IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC,

Appellant,

vs.

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,

Respondent.

Case No. 83214

APPEAL

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

RESPONDENT'S MOTION FOR SUMMARY AFFIRMANCE

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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 in order that the judges of this court may evaluate possible disqualification or recusal. Respondent JPMorgan Chase Bank, N.A. is a wholly owned subsidiary of JPMorgan Chase & Co., which is a publicly held corporation. JPMorgan Chase & Co. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. However, The Vanguard Group, Inc., an investment adviser which is not a publicly held corporation, has reported that registered investment companies, other pooled investment vehicles and institutional accounts that it or its subsidiaries sponsor, manage or advise have aggregate ownership under certain regulations of 10% or more of the stock of JPMorgan Chase & Co.

Dated: December 22, 2021.

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INTRODUCTION

This Court has twice reversed the district court's judgment in favor of Appellant SFR Investments Pool 1, LLC ("SFR"). This Court most recently remanded the case in a published, en banc decision with instructions that "the district court [] enter judgment in favor of [Chase] such that the Federal Foreclosure Bar prevented the foreclosure sale from extinguishing the first deed of trust." *JPMorgan Chase Bank, Nat'l Ass'n v. SFR Invs. Pool 1, LLC*, 475 P.3d 52, 58 (Nev. 2020). On remand, the district court complied with that order, with no objection from SFR.

SFR brings the case to this Court for the third time, seeking to introduce an issue never before presented to the district court or in the prior rounds of appellate briefing. SFR's new theory is that FHFA's statutory structure somehow caused it harm, referring to the provision specifying that FHFA's Director can be removed only for cause, and citing *Collins v. Yellen*, 141 S. Ct. 1761 (2021). SFR now demands that this Court remand this case to the district court *a third time* so that SFR can pursue this theory. *See* Appellant's Opening Brief ("AOB") at 17-21.

The Court should instead summarily affirm the judgment of the district court because this latest appeal is baseless. The Court recently rejected identical arguments that SFR raised for the first time on appeal in a materially identical case. *Ditech Fin. LLC v. SFR Invs. Pool 1, LLC*, No. 81949, 2021 WL 5993383, at *1 (Nev. Dec. 17, 2021) (unpublished disposition). SFR argued there, as it does here, "that it should be permitted to seek money damages on remand based on [*Collins*]." *Id.* at *1. This Court rejected that argument because SFR failed to "explain from whom it wishes to seek money damages" or "why it was unable to previously make arguments

similar to those asserted by the plaintiffs in *Collins*." *Id.* The Court reversed judgment in favor of SFR, finding that the servicer was entitled to judgment in its favor without the need for additional discovery or briefing. *Id.* The Ninth Circuit has likewise rejected a purchaser's late invocation of *Collins* as procedurally improper, irrelevant to the issues in the case, and futile. *Bayview Loan Serv. v. 6364 Glenolden St. Tr.*, No. 19-17544, 2021 WL 4938115 (9th Cir. Oct. 22, 2021).

Moreover, a quick resolution of this appeal is necessary to discourage similar baseless tactics by SFR and other HOA sale purchasers in Federal Foreclosure Bar cases.[1] The Court should not indulge these tactics, and should instead summarily affirm the district court's decision.

LEGAL STANDARD

This Court has no express rule governing summary affirmance, but has inherent discretion to dispense with full merits briefing when an appeal presents no viable issue. On numerous occasions, the Court has invoked its inherent authority and/or NRAP 2 to resolve appeals on an expedited basis. *See Lee v. Whitmer*, 477 P.3d 1124 (Nev. 2020) (rejecting attempt to introduce new arguments on appeal).[2]

[1] This meritless appeal is one of dozens brought by HOA sale purchasers concerning the Federal Foreclosure Bar. *See, e.g.*, *Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, 996 F.3d 950, 959 n.5 (9th Cir. 2021); *Bayview*, 2021 WL 4938115, at *3; *Nationstar Mortg. LLC v. 312 Pocono Ranch Tr.*, No. 19-17504, 2021 WL 4938117, at *2 (9th Cir. Oct. 22, 2021).

