Case No. 83214

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, A NATIONAL ASSOCIATION, Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JESSICA PETERSEN, District Judge
District Court Case No. A-13-692304-C

APPELLANT APPENDIX VOLUME 11

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4. ***Chase waived its argument that relation back applies to motions by failing to raise it below.***

Waiver is defined as "the voluntary relinquishment or abandonment—express or implied—of a legal right or advantage. The party alleged to have waived a right must have a had both ***knowledge*** of the existing right and ***intention*** of foregoing it."[40] Here, Chase argues for the first time on appeal that relation back is from its motion to amend, a motion not yet considered by the District Court, let alone granted. This argument was not first raised to the District Court. In opposition to SFR's Second MSJ, Chase raised relation back in its briefing but did not argue, as it is now that relation back is to its motion to amend.[41] It only argued what has already been addressed *supra*. After SFR filed its Second MSJ, Chase had ample time to file its opposition as allowed under the rules. Chase had both knowledge of SFR's arguments and by choosing the arguments to place in its opposition had an intention of foregoing other arguments. Accordingly, Chase waived its right to argue relation back to its motion before this Court. As a result, this Court should not entertain the new argument here.

In a last-ditch effort, Chase relies *Premier One*,[42] for the meritless proposition

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[40] Black's Law Dictionary, 1813 (10th Ed. 2014) (emphasis added).
[41] AOB 19-24; *see* Chase's Opposition to SFR's Second MSJ at 3AA_ 543 at Sec. II.
[42] *Premier One Holdings, Inc. v. Red Rock Financial Services, LLC*, 429 P.3d 649 (2018) (unpublished disposition).

that Chase can save its waived argument. Yet, the case provides no guidance. In *Premier One*, the parties argued whether claim preclusion was applicable before the District Court and on appeal, appellant raised a subset of claim preclusion, whether non-mutual claim preclusion barred the claim.[43] In *Premier One*, this Court did not find waiver barred the use of non-mutual claim preclusion.[44] The reason for that is the parties there had all argued the elements and simply not used the proper name, "claim preclusion."[45] Thus, to enforce a waiver would be form over substance. This is not the case here. Here, where Chase is asking this Court to move the goal line for when relation back begins. Relation back is a doctrine that allows a claim plead outside the statute of limitations to be timely when the claim relates back to the original pleading. Before the District Court, Chase did not argue relation back is to its motion to amend, and should not be allowed to argue it now. Chase intentionally chose how it wanted to argue relation back and placed those arguments in its opposition to SFR's Second MSJ. It did not, like the parties in *Premier One*, simply fail to use proper nomenclature. Now on appeal, in an effort to circumvent the District Court's finding, Chase changes its relation back argument and wants a pass from this Court.

Chase is not entitled to a second bite at the apple. Accordingly, this Court

[43] *Premie*r, 429 P.3d at *1.
[44] Id. at fn. 2.
[45] *Id.*

should not consider this argument that is not properly before this Court. As such, this Court can affirm the District Court's order, finding that relation back is not available to Chase as the original complaint did not place SFR on notice of 4617(j)(3).

Again, SFR has no desire to waive the waiver. Should this Court want to entertain this argument despite the fact that Chase failed to properly raise it before the District Court in the first instance, this Court can order additional briefing.

C. The District Court Properly Exercised its Discretion in Striking Chase's New Argument – Six Year Statute of Limitations.

It is well settled that a movant cannot raise new arguments in its reply which deprives the non-moving party of an opportunity to respond in writing before the hearing. This Court addressed a variation of this issue in *Valley Health*.[46] In that case, the real party in interest Roxanne Cagnina ("Cagnina") sued Valley Health for an alleged sexual assault while under the care and treatment at the hospital.[47] Cagnina filed a motion to compel before the discovery commissioner.[48] The discovery commissioner granted the motion to compel, Valley Health filed an objection before the District Court.[49] Valley Health failed to raise an argument—

[46] *Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 127 Nev. 167, 252 P.3d 676 (2011).
[47] *Id*. at 170, 252 P.3d at 678.
[48] *Id.*
[49] *Id.*

privilege—before the discovery commissioner and raised privilege for the first time before the District Court.[50] This Court affirmed the District Court's order striking the new argument raised for the first time before the District Court.[51] This Court stated the following in its holding: "Additionally, consideration of such untimely raised contentions would unduly undermine the authority of the Magistrate Judge by allowing litigants the option of waiting until a Report is issued to advance additional arguments. *quoting Abu–Nassar v. Elders Futures, Inc.,* No. 88 Civ. 7906 (PKL), 1994 WL 445638, at *4 n. 2 (S.D.N.Y. Aug. 17, 1994)." *Id*.

1. ***Chase ambushed SFR with new arguments in its reply brief before the district court***

The case here is analogous to *Valley Health*. Like Valley Health with privilege, Chase waited until its reply to raise six-year statute of limitations rather than argue it in opposition to SFR's second MSJ, thereby depriving SFR of a meaningful opportunity to respond.[52] SFR, akin to Cagnina, was unable to respond to in writing to the "new argument," thereby ambushing SFR at the hearing. Accordingly, SFR properly moved to strike and the District Court properly exercised

[50] *Id*. at 127 Nev. 172, 252 P.3d at 679.
[51] *Id.*
[52] *See* Chase's Opposition to SFR's Second MSJ regarding statute of limitations arguments raised 3AA_543:1-546:3; *see also* Chase's Reply in support of its Second MSJ at, 4AA_575-594; *see specifically*, 4AA_590:8-592:2, which raises six-year contract claim for the first time.

its discretion in striking Chase's new argument.[53]

2. ***If the district court allowed the new argument it would lead to inefficient use of judicial resources.***

What is more, as this Court noted in *Valley Health*, parties need to present all arguments, issues, and evidence in the first instance and not wait for a reply to avoid wasting judicial resources.

> [a] contrary holding would lead to the inefficient use of judicial resources and allow parties to make an end run around the discovery commissioner by making one set of arguments before the commissioner, waiting until the outcome is determined, then adding or switching to alternative arguments before the district court. All arguments, issues, and evidence should be presented at the first opportunity and not held in reserve to be raised after the commissioner issues his or her recommendation.[54]

Again, this analysis is applicable here too. Chase should be able to place all its arguments that are in opposition to SFR's arguments in one responsive pleading to which SFR can timely respond in writing. Allowing Chase to place new arguments in its reply in effect allows Chase to make one set of arguments in its opposition to which SFR can respond by timely filing a reply and different arguments in its reply to which SFR does not have a meaningful opportunity to respond in writing and is in effect ambushed at the hearing.

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[53] *See* Transcript at 4AA_600-624; *see specifically*, 4AA_613:6-19.
[54] *See*, *Valley Health*, 127 Nev. at 679-80, 252 P.3d at 172-73. .

Here, as in *Valley Health*, if the District Court allowed the new argument it would have "frustrated the purpose" of having a hearing after briefing. Thus, by analogy this case is applicable and this Court should not consider Chase's new argument.

This Court has also declined to consider new arguments raised in a reply brief on appeal. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011).[55] The District Court did not abuse its discretion for failing to consider Chase's new argument in its reply.

This Court should affirm the District Court's order striking Chase's new argument, and not consider whether Chase's claim is entitled to a six year statute of limitations under 4617(b)(12). However, in the unlikely event this Court disagrees with SFR and determines that the District Court abused its discretion in deciding it would not consider the argument, SFR asks this Court to allow it to supplement its briefing.

D. There Is No Five-Year Statute Of Limitations Applicable To Chase's Claims

1. The District Court correctly found the five-year does not apply to Chase.

"Let us make distinctions, call things by the right names."[56]

[55] SFR believes there is only one exception to this rule, subject matter jurisdiction, which can be raised at anytime even by the Court sua sponte.

[56] Henry David Thoreau, Journal, 28 November 1860 at 278, available at https://www.walden.org/wp-content/uploads/2016/02/Journal-14-Chapter-4.pdf.

The District Court correctly found that Chase's claims were barred by the three-year statute of limitations.[57] Chase's arguments for the five-year statute of limitations fail as neither NRS 11.070 and/or NRS 11.080 are not time-bar statutes, instead, these are standing statutes. In Nevada, "quiet title" is just a slang term used to identify any action where one party claims an interest in real property adverse to another. NRS 40.010 or NRS 30.040 do not have express statute of limitations. Thus, the *title* of Chase's claim does nothing to assist the court in determining which statute of limitations applies. In order to determine this, the Court must look at the nature of the grievance to determine the character of the action, rather than the labels in the pleadings. *Torrealba v. Kesmetis*, 124 Nev. 95, 178 P.3d 716, 723 (2008). Here, Chase sought to amend to allege HERA. But HERA has its own statute of limitations: six-years for contract claims and three-years for torts i.e. non-contract claims. 12 U.S.C. § 4617(b)(12). There is no basis to look outside of HERA given that HERA is the claim/right Chase seeks to assert.[58] Regardless, Chase's reliance on NRS 11.070 and 11.080 is fatal because neither provide a statute of limitations for Chase, and even if they did, neither apply to Chase.

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[57] 4AA_628 at ¶¶ B_C.

[58] Because there is no analogous state law Federal Foreclosure Bar provision, the extender provision of HERA does not apply.

2. ***NRS 11.070 does not provide a five-year statute of limitations for Chase.***

NRS 11.070 is not a time-bar statute; instead, it is a standing statute. Regardless, it does not apply to Chase as Chase was never seized[59] nor possessed of the subject property.

3. ***NRS 11.070 is a standing statute.***

Under Nevada rules of statutory interpretation, the Court must first look to the statute's plain language. *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013). If the statute's, "language is clear and unambiguous," the Court must enforce it "as written." *Id.* (quotation omitted). The Court must "avoid[] statutory interpretation that renders language meaningless or superfluous," and "interpret a rule or statute in harmony with other rules and statutes." *Id.* (quotation omitted).

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[59] Seisin is defined as possession of a freehold estate in land. Black's Law Dictionary 1564 (10th Ed. 2014). "Originally, seisin meant simply possession and the word was applicable to both land and chattels. Prior to the fourteenth century it was proper to speak of a man as being seised of a land or seised of a horse. Gradually, seisin and possession became distinct concepts. A man could be said to be in possession of chattels, or of lands wherein he had an estate for years, but he could not be said to be seised of them. Seisin came finally to mean, in relation to land, possession under claim of a freehold estate therein. The tenant for years had possession but not seisin; seisin was in the reversioner who had the fee." *Id*. (citing Cornelius J. Moynihan, *Introduction to the Law of Real Property* 98-99 (2d ed. 1988)). Further, seisin "has nothing to do with 'seizing,' with its implication of violence." *Id*. (citing Robert E. Megarry & M.P. Thompson, *A Manual of the Law of Real Property* 27-28 (6th ed. 1993)). In other words, seisin lies with the record titleholder.

Rather than define a time-period in which a party must file suit, "founded upon title to real property," NRS 11.070 sets a condition precedent which gives a party standing to bring an action **or** defend an action, and that condition is the party must have been seized i.e. ownership in fee[60] or possessed of the real property in question, five years prior to bringing the action **or** defending the action. Both the title of the statute and the language within, namely "no cause of action…unless" make it clear that the statute is a standing statute. The fact that the statute also limits the **defense** of such an action "unless" the condition precedent exists also makes it clear that NRS 11.070 is not a time-bar statute, but rather a standing statute. This Court, in interpreting the identical predecessor to NRS 11.070, stated that the statute, "imposes a general inability to sue or defend upon any right claimed in real estate, unless the party suing or defending shall have been in possession of the real estate within five years last past." *Chollar-Potosi Mining Co. v. Kennedy & Keating*, 3 Nev. 365, 369 (1867).

NRS 11.070 makes no mention of an accrual of a claim "founded upon title;" instead, it only discusses the necessary condition a party must have in order to have standing to assert a claim or defense. In this regard, while NRS 11.070 may bar a

[60] *South End Minding Co. v. Tinney*, 22 Nev. 19, ___, 35 P. 89, 92 (1894) ("the word 'seised' means something different from simple possession of a claim…If so, it must mean, as it would naturally import, an ownership in fee, for this is the only other kind of ownership known to the law.")

claim/defense, it will not be because of any time-limitation; it will be because the party was not seized or possessed of the property i.e. the party lacks standing.

4. NRS 11.070 does not apply to the Bank.

NRS 11.070 states in relevant part

> No cause of action…founded upon the **title to real property**,…shall be effectual, unless it appears that **the person prosecuting the action…was seized or possessed of the premises in question within 5 years before the committing of the act** in respect to which said action is prosecuted…

NRS 11.070 (emphasis added.)

In the present case, Chase sought a declaration that the deed of trust remained a valid lien on the property. Simply because Chase uses the slang term "quiet title" or that it claims the deed of trust still clouds title does not morph the claim into one "founded upon title to real property." *See e.g. Bank of America, N.A. v. Country Garden Owners Association*, Case No. 2:17-cv-01850-APG-CWH, 2018 WL 4305761 (D. Nev. March 14, 2018) (finding NRS 11.070 does not apply to bank's claim); *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:17-cv-01757-JAD-VCF, 2018 WL 2292807 (D. Nev. May 18, 2018) (finding neither NRS 11.070 nor 11.080 apply to the bank's claim).

As this Court held, while a lien is a monetary encumbrance on property which clouds title, "it exists separately from that title," and therefore an action involving

the lien does not relate to title. *Hamm v. Arrowcreek Homeowners Ass'n*, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008). In *Hamm*, this Court noted "a lien right alone does not give the lienholder right and title to the property." *Id.*, quoting *In re Marino*, 205 B.R. 897, 899 (Bankr.N.D.Ill.1997). Rather, "title 'which constitutes the legal right to control and dispose of property' remains with the property owner until the lien is enforced through foreclosure proceedings."' *Id.* quoting Black's Law Dictionary 1522 (8th Ed.2004).

With this principle in mind, NRS 11.070 does not apply to Chase's unpled claim because the claim is not one "founded upon title to real property." Chase, as mere lienholder, claims a lien right, and nothing more. The unpled claim is an attempt to obtain a determination that the lien survived the sale based on HERA; it is not a claim founded upon title. If that was not enough, as discussed above, NRS 11.070 is not a time-bar statute, it is a standing statute; Chase as mere lienholder would never have standing to assert a claim or defend a claim founded upon title to real property because it was neither seized nor possessed of the property.

Chase's attempt to rely on the homeowner's prior seisin or possession of the Property is unavailing. The statute is clear: "whose title the action is prosecuted" precedes the identification of "ancestor, predecessor or grantor" meaning only if those three categories of people are prosecuting or defending for the title rights of the person who was seized or possessed of the property, will the conditions precedent

of NRS 11.070 be met. But Chase does not seek to vindicate the title rights of the prior homeowner; instead, it has no problem with validating part of the sale, the part that divested the homeowner of title, and only seeks to invalidate the part that extinguished the deed of trust. *See Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Association*, 134 Nev. __, 417 P.3d 363 (2018) (recognizing Agency can consent to sale but still assert HERA to prevent extinguishment of deed of trust.)

A plain reading of NRS 11.070 shows the statute has no application whatsoever to Chase. The District Court, therefore, did not err as a matter of law in rejecting a five-year statute of limitations as to Chase's HERA claim. This Court should affirm.

E. NRS 11.080 Does Not Provide a Five-Year Statute of Limitations for Chase.

1. NRS 11.080 is a standing statute.

NRS 11.080 sets the same condition precedent for actions for the "recovery of real property" or the "recovery of the possession thereof." Again, the statute does not state the action must be filed within five years; instead, the statute states that "no action for the recovery of real property, or for the recovery of the possession thereof… shall be maintained, unless…" the party bringing the action was seized or possessed of the premises five years before commencing the action. The terms

"maintained" and "unless" make it clear, that NRS 11.080 is a standing statute.

2. NRS 11.080 does not apply to the Bank.

NRS 11.080 states in relevant part

> No action for the **recovery** of real property, or for the **recovery** of the possession thereof . . . shall be maintained, unless it appears that the plaintiff . . . **was seized or possessed of the premises in question**, within 5 years before the commencement.

NRS 11.080 (Emphasis added.)

Again, Chase, as a lienholder, sought a declaration that the deed of trust remained a valid lien on the property based on HERA. By way of this unpled claim, Chase does not seek "recovery" or "recovery of possession" of the property. *Bank of America, N.A. v. Country Garden Owners Association*, Case No. 2:17-cv-01850-APG-CWH, 2018 WL 4305761 (D. Nev. March 14, 2018) (finding NRS 11.070 does not apply to bank's claim); *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:17-cv-01757-JAD-VCF, 2018 WL 2292807 (D. Nev. May 18, 2018) (finding neither NRS 11.070 nor 11.080 apply to the bank's claim).

Even if Chase succeeded on its unpled claim, and SFR took subject to the deed of trust, Chase would still have to foreclose on the deed of trust to get possession of the property. *Hamm*, 124 Nev. at 298, 183 P.3d at 902. Also, just like NRS 11.070, NRS 11.080 likewise requires that before a party can maintain an action to recover real property it must have been seized or possessed of the property. In the context of challenging an NRS 116 sale as a lienholder, Chase does not have standing to assert

a claim because it cannot establish it was seized or possessed of the property.

NRS 11.080 has no application whatsoever to Chase. The District Court, therefore, did not err as a matter of law in rejecting a five-year statute of limitations as to Chase's unpled HERA claim. This Court should affirm.

3. The authorities cited by Chase fully support SFR's argument.

Chase bewilderingly cites to *Gray Eagle*,[61] *Weeping Hollow,*[62] *Raymer*[63] and *Scott*[64] to support its position its claim carries a 5-year statute of limitations pursuant to NRS 11.070/11.080. These cases in fact prove beyond any doubt that a five-year statute of limitations cannot apply to Chase's defense. Notably, nowhere in NRS Chapter 11 does the term "quiet title" even appear. There is good reason for this, as the applicable statute of limitation depends on the ownership interest of the party seeking to assert it. As discussed in more detail, *infra*, Chase's confusion—or purposeful misrepresentation—ignores the fact that the limitations period depends on the precise ownership interest of the party seeking to assert quiet title, an interest which Chase simply does not have.

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[61] *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.,* 133 Nev. Adv. Op. 3, 388 P.3d 226 (Jan. 26, 2017) ("Gray Eagle").
[62] *Weeping Hollow Ave., Trust v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016).
[63] *Raymer v. U.S. Bank*, No. 16-A-739731-C, 2016 WL 10651933 (Nev. Dist. Ct. Dec. 28, 2016).
[64] *Scott v. Mortg. Elec. Registration Sys., Inc.*, 605 F. App'x 598, 600, 2015 WL 657874 (9th Cir. 2015) (unpublished).

4. Unlike the parties suing in the cases, Chase has neither title nor possessory interest

Unlike Chase—which has neither title nor possessory interest—the parties suing in *Gray Eagle*, *Weeping Hollow*, *Raymer* and *Scott* actually had title or possessory interest in the property, and therefore there was "seisin" and the claimants seeking to quiet title were therefore "seized or possessed of the premises in question, within 5 years before the commencement thereof."[65] *Gray Eagle* makes this distinction perfectly clear. The Appellant in *Gray Eagle* actually purchased two of the subject lots at a non-judicial Association foreclosure sale pursuant to NRS 116.3116, and had actual title to all three lots, entitling it to seek a true quiet title action. *Gray Eagle*, 388 P.3d at 228-229. Thus, unlike Chase here, which has neither title nor even possessory interest, the party in *Gray Eagle* seeking to quiet title was qualified to bring suit under the seisen statutes. *Gray Eagle*, 388 P.3d at 232 (emphasis added).

5. Neither Raymer *nor* Scott *aid Chase's argument.*

It is the same with the relevant parties in *Raymer* and *Scott*: the former homeowners with possessory interest were seeking to set aside the sale and get clear title. In *Scott*, **the defendant** was a bank with a mere lien interest as is the case here. *Scott,* 605 Fed.Appx. at 600. Nothing in that case supports that a bank has the

[65] *See* NRS 11.080 and NRS 11.070 cited herein.

standing to bring a claim that falls within the parameters of NRS 11.070 or NRS 11.080. Chase also cites to *Weeping Hollow*, which, citing NRS 11.070 correctly states "[u]nder Nevada law, **Spencer** could have brought claims challenging the HOA foreclosure within five years of the sale[.]" *Weeping Hollow Tr. v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016). Put simply, that case addressed only whether the current title holder, Weeping Hollow Trust, had properly named the prior title holder in its action to clear title, not how long the bank had to challenge the extinguishment of the deed of trust. In each of the cases relied on by Chase—*Gray Eagle*, *Weeping Hollow*, *Raymer* and *Scott*—it was the parties who had, or had recently had, a title or possessory interest who could take advantage of NRS 11.070 and NRS 11.080.

Chase's attempt to apply a five-year limitations period under NRS 11.070 and 11.080 fails. Here, Chase has no possessory or other rights to use, enter, or otherwise enjoy the Properties, until and unless it forecloses. Instead, Chase, at best, is a mere lienholder NRS 11.070 or 11.080 do not apply to its claims. Yet, in a last-ditch effort to convince this Court that the five-year statute of limitations is applicable, Bank mistakenly relies on *The Bank of New York Mellon v. Jentz*, Case No. 2:15-cv-1167-RCJ-CWH, 2016 WL 4487841 (D. Nev. Aug. 24, 2016). But *Jentz* begins with the same mistaken premise that Chase asks this Court to apply—that "quiet title" is but one claim rather than a mere descriptor that requires a court to look at the nature of

the claim rather than its name to determine the proper statute of limitations. Thus, *Jentz* provides no persuasive value when NRS 11.070 and 11.080 are interpreted as above.

At bottom, NRS 11.070 and 11.080 do not apply to mere lienholders. Further, 11.070 and .080 provide standing; the statute of limitations to bring the action can be much shorter.

F. There Is No Four-Year Statute of Limitations Applicable to Chase's Claims and Chase Waived this Argument.

Again, Chase waived all alternative statute of limitation arguments by not raising them below. It certainly did not raise an alternative four-year statute of limitations argument. As this Court has enforced time and again, "a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine,* 97 Nev. at 52, 623 P.2d at 983. Here, Chase, in opposition to SFR's Second MSJ never asserted this argument in a manner for SFR to respond.[66] [67] Accordingly, this Court should not consider this argument that is not properly before this Court.

[66] *See* Chase's Opposition to SFRs Second MSJ at 3AA_534-547; *see specifically*, pp. 543 at Sec. II "Chase's Claims are Timely."
[67] *See* Chase's Opening Brief ("AOB") at pg. 27 Sec. B.

G. HERA Bar's Chase's Claims Regardless of Whether the FHFA is a Party

At the District Court, Chase argued that the HERA statute of limitations only applies if FHFA is a party. The District Court correctly rejected this argument.[68] In rejecting this argument, the District Court astutely noted that if this were the case, "it would encourage the FHFA to not be a party."[69] Chase has failed to properly explain why or how the District Court was in error.

The ***only*** reason Chase can even assert 4617(j)(3), is that this Court recognized that a contractually authorized servicer could assert the right, under a principal/agency relationship.[70] In other words, Chase does not have the right, it merely steps into the shoes of FHFA and asserts the right. In this case, Chase ***never***[71] proved it is a contractually authorized servicer of Freddie Mac for the subject loan, and SFR does not concede this fact. But for purposes of this argument, even assuming Chase is the contractually authorized servicer, Chase does not step into only one shoe, it steps into ***both*** shoes. In that regard, if it can assert the right, it is equally bound by the limitations that Congress placed on that right. Thus, Chase is bound by the statute of limitations set forth in 4617(b)(12) just as FHFA would be

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[68] 4AA_628 at ¶ C-D.
[69] Id. at ¶ D.
[70] *See* Nationstar, 396 P.3d 754.
[71] The District Court granted SFR's Counter-Motion to strike on the basis that Chase disclosed its "evidence" too late; *see* FFCL at 4AA_629; *see also* transcript at 4AA_615:8-24.

if it asserted the right.

II. CHASE FAILED TO PROVE § 4617(J)(3) APPLIES

A. The District Court Properly Exercised its Discretion Granting SFR's Counter-Motion to Strike.

The District Court did not abuse its discretion in granting SFR's counter-motion to strike. A District Court abuses its discretion when it "bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. ___, ___, 367 P.3d 1286, 1292 (2016). Following the rules and holding a party to the consequences from failing to comply cannot be an abuse of discretion. Otherwise, he rules have no purpose, and certainly no teeth.

Further, all of Chase's arguments ring hollow, when it *voluntarily withdrew* the one motion that might have cured its evidentiary deficiencies—a motion to reopen discovery. Chase sheds crocodile tears over something it had a chance to avoid and, instead, argues the District Court put decided to take the risk that the District Court would strike its untimely exhibits.

1. Chase waived case ending sanctions.

It is well-settled, "a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal. *Old Aztec Mine,* 97 Nev. at 52, 623 P.2d at 983 . Yet again, Chase for the very first time asserts on this appeal, not in its opposition to SFR's counter-motion

to strike,[72] not at the hearing before the District Court, not in **any** pleading before the District Court—but on appeal raises the following new arguments:

1) that the District Court in striking Freddie's late disclosed evidence;

2) that the District Court failed to consider the *Young* factors in issuing its findings, resulting in the District Court abusing its discretion, something it did not argue would be necessary when it opposed SFR's motion;[73]

3) that SFR failed to conduct a meet and confer;

4) that the failure to disclose was harmless.

The Court did not strike the untimely evidence and new claim *sua sponte*. It did so after full briefing and a hearing, where Chase never complained of these failures.[74] In that briefing, Chase never raised, at the hearing or in its briefing, that by the District Court using its discretion to strike the exceedingly late disclosed evidence would result in effect, case ending sanctions. Nowhere in its opposition does Chase argue that the failure to disclose was harmless or case ending sanctions.[75] Rather, Chase argues that there is an ongoing obligation to supplement. While that is true, it is timely during discovery. Since these arguments were not raised below,

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[72] The Bank's opposition to SFR's Counter-Motion regarding striking the undisclosed documents and witness, only argues that the Bank had "an on-going obligation to supplement its NRCP 16.1 disclosures." 3AA_576 lines 16-19.
[73] *See* Appellant's Answer Brief at pp. 48-56, citing *Young v. Ribeiro Bldg., Inc*., 106 Nev. 88, 787 P.2d 777 (1990) ("*Young*").
[74] 4AA_600-624; *see also* transcript of hearing, 4AA_600-618.
[75] 4AA_592 at sec. V; *see also* transcript of hearing, 4AA_600-618

this Court should not consider them.

2. <u>Chase disingenuously over-expands SFR's counter-motion.</u>

Chase blatantly misrepresents SFR's counter-motion to strike, and the District Court's order granting it. The *only* remedy SFR was seeking to obtain from the District Court was for it not to consider the late disclosed exhibits and witness, which the District Court properly exercised its discretion when granting.[76] [77] It followed the Rules of Civil Procedure. This is entirely different from seeking case ending sanctions, which Chase is asserting occurred, which did NOT occur. SFR's Counter-motion **<u>did no</u>**t request that the District Court strike Chase's complaint, claims, or otherwise. Neither did SFR seek case ending sanctions, nor did the District Court's order strike Chase's Complaint. Further, SFR did not request that any timely disclosed documents be stricken.

SFR's counter-motion to strike was based on the premise that Chase failed to timely disclose exhibits, and its witness, which should have been in its mandatory initial disclosure.[78] Thus, due to the failure to disclose, SFR asked the District Court

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[76] *See* SFR's Counter-motion to strike, 4AA_552-553; *see also* SFR's Reply in support, 4AA_595-599.
[77] *See* District Court's Finding of Facts Conclusion of Law, 4AA_626-630; see also Transcript from hearing, 4AA_600-618; *see specifically*, 4AA_60314-17; 4AA_615:8-19.
[78] *See* SFR's Counter-motion to strike, 4AA_552-553; *see also* SFR's Reply in support, 4AA_595-599.

to not consider the evidence— which it properly did not consider. *See* NRCP 37(c)(1) ("the party is not allowed to use that information or witness **to supply evidence on a motion, at a hearing**, or at trial, unless the failure was substantially justified or is harmless.") (Emphasis added).

3. ALL of Chase's supplemental disclosures were after the close of discovery.

Here, all of Chase's supplemental disclosures were ***late***. Chase's first supplemental disclosure was served on **May 6, 2016**, the second supplemental disclosure was served on **July 26, 2016**, and then shockingly, **707** days ***after*** discovery expired when the parties were back on remand, Chase served SFR with its third supplemental disclosure on **April 13, 2018**.[79] ***All*** these were each ***well*** past the **May 2, 2016** deadline, a deadline that was *never* extended. Chase chose not to disclose during the discovery period. And, Chase never made an argument to the District Court that its actions were substantially justified or harmless.

