No. 20-___

IN THE

Supreme Court of the United States

SFR INVESTMENTS POOL 1, LLC,
Petitioner,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION, et al.,
Respondents.

BOURNE VALLEY COURT TRUST,
Petitioner,

v.

WELLS FARGO BANK, NA,
Respondent.

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

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Fannie and Freddie 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. In *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854, 858 (9th Cir. 2020), the Ninth Circuit held that these quiet title actions are subject to a federal statute of limitations for "contract claims" by FHFA, 12 U.S.C. § 4617(b)(12).[*]

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 FHFA may challenge the validity of a state foreclosure sale on the ground that the sale violated 28 U.S.C. § 4617(j)(3) because FHFA held an interest in the property and did not consent to the foreclosure, without producing the contract that estab-

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[*] This holding is challenged in a separate petition in *SFR Investments Pool 1, LLC v. M&T Bank*, No. 20-__, being filed simultaneously with this petition. Petitioner here requests that the two cases be considered together.

lished its property interest and relying instead on entries in its computerized databases purporting to reflect the existence and terms of the contracts.

PARTIES TO THE PROCEEDING

Petitioners:

SFR Investments Pool 1, LLC

Bourne Valley Court Trust

Respondents:

Federal Housing Finance Agency

Federal Home Loan Mortgage Corporation

Federal National Mortgage Association

Wells Fargo Bank, N.A.

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

Federal Housing Finance Agency; Federal Home Loan Mortgage Corporation; Federal National Mortgage Association v. SFR Investments Pool 1, LLC, 9th Cir. Case No. 19-15910, Memorandum decision entered June 25, 2020, Order on petition for rehearing entered August 4, 2020; USDC Nevada Case No. 2:15-cv-02381, Order and Judgment entered on April 1, 2019, Order on motion for partial reconsideration entered November 25, 2019.

Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 9th Cir. Case No. 19-15253: Memorandum decision entered June 25, 2020, Order on petition for rehearing entered August 4, 2020;

Bourne Valley Court Trust v. Wells Fargo Bank, N.A.; MTC Financial Inc., d/b/a Trustee Corps; and Nevada Legal News, LLC, USDC Nevada Case No. 2:13-cv-00649-JCM-GWF: Order entered January 10, 2019, Judgment entered January 11, 2019;

Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 9th Cir. Case No. 15-15233: Opinion entered August 12, 2016, on petition for rehearing entered October 18, 2016;

Bourne Valley Court Trust v. Wells Fargo Bank, United States Supreme Court Case No. 16-1208: cert. denied June 26, 2017.

Also:

M&T Bank; *Federal Home Loan Mortgage Corporation v. SFR Investments Pool 1, LLC*, C.A. Case No. 18-17395

A Petition for Writ of Certiorari is being filed for the *M&T* case concurrently with the instant Petition. The cases are related and SFR and Bourne Valley Court Trust request the Petitions be considered together.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners SFR Investments Pool 1, LLC and Bourne Valley Court Trust respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these related cases, which were heard by the same panel on the same day and the decisions issued on the same day

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) in *Federal Home Loan Mortgage Corp., et al v. SFR Investments Pool 1, LLC* ("Jessica Grove") is published at 810 Fed. Appx. 589 (Mem). The opinion of the district court (Pet. App. 11a-21a) is published as *Ditech Financial LLC v. SFR Investments Pool 1, LLC* at 380 F.Supp.3d 1089.

The opinion of the court of appeals (Pet. App. 27a-30a) in *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.* ("Bourne Valley") is published at 810 Fed. Appx. 492 (Mem). The opinion of the district court (Pet. App. 37a-45a) is published at 2019 WL 177467.

JURISDICTION

The judgment of the court of appeals in each case was entered on June 25, 2020. Pet. App. 1a, 27a. The court of appeals denied petitioners' timely petitions for rehearing en banc on August 4, 2020. Pet. App. 24a, 46a. 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(b)(12), 4617(j)(3), Nevada Revised Statutes § 11.190, and Fed. R. Evid. 1002 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 principles. 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.

As to the second question, Fannie Mae and Freddie Mac (government-sponsored entities or GSEs) buy mortgages or promissory notes and deeds of trust, but

generally do not record their interests. Instead, the deeds of trust are typically recorded in the name of an entity servicing the loan, such as Wells Fargo in the *Bourne Valley* case. When FHFA put the GSEs into conservatorship, these promissory notes and deeds of trust became property of FHFA. 12 U.S.C. § 4617(b)(2)(A). As a result, the so-called Federal Foreclosure Bar prevented any foreclosure without FHFA's consent. Plaintiffs sued to establish that FHFA's interest in the properties, the deeds of trust, were not extinguished.

To succeed on a claim that the Federal Foreclosure Bar prevents extinguishment of the deed of trust because FHFA owned the notes and deeds of trust, the party must establish the existence and content of one or more contracts. That is, the plaintiff must establish: (i) FHFA ownership at the time of the HOA foreclosure; and (ii) if the suit is brought by someone other than FHFA, an agency relationship between the party bringing the action and the GSE, and authority to file the suit on the GSE's behalf with respect to the particular property involved. To prove these things, the plaintiff must prove the existence of the contracts through which the GSE established an interest in the property, such as the actual purchase agreement naming the loan for the particular property, as well as the actual contract between the GSE and the purported servicer, showing the particular property involved and what authority that servicer has related to that loan.

The question presented here arises because the Ninth Circuit allowed FHFA and its agents to prove ownership by using only entries in computer screen printouts rather than the actual contracts themselves. Among its many flaws, that ruling contravenes the

Best Evidence Rule, Federal Rule of Evidence 1002, unambiguously requires that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise."

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. Many homes (particularly in states like Nevada) are developed as part of a planned community, in which important services are provided by a home

owners association (HOA) rather than the local government. In order to finance these services, homeowners are required to pay regular assessments to the HOA. In Nevada, if the assessments are not paid, the association may put a lien against the property and non-judicially foreclose on it. 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 extinguishes 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, through which 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)

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[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).

which prevents foreclosure or sale of property of the Agency without the Agency's consent. This has been 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 promissory note owned by Fannie or Freddie. *Berezovsky v. Moniz*, 869 F.3d 923, 930-931 (9th Cir. 2017).

4. Generally, Fannie and Freddie do not record their interest in their own names; the named beneficiary is usually a banking entity or MERS, the Mortgage Electronic Registration System.[3] Because transfers of interest often happen only in the MERS registry, if the note and deed of trust are transferred to a GSE, it will not appear in the public records. Thus, while generally the public records are where property interests can be found and those records relied on, neither lienholders or those attending and bidding on properties at foreclosure sales cannot know if the Federal Foreclosure Bar is at play. Because a properly held foreclosure sale by a senior lienholder, here by an HOA, will presumptively extinguish a junior lien, here the deed of trust,[4] and because Fannie or Freddie's

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[3] MERS was designed and implemented so that mortgages could be sold and traded among members without the need to record each transaction. *See Cervantes v. Countrywide Home Loans, Inc*. 656 F.3d 1034, 1038-39 (9th Cir. 2011).

[4] *Nationstar Mortgage, LLC v. Saticoy Bay Series 2227 Shadow Canyon*, 133 Nev. 740, 745 405 P.3d 641, 646 (2017) ("[The Bank] has the burden to show that the sale should be set aside in light of [the purchaser's] status as the record title holder." (citing *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 668-69, 918 P.2d 314, 318 (1996)); NRS 47.250(16); NRS

property interest is not required to be recorded, they or their agents must come to court and have the deed of trust declared to have survived the sale because of the Federal Foreclosure Bar.

5. The Ninth Circuit has held that a quiet title claim challenging the result of the foreclosure sale is one in contract. *M&T Bank v. SFR Investments Pool 1, LLC*, 963 F.3d 854, 858 (9th Cir. 2020). [5]

6. To be able to bring and prosecute an action involving "property of the Agency" on behalf of FHFA, Fannie or Freddie and invoke the Federal Foreclosure Bar, that party much prove two things: (i) Freddie or Fannie's rightful ownership of the promissory note underlying the deed of trust, which means the actual note properly endorsed was transferred from the originating lender to the GSE before the HOA sale and still belongs to the GSE at the time of the lawsuit; and (ii) an agency relationship between the party prosecuting the suit and the GSE as to the specific property involved in the litigation.[6]

116.31166; and *Shadow Wood Homeowners Ass'n Inc. v. New York Community Bancorp, Inc.*, 132 Nev. 49, 57-58, 366 P.3d 1105, 1111 (2016) (observing that NRS 116.31166's language was taken from NRS 107.030(8), which governs power-of-the sale foreclosures))). *See also SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 419; *See Nationstar Mortgage, LLC v Saticoy Bay Series 2227 Shadow Canyon*, 405 P.3d 641, 646 (Nev. 2017); *Resources Group, LLC as Trustee of East Sunset Road Tr. v. Nevada Ass'n Services, Inc.*, 437 P.3d 154, 156 (Nev. 2019).

[5] SFR has filed a Petition for Writ of Certiorari in *M&T Bank* concurrently with the instant petition.

