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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Federal National Mortgage Association, a
government-sponsored entity; Federal Housing
Finance Agency, as Conservator of Fannie Mae,

2:14-cv-02046-JAD-PAL

Plaintiffs

v.

**Order Regarding
Motions to Dismiss and
Related Briefing**

SFR Investments Pool 1, LLC, a Nevada LLC; Sun
City Aliante Community Association, a Nevada Non-
Profit Corporation; Does 1 through X, inclusive; and
Roe Corporations I through X, inclusive,

[ECF 32, 35, 54, 56]

Defendants

12 A year ago, the Nevada Supreme Court held in *SFR Investments Pool 1, LLC v. U.S. Bank*¹
13 that homeowners associations' nonjudicial foreclosures on superpriority liens under NRS 116.3116
14 extinguish lenders' first trust deeds. The decision made winners out of the investors who purchased
15 the foreclosure properties and losers of the lenders whose interests were wiped out. Lenders
16 promptly developed new arguments in hopes of reclaiming their lost assets.² This is one of more
17 than a dozen cases in this district in which Fannie Mae and Freddie Mac seek to avoid the costly
18 impact of the *SFR* decision on their portfolios of mortgages on foreclosure properties by invoking
19 U.S.C. § 4617(j)(3), which precludes foreclosure on these government-sponsored enterprises' assets
20 while they remain under the conservatorship of the Federal Housing Finance Agency (FHFA).

21 The purchaser who bought at foreclosure the Sun City Aliante home on which this case is
22 based moves to dismiss Fannie Mae's and the FHFA's quiet-title and declaratory-relief claims
23 against it, offering a handful of reasons that the foreclosure bar should not apply.³ This district's
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¹ *SFR Inv. Pool 1 v. U.S. Bank*, 334 P.3d 408, 419 (Nev. 2014).

26 ² See *Freedom Mortgage Corp. v. Las Vegas Dev. Group, LLC*, __ F. Supp.3d __, 2015 WL
27 2398402 (D. Nev. May 19, 2015).

28 ³ ECF 41.

1 Chief Judge Gloria Navarro rejected the same arguments in *Skylights, LLC v. Byron*⁴ and held that
2 § 4617(j)(3) preempted NRS 116.3116 to the extent it would have extinguished Fannie Mae’s first-
3 trust-deed interest through the HOA’s foreclosure of its superpriority lien. I adopt Chief Judge
4 Navarro’s *Skylights* reasoning and deny the defendant purchaser’s motion to dismiss based on its §
5 4617(j)(3) arguments; I grant the motion only to the extent it seeks to dismiss plaintiffs’ claims
6 against fictitious defendants—a request that plaintiffs do not oppose.⁵

7 The HOA separately argues that the FHFA’s and Fannie Mae’s wrongful-foreclosure claim
8 against it is barred because these plaintiffs bypassed the mandatory mediation process that Nevada
9 law requires before a lawsuit over the HOA’s covenants, codes, and restrictions (CC&Rs) can be
10 filed. Because the single claim against the HOA is based on a violation of 12 U.S.C. § 4617(j) and
11 does not implicate any of the HOA’s CC&Rs, I deny the HOA’s motion.

12 **Background**

13 When this Sun City Aliante home located at 7445 Crested Quail Street in Las Vegas, Nevada
14 became a casualty of the housing crash, it was encumbered by a first trust deed held by Fannie Mae
15 since December 1, 2006.⁶ Under the *SFR* decision, the Sun City Aliante Community Association’s
16 (the HOA’s) nonjudicial foreclosure on its superpriority lien against the property on August 5, 2013,
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19 ⁴ *Skylights, LLC v. Byron*, ___ F. Supp. 3d ___, 2015 WL 3887061 (D. Nev., June 24, 2015).

20 ⁵ ECF 48 at 19.

21 ⁶ ECF 1 at 4 (alleging that Fannie Mae purchased the mortgage in December 2006 and that notice of
22 Fannie Mae’s interest was recorded on or about June 28, 2011). The facts in this section were taken
23 from the complaint and not intended as any finding of fact. I accept all well-pleaded facts in the
24 complaint as true and draw all reasonable inferences from those facts in favor of the plaintiffs. *Livid*
25 *Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). I also take judicial
26 notice of filings in other matters and of other publicly filed documents to the extent they are related
27 to this one and were relied upon by Chief Judge Navarro in *Skylights*. Finally, I consider the
28 documents attached to the complaint without converting these motions to dismiss into motions for
summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“A court may,
however, consider certain materials—documents attached to the complaint, documents incorporated
by reference in the complaint, or matters of judicial notice—without converting the motion to
dismiss into a motion for summary judgment.”).