The failure to timely disclose was prejudicial to SFR, i.e. not harmless. SFR was unable to defend itself. SFR was deprived of the ability to notice a deposition of Freddie. SFR faced an uphill battel in conducting discovery. Chase should have disclosed the witness and the exhibits in a mandatory initial disclosure. NRCP 16.1(a)(1)(B) and NRCP 26(b).

[79] *Id*.

4. ***Chase was dilatory, which should end any analysis: it never attempted to re-open discovery.***

This Court should not fall for Chase's crocodile tears that the failure to disclose was harmless; it was the opposite. Chase chose the route it took. In fact, Chase knew it had to reopen discovery to use the late disclosed documents in its prior supplements. Therefore it knew it needed to reopen to disclose the documents and witness it eventually put in its last supplement.

In fact, Chase actually filed a motion to reopen after remand. The then bemoans the fact that SFR opposed so it withdrew its motion.[80] Then it did a third supplemental disclosure with the Meyers declaration and exhibits. This is inexcusable for a new claim which Chase had to have the evidence before making the claim, even then Chase did not disclose the evidence it claims it needed.

Yet, failing to follow through on its own motion, Chase now argues that SFR could have moved to re-open discovery. To be clear, **it is not** SFR's duty or responsibility to seek evidence to prove Chase's claims; Chase bears that burden. And Chase failed to seek to re-open discovery. Chase's attempt to shift the focus on to what SFR might have done, rather than what it should have done is outlandish. attempt to shift the focus on SFR is so outlandish

[80] *See* Chase's Motion to Extend Discovery Deadlines at 2AA_268-274; *see also* SFR's Opposition, 2AA_275-286; *see* Chase's withdrawal, 2AA_287-289.

Examining the timeline of events reveals that the District Court's analysis was correct, and did not abuse its discretion in finding that Chase was not diligent. Chase was dilatory and the inquiry should end there for this Court, as it did with the District Court.

5. ***Chase knew it needed the evidence and it knew late disclosed evidence may not be considered.***

It took **833 days of litigation** for Chase to even plead HERA in its Amended Complaint.[81] If the facts are as Chase says they are, which SFR is not conceding, that the note and deed of trust are Freddie's since September 27, 2006,[82] it begs the following questions:

1) why not allege 12 U.S.C § 4617 (j)(3) in the initial complaint if Freddie purportedly obtained its interest shortly after origination; and for the same reason

2) why not disclose Mr. Meyer and the relevant documents purporting to "prove" Freddie's interest **in its mandatory initial disclosures**?

Assuming for the sake of argument, that this allegation is true, which SFR is not conceding, **then HERA should have been plead in the initial complaint** and any and all witnesses, and documents which purport to establish

[81] *See* Amended Complaint, 1AA_071-081.
[82] *See* Bank's First MSJ, 1AA_163:16-18.

Freddie's purported interest should have been timely disclosed in Chase's initial disclosures at best, at bottom in a timely supplemental disclosure, which left time remaining for SFR to have a meaningful opportunity to defend itself. These are documents Chase should have had in its possession when it amended.[83]

NRCP 16.1(a)(1)(A)(i)-(v) states the required initial disclosures, "**without awaiting a discovery request**" is the name of *any* witness likely to have discoverable information, as well as all documents. *Id*. (Emphasis added).

Here, according to Chase, Mr. Meyer is a witness "likely to have discoverable information."[84] Accordingly, Chase should have disclosed Mr. Meyer *immediately* after the District Court granted Chase's motion to amend its complaint to add 12 U.S.C § 4617(j)(3). Chase failed to timely disclose Mr. Meyer in its mandatory disclosure. This, not an attempt to inflict case ending sanctions, was the basis for the District Court's decision to grant SFR's countermotion to strike. *See* 4AA_629:8-12.

6. Chase withdrew its motion to re-open discovery.

It cannot be repeated too often.: Chase ***voluntarily withdrew*** its motion to re-open discovery.[85] It just attached the same undisclosed items to its 2018 motion for

[83] Currently before the Nevada Supreme Court is case number 76952, JP Morgan Chase Bank, N.A, c. SFR, where the circumstances are very similar. See SFR's Answering Brief, filed on June 12, 2019.
[84] 2AA_268-274; 2AA_290-314.
[85] *See* Withdrawal of Motion, 2AA_287-289.

summary judgment. Chase then blames its choice to withdraw on SFR's opposition. Of course, SFR opposed, for the very reasons set forth in section I 2-5. If Chase needed the witness and exhibits, it should not have voluntarily withdraw its motion to re-open discovery. Of course, SFR opposed. If Chase needed the evidence, which it knew it did base on the First MSJ, it should have argued the motion to the District Court. What is more, the withdrawing of its request would not satisfy the good cause to extend discovery. This is why Chase's cry of "case ending sanctions" rings hollow. If it knew it needed these documents and had every opportunity to plead its case to the District Court in its motion to re-open discovery.

7. The case law Chase relies on is distinguishable.

Chase argues that litigation on the merits is not being penalized by the rules.[86] Recall, again, Chase chose not to play by the rules. It withdrew its motion to re-open. That is why this argument rings hollow. Chase is twisting the concept of litigation on the merits; suffering the consequences designed by the rules is indeed litigating on the merits.

Chase relies on a U.S. District Court order, *Benezette*.[87] In that case, the bank made disclosures *seven months* after the close of discovery. The judge in that case, decided in part due to stays, to re-open discovery which would cure any prejudice to

[86] AOB pg. 49-58.
[87] *Capital One Nat'l Ass'n v. SFR Invs. Pool 1, LLC*, Case No. 2:15-cv-01324-KJD-PAL, 2019 WL 1596656 (D. Nev. 2019), and is attached hereto in SA_00010-13.

SFR.[88] That decision was not only distinguishable but as this Court noted the District Court's decision was discretionary and this Court would not reverse.

Our case is distinguishable. Chase ***withdrew*** its motion to re-open discovery. Chase failed to disclose the evidence it claims it needed. Thus, its voluntary withdrawal of its motion to re-open flies in the face of its arguments that, somehow, the District Court should have granted additional discovery *sua sponte*. It cannot complain that the District Court issued case-ending sanctions when Chase itself, didn't think enough of the evidence to argue its motion to the Court.

Chase's additional arguments all fail. **First**, Chase asserts that "SFR knew for more than three years that [Chase] is relying on the Federal Foreclosure Bar."[89] Chase does not explain how SFR *knew* for this particular case, that Chase is the purported servicer for Freddie, and that Freddie purportedly owned the Note and DOT at the time of the Association foreclosure sale. Something Chase had the burden to prove, through timely disclosed evidence.

Again, Chase has misplaced reliance on case law. Chase relies upon *Capanna*[90] for the proposition that since SFR knew that Chase was relying on the Federal Foreclosure Bar, the District Court should have denied SFR's counter-motion to strike. Again, the facts of *Capanna* are distinguishable.

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[88] *Id.*
[89] AOB at pg. 53.
[90] *Capanna v. Orth,* 134 Nev. ___, 432 P.3d 726 (2018).

In *Capanna* the District Court "carefully considered the **timeliness** of Orth's disclosures and found that Orth **satisfied his duty to supplement the disclosures at appropriate intervals**." *Capanna*, 432 P.3d at 734, (emphasis added); *see also* NRCP 26(e)(1). This decision too, was discretionary.

Here, Chase did not "satisfy its duty to supplement at appropriate intervals" Chase did the exact opposite by not disclosing the evidence and witness it needed. Here, the District Court properly exercised its discretion in finding Chase did not supplement at the appropriate intervals, and certainly not timely.

The cases cited by Chase, instead support affirming the district court – a district court's decision on whether to accept or strike evidence is discretionary and this Court will not disturb it absent some real showing of abuse.

8. Knowledge of a claim does not equate to knowing the evidence the claimant will produce

Chase absurdly argues that SFR was on notice of Chase's claims arising under the Federal Foreclosure Bar for at least three years. While SFR may have gleamed this knowledge from a plain reading of the allegations contained in the Amended Complaint, Chase ignores a crucial factor—that it still needs to establish those same allegations with admissible evidence, i.e. **it is Chase's burden to prove**; not SFR's to disprove. Just because Chase's amended complaint literally contains the magic words "Federal Foreclosure Bar" does not mean Chase automatically wins, nor does

it wipe all their failures away. Chase then needs to satisfy its burden by timely producing admissible evidence. One aspect of what makes evidence admissible, is that it is timely disclosed. Thus, it goes without saying that if Chase failed to timely disclose the evidence to establish its purported claims, then Chase cannot prove its claims, and Chase knew that. Whether SFR knew from reading the Amended Complaint about Chase's claim is not the issue; the real issue is whether Chase can establish its claims via admissible evidence, which it cannot. This is just like a plaintiff alleging it slipped and fell at defendant's casino. Plaintiff can allege this in its complaint, but if plaintiff cannot meet its burden of establishing duty, breach, causation and damages, by timely disclosing necessary documents and timely disclosing an expert witness, then the allegations contained in the complaint are meaningless. And again, SFR should not be required to reopen discovery to prove Chase's case.

Chase argues that any surprise surrounding Chase's late disclosure was "dissipated" in the years post disclosure. Again, this argument fails. Chase acts as if somehow length of time acts as a vaccination for their failure to timely disclose, it does not. The rules or the law in Nevada do not have such an exception. Surprise is not the issue. Again, Chase could have moved to reopen and made this argument there; it did not. Chase sued SFR in this specific case, regarding this specific Property. This means that Chase needs to prove its allegations contained in its

complaint as to this specific Property—i.e. this is a closed universe for the parties and this Court. This Court must consider what occurred HERE, which is nothing. Chase did not timely disclose Mr. Meyer or the exhibits. And again, the real issue is not "surprise," or length of time. **The issue is whether Chase timely disclosed: it did not.**

Chase argues that SFR "has extensive" litigation regarding the Federal Foreclosure Bar. The same applies to Chase. And again, the argument is non-responsive to whether the District Court abused its discretion in granting SFR's counter-motion. Again, this is a closed universe about the legal and factual issues as they relate to this particular case. This means that Chase needs to prove that the note and DOT were property of the Agency, such that 12 U.S.C. § 4617(j)(3) is triggered, and that this purported interest was in place when the sale occurred, which Chase cannot do here. If this evidence was so necessary, then Chase knew its case depended on timely disclosure. Instead Chase relies upon cases where a judge exercised its discretion in a contrary matter. But again, the standard is here is discretion.

This Court recently affirmed a district court's order that declined to consider a declaration **that was not provided during the discovery period**. *See Green Tree Servicing, LLC v. SFR Investments Pool 1, LLC*, 435 P.3d 666 (Nev. 2019) (unpublished disposition) ("*Grey Spencer*"). Just as this Court affirmed the District

Court's discretion in *Grey Spencer*, the same result should apply here.

In light of this, the District Court properly exercised its discretion by granting SFR's countermotion to strike.

Accordingly, the District Court's order should be ***affirmed***.

B. The District Court did not make Findings as to Freddie's Ownership Absent the Documents It Struck.

After first bemoaning "case-ending sanctions," Chase then argues that SFR's counter-motion to strike was immaterial because Chase had evidence sufficient to grant its motion for summary judgment. First, no matter the evidence actually produced, the District Court found Chase's claim time-barred and, as a result, the District Court did not need to reach findings and conclusions on the counter-motion because finding Chase's claims as time-barred is case dispositive.

As to the finding in the District Court's Order of Freddie's ownership, it must be remembered that the findings related to pages 3-7 of Chase's opposition to SFR's motion for summary judgment.[91] But a review of those pages demonstrate that Chase relied almost exclusively on the documents the Court struck.[92] And during the hearing, the District Court expressed its favor of the "reasoning" in those pages before it ever decided the motion to strike.[93] Thus, it cannot be said that the District

[91] 4AA_625-630.
[92] 2AA_290-314; 3AA_315-523; 4AA_548-567.
[93] 4AA_600-624.

Court did not adopt pages 3-7 whole cloth, based on argument relying on the documents that it struck. The District Court never expressly stated that it found Freddie ownership in the absence of the Freddie records and declaration. Thus, if this Court were to disagree with the District Court on the statute of limitations, this Court must remand for the District Court to make findings and conclusion based on the evidence actually before it. As this court recognized "[t]his Court is not a fact-finding tribunal; that function is best performed by the District Court." *Zugel*, 99 Nev. at 100, 659 P.2d at 296. *citing*, *Zobrist v. Sheriff,* 96 Nev. 625, 614 P.2d 538 (1980) Even on summary judgment, factual issues should be decided by the District Court in the first instance. *See Id*.

III. ALL ARGUMENTS WAIVED OR OTHERWISE NOT PRESERVED AS DISCUSSED ABOVE, ARE LIKEWISE WAIVED AS TO AMICI

The Amicus Brief by the FHFA raises the same arguments that Chase raised in its Opening Brief, including the same arguments which Chase waived, which SFR objected to. If this Court considers the waived arguments in the Amicus Brief, it would circumvent *Old Aztec* and waiver. Accordingly, this Court should adopt the rule from sister jurisdictions where this practice is not allowed. "It is settled that an amicus 'cannot raise issues that have not been preserved by the parties,'" the court held in *Alliance Home of Carlisle, Pa. v. Board of Assessment Appeals*, 919 A.2d 206, 221 n. 8 (Pa. 2007). Amicus parties are limited to issues "preserved or raised by the parties themselves," as the court held in *Commonwealth v. Allshouse*, 36 A.3d

163, 179 n.18 (Pa. 2012). Appellate courts "will not permit [an] amicus curiae to raise issues which the petitioner himself is barred from raising by failing to argue them below," the court held in *Seidman v. Insurance Commissioner*, 532 A.2d 917, 920 (Pa. Cmwlth. 1987).

CONCLUSION

In this case, Chase presented a plethora of failures: failure to timely plead HERA, failure to follow through with its attempt to re-open discovery, failure to timely disclose exhibits and witnesses, and failure to properly raise arguments before the District Court. An Appeal is not a place for an appellant to try to correct us own failures. The District Court correctly found and concluded that Chase's claims are time-barred. Therefore, this Court must affirm the District Court's order.

DATED: July 12, 2019. **KIM GILBERT EBRON**

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, is 51 pages long and contains 11,892 words.
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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/ / /

4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of July, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 12th day of July, 2019. Electronic service of the foregoing **Respondent's Answering Brief** shall be made in accordance with the Master Service List as follows:

Master Service List

Docket Number and Case Title: 77010 - JPMORGAN CHASE BANK, NAT'L ASS'N VS. SFR INV.'S POOL 1, LLC
Case Category Civil Appeal
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Dated this 12th day of July, 2019.

/s/ Caryn R. Schiffman
An employee of KIM GILBERT EBRON

TAB 42

Case No. 77010
IN THE SUPREME COURT OF NEVADA

JP MORGAN CHASE BANK, National Association, a national association

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

APPEAL
From the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

AMENDED RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1 (a) and must be disclosed. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

Respondent, SFR Investments Pool 1, LLC, is a privately held limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

In District Court, SFR Investments Pool 1, LLC was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana S. Ebron, Esq., Karen L. Hanks, Esq. and Caryn R. Schiffman, Esq. of Kim Gilbert Ebron fka Howard Kim & Associates. The same attorneys represent Respondent on appeal.

DATED this 14th day of July, 2019.

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INTRODUCTION

This case presents ***one*** issue for this Court: whether HERA's[1] three-year statute of limitations barred Chase's claim(s) based on 12 U.S.C. § 4617(j)(3). Because Chase's claims are time-barred, this case is not about whether federal law preempts state law. This Court should affirm the District Court's holding that the three-year statute of limitations barred Chase's claims. What is more, in the unlikely event this Court disagrees with the District Court and finds Chase's claim was timely, this Court has alternative grounds to affirm the District Court's order. Here, because the District Court properly enforced the NRCP, and because Chase failed to timely produce the evidence it argues it needed, Chase's claims are unsupported to establish its claim under HERA. Accordingly, the District Court properly granted summary judgment in SFR's favor. Of note, Chase raised a variety of arguments that it never raised first at the District Court, in an attempt to circumvent proper granting of judgment in SFR's favor.

FACTUAL AND PROCEDURAL BACKGROUND

SFR purchased the subject Property as the highest bidder at the May 1, 2013

[1] In July 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), which established the Federal Housing Finance Agency ("FHFA" or "Agency") to regulate Federal Home Loan Mortgage Corporation ("Freddie") and Federal Housing Finance Agency ("Fannie Mae"). HERA contains the Federal Foreclosure Bar, 12 U.S.C 4617 (j)(3) and the statute of limitations 12 U.S.C 4617 (b)(12).

public foreclosure auction held on behalf of Pebble Canyon Homeowners Association (the "Association") pursuant to NRS 116.[2] At no time before the sale was Freddie Mac named as a beneficiary on the subject Deed of Trust. SFR purchased the Property, Freddie Mac was not the named beneficiary of the deed of trust.[3]

I. CHASE'S INITIAL COMPLAINT IS SILENT AS TO 12 U.S.C § 4617 (J)(3).

The initial complaint filed on or about **November 27, 2013**,[4] is devoid of any of the following allegations:

1) that the Federal Home Loan Mortgage Corporation ("Freddie") owned the note and deed of trust ("DOT"); **or**

2) that 12 U.S.C § 4617 (j)(3) preempted Nevada law to the extent that Nevada law would allow an Association foreclosure sale to extinguish a deed of trust securing a loan owned by Freddie.

Finally, after **833** days of litigation, for the first time in its amended complaint, filed on or about March 9, 2016, Chase raised 12 U.S.C § 4617(j)(3), arguing that the subject deed of trust was property of Freddie which later became the property of

[2]3263 Morning Springs Drive, Henderson, NV 89074; Parcel No. 177-24-514-043. 1AA_002. The former homeowners were Robert M. Hawkins and Christine V. Hawkins. 1AA_003. See 3AA_325-327.
[3] 3AA_333; SA_000033-35.

FHFA[5] when Freddie was placed in conservatorship; if true, Chase knew this at the initiation of litigation.[6] Yet, after obtaining leave of the court specifically to add 12 U.S.C § 4617(j)(3), Chase did not disclose its evidence to support this claim; evidence that should have been in its possession when it brought the motion to amend and disclosed immediately thereafter, which necessitated in part, SFR's counter-motion to strike.[7] The same evidence that Chase claims the District Court's striking amounted to case-ending sanctions.

II. CHASE FAILED TO TIMELY DISCLOSE EXHIBITS AND WITNESS— DEAN MEYER DURING DISCOVERY.

Chase failed to timely supplement its initial disclosures of documents and witnesses. Discovery closed on **May 2, 2016**.[8] While parties have an obligation to supplement, it is within the discovery period, and not anytime a party sees fit. ***All*** of Chases supplemental disclosures were late—after discovery closed.[9] The first supplemental disclosure was served on **May 6, 2016**, the second supplemental disclosure was served on **July 26, 2016**, and then shockingly, **707** days after discovery expired and the parties were back from remand, Chase serves SFR with

[5] Federal Housing Finance Agency.
[6] 1AA_071-080.
[7] *See* SFR's Counter-Motion to strike, 3AA_552-553; *see also* SFR's Reply in support, 4AA_595-599.
[8] *See* Scheduling Order filed on June 29, 2015, 1AA_035-037.
[9] *See* SFR's Reply in support of its Countermotion to Strike, 4AA_595-599.

its third supplemental disclosure on **April 13, 2018**.[10] ***All*** these were each ***well*** past the **May 2, 2016** deadline, a deadline that was *never* extended. Chase chose not to disclose during the discovery period. More telling, however, is that on **January 23, 2018**, Chase filed a motion to re-open discovery and then voluntarily withdrew after SFR opposed,[11] further evidencing Chase's purposeful violation of the scheduling order.

Chase and SFR filed competing motions for summary judgment in 2016 (collectively "First MSJs" individually, the "Bank's first MSJ" and "SFR's first MSJ").[12] SFR did not need to contest whether the exhibits attached to Chase's 2016 MSJ were properly before the District Court because SFR challenged Chase's standing to raise 12 U.S.C. § 4617 (j)(3) as defense or claim, which the District Court agreed and entered judgment in in SFR's favor.[13] While Chase's first appeal was pending, this Court issued its decision in *Nationstar*.[14] In light of this decision, the parties stipulated to remand back to the District Court only to brief issues related to 12 U.S. C. § 4617(j)(3).[15] SFR did not need to stipulate to remand, SFR ***only*** did so

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[10] *Id*.
[11] *See* Chase's Motion to Extend Discovery Deadlines at 2AA_268-274; *see also* SFR's Opposition, 2AA_275-286; *see* Chase's withdrawal, 2AA_287-289.
[12] Bank's 2016 MSJ 1AA_157-190; *see also*, SFR's 2016 MSJ 1AA_134-156.
[13] *See* Findings of Fact Conclusion of law ("FFCL"), 2AA_258-267.
[14] *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. ___, 396 P.3d 754 (2017).
[15] *See* Stipulation and Order to Remand filed on September 208, 2017 SA_000054-70.

because the District Court findings regarding the validity of the sale would remain intact, and Chase agreed.[16]

III. CHASE'S DILATORY BEHAVIOR CONTINUES.

Back in District Court after remand, Chase filed a motion to reopen discovery so it could cure untimely disclosures and, presumably to properly disclose the documents it later disclosed in its April 2018 supplement. But then, Chase voluntarily and purposefully withdrew its motion, which would have been a chance for Chase to cure/remedy its late disclosures.[17] In withdrawing its motion, Chase *knew* that it did not timely disclose all the documents it claimed it needed to disclose.

Chase's second MSJ used the Meyers declaration and the undisclosed documents.[18] The District Court was informed of these issues and exercised its discretion to consider the late disclosed documents. The District Court did not issue case-ending sanctions.

IV. CHASE FAILED TO PROPERLY RAISE ARGUMENTS AT THE DISTRICT COURT.

In 2018, after remand from the Nevada Supreme Court, the parties filed competing motions for summary judgment (collectively "Second MSJs" individually, "Chase's Second MSJ" and "SFR's Second MSJ").[19] SFR's Second

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[16] *Id.*
[17] *See* Withdrawal filed in February 1, 2018 at 2AA_287-289.
[18] *See* SFR's Counter-motion to strike, 4AA_548-567; *see specifically*, 3AA_552-553.
[19] Chase's 2018 MSJ 2AA_290-314; *see also*, SFR's 2018 MSJ 3AA_524-533.

MSJ raised statute of limitations barring Chase's HERA claims.[20] In opposition to SFR's Second MSJ, Chase *only* raised the following arguments: statute of limitations applies to claims brought by the FHFA, and since FHFA is not a party, the statute of limitations does not apply, only the quiet title statute of limitations applies, and even if three-year applied—it was timely.[21] Yet, in its reply in support of its Second MSJ, Chase raised a new argument for the first time: that Chase's claims are subject to the six year statute of limitations as the claims sound in contract ("new argument").[22] At the hearing, SFR moved the District Court to strike Chase's new argument raised in its reply in support of its Second MSJ because SFR was unable to address the new argument.[23] Due to this, and this alone, the District Court properly exercised its discretion and did not consider Chase's new argument.[24]

V. CHASE WAIVED ANY ARGUMENT REGARDING THE VALIDITY OF THE SALE.

After the *Nationstar* opinion, the District Court certified that it would reconsider its order on appeal.[25] Chase stipulated to limiting the issues on remand, agreeing that all prior findings and conclusions as to the validity of the sale would stand.[26] Yet, in its Second MSJ, Chase breached the stipulation by raising issues

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[20] 3AA_528 at Sec. B
[21] 3AA_543-546.
[22] 4AA_591:7-592:2.
[23] 4AA_600-624; *see specifically*, 4AA_613:6-18.
[24] *Id*. at 4AA_613:19.
[25] SA_00055-58.
[26] SA_00062 at ¶¶10-11.

regarding the price SFR paid, i.e. the validity of the sale itself.[27] The District Court properly exercised its discretion to strike this argument.

All told, notwithstanding untimeliness of the federal foreclosure bar or 4617(j)(3) claim, Chase never properly disclosed admissible evidence to establish Freddie's ownership interest in the subject Property. Therefore, there are no genuine issues of material fact rebutting validity of the Association sale, and SFR's resulting deed. Therefore, this Court should affirm the District Court's judgment entered in favor of SFR

SUMMARY OF THE ARGUMENT

The District Court correctly found that Chase's 12 U.S.C § 4617(j)(3) claim is time barred. Here, the sale occurred on March 1, 2013. **1043** days later on March 9, 2016, Chase filed its amended complaint. However, the original complaint is silent as to any facts regarding the Federal Foreclosure Bar, or any allegations remotely related to the Federal Foreclosure Bar that would put SFR on notice that Freddie claimed an interest in the Property at the time of the sale. Accordingly, the District Court correctly concluded that relation back would not save the day for Chase as the original complaint did not implicitly or explicitly place SFR on notice of its claims under 12 U.S.C § 4617(j)(3). What is more, is at the hearing the District Court

[27] *See* Bank's 2018 MSJ; *see specifically*, Chase disputing the price SFR paid for the Property at 2AA_299:1-3; *see also*, 2AA_310 Sec. C&D.

properly disregarded Chase's new argument—that its claims are not barred as the six-year statute of limitations applies, which was raised in its reply in support of its own motion for summary judgment, which effectively deprived SFR of an opportunity to address it. This means that Chase is limited to the arguments raised in its 2018 Opposition and this Court should not consider *any* of the new arguments, which Chase is bringing for the first time on appeal. This Court should affirm the District Court's judgment in favor of SFR.

STANDARD OF REVIEW

Chase's stated standard is incorrect. While questions of law are reviewed *de novo* by this Court, a District Court's decision to strike an argument is under an abuse of discretion. *Century Steel, Inc. v. State, Div. of Indus. Relations, Occupational Safety & Health Section*, 122 Nev. 584, 588, 137 P.3d 1155, 1158 (2006). But this Court reviews a District Court's decision to strike arguments under an abuse of discretion, and will not interfere with the District Court's exercise of its discretion absent a showing of palpable abuse. *See Olausen v. State Dep't. of Corr*., 281 P.3d 1206 (Table) (Nev. 2009) (unpublished disposition) (A district court's dismissal for failure to oppose a motion to dismiss is reviewed for abuse of discretion.) *see also; Walls v. Brewster,* 112 Nev. 175, 912 P.2d 261 (1996). A district court's decision to grant a motion due to failure to oppose the same is reviewed for abuse of discretion. *Sheckler v. Chaisson JRJ Investments, LLC*, 373

P.3d 960 (Table) (2011) (unpublished disposition); *Las Vegas Fetish & Fantasy v. Ahern Rentals,* 124 Nev. 272, 277–78, 182 P.3d 764, 768 (2008).

Therefore, before reviewing the grant of summary judgment in SFR's favor, this Court must review for abuse of discretion the District Court's decision to strike the new argument raised in Chase's reply in support of its 2018 MSJ, and it's under the correct standard, this Court must affirm. Additionally, the District Court's decision to strike the purposefully late disclosed documents is also subject to an abuse of discretion standard, and under this standard this Court must affirm.

ARGUMENT

I. CHASE'S ASSERTION OF § 4617(J)(3) IS TIME-BARRED

A. The District Court Properly Found the Federal Foreclosure Bar is a Right that Must be Timely Asserted.

1. The "hook" for Chase' claims is the statute—12 U.S.C. § 4617(j)(3).

Chase's claim is entirely based on the enforcement of the Federal Foreclosure Bar (4617(j)(3)). Chase' amended complaint states that "SFR's claim of free and clear title to Property is barred by **12 U.S.C. 4617 (j)(3),** which precludes an Association foreclosure sale from extinguishing Freddie Mac's interest in the Property and preempts any state law to the contrary.[28]

There is no question that Chase's claim stems entirely from the assertion of a

[28] *See* Amended Complaint at 1AA_077 at ¶ 46.

statutory protection—4617(j)(3). Given the reliance upon a **statutory provision** to prevent extinguishment of the Deed of Trust, rather than any potential contract, Chase's claim/defense clearly constitute a "wrong independent of contract," which the Nevada Supreme Court has used to describe **tort** claims.[29] Black's defines a tort similarly: "[a] civil wrong, other than breach of contract, for which a remedy may be obtained. . . ."[30]

Therefore, Chase's claims arise from an alleged violation of a statute, which is clearly a "wrong independent of contract"[31] and something "other than a breach of contract,"[32] and, therefore, appropriately categorized as a tort. The three-year statute of limitations under 12 U.S.C. § 4617(b)(12) applies to claims—outright or masquerading as defenses—based on **4617(j)(3).**

2. 4617(b)(12) provides a three-year statute of limitations.

