IN THE SUPREME COURT OF THE STATE OF NEVADA

AIRMOTIVE INVESTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY Appellant, vs. BANK OF AMERICA, N.A. Respondent.	Case No. 80373

APPEAL
From the Eighth Judicial District Court, Clark County,
The Honorable Stefany A. Miley, District Court Judge
Case No. A-12-654840-C

RESPONDENT BANK OF AMERICA, N.A.'S OPPOSITION TO MOTION TO STAY

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Telephone: (702) 634-5000

Attorneys for Bank of America, N.A.

Bank of America, N.A. (**BANA**) opposes Airmotive Investments, LLC's motion to stay the appeal.

INTRODUCTION

This appeal involves a common fact pattern: A purchaser of a property sold at an HOA sale contends it acquired free-and-clear title because, under a Nevada statute, the HOA sale purportedly extinguished the first deed of trust encumbering the property at issue. But at the time of the HOA sale here, the Federal National Mortgage Association (**Fannie Mae**) owned the deed of trust and was under the conservatorship of the Federal Housing Finance Agency (**FHFA**). The Housing and Economic Recovery Act of 2008 (**HERA**), Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq.*), provides that property, including lien interests, of Fannie Mae and the Federal Home Loan Mortgage Corporation (**Freddie Mac**) (together, the **enterprises**) cannot be extinguished by any foreclosure process without the consent of FHFA while the enterprises are under FHFA's conservatorship. *See* 12 U.S.C. § 4617(j)(3) (the **Federal Foreclosure Bar**). The Federal Foreclosure Bar protected the deed of trust from extinguishment. *See, e.g.*, *Daisy Trust v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 445 P.3d 846 (2019).

Airmotive, which stands to benefit economically from delay, seeks to stay proceedings in this appeal, arguing the proceedings in the U.S. Supreme Court in two other cases—*Collins v. Yellen*, 938 F.3d 553 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 193, No. 19-422 (July 9, 2020), *argued*, Dec. 9, 2020, and *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020), *petition for cert. filed*, No. 20-908 (U.S. Jan. 5, 2021)—could affect the court's analysis.

The equities do not favor a stay. It would impede final judgment and would encourage parties situated similarly to Airmotive to seek stays in dozens of other cases pending before this court and other Nevada federal and state courts. BANA respectfully requests the court deny Airmotive's motion and proceed with briefing and resolution on the merits.

ARGUMENT

I. *Collins* Provides No Basis to Stay This Appeal.

A. The Questions at Issue in *Collins* Have No Bearing on This Appeal.

There is no overlap between the issues pending in *Collins* and those before the court here. The only thing connecting the two cases is that they involve FHFA and the enterprises under its conservatorship.

In *Collins*, shareholders of the enterprises contend a provision in 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 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).

Those issues are not before this court. Unlike in *Collins*, Airmotive does not attack any particular agency *action*, but rather contends the automatic operation of the Federal Foreclosure Bar, a federal *statute*, does not apply to the deed of trust. At

no point has Airmotive argued 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. More fundamentally, no act of the conservator is even at issue—this case involves the default application of a statute, the Federal Foreclosure Bar, that does not depend on the conservator having done *anything*, and Airmotive's claims do not involve any conservator action.

Airmotive does not appear to suggest that whatever narrow constitutional defect a removal-clause issue might present 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 [Consumer Financial Protection Bureau (**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"). 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 HERA's other provisions. *See* Collins Br. at 77-78.

[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

Footnote continued on next page

Rather, Airmotive posits a U.S. Supreme Court 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. Mot. at 6. 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 plaintiffs seek in *Collins* is predicated on the conservatorships' existence. And there is no cause to believe the Supreme Court would grant such relief 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—there, the CFPB—in *Seila Law*, and declined to do so. Such an outcome is not plausible in *Collins*, and Airmotive's contrary perception may be influenced by the economic windfalls it reaps whenever final resolution of this and related cases is delayed. *See infra* at 9-10.

