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

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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 ANSWERING BRIEF

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.

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.

Respondent 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 respondent's behalf in the district court and expects to appear on respondent's behalf in this Court.

Dated March 4, 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

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(1). The Order granting judgment in favor of Respondent JP Morgan Chase Bank, National Association (**Chase**) was entered on June 9, 2021, and was served that same day. 12 AA_2738-42. SFR Investments Pool 1, LLC (**SFR**) timely appealed on July 9, 2021. 12 AA_2754-56; *see* NRAP 4(a)(1) (notice of appeal must be filed "no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served").

ROUTING STATEMENT

This appeal is presumptively retained by this Court because it raises a question of statewide public importance. NRAP 17(a)(12). SFR agrees that this appeal raises questions of statewide public importance, though it cites to the wrong subsection of the Rules in support of that statement. *See* Appellant's Opening Br. (**AOB**) at vii & n.2 (citing NRAP 17(a)(2), which discusses ballot or election questions). SFR also claims that the Court should hear this case because it raises "issues of first impression," incorrectly citing NRAP 17(a)(13)–(14). *Id.* The correct provision is NRAP 17(a)(11).

INTRODUCTION

This case, which concerns a Nevada HOA foreclosure sale (**HOA Sale**) and a deed of trust owned by the Federal Home Loan Mortgage Corporation (**Freddie Mac**) while under the conservatorship of the Federal Housing Finance Agency (**FHFA** or **Conservator**), has twice been before this Court on appeal. In its most recent order, this Court 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, finding that SFR's interest is subject to Freddie Mac's deed of trust, with no objection from SFR.

SFR does not challenge any ruling that led to the judgment against it. Instead, SFR raises for the first time in this third appeal a new issue never before presented to the district court or in prior rounds of appellate merits 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 yet again so that it can pursue its latest theory du jour.

This Court should affirm the district court's judgment because the removal provision is irrelevant to this case, and SFR's attempt to leverage it to prolong this litigation is procedurally improper and substantively unfounded. Indeed, this Court recently rejected materially identical arguments raised by SFR for the first time on appeal. *Ditech Fin. LLC v. SFR Invs. Pool 1, LLC*, No. 81949, 2021 WL 5993383, at *1 (Nev. Dec. 17, 2021) (unpublished disposition). The Ninth Circuit has likewise rejected an HOA sale 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).

SFR does not challenge the district court's ruling that the Federal Foreclosure Bar protected the Deed of Trust from extinguishment through the foreclosure sale, and *Collins* has no effect on the judgment against SFR. The Court should affirm.

STATEMENT OF THE ISSUES

I. Whether SFR may inject a new issue into this litigation where it did not present that issue at any point in the district court proceedings or the previous two appeals.

II. Whether the case should be remanded for consideration of a new claim, irrelevant to those SFR has asserted thus far in this litigation: specifically, that the for-cause removal provision in the Housing and Economic Recovery

Act of 2008 (**HERA**), Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq*.), harmed SFR's interest in the property.

STATEMENT OF THE CASE

This case has already come before this Court twice. In the most recent previous appeal, this Court held that Chase's assertion of the Federal Foreclosure Bar was timely and that the Federal Foreclosure Bar prevented the HOA Sale from extinguishing Freddie Mac's deed of trust. Applying the same reasoning this Court has endorsed in several decisions—including *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846 (Nev. 2019) (en banc), and *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 417 P.3d 363 (Nev. 2018) (en banc)—the Court remanded with instructions to enter judgment for Chase; the district court properly did so. Until SFR filed the instant appeal, SFR had never asserted any claim, or offered any argument, regarding FHFA's structure.

This appeal followed.

STATEMENT OF FACTS

I. The Secondary Mortgage Market

Congress created Freddie Mac to support a nationwide secondary mortgage market. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). Freddie Mac's federal statutory charter authorizes it to purchase and deal only in secured "mortgages," not unsecured loans. *See* 12 U.S.C. §§ 1451(d), 1454.

Freddie Mac does not directly manage many of the practical aspects of mortgage relationships, such as day-to-day borrower interactions; instead, it contracts with servicers to act on its behalf. In that role, servicers often appear as record beneficiaries of deeds of trust. *See Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 757–58 (Nev. 2017) (acknowledging servicers' role); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011) (describing servicers' role); Restatement (Third) of Property: Mortgages § 5.4 cmt. c (discussing the common practice where investors in the secondary mortgage market designate their servicer to be assignee of the mortgage); Freddie Mac's Single-Family Seller/Servicer Guide (the **Guide**) at 1101.2(a) (discussing Freddie Mac's relationship with servicers to manage the loans Freddie Mac purchases).[1] In such

[1] Because certain relevant exhibits to Chase's summary judgment motion were omitted from Volume 7 of SFR's Appendix (*see* 7 AA_1556-1590), Chase has submitted an Appendix with those materials (**Respondent's Appendix** or **RA**). Relevant portions of the Guide were submitted with Chase's motion for summary judgment. *See* 7 AA_1590-98; 8 AA_1702, 1715-40; RA_0015-36. This Court may also take judicial notice of the Guide. *E.g.*, *Daisy Trust*, 445 P.3d at 849 n.3 (taking judicial notice of Freddie Mac's servicing guide on appeal). The Guide is "generally known," especially by members of the mortgage lending and servicing industry in Nevada, and "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." NRS 47.130(2). An interactive version of the current Guide is publicly available on Freddie Mac's website at https://guide.freddiemac.com/app/guide. A static, PDF copy of the current Guide is available at https://guide.freddiemac.com/ci/okcsFattach/get/1002095_2 and archived prior versions of the Guide are available at https://guide.freddiemac.com/app/guide/archive. While the cited sections of the

situations, the note owner remains a secured creditor with a property interest in the collateral, even if the recorded deed of trust names only the loan servicer. *See, e.g.*, *In re Montierth*, 354 P.3d 648, 650–51 (Nev. 2015) (en banc); *Daisy Trust*, 445 P.3d at 849.

