**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company,<br><br>Appellants,<br><br>vs.<br><br>NATIONSTAR MORTGAGE, LLC, a Delaware Limited Liability Company<br><br>Respondent. | Case No. 82078 | Electronically Filed<br>Mar 18 2021 04:34 p.m.<br>Elizabeth A. Brown<br>Clerk of Supreme Court |

**APPEAL**

From the Eighth Judicial District Court, Clark County,
The Honorable Mary Kay Holthus, District Court Judge
Case No. A-13-684715-C

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# APPELLEE'S OPPOSITION TO MOTION TO STAY

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## INTRODUCTION

Appellee Nationstar Mortgage LLC respectfully opposes appellant SFR Investments Pool 1, LLC's motion to stay the appeal.

This appeal involves a fact pattern familiar to the court: The purchaser of property sold at an HOA foreclosure sale contends 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 sale. But at the time of the HOA's foreclosure 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. The Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), protected that property interest from extinguishment. *See Daisy Trust v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 445 P.3d 846 (2019).

SFR seeks to stay proceedings in this appeal, arguing proceedings in the U.S. Supreme Court in two other cases—*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), and *Collins v. Yellen*, 938 F.3d 553, *cert. granted*, 141 S. Ct. 193, No. 19-422 (U.S. July 9, 2020)[1]—could affect this court's analysis. But neither of those cases are remotely likely to have any effect here, and SFR's speculation they could is no reason

[1] The case was previously captioned *Collins v. Mnuchin*; the name changed upon the confirmation of a successor public official. *See* S. Ct. R. 35(3).

to bring this already long-running action to a halt. Nor do the equities favor a stay. It would impede final judgment in this case and also encourage parties to seek stays in dozens of other Federal Foreclosure Bar cases.

Nationstar respectfully requests the court deny SFR's motion.

## ARGUMENT

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

This appeal should not be stayed pending the resolution of SFR's petition for a writ of certiorari in *M&T Bank*. That 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 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. SFR failed

to establish any of these factors provide a "compelling reason" for the Supreme Court to grant its petition.[2]

*First*, there is no circuit split. *M&T Bank* confirms the Housing and Economic Recovery Act's (**HERA**) Limitations Provision governs quiet-title claims implicating the Federal Foreclosure Bar. *M&T Bank* follows decisions of other federal circuits having 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).

SFR's petition hints at a vague disagreement between *M&T Bank* and *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982). *See M&T Bank* Pet. at 22-23. But *Megapulse* does not even address the same issue. In *Megapulse*, the issue

[2] The fact the U.S. Supreme has asked for a response to the *M&T Bank* petition does not suggest the petition is likely to be granted. An empirical analysis of certiorari petitions found that, between the 2001 and 2004 terms, the Court granted only 8.6% of petitions to which it had a requested a response. *See* Thompson & Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16:2 GEO. MASON L. REV. 237, 250 (2009). Another study, looking at a random sample of certiorari petitions filed by paying parties between January 2009 and May 2019 for which the Supreme Court requested a response from the United States, shows that in *none* of those cases did the Supreme Court eventually grant the petition. *See* Adam Feldman, *SCOTUSblog*, Comparing cert-stage OSG efforts under Obama and Trump, (June 6, 2019), *www.scotusblog.com/2019/06/empirical-scotus-comparing-cert-stage-osg-efforts-under-obama-and-trump.* Given SFR's petition in *M&T Bank* asserted—incorrectly in Nationstar's view—that a forthcoming U.S. Supreme Court decision could be relevant to the petition, the court may well have been curious as to whether the assertion was plausible. As explained herein, it is not.