[2] *See also Pressey v. Christiana Tr.*, 130 Nev. 1232 (Nev. 2014); *Nev. Pol'y Rsch. Inst. v. Clark Cnty. Reg'l Debt Mgmt. Comm'n*, No. 61560, slip op. at 2 (Nev. Aug. 24, 2012); *Cook v. Maher*, 108 Nev. 1024, 1025 n.1 (1992) (per curiam).

ARGUMENT

Summary affirmance is warranted because 1) SFR's argument was never previously raised and thus procedurally improper; 2) SFR's argument is unrelated to a pending claim; 3) an attempt to assert a *Collins*-based claim at this stage is belated, prejudicial, and futile; and 4) summary affirmance would deter SFR and other HOA sale litigants from needlessly prolonging litigation.

I. SFR's New *Collins*-Related Argument Is Procedurally Improper.

SFR sets forth a new argument concerning the separation-of-powers issue resolved in *Collins*. In that case, the U.S. Supreme Court concluded that although HERA's "for cause" removal restriction for FHFA's Director, 12 U.S.C. § 4512, improperly restricted the President's authority, the fact remained that all of FHFA's directors "were properly appointed," leaving "no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office." *Collins*, 141 S. Ct. at 1787-88. SFR now contends that the Court should remand to "evaluate the damages, or harm" resulting from "[d]ecisions…made by the FHFA Director while serving under an unconstitutional statute." AOB at 4.

This argument never appeared in SFR's briefing before the district court or before this Court in prior rounds of appeals. SFR never suggested that FHFA's structure might be defective, much less that any such defect caused it harm. Indeed, SFR has never asserted any claim against FHFA, which is not a party to this case. Instead, SFR's arguments have always concerned whether an Enterprise under FHFA conservatorship owns the Loan, whether the Federal Foreclosure Bar

protected that interest from extinguishment, and whether Chase's assertion of that argument was time barred. *See Chase v. SFR*, 475 P.3d 52.

Indeed, this Court has already rejected SFR's *Collins*-related arguments in another appeal as improper, finding that SFR failed to explain "why it was unable to previously make arguments similar to those asserted by the plaintiffs in *Collins*." *Ditech v. SFR*, 2021 WL 5993383, at *1. The Ninth Circuit has likewise concluded that SFR's argument is "improper because it tries to inject a new issue into the case." *Bayview*, 2021 WL 4938115, at *2. That the U.S. Supreme Court only recently ruled on a question of law, as SFR argues, does not mean that SFR could not have raised a similar question before the decision was issued. *See* AOB at 9-14.

This Court's precedent is clear: the Court does not consider arguments raised for the first time on appeal. *See Barket v. Hart*, 129 Nev. 1097, *1 n.1 (2013) (citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). This rule is common to appellate practice, broken only in exceptional circumstances necessary to prevent manifest injustice. *See, e.g., Padgett v. Wright*, 587 F.3d 983, 986 (9th Cir. 2009). SFR cannot establish such exceptional circumstances here.

II. SFR's New Argument Does Not Relate to a Pending Claim.

SFR contends that under *Collins*, it may challenge FHFA's purported shift in policy from "generally consenting to foreclosure under state super lien laws[] to… issuing a blanket statement" of non-consent. *See* AOB at 14. But those arguments are irrelevant to this case—SFR has not pled any claim or defense relating to the Director's decisions or FHFA's structure, and it has not alleged any harm flowing from the removal provision. SFR has not asserted *any* claim against FHFA, the party

that—under SFR's new theory—took action that supposedly caused SFR harm. SFR cannot seek damages from an entity that is not a party to any claim, nor can it pursue damages against Chase for FHFA's actions.

Furthermore, a party cannot seek relief for a claim or defense it has not pled. A pleading must be "sufficiently definite to give 'fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'" *Taylor v. State*, 73 Nev. 151, 152 (1957). A party must set forth "the facts which support his complaint." *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578-79 (1995); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). SFR's pleading provides no notice that it will make an argument related to an FHFA Director action or the removal provision. That argument never appeared in SFR's answer or counterclaim, or in subsequent briefing over nearly eight years—until SFR made the argument in its opening brief for this *third* appeal. SFR did not even seek damages in its answer or counterclaim. *Id.*; *see also* AOB at 1.

