIVE INVESTMENTS, LLC, A)
13 NEVADA LIMITED LIABILITY)
14 COMPANY,)

Appellant,

15 vs.

16 BANK OF AMERICA, N.A.,

Respondent.)

Supreme Court No. 80373

District Court Case No. A654840

17
18 **APPELLANT'S MOTION TO STAY APPEAL**

19 **AND TO HOLD ALL DEADLINES IN ABEYANCE**

20 COMES NOW, Appellant, AIRMOTIVE INVESTMENTS, LLC, by and
21 through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and hereby
22 presents its Motion to Stay Appeal and to Hold all Deadlines in Abeyance.

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1 This Motion is made and based upon the attached Memorandum of Points and
2 Authorities and all papers and pleadings on file herein.

3 DATED this 2nd day of March, 2021.

4 ROGER P. CROTEAU & ASSOCIATES, LTD.

5
6 /s/ Timothy E. Rhoda
7 ROGER P. CROTEAU, ESQ.
8 Nevada Bar No. 4958
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14 *Attorney for Appellant*
15 AIRMOTIVE INVESTMENTS, LLC

16 MEMORANDUM OF POINTS AND AUTHORITIES

17 INTRODUCTION

18 The instant appeal was filed on January 2, 2020. Appellant filed its
19 Opening Brief and Appendix on December 21, 2020. Respondent's Answering
20 Brief is presently due on March 22, 2021, pursuant to this Court's Order dated
21 February 26, 2021. However, as set forth below, recent developments in the
22 governing law constitute good cause to stay this matter.

23 STATEMENT OF THE FACTS

24 The instant appeal involves real property commonly known as 6279
25 Downpour Court, Las Vegas, Nevada 89110, Assessor Parcel No. 140-34-413-075
26 (*the "Property"*). The Property was the subject of a homeowners association lien
27 foreclosure sale (*"HOA Foreclosure Sale"*) conducted pursuant to NRS Chapter
28 116. The HOA Foreclosure Sale occurred on April 12, 2011, and was conducted
by Absolute Collection Services, LLC (*"HOA Trustee"*) on behalf of Palo Verde
Ranch Homeowners Association (*"HOA"*). Appellant, Airmotive Investments,
LLC, is the current title owner of the Property, having acquired it from the
prevailing bidder at the HOA Foreclosure Sale.

1 At the time of the HOA Foreclosure Sale, the Respondent, Bank of
2 America, N.A. (“BANA”), was the holder of a deed of trust recorded against the
3 Property in the Official Records of the Clark County Recorder as Instrument No.
4 20060630-0002110 (“*First Deed of Trust*”). Pursuant to its Complaint, Airmotive
5 generally alleged that the HOA Foreclosure Sale served to extinguish the First
6 Deed of Trust and all other subordinate liens pursuant to Nevada law as ultimately
7 interpreted by the Nevada Supreme Court in the seminal matter of *SFR Invs. Pool*
8 *1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014). During
9 the course of the litigation, BANA asserted that the First Deed of Trust was owned
10 by Federal National Mortgage Association (“*Fannie Mae*”). As a result, BANA
11 argued that NRS §116.3116 *et seq.* was preempted by the Housing and Economic
12 Recovery Act of 2008 (“*HERA*”) and, specifically, the so-called “Federal
13 Foreclosure Bar” of 12 U.S.C. 4617(j)(3).

14 On September 24, 2018, after discovery had closed without BANA
15 disclosing evidence supporting any claim that Fannie Mae owned the First Deed of
16 Trust, the parties filed a Stipulation and Order to Reopen and Extend Discovery
17 Deadlines. Pursuant to this Stipulation, discovery was re-opened and rescheduled
18 to close on March 6, 2019. BANA thereafter disclosed its First Supplemental
19 Disclosures on March 6, 2019 at 4:29 p.m. Thus, the disclosures were effectively
20 served 31 minutes before the close of discovery. Included in this disclosure were
21 over 350 pages of previously undisclosed documents.