was whether a claim against the United States was "founded upon contract" for the purposes of the Tucker Act, which waives sovereign immunity as to contract claims against the United States. *See* 28 U.S.C. §§ 1346(a)(2),1491(a)(1). The *Megapulse* court concluded the claim at issue in that case was not a contract claim, but it also *refuted* any suggestion 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). 672 F.2d at 971. So as the Ninth Circuit correctly concluded in *M&T Bank*, *Megapulse* does not suggest that a claim not sounding in contract must sound in tort. *See* 963 F.3d at 857 n.2. The *Megapulse* inquiry, strictly defining which claims are "'clearly' a contract claim," has no bearing on the analysis here, where courts must characterize *all* claims as either "contract" or "tort" solely for purposes of a limitations provision. *See id.*

*Second*, SFR does not allege any split in authority between *M&T Bank* and any decision of this court or the highest court of any other state. Nor could it: In *Chase v. SFR*, 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, when required to choose one category to select the applicable statute of limitations, such claims "sound more in contract than in tort." 475 P.3d at 56.

*Third*, SFR identifies neither any important federal question nor any ruling conflicting with U.S. Supreme Court precedent on an issue of federal law. SFR suggests the narrow statute of limitations analysis conducted by the Ninth Circuit in *M&T Bank* would somehow cause havoc in Nevada's tort law. *M&T Bank* Pet. at 25-26. SFR does not explain how this can be so, when the analysis is applicable only to claims held 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 SFR concedes is timely. Moreover, SFR suggests the Ninth Circuit's decision would disrupt Nevada law without mentioning that this court, finding no such problem, already reached the same conclusion as *M&T Bank* in *Chase v. SFR*.[3]

## II. *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 this court. 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

[3] A notable omission, as *Chase v. SFR* preceded SFR's petition for a writ of certiorari in *M&T Bank* by more than a month.

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 a 2008 agreement between FHFA and the Department of Treasury—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*, SFR does not attack any agency *action*, but rather contends the automatic operation of the Federal Foreclosure Bar, a federal *statute*, does not apply to a deed of trust that encumbers a property it claims to have purchased. At no point in any pleading or any merits briefing in this case has SFR argued an FHFA action is invalid, much less that an FHFA action is invalid because of any purported constitutional defect in the FHFA Director removal provision. No act of the Conservator is at issue—this case involves the default application of the Federal Foreclosure Bar, and the specific claims at issue do not involve any Conservator action.

SFR appears to suggest whatever narrow constitutional defect a removal-clause issue might present would somehow render all of HERA (including the Federal Foreclosure Bar) invalid. The Supreme Court 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); *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 *Collins* plaintiffs concede under *Seila Law*, with a single exception that is not implicated here,[4] the removal provision is severable from the rest of HERA. *See* Collins Br. at 77-78.

Rather, SFR posits a holding in *Collins* that the FHFA Director's for-cause removal protection is unconstitutional would invalidate the 2008 decisions to place the Enterprises in conservatorships. Mot. at 4. That suggestion is implausible, as it contemplates the Supreme Court ordering a resolution no party has asked for—*i.e.*, determining the remedy for an unconstitutional removal provision includes unwinding the conservatorships themselves. And there is no cause to believe the U.S. Supreme Court would grant such relief even if any party in *Collins* asked it to, as it would have enormously disruptive consequences—upending a fundamental sector of the national economy by unwinding nearly 13 years of conservatorship operations. The Enterprises are critical to the nation's housing and financial markets;

[4] The *Collins* plaintiffs contend 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 Federal Foreclosure Bar'.

they currently own about $5.3 trillion (about half) of all outstanding mortgages, and have completed roughly 5.5 million foreclosure-prevention actions since the start of the conservatorships in September 2008. Without the conservatorships to preserve Enterprise functions, they would not have been able to engage in financing and loan-modification actions that have allowed millions of Americans to become homeowners or stay in their homes through both the financial crisis and the covid-19 pandemic.

SFR notes two similar appeals in the Ninth Circuit have been stayed pending the resolution of *Collins*. *See* Mot. at 1, n.2. 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, which are still pending. There is reason to believe those orders will 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. G, *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 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. H, Mtn. for Recons., *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).