The District Court properly found HERA's three-year statute of limitations applies to any assertion of 4617(j)(3) in the context of a foreclosure sale, and also

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[29] *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (quoting *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 552 P.2d 885, 888 (1976)) (emphasis added); *see also David v. Hett*, 270 P.3d 1102, 1114 (Kan. 2011) (claim sounds in tort if plaintiffs allege breach of common-law or statutory duty independent from any contract).
[30] *See also* BLACK'S LAW DICTIONARY 1717 (10th Ed. 2009) (emphasis added).
[31] *Bernard*, 734 P.2d at 1240.
[32] BLACK'S at 1717.

properly found relation back was inapplicable.[33] 12 U.S.C. § 4617(b)(12) provides in relevant part:

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

12 U.S.C. § 4617(b)(12) (emphasis added.)

The Federal Housing Finance Agency ("FHFA") has successfully argued and convinced the Second Circuit to hold that, "Congress intended one statute of limitations – 4617(b)(12) of HERA – to apply to *all* claims brought by the FHFA as conservator [and] supplant[s] any other limitations that otherwise might have applied." *Federal Housing Finance Agency v. UBS Americas Inc.*, 712 F.3d 136, 143-44 (2d Cir. 2013) (emphasis in original).

Under Nevada law, liability arising from a statute carries a three-year statute of limitations. NRS 11.190(3)(a). As set forth above, Chase's claim rests entirely on § 4617(j)(3). The liability for violating the federal statute is that due to preclusion, the deed of trust, if actually owned by Freddie, could not be extinguished and SFR's title remains clouded by that deed of trust. Thus, the extender-statute does not apply, as the applicable statute of limitations is the same as set forth in § 4617(b)(12)—3 years.

[33] *See* FFCL 4AA_625-630; *see specifically*, 4AA_628:11-29:6.

3. ***Chase steps into both shoes of the FHFA—to assert the right and accept the limitations that Congress placed on that right.***

Here, the ***only*** reason Chase can even assert 4617(j)(3), is because this Court recognized that an authorized servicer could assert the right, under a principal/agency relationship.[34] In other words, Chase steps into the shoes of FHFA and asserts the right. In this case, Chase ***never***[35] proved it is an authorized servicer of Freddie Mac for the subject loan, and SFR does not concede this fact. But for purposes of this argument, even assuming Chase is the authorized servicer, Chase does not step into only one shoe, it steps into ***both*** shoes. In that regard, if it can assert the right, it is equally bound by the limitations that Congress placed on that right. Thus, Chase is bound by the statute of limitations set forth in 4617(b)(12) just as FHFA would be if it asserted the right. The District Court correctly found this, when it stated:

> "…but FHFA is not a party. We are, we claim the right to assert the federal foreclosure bar because we're a servicer acting in a representative capacity to the FHFA. So the problem with that logic in my way of thinking is this: It would mean that the servicer who claims a derivative right to assert the federal foreclosure bar is actually in a superior position is immune from the statute of limitations argument, and that would actually encourage the FHFA to not be a party and litigate its interests because to do so they would be foreclosed by the statute of limitations. Instead, they step back and say, well we don't want to a party because the statute of limitations would shut us out, but

[34] *See Nationstar*, 396 P.3d 754.

[35] The District Court granted SFR's Counter-Motion to strike on the basis that Chase disclosed its "evidence" too late; *see* FFCL at 4AA_629; *see also* transcript at 4AA_615:8-24.

> you guys go ahead and assert it in your capacity as your derivative representative capacity."[36]

Having established the three-year statute of limitations applies, the District Court properly determined that Chase' amended complaint did not relate back to the original complaint because the original complaint did not implicitly or explicitly place SFR on notice of its claim under 12 U.S.C § 4617(j)(3).

B. The District Court Properly Found Relation Back Does Not Save the Day for the Bank.

Other than saying this Court should reverse the District Court's order finding that relation back was inapplicable, Chase's brief is devoid of any analysis explaining why the District Court abused its discretion. Of course, such challenge does not involve a de novo standard, rather it involves an abuse of discretion standard. *See State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004). A district court *only* abuses its discretion when it "bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. ___, ___, 367 P.3d 1286, 1292 (2016).

In the present case, at the District Court level Chase moved to amend after **833** days of litigation. At the hearing the District Court stated as follows:

> "Here's why I think you have to [do] more than you did: Because you say, we are claiming that the sale did not extinguish the first deed of trust. You go, okay that the result you are looking for, it didn't extinguish it but what's your theory? I don't think notice was given to

[36] 4AA_605:20-606:13.

SFR if your theory was Federal Foreclosure Bar."[37]

Here, Chase's original complaint was filed on November 27, 2013,[38] and contained ***no*** reference to Freddie, the Federal Foreclosure Bar or HERA. This is evident by the fact that Chase sought to amend its complaint specifically to add 12 U.S.C § 4617(j)(3). Had Chase truly alleged this claim in the first instance it would not have needed to amend its complaint: but it did. Chase knows it did not allege the claim of 12 U.S.C. § 4617(j)(3), either implicitly or explicitly. The amended complaint makes it apparent all the allegations regarding the federal interest that were completely absent from the original complaint.

The District Court did not abuse its discretion in finding relation back inapplicable.

1. Standard for relation back

NRCP 15(c) states, "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the ***original pleading***, the amendment relates back to the date of the original pleading." (Emphasis added). However, "where the original pleading does not give a defendant 'fair notice of what the plaintiff's [amended] claim is and the grounds upon which it rests,' the purpose of the statute of limitations has not

[37] 4AA_610:22-611:5.
[38] 1AA_001-7.

been satisfied and it is 'not an original pleading that [can] be rehabilitated by invoking Rule 15(c).'" *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 n. 3, 104 S.Ct. 1723 (1984) (internal marks and citation omitted). *See also, Glover v. F.D.I.C.*, 698 F.3d 139, 146 (3d Cir. 2012).

In other words, the analysis under NRCP 15(c) is "whether the original complaint adequately notified the defendants of the basis for liability the plaintiffs would later advance in the amended complaint." *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 866 (D.C. Cir. 2008) (emphasis added). Similarly, Nevada law will not allow a new claim based upon a new theory of liability asserted in an amended pleading to relate back under NRCP 15(c) after the statute of limitations has run. *Nelson v. City of Las Vegas*, 99 Nev. 548, 556–57, 665 P.2d 1141, 1146 (1983).

2. Chase's original complaint is silent as to HERA

Chase's complaint (filed on November 27, 2013), and answer (filed on August 11, 2015) are completely bereft of any mention of 4617(j)(3), any federal interest, preemption or anything even remotely indicating Chase intended to challenge the sale based on the Supremacy Clause due to an alleged interest by Freddie.[39] Chase's complaint and amended complaint allege "[Chase] is the lender and beneficiary under the…promissory note and corresponding deed of trust."[40]

[39] 1AA_001-007; 1AA_038-48.
[40] 1AA_004 at ¶ 10. Even Chase's answer alleges a total of 13 affirmative defenses, none of which allege preemption/4617(j)(3). 1AA_044-46.

Simply put, anyone reading Chase's complaint would have no idea that 4617(j)(3) would be alleged or that Freddie would claim an interest in the deed of trust. The absence of these allegations makes Chase's reliance on *Jackson v. Groenenyke*[41] unconvincing. In *Jackson*, this Court dealt with a water rights issue, and this Court allowed a party to amend his pleadings to include land access for maintenance and repair on the subject pipe. *Id.* at 366. The Court reasoned that these issues arise from the same transaction or occurrence as the vested right to receive water because the quest to assert water rights necessarily includes action to ensure the continued flow of that water. *Id.* at 366. In the present case, there is nothing for Chase's HERA claim to relate back to; Chase never alleged anything to do with a federal interest, and unlike *Jackson*, it does not necessarily follow that a bank challenging an NRS 116 sale will involve a claimed federal interest.

But Chase wants the rule to be read as if the "transaction" is the Association sale itself, and therefore any amendment would relate back, even a yet-to-be made one. But this defies the purpose of the rule. The "conduct, transaction, or occurrence" Rule 15(c) references, cannot be the event by which gave rise to the claim i.e. the car accident in a negligence case, the contract in a breach of contract case or the slip and fall in a premises liability case. A mere history of NRS 116 litigation demonstrates how protean bank claims are, so that SFR cannot be deemed to know

[41] *Jackson v. Groenenyke*, 369 P.3d 362 (Nev. 2016).

from a bare bones pleading what claims may arise, especially having had to litigate the interpretation of NRS 116.3116(2), constitutionality, commercial reasonableness, mortgage protection clause, tender, fraudulent transfer, and any number of other claims by which a deed of trust was somehow revived. In other words, even in this notice pleading state, a defendant has to have some idea of what claims it needs to defend. And, a plain reading of the complaint in this case gives no indication that a claim arising under § 4617(j)(3) should be anticipated.[42] If this was the standard then there would be no purpose for the rule because every amendment would relate back to the original pleading.

And yet, we have a rule that requires fair notice in the original pleading of the now asserted amendment such that it can relate back. Again, as this Court held, NRCP 15(c) does not allow a new claim based upon a new theory of liability to relate back. *See Nelson*, 665 P.2d at 1146. Thus, it stands to reason if there is nothing to relate back to, i.e. no allegations even remotely touching upon what a party now seeks to allege, then the mandates of Rule 15(c) are not met. That is exactly what we have in this case here.

All told, because there are zero allegations about any federal interest relation back does not apply, the District Court properly found this in its decision.

[42] 1AA_001-7.

3. ***Chase waived its legal theory argument by failing to properly raise it below—at the District Court.***

It is well-settled, "a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Here, Chase, in opposition to SFR's Second MSJ never asserted the Federal Foreclosure Bar was merely a theory not a claim.[43] [44] Accordingly, this Court should not consider this argument that is not properly before this Court. SFR has no desire to waive the waiver. Should this Court want to entertain this argument despite the fact that Chase failed to properly raise it before the District Court in the first instance, this Court can order additional briefing.

4. ***Chase waived its argument that relation back applies to motions by failing to raise it below.***

Waiver is defined as "the voluntary relinquishment or abandonment—express or implied—of a legal right or advantage. The party alleged to have waived a right must have a had both ***knowledge*** of the existing right and ***intention*** of foregoing it."[45] Here, Chase argues for the first time on appeal that relation back is from its motion to amend, a motion not yet considered by the District Court, let alone granted.

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[43] *See* Chase's Opposition to SFRs Second MSJ at 3AA_534-547; *see specifically*, pp. 543 at Sec. II "Chase's Claims are Timely."
[44] *See* Chase's Opening Brief ("AOB") at pg. 27 Sec. B.
[45] Black's Law Dictionary, 1813 (10th Ed. 2014) (emphasis added).

This argument was not first raised to the District Court. In opposition to SFR's Second MSJ, Chase raised relation back in its briefing but did not argue, as it is now that relation back is to its motion to amend.[46] It only argued what has already been addressed *supra*. After SFR filed its Second MSJ, Chase had ample time to file its opposition as allowed under the rules. Chase had both knowledge of SFR's arguments and by choosing the arguments to place in its opposition had an intention of foregoing other arguments. Accordingly, Chase waived its right to argue relation back to its motion before this Court. As a result, this Court should not entertain the new argument here.

In a last-ditch effort, Chase relies *Premier One*,[47] for the meritless proposition that Chase can save its waived argument. Yet, the case provides no guidance. In *Premier One*, the parties argued whether claim preclusion was applicable before the District Court and on appeal, appellant raised a subset of claim preclusion, whether non-mutual claim preclusion barred the claim.[48] In *Premier One*, this Court did not find waiver barred the use of non-mutual claim preclusion.[49] The reason for that is the parties there had all argued the elements and simply not used the proper name,

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[46] AOB 19-24; *see* Chase's Opposition to SFR's Second MSJ at 3AA_ 543 at Sec. II.
[47] *Premier One Holdings, Inc. v. Red Rock Financial Services, LLC*, 429 P.3d 649 (2018) (unpublished disposition).
[48] *Premie*r, 429 P.3d at *1.
[49] *Id.* at fn. 2.

"claim preclusion."[50] Thus, to enforce a waiver would be form over substance. This is not the case here. Here, where Chase is asking this Court to move the goal line for when relation back begins. Relation back is a doctrine that allows a claim plead outside the statute of limitations to be timely when the claim relates back to the original pleading. Before the District Court, Chase did not argue relation back is to its motion to amend, and should not be allowed to argue it now. Chase intentionally chose how it wanted to argue relation back and placed those arguments in its opposition to SFR's Second MSJ. It did not, like the parties in *Premier One*, simply fail to use proper nomenclature. Now on appeal, in an effort to circumvent the District Court's finding, Chase changes its relation back argument and wants a pass from this Court.

Chase is not entitled to a second bite at the apple. Accordingly, this Court should not consider this argument that is not properly before this Court. As such, this Court can affirm the District Court's order, finding that relation back is not available to Chase as the original complaint did not place SFR on notice of 4617(j)(3).

Without waiving the waiver, Chase wrongly asserts its motion should be the relation-back deadline. A party should be held to the language of the Rule which discusses pleadings, not motions. Further, an amended pleading is not the operant

[50] *Id.*

document until or unless it is actually filed. Allowing parties to relate back to a motion, rather than an actual pleading as required by the rule, encourages delay and ambiguity in the system, especially if the moving party fails to actually file the amended pleading itself.

C. The District Court Properly Exercised its Discretion in Striking Chase's New Argument – Six Year Statute of Limitations.

It is well settled that a movant cannot raise new arguments in its reply which deprives the non-moving party of an opportunity to respond in writing before the hearing. This Court addressed a variation of this issue in *Valley Health*.[51] In that case, the real party in interest Roxanne Cagnina ("Cagnina") sued Valley Health for an alleged sexual assault while under the care and treatment at the hospital.[52] Cagnina filed a motion to compel before the discovery commissioner.[53] The discovery commissioner granted the motion to compel, Valley Health filed an objection before the District Court.[54] Valley Health failed to raise an argument—privilege—before the discovery commissioner and raised privilege for the first time before the District Court.[55] This Court affirmed the District Court's order striking

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[51] *Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 127 Nev. 167, 252 P.3d 676 (2011).
[52] *Id*. at 170, 252 P.3d at 678.
[53] *Id.*
[54] *Id.*
[55] *Id*. at 127 Nev. 172, 252 P.3d at 679.

the new argument raised for the first time before the District Court.[56] This Court stated the following in its holding: "Additionally, consideration of such untimely raised contentions would unduly undermine the authority of the Magistrate Judge by allowing litigants the option of waiting until a Report is issued to advance additional arguments. . . ."[57]

1. ***Chase ambushed SFR with new arguments in its reply brief before the district court***

The case here is analogous to *Valley Health*. Like Valley Health with privilege, Chase waited until its reply to raise six-year statute of limitations rather than argue it in opposition to SFR's second MSJ, thereby depriving SFR of a meaningful opportunity to respond.[58] SFR, akin to Cagnina, was unable to respond to in writing to the "new argument," thereby ambushing SFR at the hearing. Accordingly, SFR properly moved to strike and the District Court properly exercised its discretion in striking Chase's new argument.[59]

2. ***If the district court allowed the new argument it would lead to inefficient use of judicial resources.***

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[56] *Id.,*

[57] *Id*. *quoting Abu–Nassar v. Elders Futures, Inc.,* No. 88 Civ. 7906 (PKL), 1994 WL 445638, at *4 n. 2 (S.D.N.Y. Aug. 17, 1994)

[58] *See* Chase's Opposition to SFR's Second MSJ regarding statute of limitations arguments raised 3AA_543:1-546:3; *see also* Chase's Reply in support of its Second MSJ at, 4AA_575-594; *see specifically*, 4AA_590:8-592:2, which raises six-year contract claim for the first time.

[59] *See* Transcript at 4AA_600-624; *see specifically*, 4AA_613:6-19.

What is more, as this Court noted in *Valley Health*, parties need to present all arguments, issues, and evidence in the first instance and not wait for a reply to avoid wasting judicial resources.

> [a] contrary holding would lead to the inefficient use of judicial resources and allow parties to make an end run around the discovery commissioner by making one set of arguments before the commissioner, waiting until the outcome is determined, then adding or switching to alternative arguments before the district court. All arguments, issues, and evidence should be presented at the first opportunity and not held in reserve to be raised after the commissioner issues his or her recommendation.[60]

Again, this analysis is applicable here too. Chase should be able to place all its arguments that are in opposition to SFR's arguments in one responsive pleading to which SFR can timely respond in writing. Allowing Chase to place new arguments in its reply in effect allows Chase to make one set of arguments in its opposition to which SFR can respond by timely filing a reply and different arguments in its reply to which SFR does not have a meaningful opportunity to respond in writing and is in effect ambushed at the hearing.

Here, as in *Valley Health*, if the District Court allowed the new argument it would have "frustrated the purpose" of having a hearing after briefing. Thus, by analogy this case is applicable and this Court should not consider Chase's new

[60] *See Valley Health*, 127 Nev. at 679-80, 252 P.3d at 172-73..

argument.

This Court has also declined to consider new arguments raised in a reply brief on appeal. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011).[61] The District Court did not abuse its discretion for failing to consider Chase's new argument in its reply.

This Court should affirm the District Court's order striking Chase's new argument, and not consider whether Chase's claim is entitled to a six year statute of limitations under 4617(b)(12). However, in the unlikely event this Court disagrees with SFR and determines that the District Court abused its discretion in deciding it would not consider the argument, SFR asks this Court to allow it to supplement its briefing.

D. Chase and SFR have No Contract On Which to Base Chase's Claim.

While the District Court properly struck Chase's arguments that its claim arising from 4617(j)(3) sounds in contract, Chase is also wrong. Chase clings to the idea that the mere existence of a contract—between other parties, regarding other things that are not being enforced here—is a sufficient "similarity" to categorize Chase's claims—based ***entirely*** on a ***statute***—as sounding in contract. In other words, Chase asks this Court to look for some non-existent similarity between its

[61] SFR believes there is only one exception to this rule, subject matter jurisdiction, which can be raised at anytime even by the Court sua sponte.

claim that NRS 116.3116(2) and the Association foreclosure sale violate § 4617(j)(3) and a contract action as defined under Nevada law.

1. ***A contract action necessarily requires a contract – between the parties.***

A contract action first requires an ***actual contract***. Additionally, said contract action must be ***based on the obligations set forth in that contract*** and must be ***between the parties to the contract***. *See Nevada Contract Services, Inc. v. Squirrel Companies, Inc*., 119 Nev. 157, 161, 68 P.3d 896, 899 (2003) (an essential element to a contract claim is that an agreement existed between the parties). Here, the analysis ends swiftly—there is no contract between Chase and SFR. Without said contract, Chase and SFR are not parties to a contract, the claims brought cannot be based on said non-existent contract, nor can it be based on non-existent obligations within said non-existent contract. Chase does not dispute there is no contract between Chase and SFR. Chase admits it is not seeking to enforce a contract here, and certainly not against SFR. In other words, simply because contracts exist between other parties Thus, Chase's claim cannot be a breach of contract claim. Given these undisputed facts, the contractual "hook" to latch Chase's claims to does not exist. Thus, the claim cannot sound in contract, and Chase is not entitled to the 6-year statute of limitations associated with a contract. Rather, the Court must look at the substance of Chase's defense, and that substance reveals *one* resounding

theme—12 U.S.C. § 4617(j)(3).

2. Wise *and* FDIC *have no bearing here.*

Chase overstates any relevance or persuasive value of Wise[62] and FDIC.[63] Here, there are not "multiple potentially-applicable statutes"[64] under which a claim could reside, nor is this a case where there is a "'substantial question' which of two conflicting statutes" apply.[65] The question here is the nature of the claim itself.

Wise dealt with a claim to recover employee insurance benefits under 29 U.S.C. § 1132(a)(1)(B). The court had to look elsewhere for a proper statute of limitations because "ERISA [(Title 29)] does not contain its own statute of limitations for suits to recover benefits under 29 U.S.C. § 1132(a)(1)(B)."[66] Wise sued because she had returned to her prior employer, GTE, **under the promise** that she would be eligible for all her prior benefits, including long-term disability.[67] In other words, **Wise and GTE had an oral contract**. The Ninth Circuit was called upon to determine which of Washington State's two statutes of limitations for contract claims applied for Wise's contract claims: three-year oral or six-year

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[62] *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180 (9th Cir. 2010)
[63] *FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304 (9th Cir. 1989
[64] *Wise*, 600 F.3d at 1187 n.2.
[65] *FDIC*, 884 F.2d at 1307.
[66] *Wise*, 600 F.3d at 1184.
[67] *Id*. 1183.

written.[68] Thus, there were at least two statutes of limitations for contract claims that could be applied. The Ninth Circuit ultimately determined that ERISA meant for there to be only one statute of limitations and applied the six-year statute to Wise's claim.[69] But what distinguishes *Wise* from this case, is that there was no question the court was addressing a contract claim. Not trying to determine the actual nature of the claim itself. Here, because there is no contract being enforced, but rather a statutory prohibition, there is no question that a six-year statute of limitations cannot apply.

FDIC dealt with the FDIC's breach of fiduciary duties claims based on **express and implied contracts *between the parties***. Further, with regard to breach of fiduciary duties, the Ninth Circuit noted that several courts had determined that such claims sound in contract.[70] Neither of these cases, nor the propositions for which they stand apply here.

Chase and FHFA are asking this Court to contort the definition of a contract claim to the point of breaking. Under Nevada law, if a claim is not a contract, it is a tort. Accordingly, Chase's claims must fall into the tort categorization of 12 U.S.C. § 4617(b)(12).

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[68] *Id.* at 1184-1185.
[69] *Id.* at 1187.
[70] *FDIC*

E. There Is No Five-Year Statute Of Limitations Applicable To Chase's Claims

1. The District Court correctly found the five-year does not apply to Chase.

"Let us make distinctions, call things by the right names."[71]

The District Court correctly found that Chase's claims were barred by the three-year statute of limitations.[72] Chase's arguments for the five-year statute of limitations fail as neither NRS 11.070 and/or NRS 11.080 are not time-bar statutes, instead, these are standing statutes. In Nevada, "quiet title" is just a slang term used to identify any action where one party claims an interest in real property adverse to another. NRS 40.010 or NRS 30.040 do not have express statute of limitations. Thus, the *title* of Chase's claim does nothing to assist the court in determining which statute of limitations applies. In order to determine this, the Court must look at the nature of the grievance to determine the character of the action, rather than the labels in the pleadings. *Torrealba v. Kesmetis*, 124 Nev. 95, 178 P.3d 716, 723 (2008). Here, Chase sought to amend to allege HERA. But HERA has its own statute of limitations: six-years for contract claims and three-years for torts i.e. non-contract claims. 12 U.S.C. § 4617(b)(12). There is no basis to look outside of HERA given

[71]Henry David Thoreau, Journal, 28 November 1860 at 278, available at https://www.walden.org/wp-content/uploads/2016/02/Journal-14-Chapter-4.pdf. Last visited April 17, 2019.
[72] 4AA_628 at ¶¶ B_C.

that HERA is the claim/right Chase seeks to assert.[73] Regardless, Chase's reliance on NRS 11.070 and 11.080 is fatal because neither provide a statute of limitations for Chase, and even if they did, neither apply to Chase.

2. ***NRS 11.070 does not provide a five-year statute of limitations for Chase.***

NRS 11.070 is not a time-bar statute; instead, it is a standing statute. Regardless, it does not apply to Chase as Chase was never seized[74] nor possessed of the subject property.

3. ***NRS 11.070 is a standing statute.***

Under Nevada rules of statutory interpretation, the Court must first look to the statute's plain language. *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013). If the statute's, "language is clear and unambiguous," the Court

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[73] Because there is no analogous state law Federal Foreclosure Bar provision, the extender provision of HERA does not apply.

[74] Seisin is defined as possession of a freehold estate in land. Black's Law Dictionary 1564 (10th Ed. 2014). "Originally, seisin meant simply possession and the word was applicable to both land and chattels. Prior to the fourteenth century it was proper to speak of a man as being seised of a land or seised of a horse. Gradually, seisin and possession became distinct concepts. A man could be said to be in possession of chattels, or of lands wherein he had an estate for years, but he could not be said to be seised of them. Seisin came finally to mean, in relation to land, possession under claim of a freehold estate therein. The tenant for years had possession but not seisin; seisin was in the reversioner who had the fee." *Id*. (citing Cornelius J. Moynihan, *Introduction to the Law of Real Property* 98-99 (2d ed. 1988)). Further, seisin "has nothing to do with 'seizing,' with its implication of violence." *Id*. (citing Robert E. Megarry & M.P. Thompson, *A Manual of the Law of Real Property* 27-28 (6th ed. 1993)). In other words, seisin lies with the record titleholder.

must enforce it "as written." *Id.* (quotation omitted). The Court must "avoid[] statutory interpretation that renders language meaningless or superfluous," and "interpret a rule or statute in harmony with other rules and statutes." *Id.* (quotation omitted).

Rather than define a time-period in which a party must file suit, "founded upon title to real property," NRS 11.070 sets a condition precedent which gives a party standing to bring an action **or** defend an action, and that condition is the party must have been seized i.e. ownership in fee[75] or possessed of the real property in question, five years prior to bringing the action **or** defending the action. Both the title of the statute and the language within, namely "no cause of action…unless" make it clear that the statute is a standing statute. The fact that the statute also limits the **defense** of such an action "unless" the condition precedent exists also makes it clear that NRS 11.070 is not a time-bar statute, but rather a standing statute. This Court, in interpreting the identical predecessor to NRS 11.070, stated that the statute, "imposes a general inability to sue or defend upon any right claimed in real estate, unless the party suing or defending shall have been in possession of the real estate within five years last past." *Chollar-Potosi Mining Co. v. Kennedy & Keating*, 3

[75] *South End Minding Co. v. Tinney*, 22 Nev. 19, ___, 35 P. 89, 92 (1894) ("the word 'seised' means something different from simple possession of a claim…If so, it must mean, as it would naturally import, an ownership in fee, for this is the only other kind of ownership known to the law.")

Nev. 365, 369 (1867).

NRS 11.070 makes no mention of an accrual of a claim "founded upon title;" instead, it only discusses the necessary condition a party must have in order to have standing to assert a claim or defense. In this regard, while NRS 11.070 may bar a claim/defense, it will not be because of any time-limitation; it will be because the party was not seized or possessed of the property i.e. the party lacks standing.

4. NRS 11.070 does not apply to the Bank.

NRS 11.070 states in relevant part

> No cause of action…founded upon the **title to real property**,…shall be effectual, unless it appears that **the person prosecuting the action…was seized or possessed of the premises in question within 5 years before the committing of the act** in respect to which said action is prosecuted…

NRS 11.070 (emphasis added.)

In the present case, Chase sought a declaration that the deed of trust remained a valid lien on the property. Simply because Chase uses the slang term "quiet title" or that it claims the deed of trust still clouds title does not morph the claim into one "founded upon title to real property." *See e.g. Bank of America, N.A. v. Country Garden Owners Association*, Case No. 2:17-cv-01850-APG-CWH, 2018 WL 4305761 (D. Nev. March 14, 2018) (finding NRS 11.070 does not apply to bank's claim); *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:17-

cv-01757-JAD-VCF, 2018 WL 2292807 (D. Nev. May 18, 2018) (finding neither NRS 11.070 nor 11.080 apply to the bank's claim).

As this Court held, while a lien is a monetary encumbrance on property which clouds title, "it exists separately from that title," and therefore an action involving the lien does not relate to title. *Hamm v. Arrowcreek Homeowners Ass'n*, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008). In *Hamm*, this Court noted "a lien right alone does not give the lienholder right and title to the property." *Id.*, quoting *In re Marino*, 205 B.R. 897, 899 (Bankr.N.D.Ill.1997). Rather, "title 'which constitutes the legal right to control and dispose of property' remains with the property owner until the lien is enforced through foreclosure proceedings."' *Id.* quoting Black's Law Dictionary 1522 (8th Ed.2004).

With this principle in mind, NRS 11.070 does not apply to Chase's unpled claim because the claim is not one "founded upon title to real property." Chase, as mere lienholder, claims a lien right, and nothing more. The unpled claim is an attempt to obtain a determination that the lien survived the sale based on HERA; it is not a claim founded upon title. If that was not enough, as discussed above, NRS 11.070 is not a time-bar statute, it is a standing statute; Chase as mere lienholder would never have standing to assert a claim or defend a claim founded upon title to real property because it was neither seized nor possessed of the property.