[6] *Berezovsky*, 869 F.3d at 932 (citing *In re Montierth*, 354 P.3d 648, 650-651 (Nev. 2015) (citing Restatement (Third) of Property: Mortgages § 5,4 cmt. C (Am Law. Inst. 19997))).

7. Fed. R. Evidence 1002 provides that"[a]n original writing, recording, or photograph is required in order to prove its content, unless these rules or a federal statute provides otherwise."[7] But the Ninth Circuit in *Berezovsky*, determined the GSEs and their purported servicers could simply provide computer screen shots of loan records and an employee declaration claiming the documents to be business records that prove that there is a promissory note and FHFA owned it at the time of the HOA foreclosure sale because it was sold to Fannie or Freddie prior to the foreclosure sale. They were also allowed to use these same or similar screen shots to prove an agency relationship between a servicing bank (such as M&T) and the GSE.[8] The Ninth Circuit relied on *Berezovsky* in these cases in allowing the same lesser evidence. (Pet. App. 4a, 30a.)

In many of the cases involving homeowner association foreclosure sales, the banks in the litigation have avoided having to produce the original notes, with any accompanying endorsements and allonges, by asserting they are not seeking to enforce the deed of trust. They have used the same logic to avoid producing the contractual agreements naming them as an agent of Fannie or Freddie for the particular property involved.

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[7] When a party moves for summary judgment before discovery has conducted, and the non-moving party requests discovery pursuant to Fed. R. Civ. P. 56(d), generally, such relief is not only appropriate, but should be granted fairly freely. *Jacobson v. United States Dep't of Homeland Security*, 882 F.3d 878 (9th Cir. 2018); *see also Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003).

[8] 869 F.3d at 932-33.

By successfully doing so, they have not only been allowed to avoid showing best evidence, but denied the purchasers, the strangers to the contracts on which their claims are "entirely dependent" upon, meaningful discovery and an opportunity to be heard. The burden is on the person claiming to preempt state law, and to show the HOA foreclosure sale did not extinguish the deed of trust. *See Resources Group, LLC as Trustee of East Sunset Road Tr. v. Nevada Association Services, Inc*., 437 P.3d 154, 162 (Nev. 2019).

II. Factual And Procedural History

A. *Federal Home Loan Mortgage Corp. et al. v. SFR ("Jessica Grove")*

SFR purchased the subject properties as the highest bidder at homeowner association foreclosure auctions. At the time of the sales, none of the properties were recorded in Fannie or Freddie's name. *See* JGCA Dkt. 13-8 at 477-490; JGDC Dkt. 66-1.[9]

Ditech Financial, LLC (the loan servicer for the Jessica Grove note and named beneficiary of the deed of trust Fannie and FHFA), initially filed a complaint regarding the Jessica Grove property asserting that the sale failed to extinguish Fannie's interest in the property because the foreclosure violated the Federal Foreclosure Bar, FHFA having never consented to the sale. JGDC Dkt. 1. On June 15, 2016, FHFA, Fannie, and Freddie (collectively referred to as "respondents") filed an Amended Complaint, adding 88 additional properties claiming each property had a note owned by FHFA and that the Federal Foreclosure Bar

[9] All references to the Jessica Grove case shall be made as JGDC Dkt. or JGCA Dkt.

preempted any Nevada law's extinguishment of the GSE's interest in the properties. JGDC Dkt. 24, 29-1. The case was stayed for almost two years before discovery began while issues related to constitutionality of the Nevada foreclosure statutes were pending in various courts. JGDC Dkt. 41, 55; *see* Pet. App. 29a n.1; *see also* US Supreme Court Dkt. No. 16-1208.

Once the stay was lifted, SFR moved to dismiss with respect to 53 of the properties on statute of limitations grounds. SFR argued that the suit was subject to the three-year statute of limitations in §4617(b)(12), and that the sales for those properties had occurred more than 3 years before the amended complaint was filed and much longer for many of those properties. JGDC Dkt. 60. Respondents argued the six-year statute of limitation for contracts applied, or alternatively the NRS 11.070 five-year limitation. JGDC Dkt. 65.

Less than two months after discovery opened, respondents filed a motion for summary judgment, attaching almost 1000 pages of exhibits to the motion consisting primarily of computer screen printouts of records purporting to show purchase dates and servicing dates for the loans in question, with none of the documents used to support the information in the screen shots included. JGDC Dkt. 66 - 69-9. Copies of the promissory notes were also not attached. JGDC Dkt. 66 – 69-9. SFR opposed the stay and protective order motions, as well as the summary judgment motion and sought Federal Rule of Civil Procedure 56(d) relief as it had not had time to even begin discovery into the documents by which respondents justified their relief, i.e. contracts by which FHFA claimed a property interest and the contracts proving agency relationships as to each property. JGDC Dkt. 85.

Respondents also sought a protective order from SFR's attempt to obtain and examine the contracts, as well as a stay of discovery. JGDC Dkt. 70, 71, 101. Their argument was that these documents were "irrelevant" as to ownership of the note. JGDC Dkt. 70 at 8. Yet they also refused to produce the purchase contracts which would prove ownership and any powers of attorney which would prove the agency relationships. JGDK Dkt. 70 at 9-10. They also sought a protective order to prevent SFR from obtaining records from MERS, a third-party, because it claimed the records could contain commercial or sensitive information, without stating what type of information that might be. JGDC 108 at 7. Yet, what SFR sought was the records of unrecorded transfers of the contract and security interest which might prove Freddie or Fannie's interest. JGDC 7-11. The magistrate granted the stay and all discovery halted. JGDC 110.

Before ruling on the discovery motions, the district court granted respondents' motion for summary judgment and denied SFR's motions for summary judgment and relief and Rule 56(d) relief. Pet. App. 11a-21a. The district court concluded respondents' claims sounded in contract and therefore applied the six-year statute of limitations. Pet. App. 17a-18a. Then the district court, relying on a case in which Rule 56(d) relief was never sought, denied SFR further discovery because it found the thousands of pages of exhibits, declared to be business records, adequate proof the Agency owned the notes secured by the deeds of trust preventing extinguishment. Pet. App. 17a-20a (citing *Berezovsky*, 869 F.3d at 932). The district court stated the arguments raised by petitioner did not do rise to the level of showing a genuine issue of material

fact as to the Agency's ownership. *See* Pet. App. 20a. The district court denied SFR's motion for partial reconsideration on the discovery issues. Pet. App. 5a-10a.

The Ninth Circuit affirmed. Pet. App. 1a-4a. As most relevant here, the court affirmed the district court's entry of summary judgment without allowing discovery of the contracts forming the basis of respondents' claims. Pet. App. 3a-4a. The court reasoned that under its prior precedent in *Berezoksky*, the "summary judgment record" – which contained screenshots but no contracts – "already made plain that plaintiffs possessed valid and enforceable interests in all of the Properties at the time of the foreclosure sales." Pet. App. 3a-4a.[10]

SFR timely moved for panel rehearing and en banc reconsideration, arguing that the panel erred in denying SFR access to the underlying contracts, particularly given that the court had applied a six-year statute of limitations for contract claims on the ground that respondents' claims where "entirely dependent" on those contracts. JGCA 49-1. The Ninth Circuit denied rehearing and reconsideration. Pet. App. 24a.

B. *Bourne Valley Court Trust v. Wells Fargo Bank*

Bourne Valley Court Trust (BVCT) purchased its property from the successful bidder at a homeowners association foreclosure auction. Pet. App. 28a. BVCT was similarly denied the opportunity to do meaningful

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[10] The panel also relied on *M&T Bank* to hold that respondents' claims were subject to 12 U.S.C. § 4617(b)(12)(A)(i)'s six-year statute of limitations of "contract claims." Pet.App. 3a.

discovery into Freddie's ownership, which was not raised until well into litigation, over 5 years after it began. *See* Pet. App. 29a n.1; BVDC Dkt. 1-1[11] (complaint filed in state court on January 25, 2013); 22 (Wells Fargo's motion for summary judgment not raising Freddie's interest or the Federal Foreclosure Bar); 78 at p. 5 and 7-12 (raising Freddie's interest and the Federal Foreclosure Bar for the first time on August 1, 2017).

On appeal, as in *Jessica Grove*, the panel issued a short memorandum, relying on *M&T Bank* characterizing the claim as contract and finding the "record had already made plain Freddie possessed a valid and enforceable interest in the Property at the time of the foreclosure sale." Pet. App. 27a-30a (relying on *Berezovsky*, 869 F.3d at 932-33). As in Jessica Grove, BVCT timely petitioned for rehearing and en banc reconsideration on the basis that it had been denied any meaningful discovery in the case. BVCA Dkt. 61-1. 46a. The petition was denied. Pet. App. 46a.

REASONS FOR GRANTING THE WRIT

I. The Petition Should Be Held For A Decision In *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

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[11] All references to the *Bourne Valley* District Court Docket are as BVDC Dkt, and to the court of appeals docket as BVCA Dkt.