22 BANA filed its Motion for Summary Judgment on April 5, 2019, relying
23 upon the documents that it had disclosed on March 6, 2019, literally minutes
24 before the close of discovery. Airmotive filed its Opposition to BANA’s Motion
25 for Summary Judgment on July 17, 2019, making various arguments. At the
26 outset, the primary argument was that BANA’s evidence was not timely disclosed
27 and that it must therefore be excluded pursuant to NRCP 16.1, NRCP 26(e) and
28 NRCP 37(c). In addition, Airmotive argued that BANA’s claims were barred by

1 the statute of limitations. The district court ultimately considered the late
2 disclosed evidence and granted BANA's motion.

3 Aside from the violation of due process suffered by Airmotive, the
4 constitutionality of the structure of Freddie Mac's conservator, Federal Housing
5 Finance Agency ("FHFA"), is currently in question. As a result, the instant
6 appeal should be stayed. As discussed below, the Ninth Circuit Court of Appeals
7 has recently granted at least two substantially identical motions. Moreover, the
8 United States Supreme Court may be reviewing the Ninth Circuit Court of
9 Appeals' decision which determined the statute of limitations applicable to the
10 Respondent's claims. As a result, the instant appeal should be stayed. As
11 discussed below, the Ninth Circuit Court of Appeals has recently granted at least
12 two substantially identical motions.

13 **LEGAL ARGUMENT**

14 **A. STATEMENT OF THE LAW**

15 A "court may, with propriety, find it is efficient for its own docket and the
16 fairest course for the parties to enter a stay of an action before it, pending
17 resolution of independent proceedings which bear upon the case." *Mediterranean*
18 *Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (*Leyva v.*
19 *Certified Grocers of California, Ltd.* 593 F.2d 857, 863-4 (9th Cir. 1979).

20 Factors a court may consider when deciding whether to issue a stay of proceeding
21 include the interests of the parties, the efficient use of judicial resources, and the
22 interests of the public and persons not parties to the litigation. *See e.g. Keating v.*
23 *Office of Thrift Supervision*, 45 F.3d 322, 324-5 (9th Cir. 1995).

24 **B. THE CONSTITUTIONALITY OF FHFA'S STRUCTURE IN** 25 **CURRENTLY IN DISPUTE**

26 The constitutionality of the structure of Fannie Mae's conservator, Federal
27 Housing Finance Agency ("FHFA") is presently at issue before the United States
28 Supreme Court in the matter of *Collins v. Yellen*, No. 19-422. Oral argument took

1 place on December 9, 2020. In *Collins*, the United States Supreme Court granted
2 certiorari to decide whether the FHFA’s single-director structure violates the
3 Appointments Clause and, if so, whether certain actions taken by the agency,
4 while unconstitutionally structured, must be set aside. Thus, *Collins* has the
5 potential of holding the FHFA was unconstitutionally structured at the time of the
6 conservatorship decision and to call into question whether the conservatorship was
7 validly imposed (and, if the conservatorship was not validly imposed, a question
8 will exist whether the Federal Foreclosure Bar is valid and/or whether it should
9 have been applied to this case).

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

21 As the Solicitor General has written, a hold is appropriate where the Court’s
22 decision in a pending case “could affect the analysis of [the] question” presented
23 by the petition or if “it is possible that the Court’s resolution of the question
24 presented in [the pending case] could have a bearing on the analysis of petitioner’s
25 argument,” even if the cases do “not involve precisely the same question.” *U.S.*
26 *BIO 7, Yang v. United States*, No. 02-136. Here, the lower court found the HOA
27 Foreclosure Sale failed to extinguish Fannie Mae’s subordinate lien because the
28

1 sale took place after FHFA put both regulated entities under conservatorship,
2 thereby triggering the Foreclosure Bar.

3 *Collins* has the potential of holding the FHFA was unconstitutionally
4 structured at the time of the conservatorship decision and to call into question
5 whether the conservatorship was validly imposed. If the conservatorship was not
6 validly imposed, then the Federal Foreclosure Bar may not be valid. That
7 Airmotive did not raise an Appointments Clause challenge below does not
8 preclude it from raising the issue now. The United States Supreme Court has
9 “expressly included Appointments Clause objections” in the category of
10 “nonjurisdictional structural constitutional objections that could be considered on
11 appeal whether or not they were ruled upon below.” *Freytag v. C.I.R.*, 501 U.S.
12 868, 878-79 (1991) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). The
13 United States Supreme Court has thus considered Appointment Clause challenges
14 “despite the fact that [the challenge] had not been raised in the District Court or in
15 the Court of Appeals.” *Id.* at 879 (quoting *Glidden*, 370 U.S. at 536). In such
16 cases, the “strong interest of the federal judiciary in maintaining the constitutional
17 plan of separation of powers” outweighs any “disruption to sound appellate
18 process entailed by entertaining objections not raised below.” *Ibid.*