### B. SFR Cannot Assert a Challenge Based on *Collins* Now

SFR waived any argument related to the *Collins* issues by never asserting such an argument in its briefing to the district court. At no point in this case has SFR ever challenged FHFA's decision to place Freddie Mac 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 in a motion to stay or in its answering brief on appeal. Even absent a waiver, SFR could not raise such a challenge now—nearly 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—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).

SFR attempts to excuse its waiver by citing to case law suggesting it is somehow impossible to waive an Appointments Clause claim. *See* Mot. at 4 (citing *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991)). But *Freytag* involved an Appointments Clause objection to the "special trial judge" hearing petitioner's tax case. 501 U.S. at 878. Neither *Collins* nor this case involves an Appointments Clause issue. This challenge to the removal provision relies on separation-of-powers

principles. As Justice Scalia noted in his concurrence in *Freytag*, the Court did not adopt a "general rule" that structural constitutional (including Appointments Clause) rights cannot be forfeited. 501 U.S. at 893. Rather, the Supreme Court explained it would exercise its discretion to forgive a waiver only if the challenge is "neither frivolous nor disingenuous." *Id.* at 880. But SFR's challenge is both: as noted above, the removal-clause issue is immaterial to the questions SFR actually raised in this case. And SFR's claim it could not raise an Appointment Clause challenge below because the Supreme Court had not yet overturned the Ninth Circuit's decision in *Seila Law*, Mot. at 5, is disingenuous. The Ninth Circuit does not bind this court or the district courts of this state. Even if it did, litigants often challenge existing precedent by arguing for its reinterpretation or modification; the fact the Ninth Circuit upheld the CFPB's structure as constitutional did not preclude SFR from bringing a good-faith challenge to FHFA's structure. *See id.*

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

Allowing this case to conclude would serve the interests of judicial economy and substantial justice. SFR and similar parties have sought to stay other cases before this court, the Ninth Circuit, and federal district courts in cases raising the same issues.[5] If the motion is granted, SFR and other similarly situated HOA sale

[5] *See, e.g.*, Motion to Stay, *Las Vegas Dev't Grp. LLC v. Nationstar Mortg., LLC,*

Footnote continued on next page

purchasers would seek stays and similar relief in many cases pending the courts. District courts may be persuaded by an order granting SFR and other HOA sale purchasers' pending motions to stay. All progress toward resolution concerning hundreds of properties suffering from clouded property interests will grind to a halt.

HOA sale purchasers like SFR have every incentive to needlessly prolong the appeal process, as any delay in judgment accrues to their benefit. Having acquired the property for far less than fair market value, SFR may continue to reap substantial profits by renting it out at market rates. Meanwhile, Freddie Mac—which made a substantially larger, market-priced investment in the loan secured by the property—receives no return whatsoever. Until this case is resolved, SFR stands to collect additional unjust economic returns from Freddie Mac's invested capital, hindering 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 also not impose any harm on SFR. Even if SFR's projections about *Collins* come true, SFR could raise that in briefing before this court reaches a decision, or file a notice of new authority. Stays of appeals are the exception, not the rule, and it is not inequitable to require SFR to pursue its

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No. 80826 (Nev. filed Feb. 17, 2021); Respt's Mot. to Stay Issuance of Remittitur, *Residential Credit Sols., Inc. v. SFR Invs. Pool 1, LLC*, No. 79306 (Jan. 11, 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).

appeal in due course. SFR also has the option to retain the property even in the event of a loss: SFR could pay off Freddie Mac's lien or purchase the property at a sale accompanying foreclosure proceedings in connection with Freddie Mac's deed of trust. If SFR elects not to pay the lien or purchase the property, that is its choice. But that choice means it should not reap the returns to which a free-and-clear title holder is entitled.

## CONCLUSION

Nationstar respectfully requests the court deny SFR's motion to stay.

Dated this 18th day of March, 2021.

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## CERTIFICATE OF SERVICE

I certify that I electronically filed on March 18, 2021, the foregoing **APPELLEE'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