Under similar circumstances, both this Court and the Ninth Circuit rejected an HOA sale purchaser's invocation of *Collins* for the first time on appeal. *Ditech v. SFR*, 2021 WL 5993383, at *1 (SFR failed to "explain from whom it wishes to seek money damages"); *Bayview*, 2021 WL 4938115, at *2 ("Because FHFA is not a party to this case, it is unclear how we could even order the damages proceedings that the Trust requests on remand."). The Court should do the same here.

III. SFR Cannot Add a *Collins*-Based Claim or Defense Now.

Even if SFR were to move to amend the complaint on remand to assert a new claim and join a new party, that request would be denied as belated, prejudicial, and

futile. *See MEI-GSR Holdings, Inc. v. Peppermill Casinos, Inc.*, 134 Nev. 235, 239 (2018) (describing factors for denying motion to amend).

A. Any Attempt to Amend Would Be Untimely and Prejudicial.

SFR's amendment would be belated because it could have raised a challenge to FHFA's decisions any time after they were made. SFR likewise was free to challenge the removal provision at any time after it purchased the Property in 2013; the for-cause removal provision had already been enacted as part of HERA in 2008. And as all the facts necessary to raise such a claim were public, SFR has no excuse for its delay. SFR could have challenged removal as the plaintiffs in *Collins* did, but it did not. It is far too late to add new claims or to join FHFA as a party.

B. Any Attempt to Amend Would be Futile.

Remand would be futile because SFR's new argument cannot succeed as a matter of law. *See Allum v. Valley Bank of Nev.*, 109 Nev. 280, 302 (1993). Indeed, the Ninth Circuit held in *Bayview* that the purchaser's "suggestion that *Collins* voided FHFA's actions with regard to [a loan] owned by [an Enterprise] is baseless." 2021 WL 4938115, at *2.

1. No FHFA Director's Action Caused SFR Harm.

SFR asserts that the harm it has suffered is its inability to acquire free-and-clear title to the property through the HOA Sale. *See* AOB at 19. But that circumstance results from the automatic operation of a federal statute, not from a FHFA Director's decision. The Federal Foreclosure Bar set a default rule: by law, Enterprise liens are automatically protected from extinguishment via a foreclosure, absent FHFA's affirmative consent. 12 U.S.C. § 4617(j)(3). The Federal Foreclosure

Bar, enacted in 2008, thus prevented the 2013 HOA Sale from extinguishing Freddie Mac's interest as a matter of law. This Court acknowledged the point in confirming that Federal Foreclosure Bar-based claims and defenses do not turn on FHFA action. *See Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 417 P.3d 363, 368 (Nev. 2018); *BDJ Invs., LLC v. Ditech Fin. LLC*, 472 P.3d 194 (Nev. 2020). Thus, neither FHFA nor its Director needed to act for the Deed of Trust to survive the HOA Sale, and neither did.

SFR's argument also fails because FHFA made no such decision. SFR presents no plausible evidence of a policy change. *See* AOB at 14-15 & n.32. To the contrary, FHFA in April 2015, "confirm[ed] that it *has not* consented, and will not consent in the future, to the foreclosure or other extinguishment or any [Enterprise] lien or other property interest in connection with HOA foreclosures of super-priority liens." Statement on HOA Super-Priority Lien Foreclosures ("2015 Statement") (Apr. 21, 2015), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-SuperPriority-Lien-Foreclosures.aspx) (emphasis added); *see also Ditech Fin. LLC v. T-Shack, Inc.*, 850 F. App'x 529, 530 (9th Cir. 2021). There can be no decision to change a practice that never existed.

Even if it were the case that FHFA broke a prior silence to adopt a new policy, that "change" would be illusory and without legal effect. Because only "affirmative consent" can waive the Federal Foreclosure Bar's protection, *Christine View*, 417 P.3d at 368, both implicit consent and express non-consent lead to the same result: protection of the Enterprise lien. Accordingly, FHFA's purported abandonment of a policy of "implicit consent" could not cause SFR any harm.

2. *Collins* Does Not Affect the Validity of FHFA Actions That Lack a Direct Causal Connection to the Removal Provision.