Chase's attempt to rely on the homeowner's prior seisin or possession of the

Property is unavailing. The statute is clear: "whose title the action is prosecuted" precedes the identification of "ancestor, predecessor or grantor" meaning only if those three categories of people are prosecuting or defending for the title rights of the person who was seized or possessed of the property, will the conditions precedent of NRS 11.070 be met. But Chase does not seek to vindicate the title rights of the prior homeowner; instead, it has no problem with validating part of the sale, the part that divested the homeowner of title, and only seeks to invalidate the part that extinguished the deed of trust. *See Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Association*, 134 Nev. __, 417 P.3d 363 (2018) (recognizing Agency can consent to sale but still assert HERA to prevent extinguishment of deed of trust.)

A plain reading of NRS 11.070 shows the statute has no application whatsoever to Chase. The District Court, therefore, did not err as a matter of law in rejecting a five-year statute of limitations as to Chase's HERA claim. This Court should affirm.

F. NRS 11.080 Does Not Provide a Five-Year Statute of Limitations for Chase.

1. NRS 11.080 is a standing statute.

NRS 11.080 sets the same condition precedent for actions for the "recovery of real property" or the "recovery of the possession thereof." Again, the statute does

not state the action must be filed within five years; instead, the statute states that "no action for the recovery of real property, or for the recovery of the possession thereof… shall be maintained, unless…" the party bringing the action was seized or possessed of the premises five years before commencing the action. The terms "maintained" and "unless" make it clear, that NRS 11.080 is a standing statute.

2. NRS 11.080 does not apply to the Bank.

NRS 11.080 states in relevant part

> No action for the **recovery** of real property, or for the **recovery** of the possession thereof . . . shall be maintained, unless it appears that the plaintiff . . . **was seized or possessed of the premises in question**, within 5 years before the commencement.

NRS 11.080 (Emphasis added.)

Again, Chase, as a lienholder, sought a declaration that the deed of trust remained a valid lien on the property based on HERA. By way of this unpled claim, Chase does not seek "recovery" or "recovery of possession" of the property. *Bank of America, N.A. v. Country Garden Owners Association*, Case No. 2:17-cv-01850-APG-CWH, 2018 WL 4305761 (D. Nev. March 14, 2018) (finding NRS 11.070 does not apply to bank's claim); *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:17-cv-01757-JAD-VCF, 2018 WL 2292807 (D. Nev. May 18, 2018) (finding neither NRS 11.070 nor 11.080 apply to the bank's claim).

Even if Chase succeeded on its unpled claim, and SFR took subject to the deed of trust, Chase would still have to foreclose on the deed of trust to get possession of

the property. *Hamm*, 124 Nev. at 298, 183 P.3d at 902. Also, just like NRS 11.070, NRS 11.080 likewise requires that before a party can maintain an action to recover real property it must have been seized or possessed of the property. In the context of challenging an NRS 116 sale as a lienholder, Chase does not have standing to assert a claim because it cannot establish it was seized or possessed of the property.

NRS 11.080 has no application whatsoever to Chase. The District Court, therefore, did not err as a matter of law in rejecting a five-year statute of limitations as to Chase's unpled HERA claim. This Court should affirm.

3. The authorities cited by Chase fully support SFR's argument.

Chase bewilderingly cites to *Gray Eagle*,[76] *Weeping Hollow,*[77] *Raymer*[78] and *Scott*[79] to support its position its claim carries a 5-year statute of limitations pursuant to NRS 11.070/11.080. These cases in fact prove beyond any doubt that a five-year statute of limitations cannot apply to Chase's defense. Notably, nowhere in NRS Chapter 11 does the term "quiet title" even appear. There is good reason for this, as the applicable statute of limitation depends on the ownership interest of the party seeking to assert it. As discussed in more detail, *infra*, Chase's confusion—or

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[76] *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.,* 133 Nev. Adv. Op. 3, 388 P.3d 226 (Jan. 26, 2017) ("Gray Eagle").
[77] *Weeping Hollow Ave., Trust v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016).
[78] *Raymer v. U.S. Bank*, No. 16-A-739731-C, 2016 WL 10651933 (Nev. Dist. Ct. Dec. 28, 2016).
[79] *Scott v. Mortg. Elec. Registration Sys., Inc.*, 605 F. App'x 598, 600, 2015 WL 657874 (9th Cir. 2015) (unpublished).

purposeful misrepresentation—ignores the fact that the limitations period depends on the precise ownership interest of the party seeking to assert quiet title, an interest which Chase simply does not have.

4. ***Unlike the parties suing in the cases, Chase has neither title nor possessory interest***

Unlike Chase—which has neither title nor possessory interest—the parties suing in *Gray Eagle*, *Weeping Hollow*, *Raymer* and *Scott* actually had title or possessory interest in the property, and therefore there was "seisin" and the claimants seeking to quiet title were therefore "seized or possessed of the premises in question, within 5 years before the commencement thereof."[80] *Gray Eagle* makes this distinction perfectly clear. The Appellant in *Gray Eagle* actually purchased two of the subject lots at a non-judicial Association foreclosure sale pursuant to NRS 116.3116, and had actual title to all three lots, entitling it to seek a true quiet title action. *Gray Eagle*, 388 P.3d at 228-229. Thus, unlike Chase here, which has neither title nor even possessory interest, the party in *Gray Eagle* seeking to quiet title was qualified to bring suit under the seisen statutes. *Gray Eagle*, 388 P.3d at 232 (emphasis added).

5. ***Neither* Raymer *nor* Scott *aid Chase's argument.***

It is the same with the relevant parties in *Raymer* and *Scott*: the former

[80] *See* NRS 11.080 and NRS 11.070 cited herein.

homeowners with possessory interest were seeking to set aside the sale and get clear title. In *Scott*, **the defendant** was a bank with a mere lien interest as is the case here. *Scott,* 605 Fed.Appx. at 600. Nothing in that case supports that a bank has the standing to bring a claim that falls within the parameters of NRS 11.070 or NRS 11.080. Chase also cites to *Weeping Hollow*, which, citing NRS 11.070 correctly states "[u]nder Nevada law, **Spencer** could have brought claims challenging the HOA foreclosure within five years of the sale[.]" *Weeping Hollow Tr. v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016). Put simply, that case addressed only whether the current title holder, Weeping Hollow Trust, had properly named the prior title holder in its action to clear title, not how long the bank had to challenge the extinguishment of the deed of trust. In each of the cases relied on by Chase—*Gray Eagle*, *Weeping Hollow*, *Raymer* and *Scott*—it was the parties who had, or had recently had, a title or possessory interest who could take advantage of NRS 11.070 and NRS 11.080.

Chase's attempt to apply a five-year limitations period under NRS 11.070 and 11.080 fails. Here, Chase has no possessory or other rights to use, enter, or otherwise enjoy the Properties, until and unless it forecloses. Instead, Chase, at best, is a mere lienholder NRS 11.070 or 11.080 do not apply to its claims. Yet, in a last-ditch effort to convince this Court that the five-year statute of limitations is applicable, Bank mistakenly relies on *The Bank of New York Mellon v. Jentz*, Case No. 2:15-cv-1167-

RCJ-CWH, 2016 WL 4487841 (D. Nev. Aug. 24, 2016). But *Jentz* begins with the same mistaken premise that Chase asks this Court to apply—that "quiet title" is but one claim rather than a mere descriptor that requires a court to look at the nature of the claim rather than its name to determine the proper statute of limitations. Thus, *Jentz* provides no persuasive value when NRS 11.070 and 11.080 are interpreted as above.

At bottom, NRS 11.070 and 11.080 do not apply to mere lienholders. Further, 11.070 and .080 provide standing; the statute of limitations to bring the action can be much shorter.

G. There Is No Four-Year Statute of Limitations Applicable to Chase's Claims and Chase Waived this Argument.

Again, Chase waived all alternative statute of limitation arguments by not raising them below. It certainly did not raise an alternative four-year statute of limitations argument. As this Court has enforced time and again, "a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine,* 97 Nev. at 52, 623 P.2d at 983. Here, Chase, in opposition to SFR's Second MSJ never asserted this argument in a manner for SFR to respond.[81] [82] Accordingly, this Court should

[81] *See* Chase's Opposition to SFRs Second MSJ at 3AA_534-547; *see specifically*, pp. 543 at Sec. II "Chase's Claims are Timely."
[82] *See* Chase's Opening Brief ("AOB") at pg. 27 Sec. B.

not consider this argument that is not properly before this Court.

H. HERA Bar's Chase's Claims Regardless of Whether the FHFA is a Party

At the District Court, Chase argued that the HERA statute of limitations only applies if FHFA is a party. The District Court correctly rejected this argument.[83] In rejecting this argument, the District Court astutely noted that if this were the case, "it would encourage the FHFA to not be a party."[84] Chase has failed to properly explain why or how the District Court was in error.

The ***only*** reason Chase can even assert 4617(j)(3), is that this Court recognized that a contractually authorized servicer could assert the right, under a principal/agency relationship.[85] In other words, Chase does not have the right, it merely steps into the shoes of FHFA and asserts the right. In this case, Chase ***never***[86] proved it is a contractually authorized servicer of Freddie Mac for the subject loan, and SFR does not concede this fact. But for purposes of this argument, even assuming Chase is the contractually authorized servicer, Chase does not step into only one shoe, it steps into ***both*** shoes. In that regard, if it can assert the right, it is

[83] 4AA_628 at ¶ C-D.
[84] Id. at ¶ D.
[85] *See* Nationstar, 396 P.3d 754.
[86] The District Court granted SFR's Counter-Motion to strike on the basis that Chase disclosed its "evidence" too late; *see* FFCL at 4AA_629; *see also* transcript at 4AA_615:8-24.

equally bound by the limitations that Congress placed on that right. Thus, Chase is bound by the statute of limitations set forth in 4617(b)(12) just as FHFA would be if it asserted the right.

II. CHASE FAILED TO PROVE § 4617(J)(3) APPLIES

A. The District Court Properly Exercised its Discretion Granting SFR's Counter-Motion to Strike.

The District Court did not abuse its discretion in granting SFR's counter-motion to strike. A District Court abuses its discretion when it "bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. ___, ___, 367 P.3d 1286, 1292 (2016). Following the rules and holding a party to the consequences from failing to comply cannot be an abuse of discretion. Otherwise, he rules have no purpose, and certainly no teeth.

Further, all of Chase's arguments ring hollow, when it *voluntarily withdrew* the one motion that might have cured its evidentiary deficiencies—a motion to reopen discovery. Chase sheds crocodile tears over something it had a chance to avoid and, instead, argues the District Court put decided to take the risk that the District Court would strike its untimely exhibits.

1. Chase waived case ending sanctions.

It is well-settled, "a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered

on appeal. *Old Aztec Mine,* 97 Nev. at 52, 623 P.2d at 983 . Yet again, Chase for the very first time asserts on this appeal, not in its opposition to SFR's counter-motion to strike,[87] not at the hearing before the District Court, not in **any** pleading before the District Court—but on appeal raises the following new arguments:

1) that the District Court in striking Freddie's late disclosed evidence;

2) that the District Court failed to consider the *Young* factors in issuing its findings, resulting in the District Court abusing its discretion, something it did not argue would be necessary when it opposed SFR's motion;[88]

3) that SFR failed to conduct a meet and confer;

4) that the failure to disclose was harmless.

The Court did not strike the untimely evidence and new claim *sua sponte*. It did so after full briefing and a hearing, where Chase never complained of these failures.[89] In that briefing, Chase never raised, at the hearing or in its briefing, that by the District Court using its discretion to strike the exceedingly late disclosed evidence would result in effect, case ending sanctions. Nowhere in its opposition does Chase argue that the failure to disclose was harmless or case ending sanctions.[90]

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[87] The Bank's opposition to SFR's Counter-Motion regarding striking the undisclosed documents and witness, only argues that the Bank had "an on-going obligation to supplement its NRCP 16.1 disclosures." 3AA_576 lines 16-19.
[88] *See* Appellant's Answer Brief at pp. 48-56, citing *Young v. Ribeiro Bldg., Inc*., 106 Nev. 88, 787 P.2d 777 (1990) ("*Young*").
[89] 4AA_600-624; *see also* transcript of hearing, 4AA_600-618.
[90] 4AA_592 at sec. V; *see also* transcript of hearing, 4AA_600-618

Rather, Chase argues that there is an ongoing obligation to supplement. While that is true, it is timely during discovery. Since these arguments were not raised below, this Court should not consider them.

2. Chase disingenuously over-expands SFR's counter-motion.

Chase blatantly misrepresents SFR's counter-motion to strike, and the District Court's order granting it. The *only* remedy SFR was seeking to obtain from the District Court was for it not to consider the late disclosed exhibits and witness, which the District Court properly exercised its discretion when granting.[91] [92] It followed the Rules of Civil Procedure. This is entirely different from seeking case ending sanctions, which Chase is asserting occurred, which did NOT occur. SFR's Counter-motion **did not** request that the District Court strike Chase's complaint, claims, or otherwise. Neither did SFR seek case ending sanctions, nor did the District Court's order strike Chase's Complaint. Further, SFR did not request that any timely disclosed documents be stricken.

SFR's counter-motion to strike was based on the premise that Chase failed to timely disclose exhibits, and its witness, which should have been in its mandatory

[91] *See* SFR's Counter-motion to strike, 4AA_552-553; *see also* SFR's Reply in support, 4AA_595-599.
[92] *See* District Court's Finding of Facts Conclusion of Law, 4AA_626-630; see also Transcript from hearing, 4AA_600-618; *see specifically*, 4AA_60314-17; 4AA_615:8-19.

initial disclosure.[93] Thus, due to the failure to disclose, SFR asked the District Court to not consider the evidence— which it properly did not consider. *See* NRCP 37(c)(1) ("the party is not allowed to use that information or witness **to supply evidence on a motion, at a hearing**, or at trial, unless the failure was substantially justified or is harmless.") (Emphasis added).

3. ALL of Chase's supplemental disclosures were after the close of discovery.

Here, all of Chase's supplemental disclosures were ***late***. Chase's first supplemental disclosure was served on **May 6, 2016**, the second supplemental disclosure was served on **July 26, 2016**, and then shockingly, **707** days ***after*** discovery expired when the parties were back on remand, Chase served SFR with its third supplemental disclosure on **April 13, 2018**.[94] ***All*** these were each ***well*** past the **May 2, 2016** deadline, a deadline that was *never* extended. Chase chose not to disclose during the discovery period. And, Chase never made an argument to the District Court that its actions were substantially justified or harmless.

The failure to timely disclose was prejudicial to SFR, i.e. not harmless. SFR was unable to defend itself. SFR was deprived of the ability to notice a deposition of Freddie. SFR faced an uphill battel in conducting discovery. Chase should have

[93] *See* SFR's Counter-motion to strike, 4AA_552-553; *see also* SFR's Reply in support, 4AA_595-599.
[94] *Id*.

disclosed the witness and the exhibits in a mandatory initial disclosure. NRCP 16.1(a)(1)(B) and NRCP 26(b).

4. ***Chase was dilatory, which should end any analysis: it never attempted to re-open discovery.***

This Court should not fall for Chase's crocodile tears that the failure to disclose was harmless; it was the opposite. Chase chose the route it took. In fact, Chase knew it had to reopen discovery to use the late disclosed documents in its prior supplements. Therefore it knew it needed to reopen to disclose the documents and witness it eventually put in its last supplement.

In fact, Chase actually filed a motion to reopen after remand. The then bemoans the fact that SFR opposed so it withdrew its motion.[95] Then it did a third supplemental disclosure with the Meyers declaration and exhibits. This is inexcusable for a new claim which Chase had to have the evidence before making the claim, even then Chase did not disclose the evidence it claims it needed.

Yet, failing to follow through on its own motion, Chase now argues that SFR could have moved to re-open discovery. To be clear, **it is not** SFR's duty or responsibility to seek evidence to prove Chase's claims; Chase bears that burden. And Chase failed to seek to re-open discovery. Chase's attempt to shift the focus on

[95] *See* Chase's Motion to Extend Discovery Deadlines at 2AA_268-274; *see also* SFR's Opposition, 2AA_275-286; *see* Chase's withdrawal, 2AA_287-289.

to what SFR might have done, rather than what it should have done is outlandish. attempt to shift the focus on SFR is so outlandish

Examining the timeline of events reveals that the District Court's analysis was correct, and did not abuse its discretion in finding that Chase was not diligent. Chase was dilatory and the inquiry should end there for this Court, as it did with the District Court.

5. ***Chase knew it needed the evidence and it knew late disclosed evidence may not be considered.***

It took **833 days of litigation** for Chase to even plead HERA in its Amended Complaint.[96] If the facts are as Chase says they are, which SFR is not conceding, that the note and deed of trust are Freddie's since September 27, 2006,[97] it begs the following questions:

1) why not allege 12 U.S.C § 4617 (j)(3) in the initial complaint if Freddie purportedly obtained its interest shortly after origination; and for the same reason

2) why not disclose Mr. Meyer and the relevant documents purporting to "prove" Freddie's interest **in its mandatory initial disclosures**?

Assuming for the sake of argument, that this allegation is true, which SFR is not conceding, **then HERA should have been plead in the initial complaint** and

[96] *See* Amended Complaint, 1AA_071-081.
[97] *See* Bank's First MSJ, 1AA_163:16-18.

any and all witnesses, and documents which purport to establish Freddie's purported interest should have been timely disclosed in Chase's initial disclosures at best, at bottom in a timely supplemental disclosure, which left time remaining for SFR to have a meaningful opportunity to defend itself. These are documents Chase should have had in its possession when it amended.[98]

NRCP 16.1(a)(1)(A)(i)-(v) states the required initial disclosures, "**without awaiting a discovery request**" is the name of *any* witness likely to have discoverable information, as well as all documents. *Id*. (Emphasis added).

Here, according to Chase, Mr. Meyer is a witness "likely to have discoverable information."[99] Accordingly, Chase should have disclosed Mr. Meyer *immediately* after the District Court granted Chase's motion to amend its complaint to add 12 U.S.C § 4617(j)(3). Chase failed to timely disclose Mr. Meyer in its mandatory disclosure. This, not an attempt to inflict case ending sanctions, was the basis for the District Court's decision to grant SFR's countermotion to strike. *See* 4AA_629:8-12.

6. Chase withdrew its motion to re-open discovery.

It cannot be repeated too often.: Chase ***voluntarily withdrew*** its motion to re-

[98] Currently before the Nevada Supreme Court is case number 76952, JP Morgan Chase Bank, N.A, c. SFR, where the circumstances are very similar. See SFR's Answering Brief, filed on June 12, 2019.
[99] 2AA_268-274; 2AA_290-314.

open discovery.[100] It just attached the same undisclosed items to its 2018 motion for summary judgment. Chase then blames its choice to withdraw on SFR's opposition. Of course, SFR opposed, for the very reasons set forth in section I 2-5. If Chase needed the witness and exhibits, it should not have voluntarily withdraw its motion to re-open discovery. Of course, SFR opposed. If Chase needed the evidence, which it knew it did base on the First MSJ, it should have argued the motion to the District Court. What is more, the withdrawing of its request would not satisfy the good cause to extend discovery. This is why Chase's cry of "case ending sanctions" rings hollow. If it knew it needed these documents and had every opportunity to plead its case to the District Court in its motion to re-open discovery.

7. The case law Chase relies on is distinguishable.

Chase argues that litigation on the merits is not being penalized by the rules.[101] Recall, again, Chase chose not to play by the rules. It withdrew its motion to re-open. That is why this argument rings hollow. Chase is twisting the concept of litigation on the merits; suffering the consequences designed by the rules is indeed litigating on the merits.

Chase relies on a U.S. District Court order, *Benezette*.[102] In that case, the bank

[100] *See* Withdrawal of Motion, 2AA_287-289.
[101] AOB pg. 49-58.
[102] *Capital One Nat'l Ass'n v. SFR Invs. Pool 1, LLC*, Case No. 2:15-cv-01324-KJD-PAL, 2019 WL 1596656 (D. Nev. 2019), and is attached hereto in SA_00010-13.

made disclosures *seven months* after the close of discovery. The judge in that case, decided in part due to stays, to re-open discovery which would cure any prejudice to SFR.[103] That decision was not only distinguishable but as this Court noted the District Court's decision was discretionary and this Court would not reverse.

Our case is distinguishable. Chase ***withdrew*** its motion to re-open discovery. Chase failed to disclose the evidence it claims it needed. Thus, its voluntary withdrawal of its motion to re-open flies in the face of its arguments that, somehow, the District Court should have granted additional discovery *sua sponte*. It cannot complain that the District Court issued case-ending sanctions when Chase itself, didn't think enough of the evidence to argue its motion to the Court.

Chase's additional arguments all fail. **First**, Chase asserts that "SFR knew for more than three years that [Chase] is relying on the Federal Foreclosure Bar."[104] Chase does not explain how SFR *knew* for this particular case, that Chase is the purported servicer for Freddie, and that Freddie purportedly owned the Note and DOT at the time of the Association foreclosure sale. Something Chase had the burden to prove, through timely disclosed evidence.

Again, Chase has misplaced reliance on case law. Chase relies upon *Capanna*[105] for the proposition that since SFR knew that Chase was relying on the

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[103] *Id.*
[104] AOB at pg. 53.
[105] *Capanna v. Orth,* 134 Nev. ___, 432 P.3d 726 (2018).

Federal Foreclosure Bar, the District Court should have denied SFR's counter-motion to strike. Again, the facts of *Capanna* are distinguishable.

In *Capanna* the District Court "carefully considered the **timeliness** of Orth's disclosures and found that Orth **satisfied his duty to supplement the disclosures at appropriate intervals**." *Capanna*, 432 P.3d at 734, (emphasis added); *see also* NRCP 26(e)(1). This decision too, was discretionary.

Here, Chase did not "satisfy its duty to supplement at appropriate intervals" Chase did the exact opposite by not disclosing the evidence and witness it needed. Here, the District Court properly exercised its discretion in finding Chase did not supplement at the appropriate intervals, and certainly not timely.

The cases cited by Chase, instead support affirming the district court – a district court's decision on whether to accept or strike evidence is discretionary and this Court will not disturb it absent some real showing of abuse.

8. Knowledge of a claim does not equate to knowing the evidence the claimant will produce

Chase absurdly argues that SFR was on notice of Chase's claims arising under the Federal Foreclosure Bar for at least three years. While SFR may have gleamed this knowledge from a plain reading of the allegations contained in the Amended Complaint, Chase ignores a crucial factor—that it still needs to establish those same allegations with admissible evidence, i.e. **it is Chase's burden to prove**; not SFR's

to disprove. Just because Chase's amended complaint literally contains the magic words "Federal Foreclosure Bar" does not mean Chase automatically wins, nor does it wipe all their failures away. Chase then needs to satisfy its burden by timely producing admissible evidence. One aspect of what makes evidence admissible, is that it is timely disclosed. Thus, it goes without saying that if Chase failed to timely disclose the evidence to establish its purported claims, then Chase cannot prove its claims, and Chase knew that. Whether SFR knew from reading the Amended Complaint about Chase's claim is not the issue; the real issue is whether Chase can establish its claims via admissible evidence, which it cannot. This is just like a plaintiff alleging it slipped and fell at defendant's casino. Plaintiff can allege this in its complaint, but if plaintiff cannot meet its burden of establishing duty, breach, causation and damages, by timely disclosing necessary documents and timely disclosing an expert witness, then the allegations contained in the complaint are meaningless. And again, SFR should not be required to reopen discovery to prove Chase's case.

Chase argues that any surprise surrounding Chase's late disclosure was "dissipated" in the years post disclosure. Again, this argument fails. Chase acts as if somehow length of time acts as a vaccination for their failure to timely disclose, it does not. The rules or the law in Nevada do not have such an exception. Surprise is not the issue. Again, Chase could have moved to reopen and made this argument

there; it did not. Chase sued SFR in this specific case, regarding this specific Property. This means that Chase needs to prove its allegations contained in its complaint as to this specific Property—i.e. this is a closed universe for the parties and this Court. This Court must consider what occurred HERE, which is nothing. Chase did not timely disclose Mr. Meyer or the exhibits. And again, the real issue is not "surprise," or length of time. **The issue is whether Chase timely disclosed: it did not.**

Chase argues that SFR "has extensive" litigation regarding the Federal Foreclosure Bar. The same applies to Chase. And again, the argument is non-responsive to whether the District Court abused its discretion in granting SFR's counter-motion. Again, this is a closed universe about the legal and factual issues as they relate to this particular case. This means that Chase needs to prove that the note and DOT were property of the Agency, such that 12 U.S.C. § 4617(j)(3) is triggered, and that this purported interest was in place when the sale occurred, which Chase cannot do here. If this evidence was so necessary, then Chase knew its case depended on timely disclosure. Instead Chase relies upon cases where a judge exercised its discretion in a contrary matter. But again, the standard is here is discretion.

This Court recently affirmed a district court's order that declined to consider a declaration **that was not provided during the discovery period**. *See Green Tree*

Servicing, LLC v. SFR Investments Pool 1, LLC, 435 P.3d 666 (Nev. 2019) (unpublished disposition) ("*Grey Spencer*"). Just as this Court affirmed the District Court's discretion in *Grey Spencer*, the same result should apply here.

In light of this, the District Court properly exercised its discretion by granting SFR's countermotion to strike.

Accordingly, the District Court's order should be ***affirmed***.

B. The District Court did not make Findings as to Freddie's Ownership Absent the Documents It Struck.

After first bemoaning "case-ending sanctions," Chase then argues that SFR's counter-motion to strike was immaterial because Chase had evidence sufficient to grant its motion for summary judgment. First, no matter the evidence actually produced, the District Court found Chase's claim time-barred and, as a result, the District Court did not need to reach findings and conclusions on the counter-motion because finding Chase's claims as time-barred is case dispositive.

As to the finding in the District Court's Order of Freddie's ownership, it must be remembered that the findings related to pages 3-7 of Chase's opposition to SFR's motion for summary judgment.[106] But a review of those pages demonstrate that Chase relied almost exclusively on the documents the Court struck.[107] And during

[106] 4AA_625-630.
[107] 2AA_290-314; 3AA_315-523; 4AA_548-567.

the hearing, the District Court expressed its favor of the "reasoning" in those pages before it ever decided the motion to strike.[108] Thus, it cannot be said that the District Court did not adopt pages 3-7 whole cloth, based on argument relying on the documents that it struck. The District Court never expressly stated that it found Freddie ownership in the absence of the Freddie records and declaration. Thus, if this Court were to disagree with the District Court on the statute of limitations, this Court must remand for the District Court to make findings and conclusion based on the evidence actually before it. As this court recognized "[t]his Court is not a fact-finding tribunal; that function is best performed by the District Court." *Zugel*, 99 Nev. at 100, 659 P.2d at 296. *citing*, *Zobrist v. Sheriff,* 96 Nev. 625, 614 P.2d 538 (1980) Even on summary judgment, factual issues should be decided by the District Court in the first instance. *See Id*.

III. ALL ARGUMENTS WAIVED OR OTHERWISE NOT PRESERVED AS DISCUSSED ABOVE, ARE LIKEWISE WAIVED AS TO AMICI

The Amicus Brief by the FHFA raises the same arguments that Chase raised in its Opening Brief, including the same arguments which Chase waived, which SFR objected to. If this Court considers the waived arguments in the Amicus Brief, it would circumvent *Old Aztec* and waiver. Accordingly, this Court should adopt the rule from sister jurisdictions where this practice is not allowed. "It is settled that an

[108] 4AA_600-624.

amicus 'cannot raise issues that have not been preserved by the parties,'" the court held in *Alliance Home of Carlisle, Pa. v. Board of Assessment Appeals*, 919 A.2d 206, 221 n. 8 (Pa. 2007). Amicus parties are limited to issues "preserved or raised by the parties themselves," as the court held in *Commonwealth v. Allshouse*, 36 A.3d 163, 179 n.18 (Pa. 2012). Appellate courts "will not permit [an] amicus curiae to raise issues which the petitioner himself is barred from raising by failing to argue them below," the court held in *Seidman v. Insurance Commissioner*, 532 A.2d 917, 920 (Pa. Cmwlth. 1987).

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CONCLUSION

In this case, Chase presented a plethora of failures: failure to timely plead HERA, failure to follow through with its attempt to re-open discovery, failure to timely disclose exhibits and witnesses, and failure to properly raise arguments before the District Court. An Appeal is not a place for an appellant to try to correct us own failures. The District Court correctly found and concluded that Chase's claims are time-barred. Therefore, this Court must affirm the District Court's order.

