No. 20-___

IN THE

Supreme Court of the United States

SFR INVESTMENTS POOL 1, LLC,

Petitioner,

v.

M&T BANK; FEDERAL HOME LOAN MORTGAGE CORPORATION,

Respondents.

On Petition for a Writ of Certiorari
to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Jacqueline A. Gilbert
Diana Cline Ebron
Counsel of Record
KIM GILBERT EBRON
7625 Dean Martin Dr.
Ste. 110
Las Vegas, NV 89139
(702) 400-4130
Jackie@kgelegal.com

QUESTIONS PRESENTED

Fannie Mae and Freddie Mac buy and securitize residential mortgages. In 2008, the Federal Housing Finance Authority (FHFA or Agency) put Fannie and Freddie into conservatorship. A federal statute provides that "[n]o property of the [FHFA] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency." 12 U.S.C. § 4617(j)(3). Because Fannie and Freddie regularly fail to record their interest in a property, many properties are foreclosed upon in potential violation of this provision. FHFA has therefore frequently filed quiet title actions asserting that Fannie or Freddie's mortgages were not extinguished by a foreclosure sale. As relevant here, 12 U.S.C. § 4617(b)(12) provides that the "applicable statute of limitations with regard to any Agency as conservator shall be" six years "in the case of a contract claim" and three years "in the case of any tort claim." In these cases, the Ninth Circuit held that even though there is no contract between petitioners and the FHFA, the actions were governed by the longer, six-year limitations period for contract claims. The questions presented are

1. Whether the FHFA's structure violates separation of powers and, if so, whether its conservatorship of Fannie Mae and Freddie Mac must be set aside.

2. Whether quiet title actions by FHFA, asserting that a state law foreclosure failed to extinguish the agency's property interests, are contract claims for purposes of 12 U.S.C. § 4617(b)(12).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

SFR Investments Pool 1, LLC's (SFR) parent corporation is SFR Investments, LLC. No publicly held corporation owns 10% or more of SFR's stock.

RELATED PROCEEDINGS

M&T Bank; Federal Home Loan Mortgage Corporation v. SFR Investments Pool 1, LLC, 9th Cir. Dkt. No. 18-17395, Opinion entered June 25, 2020; Order on rehearing entered August 4, 2020.

M&T Bank; Federal Home Loan Mortgage Corporation v. SFR Investments Pool 1, LLC, USDC Nev. Case No. 2:17-cv-01867-JCM-CWH, Order and judgment entered November 15, 2018; order on SFR's motion for reconsideration entered on April 10, 2019.

Also,

Federal Home Loan Mortgage Corporation, et. al, v. SFR Investments Pool 1, LLC, C.A. Case No. 19-15910,

and

Bourne Valley Court Trust v. Wells Fargo Bank, N.A., C.A. Case No. 19-15253,

A joint Petition for Writ of Certiorari is being filed for these two cases concurrently with the Petition in this case. The cases are related and SFR requests the Petitions be considered together.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner SFR Investments Pool 1, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is published at 963 F.3d 854. The opinion of the district court (Pet. App. 11a-16a) is published at 2019 WL 1560426 (Order denying reconsideration); (Pet. App. 17a-25a) 2018 WL 6003854 (Order on summary judgment motions and motion for Rule 56(d) relief).

JURISDICTION

The judgment of the court of appeals e was entered on June 25, 2020. Pet. App. 1a. The court of appeals denied petitioners' timely petitions for rehearing en banc on August 4, 2020. Pet. App. 26a-27a. On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of 12 U.S.C. §§ 4617(a)(2), 4617(b)(12), 4617(j)(3), Nevada Revised Statutes § 11.190 are included in Appendix D of this petition.

STATEMENT OF THE CASE

Respondents filed suit to allege that certain state-law foreclosure sales failed to extinguish Fannie Mae or Freddie Mac's interest in the properties because the sales violated the so-called Federal Foreclosure Bar,

12 U.S.C. § 4617(j)(3). That provision states that "[n]o property of the" Federal Housing Finance Authority (FHFA) "shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the agency." *Id*. Here, Fannie Mae and Freddy Mac's interests in the properties became property of FHFA after that agency's Director exercised his unilateral power to place both entities into conservatorship. *See* 12 U.S.C. §§ 4617(a)(2), (b)(2)(A)(i).

The first question arises because the decision to put the GSEs into conservatorship, which triggered the Federal Foreclosure Bar, was made by an agency whose insulation from presidential oversight violates separation of powers principle. Because this Court is presently considering whether the FHFA's single-director structure violates separation-of-powers principals (and, if so the appropriate remedy) in *Collins v. Mnuchin*, No. 19-422, the Court should hold this petition pending its decision in that case.

The second question presented by this petition arises from the Ninth Circuit's holding that a claim based on the Federal Foreclosure Bar, seeking to set aside the presumptive extinguishment of a deed of trust by a Nevada's homeowners association foreclosure sale, is a contract claim. This, despite acknowledging no contract or any agreement exists between the parties, and despite Respondents expressly stating they were not seeking to enforce the deed of trust (DOT) or note. While FHFA must have an interest in the note and deed of trust for it, a GSE or servicer, to have standing to bring the claim, those documents are not what is truly underlying the claim itself. Rather, the claim is based on the so-called Federal Foreclosure

Bar, not any contract. The Ninth Circuit therefore focused its analysis on the wrong issue. The proper issue is what would avoid extinguishment of the deed of trust – and here it is the statute. A claim based on an alleged violation of a statute is much more accurately characterized as a tort claim than a contract claim.

I. Legal Background

1. State laws pervasively permit lenders, homeowners associations, taxing authorities, repairmen, and others to secure payment by recording a lien on the debtor's real property. When the debt is defaulted, the lienholder may foreclose on the property, causing it to be sold. The distribution of the proceeds is determined by the priority of the liens, which is established by state law (often by statute). If the sale produces less money than is needed to satisfy all the creditors, those will liens of lesser priority (often called "junior" lienholders) may not be paid.

State law also determines what happens to the liens after the sale is completed. A foreclosure sale ordinarily extinguishes all liens junior to the lien being foreclosed upon, but leaves intact any senior liens. *See, e.g.*, Real Estate Finance Law § 7:20; Restatement (Third) of Property (Mortgages) § 7.1 cmt. a; *see also United States v. Brosnan*, 363 U.S. 237, 250 (1960) (noting a "private sale of its own force [is] effective under California law to extinguish all junior liens"). This established rule allows the purchaser to take title to the foreclosed property free and clear of the junior liens, thereby removing a practical impediment to the remedy's effectiveness.

2. In Nevada, if HOA the assessments are not paid, the association may enforce its lien against the

property through non-judicial foreclosure. NRS 116.31162(1).[1] NRS 116.3116(2) gives a portion of the lien priority over a first mortgage or deed of trust for nine-months of unpaid dues (the lien for the rest of the dues having its ordinary priority behind the mortgage and other liens). *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 411-14 (Nev. 2014).[2] And, the association super priority lien operates like any other senior lien – when the association forecloses on it, all junior lienholders are entitled to any proceeds in excess of the amount of the HOA's lien but the junior liens are extinguished. *Id.* Accordingly, just as a foreclosure initiated by the holder of a first mortgage can extinguish a second mortgage, an HOA foreclosure will extinguish the lien held by a bank with a first mortgage or deed of trust on the property. *Id*. at 419.

3. Congress enacted HERA in 2008[3] and 12 U.S.C. § 4617(a)(2) gave the FHFA Director the discretion to appoint FHFA conservator over the GSEs. HERA also provided that FHFA as conservator succeeded to all property of Fannie and Freddie, including the interest in promissory notes and deeds of trust. 12 U.S.C. § 4617(b)(2)(A). Congress also adopted what has been coined the "Federal Foreclosure Bar" or § 4617(j)(3) which prevents foreclosure or sale of property of the Agency without the Agency's consent. This has been

---

[1] Unless otherwise indicated, cites to the Nevada Revised Statute are to the version in effect at the time of the actual foreclosures in this case – between 2012 and 2014.

[2] *See also Chase Plaza Condo. Ass'n*, 98 A.3d 166, 172-78 (D.C. 2014); *Summerhill Village Homeowners Ass'n v. Roughley*, 270 P.3d 639 (Wash. Ct. App. 2012).