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 brief, 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 President or who otherwise served in violation of the Constitution's structural provisions." *Collins* Petr. Br. 62; *see also id.* at 62-66 (discussing authorities). The Government resists vacatur of the agency action at issue in *Collins*, although largely for case-specific reasons. *Collins* Federal Parties Reply Br. 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).[12]

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[12] 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*, No. 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

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. The Second Question Presented Warrants Plenary Review.

Regardless of the outcome in *Collins*, this Court should grant plenary review of the second question presented. The Ninth Circuit's decision contravenes the plain terms of the Rules of Evidence and unfairly forces homeowners to take FHFA's word for it that its records accurately reflect an ownership it declined to record in the public land records.

A. The Ninth Circuit's Decision Violates Established Rules Of Evidence And Principles Of Fair Adjudication.

At the core of FHFA's suit in these cases is the claim that by virtue of various contracts, it has a property interest in the foreclosed properties at issue and its servicers have the right to bring suit on its behalf. It is only because of those contracts that FHFA can claim that the foreclosures violated federal law and therefore failed to convey clear title to the purchasers. And it is only because of those contracts that FHFA can claim that its suits were "contract claims" and thus timely filed, despite respondents' near six-year delay in asserting rights in the property. Yet, when it came time to prove up its case, FHFA and its agents refused to produce the actual contracts. Instead, they

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authority to accept the argument, *id*. at 27. *See also Davis* Pet. 22-23 & n.* (same).

produced screen shots of computer printouts and databases that purported reflected the contracts' existence and relevant provisions.

But when the Ninth Circuit determined in *Berezovsky* the lesser evidence of computer screen printouts was sufficient to prove ownership and agency, the Ninth Circuit disregarded the Best Evidence Rule, Federal Rule of Evidence 1002, and deprived petitioner of valuable property rights without a fair hearing.

1. It seems axiomatic that if a claim's very existence depends on a contract, that contract must be produced for a court to proceed to grant relief on that claim. This is especially so where, as here, the party against whom relief is being sought is not even a party to that writing.

Indeed, Federal Rule of Evidence unambiguously and expressly provides that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Fed. R. Evid. 1002. Respondents' claims could not succeed unless they could "prove [the] contents" of a contract, *id*., namely by showing that at the time of the foreclosure, one of the GSE's had acquired the mortgage on the foreclosed property. They have never pointed to any other Rule of Evidence or federal statute that supersedes Rule 1002, and petitioners are aware of none. Yet the Ninth Circuit has held that the "original writing" embodying the GSE's contractual rights in the property is *not* "required in order to prove its content," *id*., in utter disregard for the Rule.

In no other context have petitioners found it to be acceptable for the written contract to be withheld and

reliance on ancillary documents be used to prove not only the existence of, but the content of, the contracts. Because each deed of trust is related to a particular note and property, and each loan must be attached to a right to service that note, those instruments become vital in proving a right to raise the Federal Foreclosure Bar and to ultimately prevail on the claim. The Agency, GSE's and their servicers must be compelled to produce these documents and not hide behind proportionality or lesser evidence. Without these documents, title holders, like SFR and BVCT, who are strangers to these contracts, have no way to challenge the very ability of FHFA, the GSEs and servicers' rights to assert the Federal Foreclosure Bar in the first instance. Instead, the title owner of the real property is put in the position of bearing the burden to show some reason to dispute in every case to even be entitled to look beyond the computer screen shots, where it has no access to the evidence in the first instance. This changes the burden from the more open discovery and requirements in a civil case to one more akin to fraud, but without access to any facts. This is not what is meant by giving a party "a full and fair opportunity to develop and present facts and legal argument in support of its position." *Wander v. United Ben. Life Ins. Co*., 905 F.2d 1541 (9th Cir. 1990); *see also* Imre Stephen Szalai, *A Constitutional Right to Discovery? Creating and Reinforcing Due Process Norms Through the Procedural Laboratory of Arbitration*, 15 Pepp. Disp. Resol. L.J. 337, 369 n.139 and accompanying text (2015).

One of the primary reasons respondents gave to the district courts for not having to produce those contracts is they were not seeking to enforce the deeds of

trust so these contracts were "irrelevant" and the burden of producing them would be disproportional. But that argument is precluded by Federal Rule of Evidence 1002, which requires the party relying on the document to produce the original with no exceptions, no weighing of burdens, and no authority for courts to make their own assessments of whether substitute evidence should suffice.

2. In any event, there are good reasons for adhering to the Rule in this context.

For one thing, property owners generally have no way to test the GSEs' claim to have acquired rights in a property after the initial loan because Fannie and Freddie are not required, and typically decline, to record their interests in the public land records.

At the same time, the unreliability of FHFA, Fannie and Freddie's databases is well established. Freddie and Fannie have testified the information input to their systems is done by the initial lender without any independent review by the GSE. JGCA Dkt. 12 at 30; 13-2 at 77; 13-3 at 97, 98, 13-10 at 575-76. And FHFA itself as repeatedly sued subservicers for fraud and misrepresentation of such information. *Id*.

One example of such fraud occurred when Taylor Bean & Whitaker (TBW) sold the same loans to multiple entities, including Fannie and Freddie. Moreover, GSE databases continued to list TBW as servicing the contracts for the GSEs years after the FBI had raided and shut down TBW. JGCA Dkt. 12 at 25, 29; 13-3 at 149 – 13-4 at 166; 13-6 at 327-330.

In this case, what information petitioners have been able to acquire shows that in at almost 25 percent of the properties involved, the recorded beneficiary at

the time of the sale did not match the alleged servicer at that time. JGCA 12 at 25; 13-6 at 360; 13-7 at 362, 265, 268, 370; 13-8 at 460, 462.

SFR and Bourne Valley, and others similarly situated, should have the right to examine documents showing the ownership interest and agency relationships, and the courts should be sure the records are correct before property is stripped away.

B. The Second Question Presented Is Of Enormous Significance.

The second question also warrants review because the of its recurring practical significance to homeowners faced with belated attempts by FHFA to disrupt their ownership based on alleged contracts to which the homeowners were never parties and have no

1. The second question presented arises frequently. Indeed, the effect of the Ninth Circuit's decision in Nevada alone would warrant immediate review. Nevada was particularly hard hit in the Great Recession, triggering one of the highest rates of foreclosure in the country and a dramatic fall in real estate prices.[13] During this time, HOA's foreclosed on a great many homes. *See generally*, Kylee Gloeckner, *Ne-*

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[13] *See, e.g.*, Jan Hogan, *Strip left reeling: Picking up the pieces after the Great Recession*, Las Vegas Review Journal (Mar. 27, 2016), a*vailable at* http://www.reviewjournal.com/business/neon-rebirth/strip-left-reeling-picking-the-pieces-after-the-great-recession; Jack Healy, *Underwater in the Las Vegas Desert, Years After the Housing Crash*, New York Times (Aug. 2, 2016), *available at* https://www.nytimes.com/2016/08/03/us/las-vegas-2008-housing-crash.html.

vada's Foreclosure Epidemic: Homeowner Association's Super-Priority Liens Not So "Super" for Some, 15 Nev. L.J. 326 (2014).

There are still *hundreds* of cases in the Nevada state and federal courts questioning the title of properties sold at HOA nonjudicial foreclosures. This case alone involves over 80 properties, and SFR itself has well in excess of three hundred remaining. The question thus affects tens if not hundreds of millions of dollars of property value of which the current legal titleholders have no means to defend.[14] And while not all involve FHFA, all involve the same significant property rights.

And, of course, the Ninth Circuit's decision is not limited to Nevada, and extends to similar proceedings in many other states that were also hosts to large scale foreclosures in the housing crisis.

2. The consequences of the Ninth Circuit's rule are profound. As this case illustrates, FHFA and the GSEs are descending on innocent homeowners sometime a half decade or more after they paid substantial sums for properties they reasonably believed they were acquiring free and clear because they had no way of knowing that some contract to which they were

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[14] There are over 80 properties at issue in these cases. If the homes had only an average value of $250,000, which is a low estimate, that represents over $20,000,0000. *See* Eli Segall, *Prices for new Las Vegas homes set another record*, Las Vegas Review-Journal, Dec. 2, 2020 (stating median resale home sales price of $340,200), *available at* https://www.reviewjournal.com/business/housing/prices-for-new-las-vegas-homes-set-another-record-2199866/ (last viewed Dec. 29, 2020).

strangers had at some point conveyed the prior homeowner's mortgage to Fannie or Freddie. In the Ninth Circuits, these hapless purchasers are simply being told they must accept screen shots of a quasi-government agency's databases as irrefutable proof of the agency's right to encumber the property with sometimes hundreds of thousands of dollars of debt that the new owner must pay off in order to get what she reasonably thought she had acquired at the time of the foreclosure sale.

As a practical matter, this means that FHFA is able to impose hundreds of thousands of dollars of debt on innocent homeowners merely by filing a lawsuit claiming to have had an interest in the property at the time of its sale. The purchasers have no means to challenge petitioners' claims without the actual contracts, which are, or should be, within the exclusive possession or control of the GSE. The panel's decision puts the purchasers in a Catch-22 with no means to protect their property rights from being destroyed.

3. Nor does this case involve only the interests of affected property owners. Accepting respondents' claimed ownership in the affected properties has the consequence of displacing States property law, a serious invasion of one of the States' core sovereign interests. The serious federalism consequences of the decision below provide additional reason for the Court's review.