Freddie Mac and its servicers also work with Mortgage Electronic Registration Systems, Inc. (**MERS**). MERS is "a subscription-based service that tracks changes in mortgage servicing rights and beneficial ownership interests in loans secured by residential properties." *Perez v. MERS*, 959 F.3d 334, 336 n.1 (9th Cir. 2020). While "MERS, as the 'nominee' of the lender and of [the lender's] assignee," is "recorded as the beneficiary under the deed of trust," the lender (or its successor or assignee) remains owner of the promissory note and corresponding deed of trust. *See In re MERS, Inc.*, 754 F.3d 772, 776 (9th Cir. 2014); *Daisy Trust*, 445 P.3d at 849.

II. Statutory Background

HERA established FHFA as the Enterprises' regulator, authorized its Director to place the Enterprises into conservatorships in certain circumstances, and enumerated the powers, privileges, and exemptions FHFA possesses as Conservator. In September 2008—at the height of the financial crisis—FHFA's Director placed

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Guide have been amended over the course of Freddie Mac's ownership of the Loan, none of these amendments have materially changed the relevant sections.

the Enterprises into conservatorships, where they remain today. *See Nationstar*, 396 P.3d at 755.

The Federal Foreclosure Bar—a broad statutory "exemption," captioned "Property protection," within HERA's conservatorship provision—mandates that when the Enterprises are under FHFA conservatorship, "[n]o property of the Agency shall be subject to … foreclosure … without the consent of the Agency …." 12 U.S.C. § 4617(j)(3). Another HERA provision mandates that upon the inception of conservatorship, FHFA succeeds immediately and by operation of law to "all rights, titles, powers, and privileges" of the entity in conservatorship "with respect to [its] assets," thereby making all conservatorship assets "property of the Agency" for the duration of the conservatorship. *See* 12 U.S.C. §§ 4617(b)(2)(A), (j)(3).

III. Facts Specific to the Property at Issue

This case involves a Deed of Trust securing a $240,000 promissory note (the **Note**) (together with the Deed of Trust, the **Loan**) on property located at 3263 Morning Springs Drive in Henderson (the **Property**). 1 AA_0061-81. The Deed of Trust, recorded on June 12, 2006, lists Robert M. Hawkins and Christine V. Hawkins (**Borrowers**) as the borrowers, GreenPoint Mortgage Funding, Inc. (**Lender**) as the lender, and MERS as beneficiary "acting solely as a nominee for Lender and Lender's successors and assigns." 1 AA_0061-62. Freddie Mac purchased the Loan in September 2006, thereby acquiring ownership of the Note and Deed of Trust.

RA_0004-5, 9. In October 2009, MERS, as nominee for Lender and Lender's successors and assigns, recorded an assignment of its interest in the Deed of Trust to Chase. 8 AA_1712-13.

According to a Foreclosure Deed recorded on March 6, 2013, SFR purchased the Property at the HOA Sale on March 1, 2013 for $3,700. 8 AA_1853-55.[2] At the time of the HOA Sale, Freddie Mac owned the Loan and Chase served as record beneficiary of the Deed of Trust in its capacity as Freddie Mac's Loan servicer. *See* RA_0006-7, 13; 8 AA_1712-13.

At no time did the Conservator consent to the HOA Sale extinguishing or foreclosing Freddie Mac's interest in the Deed of Trust. To the contrary, FHFA has publicly stated that it "has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection with HOA foreclosures of super-priority liens." 8 AA_1871 (FHFA's Statement on HOA Super-Priority Lien Foreclosures (**2015 Statement**) (Apr. 21, 2015), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx).

[2] SFR incorrectly states that the HOA Sale occurred on May 1, 2013, AOB at 5; as reflected in the foreclosure deed, the HOA Sale occurred on March 1, 2013. *See* 8 AA_1853-55.

IV. Relevant Procedural History

In November 2013, Chase filed a complaint seeking a declaration that the Deed of Trust survived the HOA Sale and an order quieting title in SFR's name, subject to the Deed of Trust. 1 AA_0002-08. In August 2016, the district court granted summary judgment in favor of SFR, concluding in part that Chase lacked standing to invoke the Federal Foreclosure Bar. 6 AA_1333-42. Following this Court's decision in *Nationstar v. SFR*, 396 P.3d 754, the parties stipulated to reconsideration of Chase's Federal Foreclosure Bar arguments and to vacation of the district court's earlier decision with respect to that issue. *JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, No. 71337, Dkt. No. 17-33540.

On remand, the district court awarded summary judgment to SFR on the grounds that Chase's assertion of the Federal Foreclosure Bar was time-barred under HERA's statute of limitations. 10 AA_2176-81. Chase appealed, and this Court reversed the district court judgment, finding that Chase timely asserted the Federal Foreclosure Bar. *Chase v. SFR*, 475 P.3d at 55-57. The Court also concluded that Chase was entitled to summary judgment because it "demonstrated that Freddie Mac owned the loan," and remanded "for the district court to enter judgment in favor of Chase such that the Federal Foreclosure Bar prevented the [HOA Sale] from extinguishing the [Deed of Trust] and SFR therefore took the property subject to that [D]eed of [T]rust." *Id.* at 58-59.