[3] Housing and Economic Recovery Act of 2008.

deemed to mean that while an HOA in Nevada may foreclose on its lien, federal law preempts the super-priority portion of the lien from extinguishing a deed of trust securing a note owned by Fannie or Freddie.[4] *Berezovsky v. Moniz*, 869 F.3d 923, 930-31 (9th Cir. 2017). As M&T and Freddie told the Ninth Circuit, it issued a statement on April 21, 2015, well into litigation in scores of the NRS 116 HOA foreclosure cases brought in Nevada, including this case, FHFA "has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie or Freddie lien or other property interest in connection with HOA foreclosures of super-priority liens."[5]

4. The Ninth Circuit has recognized that an action claiming preemption based on the Federal Foreclosure Bar may be brought by a GSE or a loan servicing agent on behalf of FHFA. *Berezovsky*, 869 F.3d at 932-33. Here, M&T Bank was the purported servicer and Freddie Mac the purported owner of the note to which FHFA succeeded.

4. HERA provides the statutes of limitation for actions brought by the Agency or on its behalf. 12 U.S.C. § 4617(b)(12) provides in pertinent part:

---

[4] *Berezovsky* held it was through implied preemption, not express. *Id.* at 931.

[5] FHFA's Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx; *see* C.A. Dkt. 26 at 6 n.1 and accompanying text; *see also* D.C. Dkt. 21 Ex. I.

> **(12) STATUTE OF LIMITATIONS FOR ACTIONS BROUGHT BY CONSERVATOR OR RECEIVER**
>
> **(A) In general** Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver 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.

No other option is provided. Accordingly, to determine the statute of limitations, first the claim must be categorized as either contract or tort. Then, the Agency gets the longer of the state statute of limitations or the time set forth in HERA, a minimum of 6 years for contract or 3 years for tort. *Id.*

II. Factual And Procedural History

Petitioner SFR bought the property at an HOA nonjudicial foreclosure auction on July 11, 2012. Pet. App. 4a-5a. As a matter of Nevada law, the sale presumptively extinguished all junior liens, including a first trust held by respondent M&T Bank. *Id*. 5a. The first deed of trust recorded against the Property at the

time named M&T Bank as beneficiary. *Id.* Neither the deed of trust nor the assignment to M&T Bank named Freddie as having an interest in the deed of trust or note. D.C. Dkt. 21, Exs. A&B. Waiting until almost five years after the sale, M&T Bank and Freddie, whose interest was still not recorded in the public records, filed their complaint for quiet title alleging preemption of the first deed of trust's extinguishment by the Federal Foreclosure Bar. Pet. App. 12a.

SFR moved to dismiss the complaint as time-barred under Nevada's statute of limitation for liability arising from a statute, NRS 11.190(3)(a). Pet. App. 5a. Respondents opposed, claiming a five-year statute of limitations applied under NRS 11.070, a statute that applies to those who have been seized or possessed of the property. Pet. App. 5a. Respondents never argued they were bringing a contract claim, that the claim sounded in contract, or that the six-year statute of limitations under HERA should apply. D.C. Dkt. 13 at 5; D.C. Dkt. 43 at 15.

The district court denied SFR's the motion, and applied the five-year statute of limitations in NRS 11.070. Pet. App. 6a. Immediately thereafter, before SFR had even answered the complaint, respondents filed a motion for summary judgment based on a declaration and documents not previously disclosed. D.C. Dkt. 20, 21, 24. Ultimately, the district court granted summary judgment in favor of respondents.[6] Pet. App. 17a.

---

[6] In district court, SFR also sought further discovery, asserting Freddie and M&T Bank must produce the wet-ink promissory note and other contracts proving the right to rely on the Federal

SFR appealed solely on the issue of statute of limitations, setting forth its analysis of the HERA statute and why the claim must be categorized as non-contract and therefore tort with a three-year statute of limitations. For the first time, on appeal, plaintiffs argued the six-year statute of limitations applied to its claim and the Agency filed an amicus brief in support of either the six-year contract statute of limitations or the five-year statute under NRS 11.070. C.A. Dkt. 26 at 8.

The Ninth Circuit panel first determined § 4617(b)(12) applies to all claims brought by the Agency. Pet. App. 6a. Then the panel acknowledged "there is no contract between SFR and plaintiffs." *Id*. 9a. Thus this could not be determined to be a breach of contract or agreement between the parties as is required for a contract action. But the panel then stated "the quiet title claims are entirely 'dependent' upon Freddie's lien on the Property, an interest created by contract." *Id*. Thus, it held the claims were "contract" claims under § 4617(b)(12)(A)(ii). *Id*. The panel went on to state that because respondents did not seek damages or breach of duty resulting in injury to person or property it did not meet "traditional hallmarks of a torts action." *Id.* The court ignored that damages and breach are also hallmarks of a contract action. And it

---

Foreclosure Bar. D.C. Dkt. 28 at 3-10, 30; D.C. Dkt. 28-1 at ¶¶ 31-40. However, on appeal, SFR narrowed its focus to the statute of limitations. The issues related to requiring best evidence and requiring production of the contracts if the basis of the petition for writ of certiorari filed concurrently herewith, from Ninth Circuit decisions issued the same day in *Federal Home Loan Mortgage Corporation, et al. v. SFR Investments Pool 1, LLC*, C.A. Case No. 19-15910 and *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, C.A. Case No. 19-15253.

did not address the argument that simply because there is a contract in the background the Court must consider, that does not change the action into a contract action itself.

Based on this analysis, the M&T Bank court held the six-year statute of limitations applied and the action was timely filed. *Id*. 10a.

REASONS FOR GRANTING THE WRIT

The case warrants review for the same reasons this Court granted certiorari in *Collins v. Mnuchin*, No. 19-422. Because FHFA's claims in this case arise only because of the Agency's decision to put Fannie Mae and Freddie Mac into conservatorship, and because that act must be set aside if this Court determines that FHFA's structure is unconstitutional, the Court should hold this petition pending its decision in *Collins*, and then make an appropriate disposition in light of what the Court decides in that case.

The case independently warrants review because the Ninth Circuit's application of the statute of limitations for "contract claims" to a suit by FHFA against a homeowner with whom it has no contract, defies the plain language of the statute and basic common sense. The Federal Foreclosure Bar is already an extensive invasion of state sovereignty; FHFA suits after the fact seeking to undo the legal effect of otherwise lawful state sales are even worse. The decision in this case takes that injury to state sovereignty even further by maximizing the statute of limitations, and thereby damaging reasonably settled expectations developed under state property law. The Ninth Circuit's error is enormously consequential, affecting foreclosure sales through the largest and most populous circuit in the

nation. Even more, the logic of the decision would extend the lengthy "contract" limitations period to every claim brought by the FHFA involving or touching upon real property, simply because the Agency has an interest in the note underlying the deed of trust. This invasion of property rights and state sovereignty should not stand. This Court must intervene.

I. The Petition Should Be Held For *Collins v. Mnuchin.*

The decision below should be vacated because the FHFA conservatorship is invalid, the product of decisions by an agency whose structure violates the Appointments Clause. Given that the constitutionality of the FHA's structure is presently before the Court in *Collins v. Mnuchin*, No. 19-422, the Court should hold this case pending its decision in that case and then remand to the Ninth Circuit for reconsideration in light of the Court's decision.

In *Collins*, this 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. *See Collins* Pet. i. In its merits briefs, the FHFA has conceded that its structure is unconstitutional in light of *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), which held that the indistinguishable structure of the CFPB violated the Appointments Clause. *See Collins* Federal Parties Reply Br. 23-26. The *Collins* petitioners further argue that in "a long line of cases, this Court has repeatedly set aside the past actions of federal officials who were unconstitutionally insulated from oversight by the Pres-

ident 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. 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, FHFA claims that petitioners' foreclosure sales failed to extinguish Fannie and Freddie's junior liens because the sales took place after FHFA put both regulated entities under conservatorship, thereby triggering the Foreclosure Bar. *See* Pet. App. 4a. *Collins* will decide whether the agency that made that decision was unconstitutionally structured and provide important guidance on whether, if not, that means that actions taken during the conservatorship can have legal effect.

That petitioners did not raise an Appointments Clause challenge below does not preclude them from raising the issue now. This 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 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*.