4. Finally, the Ninth Circuit's rejecting of the Best Evidence Rule could reach beyond FHFA cases. It could bleed into cases where any party attempting to foreclose on a lien interest no longer has to prove its actual interest in the lien or property being foreclosed, but simply provide lesser evidence of the time and

manner in which it purportedly obtained the interest, say a computer generated table, and claim such an interest. And if the foreclosure was on property now belonging to a third-party, a non-party to the contract creating the interest, then that party would have no means to challenge the foreclosure. If a person wants to take property belonging to another, then it must be required to bring the actual documents creating its interest to the table. Without those documents, a court cannot make a reasonable and accurate determination of the parties' rights.

CONCLUSION

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

Respectfully submitted,

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December 31, 2020

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN MORTGAGE CORPORATION; et al., Plaintiffs-Appellees, v. SFR INVESTMENTS POOL 1, LLC, Defendant-Appellant.	No. 19-15910 D.C. No. 2:15-cv-02381-GMN-NJK MEMORANDUM[*]

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Submitted June 9, 2020[**]
San Francisco, California

Filed June 25, 2020

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

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

This case arises out of purchases by SFR Investments Pool 1, LLC, of various Nevada residential properties (the "Properties") at non-judicial foreclosure sales involving homeowners association ("HOA") liens. The earliest of the HOA sales was in March 2012. Before the HOA sales, Federal Home Loan Mortgage Corporation ("Freddie Mac") or the Federal National Mortgage Association ("Fannie Mae") (together, the "Enterprises") had purchased the loans on the Properties and acquired the deeds of trust securing the loans.

Nevada law grants an HOA a "superpriority" lien 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). However, in 2008, the Federal Housing Finance Agency ("FHFA") placed the Enterprises into conservatorship. *See* 12 U.S.C. § 4617(a)(2), (b)(2)(A)(i). Under the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), "[n]o property of the [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." The Federal Foreclosure Bar preempts the Nevada superpriority lien scheme. *See Berezovsky v. Moniz*, 869 F.3d 923, 929-31 (9th Cir. 2017).

In June 2016, the FHFA, Freddie Mac, and Fannie Mae sued SFR to quiet title to the Properties,

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

arguing that because of the Federal Foreclosure Bar, the non-judicial foreclosure sales did not extinguish the previously recorded deeds. The district court granted summary judgment to the plaintiffs. We have jurisdiction of SFR's appeal under 28 U.S.C. § 1291 and affirm.

1. For the reasons stated in our opinion in *M&T Bank v. SFR Investments Pool 1, LLC.*, No. 18-17395, the six-year period in 12 U.S.C. § 4617(b)(12)(A)(i) governs the quiet title claims in this action. The complaint, which was filed less than six years after the earliest non-judicial foreclosure sale in March 2012, was therefore timely.

2. The district court did not err in concluding that summary judgment was appropriate as to twenty Properties for which the record beneficiaries on the deeds of trust was neither Freddie Mac, Fannie Mae, nor their loan servicers at the time of the foreclosure sales.[1] For all of those Properties, the recorded beneficiary on the deed of trust was the agent for one of the Enterprises. *See Berezovsky*, 869 F.3d at 932-33.[2]

3. The district court did not abuse its discretion in denying SFR's request under Federal Rule of Civil Procedure 56(d) to defer ruling on the plaintiffs'

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[1] As to the remaining properties, SFR does not argue on appeal that summary judgment should have been granted in its favor on this basis.

[2] It does not matter that some of the record beneficiaries on some of the deeds of trust were former servicers who had transferred their servicing rights before the foreclosure sales. A former servicer remains obligated to act on behalf of the Enterprises even after the transfer of servicing rights. *See* Fannie Mae Servicing Guide § A2-7-03 (2020); Freddie Mac Servicing Guide § 7101.15(a) (2020).

summary judgment motion to allow further discovery. *See Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 612 (9th Cir. 2017) (standard of review). The summary judgment record already made plain that plaintiffs possessed valid and enforceable interests in all of the Properties at the time of the foreclosure sales. *See e.g., Berezovsky*, 869 F.3d at 932-33; *Fed. Nat'l Mortg. Ass'n v. KK Real Estate Inv. Fund, LL*C, 772 F. App'x 552, 553 (9th Cir. 2019). A party seeking Rule 56(d) relief must do "more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

AFFIRMED.[3]

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

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DITECH FINANCIAL LLC, *et al.*, Plaintiffs, vs. SFR INVESTMENTS POOL 1, LLC, *et al.*, Defendants.	Case No.: 2:15-cv-02381-GMN-NJK **ORDER**

Pending before the Court is Defendant SFR Investments Pool 1, LLC's ("SFR's") Motion for Partial Reconsideration, (ECF No. 132), regarding the Court's March 30, 2019, Order, (ECF No. 127). Plaintiffs Federal Home Loan Mortgage Corporation, Federal Housing Finance Agency, and Federal National Mortgage Association (collectively, "Plaintiffs") filed a Response, (ECF No. 133). SFR filed a Reply, (ECF No. 135). For the reasons discussed below, the Court **DENIES** the Motion.

I. BACKGROUND

This case arises from the non-judicial foreclosure sales of 89 parcels of real property allegedly subject to the federal foreclosure bar. (*See* Am. Compl. ¶¶ 24–116, ECF No. 24). Similar foreclosure cases have been common in the District of Nevada. This case falls into a sub-category of such cases in which federally sponsored loan servicers claim an interest in the subject

property. Plaintiffs allege that the federal foreclosure bar, 12 U.S.C. § 4617(j)(3), preempts Nev. Rev. Stat. 116 such that the homeowners associations' foreclosures on their superpriority liens did not extinguish Plaintiffs' interests in the properties. (*See* Order 4:4–7, ECF No. 127). In its Order, the Court granted Plaintiffs' Motion for Summary Judgment and denied SFR's Motion for Relief under Federal Rule of Civil Procedure ("FRCP") 56(d). (*Id.* 9:1–2). SFR now moves the Court to reconsider its denial of FRCP 56(d) discovery relief under FRCP 60(b) because the Court did not substantively address its previous Motion, SFR met the requirements for relief under the Rule, and the Court granted the relief in a similar case. (Part. Mot. for Reconsideration ("MFR") 6:4–6:9, ECF No. 132).

II. LEGAL STANDARD

"[A] motion for reconsideration should not be granted, absent highly unusual circumstances." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted). Reconsideration is appropriate where: (1) the court is presented with newly discovered evidence, (2) the court committed clear error or the initial decision was manifestly unjust, or (3) there is an intervening change in controlling law. *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration is not a mechanism for rearguing issues presented in the original filings, *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985), or "advancing theories of the case that could have been presented earlier," *Resolution Trust Corp. v. Holmes*, 846 F. Supp. 1310, 1316 (S.D. Tex. 1994) (footnotes omitted). Thus, Rule 60(b) is not "intended to give an unhappy litigant one additional chance to sway the judge." *Durkin v. Taylor*, 444

F. Supp. 879, 889 (E.D. Va. 1977). Rule 60(b) relief should only be granted under "extraordinary circumstances." *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

III. DISCUSSION

SFR does not allege that newly discovered evidence or an intervening change in controlling law justify reconsideration. Rather, its Motion essentially argues that the Court's Order regarding SFR's Motion for Rule 56(d) relief was clearly erroneous or manifestly unjust. The Court concludes that SFR has failed to meet its burden to prevail on the Motion.

While a summary judgment motion may be filed "at any time until 30 days after the close of all discovery," *see* Fed. R. Civ. P. 56(b), such motions generally should not be ruled upon before the non-moving party has had adequate time to discover facts "essential to justify its opposition." *Michelman v. Lincoln Nat'l Life Ins. Co.*, 685 F.3d 887, 899 (9th Cir. 2012) (quoting Rule 56(d)). The party seeking Rule 56(d) relief must show "(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

SFR contends that it "was deprived of a realistic opportunity to pursue discovery in support of [its] theory of the case" prior to the Court ruling on Plaintiffs' Motion for Summary Judgment. (MFR 2:5–7). SFR argues that Plaintiffs withheld their initial disclosures until just before filing their Motion for Summary Judgment, Motion to Stay Discovery, and Motion for Protective Order. (*Id.* 2:19–24). When reviewing the

discovery produced, which largely consisted of screenshots of Plaintiffs' internal records, SFR alleges that the screenshots revealed that the beneficiaries of the deeds of trust ("DOTs") encumbering the properties did not match the entities Plaintiffs alleged serviced the DOTs during the relevant periods. (*Id.* 2:25–3:6). In light of the alleged inconsistency in Plaintiffs' records, SFR sought to conduct additional discovery "to test the[ir] reliability." (*Id.* 3:7–4:9). The Court did not allow SFR to conduct the discovery prior to ruling on the Motion for Summary Judgment. (*Id.* 4:10–15). SFR argues that the Court should reconsider its prior Order regarding its 56(d) Motion because: (1) SFR met the requirements for Rule 56(d) relief; (2) the Court granted 56(d) relief in a similar case; and (3) the breadth of facts and the procedural record justify reconsideration. (*Id.* 6:4–9:13).