Airmotive notes two similar appeals in the Ninth Circuit have been stayed pending the resolution of *Collins*. *See* Mot. at 7. However, the motions to stay in both cases were granted by the court clerk, not a judge or panel of judges. *See id.* FHFA, the enterprises, and their servicers in those cases filed motions for reconsideration of those stay orders under Circuit Rule 27-10, and those motions are

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Foreclosure Bar. No one has cited to it in this case, or, so far as BANA is aware, in any other Federal Foreclosure Bar case.

still pending. There is reason to believe those orders may be overturned: While one HOA sale purchaser has previously succeeded in securing stay orders from the Ninth Circuit clerk, no motions or merits panel ever granted such a stay. *See, e.g.*, Ex. A, *Ditech Fin. LLC v. SFR Invs. Pool 1, LLC*, No. 20-15498 (Oct. 19, 2020) (motions panel denying motion to stay appeal). And when FHFA and an enterprise's servicer moved for reconsideration of an order of the clerk imposing a stay, that motion was granted, and the stay of briefing lifted. *See* Ex. B, Mtn. for Reconsideration, *Bank of Am. v. Saticoy Bay LLC Series 5328 Lochmor*, No. 20-15582 (9th Cir. filed Oct. 13, 2020); Ex. C, Order, *Lochmor*, No. 20-1552 (Oct. 30, 2020).

B. Airmotive Cannot Assert a Challenge Based on *Collins* Now.

Airmotive waived any argument related to the *Collins* issues by not asserting such an argument below or in their opening brief before this court. At no point in this case has Airmotive ever challenged FHFA's decision to put the enterprises under conservatorship or argued the terms of the Director's removal conflict with Article II of the Constitution; it cannot do so for the first time in a motion to stay on appeal. Even absent a waiver, Airmotive 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) (FHFA's conservatorship must be challenged within 30 days of the Agency being appointed as conservator); 28 U.S.C. § 2401 (providing a six-year statute of limitations for civil actions against the United States). Moreover, Airmotive—which 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) (restricting judicial review to regulated entities).

Airmotive attempts to excuse its waiver by citing to case law suggesting it is somehow impossible to waive an appointments clause claim. *See* Mot. at 6 (citing *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991)). Even assuming Airmotive has correctly characterized those authorities, they are inapposite here: There is no appointments clause claim or issue in *Collins*. The defect the enterprise shareholders raise in that appeal is not whether FHFA's director is constitutionally appointed. Rather, they contend 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. Airmotive cites no authority that a separation-of-powers challenge to a removal clause can be introduced for the first time in a motion to stay appellate proceedings in a case where the removal-clause issue would be immaterial anyway.

II. Airmotive's Challenge Based on *M&T Bank* Fails.

A. Airmotive Has Abandoned Its Statute-of-Limitations Claims.

Airmotive briefed the timeliness of BANA's claims to the district court, which found that the six-year statute-of-limitations provision applicable to claims that sound more in contract than in tort applies to claims based on the Federal Foreclosure Bar. 5 JA 548. But in its briefing on appeal, Airmotive never raised the statute-of-limitations issue. The court should consider the issue waived and should not stay this appeal pending the resolution of a case that now has no import for the issues Airmotive chose to assert. *See, e.g., Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008).

B. The U.S. Supreme Court Is Exceedingly Unlikely to Grant Certiorari in *M&T Bank*.

Regardless of Airmotive's waiver, the petition for a writ of certiorari in *M&T Bank* does not warrant a stay of this appeal. Despite the U.S. Supreme Court having asked for a response from respondents, the *M&T Bank* petition is unlikely to be granted, as no conflict exists between the Ninth Circuit's decision and the law of any other circuit or any state's highest court.