On remand and pursuant to this Court's order, the district court entered judgment in favor of Chase without objection from SFR on June 9, 2021, and the judgment was served that same day. 12 AA_2738-42. SFR timely noticed this appeal. 12 AA_2754-56.

In December 2021, Chase filed a motion for summary affirmance in this appeal. Dkt. No. 21-36497. This Court denied Chase's motion on the grounds that the arguments made in the motion go to the merits of the appeal, which this Court deemed as not an appropriate basis for summary affirmance. Dkt. No. 22-04655.

STANDARD OF REVIEW

"[A] de novo standard of review does not trump the general rule that '[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.'" *Schuck v. Signature Flight Support of Nev., Inc.*, 245 P.3d 542, 544 (Nev. 2010) (citing *Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981)). This Court may "decline to exercise [its] discretion to entertain … constitutional arguments raised for the first time on appeal." *Wells Fargo Bank v. Renslow*, No. 58283, 2015 WL 3368883, at *2 (Nev. May 21, 2015) (unpublished disposition).

SUMMARY OF ARGUMENT

SFR does not challenge the district court's holding that the Federal Foreclosure Bar protected Freddie Mac's Deed of Trust from extinguishment

through the HOA Sale. In fact, it does not challenge any aspect of the district court's decision. Instead, SFR appeals the entry of judgment against it on grounds that were neither raised nor passed upon by the district court: that the U.S. Supreme Court's decision in *Collins* provides a basis for remand so that the district court may "determine damages caused to SFR by the unconstitutional structure of the FHFA." AOB at 4.

SFR's attempt to introduce the question into this litigation fails as a procedural matter; SFR cannot raise that new argument on appeal. Regardless, the new argument would not succeed even if the Court were inclined to consider it, because SFR never pled a claim or defense that turns on an action taken by the FHFA Director. And any attempt to amend the pleadings on remand would be futile because SFR cannot link the removal provision to anything that happened in this case. FHFA's Director neither took any affirmative action with respect to the Deed of Trust nor effectuated any "policy change" that might have been different but for the removal provision.

This case has been pending far too long already. SFR has done everything it can to avoid the conclusion that the Federal Foreclosure Bar applied to preserve Freddie Mac's Deed of Trust. In a last-ditch effort to prolong this litigation yet again, SFR now asserts a constitutional claim it never argued nor pled in the district court and that has nothing to do with this case. SFR's attempt to inject a new issue

at this stage is a bald attempt to evade this Court's mandate and forestall final judgment, in contravention of the spirit of the mandate rule. SFR has run out of arguments that have even a thin veneer of plausibility, and this Court should promptly bring this action to a final conclusion by affirming the judgment the district court entered under this Court's previous mandate.

ARGUMENT

SFR argues that this Court should remand this case in light of the U.S. Supreme Court's recent decision in *Collins*. SFR asserts that "*Collins* makes it clear that decisions and actions taken by the Director of the FHFA under its unconstitutional structure are called into question," AOB at 18, and that "[j]ust like the *Collins* [plaintiffs], SFR should be able to go back on remand and develop the case as it relates to the actions of the [FHFA Director] and the potential damages caused to SFR as a result of those actions," *id.* at 19.[3]

[3] In discussing *Collins*, SFR points the Court to the oral argument in a pending Nevada Supreme Court proceeding involving FHFA. *See* AOB at 6 & n.11, 13 n.30 (citing *FHFA v. Eighth Jud. Dist. Ct., Clark Cty*, No. 82666 (Nev.) ("*Westland*")). SFR parrots arguments 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. *See generally* Pet. for Writ of Prohibition, *FHFA v. Eighth Jud. Dist. Ct., Clark Cty*, No. 82666, Dkt. No. 21-08661. 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), which is not at issue here.

Not so. In *Collins*, the U.S. Supreme Court held that the "for-cause" removal provision in HERA applicable to FHFA's Director violates the constitutional separation of powers restriction. 141 S. Ct. at 1787 (describing 12 U.S.C. § 4512). The U.S. Supreme Court confirmed that this structural defect left "no basis for concluding that any head of the FHFA lacked authority to carry out the functions of the office," because each Director was properly appointed. *Id.* at 1788. The U.S. Supreme Court's remand in *Collins* accordingly was narrow; FHFA's statutory powers were upheld and the court remanded the case solely for consideration as to whether the unconstitutional Director removal provision caused harm to the *Collins* plaintiffs. However, the court never held that the *Collins* plaintiffs were entitled to any relief upon remand. Indeed, "[t]he mere existence of an unconstitutional removal provision … generally does not automatically taint Government action by an official unlawfully insulated," *id.* at 1793 (Thomas, J. concurring), and "actions the President supports—which would have gone forward whatever his removal power—will remain in place" and cannot support a claim for relief, *id.* at 1801-02 (Kagan, J. concurring in part).

None of SFR's arguments for remand has merit. Indeed, the Nevada Supreme Court and the Ninth Circuit have rejected substantially the same arguments in materially identical cases, including one in which SFR offered them. *Ditech v. SFR*, 2021 WL 5993383, at *1 (rejecting SFR's *Collins* arguments because SFR "[did]

not explain from whom it wishes to seek money damages, nor … why it was unable to previously make arguments similar to those asserted by the plaintiffs in *Collins*" and remanding for entry of judgment in favor of servicer without the need for additional discovery or briefing); *Bayview*, 2021 WL 4938115, at *2 (rejecting similar arguments as "an improper request for remand" that would be futile and irrelevant to the issues in the case).[4] This Court should do the same here.