Plaintiffs argue that they began to produce discovery in the two months prior to filing their Motion for Summary Judgment, and SFR "did not seek any depositions or issue any interrogatories during that time." (Resp. 2:24–3:4). Rather, Plaintiffs filed their Motion for Summary Judgment on September 18, 2018, and SFR did not seek the discovery at issue until December 4, 2018, four months after Plaintiffs informed SFR they would move for summary judgment and more than two months after filing the Motion. (*Id.* 3:3–10). Plaintiffs argue that SFR has failed to meet its burden to prevail on a motion for 56(d) relief because: (1) the Ninth Circuit has held that business records like those Plaintiffs produced are sufficiently reliable to substantiate a motion for summary judgment; (2) the minimal probative value of the discovery sought does not justify its substantial cost; (3) SFR has not identified facts

that could be drawn from the discovery that would change the outcome of the summary judgment ruling; (4) SFR had the opportunity to conduct discovery and failed to do so; and (5) SFR's theories for the benefit of the discovery are overly speculative; and (6) the similar case SFR argues justifies relief is distinguishable. (*Id.* 5:16–16:26).

The Court concludes that Plaintiff has failed to meet the high burden to prevail on a motion for reconsideration. The Ninth Circuit has repeatedly held that district courts have not abused their discretion in similar cases by granting summary judgment in reliance upon the exact type of records Plaintiffs produced—sworn declarations and the federal servicers' business records—because they sufficiently establish the federal entities' interest in the property. *See Bank of Am., N.A. v. Santa Barbara Homeowners Ass'n*, No. 2:16-cv-02768-MMD-CWH, 2019 U.S. Dist. LEXIS 120160 at *5–*6 (D. Nev. June 4, 2019) (collecting Ninth Circuit cases); s*ee also Fannie Mae v. KK Real Estate Inv. Fund, LLC*, 772 Fed. Appx. 552, 553 (9th Cir. 2019) (decided during the pendency of this Motion). This Court's Order granting Rule 56(d) relief in *Fannie Mae v. SFR Invs. Pool 1, LLC*, No. 2-18-cv-001584-GMN-GWF, 2019 U.S. Dist. LEXIS 84215 (D. Nev. May 20, 2019) ("*McCloud*") is distinguishable because the Court relied on the case's pre-discovery posture in granting the relief; whereas, in this case SFR received the disputed records during discovery through a request for production. *See McCloud*, 2019 U.S. Dist. LEXIS 84215 at *11–*12. Therefore, SFR has not satisfied its burden to prevail on its Motion for Reconsideration.

IV. CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that SFR's Motion for Partial Reconsideration, (ECF No. 132), is **DENIED**.

DATED this 25 day of November, 2019.

/s/
Gloria M. Navarro, District Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DITECH FINANCIAL LLC, *et al.*, Plaintiffs vs. SFR INVESTMENTS POOL 1, LLC, *et al.*, Defendants.	Case No.: 2:15-cv-02381-GMN-NJK **ORDER**

Pending before the Court is the Motion for Summary Judgment, (ECF No. 66), filed by Plaintiffs Federal Housing Finance Agency ("FHFA"), in its capacity as Conservator for Federal National Mortgage Association ("Fannie Mae"), and Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively "Plaintiffs"). Defendant SFR Investments Pool 1, LLC ("SFR") filed a Response, (ECF No. 66),[1] and Plaintiffs filed a Reply, (ECF No. 121). Also before the Court is SFR's Motion for Summary judgment, (ECF No. 117). Plaintiffs filed a Response, (ECF No. 122), and SFR filed a Reply, (ECF No. 126).[2] For the reasons stated

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[1] On October 17, 2018, SFR filed a Motion to Extend Time to respond to Plaintiffs' MSJ. (ECF No. 84). For good cause appearing, the Court grants this extension and considers SFR's response timely.

[2] Also before the Court is SFR's Motion to Dismiss, (ECF NO. 60). As SFR incorporates the same arguments in its Motion for Summary Judgment, this Order resolves both motions.

herein, Plaintiffs' Motion for Summary Judgment is **GRANTED**.

I. BACKGROUND

The present action involves the interplay between Nev. Rev. Stat. ("NRS") § 116 and 12 U.S.C. § 4617 as it relates to the parties' interests in 89 different residential units located in Nevada (collectively "the Properties"). (Am. Compl. ¶ 25, ECF No. 24). In Plaintiffs' Amended Complaint and Motion for Summary Judgment, Plaintiffs provide a brief history for the 89 properties, including the respective dates that they acquired the deeds of trust ("DOTs") for each of the parcels. (*See id.* ¶¶25–114); (*See also* Charts, Ex. A to Pls.' MSJ, ECF No. 66-1); (DOTS, Ex. E to Pls.' MSJ, ECF No. 66-5). In addition, Plaintiffs provide the date that each property was subject to a homeowners' association ("HOA") foreclosure sale under NRS 116. (*Id.*). Based on their claimed ownership interest in the Properties, Plaintiffs seek to quiet title and obtain declaratory relief that their DOTs encumbering the Properties were not extinguished by the HOA foreclosure sales. (*Id.* ¶¶ 117–136). The parties now move for summary judgment on this issue.[3]

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication 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

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[3] The Court takes judicial notice of the matters of public record attached as exhibits in the respective parties' motions. *See Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). 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).

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). In 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. *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. *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. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. 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." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *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. *Celotex Corp.*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth; it is to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. 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. *Id.* at 249–50.

III. DISCUSSION

Plaintiffs move for summary judgment on their quiet tile and declaratory relief claims, asserting that 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar") compels the Court to find that the HOA's foreclosure sale did not extinguish Plaintiffs' DOTs on the Properties. (Pls.' MSJ 13:18–26, ECF No. 66). In turn, SFR raises five arguments as to why the Federal Foreclosure Bar does not apply to this action: (1) the Court lacks jurisdiction; (2) Plaintiffs' claims are time-barred; (3) Plaintiffs fail to proffer admissible evidence; (4) Plaintiffs lack a property interest; and (5) FHFA consented to the extinguishment of the DOTs. (*See* SFR's MSJ 5:2–7:11); (SFR's Resp. 6:5–25:27, ECF No. 115). The Court first addresses the threshold questions of jurisdiction and statute of limitations.

A. Subject Matter Jurisdiction

1) In Rem Jurisdiction

SFR argues that the Court lacks jurisdiction because four of the properties listed in the Amended Complaint are already subject to the *in rem* jurisdiction of the Eighth Judicial District Court of Nevada. (SFR's MTD 5:22–7:22, ECF No. 60). These four properties are identified as: (1) Rolling Boulder; (2) Benezette Court; (3) Cimarron Cove; and (4) Sea Rock Road. (*See* Am. Compl. ¶¶ 47, 55, 62, 86). According to SFR, "[t]he inclusion of the [] properties divests this Court of jurisdiction over the amended complaint." (SFR's MTD 7:21–22).

In response, Plaintiffs concede that the four properties should be dismissed from the action. (Pls.' MTD Resp. 4:3–5:5, ECF No. 65). Additionally, Plaintiffs request voluntary dismissal of an additional two of the

properties: Hazel Croft Way and Lady Lucille Court. (*Id.*); (*See* Am. Compl. ¶¶ 107, 109).

SFR provides no authority, nor is the Court aware of any, that the mere presence of the four at-issue properties divests the Court of jurisdiction over the remaining properties. The Court therefore rejects this argument. As to the four at-issue properties, the Court agrees it does not have jurisdiction based on the other pending actions. *See Marshall v. Marshall*, 547 U.S. 293, 311 (2006) ("[W]hen one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res."). The Court will therefore dismiss these properties from the Amended Complaint, along with the two additional properties that Plaintiffs voluntarily dismiss.

2) Judicial Estoppel – Silver Brook Property

SFR argues that the Silver Brook property should be dismissed from the action based on judicial estoppel. (SFR's MTD 9:1–11:24). Specifically, SFR contends that Nationstar Mortgage LLC ("Nationstar"), the recorded beneficiary of Silver Brook's deed of trust and authorized servicer for Freddie Mac, argued in a state court action that it was entitled to a distribution of excess proceeds obtained from the property's HOA foreclosure sale. (*Id.*). According to SFR, this position is inconsistent with Plaintiffs' current position that the HOA sale did not extinguish the DOT. (*Id.*).

In response, Plaintiffs argue that Nationstar's position was not inconsistent because Nationstar premised its argument on the DOT surviving the HOA sale. (Pls.' MTD Resp. 11:15–13:8); (*See* Nationstar Argument at 4, Ex. E to Pls. MTD, ECF No. 65-4). Specifically, Plaintiffs note that Nationstar argued for excess

proceeds based on Freddie Mac's lien being the "next-most senior lien" after the HOA's superpriority lien was satisfied. (*Id.*). Thus, Plaintiffs contend that Nationstar's claim was not premised on the HOA sale extinguishing Plaintiffs' DOT. (*Id.*).