1 would extinguish the first trust deed.⁷ But Fannie Mae—with its conservator the FHFA—challenges
2 that foreclosure as a violation of 12 U.S.C. § 4617(j)(3), which states that “[n]o property of [FHFA]
3 shall be subject to . . . foreclosure, or sale without the consent of” the FHFA.⁸ Fannie Mae and the
4 FHFA sue SFR for quiet title and a declaration that Fannie Mae’s first-position deed of trust “still
5 encumbers the Property” and was not extinguished by the HOA’s August 2013, foreclosure sale of
6 its lien against the property.⁹ They also sue the HOA for wrongful foreclosure on the basis that the
7 HOA failed to obtain the FHFA’s consent under § 4617(j)(3) before conducting its sale.¹⁰ The
8 FHFA alleges that it did not consent to the HOA’s sale extinguishing or foreclosing Fannie Mae’s
9 first-position lien on the property.¹¹

10 SFR Investments Pool 1—the victor in the Nevada Supreme Court’s *SFR* case and the
11 investor who also bought this Sun City Aliante home at the 2013 foreclosure sale—moves to dismiss
12 the quiet-title and declaratory-relief claims against it.¹² It argues that applying § 4617(j)(3) in this
13 case would deprive it of its right to its property without due process of law;¹³ that the FHFA is going
14 beyond its statutory powers by invoking § 4617(j)(3);¹⁴ that § 4617(j)(3) has no application to the
15 foreclosures of private liens;¹⁵ and that the HOA lien attached before the FHFA’s conservatorship

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19 ⁷ ECF 1 at ¶ 31; *SFR*, 334 P.3d at 419 (“NRS 116.3116(2) gives an HOA a true superpriority lien,
proper foreclosure of which will extinguish a first deed of trust.”).

20 ⁸ ECF 1 at 7–8.

21 ⁹ *Id.*

22 ¹⁰ ECF 1 at 8.

23 ¹¹ *Id.* at ¶ 34.

24 ¹² ECF 32.

25 ¹³ *Id.* at 4–9; *see also Skylights*, 2015 WL 3887061 at *7 & n.4.

26 ¹⁴ *Id.* at 9; *see also Skylights*, 2015 WL 3887061 at *11.

27 ¹⁵ ECF 32 at 10–11; *see also Skylights*, 2015 WL 3887061 at *8.

1 began, precluding the application of § 4617(j)(3).¹⁶ All of these arguments were considered and
2 rejected by Chief Judge Navarro in *Skylights* and in a handful of other cases in this district in which
3 the FHFA is raising § 4617(j)(3) to preclude Fannie Mae and Freddie Mac from losing their security
4 interests in these foreclosure properties.¹⁷ The HOA joins in the motion without further elaboration
5 on the purchaser’s arguments¹⁸ and separately moves to dismiss because Fannie Mae and the FHFA
6 did not exhaust the mandatory mediation process under NRS 38.310 for claims relating to “[t]he
7 interpretation, application or enforcement of any covenants, conditions or restrictions . . . adopted by
8 an association” before filing their wrongful-foreclosure claim against the HOA.¹⁹

9 . . .

15 ¹⁶ ECF 32 at 11; *see also Skylights*, 2015 WL 3887061 at *11. In its reply brief, the purchaser adds
16 two new arguments: that the foreclosure bar does not automatically preempt contrary state law
17 because the statute allows the FHFA to consent to the foreclosure, ECF 48 at 12–13, and that the
18 FHFA failed to refute its argument that the FHFA deprived the HOA of property without due process
19 of law. ECF 48 at 19. These belated arguments generated the FHFA’s motion for leave to file a
20 surreply to address them (ECF 54) and the purchasers’ motion to strike the proposed surreply (ECF
21 56). I note that the purchaser did not argue in its motion to dismiss that § 4617(j)(3) deprives *the*
22 *HOA* of due process; I exercise my discretion to not consider these new arguments because they were
23 raised too late, *see Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (district court has discretion
24 to ignore new arguments raised in reply brief); and I deny both post-briefing motions.