I. SFR Cannot Avoid This Court's Mandate

This Court has already determined that judgment should be entered in favor of Chase. SFR's attempt to inject a new issue in this third appeal is a bald attempt to evade this Court's mandate and to forestall final judgment. SFR's efforts serve only to prolong the litigation, and they contravene the spirit of the mandate rule, which "requires lower courts to effectuate a higher court's ruling on remand." *Estate of Adams By and Through Adams v. Fallini*, 386 P.3d 621, 624 (Nev. 2016). That is exactly what the district court did here.

In a published, en banc decision, this Court remanded the case with instructions that "the district court [] enter judgment in favor of [Respondent JP Morgan] Chase [Bank, N.A.] such that the Federal Foreclosure Bar prevented the foreclosure sale from extinguishing the first deed of trust." *Id.* at 58-59. On remand,

[4] At the time SFR filed its opening brief in this appeal, the Ninth Circuit had already issued its decision in *Bayview* but this Court had not yet issued its decision in *Ditech v. SFR*.

the district court complied with that order, finding that SFR's interest is subject to Freddie Mac's deed of trust, with no objection from SFR. SFR offers no argument whatsoever that the district court diverted in any way from this Court's unambiguous mandate.

In effect, SFR seeks to relitigate the earlier appeal, not to challenge the propriety of what the district court did on remand. SFR had every opportunity to present all of its arguments earlier in this action, and this Court mandated that Chase was entitled to a final judgment. The Court should not indulge SFR's attempt to call a do-over now and to casually discard this Court's and the other parties' investment in bringing this case to resolution.

The district court implemented this Court's mandate to the letter. SFR cannot relitigate the appeal that led to that mandate. The Court should therefore affirm the district court's decision.

II. SFR Has Forfeited the Argument

SFR raises a new argument that relies on *Collins v. Yellen*, a U.S. Supreme Court decision voiding, based on separation-of-powers principles, HERA's "for-cause" removal provision applicable to FHFA's Director. 141 S. Ct. at 1787 (describing 12 U.S.C. § 4512). The Supreme Court nevertheless confirmed that this structural defect left "no basis for concluding that any head of the FHFA lacked authority to carry out the functions of the office," because each Director was

properly appointed. *Id.* at 1788. SFR nevertheless now contends that it "has standing to conduct discovery into compensable damages caused by decisions of the FHFA director," including a purported decision to "significantly change the prior policy of consent" to the foreclosure of Enterprise interests through super-priority lien laws. *See* AOB at 7, 12.

SFR never offered this argument in any of the prior rounds of district court pleadings or briefing or in any of the prior rounds of appellate briefing: Not once did SFR suggest that FHFA's structure might be defective, much less that any such defect caused it harm. Indeed, SFR has not asserted any claim against FHFA, which is not a party to this case. Nor does SFR explain why it could not have challenged the removal provision in the district court, as the *Collins* appellants (and other parties in similar litigation) did years ago. SFR could have challenged FHFA's purported decision not to consent to the foreclosure of Enterprise liens through HOA sales—which SFR alleges took place in "late 2014/2015," AOB at 5, after SFR had acquired title to the Property through the March 2013 HOA Sale—any time thereafter.[5] The fact that the Supreme Court had not yet ruled on the constitutionality of the removal

[5] Chase does not mean to suggest that such a challenge would have been proper or meritorious if asserted immediately after FHFA announced its position on non-consent. For the reasons explained herein, that claim would still have been meritless if SFR had timely raised it.

clause did not preclude SFR from challenging FHFA's decision on separation-of-powers grounds.

This Court does not consider arguments raised for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983-84 (Nev. 1981). This Court's 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) (citing *Int'l Union of Bricklayers & Allied Craftsman Loc. Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985)). SFR does not claim such exceptional circumstances here, and none exist. All the facts necessary to plead a claim or assert an argument relating to the removal provision have been available since HERA was enacted in 2008, long before SFR commenced this action. SFR is a sophisticated and experienced litigant in cases like this that surely knew it could plead such a claim, and that it needed to plead the claim to preserve it. SFR never did so.

Having failed to assert the removal-provision argument in the district court, SFR forfeited it. The Court should not countenance SFR's attempt to prolong this litigation by entertaining the argument now.

III. *Collins* Is Irrelevant to the Claims and Defenses in this Case

Even without SFR's forfeiture, a remand to assess whether SFR may recover "damages … caused by the unconstitutional structure of the FHFA," AOB at 4,

would be unwarranted, because that argument has nothing to do with any claim or defense raised in this case. Nor can SFR amend its pleadings to find a way out of the problem—any theory that the removal clause caused SFR harm by preventing it from obtaining free-and-clear title to the Property through the HOA Sale would fail as a matter of law.

A. SFR Has Not Pled Any Claim or Defense Related to the For-Cause Removal Provision

SFR contends that under *Collins*, it may challenge FHFA's purported decision to change "the FHFA['s] policy from generally consenting to foreclosure under state super lien laws." 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. Critically, SFR has not asserted *any* claim against FHFA, the party that—under SFR's new theory—took the 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. Nevada is a notice-pleading jurisdiction that requires claims to 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*, 311 P.2d 733, 734 (Nev. 1957). A party must set forth "the facts which support his complaint."

Liston v. Las Vegas Metro. Police Dep't, 908 P.2d 720, 723 (Nev. 1995). Similarly, "an affirmative defense not raised in the pleadings is ordinarily deemed waived" unless the opposing party is given reasonable notice and an opportunity to respond. *Whealon v. Sterling*, 119 P.3d 1241, 1244 (Nev. 2005).