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. *Rissetto v. Plumbers & Steamfitters Local 343,* 94 F.3d 597, 600–601 (9th Cir. 1996); *Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir. 1990). In analyzing judicial estoppel, courts consider factors such as: (1) whether a party has taken a "clearly inconsistent" position; (2) whether the party succeeded in persuading a court to accept that earlier position; and (3) whether the party would derive an unfair advantage if not estopped. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001).

Here, the Court finds that SFR has not met the first prong of showing that Nationstar's prior statements were "clearly inconsistent." To the contrary, Nationstar explicitly premised its arguments on Plaintiffs' DOT surviving the HOA sale. While SFR asserts this position is irreconcible with Nationstar's ability to obtain excess proceeds in the underlying state court action, the ultimate merits of Nationstar's arguments are separate from whether Nationstar's representations are inconsistent to this action. Accordingly, the Court rejects SFR's judicial estoppel claim.

B. Statute of Limitations

SFR argues that 53 of the properties in this action are time-barred based on a three-year statute of

limitations under 12 U.S.C. § 4617. (SFR's MTD 7:23–8:21). Plaintiffs, in turn, argue that the properties are timely because the six-year statute of limitations applies under 12 U.S.C. § 4617. (Pls.' MTD Resp. 5:6–11:1). Alternatively, Plaintiffs argue that the state law statute of limitations applies. (*Id.*).

12 U.S.C. § 4617(b)(12) proscribes two different statutes of limitations for actions brought by FHFA depending on whether the claims sound in contract or tort. The limitations period for any contract claim is the longer of six years or "the period applicable under State law;" and for any tort claim, the period is the longer of three years or "the period applicable under State law." *See* 12 U.S.C. § 4617(b)(12).

Although this case does not clearly fit under either category, the Court finds Plaintiffs' claims more clearly sound in contract. At bottom, this action concerns the viability of Plaintiffs' lien interests against the Properties. As these liens were created by contract, an action to enforce those liens is necessarily a "contract action." *See Fed. Hous. Fin. Agency v. LN Mgmt. LLC, Series 2937 Barboursville*, No. 2:17–CV–03006–JAD–GWF, 2019 WL 1117900, at *5 (D. Nev. Mar. 11, 2019). Moreover, even assuming Plaintiffs' claims sounded in tort, Plaintiffs' claims would be timely under the 5-year state law statute of limitations for quiet title actions. *Deutsche Bank Nat'l Tr. Co. for Morgan Stanley ABS Capital I Inc. Tr. 2006-HE8 Mortg. Pass-Through Certificates, Series 2006-HE8 v. SFR Investments Pool 1, LLC*, No. 2:17–CV–00259–GMN–NJK, 2018 WL 615669, at *3 (D. Nev. Jan. 26, 2018). The Court therefore rejects SFR's statute of limitations argument.

C. Federal Foreclosure Bar

Plaintiffs request that the Court declare that 12 U.S.C. § 4617(j)(3) preempts NRS 116 such that the HOA foreclosure sales did not extinguish their interests in the Properties. The Federal Foreclosure Bar prohibits foreclosures of federally owned or controlled property "without the consent of the [Federal Housing Finance Agency]." 12 U.S.C. § 4617(j)(3) (2012); *see Saticoy Bay, LLC, Series 2714 Snapdragon v. Flagstar Bank, FSB*, 699 F. App'x 658 (9th Cir. 2017); *Skylights LLC v. Fannie Mae*, 112 F. Supp. 3d 1145 (D. Nev. 2015). The Ninth Circuit's decision in *Berezovsky v. Moniz*, 869 F.3d 923, 932 (9th Cir. 2017), confirmed that the Federal Foreclosure Bar preserves the property interests of the Federal Housing Finance Agency, including a government-sponsored enterprise of the Agency such as Fannie Mae, from an HOA's foreclosure sale under NRS 116.3116, if that sale occurred without the affirmative consent of the Agency. *Id.* at 927–32.

Here, Plaintiffs have presented business records supported by employee declarations, which show that Plaintiffs purchased the original loans secured on the Properties and maintained ownership at the time of the respective HOA foreclosure sales. (*See* Charts, Ex. A to Pls.' MSJ, ECF No. 66-1); (DOTS, Ex. E to Pls.' MSJ, ECF No. 66-5). This evidence is materially the same as the evidence deemed sufficient in *Berezovsky*. Nonetheless, SFR raises a number of arguments going to the authenticity of the records, sufficiency of the agency relationships and property interests, recording documents, and consent to extinguishment. (*See* SFR's MSJ 5:2–7:11); (SFR's Resp. 6:5–25:27). This Court, as well as the Ninth Circuit, has explicitly rejected these

arguments. *See BANK OF AMERICA, N.A., Plaintiff v. PUEBLO AT SANTE FE CONDOMINIUM ASSOCIATION, INC., et al., Defendants. Additional Party Names: Keynote Properties, LLC*, No. 2:16–CV–01199–GMN–CWH, 2019 WL 1338385, at *4 (D. Nev. Mar. 25, 2019); *Bank of Am., N.A. v. Palm Hills Homeowners Ass'n, Inc.*, No. 216–CV–00614–APG–GWF, 2019 WL 958378, at *2 (D. Nev. Feb. 27, 2019); *Williston Inv. Grp., LLC v. JP Morgan Chase Bank, NA*, 736 F. App'x 168, 169 (9th Cir. 2018); *Berezovsky v. Moniz*, 869 F.3d at 932. Defendants do not satisfy their burden of providing, or pointing to, any evidence that raises more than a "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Accordingly, the Court finds that the HOA sales did not extinguish Plaintiffs' interests in the Properties, and the DOTs continue to encumber the same. The Court therefore grants summary judgment in favor of Plaintiffs.[4]

IV. CONCLUSION

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment, (ECF No. 66), is **GRANTED** pursuant to the foregoing.

IT IS FURTHER ORDERED that SFR's Motion for Summary Judgment, (ECF No. 117), is **DENIED**.

IT IS FURTHER ORDERED that SFR's Motion for Relief under Fed. R. Civ. P. 56(d), (ECF No. 116), is **DENIED**.

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[4] As the Court finds summary judgment appropriate based on the evidence in the record, the Court denies SFR's request to extend discovery, (ECF No. 116).

IT IS FURTHER ORDERED that SFR's Motion to Dismiss, (ECF No. 60), is **GRANTED in part** and **DENIED in part**.

IT IS FURTHER ORDERED that SFR's Motion to Extend Time, (ECF No. 84), is **GRANTED**.

The Clerk of Court shall enter judgment accordingly and close the case.

DATED this 30 day of March, 2019.

/s/
Gloria M. Navarro, Chief Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FEDERAL HOUSING FINANCE AGENCY, et al., Plaintiff(s),	Case No. 2:15-cv-02381-GMN-NJK
v.	**Order**
SFR INVESTMENTS POOL 1, LLC, Defendant(s).	[Docket Nos. 100, 108]

Pending before the Court are two motions for protective order. Docket Nos. 100, 108. Those motions have been fully briefed. *See* Docket Nos. 102, 105, 111, 112 (corrected image), 113. The nub of the parties' dispute is whether SFR is entitled to discovery into the Enterprises' interest in the properties that are subject to this case. That same underlying dispute has been briefed in other filings that remain pending. *See, e.g.*, Docket No. 70.

Federal courts have broad discretion in controlling their dockets. *See, e.g.*, *Landis v. N. American Co.*, 299 U.S. 248, 254 (1936). It is not in the interest of efficiency to address the same or substantially similar arguments in the same case through several different motions. Given the procedural posture of this case, the Court hereby **STAYS** discovery on an interim basis pending resolution of the pending motion to stay discovery (Docket No. 70). *Cf. V5 Techs., LLC v. Switch, Ltd.*, 2017 U.S. Dist. Lexis 174971, at *2 (D. Nev. Oct.

23, 2017) (staying discovery on an interim basis pending resolution of a motion to stay discovery).

Accordingly, the motions for protective order are **DENIED** as moot.

IT IS SO ORDERED.

Dated: January 30, 2019

/s/
Nancy J. Koppe
United States Magistrate Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN MORTGAGE CORPORATION; et al., Plaintiffs-Appellees, v. SFR INVESTMENTS POOL 1, LLC, Defendant-Appellant.	No. 19-15910 D.C. No. 2:15-cv-02381-GMN-NJK 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 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. 49, is **DENIED**.

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

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Federal Home Loan Mortgage Corporation, et al., Plaintiff, v. SFR Investments Pool 1, LLC, Defendant.	JUDGMENT IN A CIVIL CASE Case Number: 2:15-cv-02381-GMN-NJK

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

_X_ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of Plaintiffs Federal Home Loan Mortgage Corporation, Federal Housing

Finance Agency, and Federal National Mortgage Association and against Defendant SFR Investments Pool 1, LLC.