22 ¹⁷ *See supra* notes 13–16; *see also 1597 Ashfield Valley Trust v. Fed. Nat. Mortgage Ass’n Sys.*, 2015
23 WL 4581220, at *7 (D. Nev. July 28, 2015) (“Unless FHFA consents, HOA superpriority foreclosure
24 sales are incapable of extinguishing property interests held by Fannie Mae while under FHFA
25 conservatorship.”); *accord, My Global Vill., LLC v. Fed. Nat. Mortgage Ass’n*, 2015 WL 4523501,
26 at *4 (D. Nev. July 27, 2015); *Premier One Holdings, Inc. v. Fed. Nat. Mortgage Ass’n*, 2015 WL
27 4276169, at *3 (D. Nev. July 13, 2015); *Williston Inv. Grp., LLC v. JP Morgan Chase Bank Nat.*
28 *Ass’n*, 2015 WL 4276144, at *3 (D. Nev. July 13, 2015); *Elmer v. JP Morgan Chase Bank Nat.*
Ass’n, 2015 WL 4393051, at *3 (D. Nev. July 13, 2015).

27 ¹⁸ ECF 34.

28 ¹⁹ ECF 35.

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2 **Discussion**

3 **A. SFR Investments Pool 1 has not shown that the FHFA’s and Fannie Mae’s invocation of**
4 **§ 4617(j)(3) is legally unsound.**

5 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint.²⁰ A
6 complaint should be dismissed under this rule only when it lacks “a cognizable legal theory or
7 sufficient facts to support a cognizable legal theory.”²¹ The purchaser argues that Fannie Mae’s and
8 the FHFA’s claims are “facially implausible” and must be dismissed under Rule 12(b)(6) because
9 these plaintiffs’ invocation of § 4617(j)(3)’s foreclosure bar is legally unsound.²²

10 The purchaser’s legal challenge is based almost entirely on the identical arguments raised by
11 the investor in *Skylights*.²³ In that case, *Skylights*—the investor who purchased a condominium at
12 the HOA’s nonjudicial foreclosure sale—sued the other parties it believed may claim an interest in
13 the property (including Fannie Mae), seeking a declaration that it took title free and clear of any other
14 interest.²⁴ The FHFA intervened and, together, Fannie Mae and the FHFA moved for summary
15 judgment, arguing that “*Skylights* could not have extinguished Fannie Mae’s” first-trust-deed interest
16 when it purchased the property at the HOA’s foreclosure sale because § 4617(j)(3) “barred the HOA
17 from foreclosing on the Property without the consent of the conservator, FHFA.”²⁵

18 In opposing the motion, *Skylights* offered the same arguments that the purchaser in the
19 instant case now raises as the bases for its motion to dismiss.²⁶ Chief Judge Navarro carefully

20 ²⁰ *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

21 ²¹ *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

22 ²² ECF 32 at 2.

23 ²³ *Skylights* was identified by the plaintiffs as a case related to this one because both cases present
24 “an identical question of federal law concerning quiet title claims made by and against FHFA, Fannie
25 Mae, and” Freddie Mac. ECF 39 at 2.

26 ²⁴ *Skylights*, 2015 WL 3887061, *3.

27 ²⁵ *Id.* at *4.

28 ²⁶ *Id.* at *4–11.

1 considered and rejected all of them, concluding that § 4617(j)(3)'s federal foreclosure bar prevents
2 Nevada's superpriority lien statute from extinguishing the interest of Fannie Mae or Freddie Mac
3 without the FHFA's consent:

4 12 U.S.C. § 4617(j)(3) preempts Nevada Revised Statutes § 116.3116
5 to the extent that a homeowner association's foreclosure of its super-
6 priority lien cannot extinguish a property interest of Fannie Mae or
7 Freddie Mac while those entities are under FHFA's conservatorship.
8 Accordingly, the HOA's foreclosure sale of its super-priority interest
9 on the Property did not extinguish Fannie Mae's interest in the
10 Property secured by the Deed of Trust or convey the Property free and
11 [clear] to Skylights.²⁷

9 I adopt Chief Judge Navarro's conclusion and the analysis she articulated in *Skylights* to reject the
10 purchaser's same dismissal arguments here.