In this case, petitioners' failure to raise an Appointments Clause challenge below imposed no "disruption to sound appellate practice," *ibid*., because any such argument would have been futile given existing circuit precedent. *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."). At the time petitioners were litigating these cases in the district court and on appeal, the Ninth Circuit had upheld the constitutionality of the single-director structure of the CFPB. *See CFPB v. Seila Law LLC*, 923 F.3d 680 (9th Cir. 2019). Because there is no material difference between the structure of the FHFA and the CFPB, petitioners had no basis to raise an Appointments Clause challenge in these cases until this 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). And this Court did not overrule *Seila Law* until after the Ninth Circuit issued its decisions in these

cases. *Compare Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (decided on June 29, 2020), *with* Pet. App. 1a (decided on June 25, 2020).[7]

Thus, the Court should hold the case pending its decisions in *Collins* (and possibly *Carri,* and *Davis*) then remand the case to the Ninth Circuit for reconsideration in light of its decision.

II. Question Two Should Be Granted Because The Ninth Circuit Has Expanded The Power Of A Federal Agency To Extinguish Private Property Rights In Contravention Of The Plain Language Of A Federal Statute.

Regardless of the outcome in *Collins*, this Court should grant plenary review of the second question presented. The Ninth Circuit's decision characterizing plaintiff's claim as contract is incorrect based on common law and Nevada definitions of tort and contract claims. And, because tort claims are those arising from

---

[7] To the extent there is any question about whether petitioners were required to raise an Appointments Clause challenge below, this Court's impending decision in *Car v. Commissioner*, No. 19-1442, and *Davis v. Saul*, 20-105, could shed light on the matter. In those cases, the Court granted certiorari to decide whether social security benefit claimants forfeit Appointment Clause challenges by failing to raise them before administrative law judges. *See Carr* Pet. i; *Davis* Pet i. The petitioners argue, among other things, that there was no need to raise the arguments in that forum because "the interests implicated by an Appointments Clause challenge are so important that they can 'be considered on appeal whether or not they were ruled on below," *Carr* Pet. 28 (quoting *Freytag*, 501 U.S. at 878-79), and because raising the issue would have been "futile" given the ALJs' lack of authority to accept the argument, *id*. at 27. *See also Davis* Pet. 22-23 & n.* (same).

violation of common law or statutory duties. Thus, the violation of the Federal Foreclosure Bar, § 4617(j)(3) is more accurately characterized as a tort rather than a contract.

Additionally, the question is important because it allows classification of other FHFA property claims into contract for purposes of obtaining a longer statute of limitations; for example, trespass-a tort-would normally carry a three-year statute of limitations in Nevada, NRS 11.190(3)(b), but based on the panel's reasoning here, it would be classified as a contract claim if FHFA were bringing it. Even more importantly, the same reasoning could be applied outside the context of HERA to characterize any claim wherein a contract lurked in the background, as a contract claim rather than looking at the actual nature and basis of the claim itself.

A. FHFA Actions To Invalidate Foreclosures Sales Under The Federal Foreclosure Bar Do Not Assert "Contract Claims."

The Ninth Circuit's holding on the statute of limitations cannot be reconciled with the plain language of the statute. Section 4617(b)(12) of Title 12 reserves its longest statute of limitations for "contract claims." The Ninth Circuit acknowledged that M&T's suit did not seek to enforce any contract, or seek relief for petitioner's breach of any contract to which petitioner is a party. Instead, it was sufficient, the court believed, that "the quiet title claims are entirely 'dependent' upon Freddie's lien on the Property, an interest created by contract." Pet. App. 9a. While the existence of such a contract – between Freddie and some third party – may have been a necessary condition to bring

suit, that is not the question posed by the statute, which asks about the nature of the claim respondents propose to adjudicate, not the broader circumstances that may be connected in some way to the claims they are actually asserting in the litigation.

Here, respondents did not seek to assert any contract right arising from the Note or the deed of trust, to which petitioner is not a party. Put another way, the mere existence of these contracts does not serve as the basis to challenge the sale. The Nevada Supreme Court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank*, 130 Nev. 742, 334 P.3d 408 (2014), makes that clear. There must be some other basis for the challenge. And here it is the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3).

In focusing on the fact that respondents' suit involved a contract in an indirect way, the Ninth Circuit thus asked and answered the wrong question. The question is not what allows a servicer to get through the courtroom doors, but rather, what serves as the basis for the claim. Certainly, the Bank's claim was not based on the mere existence of a lien. If it were, SFR would have won easily.

Thus, when the Ninth Circuit said the Bank's claim was a contract claim it was wrong. The Bank's claim arose solely because of the existence of the Federal Foreclosure Bar. Without this statute, the Bank's claim would fail as a matter of law, and that remains true irrespective of Freddie's lien interest. This cements the notion the Note and deed of trust are not the basis of the claim, and because this is the only relevant question when determining whether a claim sounds in tort or contract, the Court erred when it shifted the analysis to standing.

B. The FHFA's Suit Alleging Violation Of The Federal Foreclosure Bar Is A "Tort Claim" Within The Meaning Of The Act.

Based on (i) the definitions of tort and contract claims, and (ii) the D.C. Circuit's instructive reasoning that the mere existence of a contract does not turn every claim into one arising in contract, the court of appeals wrongly characterized FHFA's claim.

The Ninth Circuit should have concluded instead that the FHFA's suit asserted tort claims within the meaning of the statute of limitations provision.

1. Under common law, contract claims "constitute a violation…of duties arising by virtue of the alleged express agreement between the parties" while tort claims deal with breaches of common law or statutory duties independent of any contract, *i.e*. a "wrong independent of contract."[8] The basis of respondents' claim was the existence of a federal statute that preempted a state statute. That is the very common law definition of tort, a violation of something imposed by law.

Although the court of appeals did not expressly state the specific definition of a "tort claim" it used, the panel noted that FHFA's claims did not involve what it called the "traditional hallmarks of tort actions," which include a claim for "damages," as well as a "breach of duty resulting in injury to person or property." Pet. App. 10a ("Freddie Mac and the Bank do not

---

[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)); *see also David v. Hett*, 293 Kan. 679, 270 P.3d 1102, 1114 (2011) (claim sounds in tort if plaintiffs allege breach of common-law or statutory duty independent from any contract).

seek damages or claim a breach of duty resulting in injury to person or property, two of the traditional hallmarks of a torts action."). This was error as neither of these "elements" distinguish contract claims from common law tort claims.[9]

Both tort and contract definitions include the word "duty." 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 – if the duty **does not** emanate from agreement between the parties, it is a "wrong independent of contract"[10] and is appropriately characterized as a tort.

Put simply, where there is no contract between the parties the action is "strictly and solely ex delicto [tort]."[11] Given the Ninth Circuit's acknowledgment that there is no agreement between the parties, the in-

---

[9] In referring to "contract claims" and "tort claims," Congress presumably intended common law understandings of those terms to govern. *See United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975) (citing *United States v. Neidorf*, 522 F.2d 916, 919 (9th Cir. 1975)).

[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 the common law division of actions as ex contractu (contract) and ex delicto (tort)).

quiry should have ended, because without an agreement between the parties, the very definition of a contract action cannot apply.

In addition, the Ninth Circuit was wrong in its premise that all tort claims assert the violation of some "duty." Nevada law provides many examples, including, but not limited to, wrongful foreclosure,[12] civil

[12] *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 662 P.2d 610 (1983).

assault,[13] civil battery,[14] civil conspiracy,[15] false imprisonment,[16] fraudulent or intentional misrepresentation,[17] nuisance,[18] slander of title,[19] intentional infliction of emotional distress,[20] and probably most notably, intentional interference with a contract.[21] Not a single one of these torts requires duty as an element.

Furthermore, the fact that a claim is "dependent" in some sense on a contract does not preclude it from arising in tort law. For example, intentional interference with a contract is a tort despite revolving entirely around a contract, because what drives the claim is not

---

[13] Prosser and Keeton on Torts, § 10 at 43 (5th ed. 1984); *Olivero v. Lowe*, 116 Nev. 395, 995 P.2d 1023 (2000).

[14] *Ashcraft v. King*, 278 Cal. Rptr. 900, 228 Cal. App. 3d 604 (1991); *see also Olivero*, 116 Nev. 395; *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 469 P.2d 399 (1970).