SFR's pleadings provide no notice that it would make an argument related to an action of FHFA's Director or the removal provision. That argument never appeared in SFR's answer, counterclaim, or cross-claim (*see* 1 AA_0014-24, 28-38, 190-99), or in subsequent district court or appellate briefing. SFR's attempt to graft a constitutional issue onto this appeal must fail in light of the counterclaims it *did* assert: state-law claims for injunctive relief and to quiet title. 1 AA_0036-38. Under similar circumstances, this Court has rejected SFR's invocation of *Collins* because SFR failed to "explain from whom it wishes to seek money damages," *Ditech v. SFR*, 2021 WL 5993383, at *1, and the Ninth Circuit likewise concluded "[b]ecause 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," *Bayview*, 2021 WL 4938115, at *2. This Court should do the same here.

B. SFR Cannot Demand Discovery or Add a *Collins*-Based Claim or Defense Now

SFR contends that "further discovery is needed to unveil whether or not the [FHFA] director would have been removed or replaced with one that would not have changed course" on the consent issue, and any related damages. *See* AOB at 20.

SFR's request lacks any plausible basis, and would serve only to needlessly prolong the litigation. The Court should not indulge it. 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.*, 416 P.3d 249, 254-55 (Nev. 2018) (describing factors for denying motion to amend). A court may deny a motion to amend if the moving party unduly delayed in moving to amend or if amendment would seriously prejudice the opposing party. *See Kantor v. Kantor*, 8 P.3d 825, 828 (Nev. 2000) (denying motion to amend filed on the eve of trial); *Performance Steel, Inc. v. Wallner Tooling/Expac, Inc.*, No. 79993, 2021 WL 2432537, at *5 (Nev. June 11, 2021) (unpublished disposition) (motion to amend may be denied if it would cause "serious prejudice").

1. Any Attempt to Amend Would Be Untimely and Prejudicial

This case has been pending since 2013. It has already been appealed to this Court twice. Further discovery or an amendment would be untimely because SFR could have raised a challenge to FHFA's structure and the consequences of that structure on any decision by the FHFA Director in connection with the HOA Sale. But SFR never offered such an argument at any point during the prior district court proceeding or on appeal.

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 nearly eight years ago, in March 2014. 1 AA_0014-24. Any attempt by SFR to now add a claim on SFR's new theory would be based on a purported change in FHFA's policy of non-consent, not the underlying HOA Sale. Because the new claim SFR would seek 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 does SFR plausibly explain why it could not have asserted a claim based on the removal provision at an earlier stage in the proceeding. SFR's contention that "the basis of the challenge to the FHFA's structure" only recently arose, *see* AOB at 12, 17, is incorrect and risible. The removal provision was enacted in 2008. The transaction by which SFR claims the removal provision somehow disadvantaged it—SFR's purchase of the Property in the HOA Sale—happened in 2013. Nothing prevented SFR from asserting its removal-provision argument at any time thereafter, as the *Collins* appellants (and numerous other parties in similar litigations) did more than *five years ago*. *See* Pls' Compl. for Declaratory and Injunctive Relief, *Collins v. Yellen*, No. 4:16-cv-03113 (filed Oct. 20, 2016). The fact that the Supreme Court had not yet ruled on the constitutionality of the removal clause did not preclude SFR from challenging FHFA's conduct on consent based on separation-of-powers

grounds. Indeed, this Court recently criticized SFR for untimely raising similar arguments in another Federal Foreclosure Bar action. *See Ditech v. SFR*, 2021 WL 5993383, at *1 (remanding for judgment in favor of servicer without additional discovery or briefing and concluding that SFR failed to "explain why it was unable to previously make arguments similar to those asserted by the plaintiffs in *Collins*").

SFR argues that it can raise structural constitutional questions at any point in the litigation, citing *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991). *See* AOB at 9-11. SFR's reliance on *Freytag* is misplaced. *Freytag* concerns an appeal from a decision by a judge who was improperly appointed—a narrow circumstance not presented here. 501 U.S. at 880-84. And as Justice Scalia noted, *Freytag* did not adopt a "general rule" that structural constitutional rights cannot be forfeited. *See id.* at 893 (Scalia, J., concurring in part). Nor are the other cases on which SFR relies any more persuasive. *See* AOB at 9-11. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967), the court recognized that "[o]f course 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. Here, all of the facts necessary to raise a constitutional argument were available to SFR at any time after it purchased the Property in 2013. And SFR mischaracterizes this Court's holding in *Commission on Ethics v. Hardy*, 212 P.3d 1098 (Nev. 2009), *see* AOB at 11, a case initially pled as a constitutional claim, and in which the Nevada Supreme Court cites

Freytag for a substantive point, not for anything having to do with when constitutional issues can be raised within a litigation.

Compounding the unfairness of allowing SFR to introduce a new argument at this stage is the fact that any delay in final judgment allows SFR to continue to rent out the Property at market rates, while Freddie Mac receives no return on its investment in the defaulted Loan the Property secures. *See* Addendum A, Order, *Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, No. 19-17043 (9th Cir. Aug. 26, 2021) (recognizing that HOA sale 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").

2. Further Discovery or Attempt to Amend Upon Remand Would Be Futile

In addition to the procedural obstacles noted above, remand would be futile because SFR's new argument cannot succeed as a matter of law. *See Allum v. Valley Bank of Nev.*, 849 P.2d 297, 308 (Nev. 1993) (holding that there is no abuse of discretion in denying motion for leave to amend when the proposed amendment would be futile).