11 The only argument that the purchaser offers beyond those in *Skylights* is that it was a bona
12 fide purchaser of the property who took the property free and clear of Fannie Mae's first-trust-deed
13 interest.²⁸ Even assuming without deciding that Nevada's BFP statutes could override § 4617(j)(3),
14 this supplemental argument does not carry the day. As the purchaser acknowledges in its motion, "a
15 purchaser is a BFP if she buys property for value and without notice of a superior or competing
16 interest."²⁹ The facts pled in the complaint prevent the conclusion that the purchaser bought this
17 property without notice of Fannie Mae's interest. Nevada law provides that every document
18 recorded in a county recorder's office gives notice to all persons upon recordation.³⁰ A document
19 reflecting the assignment of this deed of trust to Fannie Mae was recorded in Nevada's Clark County
20 Recorder's office on June 28, 2011—more than two years before this foreclosure action.³¹ The 2011
21 recording of Fannie Mae's assignment of the deed of trust put the purchaser on constructive notice of
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24 ²⁷ *Id.* at *12.

25 ²⁸ ECF at 10.

26 ²⁹ *Id.*

27 ³⁰ Nev. Rev. Stat. § 247.190(1).

28 ³¹ ECF 1-5 at 2.

1 Fannie Mae’s interest³² and prevents the purchaser from claiming BFP status in this case.

2 The preclusive effect of 12 U.S.C. § 4617(j)(3) plus the purchaser’s record notice of Fannie
3 Mae’s interest the property may have put the purchaser on inquiry notice to investigate the FHFA’s
4 position.³³ Whether the purchaser had—and satisfied—a duty to investigate are not questions I must
5 answer at this dismissal stage, however, because the purchaser has at most shown there are issues of
6 fact as to whether it would qualify for BFP status.³⁴

7 The purchaser has not demonstrated that Fannie Mae’s and the FHFA’s claims are
8 “implausible” because it is a BFP or for any other reason. SFR Investments Pool 1’s motion to
9 dismiss based on the implausibility of the plaintiffs’ § 4617(j)(3) theory is denied.

10 **B. Claims against Doe and Roe defendants will be dismissed.**

11 The purchaser also contends that the FHFA’s and Fannie Mae’s inclusion of claims against
12 Doe and Roe Corporation defendants is not authorized, so the claims against these fictitious
13 defendants should be dismissed.³⁵ The plaintiffs offer no response to this argument, and I do not see
14 any allegation against a doe or roe defendant that justifies keeping these defendants in this case.
15 Accordingly, to streamline the pleadings and because it appears the plaintiffs have tacitly conceded
16 that fictitious defendants are unnecessary to their claims, I grant the purchaser’s motion in this
17 limited respect and dismiss any claims asserted against Does I through X and Roe Corporations I
18 through X.

19 **C. Plaintiffs’ wrongful-foreclosure claim against the HOA is not barred by NRS 38.310.**

20 The HOA relies on Rule 12(b)(1) to argue that this court lacks jurisdiction to hear the
21 wrongful foreclosure claim against it because Fannie Mae and the FHFA failed to exhaust the

23 ³² See, e.g., *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 471 P.2d 666, 669 (Nev. 1970) (“A subsequent
24 purchaser with notice, actual or constructive, of an interest in the land superior to that which he is
25 purchasing is not a purchaser in good faith, and not entitled to the protection of the recording act.”).

26 ³³ See *Berge v. Fredericks*, 591 P.2d 246, 249 (1979); see also *Tai-Si Kim v. Kearney*, 838 F.
27 Supp.2d 1077, 1088 (D. Nev. 2012) (discussing *Berge* and the duties that arise from inquiry notice).

27 ³⁴ *Berge*, 591 P.2d at 249.

28 ³⁵ ECF 32 at 11.

1 mandatory mediation process that NRS 38.310 requires before a lawsuit regarding an HOA’s
2 CC&Rs may be filed.³⁶ The failure to exhaust a statutory administrative process prevents a court
3 from acquiring subject-matter jurisdiction over an unexhausted claim “where the exhaustion statute
4 explicitly limits the grant of subject matter jurisdiction and is an integral part of the statute granting
5 jurisdiction.”³⁷ NRS 38.310 prevents the commencement of any “civil action based upon a claim
6 relating to (a) The interpretation, application or enforcement of any covenants, conditions or
7 restrictions applicable to residential property or any bylaws, rules or regulations adopted by an
8 association; or (b) The procedures used for increasing, decreasing or imposing additional
9 assessments upon residential property, . . . unless the action has been submitted to mediation”³⁸
10 As the Nevada Supreme Court explained in *Hamm v. Arrowcreek Homeowners’ Association*, “If a
11 party institutes a civil action in violation of NRS 38.310(1), the district court must dismiss it” under
12 NRS 38.310(2).³⁹