Under U.S. Supreme Court Rule 10, petitions for certiorari are "granted only for compelling reasons," typically involving at least one of the following factors: (1) a conflict in decisions between two U.S. courts of appeals on an important federal question; (2) a split in authority between two state supreme courts, or between a state supreme court and a federal circuit court on an important federal question; or (3) the existence of "an important question of federal law that has not been, but should be, settled by" the Supreme Court, or the resolution of a question of federal law "in a way that conflicts with relevant" Supreme Court precedent. S. Ct. R. 10. The *M&T Bank* petitioner failed to carry its burden of establishing any of these factors provides a "compelling reason" for the Supreme Court to grant its petition.

First, there is no circuit split. *M&T Bank* confirms the HERA limitations provision governs cases involving quiet-title claims implicating the Federal Foreclosure Bar. *M&T Bank* follows the decisions of several other federal circuits that have considered related issues. *See FHFA v. UBS Americas Inc.*, 712 F.3d 136,

143 (2d Cir. 2013); *FDIC v. Bledsoe*, 989 F.2d 805, 809 (5th Cir. 1993); *Smith v. FDIC*, 61 F.3d 1552, 1561 (11th Cir. 1995).[2]

Second, the *M&T Bank* petitioner does not allege a split in authority between the Ninth Circuit's decisions and any decision of this court or the highest court of any other state. In fact, the opposite is true: In *JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, 136 Nev. Adv. Op. 68, 475 P.3d 52 (2020), this court agreed with *M&T Bank*'s analysis and held that while quiet-title claims relying on the Federal Foreclosure Bar are neither contract nor tort, such claims "sound more in contract than in tort" for purposes of HERA's limitations statute. *Id.* at 56.

Third, the petitioner identifies neither any important federal question nor any ruling conflicting with U.S. Supreme Court precedent on an issue of federal law. The petitioner suggests the narrow statute of limitations analysis conducted by the

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[2] The only hint in the petition that a split might exist is petitioner's discussion of *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982). *See M&T Bank* Pet. at 22-23. But *Megapulse* does not conflict with *M&T Bank*; it does not even address the same issue. In *Megapulse*, the issue was whether a claim against the United States was "founded upon contract" for the purposes of the Tucker Act, which waives sovereign immunity of contract claims against the United States. *See* 28 U.S.C. §§ 1346(a)(2),1491(a)(1). The *Megapulse* court concluded the claim at issue was not a contract claim, but it nowhere categorized the claim as a "tort" and *refuted* any suggestion that the claim at issue sounded in tort—the court found jurisdiction under the Administrative Procedure Act (which applies to statutory claims only), not the Tucker Act or the Federal Tort Claims Act (which apply to contract and tort claims respectively). *Megapulse*, 672 F.2d at 971. So as the Ninth Circuit correctly concluded in *M&T Bank*, *Megapulse* does not suggest a claim not sounding in contract must sound in tort. *See M&T Bank*, 963 F.3d at 857 n.2. The *Megapulse* inquiry, defining which claims are "'clearly' a contract claim," has no bearing here, where courts must characterize *all* claims as either "contract" or "tort" solely for purposes of a statute of limitations provision. *See id.*

Ninth Circuit in *M&T Bank* would somehow cause havoc in Nevada's tort law. *M&T Bank* Pet. at 25-26. But the petitioner does not explain how this can be so, when the analysis is applicable only to claims by FHFA as conservator (or the enterprises and their servicers, standing in FHFA's shoes), and to a relatively narrow set of cases, most of which were filed well within the period that even the petitioner concedes is timely. Moreover, the petitioner suggests the Ninth Circuit's decision would disrupt Nevada law without mentioning this court, finding no such problem, already reached the same conclusion as *M&T Bank* in *Chase v. SFR*. There is no significant question of federal law at issue warranting certiorari.

III. The Interests of Judicial Economy and Substantial Justice Are Best Served By Allowing the Appeal to Proceed

Airmotive also cannot establish good cause for a stay. The equities favor continuation of briefing in, and resolution of, this appeal.