[15] *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 971 P.2d 1251 (1999); *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 970 P.2d 98 (1998).

[16] *Hernandez v. City of Reno*, 97 Nev. 429, 634 P.2d 668 (1981).

[17] *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382 (1998); *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320 (1992).

[18] *Culley v. County of Elko*, 101 Nev. 838, 711 P.2d 864 (1985).

[19] *Executive Management, LTD v. Ticor Title Insurance Co.*, 114 Nev. 823, 963 P.2d 465 (1998); *Higgins v. Higgins*, 103 Nev. 443, 744 P.2d 530 (1987).

[20] *Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 989 P.2d 882 (1999); *Miller v. Jones*, 114 Nev. 1291, 970 P.2d 571 (1998).

[21] *J.J. Industries, LLC v. Bennett*, 119 Nev. 269, 71 P.3d 1264 (2003).

the contract itself (although a requisite element), but rather the act of one **interfering** with the contract.[22]

Here, the Bank's claim is even more tenuously related to the contract. It is not the contract that functions as the basis for the claim; it is the existence of the federal statute that that serves as the entire basis of the claim. Without the federal statute, the Bank's claim would fail. This is similar to an intentional interference with a contract clam. While the existence of the contract is required, it is the interference with that contract on the part of a third party that drives the claim and without this interference, merely having the contract would not be enough to prevail on the claim. And no one would call an interference with contract claim a "contract claim" rather than a "tort claim."

In a similar context, the Nevada Supreme Court, in affirming a dismissal of a breach of contract claim brought by a purchaser at an HOA foreclosure sale, recently acknowledged "the HOA foreclosure process is governed strictly by statute, not by two parties entering into negotiations that are consummated by written agreement." *LN Management LLC Series 3732 Russell Peterson v. Shadow Hills Master Association*, 474 P.3d 333 (Nev. Oct. 16, 2020) (unpublished disposition). The Nevada Supreme Court further noted, the quintessential requirement for a contract claim is the existence of a contract **between the parties**. *Id.* at 2.

---

[22] *Stalk v. Mushkin*, 125 Nev. 21, 26, 199 P.3d 838, 841 (2009) (citing *Zimmerman v. Bank of America National T. & S. Ass'n*, 191 Cal.App.2d 55, 12 Cal.Rptr. 319, 321 (1961))("The actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable.").

(emphasis added.) Yet, the Court fully acknowledged "there is no contract between SFR and the plaintiffs…" Pet.App. 8a.

The court of appeals equally erred in treating a claim for damages as distinguishing tort and contract claims. Contract actions equally involve money damages. Nevertheless, simply because the Bank sought declaratory relief as opposed to money damages does not mean the claim does not sound in tort, and therefore sounds in contract.[23]

Likewise, the lack of injury to person or property does not mean the claim sounds in contract. Again, injury is just an element of *some* torts, it is not the lynchpin of the common law definition of tort. For example, trespass does not require actual injury. It requires invasion of a property right. Coming onto property of another is enough to meet that element of trespass. *See, e.g.*, *Dayton Valley Investors, LLC v. Union Pacific R. Co.*, 664 F. Supp. 2d 1174, 1190 (D. Nev. 2009). This would be especially so where the property owner was merely seeking declaratory relief that the invading party had no right to be there and to enjoin further invasion. At any rate, there is injury to property here. The Bank's property interest was extinguished by virtue of the Association's foreclosure sale, and but for the federal statute, the Bank would have lost its property interest. Certainly, the loss of a lien interest/money encumbrance is an injury to property. In fact, this is

---

[23] In any event, the Bank's declaratory relief still has monetary value. After all, the Bank seeks to insulate a money encumbrance valued in the six figure range.

the same injury involved in an intentional interference with contract claim.[24]

In the end, the Ninth Circuit put too much emphasis on an artificially narrow definition of tort, when Congress intended the common law definition to prevail. The court compounded its error by placing great emphasis on the traditional hallmarks of torts, while ignoring the "quintessential" hallmark of a contract action—an actual contract between the parties. *See LN Management*, *supra*. 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. Under the common law definitions of both tort and contract, the Bank's quiet title claim sounds in tort, not contract. And, therefore, the proper statute of limitations is limited to the longer of three years or the time allowed under state law for the tort.

2. SFR's position accords with the D.C. Circuit's reasoning in *Megapulse, Inc. v. Lewis*.[25] In *Megapulse* the D.C. Circuit considered whether a claim sounded in contract for purposes of establishing if jurisdiction existed for under the Tucker Act. In doing so, the D.C. Circuit admonished that "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."[26]

---

[24] *Stalk*, *supra*.

[25] 672 F.2d 959 (D.C. Cir. 1982).

[26] *Id.*

Here, the Ninth Circuit distinguished *Megapulse* on the obscure basis the *Megapulse* Court did not characterize the claim as tort. Pet. App. 10a n.3. But as the D.C. Circuit recognized, it is important to look beyond the origin of the relationship, even when one exists between the parties, noting: "[c]ontract issues may arise in various types of cases where the action itself is not founded on a contract."[27]

The same can be said here. While the origin of Freddie'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 the quiet title claim against SFR that challenges the effect of the foreclosure sale. Put another way, the Note does not serve as the basis to challenge the foreclosure sale, instead, the challenge emanates from the Federal Foreclosure Bar, i.e. emanates from law not a contract.

Consider this: if the foreclosure sale occurred prior to the enactment of the Federal Foreclosure Bar, 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*. This Court's intervention is needed to prevent further incursion into state property law and to inform the lower courts that the existence of a contract, without seeking breach or enforcement does not transform every action into a contract claim.

---

[27] *Id.* at 968.

C. The Ninth Circuit's Decision Will Have Broad And Harmful Consequences.

The Ninth Circuit's decision demands review because it will dictate the outcome of hundreds, if not thousands, of cases throughout the western United States. It means every action brought by or on behalf of the FHFA which is dependent in some way upon FHFA's ownership of a note and deed of trust is entitled to a minimum of a six-year statute of limitations. For example, in cases decided the same day, the same panel relied on M&T Bank to give the FHFA and GSEs the six-year statute of limitations. One of those cases involves over 80 properties.[28] There are scores more cases pending in federal courts on the same issue which are all, at this time, subject to the Ninth Circuit's holding here.

This court reach further, to cases where the time limit would generally be less, even under HERA. For example, FHFA or its agents have claimed in some cases that a purchaser has interfered with the ability for FHFA to foreclose, thereby interfering with its contract with the borrower. [29] That claim is necessarily

---

[28] *See Federal Home Loan Mortgage Corp. v. SFR Investments Pool 1, LLC*, 810 Fed. Appx. 589 (9th Cir. June 25, 2020) (memorandum); *see also Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 810 Fed. Appx. 492 (9th Cir. June 25, 2020) (memorandum). SFR and Bourne Valley Court Trust are filing a joint petition as to these two decisions concurrently with the instant petition.

[29] *See, e.g.*, *Alessi & Koenig, LLC v. Jameson, et al.*, Case No. A-15-715129-C (Eighth Judicial Dist. Ct., Clark County, Nevada) (Answer and Counterclaim of Defendant The Bank of New York Mellon at p. 20 (June 22, 2015); SFR uses this simply as an example and does not accept or concede that a claim for this cause

entirely dependent on the note and deed of trust. Yet, this cause of action in Nevada carries a three-year statute of limitations, which would remain three-years under HERA. NRS 11.190(3)(c); § 4617(b)(12)(A)(ii). And much less than six years in other Ninth Circuit states.[30]

The decision below regarding classifying the quiet title claim as contract establishes that when FHFA is involved, the lens through which a court analyzes its claim must not turn on whether or not there is a mortgage owned by FHFA in some way involved. The mere fact of ownership (which SFR and Bourne Valley do not concede for reasons stated in the sections related to production of the contracts) does not support overturning the otherwise valid sale. Rather, it is the existence of the Federal Foreclosure Bar that gives the banks, GSEs and FHFA legs in these cases. This continuing and deeper incursion into state law should be halted.

Further, while the Ninth Circuit was characterizing the claim while interpreting the HERA statute of limitations, nothing limits its analysis to FHFA suits. The Circuit's analysis could bleed over into determining the statute of limitations where FHFA is not involved, using the same reasoning: anyone with an interest in property could restyle their claims to avoid a shorter statute of limitations, even when breach or enforcement of the contract is not at issue. Or, worse,

---

of action exists under law against the purchaser at a foreclosure sale.