Indeed, the Ninth Circuit recently concluded that the 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

because the agency's directors were properly appointed by the President and thereby had the authority to carry out the functions of that office." *Bayview*, 2021 WL 4938115, at *2. Here, SFR similarly contends that the FHFA Director's "action" that should be evaluated following *Collins* is "the significant shift in FHFA policy from generally consenting to foreclosure under state super lien laws, to the Director issuing a blanket statement that the FHFA does not nor did it ever consent." AOB at 14.

But SFR cannot deploy *Collins* as a basis for a claim here because SFR never even asked for FHFA's consent to the extinguishment of the Deed of Trust; any alleged change in FHFA's policy of non-consent is thus of no consequence. Moreover, FHFA never made the "decision" SFR contends should be challenged, never took any action with respect to the Deed of Trust at issue in this case, and never changed its position on whether the Agency will consent to the extinguishment of Enterprise loans through HOA foreclosures. Nor does SFR explain how such a decision would have caused it harm, or demonstrate that the decision would have been different but for the removal provision.

a. No FHFA Director's Action Caused SFR Harm

SFR's supposed harm—its inability to acquire free-and-clear title to the Property through the HOA Sale, *see* AOB at 14—results from the automatic operation of a federal statute, not from an FHFA Director's decision, as SFR

incorrectly argues. The Federal Foreclosure Bar sets 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); *Christine View*, 417 P.3d at 368. The Federal Foreclosure Bar, enacted in 2008, thus prevented the 2013 HOA Sale from extinguishing the Deed of Trust; neither FHFA nor its Director needed to act for the Deed of Trust to survive the HOA Sale, and neither did.

SFR does not, because it cannot, point to any decision by FHFA to either start or stop consenting to the extinguishment of Enterprise liens. 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. Instead, SFR contends that a public statement made by FHFA articulated a change in policy from "general consent" to express non-consent. *See* AOB at 14-17, 19. FHFA's 2015 Statement contradicts SFR's argument directly, as it confirms that FHFA *has not* consented, and will not consent in the future, to the extinguishment of any Enterprise property interest. 8 AA_1871. Nor is it plausible that FHFA would ever have had a default policy of consenting to extinguish Enterprise liens, as such a policy would effectively cede valuable property interests for no consideration.

In any event, even if the Court assumes—contrary to the 2015 Statement's plain language—that FHFA broke its silence to adopt a new policy of non-consent,

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 (which SFR misleadingly terms "general consent") and express non-consent lead to the same result: protection of the Enterprise lien. Accordingly, any prior policy of implicit or "general" consent would have amounted to no consent at all, leaving the Federal Foreclosure Bar's protections in place. Thus, FHFA's purported abandonment of that policy would have no legal effect, and could not cause SFR any harm.

SFR claims that FHFA also "maintain[ed] a policy of hiding the potential application" of the Federal Foreclosure Bar by hiding FHFA's interest in "pending litigation as long as possible," and that such policy harmed SFR because SFR engaged in years of litigation. AOB at 7, 14-15. 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. But this Court has confirmed time and again that such a practice complies with Nevada law, including in cases where the practice was challenged by SFR itself. *E.g.*, *Daisy Trust*, 445 P.3d 846; *CitiMortgage, Inc. v. SFR Invs. Pool 1, LLC*, No. 70237, 2019 WL 289690, at *1 (Nev. Jan. 18, 2019) (unpublished disposition). SFR's concern is with Nevada doctrine, not with anything FHFA's Director did or did not do. For that reason SFR's

aspersions cannot support a *Collins*-based argument—SFR never suggests that the practice would have been different but for the removal provision.

SFR also contends that FHFA did not have "a mechanism for consent," which it argues demonstrates that FHFA had a general policy of consent. *See* AOB at 15-16. But SFR does not specify what mechanism now exists that did not exist previously which might be indicative of a purported change in FHFA's policy of consent. The fact is SFR could have contacted FHFA at any time to inquire whether the Property was encumbered by an Enterprise-owned deed of trust. Indeed, prospective HOA foreclosure sale purchasers now routinely ask FHFA whether particular properties scheduled to be sold at HOA foreclosure sales are encumbered by Enterprise liens; FHFA provides timely and complete answers to their inquiries. FHFA has publicly and repeatedly confirmed that, upon inquiry, it will state whether an entity in conservatorship holds an interest in a given property. *See, e.g.*, Appellees' Br. at 19 n.6, *Alessi & Koenig v. FHFA*, No. 18-16166 (9th Cir. 2018), 2018 WL 5621457.

b. FHFA Made No Change to Any Policy Regarding Consent

None of SFR's purported evidence suggests that FHFA ever changed any policy relating to consent to the extinguishment of Enterprise liens.

First, SFR cites to a letter from a congressional delegation describing FHFA's non-consent position as a "new policy." AOB at14-15 n.32, 19. A congressional

delegation's assertion that an FHFA policy has changed is beside the point. FHFA speaks for itself, and it has neither stated nor acted as if its policy changed. In any event, the congressional letter only states that FHFA "appeared to *implicitly* acknowledge that super lien laws could be used to foreclose on properties" that serve as collateral for Enterprise liens. Letter from Sen. Elizabeth Warren et al. to FHFA Director M. Watt at 2 (May 12, 2016) (emphasis added), https://www.warren.senate.gov/files/documents/2016-5-12_MA_delegation_ltr_ to_ FHFA.pdf. But as noted above, *express* consent is required to waive the Federal Foreclosure Bar's protections. *See supra* 28-29. Even taken on its own terms, the letter offers nothing to suggest FHFA ever had a policy of *effectively—i.e.*, *expressly*—consenting. It thus does not support SFR's claim that FHFA changed its consent policy.