DATED: July 14, 2019. **KIM GILBERT EBRON**

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, is 55 pages long and contains 13,083 words.
3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 14th day of July, 2019. Electronic service of the foregoing **Amended Respondent's Answering Brief** shall be made in accordance with the Master Service List as follows:

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TAB 43

IN THE SUPREME COURT OF NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Appellant, v. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Respondent.	Supreme Court No. 77010

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant JPMorgan Chase Bank, N.A. is wholly owned by JPMorgan Chase & Co. No publicly held company owns 10% or more of JPMorgan Chase & Co.'s stock.

BALLARD SPAHR LLP appeared on appellant's behalf in the district court and is expected to appear on appellant's behalf in this Court.

Dated: September 11, 2019.

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INTRODUCTION

SFR's answering brief repeats the district court's flawed conclusion that Chase's Federal Foreclosure Bar argument is time-barred under HERA's three-year limitations period for tort claims. To the contrary, Chase's Federal Foreclosure Bar argument is a legal theory not subject to a limitations period and was timely raised under *any* limitations period. In any event, the argument was timely raised under HERA's statutory limitations provision or under the applicable state-law periods. The argument is also timely because it relates back to the original complaint. For these reasons, and because Chase's evidence demonstrates that Freddie Mac owned the Loan at the time of the Sale, this Court should reverse, remand, and direct the district court to enter judgment in favor of Chase.

ARGUMENT

I. Chase's Federal Foreclosure Bar argument is not barred by a statute of limitations.

A. Chase's Federal Foreclosure Bar argument is a legal theory supporting its quiet-title claim.

The Court need not decide the statute of limitations question, because Chase invoked the Federal Foreclosure Bar as a theory supporting its quiet-title claim. SFR argues that Chase "waived its legal theory argument" by not raising it below. Amended Respondent's Answering Brief ("Am. Ans. Br.") at 18. Wrong. Chase has consistently maintained that the Federal Foreclosure Bar is a *theory* supporting

its quiet-title claim. Chase moved to amend because "*theories*"—such as the Federal Foreclosure Bar—have "developed extensively" in the courts. 1 AA 052-53 (emphasis added). Chase's amended complaint did not state the Federal Foreclosure Bar as a new cause of action, but as support for its quiet-title claim. 1 AA 077-79. And in Chase's opposition to SFR's summary judgment motion, Chase reiterated that it was "not asserting a new claim, but rather *a new basis* for its original quiet title claim." 3 AA 544-545; *compare* Am. Ans. Br. 18. Because this point was urged in the trial court, it can and should be considered on appeal. *Cf. Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981).

Chase is aware of no authority supporting the proposition that legal theories can be time-barred. Op. Br. 27-28.

B. Chase timely asserted the Federal Foreclosure Bar.

SFR argues that Chase "waived its argument that relation back applies to motions by failing to properly raise it below." Am. Ans. Br. 18. SFR confuses two arguments: (1) that Chase timely asserted the Federal Foreclosure Bar because it gave notice of that argument in its motion to amend, Op. Br. 19-26; and (2) that Chase's amended complaint relates back, Op. Br. 28-30. SFR appears to raise a waiver argument as to the former. This Court should consider Chase's argument even though it was not raised below.

This Court has allowed parties to make arguments on appeal that were "not specifically argue[d]" below when they are a form of a general argument that *was* litigated. *Premier One Holdings, Inc. v. Red Rock Financial Services, LLC*, No. 73369, 2018 WL 5617923, *2 n.2 (Nev. Oct. 29, 2018) (unpublished disposition). SFR's basis for distinguishing *Premier One* is that Chase is "chang[ing]" its relation back argument. Am. Ans. Br. 20. Wrong. Chase merely supplements its statute of limitations rebuttal by pointing out that the proper date for calculating the limitations period runs from the date of filing of the motion to amend, not the date the motion is granted. Although Chase did not specifically argue that point below, it is a form of a general argument that was litigated: the statute of limitations. There is no waiver.

SFR does not convincingly rebut Chase's argument that it timely raised the Federal Foreclosure Bar in its motion to amend the complaint, filed less than three years after the Sale—and *before* any asserted limitations period ran. Op. Br. 19-26. SFR warns that treating the filing of Chase's motion to amend as the operative date under Rule 15(c) will "encourage[] delay and ambiguity in the system." Am. Ans. Br. 21. But the consequences of SFR's argument are worse; a litigant filing a motion to amend within the statutory period will find herself at the mercy of the court's docket. If the motion to amend is not granted within the limitations period, the

litigant will *lose her right* to bring the new claim or raise the new defense. As other jurisdictions have recognized, this cannot be the law. Op. Br. 20-21.

II. Chase's claim is timely under any applicable limitations provision.

The district court erred in holding that HERA's three-year limitations period for tort claims applies to Chase's "HERA claim." 4 AA 628. SFR is likewise wrong in arguing that "HERA's three-year statute of limitations applies to any assertion of 4617(j)(3) in the context of a foreclosure sale." Am. Ans. Br. 10. HERA's six-year limitations period for contract-based actions provides the applicable time bar. Even if the Court concludes that Chase's Federal Foreclosure Bar argument sounds in tort, the Court must apply the *longer* of the three-year period or the state-law period. As the applicable state-law period is either five years under NRS 11.070 or 11.080, or four years under NRS 11.220, Chase's invocation of the Federal Foreclosure Bar was timely.

A. HERA's six-year statute of limitations governs.

SFR argues that Chase "failed to properly raise" its argument that HERA's six-year statute of limitations governs because Chase first presented that argument in its summary judgment reply brief. RB 5-6, 21-24. That is wrong.[1] Chase's reply

[1] Throughout its brief, SFR argues that several of Chase's arguments are waived, and that such arguments are "likewise waived as to amici." *See* RB 53-54. Because Chase did not waive any of the arguments presented in its Opening Brief, the Court should consider all related points made by amici.

brief simply presented a more fully developed analysis of § 4617(b)(12)(A)'s statute-of-limitations provision, which Chase cited in full in its opposition to SFR's summary judgment motion, 3 AA 543, and the first prong of which SFR conveniently and continuously ignores. Am. Ans. Br. 11; 3 AA 528. Chase's reply presented no new statutory text, no new evidence, and no new claim. Instead, it offered an alternative interpretation supporting a claim it previously made: that HERA's three-year statute of limitations did not apply. 3 AA 543. SFR was not "in effect ambushed" by Chase's reliance on the contract prong of the HERA statute. Am. Ans. Br. 23.

Furthermore, SFR could have sought supplemental briefing, requested permission to file a sur-reply, or responded to Chase's oral argument, 4 AA 607-08 (Tr. 8:22-9:14). Instead, SFR chose to do nothing more than note at the hearing that it "never had the opportunity to address the six-year statute of limitations argument." 4 AA 613 (Tr. 14:15-18).

Even if it considers the argument untimely, the Court should exercise its prerogative to consider Chase's argument for practical reasons. *Cf. Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 n.3 (Nev. 2011) (considering issue raised for the first time in appellate reply brief and reversing on that issue). To determine which of HERA's statute-of-limitations provisions applies to Chase's quiet-title claim, the Court will have to "consider[] [HERA's] provisions as a whole," *see S.*

Nev. Homebuilders Ass'n v. Clark Cty., 117 P.3d 171, 173 (Nev. 2005) (internal quotation marks omitted), and "construe the language of the statute so as to give it force and not nullify its manifest purpose," *Hughes Props., Inc. v. State*, 680 P.2d 970, 971 (Nev. 1984). Accordingly, the Court must consider the contract-claim *and* the tort-claim prongs of the statute to render a decision that accords with congressional intent. *See id.* As the Court has the benefit of informed appellate briefing on the issue, it should exercise its discretion to consider Chase's argument.

SFR's reliance on *Valley Health Sys., LLC v. Eighth Judicial Dist. ex rel. Cty. of Clark*, 252 P.3d 676 (Nev. 2011), is unavailing. Am. Ans. Br. 21-24. In *Valley Health*, the petitioner first raised a privilege objection *after* the discovery commissioner recommended that the petitioner produce documents. *Id.* at 678. Here, Chase argued for the six-year limitations period in its reply brief and at a hearing *before* the court awarded summary judgment to SFR. Chase did not "wait[] until the outcome is determined, then add[]or switch[] to alternative arguments before [this] [C]ourt." *See id.* at 679. And because no discovery commissioner was involved, the Court's concerns about "making an end run around" the commissioner are irrelevant. *Id.* at 679-80; *see* Am. Ans. Br. 23.

1. The Federal Foreclosure Bar argument is subject to HERA's six-year limitations period.

Chase agrees with SFR that HERA's limitations provision applies here. Am. Ans. Br. 12-13, 39-40; Op. Br. 32-36 (explaining that FHFA need not be a party for

HERA's statute of limitations to apply).[2] But the district court erred in concluding—and SFR wrongly argues on appeal—that the three-year "tort" prong of HERA's limitations provision applies to Chase's "HERA claim." 4 AA 628; Am. Ans. Br. 10-11. Indeed, federal courts have held that the six-year "contract" prong applies to cases implicating the Federal Foreclosure Bar. *E.g. FHFA v LN Mgmt. LLC, Series 2937 Barboursville*, 369 F. Supp. 3d 1101, 1109-10 (D. Nev. 2019).

Section 4617(b)(12)(A) provides, as a limitations period:

> (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.

Chase's Federal Foreclosure Bar argument fits more naturally into HERA's contract category because it supports the continued existence of a contractually created interest in the Property. Op. Br. 36-39. Specifically, Freddie Mac's property interest is grounded in the contractual relationship and obligations between the

[2] SFR states in passing that Chase "***never*** proved it is a contractually authorized servicer of Freddie Mac for the subject loan." RB 39. But Chase submitted the same evidence this Court has repeatedly found sufficient to prove an Enterprise-servicer relationship, including Freddie Mac's and Chase's business records and employee declarations, and the Freddie Mac Guide. *See, e.g.*, *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 849-50 (Nev. 2019); AOB 57-58.

borrower and Lender as embodied in the Loan. Chase's argument is therefore subject to the six-year statute of limitations. Because the Sale took place on March 1, 2013, and Chase filed its quiet-title claim in November 2013, Chase's invocation of the federal statute was timely.[3]

SFR contends that because the Federal Foreclosure Bar is a "statutory provision," and there is no contract between Chase and SFR, the cause of action "clearly constitute[s] a 'wrong independent of contract'" to which the three-year limitations period purportedly applies. Am. Ans. Br. 10 & n.29, 24-25 (citing *Bernard v. Rockhill Dev. Co.*, 734 P.2d 1238, 1240 (Nev. 1987), and *David v. Hett*, 270 P.3d 1102, 1114 (Kan. 2011)). Wrong. The fact that Chase's claim is supported by a federal statute does not make the claim a tort, and SFR does not allege any tort here. A tort is a "civil wrong ... for which the court will provide a remedy in the form of an action for damages," *Szekeres v. Robinson*, 715 P.2d 1076, 1077 (Nev. 1986) (internal quotation marks omitted), and generally involves a "breach of duty that the law imposes on persons who stand in a particular relation to one another," *Tort*, Black's Law Dictionary (11th ed. 2019).

[3] Chase's argument is timely even if the period is calculated from March 9, 2016, the date the district court granted Chase's motion to amend the complaint. 1 AA 069-70. The amended complaint asserted the Federal Foreclosure Bar as an argument supporting its quiet-title claim. 1 AA 058-67.

Here, neither Chase nor SFR allege a civil "wrong" or duty that was breached, and neither seeks damages. The parties' primary request is that this Court determine their rights and interests in the Property. 1 AA 019-21, 77-79. The existence or non-existence of a statute or a contract thus cannot be the end of the analysis.

Nor does SFR provide any reason why the absence of a contract between SFR and Chase makes the action "appropriately categorized as a tort" under Nevada law. Am. Ans. Br. 10, 24-25. Indeed, the Court could just as easily adopt the opposite position: Because Chase's claim is not tort-related, it necessarily falls under HERA's contract provision. As explained above, federal policy in fact supports the adoption of the contract provision as the default limitations period.

Finally, SFR provides no persuasive authority to support its contention that the Federal Foreclosure Bar argument is similar to a tort claim. Perhaps that is because it bears no significant similarity to any tort-based claim. Op. Br. 37-38. In any event, neither of the cases SFR cites sheds light on the question before the Court: whether invocation of a federal statute that automatically protects Enterprise property fits more reasonably into the contract or tort category of a limitations provision that governs all claims but expressly offers only those two choices.[4] In

[4] As *Bernard* and *Hett* make clear, contract and tort claims each seek relief for breach of a legal duty—a duty undertaken privately for contract claims, and a duty imposed at law for tort claims. *See Bernard*, 734 P.2d at 1240; *Hett*, 270 P.3d at 1114. By contrast, the quiet-title claim here seeks only a declaration of the parties' respective rights to a given property, not relief for a breach of any duty.

Bernard and *Hett*, this Court and the Kansas Supreme Court considered whether a defendant's duty to the plaintiff was contractual or arose from a duty independent of the parties' agreement. *Bernard*, 734 P.2d at 1240; *Hett*, 270 P.3d at 1115. Here there is no agreement between the parties, and no allegation that either party had any duty to the other arising from or relating to the federal statutory protection of the Deed of Trust. Those cases are inapposite.

2. If HERA's limitations provision is ambiguous, the Court must apply the longer limitations period.

If the Court concludes that it must look outside the statutory text to determine which prong of the HERA provision governs this case, it must apply *federal policy*—because this is a *federal statute*—which mandates the six-year limitations period. Op. Br. 38-39. SFR fails to meaningfully distinguish *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 2010), or *FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304, 1307 (9th Cir. 1989). SFR argues that *Wise* is distinguishable because the court was not "trying to determine the actual nature of the claim," and in *FDIC* the claims were based on contracts "***between the parties***." Am. Ans. Br. 26-27. Those facts have nothing to do with the federal policy supporting the application of the longer of two potentially-applicable limitations periods. *Wise* is particularly on point—the Ninth Circuit noted that there was "a substantial question as to whether FDIC's claims sounded in tort or contract" before applying the longer of the relevant statutes of limitations. *See* 884 F.2d at 1307.

To apply the three-year limitations period here, where the claim is not clearly grounded in contract or tort, would subvert HERA's limitations provision, which is designed to set a limitations-period floor while mandating that FHFA and the Enterprises under conservatorship take advantage of longer state-law periods when possible. *See* 12 U.S.C. § 4617(b)(12)(A). Accordingly, if a claim is *arguably* contractual, and clearly not a tort, the Court should apply the longer limitations period to further congressional intent to preserve HERA claims.

B. The applicable state-law limitations period is five years.

Even if HERA's "tort" prong applies, the statute specifies "the longer of" three years or the otherwise-applicable state-law period. 12 U.S.C. § 4617(b)(12)(A)(ii). Contrary to SFR's contention that "the extender provision of HERA has no application here because there is no analogous state law," Am. Ans. Br. 29 n.73, NRS 11.070 and 11.080 govern the limitations period for Chase's quiet-title action.

SFR provides no compelling arguments in support of its conclusion that NRS 11.070 and 11.080 do not apply here. Am. Ans. Br. 28-38. *First*, SFR contends that the state-law provisions are "standing statutes" setting forth "a condition precedent which gives a party standing to bring an action **or** defend an action." *Id.* at 28-30, 33-34. Wrong. For one thing, both NRS 11.070 and 11.080 appear in Chapter 11 of the Nevada Revised Statutes, titled "Limitation of Actions." "Civil actions can

only be commenced within the periods prescribed in [that] chapter," unless a statute (like HERA) provides otherwise. *See* NRS 11.010. For more than a century this Court has characterized NRS 11.070 and 11.080 as "statutes of limitation" that set forth time bars for real-property actions. *See, e.g.*, *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.*, 388 P.3d 226, 232 (Nev. 2017) ("NRS 11.080 provides for a five-year statute of limitations for a quiet title action"); *Bentley v. State*, Nos. 64772, 66303, 66932, 2016 WL 3856572, at *10 (Nev. Jul. 14, 2016) (unpublished disposition) (acknowledging 11.070 is a statute of limitations for quiet title actions); *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 365, 368 (1867) (describing prior codification of 11.070 as "[t]he fifth section of our statute of limitations").

Second, SFR argues that 11.070 and 11.080 do not apply because Chase is not "seized or possessed of the property" and "does not seek to vindicate the title rights of the prior homeowner." Am. Ans. Br. 31-35. In fact, SFR accuses Chase of "purposeful[ly] misrepresenti[ng]" that a plaintiff need not have "title or possessory interest in the property" under those statutes. *Id*. 35-38. But NRS 11.070 and 11.080 grant a five-year limitations period to any "person" or "plaintiff" where the "grantor" of the person or plaintiff was seized of the real property in question, regardless of whether the litigation is on behalf of the "grantor." NRS 11.070, 11.080. Courts have thus applied the limitations provisions to "anyone with an interest in the

property to sue to determine adverse claims," "even if that person does not have title to or possession of the property." *See Nationstar Mortg. LLC v. Amber Hills II Homeowners Ass'n*, No. 2:15-cv-01433-APG-CWH, 2016 WL 1298108, at *3-4 (D. Nev. Mar. 31, 2016). And a "grantor" under Nevada law includes a borrower who has executed a deed of trust to provide another party with a security interest in the property. *See* NRS 107.410 ("'Borrower' means a natural person who is a mortgagor or *grantor of a deed of trust under a residential mortgage loan*." (emphasis added)). Chase's quiet title claim is "founded upon the title to" the Property, and Chase's "grantors" were "seized or possessed of the premises" at the time of the Sale.[5]

SFR's reading of the statute to require that the grantor be "prosecuting or defending for the title rights of the person who was seized or possessed of the property" does not comport with the statutory language. Am. Ans. Br. 33. The statute plainly states that the "grantor" of the person making the defense—here, the Borrower on the Deed of Trust, of which Chase is record beneficiary and defender—is the one who must be "seized and possessed of the premises in question." NRS 11.070. And SFR fails to distinguish the cases Chase relies on, Am. Ans. Br. 35-38; none of those cases states or even implies that the five-year limitations statutes apply

[5] Chase does not dispute that lien and title interests are different. Am. Ans. Br. 32, 34-35 (citing *Hamm v. Arrowcreek Homeowners Ass'n*, 183 P.3d 895 (Nev. 2008)).

only to quiet-title claims where the claimant has a "title [or] possessory interest" in the Property. *Id.*

Thus, even if this Court were to conclude that Chase's invocation of the Federal Foreclosure Bar was a tort claim for purposes of HERA—or indeed, if the Court were to conclude that the HERA statute of limitations did not apply at all—the five-year state-law period under NRS 11.070 or 11.080 would apply.

C. The minimum statutory limitations period is four years.

If the Court concludes that HERA's six-year statute of limitations does not apply and declines to apply Nevada's quiet-title limitations periods, Nevada's four-year "catch-all" limitations period would still render Chase's argument timely. Although Chase did not specifically cite NRS 11.220 in briefing the timeliness issue below, Am. Ans. Br. 38-39, asserting it here is proper because the statute provides support to an argument Chase did make: that its quiet-title action was timely filed. *Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim.").

SFR contends that the applicable state-law period is a three-year limitations period for "liability arising from a statute" because Chase's claim "rests entirely on § 4617(j)." Am. Ans. Br. 11 (citing NRS 11.190.3(a)). That argument is unpersuasive; the Federal Foreclosure Bar is not a statute that "create[s]" a liability. *See* NRS 11.190.3(a). Section 4617(j) operates to *protect* an existing lien interest,

preempting an *effect* of the Sale. It does not create a liability arising out of the Sale. Accordingly, Nevada federal courts have rejected the argument that 11.190 applies to a claim involving the Federal Foreclosure Bar. *E.g.*, *Barboursville*, 369 F. Supp. 3d at 1111.

Given that no plausible argument supports a limitations period shorter than four years, Chase's assertion of the Federal Foreclosure Bar was timely.

III. Chase's Federal Foreclosure Bar argument relates back to its initial complaint.

Alternatively, Chase's Federal Foreclosure Bar argument relates back to the initial complaint. Op. Br. 28-30. SFR wrongly asserts that the Court reviews this ruling for abuse of discretion. Am. Ans. Br. 13. The Court exercises *de novo* review in cases where a district court grants summary judgment on the ground that the amended pleading did not relate back and was thus time-barred. *See Costello v. Casler*, 254 P.3d 631, 634-36 (Nev. 2011). The case SFR cites in support of abuse of discretion review, *State, Univ. & Comm. College Sys. v. Sutton*, 103 P.3d 8, 19 (Nev. 2004), describes the standard of review for a motion to amend under NRCP 15(b), and Chase does not challenge the grant of its motion to amend here.

SFR alleges that Chase's initial complaint gave it no notice of Chase's intent to invoke HERA and thus the amendment cannot relate back. Am. Ans. Br. 15. SFR takes too narrow a view of Rule 15(c)'s requirement that the new claim or defense "[arise] out of the conduct, transaction, or occurrence set out" in the initial pleading.

N.R.C.P. 15(c)(1). *Jackson v. Groenenyke*, 369 P.3d 362, 365-66 (Nev. 2016), suggests that courts take a broad view of what constitutes the "same facts and circumstances" for the purposes of Rule 15(c). SFR's efforts to distinguish *Jackson* are unconvincing: just as the assertion of water rights includes reasonable action to ensure the flow of water, the assertion of a continued lien interest includes automatic protection of that interest through a federal statute. SFR's warning that interpreting the "'transaction' [to be] the [HOA] sale itself" would defy the purpose of Rule 15 is nonsensical. Am. Ans. Br. 16-17. It is logical that the transaction or occurrence is the Sale; that single event spurred Chase to file a quiet-title claim and triggered the Federal Foreclosure Bar.

SFR's citation to *Nelson v. City of Las Vegas*, 665 P.2d 1141 (Nev. 1983), to support its allegations is unconvincing. Am. Ans. Br. 15, 17. *Nelson* makes clear that NRCP 15(c) prohibits relation back for "a *new cause of action* that describes a *new and different source of damages*" where there is no "fair notice of the fact situation from which the new claim for liability arises." 665 P.2d 1146 (emphases added). None of those conditions is present here. The cause of action (quiet title) is the same in the original and amended complaint, and the Federal Foreclosure Bar argument does not change the basic facts or request for relief in this case.

IV. Because Chase's evidence demonstrates that Freddie Mac owns the Loan, and because SFR did not provide contrary evidence, Chase is entitled to summary judgment.

As explained in Chase's opening brief, once the Court determines that Chase's arguments under the Federal Foreclosure Bar are not time-barred, the Court should direct the district court to enter judgment for Chase. There is no genuine dispute that Freddie Mac owned the Deed of Trust at the time of the Sale. Therefore, the Federal Foreclosure Bar protected the Deed of Trust. SFR's counter-motion to strike the Meyer Declaration and its exhibits does not alter this result because (1) the Chase Records and the Grageda Declaration independently show that Freddie Mac owned the Loan; (2) SFR did not comply with the meet-and-confer requirement of N.R.C.P. 37; and (3) any alleged violation of N.R.C.P. 16.1 was harmless. Alternatively, the district court erred in striking the Meyer Declaration because a case-dispositive sanction was not warranted under *Young v. Johnny Ribeiro Bldg., Inc.*, 787 P.2d 777 (Nev. 1990). Therefore, in the alternative, the Court should remand with instructions to enter non-case-concluding sanctions.

A. Based on the Chase Records, Chase is entitled to summary judgment without any need to consider SFR's counter-motion to strike.

As explained in Chase's opening brief, Chase provided two sets of business records to show that Freddie Mac owned the Loan. First, Chase provided the Meyer Declaration and the attached records created by Freddie Mac. Op. Br. 12-13. The

district court struck these documents pursuant to SFR's counter-motion under N.R.C.P. 37. Second, Chase provided the Grageda Declaration and the Chase Records. Op. Br. 12. The latter documents *were not* struck because they *were not* encompassed by SFR's counter-motion. Op. Br. 13-14. These documents independently demonstrate Freddie Mac's ownership of the Loan. Op. Br. 47-48. Therefore, Chase is entitled to summary judgment without the need to consider SFR's counter-motion to strike. Op. Br. 48.

In its answering brief, SFR does not meaningfully address Chase's argument that the Grageda Declaration and the Chase Records entitle Chase to summary judgment. Instead, SFR argues that the Court "must remand for the District Court to make findings and conclusion[s]" because "[t]he District Court never expressly stated that it found Freddie [Mac] ownership in the absence of the Freddie [Mac] records and declaration." Am. Ans. Br. 53. SFR is incorrect. Where parties file cross-motions for summary judgment, and where the district court erroneously grants the first motion while erroneously denying the second motion, an appellate court may reverse the grant of the first motion *and* reverse the denial of the second motion in an appeal by the non-prevailing party. That is, the appellate court may direct the district court to enter judgment for the party that should have prevailed. *See GES, Inc. v. Corbitt*, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001) ("An order denying summary judgment is not independently appealable; however, we may

review the propriety of the district court's summary judgment ruling because [appellant] has properly raised the issue in its appeal from the final judgment."); *Outboard Marine Corp. v. Schupbach*, 93 Nev. 158, 161, 561 P.2d 450, 452 (1977) ("Although not an appealable ruling per se, we may review the propriety of an interlocutory ruling following judgment if properly assigned as error.").

Chase presented the district court with the Chase Records and Grageda Declaration and requested summary judgment in its favor. SFR did not present any contrary evidence. Therefore, this Court should reverse the grant of SFR's summary judgment motion, reverse the denial of Chase's summary judgment motion, and direct the district court to enter judgment for Chase.

B. Even if the Meyer Declaration and its exhibits are necessary to Chase's claims, Chase is still entitled to summary judgment.

1. SFR failed to meet and confer before filing its counter-motion.

Even if the Court does not believe that the Chase Records and Grageda Declaration establish Freddie Mac's ownership interest—and therefore, that Chase must rely on the Meyer Declaration and its exhibits—Chase is still entitled to summary judgment. As explained in Chase's opening brief, SFR filed its counter-motion to strike the latter materials without certifying that it had met and conferred with Chase. Op. Br. 51; 4 AA 552-53. In its answering brief, SFR does not dispute that it violated the meet-and-confer requirement. Instead, SFR argues in passing that

Chase forfeited this issue because Chase did not explicitly raise it before the district court. Am. Ans. Br. 41.

SFR cites no legal authority for its position that a non-moving party can waive N.R.C.P. 37's meet-and-confer requirement and Chase is not aware of any such authority. Allowing for waiver under these circumstances would inappropriately shift the burden of complying with the requirement (and certifying compliance) from the moving party to the non-moving party. Because SFR did not satisfy this threshold requirement, the district court could not exclude the Meyer Declaration or enter any other sanction. *See Robinson v. Potter*, 453 F.3d 990, 995 (8th Cir. 2006) (motion to compel properly denied where moving party did not demonstrate any attempt to meet and confer); *Hager v. Graham*, 267 F.R.D. 486, 491-92 (N.D. W. Va. 2010) (failure to confer or attempt to confer is ground for denial of motion to compel); *Ross v. Citifinancial, Inc.*, 203 F.R.D. 239, 240 (S.D. Miss. 2001) (Rule 37(a)(1) certificate is "mandatory prerequisite" on motion to compel).

Because the district court could not exclude the Meyer Declaration and its exhibits, and because SFR did not present any contrary evidence, Chase is entitled to summary judgment. Therefore, the Court should direct the district court to enter judgment for Chase.

2. Any violation of N.R.C.P. 16.1 was harmless.

Even if the Court excuses SFR's failure to meet and confer, the fact remains that any alleged violation of N.R.C.P. 16.1 was harmless. Op. Br. 51-54. Therefore, the district court could not exclude the Meyer Declaration or enter any other sanction. *See* N.R.C.P. 37(c)(1) (2018) ("A party that *without substantial justification* fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, *unless such failure is harmless*, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.") (emphasis added).

In its answering brief, SFR claims that Chase forfeited its harmlessness argument because Chase failed to raise the argument below. Am. Ans. Br. 43. This contention is plainly incorrect and appears to have been copied from a different case. Chase explicitly argued in its 2018 summary judgment briefing that the alleged violation of N.R.C.P. 16.1 was harmless:

> As part of its First Supplement to N.R.C.P. 16.1 Initial Disclosures ("First Supplement"), Chase identified a "Corporate Representative of Federal Home Loan Mortgage Corporation ("Freddie Mac")" as someone possessing discoverable information. See Exhibit 2, attached hereto. Mr. Meyer also provided a declaration in support of the Chase's motion for summary judgment filed on July 26, 2016. In support of the 2016 motion for summary judgment, Chase attached all of the same exhibits that SFR now contests (Exs. 7, 7-1 through 7-9, 10, 11, 24, and 27).