[30] *See*, *e.g.*, California, 2-year, Cal. Code Civ. Proc. § 339(1); Alaska, 2-year, AS § 09.10.070; Arizona, 2-year, A.R.S. § 12-542; Oregon, 2-year, O.R.S. § 12.110.

even when property interests are not at issue. Clever lawyers could restyle what are otherwise tort claims into contract claims so long as there is any contract existing in the background, to attempt to use the longer statute of limitations. Finally, a defendant could use the same logic used by the Ninth Circuit here to shorten the time available to bring an action so long as there is a contract in the background. For example, if a tort claim is somehow related to an underlying contract, would a party be barred under the Federal Tort Claims act because the claim is now one under contract? Or, in Nevada, a claim for wrongful death due to against the owner of real property could use this same analysis to say that the tort of wrongful death due to a construction defect should be deemed a contract claim because of the contract between the homeowner and contractor, such that the plaintiff would have only six-years to bring an action rather than the ten allowed by statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jacqueline A. Gilbert
Diana Cline Ebron
Counsel of Record
KIM GILBERT EBRON
7625 Dean Martin Dr.
Ste. 110
Las Vegas, NV 89139
(702) 400-4130
Jackie@kgelegal.com

December 31, 2020

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

M&T BANK; FEDERAL HOME LOAN MORTGAGE CORPORATION, *Plaintiffs-Appellees*, v. SFR INVESTMENTS POOL 1, LLC, *Defendant-Appellant*, and DIAMOND CREEK COMMUNITY ASSOCIATION, a Nevada Non-Profit Corporation, *Defendant*.	No. 18-17395 D.C. No. 2:17-cv-01867-JCM-CWH OPINION

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted June 9, 2020
San Francisco, California

Filed June 25, 2020

Before: Milan D. Smith, Jr. and Andrew D. Hurwitz, Circuit Judges, and C. Ashley Royal,[*] District Judge.

Opinion by Judge Hurwitz

SUMMARY[**]

Federal Foreclosure Bar / Statute of Limitations

The panel affirmed the district court's summary judgment in favor of plaintiffs Federal Home Loan Mortgage Corporation ("Freddie Mac") and M&T Bank in a quiet title action concerning foreclosed real property in Nevada.

The Housing and Economic Recovery Act ("HERA") created the Federal Housing Finance Agency ("FHFA") to regulate Freddie Mac and other lending agencies, and enacted the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3) (providing that no property of FHFA shall be subject to foreclosure without the consent of the FHFA, nor shall any involuntary lien attach to the property of the FHFA).

The panel held that under 12 U.S.C. § 4617(b)(12), a quiet title action is a "contract" claim that is subject to a statute of limitations of at least six years. The panel further held that Freddie Mac and M&T Bank timely filed their quiet title action within six years of the foreclosure sale; and Freddie Mac's deed of trust,

---

[*] The Honorable C. Ashley Royal, United States District Judge for the Middle District of Georgia, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

which had been placed under the conservatorship of FHFA, survived a non-judicial foreclosure sale of a Nevada residential property to satisfy a homeowners association superpriority lien.

The panel held that although Freddie Mac and the Bank were not assignees of the FHFA, Freddie Mac was under the FHFA conservatorship, and the FHFA thus had all the rights of Freddie Mac with respect to its assets. The panel also held that although there was no contract between the purchaser and the plaintiffs, the quiet title claims were entirely "dependent" upon Freddie Mac's lien on the property, an interest created by contract.

***

OPINION

HURWITZ, Circuit Judge:

The sole contested issue in this appeal is whether under 12 U.S.C. § 4617(b)(12), a quiet title action is a "contract" claim or a "tort" claim. If it is the former, this action is subject to a statute of limitations of at least six years, was timely filed, and the plaintiffs are entitled to summary judgment. We conclude that the statute of limitations applicable to a "contract" claim under 12 U.S.C. § 4617(b)(12)(A)(i) applies and affirm the judgment of the district court.

I.

Nevada law grants a homeowners association ("HOA") a "superpriority" lien on a property for unpaid assessments; that lien is superior even to a previously recorded first deed of trust. *See* Nev. Rev. Stat. § 116.3116; *Bank of Am., N.A. v. Arlington W. Twilight Homeowners Ass'n*, 920 F.3d 620, 621–22 (9th Cir.

2019) (per curiam). But, the "Federal Foreclosure Bar," 12 U.S.C. § 4617(j)(3), provides that "[n]o property of the [Federal Housing Finance Agency] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency." The Federal Foreclosure Bar preempts the Nevada superpriority lien scheme. *See Berezovsky v. Moniz*, 869 F.3d 923, 931 (9th Cir. 2017).

The underlying question in this case is whether a first deed of trust in favor of the Federal Home Loan Mortgage Corporation ("Freddie Mac"), which had been placed under the conservatorship of the Federal Housing Finance Agency ("FHFA"), survived a non-judicial foreclosure sale of a Nevada residential property to satisfy an HOA superpriority lien. That question turns on whether plaintiffs timely filed this action.

II.

The background facts are undisputed and largely a matter of public record. The story begins in November 2006, when an individual purchased a home in Las Vegas ("the Property") with a loan of approximately $200,000 from Universal American Mortgage Company LLC. The loan was secured by a first deed of trust. In January 2007, Freddie Mac acquired the loan and deed of trust.

In response to the 2008 financial crisis, Congress enacted the Housing and Economic Recovery Act ("HERA"), Pub. L. No. 110–289, 122 Stat. 2654 (codified at 12 U.S.C. § 4511 *et seq.*), which created the FHFA to regulate Freddie Mac and other lending agencies. In 2008, the FHFA placed Freddie Mac into conservatorship. As conservator, the FHFA has "all

rights, titles, powers, and privileges" of Freddie Mac. 12 U.S.C. § 4617(b)(2)(A)(i). HERA also enacted the Federal Foreclosure Bar. *Id.* at § 4617(j)(3).

The Property was sold on July 20, 2012 at a non-judicial foreclosure sale to SFR Investments Pool 1, LLC, for $5,200 to satisfy unpaid assessments by the Diamond Creek Community Association, an HOA. The FHFA, however, never consented to the extinguishment of the first deed of trust through the 2012 foreclosure sale. Therefore, in July 2017, Freddie Mac and M&T Bank, to whom Freddie Mac had assigned the deed of trust under a servicing agreement in May 2012,[1] filed this action, seeking to quiet title in the Property and requesting a judgment that the first deed of trust remained enforceable. The complaint asserted that the deed of trust had not been extinguished because of the Federal Foreclosure Bar and because the FHFA had never consented to the foreclosure sale.

SFR moved to dismiss the complaint, claiming that it was time-barred under the three-year statute of limitations applicable to "tort" claims in 12 U.S.C. § 4617(b)(12)(A)(ii). In response, Freddie Mac and the Bank contended that the governing statute of limitations was the five-year statute in Nevada Revised Statutes ("N.R.S") § 11.070 applicable to "an action, founded upon the title to real property."

---

[1] The relationship between Freddie Mac and M&T Bank is governed by Freddie Mac's Single-Family Seller/Servicer Guide, which provides that Freddie Mac's servicer may serve as record beneficiary for a deed of trust owned by Freddie Mac but must assign the deed of trust back to Freddie Mac upon Freddie Mac's demand. *See Berezovsky*, F.3d at 932–33.

The district court found that the state statute applied and that the action was timely because it was filed within five years of the HOA foreclosure sale. The court later granted summary judgment to Freddie Mac and the Bank, finding that because the FHFA never consented to the foreclosure sale, Freddie Mac's interest in the Property through the deed of trust survived under the Federal Foreclosure Bar. SFR timely appealed.

We have jurisdiction under 28 U.S.C. § 1291 and review the summary judgment de novo. Fed. Home Loan Mortg. Corp. v. SFR Invs. Pool 1, LLC, 893 F.3d 1136, 1144 (9th Cir. 2018). We "may affirm a summary judgment on any ground finding support in the record." *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1155 n.14 (9th Cir. 2002) (quoting *Karl Storz Endoscopy-Am., Inc. v. Surgical Techs., Inc.*, 285 F.3d 848, 855 (9th Cir. 2002)).

