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 REPLY IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE

Joel E. Tasca
Nevada Bar No. 14124
BALLARD SPAHR LLP
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135
(702) 471-7000
tasca@ballardspahr.com

Andrew S. Clark
Nevada Bar No. 14854
BALLARD SPAHR LLP
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135
(702) 471-7000
clarkas@ballardspahr.com

Attorneys for Respondent JP Morgan Chase Bank, N.A.

This case has been pending for more than seven years. SFR's arguments that 1) summary affirmance is inappropriate; 2) SFR did not waive any argument concerning the structure of FHFA by failing to raise it any point during earlier proceedings; and 3) the harm purportedly suffered by SFR should be determined by the district court on remand—all of which would serve only to needlessly delay final resolution—lack merit. The Court should bring this long-running dispute promptly to conclusion by summarily affirming the district court judgment.

ARGUMENT

I. Summary Affirmance Is Appropriate.

This Court has the inherent discretion to dispense with full merits briefing if an appeal presents no viable issue. Mot. at 2. SFR does not argue otherwise; rather, SFR quibbles that Chase cited cases involving election issues or injunctive relief. *See* SFR Opposition to Motion for Summary Affirmance ("Opp.") at 3. But that is beside the point, as those cases confirm that this Court may, at its discretion, summarily affirm a district court decision without full merits briefing.

II. SFR Has Forfeited Its *Collins* Arguments.

Absent exceptional circumstances and manifest injustice, this Court does not consider arguments for the first time on appeal. *See* Mot. at 4. SFR identifies neither here. To the contrary, SFR could have challenged FHFA's structure on separation-of-powers grounds at any time, as the *Collins* plaintiffs did, regardless of whether the U.S. Supreme Court had already ruled on the point. Indeed, this Court recently criticized SFR for untimely raising similar arguments in another Federal Foreclosure Bar action. *Ditech Fin. LLC v. SFR Invs. Pool 1, LLC*, No. 81949, 2021 WL

5993383, at *1 (Nev. Dec. 17, 2021) (unpublished disposition); *see also Bayview Loan Serv. v. 6364 Glenolden St. Tr.*, No. 19-17544, 2021 WL 4938115 (9th Cir. Oct. 22, 2021).

SFR argues that courts must allow parties to raise structural constitutional questions at any point in litigation, even the eleventh hour, citing *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991). Opp. at 4-6. But *Freytag* did not adopt a "general rule" that structural constitutional rights cannot be forfeited. *See id.* at 893 (Scalia, J., concurring in part). And *Freytag* concerns an appeal from a decision by a *judge* who was improperly appointed—a narrow circumstance not presented here—calling into question the integrity of the *decision on appeal*. 501 U.S. at 880-84. Nor are the other cases on which SFR relies for its position any more persuasive. *See* Opp. at 11-12. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967), the court recognized that "it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time," if that waiver was one of a known right or privilege. *See id.* at 11. And in *Commission on Ethics v. Hardy*, 212 P.3d 1098 (Nev. 2009)—which was pled at the outset as a constitutional claim—this Court cites *Freytag* for a substantive point, not for anything having to do with whether constitutional issues can be raised initially seven years into an ongoing litigation.

III. SFR Cannot Prevail on the Merits, and this Court Should Not Remand the Case.

SFR argues that this Court should remand the case so the district court can "evaluate the evidence to the existence of and the extent of damages to SFR" as a result of any action by the FHFA Director. Opp. at 9; *see also id.* at 8-10. As

explained in Chase's Motion, any attempt to amend would be futile, as no FHFA Director action caused SFR any harm. *See* Mot. at 6-7.

Regardless, any *Collins*-based claim SFR might seek to insert into the case at this late date would be time-barred. An amended pleading relates back only where it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out … in the original pleading." Nev. R. Civ. P. 15(c). Here, SFR filed its original counterclaim seeking quiet-title and injunctive relief more than seven years ago, in March 2014; SFR now seeks to amend that complaint to add a new claim arising from a purported change in FHFA's policy of non-consent, not the underlying HOA Sale. Because the new claim SFR seeks to add does not arise out of the transaction or occurrence of the original pleading (the HOA Sale), any amendment raising it would be time-barred.

