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Electronically Filed
Mar 18 2021 01:20 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

10 IN THE SUPREME COURT OF THE STATE OF NEVADA

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

14 Appellant,)

15 vs.)

16 BANK OF AMERICA, N.A.,)

17 Respondent.)

Supreme Court No. 80373

District Court Case No. A654840

18 **REPLY TO OPPOSITION TO MOTION TO STAY**

19 COMES NOW, Appellant, AIRMOTIVE INVESTMENTS, LLC, by and
20 through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and hereby
21 presents its Reply to Bank of America, N.A.'s Opposition to Motion to Stay.

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

3 DATED this 12th day of March, 2021.

4 ROGER P. CROTEAU & ASSOCIATES, LTD.

5
6 /s/ Timothy E. Rhoda
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16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **A. THE MERITS OF THE *M&T BANK* PETITION ARE NOT AT ISSUE**
18 **HEREIN**

19 The Respondent avers that “the U.S Supreme Court is exceedingly unlikely
20 to grant certiorari in *M&T Bank*.” See Opposition. However, the Respondent
21 acknowledges that the United States Supreme Court has requested responses to the
22 pending petition which, at the very least, indicates that the Court is more likely
23 than normal to grant certiorari. Moreover, the Respondent provides no authority
24 stating that this Court may deny a stay based on the Respondent’s perceived merits
25 of a petition. Thus, the merits of the *M&T Bank* Petition are not before this Court,
26 nor are they a condition precedent to granting a stay.

27 **B. APPELLANT HAS NOT WAIVED ANY ARGUMENTS RELATED**
28 **TO THE STATUTE OF LIMITATIONS UNDER THE**
CIRCUMSTANCES AT HAND

At the time that the Appellant’s Opening Brief was submitted in this matter,
M&T Bank was binding precedent. Moreover, as the Respondent points out, this
Court had followed *M&T Bank* in the matter of *JPMorgan Chase Bank, N.A. v.*

1 *SFR Invs. Pool 1, LLC*, 136 Nev. Adv. Op. 68, 475 P.3d 52 (2020). Both cases
2 technically continue to be precedent at this point in time. However, this could
3 change based upon the associated pending United States Supreme Court
4 proceedings. In the event that the United States Supreme Court overrules *M&T*
5 *Bank*, this would necessarily require this Court to re-visit *JPMorgan Chase Bank*.
6 Appellant has most certainly not abandoned its statute of limitations defense
7 where it relied upon the then-existing state of law at the time of briefing and the
8 law may thereafter change.

9 **C. COLLINS CONSTITUTES AN ADDITIONAL BASIS UPON WHICH**
10 **TO STAY THIS APPEAL**

11 Neither of Respondent's arguments regarding the pending United States
12 Supreme Court appeal of *Collins v. Yellen*, No. 19-422, have merit. First, *Collins*
13 has the potential to significantly impact HERA and its application to this case.
14 Second, while Respondent argues Airmotive somehow waived any argument
15 related to the issues in *Collins*, this is simply not the case. Nor will Respondent be
16 harmed by a stay.

17 **1. *Collins has the Potential to Impact HERA, as well as its Force and***
18 ***Effect***

19 Airmotive does not argue that *Collins* is likely to completely dispose of this
20 lawsuit. Instead, Airmotive avers that *Collins* may call into substantial doubt the
21 validity of the HERA claim in this case, making final relief premature. The FHFA
22 has conceded its structure is unconstitutional so it is likely the Court will find it to
23 be so. *Collins* Federal Parties Reply Br. 23-26. The question is whether the
24 challenged actions are ultra vires, and "must be set aside." *Collins* Petr. Br. 65. If
25 the Court agrees, its decision will have direct implications here, where the claim
26 depends largely on the Federal Foreclosure Bar, which applies only on
27 conservatorship, a decision left solely to the "discretion of the Director." 12
28 U.S.C. § 4617(a)(2). If the Net Worth Sweep is invalid due to the unconstitutional

1 structure, it will also draw into serious question the validity of the conservatorship
2 which, if ultra vires, may destroy the Federal Foreclosure Bar claim here. It could
3 also call into question the FHFA Director's unilateral and oft cited claim that it
4 never would and never did grant consent to foreclosure.

5 *Collins* may impact the foundation of BANA's HERA claim, which is
6 reason enough to stay this appeal pending the decision in *Collins*. The parties can
7 then argue why the *Collins* decision should or should not affect this case, and this
8 Court can consider the parties' respective arguments with the benefit of what the
9 Supreme Court has actually decided (rather than what BANA believes the United
10 States Supreme Court *should* decide). Indeed, until *Collins* is actually decided, the
11 parties and this Court are unable to do any more than guess what the ultimate
12 effect of the United States Supreme Court's decision may be.