III.

Although Freddie Mac and the Bank relied on N.R.S. § 11.070 below, on appeal all parties—and the FHFA as amicus—agree that the HERA statute of limitations, 12 U.S.C. § 4617(b)(12)(A), controls.[2] That is correct.

---

[2] "Although the general rule in this circuit is that an appellate court will not consider an issue raised for the first time on appeal, we will reach the question if it is purely one of law and the opposing party will suffer no prejudice because of failure to raise it in the district court." *United States v. Thornburg*, 82 F.3d 886, 890 (9th Cir. 1996). This case presents a purely legal issue that SFR treated extensively in its briefs, so we consider plaintiffs' argument regarding whether the action was time-barred under the federal statute. *See id.*

In relevant part, HERA provides that the statute of limitations for "any action brought by the [FHFA] as conservator . . . 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)(A). Although the statute refers to "any action brought by the [FHFA] as conservator," *id.*, it applies here even though the plaintiffs are Freddie Mac and the Bank, its loan servicer.

In *FDIC v. Bledsoe*, the Fifth Circuit held that that a similarly worded statute of limitations—facially applying only to actions brought by a federal agency—also applied to actions brought by a private entity acting as an assignee for the federal agency. 989 F.2d 805, 809–11 (5th Cir. 1993). The Court found that the common law was "loud and consistent," in providing that "an assignee stands in the shoes of his assignor, deriving the same but no greater rights and remedies than the assignor then possessed" and therefore receives the same limitations period as the assignor. *Id.* at 810 (cleaned up). We adopted the Fifth Circuit's reasoning in *United States v. Thornburg*, 82 F.3d 886, 891 (9th Cir. 1996).

We reach the same conclusion here. Although Freddie Mac and the Bank are not assignees of the FHFA, Freddie Mac is under the FHFA conservatorship, and the FHFA thus has "all rights, titles, powers, and privileges" of Freddie Mac "with respect to [its] . . . assets." 12 U.S.C. § 4617(b)(2)(A)(i). Like an assignee, Freddie Mac thus "stands in the shoes of" the FHFA with respect to its current claims to quiet title to the deed of trust, which is property of the conservatorship. *Bledsoe*, 989 F.2d at 809; *see Thornburg*, 82 F.3d at 891. M&T Bank, Freddie Mac's assignee, stands in the same shoes as its assignor. *See Bledsoe*, 989 F.2d at 809; *Thornburg*, 82 F.3d at 891.

IV.

Although § 4617(b)(12)(A) only explicitly addresses "tort" and "contract" claims, it applies to all claims brought by the FHFA as conservator. *See* 12 U.S.C. § 4617(b)(12)(A) (stating that it "provides" what "the statute of limitations" "shall be" for "any action brought by the [FHFA] as conservator"). "By using these words, Congress precluded the possibility that some other limitations period might apply to claims brought by FHFA as conservator." *Fed. Hous. Fin. Agency v. UBS Ams. Inc.*, 712 F.3d 136, 142 (2d Cir. 2013); *cf. Nat'l Credit Union Admin. Bd. v. RBS Sec., Inc.*, 833 F.3d 1125, 1131 (9th Cir. 2016) ("By expressly stating that 'the' statute of limitations for 'any action' brought by the NCUA as conservator or liquidating agent 'shall be' as specified, Congress made clear that no other limitations period applies to the NCUA's claims."). Thus, if neither description is a perfect fit, we must decide when applying the statute whether a claim is better characterized as sounding in contract or in tort.

We conclude that the claims in this action are "contract" claims under 12 U.S.C. § 4617(b)(12)(A)(i). Although there is no contract between SFR and the plaintiffs, the quiet title claims are entirely "dependent" upon Freddie Mac's lien on the Property, an interest created by contract. *See Stanford Ranch, Inc. v. Md. Cas. Co.*, 89 F.3d 618, 625 (9th Cir. 1996) ("If a claim is dependent upon the existence of an underlying contract, the claim sounds in contract, as opposed to tort.") (applying California law); *see also 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."). Freddie Mac and the Bank do 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. *See United States v. Burke*, 504 U.S. 229, 234–35 (1992); *Prudential Ins. Co. of Am. v. L.A. Mart*, 68 F.3d 370, 375 (9th Cir. 1995).

Indeed, even if the question were closer, we would still choose the longer contract limitations period. "When choosing between multiple potentially-applicable statutes, as a matter of federal policy the longer statute of limitations should apply." *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 2010) (cleaned up); *see Fed. Deposit Ins. Corp. v. Former Officers & Dirs. of Metro. Bank*, 884 F.2d 1304, 1307 (9th Cir. 1989) ("This circuit has held, however, that when there is a 'substantial question' which of

two conflicting statutes of limitations to apply, the court should apply the longer.").[3]

We therefore conclude that plaintiffs had at least six years to bring their claims after the foreclosure sale. Because less than six years transpired between the accrual of the cause of action in 2012 on the date of the foreclosure sale and the filing of this suit in 2017, the suit was not time-barred. The judgment of the district court is AFFIRMED.[4]

---

[3] Contrary to SFR's contentions, *Megapulse, Inc. v. Lewis*, which stated that "the mere existence of . . . contract-related issues" does not "convert this action to one based on the contract," does not compel a contrary result. 672 F.2d 959, 969 (D.C. Cir. 1982). The issue in *Megapulse* was whether the claim presented was "clearly" a contract claim over which "the Court of Claims has exclusive jurisdiction." *Id.* at 967, 968. And, although the D.C. Circuit did not find that the claim at issue was "clearly" a contract claim, it also did not find that the claim sounded in tort. *See id.* at 971.

[4] We grant SFR's unopposed motion for judicial notice of orders in five cases before the Eighth Judicial District of the State of Nevada.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

M&T BANK, *et al.*, Plaintiffs, v. SFR INVESTMENTS POOL 1, LLC, *et al.*, Defendants.	Case No. 2:17-cv-01867-JCM-CWH ORDER

Presently before the court is defendant SFR Investments Pool 1, LLC's ("SFR") motion for reconsideration. (ECF No. 92). Plaintiffs Federal Home Loan Mortgage Corporation ("Freddie Mac") and M&T Bank ("M&T") (collectively "plaintiffs") filed a response (ECF No. 97), to which SFR replied (ECF No. 98).

Also before the court is plaintiffs' motion for leave to file surreply. (ECF No. 99). SFR filed a response (ECF No. 100), to which plaintiffs replied (ECF No. 101).

I. Facts

This action arises from a dispute over real property located at 8186 Deadwood Bend court, Las Vegas, Nevada 89178 ("the property"). (ECF No. 1).

Ronald Franke purchased the property on or about November 2, 2006. (ECF No. 28-2). Franke financed the purchase with a loan in the amount of $202,250.00 from Universal American Mortgage Company, LLC ("Universal"). *Id*. Universal secured the

loan with a deed of trust, which names Universal as the lender, Stewart Title Company as the trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary as nominee for the lender and lender's successors and assigns. *Id*.

On January 5, 2007, Freddie Mac purchased the loan, thereby obtaining a property interest in the deed of trust. (ECF No. 22). On May 23, 2012, MERS assigned the deed of trust to M&T, Freddie Mac's authorized servicer of the loan. (ECF Nos. 22, 28-12).

On June 24, 2011, Diamond Creek Community Association ("Diamond Creek"), through its agent Alessi & Koenig, LLC ("A&K"), recorded a notice of delinquent assessment lien ("the lien") against the property for Franke's failure to pay Copper Creek in the amount of $930.00. (ECF No. 28-8). On December 1, 2011, Diamond Creek recorded a notice of default and election to sell pursuant to the lien, stating that the amount due was $2,105.00 as of November 7, 2011. (ECF No. 28-9).

On May 7, 2012, Diamond Creek recorded a notice of foreclosure sale against the property. (ECF No. 28-11). On July 20, 2012, Diamond Creek sold the property in a nonjudicial foreclosure sale to SFR in exchange for $5,200.00. (ECF No 28-13). On July 24, 2012, SFR recorded the deed of foreclosure with the Clark County recorder's office. *Id*.