13 Assuming this Nevada statute could dictate federal-court jurisdiction, the success of the
14 HOA’s motion hinges on whether this wrongful-foreclosure claim falls within the category of claims
15 that the Nevada legislature intended for mediation before the Real Estate Division of Nevada’s
16 Department of Business and Industry.⁴⁰ The HOA argues that the Nevada Supreme Court held in
17 *McKnight Family, LLP v. Adept Management* that wrongful foreclosure actions are disputes
18 involving the “interpretation, application or enforcement” of an HOA’s CC&Rs; the claim against
19 them is one for wrongful foreclosure; *a fortiori*, this wrongful foreclosure claim by the FHFA and
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22 ³⁶ ECF 35 at 3–4.

23 ³⁷ *McBride Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 979 (9th Cir. 2002).

24 ³⁸ Nev. Rev. Stat. § 38.310.

25 ³⁹ *Hamm v. Arrowcreek Homeowners’ Ass’n*, 183 P.3d 895, 900 (Nev. 2008); *McKnight Family, LLP*
26 *v. Adept Mgmt.*, 310 P.3d 555, 558 (Nev. 2013) (the statute’s language “mandates the court to
27 dismiss any civil action initiation in violation of NRS 38.310(1)”).

28 ⁴⁰ Nev. Rev. Stat. §§ 38.300(4); 38.320(1).

1 Fannie Mae had to be mediated under NRS 38.310 before it could be filed.⁴¹ This too-simple
2 syllogism overlooks the purpose of NRS 38.310: to foster “Nevada’s public policy favoring
3 arbitration of disputes involving the interpretation and enforcement of CC&Rs.”⁴² It also ignores the
4 nature of *this* wrongful foreclosure claim, which is founded solely on the HOA’s disregard for §
5 4617(j)(3) and will not require the interpretation, enforcement, or application of any CC&R
6 provision.⁴³ Although the Nevada Supreme Court in *McKnight* broadly noted that “deciding a
7 wrongful foreclosure claim against a homeowner’s association involves interpreting covenants,
8 conditions, or restrictions applicable to residential property” and “challenges the authority behind the
9 foreclosure, not the foreclosure itself,” these conventions do not apply to this wrongful-foreclosure
10 claim.

11 In sum, the wrongful-foreclosure claim pled here is not a “civil action based upon a claim
12 relating to (a) The interpretation, application or enforcement of any covenants, conditions or
13 restrictions applicable to residential property or any bylaws, rules or regulations adopted by an
14 association; or (b) The procedures used for increasing, decreasing or imposing additional
15 assessments upon residential property,”⁴⁴ so the FHFA and Fannie Mae were not required to exhaust
16 the mediation process under Chapter 38 before filing it. The HOA’s motion to dismiss [ECF 35] is
17 denied.

18 Conclusion

19 Accordingly, IT IS THEREFORE ORDERED that SFR Investments Pool 1, LLC’s Motion to
20 Dismiss Complaint [ECF 32] is **GRANTED IN PART AND DENIED IN PART: the claims**
21 **against doe and roe defendants are dismissed; the motion is denied in all other respects;**

22 IT IS FURTHER ORDERED that Sun City Aliante Community Association’s Motion to
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24 ⁴¹ ECF 35 at 5.

25 ⁴² *Hamm*, 183 P.3d at 902.

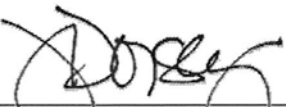
26 ⁴³ That this case turns on the applicability and interpretation of 12 U.S.C. § 4617(j)(3) and not any
27 CC&R provision is also patently evident from the purchaser’s motion to dismiss. See ECF 32.

28 ⁴⁴ Nev. Rev. Stat. § 38.310(1).

1 Dismiss Complaint [ECF 35] is DENIED;

2 IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File a Surreply in
3 Opposition to SFR's Motion to Dismiss [ECF 54] and SFR Investments Pool 1, LLC's Motion to
4 Strike Plaintiffs' Proposed Surreply [ECF 56] are DENIED.

5 Dated this 28th day of September, 2015

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8 Jennifer A Dorsey
9 United States District Judge
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