SFR's argument also fails because it cannot connect the removal provision addressed in *Collins* with any Director decision that could have caused it harm. As the Ninth Circuit concluded in *Bayview*, an HOA sale purchaser cannot pursue a *Collins*-style damages claim when it fails to "causally link[] a specific, tangible harm to the for-cause removal provision." 2021 WL 4938115, at *2. Indeed, the U.S. Supreme Court did not hold that every Director action is void, instead confirming that "because [a]ll the officers who headed the FHFA during the time in question were properly *appointed*," there is "no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office." *Collins*, 141 S. Ct. at 1787-88.

Thus, the fact that the for-cause removal provision is unconstitutional does not provide any basis for overturning FHFA action unless a claimant demonstrates a causal link between that provision and specific, tangible harm. *See Collins*, 141 S. Ct. at 1789; *Bayview*, 2021 WL 4938115, at *2. That causal requirement ensures that "actions the President supports—which would have gone forward whatever his removal power—will remain in place" and cannot support a claim for relief. *Collins*, 141 S. Ct. at 1801-02 (Kagan, J. concurring in part). And "[w]hen an agency decision would not capture a President's attention, his removal authority could not make a difference…." *Id.* at 1802 (Kagan, J. concurring in part); *see also id.* at 1795 ("[A]bsent an unlawful act, the [*Collins* plaintiffs] are not entitled to a remedy.") (Thomas, J., concurring). SFR has not alleged any connection between the for-cause

removal provision and its inability to obtain clear title to the Property, and cannot prevail on a *Collins*-based claim.

Nor could SFR plausibly make such allegations. The specific policy SFR posits FHFA would have adopted—consenting to extinguish valuable property interests for no consideration—would have been an irrational decision contradicting Congress's intent in protecting Enterprise liens through the Federal Foreclosure Bar. Nothing supports SFR's implicit position that FHFA would have done anything different but for the removal provision. FHFA's Director at the time was appointed by the sitting President, whose public statements give no indication of any concern with the 2015 Statement, let alone any indication that the President would have fired the Director over it absent the removal provision.[3]

IV. Summary Affirmance Will Discourage Tactics That Needlessly Prolong Litigation.

Summary affirmance is also appropriate because it would deter SFR and others from using this tactic of delaying final judgments with groundless litigation. Ending this appeal swiftly would serve the interests of judicial economy and substantial justice. SFR and other HOA sale purchasers have sought to belatedly introduce *Collins* in a number of other appeals under similar circumstances, and if they are allowed to delay resolution of this particular case using that tactic, SFR and the others would seek to raise *Collins* in petitions for rehearing, new appeals from

[3] The Obama White House archives reflect that the White House did not make any statements or issue any press releases related to FHFA's 2015 Statement. *See Briefing Room: Statements and Releases*, THE WHITE HOUSE, https://obamawhitehouse.archives.gov/realitycheck/briefing-room/statements-and-releases (last visited Sept. 23, 2021).

cases already resolved by this Court, and in other ways 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 delay final judgment. In ordering sanctions against an HOA sale purchaser that brought a frivolous appeal, the Ninth Circuit noted that the purchaser "ha[d] a strong financial incentive to file appeals, even if those appeals are frivolous, because it continues to reap the economic benefit of holding title to the properties during prolonged litigation." Ex. 1, Order, *Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, No. 19-17043 (9th Cir. Aug. 26, 2021). The Ninth Circuit has since ordered sanctions against two other HOA sale purchasers, both of which attempted to raise *Collins* belatedly in their frivolous appeals. *See Bayview*, 2021 WL 4938115, at *3; *312 Pocono Ranch Tr.*, 2021 WL 4938117, at *2.

The same incentives apply to SFR: having acquired the property for far less than fair market value, SFR continues to reap substantial profits by renting it out at market rates. Freddie Mac made a substantially larger, market-priced investment in the loan secured by the property but receives no return whatsoever. SFR will continue to 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), 4617(b)(2)(D)(ii).

CONCLUSION

For the foregoing reasons, Chase respectfully requests that the Court affirm summarily the judgment of the district court.

Dated: December 22, 2021.

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CERTIFICATE OF SERVICE

I certify that on December 22, 2021, I filed **Respondent's Motion for Summary Affirmance**. Service will be made on the following through the Court's electronic filing system:

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