On July 7, 2017, Freddie Mac and M&T filed a complaint, alleging four causes of action: (1) declaratory relief under 12 U.S.C. § 4617(j)(3) against SFR; (2) quiet title under 12 U.S.C. § 4617(j)(3) against SFR; (3) declaratory relief under the Fifth and Fourteenth Amendments against all defendants; and (4)

quiet title under the Fifth and Fourteenth Amendments against SFR. (ECF No. 1).

On November 15, 2018, the court granted plaintiffs' motion for summary judgment (ECF No. 21), holding that the foreclosure sale did not extinguish the deed of trust. (ECF No. 90). The court also declined to grant SFR Federal Rule of Civil Procedure 56(d) relief because the evidence before the court was sufficient to preclude a genuine dispute of material fact pertaining to Freddie Mac's interest in the deed of trust. *Id*. On that same day, the clerk entered judgment. (ECF No. 91).

On December 13, 2018, SFR filed a motion for reconsideration, arguing that new evidence shows that there is a genuine dispute of material fact with respect to Freddie Mac's interest in the deed of trust. (ECF No. 92). On December 17, 2018, SFR appealed to the Ninth Circuit. (ECF No. 93). On January 8, 2019, plaintiffs moved for leave to file a surreply in opposition to SFR's motion for reconsideration. (ECF No. 99).

II. Legal Standard

A motion for reconsideration "should not be granted, absent highly unusual circumstances." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

Rule 59(e) "permits a district court to reconsider and amend a previous order," however "the rule offers

an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (internal quotations omitted). A motion for reconsideration is also an improper vehicle "to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in litigation." *Marlyn Nutraceuticals*, 571 F.3d at 880

III. Discussion

As a preliminary matter, plaintiffs seek to file a surreply in response to an argument that SFR raised for the first time in its reply brief. (ECF No. 99). Because "motions for leave to file a surreply are discouraged[,]" the court will deny BNYM's motion. LR 7-2(b). The court will also disregard all arguments that SFR raised for the first time in its reply brief. *See United States v. Wright*, 215 F.3d 1020, 1030 n.3 (9th Cir. 2000) (declining to consider arguments raised for the first time in a reply brief)

SFR argues in its motion for reconsideration that the court should reverse its November 15, 2018, order because new evidence in the form of plaintiffs' deposition testimony creates a genuine dispute of material fact. (ECF No. 92). The court disagrees.

Before the court granted summary judgment in plaintiffs' favor, SFR argued that the evidence before the court was inadmissible and insufficient to show that Freddie Mac had an ownership interest in the deed of trust. (ECF Nos. 25, 29, 48). The evidence in dispute was the declaration of Dean Meyer, who is director of loss mitigation at Freddie Mac. (ECF No. 22). SFR also requested that the court allow further discovery into Freddie Mac's ownership interest in the

deed of trust before adjudicating plaintiffs' motion for summary judgment. (ECF No. 29).

The court denied SFR's request and held that the declaration of Dean Meyer was sufficient to allow the court to summarily hold that Freddie Mac had an ownership interest in the deed of trust. (ECF No. 90). Now, SFR is improperly attempting to rehash an old argument by once again asserting that the declaration of Dean Meyer cannot support summary judgment. *See Phillips v. C.R. Bard. Inc.*, 290 F.R.D. 615, 670 (D. Nev. 2013) ("Motions for reconsideration are not the proper vehicles for rehashing old arguments").

Moreover, the court has examined the new evidence that SFR attached to its motion and does not find any genuine dispute of material fact. Dean Meyer unequivocally stated in his declaration that Freddie Mac owns the deed of trust and attached database printouts in support of his claims. (ECF No. 22). Nothing in the record substantially challenges Dean Meyer's declaration.

The court also reiterates that federal district courts routinely rely on materially identical business records to summarily hold that Freddie Mac owns a deed of trust. *See e.g. G&P Investment Enterprises, LLC v. Wells Fargo Bank, N.A.*, 199 F. Supp. 3d 1266, 1267 (D. Nev. 2016); *see also Berezovsky v. Moniz*, No. 2:15-cv-01186-GMN-GWF, 2015 WL 8780198, at *1 (D. Nev. Dec. 15, 2015). The Ninth Circuit has affirmed several of those decisions. *See, e.g.*, *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017); *see also, e.g.*, *Williston Inv. Grp., LLC v. JP Morgan Chase Bank, NA*, 736 F. App'x. 168 (9th Cir. 2018).

In consideration of the foregoing, the court was correct to adjudicate plaintiffs' motion for summary judgment because (1) additional discovery would not assist in avoiding summary judgment and (2) there is no genuine dispute of material fact with regards to Freddie Mac's ownership interest in the deed of trust. *See Fed. Nat'l Mortgage Ass'n v. KK Real Estate Inv. Fund*, No. 2:17-cv-1289-JCM-CWH, 2018 WL 525297 at *5 (D. Nev. Jan. 23, 2018) (declining Rule 56(d) relief and entering summary judgment in circumstances materially identical to this case).

IV. Conclusion

In light of the foregoing, the court will deny SFR's motion for reconsideration pursuant to Rule 62.1(a). Fed. R. Civ. P. 62.1(a) (providing that a district court can deny a motion for relief despite a pending appeal of the underlying order).

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that SFR's motion for reconsideration (ECF No. 92) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that plaintiffs' motion for leave to file surreply (ECF No. 99) be, and the same hereby is, DENIED.

DATED THIS 10th day of April 2019.

/s/
JAMES C. MAHAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

M&T BANK, et al., Plaintiff(s), v. SFR INVESTMENTS POOL 1, LLC, et al., Defendant(s).	Case No. 2:17-CV-01867 JCM (CWH) ORDER

Presently before the court is plaintiffs Federal Home Loan Mortgage Corporation ("Freddie Mac") and M&T Bank's ("M&T") motion for summary judgment. (ECF No. 21). Defendant/counter claimant/cross claimant SFR Investments Pool 1, LLC ("SFR") filed a response (ECF No. 28), to which Freddie Mac and M&T replied (ECF No. 43).

Also before the court is SFR's motion for relief pursuant to Federal Rule of Civil Procedure 56(d). (ECF No. 29). Freddie Mac and M&T filed a response (ECF No. 43), to which SFR replied (ECF No. 47).

Also before the court is SFR's motion to strike (ECF No. 48). Freddie Mac and M&T filed a response (ECF No. 52), to which SFR replied (ECF No. 55).

I. Facts

This action arises from a dispute over real property located at 8186 Deadwood Bend court, Las Vegas, Nevada 89178 ("the property"). (ECF No. 1).

Ronald Franke purchased the property on or about November 2, 2006. (ECF No. 28-2). Franke financed the purchase with a loan in the amount of $202,250.00 from Universal American Mortgage Company, LLC ("Universal"). *Id*. Universal secured the loan with a deed of trust, which names Universal as the lender, Stewart Title Company as the trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary as nominee for the lender and lender's successors and assigns. *Id*.

On January 5, 2007, Freddie Mac purchased the loan, thereby obtaining a property interest in the deed of trust. (ECF No. 22). On May 23, 2012, MERS assigned the deed of trust to M&T, Freddie Mac's authorized servicer of the loan. (ECF Nos. 22, 28-12).

On June 24, 2011, Diamond Creek Community Association ("Diamond Creek"), through its agent Alessi & Koenig, LLC ("A&K"), recorded a notice of delinquent assessment lien ("the lien") against the property for Franke's failure to pay Copper Creek in the amount of $930.00. (ECF No. 28-8). On December 1, 2011, Diamond Creek recorded a notice of default and election to sell pursuant to the lien, stating that the amount due was $2,105.00 as of November 7, 2011. (ECF No. 28-9).

On May 7, 2012, Diamond Creek recorded a notice of foreclosure sale against the property. (ECF No. 28-11). On July 20, 2012, Diamond Creek sold the property in a nonjudicial foreclosure sale to SFR in exchange for $5,200.00. (ECF No 28-13). On July 24, 2012, SFR recorded the deed of foreclosure with the Clark County recorder's office. *Id*.

On July 7, 2017, Freddie Mac and M&T filed a complaint, alleging four causes of action: (1) declaratory relief under 12 U.S.C. § 4617(j)(3) against SFR; (2) quiet title under 12 U.S.C. § 4617(j)(3) against SFR; (3) declaratory relief under the Fifth and Fourteenth Amendments against all defendants; and (4) quiet title under the Fifth and Fourteenth Amendments against SFR. (ECF No. 1).