19 Aside from the foregoing, because there is no material difference between
20 the structure of the FHFA and the CFPB, Airmotive had no basis to raise an
21 Appointments Clause challenge in this case until the U.S. Supreme Court
22 overturned the Ninth Circuit’s decision in *Seila Law*. See *Collins* Federal Parties
23 Reply Br. 3, 23-24 (FHFA conceding that its structure is indistinguishable from
24 that of the CFPB for Appointments Clause purposes); *PHH Corp. v. CFPB*, 881
25 F.3d 75, 175-76 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (structure of FHFA
26 “raises the same question we confront here” in Appointments Clause challenge to
27 CFPB). The United States Supreme Court, however, did not overrule *Seila Law*
28 until June 29, 2020, long after the district court proceedings were concluded as to

1 Airmotive for all intents and purposes. *Seila Law LLC, supra* (2020) (decided on
2 June 29, 2020).

3 In this case, the ultimate resolution of *Collins* may bear heavily upon this
4 matter. Holding this appeal in abeyance will avoid unnecessary expense of
5 judicial resources and the resources of the parties. To the extent that any harm
6 might be suffered by the parties as a result of a stay, such harms are outweighed by
7 the avoidance of expense on the part of the parties and the outlay of judicial
8 resources. The stay is likely to be short since *Collins* has already been argued.
9 Moreover, any prejudice that may result from a stay will weigh approximately
10 equally upon the parties. Indeed, the Ninth Circuit Court of Appeals has already
11 recognized these facts by granting at least two substantially identical motions
12 presented to it. See Exhibit 1, attached hereto and incorporated herein by
13 reference. Notably, these motions were granted over the opposition of FHFA and
14 Fannie Mae. *Id.*

15 **C. THE UNITED STATES SUPREME COURT MAY REVIEW THE**
16 **STATUTE OF LIMITATIONS APPLIED TO CLAIMS SUCH AS**
17 **THOSE AT ISSUE IN THE INSTANT MATTER**

18 The instant appeal should also be stayed based upon a separate matter
19 pending before the United States Supreme Court. Assuming that this Court
20 reaches the merits of this appeal, one issue is the appropriate statute of limitations
21 to be applied to the Respondent's claims. The district court applied a minimum 4-
22 year statute of limitations, although it also cited the 6-year contract statute of
23 limitations .

24 The issue of whether a claim challenging an NRS 116 foreclosure sale based
25 on HERA sounds in contract is presently pending before the United States
26 Supreme Court, on a Petition for Certiorari from the Ninth Circuit Court of
27 Appeals, in *SFR Investments Pool 1, LLC v. M&T Bank*, No. 20-908, docketed
28 January 5, 2021. The United States Supreme Court has recently directed that

1 responses to the petition be filed. See Exhibit 2, attached hereto and incorporated
2 herein by reference. As a result, it appears quite possible that the petition will be
3 granted. If the petition is ultimately granted, it could greatly affect the outcome in
4 this case.

5 **D. GOOD CAUSE EXISTS TO STAY THIS APPEAL**

6 Although the primary issue briefed in this appeal to date is the Respondent's
7 failure to comply with the rules of civil procedure and the Appellant's resulting
8 inability to conduct discovery, the pending matters before the United States
9 Supreme Court discussed above will potentially greatly affect this appeal. In this
10 case, the district court applied at least a 4-year statute of limitations. The issue of
11 what statute of limitations applies to claims such as those of the Bank are at issue
12 in *M&T Bank*. Moreover the constitutionality of FHFA may have dramatic effect
13 upon the Federal Foreclosure Bar and its force.