3/31/2019
Date

DEBRA K. KEMPI
Clerk

/s/ Aaron Blazevich
Deputy Clerk

APPENDIX G

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOURNE VALLEY COURT TRUST, Plaintiff-Appellant, v. WELLS FARGO BANK, NA, Defendant-Appellee.	No. 19-15253 D.C. No. 2:13-cv-00649-JCM-GWF MEMORANDUM[*]

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

Submitted June 9, 2020[**]
San Francisco, California

Filed June 25, 2020

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

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

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

In 2006, a Nevada homeowner refinanced her home (the "Property") with a loan secured by a deed of trust; the Federal Home Loan Mortgage Corporation ("Freddie Mac") later acquired the loan and deed of trust. The Property was sold at a non-judicial foreclosure sale on May 7, 2012, to satisfy assessments owed to the Parks Homeowners Association. Bourne Valley Court Trust acquired the Property from the purchaser at the foreclosure sale on May 29, 2012.

Nevada law grants a homeowners association ("HOA") a "superpriority" lien 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). However, in 2008, the Federal Housing Finance Agency ("FHFA") placed Freddie Mac into conservatorship. *See* 12 U.S.C. § 4617(a)(2), (b)(2)(A)(i). Under the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), "[n]o property of the [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." The Federal Foreclosure Bar preempts the Nevada superpriority lien scheme. *See Berezovsky v. Moniz*, 869 F.3d 923, 929-31 (9th Cir. 2017).

On January 16, 2013, Bourne Valley brought a quiet title action against Wells Fargo Bank, Freddie Mac's agent and loan servicer, alleging that the 2012 foreclosure sale extinguished Freddie Mac's deed of trust. Wells Fargo filed operative answer in August

2017,[1] arguing that under the Federal Foreclosure Bar, the non-judicial foreclosure sale did not extinguish the previously recorded deed of trust. The district court granted summary judgment to Wells Fargo. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

1. Even assuming that Wells Fargo's invocation of the Federal Foreclosure Bar in response to the quiet title complaint was subject to a statute of limitations, it was timely raised.[2] For the reasons stated in our opinion in *M&T Bank v. SFR Investments Pool 1, LLC.*, No. 18-17395, the six-year period in 12 U.S.C. § 4617(b)(12)(A)(i) governs Wells Fargo's claim that the deed of trust continued to encumber the Property. Wells Fargo's answer and counterclaim were filed less than six years after the 2012 non-judicial foreclosure sale.[3]

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[1] In the interim, the district court had granted summary judgment to Bourne Valley based on Nevada's superpriority lien provision, Nev. Rev. Stat. § 116.3116, but we reversed and remanded, finding the notice provisions of Nevada Revised Statutes § 116.3116 unconstitutional. *See Bourne Valley Court Tr. v. Wells Fargo Bank, NA*, 832 F.3d 1154, 1160 (9th Cir. 2016), *partial abrogation recognized by Bank of Am., N.A.*, 920 F.3d at 623-24.

[2] *Cf. Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 415–16 (1998) ("[T]he object of a statute of limitation in keeping stale litigation out of the courts would be distorted if the statute were applied to bar an otherwise legitimate defense to a timely lawsuit." (cleaned up)).

[3] "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

2. The district court did not abuse its discretion in denying Bourne Valley's request under Federal Rule of Civil Procedure 56(d) to defer ruling on Wells Fargo's summary judgment motion to allow further discovery. *See Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 612 (9th Cir. 2017) (standard of review). The summary judgment record already made plain that Freddie Mac possessed a valid and enforceable interest in the Property at the time of the foreclosure sale. *See e.g., Berezovsky*, 869 F.3d at 932-33; *Fed. Nat'l Mortg. Ass'n v. KK Real Estate Inv. Fund, LL*C, 772 F. App'x 552, 553 (9th Cir. 2019). A party seeking Rule 56(d) relief must do "more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

AFFIRMED.[4]

(9th Cir. 1996). This case presents a purely legal issue that Bourne Valley treated extensively it in its briefs, so we consider Wells Fargo's argument regarding the federal statute. *See id.*

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

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BOURNE VALLEY COURT TRUST, Plaintiff(s), v. WELLS FARGO BANK, N.A., et al., Defendant(s).	Case No. 2:13-CV-649 JCM (GWF) ORDER

Presently before the court is Bourne Valley Court Trust's ("Bourne Valley") motion for reconsideration. (ECF No. 168). Wells Fargo Bank, N.A. ("Wells Fargo") filed a response (ECF No. 175), to which Bourne Valley replied (ECF No. 176).

I. Facts

This action arises from a dispute over real property located at 410 Horse Point Avenue, Las Vegas, Nevada (the "property"). (ECF Nos. 1, 48).

Renee Johnson purchased the property on or about September 7, 2001. (ECF No. 153-3). On or about March 1, 2006, Johnson refinanced the property with a loan in the amount of $174,000.00 from Plaza Home Mortgage, Inc. ("Plaza"). (ECF No. 153-5). Plaza secured the loan with a deed of trust, which names Plaza as the lender, Lawyer Title 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 or about June 13, 2006, Federal Home Loan Mortgage Corporation ("Freddie Mac") purchased the loan, thereby acquiring ownership of the deed of trust. (ECF No. 136-1). On February 24, 2011, MERS assigned the deed of trust to Wells Fargo, Freddie Mac's authorized servicer of the loan. (ECF Nos. 136-1, 136-3)

On August 30, 2011, Parks Homeowners Association ("Parks"), through its attorney, recorded a notice of delinquent assessment lien ("the lien") against the property for Johnson's failure to pay Parks in the amount of $1,298.57. (ECF No. 153-12). On October 12, 2011, Parks recorded a notice of default and election to sell pursuant to the lien, stating that the amount due was $2,275.70 as of October 6, 2011. (ECF No. 153-15).

On April 9, 2012, Parks recorded a notice of trustee/foreclosure sale against the property. (ECF No. 153-17). On May 7, 2012, Parks sold the property in a nonjudicial foreclosure sale to Horse Pointe Avenue Trust ("Horse Pointe") in exchange for $4,145.00. (ECF No. 136-17). On May 29, 2012, Bourne Valley acquired the property via a grant, bargain, sale deed. (ECF No. 136-18).

On January 16, 2013, Bourne Valley initiated this action in Nevada state court, requesting that the state court quiet title the property in Bourne Valley's favor. (ECF No. 1-1). On April 17, 2013, defendants removed this action to federal court. (ECF No. 1).

On August 1, 2018, Wells Fargo filed an answer and counterclaim to Bourne Valley's amended complaint, asserting six counterclaims: (1) quiet title; (2)

declaratory relief pursuant to 12 U.S.C. § 4617(j)(3); (3) quiet title pursuant to 12 U.S.C. § 4617(j)(3); (4) wrongful foreclosure; (5) violation of NRS 116.1113 *et seq*.; and (6) unjust enrichment. (ECF No. 78).

On February 15, 2018, the court granted the parties' stipulation to dismiss Wells Fargo's counterclaims. (ECF No. 129). The stipulation did not dismiss Wells Fargo's defenses, including Wells Fargo's preemption defense under 12 U.S.C. § 4617(j)(3). *Id*.

On March 28, 2018, Wells Fargo moved for summary judgment on Bourne Valley's quiet title claim, asserting its preemption defense. (ECF No. 136). On January 10, 2019, the court granted Wells Fargo's motion for summary judgment. (ECF No. 165). The next day, the court entered judgment. (ECF No. 166). On February 8, 2019, Bourne Valley filed a motion for reconsideration. (ECF No. 168). On February 11, 2019, Bourne value filed a notice of appeal. (ECF No. 169).

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 60(b) "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

Bourne Valley argues that the court committed a clear error when it held that the deed of trust encumbers the property pursuant to 12 U.S.C. § 4617(j)(3) because Wells Fargo did not timely raise its preemption defense. (ECF No. 168). The court takes this opportunity to clarify its order for Bourne Valley's benefit.

Bourne Valley argued in its motion for summary judgment that the statute of limitations barred Wells Fargo from invoking the federal foreclosure bar. (ECF No. 153). However, Wells Fargo properly asserted its § 4617(j)(3) defense as it pertained to the very property that Bourne Valley placed into dispute upon initiating this action. Accordingly, the court was correct to reject Bourne Valley's argument because "the object of a statute of limitations in keeping 'stale litigation out of the courts,' would be distorted if the statute were applied to bar an otherwise legitimate defense to a timely lawsuit . . ." *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 415–16 (1998) (internal citation omitted).

Alternatively, the court treats Wells Fargo's defense as a counterclaim under Rule 8, which provides in pertinent part:

> If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the

> pleading as though it were correctly designated, and may impose terms for doing so.

Fed. R. Civ. P. 8(c)(2).

Bourne Valley argued in its motion for summary judgment that Wels Fargo improperly pleaded its § 4617(j)(3) claim as a defense. (ECF No. 153). Bourne Valley also *regularly* referred to Wells Fargo's invocation of the federal foreclosure bar as "the Bank's 4617(j)(3) claim/defense[.]" *Id*. Under this analysis, Wells Fargo's mistaken designation prevented the October 17, 2017, stipulation from dismissing its "4617(j)(3) "claim/defense[.]" *Id*. Thus, Wells Fargo had a proper counterclaim against Bourne Valley at the time Wells Fargo filed its motion for summary judgment.