13 **2. *Airmotive is not Precluded from Raising and has not Waived the***
14 ***Arguments Herein***

15 The Respondent asserts that Airmotive lacks standing "to challenge the
16 imposition of the conservatorships." *See* Opposition. However, lack of standing
17 is irreconcilable with BANA's corresponding assertion that Airmotive should have
18 brought its challenge when the conservatorship was imposed, long before the
19 HOA Foreclosure Sale and long before BANA invoked the Federal Foreclosure
20 Bar in this case. Indeed, Airmotive did not even possess an interest in the
21 Property at the time that HERA was enacted.

22 In addition, the basis of this challenge to the FHFA's structure arose only
23 last summer with the June 29, 2020 decision in *Seila Law LLC v. CFPB*, 140 S. Ct.
24 2183 (2020). *See, e.g., Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142–43 (1967)
25 ("[T]he mere failure to interpose [a constitutional] defense prior to the
26 announcement of a decision which might support it cannot prevent a litigant from
27 later invoking such a ground."). Before then, the Supreme Court had repeatedly
28 upheld the constitutionality of independent agencies. *See id.* at 2198-2200. It was

1 only in *Seila Law* that the Supreme Court held for the first time that an
2 independent agency headed by a *single* director removable only for cause violated
3 constitutional separation of powers, overruling the Ninth Circuit’s precedent
4 upholding the same structure of the Consumer Finance Protection Board. *See id.* at
5 2200-07; *id.* at 2197.

6 **D. PENDING SETTLEMENT NEGOTIATIONS CONSTITUTE AN**
7 **ADDITIONAL BASIS TO STAY THIS APPEAL**

8 As mentioned in Respondent’s Motion to extend time to file its Answering
9 Brief filed on February 19, 2021, Airmotive is presently engaged in settlement
10 discussions to potentially globally resolve numerous pending cases with
11 FHFA/Fannie Mae/Freddie Mac. Although an agreement has not yet been
12 reached, Appellant is cautiously optimistic that a resolution will be achieved given
13 that its sister company, Thunder Properties, Inc., was able to reach such an
14 agreement.

15 **E. ANY HARM THAT MIGHT BE SUFFERED BY BANA IS MORE**
16 **THAN OFFSET BY THE CONSERVATION OF JUDICIAL**
17 **RESOURCES**

18 *Collins* was argued in December and will likely be decided by the end of
19 June, at the latest.¹ Denying a stay could lead to pointless further litigation. At
20 the very least, if this Court proceeds with the adjudication of this appeal, it would
21 be doing so without knowing with certainty what the effect of *Collins* may be
22 upon the FHFA and the Federal Foreclosure Bar. Moreover, to the extent that this
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24 ¹ The Ninth Circuit Court of Appeals has issued multiple stays in similar cases
25 pending the resolution of *Collins*. *See* Airmotive’s Motion to Stay, Exhibit 1.
26 Notably, these stays were granted over the opposition of FHFA and Fannie Mae. *Id.*
27 Although the Respondents aver that these stays “were granted by the Clerk of Court,
28 not a judge or panel of judges,” to the best of Appellant’s knowledge, the stays are
valid and remain in effect at this time.

1 Court reaches the merits of this matter, it cannot know with certainty which statute
2 of limitations is applicable until *M&T Bank* is decided. As a result, it is quite
3 likely that further litigation, motion practice and briefing may be required. This
4 can all be avoided by simply awaiting the forthcoming decisions from the United
5 States Supreme Court. At that point, not only the parties, but also this Court will
6 be able to fully consider the circumstances appropriately.

7 BANA argues that “purchasers like Airmotive have every incentive to
8 prolong the appeal process needlessly” and that “any delay in judgment accrues to
9 their benefit.” *See* Opposition. These self-serving statements seem to indicate that
10 BANA believes that Airmotive is not justified in protecting its rightfully owned
11 real property. It should not be lost upon the Court that BANA or its
12 predecessor(s) could have avoided this entire controversy by simply satisfying the
13 superpriority portion of the HOA Lien that was foreclosed upon. Instead, they did
14 nothing. Airmotive’s predecessor appeared at the HOA Foreclosure Sale and
15 purchased the Property in good faith without any notice of Fannie Mae or Freddie
16 Mac’s purported interest. In any event, this Court and the parties will be best
17 served by adjudicating this matter with the most recent and accurate law in mind.

18 CONCLUSION

19 For the reasons discussed above, Airmotive respectfully requests that this
20 appeal be stayed until the United States Supreme Court decides the *M&T Bank*
21 case and issues a decision in *Collins*. The ultimate resolution of both *Collins* and
22 *M&T Bank* may bear heavily upon this matter. Holding this appeal in abeyance
23 will avoid unnecessary expense of judicial resources and the resources of the
24 parties. To the extent that any harm might be suffered by the parties as a result of

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1 a stay, such harms are more than outweighed by the avoidance of expense on the
2 part of the parties and the outlay of judicial resources by this Court.

3 DATED this 12th day of March, 2021.

4 ROGER P. CROTEAU & ASSOCIATES, LTD.

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6 /s/ Timothy E. Rhoda
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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 18th 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.