Allowing this case to conclude would serve the interests of judicial economy and substantial justice. Airmotive and similar parties have sought to stay other cases before this court, the Ninth Circuit, and Nevada federal district courts in cases that raise the same issues.[3] If the motion is granted, Airmotive and other similarly situated HOA sale purchasers would seek stays and similar relief in the dozens of other cases pending HOA litigation. Lower courts may be persuaded an order to

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[3] *See, e.g.*, Motion to Stay, *Las Vegas Dev't Grp. LLC v. Nationstar Mortg., LLC*, No. 80826 (Nev. filed Feb. 17, 2021), Motion to Stay, *FHFA v. Las Vegas Dev't Grp. LLC*, No. 20-15658 (9th Cir. filed Feb. 23, 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); Resp't's Mot. to Stay Issuance of Remittitur, *Residential Credit Sols., Inc. v. SFR Invs. Pool 1, LLC*, No. 79306 (Jan. 11, 2021).

grant Airmotive and other HOA sale purchasers' 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 grind to a halt.

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

Proceeding with this appeal will not harm Airmotive. Even if Airmotive's fanciful projections about *Collins* come true, Airmotive could file a notice of supplement authority under NRAP 31(e). Airmotive also has the option to retain the property at issue even in the event of a loss in this appeal: Airmotive could elect to pay off Fannie Mae's lien or purchase the property at any sale accompanying the foreclosure proceeding in connection with Fannie Mae's deed of trust. If Airmotive elects not to pay off the lien or purchase the property, that is its choice. But that choice means it should not reap the returns to which free-and-clear title holders are entitled. The only way Airmotive will be put to the choice, though, is for the proceedings in this appeal to continue.

CONCLUSION

BANA respectfully requests the court deny Airmotive's motion to stay.

Dated this 9th day of March, 2021.

AKERMAN LLP

/s/ Scott R. Lachman

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89144

Attorneys for Bank of America, N.A.

CERTIFICATE OF SERVICE

I certify that I electronically filed on March 9, 2021, the foregoing **RESPONDENT BANK OF AMERICA, N.A.'S OPPOSITION TO MOTION TO STAY** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of Akerman LLP

Exhibit A

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 B

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

Alex McFall
BRADLEY ARANT BOULT CUMMINGS LLP
Roundabout Plaza
1600 Division St., Suite 700
Nashville, TN 37203
Telephone: (615) 252-4629
Facsimile: (615) 248-3029
Counsel for Appellee Bank of America N.A.

Michael A.F. Johnson
Dirk C. Phillips
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Tel: (202) 942-5000

Leslie Bryan Hart
FENNEMORE CRAIG, P.C.
7800 Rancharrah Parkway
Reno, Nevada 89511
Tel: 775-788-2228
Counsel for Amicus Curiae Federal Housing Finance Agency

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,

By: */s/ Alex McFall* Alex McFall BRADLEY ARANT BOULT CUMMINGS LLP Roundabout Plaza 1600 Division St., Suite 700 Nashville, TN 37203 Telephone: (615) 252-4629 Facsimile: (615) 248-3029 *amcfall@bradley.com* *Attorney for Appellee Bank of America N.A.*	By: */s/ Michael A.F. Johnson* Michael A. F. Johnson Dirk C. Phillips ARNOLD & PORTER KAYE SCHOLER LLP 601 Massachusetts Ave., NW Washington, DC 20001 Tel: (202) 942-5783 Fax: (202) 942-5999 *michael.johnson@arnoldporter.com* By: */s/ Leslie Bryan Hart* Leslie Bryan Hart, Esq. John D. Tennert, Esq. 7800 Rancharrah Parkway Reno, Nevada 89511 Tel: (775) 788-2228 Fax: (775) 788-2229 *lhart@fclaw.com;* *jtennert@fclaw.com* *Attorneys for Amicus Curiae Federal Housing Finance Agency*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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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 C

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