Nor would SFR's claim be viable in any event. SFR's supposed harm—its inability to acquire free-and-clear title to the Property through the HOA Sale, *see* Opp. at 8-9—results from the automatic operation of a federal *statute*, not from a FHFA Director's *decision* as SFR argues. 12 U.S.C. § 4617(j)(3); *Saticoy Bay LLC Series 9641 Christine View v. Fed. Nat'l Mortg. Ass'n*, 417 P.3d 363, 368 (Nev. 2018). Neither FHFA nor its Director needed to act for the Deed of Trust to survive the HOA Sale, and neither did.

SFR also claims that FHFA "maintain[ed] a policy of hiding FHFA's interest for as long as possible" and that such policy harmed SFR because SFR engaged in years of litigation. Opp. at 2, 9. The supposed "policy" of which SFR complains is that the Enterprises, *consistent with Nevada law*, often list their loan servicers as

record beneficiaries of the deeds of trust they own to allow the servicers to manage the loans more effectively. SFR's concern is with Nevada doctrine, not with anything FHFA's Director did or did not do.

Moreover, SFR has not identified any connection between the for-cause removal provision at issue in *Collins* and SFR's inability to obtain clear title to the Property here. And the Ninth Circuit recently concluded that an HOA sale purchaser's "suggestion that *Collins* voided FHFA's actions with regard to the … loan owned by Freddie Mac is baseless" given that *Collins* did not invalidate any FHFA actions. *Bayview*, 2021 WL 4938115, at *2. In any event, FHFA's Director at the time of the purported "decision" was appointed by a sitting President—then-President Obama—whose public statements give no indication of any concern with the 2015 Statement, let alone any indication that the President would have fired FHFA's Director over it absent the removal provision. *See* https://obamawhitehouse.archives.gov/realitycheck/briefing-room/statements-and-releases/ (last visited Feb. 2, 2022).

In an attempt to shore up its position, SFR references a letter from former President Trump in which he states that he would have removed the Enterprises from FHFA conservatorship during his administration. Opp. at 1 & n. 3, 9. Whatever former President Trump might suggest, after the fact, that he or anyone serving as FHFA Director during his administration might have done differently absent the removal provision is irrelevant here. The Federal Foreclosure Bar—including its consent requirement—operates at the time of an HOA sale. *Daisy Tr. v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 847 (Nev. 2019) (en banc); *Nationstar Mortg. LLC v.*

Saticoy Bay LLC, Series 9229 Millikan Ave., 996 F.3d 950, 955 (9th Cir. 2021). Because the HOA Sale at issue here occurred in November 2013—more than three years *before* former President Trump took office in January 2017—former President Trump's 2021 statement is beside the point.

Nor does SFR make any argument that absent the removal provision FHFA would have adopted a policy of consent to the extinguishment of its interests, and it cannot plausibly do so. Indeed, the specific policy SFR posits FHFA would have adopted—consenting to extinguish valuable property interests for no consideration—would be irrational and would contradict Congress's intent in protecting Enterprise liens through the Federal Foreclosure Bar. Unsurprisingly, therefore, the FHFA Director President Trump appointed *maintained* the policy of non-consent during his tenure, and SFR makes no allegation to the contrary.

SFR also points the Court to portions of an oral argument (in a writ proceeding involving FHFA) that have nothing to do with *Collins*. *See* Opp. at 1 & n.2, 8 (citing *FHFA v. Eighth Jud. Dist. Ct., Clark Cty*, No. 82666 (Nev.) ("*Westland*")). SFR parrots an implausible doomsday scenario offered by FHFA's *opponent*, while neglecting to inform the Court that *Westland* does not concern the Federal Foreclosure Bar, an HOA sale, or a single-family residence. Rather, *Westland* concerns a statute mandating that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator"—12 U.S.C. 4617(f)—that is not at issue here.

CONCLUSION

The Court should summarily affirm the judgment of the district court.

Dated: February 2, 2022.

BALLARD SPAHR LLP

By: /s/ Andrew S. Clark
Joel E. Tasca, Esq.
Nevada Bar No. 14124
Andrew S. Clark, Esq.
Nevada Bar No. 14854
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on February 2, 2022, I filed **Respondent's Reply in Support of Motion for Summary Affirmance**. Service will be made on the following through the Court's electronic filing system:

Jacqueline A. Gilbert
Diana S. Ebron
KIM GILBERT EBRON

Counsel for Respondent

/s/ M.K. Carlton
An Employee of Ballard Spahr LLP