Moreover, Wells Fargo's invocation of the federal foreclosure bar is a compulsory counterclaim as it arose from the same foreclosure sale that gave rise to Bourne Valley's causes of action. *See* Fed. R. Civ. P. 13(a). Because "a compulsory counterclaim relates back to the filing of the original complaint," Wells Fargo asserted its § 4617(j)(3) claim within NRS 11.070's five-year limitations period. *Religious Tech. Center v. Scott*, 82 F.3d 423 (9th Cir. 1996), *as amended on denial of reh'g* (July 5, 1996) (unpublished disposition) (citation omitted).

In light of the foregoing, Wells Fargo properly invoked the federal foreclosure bar. The court will not consider Bourne Valley's remaining arguments because Bourne Valley already raised substantially similar arguments at summary judgment. *See* (ECF Nos. 153, 164, 168); *see also Hernandez v. IndyMac Bank*, Case No. 2:12-cv-00369-MMD-CWH, 2012 WL

3860646, at *3 (D. Nev. Sept. 15, 2012) ("Motions for reconsideration are not the proper vehicles for rehashing old arguments") (internal quotes and citations omitted).

IV. Conclusion

The court will deny Bourne Valley'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 Bourne Valley's motion for reconsideration (ECF No. 168) be, and the same hereby is, DENIED.

DATED April 1, 2019.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BOURNE VALLEY COURT TRUST, Plaintiff(s), v. WELLS FARGO BANK, N.A., et al., Defendant(s).	Case No. 2:13-CV-649 JCM (GWF) ORDER

Presently before the court is defendant Wells Fargo Bank, N.A.'s ("Wells Fargo") motion for summary judgment. (ECF No. 136). Plaintiff Bourne Valley Court Trust ("Bourne Valley") filed a response (ECF No. 157), to which Wells Fargo replied (ECF No. 162).

Also before the court is Bourne Valley's motion for summary judgment. (ECF No. 153). Wells Fargo filed a response (ECF No. 156), to which Bourne Valley replied (ECF No. 164).

Also before the court is Bourne Valley's motion for Federal Rule of Civil Procedure 56(d) relief. (ECF No. 158). Wells Fargo filed a response. (ECF No. 163). Bourne Valley has not filed a reply and the time to do so has passed.

I. Facts

This action arises from a dispute over real property located at 410 Horse Point Avenue, Las Vegas, Nevada (the "property"). (ECF Nos. 1, 48).

Renee Johnson purchased the property on or about September 7, 2001. (ECF No. 153-3). On or about March 1, 2006, Johnson refinanced the property with a loan in the amount of $174,000.00 from Plaza Home Mortgage, Inc. ("Plaza"). (ECF No. 153-5). Plaza secured the loan with a deed of trust, which names Plaza as the lender, Lawyer Title 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 or about June 13, 2006, Federal Home Loan Mortgage Corporation ("Freddie Mac") purchased the loan, thereby acquiring ownership of the deed of trust. (ECF No. 136-1). On February 24, 2011, MERS assigned the deed of trust to Wells Fargo, Freddie Mac's authorized servicer of the loan. (ECF Nos. 136-1, 136-3)

On August 30, 2011, Parks Homeowners Association ("Parks"), through its attorney, recorded a notice of delinquent assessment lien ("the lien") against the property for Johnson's failure to pay Parks in the amount of $1,298.57. (ECF No. 153-12). On October 12, 2011, Parks recorded a notice of default and election to sell pursuant to the lien, stating that the amount due was $2,275.70 as of October 6, 2011. (ECF No. 153-15).

On April 9, 2012, Parks recorded a notice of trustee/foreclosure sale against the property. (ECF No. 153-17). On May 7, 2012, Parks sold the property in a

nonjudicial foreclosure sale to Horse Pointe Avenue Trust ("Horse Pointe") in exchange for $4,145.00. (ECF No. 136-17). On May 29, 2012, Bourne Valley acquired the property via a grant, bargain, sale deed. (ECF No. 136-18).

On January 16, 2013, Bourne Valley initiated this action in Nevada state court, requesting that the state court quiet title the property in Bourne Valley's favor. (ECF No. 1-1). On April 17, 2013, defendants removed this action to federal court. (ECF No. 1).

On August 1, 2018, Wells Fargo filed an answer to Bourne Valley's amended complaint, asserting six counterclaims: (1) quiet title; (2) declaratory relief pursuant to 12 U.S.C. § 4617(j)(3); (3) quiet title pursuant to 12 U.S.C. § 4617(j)(3); (4) wrongful foreclosure; (5) violation of NRS 116.1113 *et seq*.; and (6) unjust enrichment. (ECF No. 78).

Now, the parties have filed cross-motions for summary judgment. (ECF Nos. 136, 153).

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, Bourne Valley requests that the court delay adjudicating Wells Fargo's motion for summary judgment so that Bourne Valley can depose a Rule 30(b)(6) witness. (ECF No. 158). Bourne Valley claims that the witness has information on Freddie Mac's interest in the loan and that Bourne Valley needs that information in order to adequately respond to Wells Fargo's motion. *Id*. However, the case record, which contains over one hundred exhibits,

adequately informs the court about Freddie Mac's interest in the loan so as to preclude any genuine dispute of material fact. Accordingly, the court will deny Bourne Valley's motion for Rule 56(d) relief and proceed to adjudicate the cross-motions for summary judgment.

Wells Fargo argues 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). Bourne Valley argues that the statute of limitations bars Wells Fargo's quiet title claim pursuant to 12 U.S.C. § 4617(j)(3). (ECF No. 153).

NRS 11.070 sets forth a five-year limitations period for quiet title claims. Nev. Rev. Stat. 11.070. Horse Pointe recorded the deed of foreclosure sale with the Clark County recorder's office on May 29, 2012. (ECF Nos. 20, 27). Bourne Valley brought this lawsuit seven-to-eight months later, on January 16, 2013. (ECF No. 1-1). About five and a half years after Horse Pointe recorded the deed of foreclosure sale, Wells Fargo filed its answer and asserted its claim for quiet title pursuant to 12 U.S.C. § 4617(j)(3). (ECF No. 78).

Wells Fargo's quiet title claim is a compulsory counterclaim because it arises from the same foreclosure sale that gives rise to Bourne Valley's causes of action. *See* Fed. R. Civ. P. 13(a) (a party must assert a counterclaim that "arises out of the transaction or occurrence that is the subject matter of the opposing parties claim . . ."). Because "a compulsory counterclaim relates back to the filing of the original complaint," Wells Fargo asserted its claim for quiet title pursuant to 12 U.S.C. § 4617(j)(3) within the five-year limitations period. *Religious Tech. Center v. Scott*, 82 F.3d 423 (9th Cir. 1996), *as amended on denial of reh'g* (July

5, 1996) (unpublished disposition) (citing *Employers Ins. v. Wausau v. United States*, 764 F.2d 1572, 1576 (Fed. Cir. 1985)).

As for the federal foreclosure bar, 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 or about June 13, 2006. (ECF No. 136-1). Further, on February 24, 2011, Wells Fargo acquired all beneficial interest in the deed of trust via an assignment. (ECF Nos. 136-1, 136-3). Wells Fargo acted as a contractually authorized servicer of the loan on behalf of Freddie Mac, the owner of the note and deed of trust. (ECF No. 136-3). Pursuant to § 4617(b)(2)(A)(i), FHFA, as conservator, immediately succeeded to all rights, titles, powers, and privileges of Freddie Mac. *See* 12 U.S.C. § 4617(b)(2)(A)(i). Therefore, FHFA held an interest in the deed of trust as conservator for Freddie Mac prior to the foreclosure sale on May 7, 2012.

FHFA did not consent to the extinguishment of Freddie Mac's property interest through the foreclosure sale. Bourne Valley 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. 157). 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, Wells Fargo is entitled to summary judgment on their declaratory relief and quiet title claims.[1]

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Wells Fargo's motion for summary judgment (ECF No. 136) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that Bourne Valley's motion for summary judgment (ECF No. 153) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that Bourne Valley's motion for Federal Rule of Civil Procedure 56(d) relief (ECF No. 158) be, and the same hereby is, DENIED

The clerk shall enter judgment accordingly and close the case.

DATED January 10, 2019.

/s/

UNITED STATES DISTRICT JUDGE

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[1] The court will not address the litigants' remaining claims as they are no longer pertinent to the adjudication of this action.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOURNE VALLEY COURT TRUST, Plaintiff-Appellant, v. WELLS FARGO BANK, NA, Defendant-Appellee.	No. 19-15253 D.C. No. 2:13-cv-00649-JCM-GWF 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 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. 61, is **DENIED**.

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

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Bourne Valley Court Trust, Plaintiff, v. Wells Fargo Bank, N.A. et al Defendant.	JUDGMENT IN A CIVIL CASE Case Number: 2:13-cv-00649-JCM-GWF

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

_X_ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Judgment is entered in favor of Defendant Wells Fargo Bank, N.A. and against Plaintiff Bourne Valley Court Trust.

1/11/2019
Date

DEBRA K. KEMPI
Clerk

/s/ S. Denson
Deputy Clerk

APPENDIX L

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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.

* * *

Federal Rule of Evidence 1002 provides:

Rule 1002. Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.