> Chase maintains that these disclosures were timely, but even if they were not, such failure was harmless. See N.R.C.P. 37(c)(1). SFR did not object to these exhibits during the 2016 dispositive motion briefing, thus waiving its right to do so now. Furthermore, SFR has not shown—and cannot show—how it has been harmed by these purported "untimely disclosures." SFR cannot claim it has been deprived of the ability to conduct discovery related to these documents when it has known about their existence for two years and vehemently opposed any efforts to re-open discovery following the remand of this case.

4 AA 592-93. SFR responded by arguing at length that the alleged violation was not harmless. 4 AA 596-98. Clearly, this preserved harmlessness for purposes of this appeal. *See Nelson v. Adams USA Inc.*, 529 U.S. 460, 469, 120 S. Ct. 1579, 1586 (2000) (preservation "requires that the lower court be fairly put on notice as to the substance of the issue.").

As for the merits of the harmlessness issue, SFR claims that "[k]nowledge of a claim does not equate to knowing the evidence the claimant will produce." Am. Ans. Br. 49. However, the issue is not whether SFR could have predicted the evidence that Chase would introduce, but whether SFR could have obtained the evidence on its own. Once SFR knew that Chase argued the Loan was owned by Freddie Mac, SFR could have sought the information referenced in the Meyer Declaration (and its exhibits) through third-party discovery. *See Cash v. State Farm Fire & Cas. Co.*, 125 F. Supp. 2d 474, 477 (M.D. Ala. 2000) (party cannot "sleep on its rights" and wait until summary judgment to object to use of materials it has made no prior reasonable efforts to obtain). The fact that SFR chose not to do so suggests

that SFR would have acted no differently if the documents had been disclosed earlier in discovery. *See Quatro v. Tehachapi Unified Sch. Dist.*, 742 F. App'x 340, 341 (9th Cir. 2018) ("Although the District says it was prejudiced, it has not identified any evidence it would have presented had it been afforded earlier notice of the testimony.") (citation omitted).

SFR makes the related argument that "[i]t is not SFR's duty or responsibility to seek evidence to prove Chase's claims; Chase bears that burden." Am. Ans. Br. 44. However, the mere fact that Chase bears the burden of proving Freddie Mac's ownership does not automatically preclude a finding of harmlessness with respect to a failure to disclose related information. This is especially true given that SFR had litigated virtually identical facts against the same parties in countless other lawsuits. *See Lakeman v. Otis Elevator Co.*, 930 F.2d 1547, 1554 (11th Cir. 1991) (not abuse of discretion to refuse to exclude expert evidence when other party's lawyer was "well versed" in relevant issues).

SFR also complains about the timing of Chase's amended complaint and argues that Chase should have explicitly raised HERA as an argument sooner. Am. Ans. Br. 45-46. SFR has waived any such argument because it did not oppose leave to amend. Further, the relevant inquiry under N.R.C.P. 37 is *not* the amount of time between the date of Chase's original complaint and the date of Chase's amended complaint. It is the amount of time between the date when SFR learned Chase was

raising the Federal Foreclosure Bar (February 2, 2016 at the latest) and the dates when the parties litigated dispositive motions. By the time of the 2016 summary judgment briefing, SFR had known for several months that the Federal Foreclosure Bar was at issue; by the time of the 2018 summary judgment briefing, SFR had known for over two years. Therefore, SFR cannot claim to have been surprised by the relevant documents.[6]

SFR also claims that Chase's withdrawal of its motion to reopen discovery—a motion that SFR opposed—shows that "Chase *knew* that it did not timely disclose all the documents it needed to disclose." Am. Ans. Br. 5. As an initial matter, SFR's opposition to extending discovery shows that SFR was not genuinely interested in learning the facts of the case. SFR would have acted no differently if Chase had disclosed the relevant documents earlier. But more to the point, Chase ultimately decided not to seek a discovery extension in 2018 because it concluded that none was needed—it had already disclosed all of the relevant documents in 2016.

Finally, it should be noted that SFR does not appear to allege bad faith or intentional wrongdoing. This also weighs in favor of a finding of harmlessness. *See Lanard Toys, Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010) (court may

[6] SFR claims that "[s]urprise is not the issue." Am. Ans. Br. 50. However, prejudice is the single most important factor when deciding if an alleged non-disclosure is harmless. *See* 6 Moore's Federal Practice - Civil § 26.27 ("[T]he primary line of inquiry is whether the nondisclosure caused the other parties prejudice.").

consider whether there was "bad faith or willfulness involved in not timely disclosing the evidence"); *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003) (court should consider any "bad faith or willfulness involved in not disclosing the evidence at an earlier date").

To summarize, any violation of N.R.C.P. 16.1 was harmless, meaning the district court could not exclude the Meyer Declaration or enter any other sanction. Because the Meyer Declaration and its exhibits showed that Freddie Mac owned the Loan, and because SFR did not provide any contrary evidence, Chase is entitled to summary judgment. Therefore, the Court should direct the district court to enter judgment for Chase.

C. In the alternative, the Court should remand with instructions to enter lesser sanctions pursuant to *Young*.

Assuming for the sake of argument that (a) the Meyer Declaration and its attachments are necessary to show Freddie Mac's ownership, (b) SFR's failure to meet and confer was excusable, and (c) the alleged Rule 16.1 violation was not harmless, the Court should remand the case with instructions to impose lesser discovery sanctions. Case-dispositive sanctions were clearly not appropriate under *Young*.

SFR claims that its counter-motion was not governed by *Young* because SFR did not explicitly ask for case-ending sanctions or to strike Chase's complaint. Am. Ans. Br. 42. But if, *arguendo*, the Meyer Declaration and its exhibits were necessary

to prove Freddie Mac's ownership interest, the district court's sanction changed the outcome of the case because it prevented Chase from showing that the Federal Foreclosure Bar protected the Deed of Trust. Therefore, the sanction was subject to the elevated standard of *Young*. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 612, 245 P.3d 1182, 1186 (2010) (case-concluding sanction is one that results in conclusion of case, offending party being "out of court," and appeal being offending party's only recourse); *see also R & R Sails, Inc. v. Ins. Co. of the State of Pa.*, 673 F.3d 1240, 1247 (9th Cir. 2012) (court was required to apply elevated standard for case-dispositive sanctions where, in "practical terms," discovery sanction "amounted to dismissal of a claim").

SFR also complains that Chase did not explicitly invoke *Young* before the district court. However, a party cannot "waive" the right to have a motion decided under the applicable legal standard. *See Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013) ("[I]n adjudicating a claim or issue pending before us, we have the authority to identify and apply the correct legal standard, whether argued by the parties or not") (citing *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 1718 (1991)); *see also Doan v. Wilkerson*, 130 Nev. Adv. Rep. 48, 327 P.3d 498, 501 (2014) (citations omitted) ("District court rulings supported by substantial

evidence will not be disturbed absent an abuse of discretion. However, the district court must apply the correct legal standard.").[7]

Even if the parties needed to "preserve" the governing legal standard, they did so by effectively addressing several of the *Young* factors in their 2018 summary judgment briefing. Chase argued that (a) Chase had disclosed a "Corporate Representative of Federal Home Loan Mortgage Corporation" in 2016; (b) Chase had submitted materially identical versions of the challenged documents with its 2016 summary judgment motion; (c) SFR had not objected to any of the relevant documents during the 2016 summary judgment briefing; and (d) SFR failed to show prejudice. 4 AA 592-593. In turn, SFR argued at length that the alleged violation of N.R.C.P. 16.1 was prejudicial and that Chase should have disclosed the information earlier. 4 AA 596-598. All of these factors are relevant under *Young*. *See Young*, 106 Nev. at 93, 787 P.2d at 780 (factors include, among other things, degree of willfulness, degree of prejudice that would be caused by lesser sanctions, seriousness of alleged violation, and feasibility of less severe sanctions). Therefore,

[7] Where a trial court does not apply the standard for case-dispositive sanctions, an appellate court must review the record independently to determine if the standard is met. *See Adriana Int'l Corp. v. Lewis & Co.*, 913 F.2d 1406, 1412 (9th Cir. 1990) (where trial court "fails to make explicit findings" as to relevant factors for case-dispositive sanctions under Rule 37, "the appellate court must review the record independently to determine whether the dismissal was an abuse of discretion.").

the parties "preserved" the applicable legal standard to the extent they needed to do so.

As for the merits of this issue, an exclusion sanction was clearly excessive under *Young*. For the reasons explained in Chase's opening brief and in Section IV.B.2 above, this case does not present the extreme situation required for case-dispositive sanctions. Therefore, the district court could only impose non-case-concluding sanctions, such as an extension of the discovery period. *See SFR Invs. Pool 1, LLC v. Green Tree Servicing, LLC*, No. 71176, 2018 Nev. Unpub. LEXIS 1208 at *1 n.1 (Dec. 27, 2018) (unpublished disposition) (affirming district court's denial of motion to strike because SFR "could have requested an extension of the discovery deadline to conduct whatever discovery it believed necessary to counter this evidence."). Accordingly, if the Court does not accept Chase's arguments from Section IV.A-B, the Court should remand the case with instructions to enter a lesser sanction.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that this Court reverse, remand, and direct the district court to enter judgment for Chase. In the alternative, Chase requests that this Court vacate the judgment below and remand with instructions to enter a lesser, non-dispositive discovery sanction.

/ / /

Dated: September 11, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 6,950 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

/ / /

Dated: September 11, 2019.

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CERTIFICATE OF SERVICE

I certify that on September 11, 2019, I filed **Appellant's Reply Brief**. Service will be made on the following through the Court's electronic filing system:

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An Employee of Ballard Spahr LLP

TAB 44

IN THE SUPREME COURT OF NEVADA

JPMORGAN CHASE BANK, N.A., a national association, Appellant, v. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Respondent.	Supreme Court No. 77010

RESPONSE TO REQUEST TO SUPPLEMENT BRIEFING

Appellant JP Morgan Chase Bank, N.A. ("Chase") respectfully opposes Respondent SFR Investments Pool 1, LLC's ("SFR's") request to supplement the briefing in this appeal.

Chase notified this court of a recent Ninth Circuit decision that adopts arguments Chase made in the briefing of this appeal and rejects arguments made by SFR. *See M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020). SFR does not deny that *M&T Bank* is relevant, but instead requests supplemental briefing concerning the decision.

Supplemental briefing is unnecessary and would further delay resolution of this appeal. The parties have already made their respective arguments concerning the statute of limitations, if any, that applies to the invocation of the Federal Foreclosure Bar in this case. *M&T Bank* adopts Chase's argument on that issue, and

rejects the arguments SFR made both in that appeal and here. Unsurprisingly, SFR's arguments in both appeals are nearly identical. *M&T Bank* does not add any new interpretation of law that the parties have not already fully explored in their briefing in this case.

SFR's contention that the Ninth Circuit was "wrong" to conclude that quiet title claims invoking the Federal Foreclosure Bar are *better characterized* as contract, not tort—for the limited purpose of assigning them to one of only two alternative prongs of the *federal* statute of limitations provision in HERA—does not warrant yet another round of briefing here. In its responding brief, SFR has already attempted to counter that legal conclusion and the preexisting authorities that support it. *See* Am. Ans. Br. at 24-27.

Moreover, while SFR references the petitions for rehearing purportedly laying out the errors in *M&T Bank* that it and its counsel (representing another HOA sale purchaser) filed in three appeals before the Ninth Circuit, SFR neglects to inform the Court that the Ninth Circuit unanimously denied all three petitions for rehearing on August 4, 2020. *See* Order, *M&T Bank v. SFR Invs. Pool 1, LLC*, No. 18-17395 (Dkt. 66); Order, *Freddie Mac v. SFR Invs. Pool 1, LLC*, No. 19-15910 (9th Cir. 2020) (Dkt. 50); Order, *Bourne Valley Ct. Tr. v. Wells Fargo Bank*, No. 19-15253 (9th Cir. 2020) (Dkt. 63). Thus, SFR knew that these petitions had been denied for nine days prior to referencing them in its request for supplemental briefing. And, in

the event SFR seeks to reference another appellate motion that has already been denied, this Court should know that the Ninth Circuit also denied SFR's subsequent motion to stay the mandate in *M&T Bank* without even waiting for an opposition to that motion. *See* Order, *M&T Bank*, No. 18-17395 (Aug. 11, 2020) (Dkt. 68). These orders strongly suggest that the Ninth Circuit does not find SFR's arguments that the *M&T Bank* holding requires an interpretation of state law to be credible.

Supplemental briefing on the merits of *M&T Bank* would only serve to give SFR a second bite at the same apple, to waste the parties' resources, and to delay resolution of this appeal, which has been pending since September 2018. Indeed, SFR has every incentive to needlessly prolong this (or any) appeal, as delay in judgment allows SFR to reap substantial profits by renting out the property at market rates while the case is pending. Meanwhile, Freddie Mac—which made a substantial investment in the now-defaulted loan secured by the property here—receives no return whatsoever. Thus, until the case is resolved, SFR will unjustly reap the return on Freddie Mac's investment. In addition, the longer Chase must wait to obtain a judgment (and thus to foreclose on the property on behalf of Freddie Mac) the less funding Freddie Mac has to reinvest in the secondary mortgage market, which furthers its mission of providing affordable housing. *See* 12 U.S.C. § 4501.

Accordingly, Chase respectfully requests that the Court deny SFR's request. In the event that the Court decides to permit supplemental briefing, Chase requests

that the Court limit SFR's supplemental brief to ten pages and permit Chase a ten page supplemental response.

Dated: August 20, 2020.

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I certify that on August 20, 2020, I filed the foregoing **Response to Request to Supplement Briefing**. Service will be made to the following through the Court's electronic filing system:

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TAB 45

Case No. 77010

IN THE SUPREME COURT OF NEVADA

JP MORGAN CHASE BANK, National Association, a national association

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

SFR INVESTMENTS POOL 1, LLC'S SUPPLEMENTAL BRIEF IN RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITIES

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Appellant SFR Investments Pool 1, LLC ("SFR") hereby submits its supplemental brief addressing JPMorgan Chase Bank, N.A.'s (the "Bank") supplemental authorities cited in the notice of supplemental authorities filed on July 28, 2020.

INTRODUCTION

With respect to *M&T*,[1] just like *Bourne Valley*,[2] the Ninth Circuit again erred in interpretating Nevada law. A quiet title claim brought by a lienholder to challenge an association foreclosure sale is not a contract action, whether based on HERA, tender, noticing or unfairness. The *M&T* Court's analysis regarding the applicable statute of limitations is based on a faulty premise—the mere existence of the promissory note, a contract, morphs all claims brought by the Bank into contract claims, despite relying entirely on a statutory right (12 U.S.C. § 4617(j)(3)). This is directly refuted by *Megapulse*,[3] and is contrary to the treatment of quiet title actions throughout the country. Thus, this Court should not follow the rationale in *M&T Bank*.

[1] *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020).
[2] *Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016).
[3] *Megapulse, Inc. v Lewis*, 672 F.2d 959 (D.C. Cir. 1982)

I. THE BANK'S RELIANCE UPON *M&T* IS MISPLACED.

M&T is not binding on this Court, as this Court has the final say on whether a Nevada quiet title claim is a contract claim or a tort claim. In any event, the rationale applied in *M&T* is faulty for a variety of reasons.[4] SFR also notes that even post-*M&T*, panels of the 9th Circuit have stayed cases or denied motions to lift stay pending this Court's answer to the questions certified to this Court as Case No. 81129, *U.S. Bank, N.A. v. Thunder Properties, Inc*.[5]

A. Nevada's Definitions of Contract and Tort Clearly Demonstrate A Claim Based Upon 4617(j)(3) is Characterized as Tort; Use of Any Other Definitions Is Error

Although the specific definition used by the Ninth Circuit is not expressly stated, it appears the definition includes a requirement of "damages," as well as a "breach of duty resulting in injury to person or property," characterized by the *M&T* Court as "traditional hallmarks of tort actions."[6] Such a definition is erroneous as neither of these "elements" exist within the common law definition of tort—the definition Congress intended be used for purposes of HERA.[7] The common law

[4] SFR intends to file a petition for certiorari in *M&T Bank*.

[5] *See*, e.g., *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 19-16889, DktEntry 24, 27, 30; *Bank of America, N.A. v. Santa Barbara Homeowners Association*, Case No. 19-16922, DktEntry 29. While the orders do not provide the reason to stay or deny lifting stay, it can be presumed that those Panels believe this Court's decision could affect *M&T Bank* as to which statute of limitations applies to claims based on §4617(j)(3).

[6] *M&T*, 963 F.3d at 858.

[7] *United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975) (citing *United States v.*

definition of tort is simply a violation of a duty imposed by law, as opposed to a contract, while contract involves a violation of a duty imposed by agreement between the parties.[8] Even the case cited by the Ninth Circuit recognized that torts are "civil wrong[s], other than breach of contract."[9] This bears noting because plaintiffs in *M&T* made much to do about the word "duty," however, both definitions include that word. Thus, the definitions are not distinct in terms of duty vs. no duty, but rather, where the duty emanates—law or agreement between the parties. In that regard, the common law definitions are mutually exclusive, such that if the duty **does not** emanate from agreement between the parties, it is a "wrong independent of contract"[10] and is appropriately characterized as tort.

Put simply, where there is no contract between the parties, the action is "strictly and solely ex delicto [tort]."[11] In *M&T*, plaintiffs and the Agency admitted

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Neidorf, 522 F.2d 916, 919 (9th Cir. 1975)).

[8] *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (quoting *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 552 P.2d 885, 888 (1976)) (emphasis added).

[9] *M&T*, 963 F.3d at 858, *citing United States v. Burke*, 504 U.S. 229, 234-35, 112 S. Ct. 1867, 1871, 119 L. Ed. 2d 34 (1992).

[10] *Bernard*, 103 Nev. at 135, 734 P.2d at 1240.

[11] *Hampton by Hampton v. Fed. Exp. Corp.*, 917 F.2d 1119, 1123 (8th Cir. 1990) (*citing* W. Keeton, Prosser and Keeton on the Law of Torts § 92 (5th ed. 1984)) (emphasis added). *See also Guardian Tr. & Deposit Co. v. Fisher*, 200 U.S. 57, 67 (1906) (recognizing actions "where there is no contract … are strictly and solely actions ex delicto [tort]."); *Guardian Tr. & Deposit Co. v. Greensboro Water Supply Co.*, 115 F. 184, 189–90 (C.C.W.D.N.C. 1902) (recognizing common law division of actions as ex contractu (contract) and ex delicto (tort)).

"[t]he premise that this is not a formal contract-enforcement action is self-evident and uncontested."[12] Plaintiffs and the Agency admitted plaintiffs' quiet title claim was not a true contract claim because SFR owed no duties to plaintiffs or Agency and there was no agreement between plaintiffs and SFR, or the Agency and SFR. The Ninth Circuit even acknowledged there is no agreement between the parties. The inquiry should have ended there because without an agreement, express or implied, between the parties, the very definition of a contract action can not apply.

Instead, the Ninth Circuit used a narrow definition of tort and even went so far as to put great emphasis on the traditional hallmarks of torts, while ignoring the critical hallmark of a contract action—an actual contract between the parties. Nothing about the common law definition of tort deals with damages or injury to person or property. While these may be elements of types of torts, they do not make up the common law definition of tort. Nevertheless, even money damages are not exclusive to tort. Contract actions equally involve money damages. In that regard, simply because plaintiffs sought declaratory relief as opposed to money damages does not mean the claim does not sound in tort, and therefore sounds in contract. Even so, the requested declaratory relief still has monetary value. After all, the Bank seeks to insulate a money encumbrance valued in excess of $200,000.

Likewise, the lack of injury to person or property does not mean the claim

[12] *M&T*, No. 18-17395, Dkt. 26, RAB at 17.

sounds in contract. Again, injury is just an element of *some* torts, it is not the lynchpin of the common law definition of tort. Even so, there is injury to property in *M&T* and here. Bank's and *M&T's* plaintiffs' property interest was extinguished by virtue of a foreclosure sale, and but for 4617(j)(3), each would have lost their property interest.

In the end, *M&T* failed to use the common law definitions, when Congress intended the common law definition to prevail. Under those definitions, plaintiffs' quiet title claim sounds in tort, not contract. This Court should reject the conclusion based on this tortured analysis and apply an appropriate statute of limitations under Nevada law.

B. It Cannot Be the Law in Nevada that Actions Concerning Real Property Are Contract Actions

Irrespective of *M&T's* faulty logic and the definitions set forth above, it simply is not, should not and cannot be the law in Nevada that any action affecting real property sounds in contract solely because a contract exists in the background. The implications stretch much farther than HERA here.

Specifically, the Ninth Circuit found that because the claims were dependent upon Freddie Mac's lien on the property, an interest created by contract, as the determinative factor in categorizing the quiet title claims as contract claims.[13] The

[13] *M&T*, 963 F.3d at 858.

Ninth Circuit did so despite recognizing that no contract existed between SFR and plaintiffs, thereby hinging the categorization of the quiet title claims solely upon the mere existence of the promissory note. Adopting that approach here would affect the legislature's timelines set forth in NRS 107 foreclosures, such as the time to challenge a bank foreclosure due to faulty noticing under NRS 107.080(6), which is 90 days. After all, the challenge circles around a bank's use of a security interest (deed of trust) to collect on its contractual rights (promissory note), and without that, there would be nothing to challenge.

This would similarly affect all wrongful foreclosure claims, which traditionally carry a three-year statute of limitations in Nevada. In that circumstance, a homeowner who failed to file a timely wrongful foreclosure claim could simply assert a quiet title action challenging the sale in the exact same fashion and reap the benefit of a six-year statute of limitations. Under *M&T*'s faulty logic, such a claim would be timely under the six-year statute of limitations for contract claims because the underlying interest is contractual.

The adoption of *M&T* will not limit its application to only quiet title claims brought by the Agency. This will apply to cases beyond that specific circumstance expanding to all lienholders, if not all quiet title claims. This would run contrary to the legislature's intent when assigning statutes of limitations to actions involving real property, such as NRS 11.070 and 11.080 for property owners. Adoption of

M&T would give lienholders six years to quiet title, wherein the actual property owner only has five (NRS 11.070/080). This is not, should not, and cannot be the law in Nevada, and this Court should reject any such suggestion.

C. ***Megapulse*** **is Instructive, And the Ninth Circuit Discarded it in Error.**

M&T wrongfully discarded *Megapulse* on the obscure basis the *Megapulse* Court did not ultimately characterize the claim as tort. *M&T* completely ignores the fact that, while not directly analyzing the characterization of the claim, *Megapulse* still provides the informative roadmap in deciding whether a claim sounds in contract.

The primary question in *Megapulse* was the *categorization of the claims* to determine if the lower court had subject matter jurisdiction.[14] The secondary question was whether the lower court's jurisdiction was limited in any way by sovereign immunity.[15] In answering these questions, the D.C. Circuit rejected the overly broad approach by the lower court that "any case requiring some reference to or incorporation of a contract" means the claims sounds in contract.[16]

In *Megapulse*, the Government and Megapulse's relationship arose from a contract, and the impetus for the Government obtaining proprietary information

[14] *Megapulse*, 672 F.3d at 964.
[15] *Id*.
[16] *Id*. at 967-68.

from Megapulse was also the contract between the parties. Based on this, the Government argued, just like the *M&T* plaintiffs did and the Bank does here,[17] that because the origin of the relationship draws from contract, Megapulse's claims for improper disclosure of proprietary information sounded in contract, and therefore the Court of Claims had exclusive jurisdiction over the case. But the *Megapulse* Court **rejected** the Government's argument. In other words, the origin of the relationship and even the contract that led to the very information Megapulse claimed the Government improperly disseminated, was not enough to turn Megapulse's claims into one sounding in contract. Of course, SFR and the Bank are even further removed from the contract analysis because there is no agreement between SFR and the Bank, but even so, *Megapulse's* guidance dovetails perfectly with Nevada's definitions of tort versus contract. In other words, by finding the claim was not contract, it necessarily found the claim was something other than contract, *i.e.* tort.

But again, the lack of the word "tort" in the *Megapulse* decision does not negate the analysis. The *Megapulse* court was careful to look beyond the origin of the parties' relationship, *i.e.* the contract. In fact, the court noted "[c]ontract issues may arise in various types of cases where the action itself is not founded on a

[17] SFR's position that the Bank's attempt to argue the six-year statute of limitations under HERA was waived below and the district court's striking of same was correct. By responding here, SFR does not waive the waiver. *See* RAB at 21-23.

contract."[18] As examples, the *Megapulse* court identified a license (a contract) as a defense in an action for trespass (a tort), or a purchase agreement (a contract) to counter an action for conversion (a tort).[19]

The same can be said here. Sure, the origin of Bank's lien interest is the Note, which is a contract, but other than creating the interest in the Property that was foreclosed, the contract has nothing to do with Bank's challenge. Put differently, the Note does not serve as the basis to challenge the foreclosure sale, instead, that emanates from 4617(j)(3), *i.e.* emanates from law, not a contract.

Consider this: if the foreclosure sale occurred prior to the enactment of 4617(j)(3), would the promissory note independently provide this challenge to the foreclosure sale? The answer is undoubtedly **no**, despite the promissory note being the common denominator in that scenario, as well as now. This distinction is clear and emphasized by *Megapulse*—"the mere fact that a court may have to rule on a contract issue does not, by triggering some mystical metamorphosis, automatically transform an action based upon [tort] into one on the contract."[20] But here, the gap is even wider than it was in *Megapulse* because nothing about Bank's quiet title claim requires the court to rule on a contract issue.

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[18] *Megapulse*, 672 F.2d at 968.

[19] *Id*.

[20] *Id*.

D. *Wise* and *Metro Bank* Have No Application in *M&T* Because There is No Close Question

Wise[21] and *Metro Bank*[22] both stem from the premise there are multiple potentially **applicable** statutes of limitations; however, as noted above, Bank's quiet title claim sounds in tort. Therefore, *M&T's* application of deference was error.

[21] *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180 (9th Cir. 2010).

[22] *Fed. Deposit Ins. Corp. v. Former Officers & Dirs. Of Metro. Bank*, 884 F.2d 1304 (9th Cir. 1989).

CONCLUSION

Based thereon, the supplemental authorities do not bolster Bank's position nor do they provide this Court with reason to Affirm.

DATED this 17th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

1. I certify that this supplemental brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this supplemental brief complies with the page or type-volume limitations set forth in the Order Granting Motion filed September 3, 2020 because it is proportionately spaced, has a typeface of 14 points or more and contains 2,333 words.
3. I hereby certify that I have read this supplemental brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2020, I filed the foregoing **SUPPLEMENTAL BRIEF**, which shall be served via electronic service from the Court's eFlex system to:

Master Service List

Docket Number and Case Title:	77010 - JPMORGAN CHASE BANK, NAT'L ASS'N VS. SFR INV.'S POOL 1, LLC
Case Category	Civil Appeal
Information current as of:	Sep 17 2020 11:02 a.m.

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TAB 46

IN THE SUPREME COURT OF NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Appellant, v. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Respondent.	Supreme Court No. 77010

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant JPMorgan Chase Bank, N.A. is wholly owned by JPMorgan Chase & Co. No publicly held company owns 10% or more of JPMorgan Chase & Co.'s stock.

BALLARD SPAHR LLP appeared on appellant's behalf in the district court and is expected to appear on appellant's behalf in this Court.

Dated: September 24, 2020.

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INTRODUCTION

Appellant JPMorgan Chase Bank, N.A. ("Chase") respectfully submits this supplemental responsive brief pursuant to the Court's September 3, 2020 order.

Rather than attempt to distinguish *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020), SFR argues that *M&T Bank* is flat-out wrong. *M&T Bank* holds that a quiet-title claim invoking the Federal Foreclosure Bar is more akin to a contract claim than a tort claim for purposes of deciding which of two periods in the HERA Limitations Provision applies. 963 F.3d at 858. SFR contends that Chase's assertion of the Federal Foreclosure Bar was untimely under the statute's three-year limitations period for tort claims.