Second, SFR references the servicing guide for Fannie Mae. AOB at 14 & n.32. SFR presumably intended to refer to Freddie Mac's Guide, which required Freddie Mac's loan servicers to protect the priority of Freddie Mac's liens, and apparently in support of its argument that FHFA had maintained a general policy of consent. *Id.* at 14-15 & n.32, 19. But the servicing guide applies to servicer practices *whether or not* Freddie Mac is in conservatorship, and therefore does not undermine the default protection the Federal Foreclosure Bar provides *during* conservatorship. Indeed, the Ninth Circuit has already rejected arguments that Enterprise servicing

guides indicate implicit consent. *Alessi & Koenig, LLC v. Saticoy Bay LLC Series 10250 Sun Dusk Lane*, 804 F. App'x 475, 477 (9th Cir. 2020) ("This court will not infer the Agency's consent to the sale" and "the terms of [the Enterprise's] Servicing Guide do not negate [12 U.S.C.] § 4617(j)(3)"). SFR also suggests that because the servicing guide requires servicers to protect the priority of the lien, "the onus was on servicers to take whatever action was necessary to protect" FHFA and that "FHFA's problem is with the servicers," not SFR. AOB at 16-17. SFR does not explain how this amounts to a policy of consent, and in any event SFR overlooks the fact that the Federal Foreclosure Bar automatically provides backstop protection that applies *regardless* of whether an Enterprise, a servicer, or anyone else could have done something else to protect the lien. *See supra* 29.

Finally, SFR points to a single case where an Enterprise arguably could have, but did not, raise the Federal Foreclosure Bar during litigation. AOB at 16. This case does not help SFR. An Enterprise's or its loan servicer's litigation strategy (or inadvertent omission of a particular argument) has no impact on whether the federal statute applies. Even if decisions about which arguments to include in any given lawsuit could be imputed to FHFA (and they cannot), a choice to assert non-HERA grounds to preserve a lien does not suggest that FHFA has consented to the lien's extinguishment. Nor could FHFA's consent in a particular case establish a general policy or practice of consent.

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

SFR insists that *Collins* casts doubt upon "every decision made by the Director of the FHFA." AOB at 8. But as SFR acknowledges, the U.S. Supreme Court expressly rejected that argument—that Court "did not void every action taken by the Director." *Id*. at 8-9. Instead, *Collins* confirmed 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." 141 S. Ct. at 1787-88.

The fact that the for-cause removal provision is unconstitutional thus does not provide any basis for overturning FHFA action unless a claimant demonstrates a causal link between that provision and specific, tangible harm. *See id*. at 1789 (relief may be possible if "the unconstitutional removal restriction caused any … harm"). 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. *Id.* 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 identified any connection between the for-cause removal provision and its inability to obtain clear title to the Property. As noted above, the Ninth Circuit has 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.[6]

In an attempt to support its position, SFR argues that "it was well known that President Trump planned to privatize the GSEs and take them out of the control of FHFA's conservatorship." AOB at 19-20. In its Opposition to Chase's Motion for Summary Affirmance in this appeal, SFR also referenced a letter from former President Trump in which he states that he would have removed the Enterprises from FHFA conservatorship during his administration. *See* SFR's Opposition to Chase's Motion for Summary Affirmance, at 1 & n.3, 9 (Dkt. No. 22-0133). SFR's argument

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[6] 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).

fails. 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. *Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, 996 F.3d 950, 956-58 (9th Cir. 2021); *Daisy Trust*, 445 P.3d at 847. Because the HOA Sale at issue here occurred in March 2013—more than three years *before* former President Trump took office in January 2017—former President Trump's view 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 (Mark Calabria) maintained the policy of non-consent during his tenure, as has current Acting FHFA Director Sandra Thompson; SFR makes no allegation to the contrary.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that this Court affirm the district court's decision.

Dated: March 4, 2022

BALLARD SPAHR LLP

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

Attorneys for Respondent

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 7,664 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: March 4, 2022

BALLARD SPAHR LLP

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

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on March 4, 2022, I filed **Respondent's Answering Brief**. Service will be made on the following through the Court's electronic filing system:

Karen L. Hanks
Chantel M. Schimming
HANKS LAW GROUP
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139

Counsel for Respondent

/s/ Andrew S. Clark
An Employee of Ballard Spahr LLP

ADDENDUM A

FILED

AUG 26 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONSTAR MORTGAGE LLC, Plaintiff-Appellee, v. SATICOY BAY LLC, SERIES 9229 MILLIKAN AVENUE; MILLIKAN AVENUE TRUST, Defendants-Appellants, and INDEPENDENCE II HOMEOWNERS' ASSOCIATION, Defendant.	No. 19-17043 D.C. No. 2:15-cv-02151-JAD-NJK District of Nevada, Las Vegas ORDER

Before: PAEZ and VANDYKE, Circuit Judges, and GLEASON,* District Judge.