14 *Collins* has already been argued and it appears that the United States
15 Supreme Court may grant the petition for certiorari in *M&T Bank*. Because the
16 questions at issue will soon be addressed, it is appropriate to stay this appeal.
17 Staying the appeal will avoid unnecessary expenditure of judicial resources and
18 the resources of the parties. At the very least, the issues in this appeal will be
19 significantly simplified and streamlined. To the extent that any harm might be
20 suffered by the parties as a result of a stay, such harms are outweighed by the
21 avoidance of expense on the part of the parties and the outlay of judicial resources
22 by this Court. Any prejudice that may result from a stay will weigh approximately
23 equally upon the parties. It is clear that the pending matters "bear upon the case."
24 The Ninth Circuit Court of Appeals has already recognized these facts by granting
25 similar motions. See Exhibit 1.

26 **CONCLUSION**

27 For the reasons discussed above, Airmotive respectfully requests that this
28 Court stay this appeal and hold all deadlines in abeyance until the United States

1 Supreme Court issues a decision in *Collins*. Should the United States Supreme
2 Court rule the FHFA's structure was unconstitutional, then the parties should have
3 the opportunity to submit briefing as to what effect this has on the present case.
4 Moreover, the ongoing proceedings in *M&T Bank* may provide additional
5 direction regarding the proper statute of limitations to apply to the Bank's claims.

6 DATED this 2nd day of March, 2021.

7 ROGER P. CROTEAU & ASSOCIATES, LTD.

8
9 /s/ Timothy E. Rhoda
10 ROGER P. CROTEAU, ESQ.
11 Nevada Bar No. 4958
12 TIMOTHY E. RHODA, ESQ.
13 Nevada Bar No. 7878
14 2810 West Charleston Blvd. #75
15 Las Vegas, Nevada 89102
16 (702) 254-7775
17 *Attorney for Appellant*
18 **AIRMOTIVE INVESTMENTS, LLC**
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 2nd day of March, 2021, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

X VIA ELECTRONIC SERVICE: through the Nevada Supreme Court's efile and serve system.

— VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

Stephen E. Haberfeld
8224 Blackburn Avenue #100
Los Angeles, CA 90048
Settlement Judge

— VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated on the service list below.

— VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the service list below.

/s/ Timothy E. Rhoda
An employee of ROGER P. CROTEAU & ASSOCIATES, LTD.

EXHIBIT 1

EXHIBIT 1

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.

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

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.

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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 2

EXHIBIT 2

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

February 18, 2021

Mr. Matthew Allen Fitzgerald
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219

Re: SFR Investments Pool 1, LLC
v. M&T Bank, et al.
No. 20-908

Dear Mr. Fitzgerald:

Although your office has waived the right to file a response to the petition for a writ of certiorari in the above case, the Court nevertheless has directed this office to request that a response be filed.

Your response, together with proofs of service and of compliance with relevant word or page limits, should be filed on or before March 22, 2021.

Pursuant to the Court's Order of April 15, 2020, only a single copy of these documents need be submitted in paper form. You may choose to format the document under the standards set forth in Rule 33.2 (in which case the page limits of Rule 33.2 apply), or under the standards set forth in Rule 33.1 but printed on 8½ x 11 inch paper (in which case the word limits of Rule 33.1 apply).

Sincerely,

A handwritten signature in black ink, appearing to read "Scott S. Harris", written in a cursive style.

Scott S. Harris
Clerk

cc: Jacqueline Ann Gilbert
Elizabeth B. Prelogar

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

February 18, 2021

Mrs. Elizabeth B. Prelogar
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: SFR Investments Pool 1, LLC
v. M&T Bank, et al.
No. 20-908

Dear Mrs. Prelogar:

Although your office has waived the right to file a response to the petition for a writ of certiorari in the above case, the Court nevertheless has directed this office to request that a response be filed.

Your response, together with proofs of service and of compliance with relevant word or page limits, should be filed on or before March 22, 2021.

Pursuant to the Court's Order of April 15, 2020, only a single copy of these documents need be submitted in paper form. You may choose to format the document under the standards set forth in Rule 33.2 (in which case the page limits of Rule 33.2 apply), or under the standards set forth in Rule 33.1 but printed on 8½ x 11 inch paper (in which case the word limits of Rule 33.1 apply).

Sincerely,

A handwritten signature in black ink, appearing to read "Scott S. Harris", written in a cursive style.

Scott S. Harris
Clerk

cc: Jacqueline Ann Gilbert
Matthew Allen Fitzgerald