SFR's arguments are unpersuasive. SFR ignores that the Ninth Circuit based its *M&T Bank* holding on *federal* law, not state law. SFR provides no reason for this Court to reject the Ninth Circuit on a point of federal law. This Court traditionally accords Ninth Circuit (and other federal court) decisions "great weight as persuasive authority" on points of federal law, *Brooks v. Dewar*, 106 P.2d 755, 763 (Nev. 1940), *rev'd on other grounds*, 313 U.S. 354 (1941), and should follow *M&T Bank* here.[1]

[1] SFR cites two Federal Foreclosure Bar-related appeals that have been stayed pending resolution of questions certified in *U.S. Bank, Inc. v. Thunder Props., Inc.*, 958 F.3d 794 (9th Cir. 2020). Supp. Br. 2. But both appeals were stayed *sua sponte* by the Clerk of Court under Ninth Circuit Rule 27-7, not by panels, and the denials of motions to lift the stays were likewise issued by the Clerk. Orders, *Ocwen v. SFR*,

ARGUMENT

I. Federal Law Controls the Characterization of Claims for Purposes of Applying the HERA Limitations Provision.

SFR incorrectly assumes that Nevada law governs whether a claim is more akin to a contract claim or tort claim for purposes of § 4617(b)(12). *See* Supp. Br. 1. But the Ninth Circuit correctly relied on federal precedent to conclude that quiet-title claims implicating the Federal Foreclosure Bar "are 'contract' claims under 12 U.S.C. § 4617(b)(12)(A)(i)." 963 F.3d at 858.[2] *M&T Bank* is one of many cases in which a federal court has interpreted and applied federal law without relying on state-law characterizations or labels. Most notably, in applying an analogous federal limitations statute to a state-law claim that was not clearly a contract claim or a tort claim, the Ninth Circuit 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." *United States v. Neidorf*, 522 F.2d 916, 919 n.6 (9th Cir. 1975) (applying

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No. 19-16889 (Dkts. No. 24, 27, 30); Order, *Bank of America v. SFR*, No. 19-16922 (Dkt. No. 29). Those orders are not persuasive here.

[2] *See also Freddie Mac v. SFR Invs. Pool 1, LLC*, 810 F. App'x 589, 590 (9th Cir. 2020); *Nationstar Mortg. LLC v. Keynote Props., LLC*, 810 F. App'x 570, 571-72 (9th Cir. 2020); and *Bourne Valley Ct. Tr. v. Wells Fargo Bank, NA*, 810 F. App'x 492, 493 (9th Cir. 2020).

28 U.S.C. § 2415); *see also FDIC v. Former Officer & Directors of Metro. Bank*, 884 F.2d 1304, 1306-07 (9th Cir. 1989) (in applying comparable statute of limitations, the "*court* generally must characterize the action." (emphasis added)) (citing *Neidorf*).

The *Neidorf* decision rests on sound policy, advancing Congress's purpose of establishing uniform minimum limitations periods for claims brought under HERA or comparable federal statutes. HERA created the Federal Housing Finance Agency ("FHFA") as an independent federal agency with regulatory and oversight authority over Fannie Mae and Freddie Mac (together, the "Enterprises"). The law empowers FHFA to place the Enterprises into conservatorships and grants FHFA an array of powers, privileges, and exemptions from otherwise applicable laws when it acts as Conservator. If state law controlled the characterization of claims under the HERA Limitations Period, substantively identical claims might be subject to different limitations periods depending upon which state's law governed.

SFR's contention that the HERA Limitations Provision must adopt a state-law characterization of claims conflicts not only with *Neidorf* but also with Congress's apparent purpose of establishing uniform minimum limitations periods for all claims the Conservator might bring. The rule that federal law governs the categorization of claims provides the Conservator with certainty, allowing it to focus its efforts on reducing the Enterprises' operational and credit risks 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.

The characterization of Chase's quiet-title claim as a "tort" claim or "contract" claim under the HERA Limitations Provision is a *federal law* inquiry.

II. *M&T Bank* Confirms that Chase's Claim Falls into the HERA Limitations Provision's Contract Category.

Because federal law governs, *M&T Bank* resolves the question of how to characterize the claim at issue here: As a matter of federal law, it is deemed contractual for purposes of the HERA Limitations Provision. And *M&T Bank's* interpretation of a federal statute is highly persuasive; when construing "an act of Congress," this Court has noted that decisions of lower federal courts are "entitled to great weight as persuasive authority." *Brooks*, 106 P.2d at 763.

In *M&T Bank*, the Ninth Circuit held that a quiet-title claim invoking the Federal Foreclosure Bar was subject to HERA's six-year limitations period for contract claims, rather than the three-year period for tort claims, specifically holding "that the claims in this action are 'contract' claims under 12 U.S.C. § 4617(b)(12)(A)(i)." 963 F.3d at 858. The court stated that although "there was no contract" between the parties, "quiet title claims are entirely 'dependent' upon [the Enterprise's] lien on the Property, an interest created by contract," leading it to conclude the claims properly sounded in contract. *Id*. The court reasoned that the claim could not reasonably be characterized as a tort, because it "[did] not seek

damages or claim a breach of duty resulting in injury to person or property, two of the traditional hallmarks of a torts action." *Id*.

SFR responds that it "cannot be the law in Nevada that any action affecting real property sounds in contract solely because a contract exists in the background." Supp. Br. 5. But the Ninth Circuit did not purport to decide an issue of Nevada law, it did not cite any Nevada cases in reaching its holding, and it did not purport to characterize the claim for any purpose other than the HERA Limitations Provision. *See* 963 F.3d at 858. Accordingly, SFR's rhetoric about the impact of *M&T Bank*'s holding on "all quiet title claims," and "all wrongful foreclosure claims," Supp. Br. 6, is baseless. This Court's adoption of *M&T Bank*'s narrow ruling would affect only quiet-title claims implicating the Federal Foreclosure Bar, and only for the limited purpose of applying the HERA Limitations Provision.

III. Chase's Claim Does Not Fit with the HERA Limitations Provision's Tort Category.

SFR's efforts to shoehorn Chase's claim into the HERA Limitations Provision's tort category depend on the false premise that any claim not formally sounding in contract must sound in tort. Supp. Br. 2-7. SFR takes issue with the Ninth Circuit's definition of a "tort" as requiring damages or a breach of duty resulting in injury to person or property, asserting that a tort does not require either element, but rather "is simply a violation of a duty imposed by law, as opposed to

contract." *See id*. at 2-3.[3] To the extent SFR admits that a tort claim alleges the existence and breach of a duty, it has conceded that Chase's quiet-title claim does not sound in tort. Chase does not allege that SFR owed or breached any duty, and this Court has held that quiet-title claims do not require any particular elements, let alone duty and breach. *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev. 314, 1318 (2013) ("A plea to quiet title does not require any particular elements …").

To the extent SFR questions whether tort claims require a duty, a breach, and damages, this Court has held that they do. *See K-Mart Corp. v. Ponsock*, 103 Nev. 39, 49 (1987) ("A tort … requires the presence of a duty created by law…"); *Szekeres v. Robinson*, 715 P.2d 1076, 1077 (Nev. 1986) (a tort is a "civil wrong ... [seeking] remedy in the form of an action for damages") (internal quotation marks omitted). SFR has identified no plausible definition under which the quiet-title claim here would qualify as a tort, and Chase is aware of none.

The cases SFR cites favor Chase. In asserting that "where there is no contract between the parties, the action is 'strictly and solely ex delicto [tort],'" SFR purports

[3] SFR also cites *United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975), for the proposition that breach of duty and damages are not "'elements' [that] exist within the common law definition of tort—the definition Congress intended [to] be used for the purposes of HERA." Supp. Br. 2. But nothing in *Limbs* suggests that tort claims do not require duty, breach, or damages. To the contrary, the court held that the claim could not properly be categorized as a tort because it was "not for damages suffered as a result of an injury." 524 F.2d at 801. And *Limbs* does not mention HERA, so it cannot support SFR's claim that Congress intended a particular definition to be "used for the purposes of HERA."

to quote *Hampton by Hampton v. Fed. Exp. Corp.*, 917 F.2d 1119 (8th Cir. 1990). *See* Supp. Br. 3. But *Hampton* does not contain the language SFR purports to quote, nor does it suggest that an action is a "tort" absent a contract between the parties. Rather, *Hampton* recognized that "[t]ort liability … arises from 'general obligations that are imposed by law … to avoid injury to others,'" 917 F.2d at 1123 (citing W. Keeton, *Prosser & Keeton on the Law of Torts* § 92 (5th ed. 1984)), and concluded that the defendant could not be liable under a tort theory because it "could not reasonably foresee the *injury* and *damages* that could be suffered," *id*. at 1126 (emphasis added).

Guardian Trust, which SFR also quotes for the proposition that actions that do not involve a contract must be tort actions, *see* Supp. Br. 3 (quoting *Guardian Tr. & Deposit Co. v. Fisher*, 200 U.S. 57, 67 (1906)), also supports Chase's argument when read in full: "[W]here there is no contract, and the *injuries result from a failure of the corporation to exercise reasonable care* in the discharge of the duties of its public calling, actions to recover therefor are strictly and solely actions *ex delicto*." 200 U.S. at 67 (first emphasis added). SFR's citation to *United States v. Burke*, 504 U.S. 229, 234 (1992), for the proposition that a tort is a "civil wrong[], other than breach of contract," Supp. Br. 3, likewise fails. *Burke* confirms that a tort is not merely an action not founded in contract; it is "a civil wrong, other than breach of

contract, *for which the court will provide a remedy in the form of an action for damages*." *Burke*, 504 U.S. at 234 (emphasis added).

And while SFR relies most heavily on *Megapulse Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982), that decision too favors Chase. SFR incorrectly claims that the *Megapulse* court "necessarily found [a] claim was something other than contract, i.e., tort," when it concluded that "the claim was not contract." Supp. Br. 8. But *Megapulse* nowhere categorizes the claim as a "tort," and in fact refutes any suggestion that the claim at issue—which was held not to sound in contract for jurisdictional purposes—sounded in tort. *Id*. The *Megapulse* court noted that plaintiff's claim was not a contract claim and was therefore properly brought under Administrative Procedures Act jurisdiction. *Id*. at 963, 971. Had the claim sounded in tort, as SFR contends, a different statute—the Federal Tort Claims Act—would have provided the exclusive basis for jurisdiction. *See* 28 U.S.C. § 1346 *et seq*. Accordingly, 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 M&T Bank*, 963 F.3d at 857 n.2.

SFR's suggestion that "monetary value" or "injury to property" are at issue here and somehow implicate tort liability, *see* Supp. Br. 4-5, fail. Chase does not seek damages, but rather a declaration that Freddie Mac's deed of trust continues to encumber the property at issue, and the alleged extinguishment of a property interest

is not "injury to property" in the tort sense. SFR also contends that Chase's claim sounds in tort because the "basis to challenge the foreclosure sale," is not "the Note," but rather the Federal Foreclosure Bar, "*i.e.* [the challenge] emanates from law, not a contract." Supp. Br. 9. But Chase does not challenge the HOA Sale; it seeks a declaration that the Deed of Trust survived the foreclosure. That the Note is not the basis for Chase's claim does not somehow convert the claim into a tort.

Finally, if there were a serious question as to how Chase's claim should be categorized under the HERA Limitations Provision, that question must be resolved in favor of the longer limitations period as a matter of federal policy. *M&T Bank*, 963 F.3d at 858-59; see also Op. Br. 27-29. SFR's perfunctory treatment of the precedents the Ninth Circuit relied upon for the point—*Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 1989), and *Metro. Bank*—relies on the premise that Chase's "quiet title claim sounds in tort." Supp. Br. 10. As explained above, that is wrong—both as a matter of federal and state law.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that this Court consider and apply *M&T Bank*.

/ / /

/ / /

/ / /

Dated: September 24, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of this Court's September 3, 2020 Order, because it "does not exceed 5 pages or the equivalent type-volume limitation." The equivalent type-volume limitation for 5 pages is 2,333 words. This brief contains 2,326 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

/ / /

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CERTIFICATE OF SERVICE

I certify that on September 24, 2020, I filed **Appellant's Supplemental Responsive Brief**. Service will be made on the following through the Court's electronic filing system:

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An Employee of Ballard Spahr LLP

TAB 47

136 Nev., Advance Opinion 68

IN THE SUPREME COURT OF THE STATE OF NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, A NATIONAL ASSOCIATION,
Appellant,
vs.
SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 77010

FILED

OCT 29 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S Young
DEPUTY CLERK

Appeal from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Reversed and remanded with instructions.

Ballard Spahr LLP and Abran E. Vigil, Holly A. Priest, and Joel E. Tasca, Las Vegas; Ballard Spahr LLP and Matthew D. Lamb, Washington, D.C., for Appellant.

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for Respondent.

Fennemore Craig P.C. and Leslie Bryan Hart and John D. Tennert III, Reno,
for Amicus Curiae Federal Housing Finance Agency.

BEFORE THE COURT EN BANC.

OPINION

By the Court, STIGLICH, J.:

We have previously held that the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), preempts NRS 116.3116 and prevents a homeowners' association (HOA) foreclosure sale from extinguishing a first deed of trust that secures a loan owned by the Federal Housing Finance Agency (FHFA) or by a federal entity under the FHFA's conservatorship. *Saticoy Bay LLC Series 9641 Christine View v. Fed. Nat'l Mortg. Ass'n (Christine View)*, 134 Nev. 270, 272-74, 417 P.3d 363, 366-68 (2018). But we have yet to address what statute of limitations, if any, applies to an action brought to enforce the Federal Foreclosure Bar.

That is the question presented in this case. The answer is governed by the federal law that enacted the Federal Foreclosure Bar—the Housing and Economic Recovery Act (HERA). The HERA statute of limitations looks to whether the claim in the action sounds in contract or tort. Although the claims in the underlying action do not fit either category, we conclude that they are best described as sounding in contract for purposes of the HERA statute of limitations. HERA provides for a six-year statute of limitations for claims sounding in contract. Because the loan servicer commenced the action here within six years of the foreclosure sale, the date the parties agree triggered the running of the statute of limitations, we reverse the district court's summary judgment order. And because we also conclude that the loan servicer sufficiently demonstrated that a regulated entity under the FHFA's conservatorship owned the subject loan, we remand for the district court to enter judgment in favor of the loan servicer.

FACTS AND PROCEDURAL HISTORY

After the nonparty homeowners failed to pay their HOA assessments, the HOA held a foreclosure sale on March 1, 2013, at which respondent SFR Investments Pool 1, LLC, purchased the property. On November 27, 2013, appellant JPMorgan Chase Bank (Chase) filed a complaint seeking a declaration that the first deed of trust survived the sale and for quiet title. On February 2, 2016, Chase moved to amend its complaint to rely on the Federal Foreclosure Bar. After the district court granted the motion, Chase filed its amended complaint on March 9, 2016.

Both parties moved for summary judgment. Chase offered evidence that it was servicing the loan on behalf of Freddie Mac, which had been placed into an FHFA conservatorship in 2008, and argued that the first deed of trust therefore survived under the Federal Foreclosure Bar. The district court ultimately found that Chase adequately demonstrated that Freddie Mac owned the loan at the time of the foreclosure sale but that a three-year statute of limitations applied and Chase had missed that deadline by eight days because it did not mention the Federal Foreclosure Bar until it filed the amended complaint. The district court therefore entered summary judgment in favor of SFR, concluding that the foreclosure sale extinguished the deed of trust. Chase now appeals that decision, and the FHFA has filed an amicus brief in support of Chase's position.

DISCUSSION

The Federal Foreclosure Bar is part of HERA. *See* 12 U.S.C. § 4501 *et seq.* (HERA); *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev. 247, 250-51, 396 P.3d 754, 757 (2017) (discussing HERA and the Federal Foreclosure Bar). HERA includes a statute-of-limitations provision that applies "to any action brought by the [FHFA]" and specifies the

limitations period based on whether the action involves a contract claim or a tort claim:

> [T]he applicable statute of limitations with regard to any action brought by the [FHFA] 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). When the facts are uncontroverted, as they are here, the application of a statute of limitations to bar a claim is a question of law that this court reviews de novo.[1] *Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 186-87, 300 P.3d 124, 128 (2013).

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[1]SFR asserts that an abuse-of-discretion standard applies because the district court struck certain of Chase's arguments regarding the applicable statute of limitations. The supporting record citation SFR directs the court to, however, merely shows that the district court allowed SFR to argue that Chase's argument was untimely, not that the district court struck Chase's argument. And, although SFR argues Chase waived certain arguments regarding the applicable statute of limitations, we have previously considered arguments that were not raised in the district court when the issue presents solely a question of law and the interests of judicial economy warrant resolving the issue. *See Nev. Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877 n.9 (1999) ("As the interpretation of the statute is solely a question of law, rather than requiring the [party] to raise the issue in district court in a summary judgment motion, in the interests of judicial economy, we have chosen to address [it] at this time.").

HERA's statute of limitation applies even if the FHFA and the entities it regulates are not parties

We first address the threshold question of whether HERA dictates the statute of limitations in this case. HERA's statute-of-limitations provision applies to actions brought by the FHFA. 12 U.S.C. § 4617(b)(12). Confronted with an argument that the provision thus did not apply to this action brought by Chase, the district court found that HERA's limitations provision applied regardless of whether the FHFA brought the action or was joined as a party. We agree with the district court.

As we have already held, a loan servicer such as Chase can raise the Federal Foreclosure Bar on the FHFA's behalf without joining the FHFA or the regulated entity that owns the loan as a party to the action. *Nationstar*, 133 Nev. at 251, 396 P.3d at 758. That is so because HERA allows the FHFA to authorize a loan servicer to act on its behalf by contracting with the loan servicer or relying on the regulated entity's contractual relationship with a loan servicer, such that the contractually authorized loan servicer has standing to take action to protect the FHFA's interests. *See id.* at 250, 396 P.3d at 757 (holding that the broad language "such action" in 12 U.S.C. § 4617(b)(2)(D) would include allowing contracted servicers to act to protect an asset owned by a regulated entity that is under an FHFA conservatorship). It thus follows that, when the contractually authorized loan servicer brings an action to protect the FHFA's interests as conservator of a regulated entity, the same statute of limitations would apply as if the FHFA had brought the action itself. *See M & T Bank v. SFR Invs. Pool 1, LLC*, 963 F.3d 854, 857-58 (9th Cir. 2020) (agreeing with the parties that HERA governs the statute of limitations that applies to an FHFA loan servicer's action raising the Federal Foreclosure Bar). We therefore hold that, regardless of whether the FHFA, Freddie Mac, or

Fannie Mae is joined as a party, HERA's statute of limitations governs an action brought by a mortgage loan servicer to enforce the Federal Foreclosure Bar. Having determined that the timeliness of Chase's action is governed by HERA's statute-of-limitations provision, we must now determine the appropriate limitations period.

Chase's claims sound in contract, and therefore a six-year limitations period applies

The HERA statute-of-limitations provision asks whether the action brings a contract claim or a tort claim, 12 U.S.C. § 4617(b)(12), even "if neither description is a perfect fit."[2] *M & T*, 963 F.3d at 858 (recognizing that HERA's statute of limitations "applies to all [actions] brought by the FHFA as conservator," even though it bases the applicable limitations period on whether the action is contract- or tort-based); *FHFA v. UBS Ams. Inc.*, 712 F.3d 136, 143-44 (2d Cir. 2013) (holding that Congress clearly intended HERA's statute of limitations provision "to apply to *all* [actions] brought by [the] FHFA as conservator" and that it "supplants any other time limitations that otherwise might have applied"); *see also Nat'l Credit Union Admin. Bd. v. RBS Sec., Inc.*, 833 F.3d 1125, 1131 (9th Cir. 2016) (concluding that an identically worded statute made Congress's intent "clear that no other limitations period applie[d]" to the action brought).

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[2]In this regard, *Berberich v. Bank of America, N.A.*, 136 Nev. 93, 460 P.3d 440 (2020), provides no guidance. In that case, we addressed the statute of limitations that applied to an action brought by the party who purchased the subject property at an HOA foreclosure sale to quiet title to the property. *Id.* at 94, 460 P.3d at 441. Because that case did not involve an action brought by the FHFA or its contractually authorized loan servicer, HERA did not dictate the applicable statute of limitations.

One cannot dispute that no contract exists between SFR and Chase. And Chase's complaint neither alleged a breach of duty by SFR or any other party below, nor sought damages based on injury to a person or property, "two of the traditional hallmarks of a torts action." *M & T*, 963 F.3d at 858. The contract and tort descriptions thus are not a good fit for the claims in Chase's complaint. Faced with the same dilemma, the Ninth Circuit Court of Appeals has looked to "whether a claim is better characterized as sounding in contract or tort." *Id.*; *see also FHFA v. LN Mgmt. LLC, Series 2937 Barboursville*, 369 F. Supp. 3d 1101, 1109 (D. Nev. 2019) (explaining the analysis as "perform[ing] the square-peg-in-round-hole task" of determining whether an action seeking to enforce the Federal Foreclosure Bar fell "into the contract or tort bucket"), *vacated in part on other grounds on reconsideration*, No. 2:17-cv-03006-JAD-EJY, 2019 WL 6828293 (D. Nev. Dec. 13, 2019).

After careful examination, we agree with the courts that have concluded that claims seeking to enforce the Federal Foreclosure Bar sound more in contract than in tort. The key distinction between a tort and a contract claim is whether the alleged harm could have been realized without a contract. *Stanford Ranch, Inc. v. Md. Cas. Co.*, 89 F.3d 618, 625 (9th Cir. 1996). Despite the lack of a contract between SFR and Chase, "the quiet title claims [asserted by Chase] are entirely 'dependent' upon Freddie Mac's lien on the Property, an interest created by contract." *M & T*, 963 F.3d at 858; *see also Ditech Fin. LLC v. SFR Invs. Pool 1, LLC*, 380 F. Supp. 3d 1089, 1094 (D. Nev. 2019) ("At bottom, this action concerns the viability of [the] lien interests against the Propert[y]. As [the] lien[was] created by contract, an action to enforce [it] is necessarily a 'contract action.'"). As a federal district court has explained, the mortgage "lien is the hook that

allows [the loan servicer] to seek a declaration that the Federal Foreclosure Bar prevented the foreclosure sale from extinguishing Freddie Mac's deed of trust. . . . Indeed, the point of the . . . suit is to marshal and protect Freddie Mac's asset: a mortgage contract secured by a deed of trust." *LN Mgmt.*, 369 F. Supp. 3d at 1110. And to the extent there is any lingering doubt about whether Chase's claims are better characterized as sounding in contract or tort, federal law dictates that we cede to the characterization that results in the longer limitations period.[3] *See Wise v. Verizon Commc'ns Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 2010) (espousing the federal policy to apply the longer limitations period "[w]hen choosing between multiple potentially-applicable statutes"); *see also M & T*, 963 F.3d at 858 (using this policy to further support its decision to apply the statute of limitations for contract claims to the servicer's attempt to enforce the Federal Foreclosure Bar). Here, HERA provides a longer limitations period for contract claims than it does for tort claims. *See* 12 U.S.C. § 4617(b)(12).

HERA provides that if the claim sounds in contract, the statute of limitations is either six years or "the period applicable under State law," whichever is longer. 12 U.S.C. § 4617(b)(12)(i). Nevada law also imposes a six-year statute of limitations on an action arising out of a contract. NRS

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[3]To the extent Nevada law would dictate a different approach, we must interpret HERA in accordance with federal law. *See Vincent Murphy Chevrolet Co. v. United States*, 766 F.2d 449, 451 (10th Cir. 1985) (holding that a federal statute "must be interpreted in accordance with principles of federal law").

11.190(1)(b). We therefore conclude that Chase had six years from the foreclosure sale to bring its claims.[4]

Applying a six-year statute of limitations, Chase timely brought its action seeking to protect the FHFA's interest by enforcing the Federal Foreclosure Bar regardless of whether the operative filing date is that of the original complaint or the amended complaint.[5] The district court therefore erred in entering summary judgment in SFR's favor based on the statute of limitations. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (providing that summary judgment is only appropriate when the facts are not in dispute "and the moving party is entitled to judgment as a matter of law").

Chase adequately proved Freddie Mac's ownership of the mortgage loan

SFR argues that, even if this court finds that Chase timely commenced the action, we should affirm the summary judgment because Chase failed to prove Freddie Mac's interest in the mortgage loan secured by the first deed of trust. Below, SFR moved to strike certain evidence Chase provided in support of its summary judgment motion regarding Freddie Mac's ownership of the loan, arguing that Chase improperly disclosed the evidence after discovery closed. The district court granted the

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[4]SFR and Chase agree that Chase's claim "accrued" for purposes of triggering HERA's limitations period on the date of the foreclosure sale.

[5]As stated above, HERA mandates the application of a statute of limitations to an FHFA servicer's action seeking to enforce the Federal Foreclosure Bar. And, having concluded that a six-year statute of limitations applies, we need not address Chase's argument that the Federal Foreclosure Bar is merely a legal theory. That argument would only be relevant if Chase filed its amended complaint outside HERA's six-year statute of limitations, in order to determine whether the amended complaint related back to the original complaint and was therefore timely.

motion. SFR argues on appeal that without the stricken evidence, the district court's finding that Freddie Mac owns the subject loan lacks the evidentiary support necessary to affirm summary judgment in Chase's favor. Chase argues that the district court abused its discretion in granting the motion to strike. Chase alternatively argues that even without the late-disclosed documents, it presented sufficient evidence to show Freddie Mac's ownership of the loan.

We agree with SFR that the district court did not abuse its discretion in granting SFR's motion to strike the untimely disclosed evidence.[6] *See Capanna v. Orth*, 134 Nev. 888, 894-95, 432 P.3d 726, 733-34 (2018) (reviewing a district court's decision to admit untimely disclosed evidence for an abuse of discretion). An abuse of discretion occurs only when "no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). Here, despite Chase's claims that SFR knew before the close of discovery that Chase was relying on the Federal Foreclosure Bar, Chase did not disclose certain of the evidence to prove Freddie Mac's ownership of the subject loan until after discovery closed, and it did not seek to reopen discovery. Chase provided no substantial justification for the late disclosure, and we are not convinced that consideration of the evidence

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[6]Chase argues that the district court's striking of its evidence constituted case-concluding sanctions, but that argument is misplaced. The district court did not strike the evidence as a sanction, it struck the evidence because Chase disclosed it after discovery closed. And, in any event, Chase fails to demonstrate how striking the evidence was "case concluding." *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 615 n.6, 245 P.3d 1182, 1188 n.6 (2010) (defining "case concluding sanctions" as ones "in which the complaint is dismissed or the answer is stricken as to both liability and damages").

despite its late disclosure would be harmless. *See* NRCP 37(c)(1) (providing that evidence that is not timely disclosed may still be admitted if the party provides substantial justification for the late disclosure or the late disclosure is harmless); *Pizzaro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265, 396 P.3d 783, 787-88 (2017) (discussing NRCP 37(c)(1)).

We now must determine whether the remaining evidence showed Chase's entitlement to summary judgment. Summary judgment requires the moving party to present evidence to show that it is entitled to judgment as a matter of law. *Wood*, 121 Nev. at 731, 121 P.3d at 1031; *see also Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) ("If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence."). We conclude that Chase met its evidentiary burden. Chase presented a sworn declaration from an employee familiar with its business records regarding the subject loan stating that Freddie Mac purchased the loan in 2006 and still owned it. The employee's declaration further stated that Chase had serviced the loan on Freddie Mac's behalf since Freddie Mac purchased the loan. The employee also authenticated Chase's business records, including a loan transfer history showing the sale of the loan to Freddie Mac and screenshots from another database regarding Chase's status as the loan's servicer. Absent any evidence controverting the declaration or a challenge to the business records' accuracy, this evidence is sufficient to show Freddie Mac's ownership of the subject loan. *See Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 234-36, 445 P.3d 846, 850-51 (2019) (discussing the evidence demonstrating Freddie Mac's ownership of a loan, including a declaration from the servicer and screenshots of the servicer's business records, and

recognizing that the party challenging the accuracy of such evidence "bore the burden of showing that their declarations or the printouts were *not* trustworthy"); *see also* NRS 51.135 (providing that business records are admissible "unless the source of information or method or circumstances of preparation indicate lack of trustworthiness"); *Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134 (explaining the moving and opposing parties' respective burdens of production and persuasion on summary judgment). And we are not convinced by SFR's argument that the district court's factual findings on this point were insufficient such that we must remand for additional findings. *Cf. Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 785-86, 312 P.3d 479, 483 (2013) (indicating that remand may be appropriate when a procedurally defective order "precludes adequate review").