Now, Freddie Mac and M&T move for summary judgment, requesting that the court hold that the foreclosure sale did not extinguish the deed of trust. (ECF No. 21).

II. Legal Standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the nonmoving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to withstand summary judgment, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial." *Id.*

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of

proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

By contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a dispute of material fact conclusively in its favor. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.*

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory

allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth, but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

III. Discussion

As a preliminary matter, the court will deny SFR's motion for relief under Rule 56(d) (ECF No. 29) and motion to strike (ECF No. 48) because these motions are based on the erroneous contention that the evidence before the court is inadmissible and does not show that Freddie Mac owns the deed of trust. (ECF Nos. 29, 48).

Here, Freddie Mac and M&T have provided the court with the declaration of Dean Meyer, who is director of loss mitigation at Freddie Mac. (ECF No. 22). In the declaration, Dean Meyer testified that Freddie Mac owns the deed of trust and attached database printouts in support of those claims. *Id*. Courts regularly rely on this kind of evidence at summary judgment to hold that Freddie Mac owns a deed of trust. *See e.g. G&P Investment Enterprises, LLC v. Wells*

Fargo Bank, N.A., 199 F. Supp. 3d 1266, 1267 (D. Nev. 2016); *see also Berezovsky v. Moniz*, No. 2:15-cv-01186-GMN-GWF, 2015 WL 8780198, at *1 (D. Nev. Dec. 15, 2015), *aff'd*, 869 F.3d 923 (9th Cir. 2017). Accordingly, SFR has failed to show good cause to strike the declaration (ECF No. 22) or delay adjudication of Freddie Mac and M&T's motion for summary judgment (ECF No. 21).

As to the pending motion for summary judgment, Freddie Mac and M&T argue that the court should set aside the foreclosure sale because 12 U.S.C. § 4617(j)(3) ("the federal foreclosure bar") preempts contrary state law. (ECF No. 21).

The Housing and Economic Recovery Act ("HERA") established Federal Housing Finance Agency ("FHFA") to regulate Fannie Mae, Freddie Mac, and Federal Home Loan Banks. *See* Pub. L. No. 110–289, 122 Stat. 2654, codified at 12 U.S.C. § 4511 *et seq*. In September 2008, FHFA placed Fannie Mae and Freddie Mac into conservatorships "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." 12 U.S.C. § 4617(a)(2). As conservator, FHFA immediately succeeded to "all rights, titles, powers, and privileges" of Fannie Mae and Freddie Mac. 12 U.S.C. § 4617(b)(2)(A)(i). Moreover, Congress granted FHFA exemptions to carry out its statutory functions—specifically, in acting as conservator, "[n]o property of [FHFA] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of [FHFA], nor shall any involuntary lien attach to the property of [FHFA]." 12 U.S.C. § 4617(j)(3).

In *Skylights LLC v. Fannie Mae*, 112 F. Supp. 3d 1145 (D. Nev. 2015), the court addressed the applicability of 12 U.S.C. § 4617(j)(3) and held that the plain

language of § 4617(j)(3) prohibits property of FHFA from being subjected to a foreclosure without its consent. *See also Saticoy Bay, LLC v. Fannie Mae*, No. 2:14-CV-01975-KJD-NJK, 2015 WL 5709484 (D. Nev. Sept. 29, 2015) (holding that 12 U.S.C. § 4617(j)(3) preempts NRS 116.3116 to the extent that a HOA's foreclosure of its super-priority lien cannot extinguish a property interest of Fannie Mae while those entities are under FHFA's conservatorship).

Since *Skylights*, this court has consistently held that 12 U.S.C. § 4617(j)(3) prohibits property of FHFA from foreclosure absent agency consent. *See, e.g., 1597 Ashfield Valley Trust v. Fed. Nat. Mortg. Ass'n System*, case no. 2:14-cv-02123-JCM-CWH, 2015 WL 4581220, at *7 (D. Nev. July 28, 2015). Recently, the Ninth Circuit also held that the federal foreclosure bar applies to private foreclosure sales and "supersedes the Nevada superpriority lien provision." *See Berezovsky v. Moniz*, 869 F.3d 923, 929, 931 (9th Cir. 2017).

Here, Freddie Mac acquired ownership of the underlying loan on January 5, 2007. (ECF No. 22). Further, on May 23, 2012, M&T acquired all beneficial interest in the deed of trust via an assignment. (ECF No. 28-12). M&T acted as a contractually authorized servicer of the loan on behalf of Freddie Mac, the owner of the note. Pursuant to § 4617(b)(2)(A)(i), FHFA, as conservator, immediately succeeded to all rights, titles, powers, and privileges of plaintiff. *See* 12 U.S.C. § 4617(b)(2)(A)(i). Therefore, FHFA held an interest in the deed of trust as conservator for plaintiff prior to the foreclosure sale on July 20, 2012.

FHFA did not consent to the extinguishment of Freddie Mac's property interest through the foreclosure sale. SFR argues that FHFA has affirmative

rights and duties, and a failure to appear at the foreclosure sale or pay the superpriority lien prior to the sale constituted consent to the foreclosure. *See* (ECF No. 28). However, pursuant to the Ninth Circuit's recent decision in *Berezovsky*, § 4617(j) imposes no such duties on the FHFA, and the plain language of § 4617(j)(3) prevents a foreclosure sale pursuant to NRS 116.3116 *et seq.* from extinguishing the deed of trust. *See Berezovsky*, 869 F.3d at 929, 931.

Freddie Mac obtained its interest in the property prior to the foreclosure sale. As Freddie Mac was subject to conservatorship at the time of the alleged foreclosure, and the agency did not consent to foreclosure, Freddie Mac's interest in the property survived the foreclosure sale. Thus, Freddie Mac and M&T are entitled to summary judgment on their declaratory relief and quiet title claims.[1]

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Freddie Mac and M&T's motion for summary judgment (ECF No. 21) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that SFR's motion for relief under Federal Rule of Civil Procedure 56(d) (ECF No. 29) be, and the same hereby is, DENIED.

---

[1] The court will not address Freddie Mac and M&T's quiet title and declaratory relief claims under the Fifth and Fourteenth Amendments, which appear to be pled in the alternative and are not pertinent to the adjudication of this action.

IT IS FURTHER ORDERED that SFR's motion to strike (ECF No. 48) be, and the same hereby is, DENIED.

The clerk shall enter judgment accordingly and close the case.

DATED November 15, 2018.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

M&T BANK; FEDERAL HOME LOAN MORTGAGE CORPORATION, Plaintiffs-Appellees, v. SFR INVESTMENTS POOL 1, LLC, Defendant-Appellant. and DIAMOND CREEK COMMUNITY ASSOCIATION, a Nevada Non-Profit Corporation, Defendant.	No. 18-17395 D.C. No. 2:17-cv-01867-JCM-CWH District of Nevada, Las Vegas ORDER

Filed Aug. 4, 2020

Before: M. SMITH and HURWITZ, Circuit Judges, and ROYAL,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judges M. Smith and Hurwitz have voted

---

* The Honorable C. Ashley Royal, United States District Judge for the Middle District of Georgia, sitting by designation.

to deny the petition for rehearing en banc, and Judge Royal so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, Dkt. 65, is **DENIED**.

APPENDIX E

---

12 U.S.C. § 4617 provides in relevant part:

§ 4617. Authority over critically undercapitalized regulated entities

* * *

(b) Powers and duties of the Agency as conservator or receiver

* * *

(2) General powers

(A) Successor to regulated entity

The Agency shall, as conservator or receiver, and by operation of law, immediately succeed to—

(i) all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity; and

(ii) title to the books, records, and assets of any other legal custodian of such regulated entity.

* * *

(12) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver 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.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Agency as conservator or receiver; or

(ii) the date on which the cause of action accrues.

* * *

(j) Other Agency exemptions

* * *

(3) Property protection

No property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency.

* * *

Nev. Rev. Stat. § 116.3116 (2012) provides in relevant part:

§ 116.3116. Liens against units for assessments

* * *

2. A lien under this section is prior to all other liens and encumbrances on a unit except:

(a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal

Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

* * *