Appellants challenged the district court's grant of summary judgment in favor of Appellee (Nationstar) based on the court's conclusion that the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), prevented the extinguishment of the first deed of trust owned by the Federal National Mortgage Association (Fannie Mae) on the subject property. Saticoy Bay LLC, Series 9229 Millikan Avenue (Saticoy) raised at least

* The Honorable Sharon L. Gleason, United States District Judge for the District of Alaska, sitting by designation.

a dozen arguments as to why it acquired free and clear title to the property, of which we rejected in a published opinion as either squarely foreclosed by on-point precedent or as wholly without merit. *See generally Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, 996 F.3d 950 (9th Cir. 2021). Simultaneous with the filing of the opinion, we sua sponte issued an order to show cause why Saticoy and its counsel, Michael F. Bohn, should not be sanctioned under Federal Rule of Appellate Procedure 38 for these practices. Order at 2–3 (May 5, 2021), *Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, 996 F.3d 950 (9th Cir. 2021) (No. 19-17043), ECF No. 55. We invited the parties to brief the issue and have heard from both sides.

Saticoy continues to press arguments that are foreclosed by precedent or attempts to distinguish on-point cases by asserting that such cases did not account for a particular detail insignificant to their analysis. For example, Saticoy still contends that Nev. Rev. Stat. § 111.325 "expressly provides that [Fannie Mae's] unrecorded conveyance was 'void' as to Saticoy Bay because that writing was not 'first duly recorded.'" It espouses this view, even though the Nevada Supreme Court has explicitly rejected the argument that Nev. Rev. Stat. § 111.325 required Freddie Mac to record its interest in a home loan to establish that interest in the context of a Federal Foreclosure Bar case. *See Daisy Tr. v. Wells Fargo Bank, N.A.*, 445 P.3d 846, 849 (Nev. 2019) (en banc). In fact, the court clearly stated that "we are not

persuaded that … [Nev. Rev. Stat. §] 111.325 is implicated" in that situation. *Id.* In response, Saticoy issues a blanket assertion that *Daisy Trust* is "inconsistent with controlling Nevada law," i.e., the plain language of the statute. Although we recognize that parties may need to make arguments foreclosed by precedent, they do so by acknowledging the relevant precedent and either arguing that such precedent should be overturned or by identifying specific factors or analysis central to the reasoning and ultimate conclusion of the precedent that do not apply to the present case. Saticoy does not do this.

This is not an isolated problem in its response. As a second example, Saticoy argues that *Daisy Trust* does not foreclose its argument that Nev. Rev. Stat. § 111.315 requires Fannie Mae to record its interest in the deed of trust because none of the briefing—nor the Nevada Supreme Court's decision—in *Daisy Trust* cites to that specific statute. But the court in *Daisy Trust* relied on the analysis that "the deed of trust did not have to be … '*conveyed*' to Freddie Mac in order for Freddie Mac to own the secured loan" to conclude that Nev. Rev. Stat. § 111.325—which governs "[e]very conveyance of real property"—was not implicated. 445 P.3d at 849 (emphasis added). Saticoy fails to explain, because it cannot, how this rationale would not apply with equal force to Nev. Rev. Stat. § 111.315, which likewise governs "[e]very conveyance of real property." As a result, Saticoy raises a meritless challenge to our conclusion that Nev. Rev. Stat. § 111.315 is included in the Nevada

recording statutes generally referenced in *Daisy Trust* when the Nevada Supreme Court determined "that Nevada's recording statutes did not require Freddie Mac to publicly record its ownership interest as a prerequisite for establishing that interest." 445 P.3d at 849. Notably, Saticoy did not mention *Daisy Trust* in its Opening Brief in this appeal.

These are just a few examples of Saticoy's arguments that are "in direct conflict with 'firmly established rules of law for which there is no arguably reasonable expectation of reversal or favorable modification.'" *United States v. Nelson* (*In re Becraft*), 885 F.2d 547, 549 (9th Cir. 1989) (citation omitted).

In its response, Saticoy also ignores a number of arguments that it raised in the Opening Brief, including its contentions that Nationstar lacked authority to represent Fannie Mae in this litigation, and that Nationstar did not timely raise the Federal Foreclosure Bar under the statute of limitations. Based on the arguments Saticoy *did* make, we continue to conclude that its arguments are either squarely foreclosed by on-point Ninth Circuit and Nevada Supreme Court precedent or are wholly without merit, and the outcome in this appeal was thus obvious, making this appeal frivolous. *See Blixseth v. Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1007 (9th Cir. 2015) ("An appeal is frivolous when the result is obvious or the appellant's arguments are wholly without merit." (citation and internal quotation marks omitted)).

We "have discretion to award damages, attorney's fees, and single or double costs as a sanction for bringing a frivolous appeal." *Glanzman v. Uniroyal, Inc.*, 892 F.2d 58, 61 (9th Cir. 1989) (citing Fed. R. App. P. 38). Saticoy has 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. Therefore, an appropriate sanction under Rule 38 to disincentivize Saticoy from its "alarming willingness to [waste] appellate court resources" and the resources of the district courts is warranted. *In re Becraft*, 885 F.2d at 549. Saticoy's actions have made clear "the necessity of sending a message to [Saticoy] that frivolous arguments will no longer be tolerated." *Id.* Accordingly, we order Saticoy and Bohn each to pay $500 in damages to the Clerk of Court within 30 days of this order, as reimbursement for the costs incurred during this frivolous appeal. *See Blixseth*, 796 F.3d at 1009.

We also order Saticoy and Bohn to pay to Nationstar the reasonable attorneys' fees it incurred in defending against this frivolous appeal. *See Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (per curiam) ("A penalty is justified in favor of those litigants who have been needlessly put to trouble and expense."). The determination of an appropriate amount of fees as sanctions under Rule 38 is referred to Appellate Commissioner Lisa B. Fitzgerald, who has the authority to conduct

whatever proceedings she deems appropriate and necessary and to enter an order awarding fees subject to reconsideration by the panel. *See* 9th Cir. R. 39-1.9.

IT IS SO ORDERED.