CONCLUSION

The district court correctly determined that neither the FHFA nor Freddie Mac needed to be joined as a party for HERA's statute-of-limitations provision to apply to Chase's action seeking to enforce the Federal Foreclosure Bar. The district court erred, however, in applying a three-year limitations period. Because Chase's claims seeking to enforce the Federal Foreclosure Bar are best characterized as sounding in contract, a six-year statute of limitations applies. Chase's action therefore was timely filed. Accordingly, we reverse the district court's grant of summary judgment in SFR's favor based on the statute of limitations. And because Chase demonstrated that Freddie Mac owned the loan even without the late-disclosed evidence struck by the district court, we remand for the district court to enter judgment in favor of Chase such that the Federal Foreclosure Bar prevented the foreclosure sale from extinguishing the first deed of trust and SFR therefore took the property subject to that deed of trust. *See Christine View*, 134 Nev. at 272-74, 417 P.3d at 367-68; *Pink v.*

Busch, 100 Nev. 684, 691, 691 P.2d 456, 461 (1984) ("[U]pon reversal, where the material facts have been fully developed . . . and are undisputed such that the issues remaining are legal rather than factual, we will . . . remand the case to the lower court with directions to enter judgment in accordance with the opinion . . . .").

Stiglich, J.
Stiglich

We concur:

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Cadish, J.
Cadish

Silver, J.
Silver

TAB 48

Case No. 77010

IN THE SUPREME COURT OF NEVADA

JP MORGAN CHASE BANK, National Association, a national association Appellant, vs. SFR INVESTMENTS POOL 1, LLC, Respondent.	Electronically Filed Jan 06 2021 02:03 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

MOTION TO STAY ISSUANCE OF REMITTITUR

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KAREN L. HANKS, ESQ.
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This Court should stay issuance of remittitur for two reasons. First, the very issue decided in this case, whether a claim challenging an NRS 116 foreclosure sale based on HERA sounds in contract, is presently pending before the United States Supreme Court, on Petition for Certiorari from the Ninth Circuit Court of Appeals, in *SFR Investments Pool 1, LLC v. M&T Bank*, No. 20-908, docketed January 5, 2021. If the petition is granted, it could affect the decision in this case.

Additionally, the constitutionality of the FHFA's structure is presently before the U.S. Supreme Court in *Collins v. Mnuchin*, No. 19-422.[1] In *Collins*, the U.S. Supreme Court granted certiorari to decide whether the FHFA's single-director structure violates the Appointments Clause and, if so, whether certain actions taken by the agency, while unconstitutionally structured, must be set aside. Thus, *Collins* has the potential of holding the FHFA was unconstitutionally structured at the time of the conservatorship decision and call into question whether the conservatorship was validly imposed (and, if the conservatorship was not validly imposed, then the foreclosure bar should not have applied to this case).

In the ongoing merits briefing, the FHFA has conceded that its structure is unconstitutional in light of *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), which held the indistinguishable structure of the CFPB violated the Appointments Clause. *See Collins* Federal Parties Reply Br. 23-26. The *Collins* petitioners further argue

[1] Oral argument took place on December 9, 2020.

that in "a long line of cases, the U.S. Supreme Court has repeatedly set aside the past actions of federal officials who were unconstitutionally insulated from oversight by the President or who otherwise served in violation of the Constitution's structural provisions." *Collins* Petr. Br. 62; *see also id.* at 62-66 (discussing authorities). The Government resists vacatur of the agency action at issue in *Collins*, although largely for case-specific reasons. *Collins* Federal Parties Reply Br. Br. 28-40.

As the Solicitor General has written, a hold is appropriate where the Court's decision in a pending case "could affect the analysis of [the] question" presented by the petition or if "it is possible that the Court's resolution of the question presented in [the pending case] could have a bearing on the analysis of petitioner's argument," even if the cases do "not involve precisely the same question." *U.S. BIO 7, Yang v. United States*, No. 02-136. Here, the lower court found the Association foreclosure sale failed to extinguish the GSE's junior lien because the sale took place after FHFA put both regulated entities under conservatorship, thereby triggering the Foreclosure Bar.

Collins has the potential of holding the FHFA was unconstitutionally structured at the time of the conservatorship decision and call into question whether the conservatorship was validly imposed (and, if the conservatorship was not validly imposed, then the foreclosure bar should not have applied to this case).

That SFR did not raise an Appointments Clause challenge below does not preclude it from raising the issue now. The U.S. Supreme Court has "expressly included Appointments Clause objections" in the category of "nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). The U.S. Supreme Court has thus considered Appointment Clause challenges "despite the fact that [the challenge] had not been raised in the District Court or in the Court of Appeals." *Id.* at 879 (quoting *Glidden*, 370 U.S. at 536). In such cases, the "strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" outweighs any "disruption to sound appellate process entailed by entertaining objections not raised below." *Ibid.*

Nevertheless, because there is no material difference between the structure of the FHFA and the CFPB, SFR had no basis to raise an Appointments Clause challenge in this case until the U.S. Supreme Court overturned the Ninth Circuit's decision in *Seila Law*. *See Collins* Federal Parties Reply Br. 3, 23-24 (FHFA conceding that its structure is indistinguishable from that of the CFPB for Appointments Clause purposes); *PHH Corp. v. CFPB*, 881 F.3d 75, 175-76 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (structure of FHFA "raises the same question we confront here" in Appointments Clause challenge to CFPB). The U.S. Supreme

Court, however, did not overrule *Seila Law* until June 29, 2020, long after briefing was completed by the parties. *Seila Law LLC*, *supra* (2020) (decided on June 29, 2020).

Accordingly, SFR asks this Court to stay issuance of remittitur until the U.S. Supreme Court decides the *M&T Bank* case and issues a decision in *Collins*. If the U.S. Supreme Court determines the claim does not sound in contract, then the holding in this case should be reversed. Even if the petition as to the statute of limitations is denied, this Court should still stay remittitur pending *Collins*. Should the U.S. Supreme Court rule the FHFA's structure was unconstitutional, then the parties should have the opportunity to submit briefing as to what effect this has on the present case.

DATED this 6th day of January, 2021.

KIM GILBERT EBRON

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on this 6th day of January, 2021. Electronic service of the foregoing Motion to Stay Issuance of Remittitur shall be made in accordance with the Master Service.

/s/ *Karen L. Hanks*
An employee of Kim Gilbert Ebron

TAB 49

IN THE SUPREME COURT OF NEVADA

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a national association, Appellant, v. SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Respondent.	Supreme Court No. 77010

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

APPELLANT'S RESPONSE TO MOTION TO STAY REMITTITUR

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant JPMorgan Chase Bank, N.A. is wholly owned by JPMorgan Chase & Co. No publicly held company owns 10% or more of JPMorgan Chase & Co.'s stock.

BALLARD SPAHR LLP appeared on appellant's behalf in the district court and is expected to appear on appellant's behalf in this Court.

Dated: January 13, 2021.

BALLARD SPAHR LLP

By: /s/ Matthew D. Lamb

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INTRODUCTION

SFR has not satisfied the conditions permitting a stay of issuance of a remittitur because it points to no petition for a writ of certiorari in this case. Its motion should be denied on that basis.[1]

Even if that condition were no barrier to the motion, SFR has not established why a stay is merited. SFR's petition for a writ of certiorari challenging the Ninth Circuit's *M&T Bank* decision is unlikely to be granted; it identifies no split on the statute of limitations issue resolved in that case, nor can it demonstrate that the issue is sufficiently important to warrant Supreme Court review. SFR also cannot rely on the *Collins* appeal as a basis to stay; it waived the issue in that case by never raising it either in this appeal or below. And the Supreme Court's resolution of that appeal has no conceivable bearing on this appeal in any event.

Finally, the equities do not favor a stay. It would impede final judgment and encourage similar stays in dozens of other cases pending before the courts of Nevada. Such stays would give SFR and purchasers at homeowner association foreclosure sales a windfall at the expense of the Enterprises and judicial economy.

Chase respectfully requests that the Court deny SFR's motion.

ARGUMENT

I. SFR Has Not Satisfied the Standard for a Stay, As There Is No Pending Petition for Review of this Case

This Court allows a party to seek a stay of remittitur under only limited circumstances where the parties have not yet exhausted their opportunities to seek

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

relief on appeal; one is when a party has made an "application to the Supreme Court of the United States for a writ of certiorari." NRAP 41(b)(3). SFR has not filed such an application in connection with this case, nor does its motion suggest that it intends to do so. Accordingly, it has not satisfied the requirements for the imposition of a stay, and its motion should be denied on this basis alone.

Instead, SFR informs the Court that it has filed a petition for a writ of certiorari in *another* appeal, seeking review of the decision of the Ninth Circuit in *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854 (9th Cir. 2020). *See* Motion at 1. SFR also cites to a totally unrelated case before the U.S. Supreme Court, *Collins v. Mnuchin*, No. 19-422. *See id.* Neither of those appeals seeks the U.S. Supreme Court's review of this Court's decision in *this* appeal, and therefore cannot serve as a basis to stay the issuance of a remittitur. SFR cites no case where this Court has stayed the issuance of a remittitur based on other appellate cases or certiorari petitions, and counsel for Chase have not identified any.

To allow the pendency of or developments in *other* cases to serve as a basis for a stay of the issuance of a remittitur would add delay to the final resolution of disputes and provide an opportunity for gamesmanship. This is especially true in a case like this one, where this Court ruled against SFR in an *en banc* decision, and subsequently denied SFR's petition for rehearing.

In its supplemental merits briefing, SFR already raised the fact that it intended to file a petition for a writ of certiorari in the *M&T Bank* appeal. SFR neglected to mention the *Collins* case in that briefing, although the writ of certiorari had been granted in that case months before. Despite having an opportunity to do so in that

briefing, SFR never suggested that the Court should stay its decision to await the resolution of either appeal. In any event, this Court proceeded to a decision and correctly reversed the judgment of the district court with instructions to enter judgment in favor of Chase.

Later, in its November 2020 petition for rehearing, SFR both informed the Court of the pending *Collins* case and reminded the Court of its petition for a writ of certiorari in *M&T Bank*. For the first time, SFR requested that the Court stay resolution of this case. But the Court declined to do so; denying the rehearing petition less than a month later. Thus, the Court has heard the arguments SFR makes again in its motion to stay, and has already rejected them.

This is not a circumstance where the Court's rules allow the issuance of a stay of remittitur. *See* NRAP 41. SFR has not suggested that it intends to petition for a writ of certiorari, nor has it presented a reason for the Court to ensure that it does not divest itself of jurisdiction. SFR has exhausted all its opportunities to argue the merits of this case and to suggest why the resolution of other appeals should affect this Court's analysis. This Court already found those arguments wanting.

The Court should thus deny SFR's attempt to take yet another bite at the apple and delay the final resolution of this case. To do otherwise would invite parties before this Court to use motions for a stay of the issuance of a remittitur as another opportunity to raise arguments concerning yet-to-be-decided appeals in other courts and to forestall final judgment.

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

Even if a stay of remittitur could be appropriate under these circumstances, it would not be here, as SFR has very little chance of prevailing in its petition for a writ of certiorari in *M&T Bank*. The question SFR presented to the U.S. Supreme Court in that case, concerning the statute of limitations applicable to quiet title claims such as those in this case, does not satisfy Supreme Court Rule 10: Petitions for certiorari are "granted only for compelling reasons," typically involving at least one of the following factors: (1) the existence of a circuit split on an important matter; (2) a split in authority between two state supreme courts, or between a state supreme court and a federal circuit court; 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 carry its burden of establishing that its petition falls within any of these categories.

First, there is no circuit split. In fact, the opposite is true. *M&T Bank* confirms that a *federal*-law limitations provision, 12 U.S.C. § 4617(b)(12)(A), 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) (holding 12 U.S.C. § 4617(b)(12) provides a comprehensive limitations period for all actions brought by FHFA as Conservator); *FDIC v. Bledsoe*, 989 F.2d 805, 809 (5th Cir. 1993) (holding that the FDIC's similarly worded limitations period also applied to actions brought by a private entity acting as an assignee for the federal agency);

Smith v. FDIC, 61 F.3d 1552, 1561 (11th Cir. 1995) ("[B]ecause a mortgage lien is an interest in property created by contract, an action to enforce that lien is clearly a contract action.").

SFR's only hint that a split might exist—it never expressly claims one—is its reliance on *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982). *See M&T Bank* Pet. at 22-23. But 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 as to contract claims against the United States. *See* 28 U.S.C. §§ 1346(a)(2),1491(a)(1). As a waiver of sovereign immunity, that statute is construed narrowly. *See Lane v. Pena*, 518 U.S. 187, 192 (1996). The *Megapulse* court concluded that the claim at issue in that case was not a contract claim, but it also nowhere categorized the claim as a "tort," and in fact *refuted* any suggestion that the claim at issue sounded in tort. As the Ninth Circuit correctly concluded, *Megapulse* does not suggest that a claim not sounding in contract must sound in tort. *See M&T Bank*, 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 statute of 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. Again, the opposite is true: In this very case, the Court agreed with the analysis of *M&T Bank*. The Court held that while quiet-title claims relying on the Federal Foreclosure Bar are neither contract nor tort, when required to choose one of those two categories for the

purpose of selecting the applicable statute of limitations, such claims "sound more in contract than in tort." Opinion at 3. This Court also noted that "to the extent there is any lingering doubt about whether [the servicer's] claims are better characterized as sounding in contract or tort, federal law dictates that [courts] cede to the characterization that results in the longer limitations period"—the six-year period for contract-like claims. *Id.*

Third, SFR identifies neither any important federal question nor any ruling that conflicts with Supreme Court precedent on an issue of federal law. SFR suggests that the narrow statute of limitations analysis conducted by the Ninth Circuit in *M&T Bank* would somehow cause havoc in Nevada's tort law. Pet. at 25-26. SFR does not explain how this can be so, when the analysis is applicable only to claims by FHFA as Conservator, the Enterprises, and their servicers, 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 that 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 this appeal.[2] Accordingly, there is no significant issue of federal law at issue in this matter that would be warrant a grant of certiorari by the Supreme Court.

III. *Collins* Has Nothing to Do With the Issues in This Case and Provides No Basis to Stay Remittitur

SFR has also failed to establish that the Supreme Court's upcoming decision in *Collins* stands to have any bearing on this Court's resolution of this appeal.

[2] A notable omission, as this Court's decision in this case preceded SFR's petition for a writ of certiorari in *M&T Bank* by over a month.

The issues in *Collins* are whether a provision in the Housing and Economic Recovery Act ("HERA") providing that a Senate-confirmed FHFA Director may only be removed by the President for cause violates the federal constitutional separation of powers, and, if so, whether a particular agency action taken by FHFA in 2012 duly challenged in the complaint in *Collins* can or should be invalidated as a result. *See* Cert. Pet. at 1, *Collins*, No. 19-422 (U.S., filed Sept. 15, 2019).

SFR has waived any argument related to the issues in *Collins* by never asserting such an argument below or in the proceedings before this Court. SFR attempts to excuse its waiver by citing to case law suggesting that it is somehow impossible to waive an Appointments Clause claim. *See* Mot. at 3 (citing *Freytag v. C.I.R.,* 501 U.S. 868, 878-79 (1991)). Even assuming that SFR has correctly characterized those authorities, they are inapposite here: there is no Appointments Clause claim or issue in *Collins*. The constitutional defect that the Enterprise shareholders raise in that appeal is not whether FHFA's Director is constitutionally appointed. Rather, they contend that the for-cause removal clause applicable to the Director of FHFA violates the separation of powers because it insulates the Director from Presidential authority. SFR cites no authority that a separation-of-powers challenge to a removal clause can be introduced into a case for the first time in a petition for rehearing of an appellate court decision.

Even if SFR had not waived the argument, it is wholly lacking in merit. The complaint in *Collins* named FHFA as a defendant and targeted a particular agency action. In this case, by contrast, SFR has not sued FHFA and does not attack any FHFA action, just the automatic operation of the statute. SFR does not—because it

cannot—suggest that any constitutional defect in the FHFA Director removal provision would somehow render all of HERA (including the Federal Foreclosure Bar) invalid. In past removal-restriction cases, the Supreme Court has held exactly the opposite. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2209 (2020) (holding that "the [CFPB] Director's removal protection severable from the other provisions of Dodd-Frank that establish the CFPB"); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (rejecting plaintiffs' argument that unconstitutional removal provision "rendered [agency] 'and all power and authority exercised by it' in violation of the Constitution"); *see also Collins v. Mnuchin*, 938 F.3d 553, 592 (5th Cir. 2019) ("the appropriate—and most judicially conservative—remedy is to sever the 'for cause' restriction on removal of the FHFA director from the statute"). Plaintiffs in *Collins* concede that, with one isolated exception, the removal provision is severable from all of HERA's other provisions. *See Collins* Br. at 77-78, *Collins*, No. 19-422 (U.S., filed Sept. 16, 2020).

SFR postulates that a U.S. Supreme Court holding 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. Pet. at 9. That suggestion is fanciful for multiple reasons. No party in *Collins* challenges the conservatorship decisions; rather, the relief the *Collins* plaintiffs request is predicated on the conservatorships' existence. It is far too late, 13 years after the fact, to challenge those decisions. *See* 12 U.S.C. § 4617(a)(5); 28 U.S.C. § 2401. Moreover, SFR—a third party, not an Enterprise—may lack standing to challenge the imposition of the conservatorships at all. 12 U.S.C. § 4617(a)(5). And the

conservatorship decisions were made by a carryover director from a predecessor agency under a transitional provision that did not even include the removal protection at issue in *Collins*. 12 U.S.C. § 4512(b)(5). SFR's suggestion that the courts unwind 13 years of conservatorship operations critical to the Nation's housing and financial markets, based on a misunderstanding of the issue in *Collins*, provides no basis to stay the issuance of a remittitur in this appeal.

IV. A Stay Would Delay Judgment and Benefit SFR at Freddie Mac's Expense

Finally, SFR cannot establish good cause for a stay; indeed, the equities favor issuance of the remittitur per the usual schedule of this Court.

Allowing this case to conclude with the issuance of the remittitur and the entry of judgment by the district court would serve the interests of judicial economy and substantial justice. SFR has sought to stay issuance of a remittitur in at least three other appeals raising the same issues that are now pending before this Court, and if this motion is successful, SFR and similarly situated HOA sale purchasers would seek stays and similar relief in the dozens of other cases pending before this Court, the Court of Appeals, and the district courts.

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 continues 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 the case is resolved, SFR will collect additional

unjust economic returns from Freddie Mac'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) & (b)(2)(D)(ii).

Indeed, the fact that SFR has every incentive to defer final resolution of every case as long as possible is evident from its litigation strategy in its appeals before this Court. Seeking a stay of the remittitur is consistent with its frequent requests for supplemental briefing and its effort to petition for rehearing in every appeal. These actions threaten judicial economy and discourage settlements that reasonably reflect the legal landscape this Court's decisions have created.

Moreover, in the unlikely event that the U.S. Supreme Court grants certiorari in *M&T Bank* or resolves *Collins* in such a way as to call into question Freddie Mac's ownership of the Deed of Trust, issuance of a remittitur here would not cause SFR to suffer irreparable harm. If SFR elects to pay off Freddie Mac's lien or purchase the property and then prevails in the Supreme Court, it will be able to assert a claim for its money to be returned to it. If SFR 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 a free-and-clear title holder is entitled. The only way SFR will be put to the choice, though, is for the remittitur to issue. No inequitable result would befall SFR in either event.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that the Court deny SFR's motion to stay issuance of the remittitur.

Dated: January 13, 2021.

BALLARD SPAHR LLP

By: /s/ Matthew D. Lamb

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CERTIFICATE OF SERVICE

I certify that on January 13, 2021, I filed **Appellant's Response to Motion to Stay Remittitur**. Service will be made on the following through the Court's electronic filing system:

Jacqueline A. Gilbert
KIM GILBERT EBRON

Counsel for Respondent

/s/ Adam Crawford
An Employee of Ballard Spahr LLP

TAB 50

Case No. 77010

IN THE SUPREME COURT OF NEVADA

JP MORGAN CHASE BANK, National Association, a national association Appellant, vs. SFR INVESTMENTS POOL 1, LLC, Respondent.	Electronically Filed Jan 20 2021 03:35 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

REPLY IN SUPPORT OF MOTION TO STAY ISSUANCE OF REMITTITUR

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A. SFR Satisfies the Standard Under NRAP 41(b)(3).

NRAP 41(b)(3) does not state anywhere that the petition for certiorari must be filed in the specific case; it addresses a petition generally. While ordinarily the petition will be filed for the specific case, in the realm of HOA litigation, it would be unnecessarily redundant. Before this Court issued its decision here, SFR had already filed its Petition for Certiorari from the Ninth Circuit in *SFR Investments Pool 1, LLC v. M&T Bank*, No. 20-908, docketed January 5, 2021. That Petition challenges the statute of limitations issue, and therefore, it cannot be disputed that if the Petition is granted, it could affect the decision in this case. Thus, a stay is warranted.

B. The Merits of SFR's Petition are Not Before this Court.

Nowhere does NRAP 41(b)(3) provide the Court may deny a stay based on the merits of a petition. Instead, it states, "the stay shall continue until final disposition by the Supreme Court of the United States." NRAP 41(b)(3)(B). Thus, the merits of SFR's Petition are not before this Court, nor are they a condition precedent to granting a stay.

C. *Collins* Does Have Bearing on the Present Case.

Neither of Appellant's arguments regarding Collins have merit. *First*, while Appellant argues SFR waived any argument related to the issues in *Collins*, it acknowledges the Supreme Court's decision in *Freytag v. C.I.R.*, , allowed a party

to raise an Appointments Clause challenge for the first time in the Supreme Court because it fell "in the category of nonjurisdicitional structural constitutional objections that could be considered on appeal whether or not ruled upon below." 501 U.S. 868, 878-79 (1991) Further, *Freytag* did not apply a ruole specific to Appointment Clause claims, but instead invoked invoked a non-waiver principle founded in the "strong interest of the federal judiciary in maintaining the *constitutional plan of separation of power*," of which the Appointment Clause is but one part. 501 U.S. at 879 (quoting *Gliddden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (emphasis added)); *id*. at 878 ("The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political.").

Accordingly, the case on which *Freytag* relied was not an Appointments Clause decision, but one involving another aspect of the "constitutional plan of separation of powers." *Glidden*, 370 U.S. at 536 (finding no waiver of separation-of-powers challenge to lack of tenure protections for judges of Court of Claims and Court of Customs Appeals. In a related context, this Court also understands *Freytag* addresses waiver of "constitutionally based structural protection," not just Appointments Clause challenges. *Commission on Ethics v. Hardy*, 125 Nev. 285, 299 (2009).[1] Justice Gorsuch recently described *Freytag* as holding that "forfeited

[1] In *Freytag*, after rejecting waiver of the constitutional challenge, the Court held the Executive Branch's acquiescence in the alleged Appointment Clause violation did not deprive the Court of the power to reach the question either, for the same reasons

or waived arguments may be entertained when structural concerns" – not Appointments Clause Claims – "are at issue." *June Medical Svcs LLC v. Russo*, 140 S.Ct. 2103, 2175 (2020) (Gorsuch, J., dissenting).

In addition, Appellant does not contend raising this challenge at an earlier stage would have been anything but futile, given the basis of this challenge to the FHFA's structure arose only last summer with the June 29, 2020 decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). *See, e.g.*, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142–43 (1967) ("[T]he mere failure to interpose [a constitutional] defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground."). Before then, the Supreme Court had repeatedly upheld the constitutionality of independent agencies. *See id*. at 2198-2200. It was only in *Seila Law* that the Supreme Court held for the first time an independent agency headed by a *single* director removable only for cause violated constitutional separation of powers, overruling the Ninth Circuit's precedent upholding the same structure of the Consumer Finance Protection Board. *See id*. at 2200-07; id. at 2197.

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founded in the importance of preserving separation of powers. *See* 501 U.S. at 880. In *Hardy*, this Court relied on that passage to hold that "constitutionally based structural protections cannot be waived by either the legislative or executive branch."). Put simply, this Court correctly viewed *Freytag* as addressing waiver of claims based on the "structural protections" of the Constitution's separation-of-powers regime generally, not the Appointments Clause specifically.

Second, SFR does not argue *Collins* will completely dispose of this lawsuit, rather that *Collins* may call into substantial doubt the validity of the HERA claim in this case, making final relief premature. The FHFA has conceded the FHFA's structure is unconstitutional so it is likely the Court will find them so. *Collins* Federal Parties Reply Br. 23-26. The question is whether the challenged actions are ultra vires, and "must be set aside." *Collins* Petr. Br. 65. If the Court agrees, its decision will have direct implications here, where the claim depends entirely on the Federal Foreclosure Bar, which applies only on conservatorship, a decision the statute leaves to the "discretion of the Director." 12 U.S.C. § 4617(a)(2). If the Net Worth Sweep is invalid due to the unconstitutional structure, it will also draw into serious question the validity of the conservatorship which, if ultra vires, destroys the FFB claim here.

Other arguments are unconvincing, such as lack of standing which is irreconcilable with SFR should have brought the challenge when the conservatorship was imposed, five years before the foreclosure sale and eight years before Appellant invoked the FFB. SFR is obviously and directly injured by the conservatorship decision, which triggered the FFB claim relied on to deprive SFR of valuable property rights. Nothing in HERA restricts an injured party from challenging the conservatorship decision, or sets a time limit to raise such a defense to the FFB. *See* Op. 8 (citing 12 U.S.C. § 4617(a)(5)). SFR is challenging the applicability of the FFB, which *Appellant* sought to use. Finally, the Court will necessarily address the

issue of the acting vs. appointed FHFA director in *Collins*. *See Collins*, Fed. Resps. Reply Br. 31-37; *but see Collins* Petr. Reply Br. 11-18 (arguing to the contrary). *Collins* may impact the foundation of Appellant's HERA claim, which is reason enough to stay pending the decision in *Collins* and disposition of SFR's pending Petition in *M&T Bank*. Appellant can then argue why *Collins* decision should not affect this case, and this Court can consider them with the benefit of what the Supreme Court has actually decided (rather than what Appellant claims the U.S. Supreme Court *should* decide).

The delay would not last long. *Collins* was argued in December and will be decided end of June, latest. Barring multiple extensions, the SFR Petition will be resolved by March or April. Denying a stay, could lead to pointless further litigation, forcing SFR to seek certiorari from this Court's decision to ask the Supreme Court to vacate and remand for reconsideration in light of *Collins*.

DATED this 20th day of January, 2021.

KIM GILBERT EBRON

/s/ Karen L. Hanks
KAREN L. HANKS, ESQ.
Nevada Bar No. 9578
Attorneys for SFR Investments Pool 1, LLC

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on this 20th day of January, 2021. Electronic service of the foregoing Reply in Support of Motion to Stay Issuance of Remittitur shall be made in accordance with the Master Service.

/s/ *Karen L. Hanks*
An employee of Kim Gilbert Ebron

TAB 51

Case No. 77010

IN THE SUPREME COURT OF NEVADA

JP MORGAN CHASE BANK, National Association, a national association Appellant, vs. SFR INVESTMENTS POOL 1, LLC, Respondent.	Electronically Filed Feb 11 2021 04:12 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

NOTICE OF SUPPLEMENTAL AUTHORITIES IN SUPPORT OF MOTION TO STAY

JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593

KAREN L. HANKS, ESQ.
Nevada Bar No. 9578

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Pursuant to NRAP 31(e), SFR Investments Pool 1, LLC submits the following notice of supplemental authorities.

On February 10, 2021, the United States Court of Appeals for the Ninth Circuit issued an order staying the appeal in *Federal Housing Finance Agency; et al. v. GR Investments, LLC; et al.*, Case No. 20-16317, DktEntry 15 pending the U.S. Supreme Court's resolution in *Collins v. Mnuchin*, No. 19-422. Also, on February 11, 2021, the Ninth Circuit issued an order staying the appeal in *Federal National Mortgage Association v. Southern Highlands Community Association*, Case No. 20-16585, DktEntry 15 pending resolution in *Collins*. In both circumstances, the orders were issued following a request to stay on grounds identical to that requested here and support granting SFR's requested stay.

DATED this 11th day of February, 2021.

KIM GILBERT EBRON

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Certificate of Service

I hereby certify that this document was filed electronically with the Nevada Supreme Court on this 11th day of February, 2021. Electronic service of the foregoing **NOTICE OF SUPPLEMENTAL AUTHORITIES IN SUPPORT OF MOTION TO STAY** shall be made in accordance with the Master Service List.

/s/ *Jason G. Martinez*
An employee of Kim Gilbert Ebron

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 10 2021

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

FEDERAL HOUSING FINANCE AGENCY; et al.,

Plaintiffs-Appellees,

v.

GR INVESTMENTS, LLC; SILVERSTONE, LLC,

Defendants-Appellants.

No. 20-16317

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

ORDER

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

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

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

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

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

SSR/Pro Mo

The briefing schedule will be reset in a future order.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

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