

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GREEN TREE SERVICING, LLC,)

Plaintiff,)

vs.)

COLLEGIUM FUND LLC, SERIES 31, a)

Nevada limited liability company;)

TIERRA DE LAS PALMAS OWNERS)

ASSOCIATION,)

Defendants.)

Case No.: 2:15-cv-0700-GMN-GWF

ORDER

TIERRA DE LAS PALMAS OWNERS)

ASSOCIATION,)

Third-Party Plaintiff,)

vs.)

ABSOLUTE COLLECTION SERVICES,)

LLC, a Nevada limited liability company,)

Third-Party Defendant.)

COLLEGIUM FUND LLC, SERIES 31, a)

Nevada limited liability company;)

Counterclaim Plaintiff,)

vs.)

GREEN TREE SERVICING, LLC;)

JOSEPH P. SAUER, an individual; CYNTHIA)

A. SAUER, an individual,)

Counterclaim Defendants.)

1 Pending before the Court is a Motion for Summary Judgment filed by Defendant
2 Collegium Fund LLC, Series 31 (“Collegium Fund”). (ECF No. 58). Plaintiff Green Tree
3 Servicing LLC (“Green Tree”) filed a Response (ECF No. 63), and Collegium Fund filed a
4 Reply (ECF No. 70).

5 Also pending before the Court is a Motion for Summary Judgment filed by Green Tree.
6 (ECF No. 59). Third-Party Plaintiff Tierra De Las Palmas Owners Association (the “HOA”)
7 and Collegium Fund both filed Responses (ECF Nos. 62, 64), and Green Tree filed a Reply to
8 each Response (ECF Nos. 66, 71).

9 **I. BACKGROUND**

10 The present action involves the parties’ interests in real property located at 2220
11 Mediterranean Sea Avenue, North Las Vegas, NV 89031 (the “Property”). On December 21,
12 2009, Joseph P. Sauer and Cynthia A. Sauer (the “Sauers”) obtained a loan in the amount of
13 \$96,950.00 from Bank of America, N.A. (“BANA”) that was secured by a Deed of Trust on the
14 Property. (Deed of Trust, ECF No. 58-2, 59-2).¹ The Deed of Trust named BANA as the
15 beneficiary and Recon Trust Company as the trustee. (*Id.*). Fannie Mae purportedly purchased
16 the Sauer Loan on January 29, 2010 and has owned it ever since. (*See* Curcio Decl. ¶ 4, ECF
17 No. 59-3); (Ex. A to Curcio Decl. at 5, ECF No. 59-3). Green Tree asserts that on December
18 31, 2012, BANA transferred servicing to “Fannie Mae/Ditech Financial LLC subservicer.”²
19 (Ex. A to Curcio Decl. at 9) (“Servicing Transfer Request Detail” with this date as the effective
20 date). On January 10, 2013, BANA executed an Assignment of Deed of Trust to Green Tree.
21 (Assignment of Deed of Trust, ECF No. 59-4).

22
23 ¹ Both Collegium Fund and Green Tree attach the Deed of Trust to their Motions for Summary Judgment. (ECF
24 Nos. 58-2, 59-2). The Court takes judicial notice of the publicly recorded documents attached to the Motions for
25 Summary Judgment, which are all recorded in the Clark County Recorder’s office. (*See, e.g.*, Exs. 1–2, 4–8 to
Green Tree’s MSJ, ECF Nos. 59-1–2, 59-4–8); *see also Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th
Cir. 1986) (recognizing judicial notice of publicly recorded documents)

² Green Tree is “now known as Ditech Financial LLC.” (Green Tree MSJ 2:9, ECF No. 59).

1 On September 6, 2008, FHFA's Director placed Fannie Mae and Freddie Mac into
2 conservatorships pursuant to HERA. *See* 12 U.S.C. § 4617(a)(2); (*see also* Green Tree MSJ
3 2:17–23, 4:13–14).

4 On March 26, 2013, Absolute Collection Services, LLC (“ACS”), as agent and trustee
5 for the HOA, recorded a Notice of Delinquent Assessment Lien against the Property for
6 \$827.85. (Not. Delinquent Assessment Lien, ECF No. 59-5). Then on July 24, 2013, ACS
7 recorded a Notice of Default and Election to Sell, warning that the HOA would foreclose on its
8 lien unless the assessment payments were brought up to date. (Not. Default & Election to Sell,
9 ECF No. 59-6). On November 4, 2013, ACS, as agent and trustee for the HOA, recorded a
10 Notice of Trustee's Sale, setting a foreclosure sale of the Property on January 14, 2014. (Not.
11 Trustee's Sale, ECF No. 59-7). Collegium Fund subsequently purchased the Property as the
12 highest bidder at the January 14, 2014 foreclosure sale. (Corrective Foreclosure Deed, ECF
13 Nos. 59-1).³ Green Tree asserts that at no time during the process did FHFA, as conservator of
14 Fannie Mae, consent to the HOA's foreclosure. (*See* Green Tree MSJ 3:13–14, 7:10–12); (*see*
15 *also* FHFA Statement, Ex. 10 to Green Tree MSJ, ECF No. 59-10).

16 Green Tree initiated this action on April 16, 2015, asserting, *inter alia*, a claim for quiet
17 title against Collegium Fund, but also named the HOA. (Compl. ¶¶ 55–64, ECF No. 1). In the
18 HOA's Answer, it also asserted a third-party complaint against ACS related to indemnity. (ECF
19 No. 10). In Collegium Fund's Answer, it also asserted counterclaims against Green Tree and a
20 third-party complaint against the Sauers. (ECF No. 11). On June 9, 2015, the Court granted the
21 parties' Stipulation for Green Tree to file an Amended Complaint (ECF No. 20), which it filed
22 on June 10, 2015. (ECF No. 21). Collegium Fund and the HOA both filed Answers to the
23

24 ³ There are two Foreclosure Deeds, one recorded on January 16, 2014 (Foreclosure Deed, ECF No. 59-8), and
25 one recorded on February 14, 2014 (Corrective Foreclosure Deed, ECF No. 59-1). It appears that the first one
mistakenly stated that Collegium Fund LLC, Series 32 was the Grantee, which was then remedied through the
corrective deed, amending the Grantee name to Collegium Fund LLC, Series 31.

1 Amended Complaint. (ECF Nos. 22, 27). Collegium Fund also filed a Motion to Amend its
2 Counterclaim and Third-Party Complaint (ECF No. 29), which Magistrate Judge George Foley,
3 Jr. granted because no opposition was filed (ECF No. 34). ACS filed its Answer to the HOA's
4 third-party complaint (ECF No. 35), and Green tree filed its Answer to Collegium Fund's
5 counterclaims (ECF No. 38).

6 Green Tree then filed a Motion for Leave to File Second Amended Complaint ("SAC")
7 (ECF No. 40), which Magistrate Judge Foley granted because no opposition was filed (ECF
8 No. 52). On November 12, 2015, Green Tree filed its SAC, which was the first document to
9 indicate that Fannie Mae had an interest in the Property. (*Compare* Am. Compl. ¶ 14, ECF No.
10 21, *with* SAC ¶ 9–12, ECF No. 53). Collegium Fund filed an Answer to Green Tree's SAC.
11 (ECF No. 54). Subsequently, both Collegium Fund and Green Tree filed the instant Motions
12 for Summary Judgment. (ECF Nos. 58–59).⁴

13 **II. LEGAL STANDARD**

14 The Federal Rules of Civil Procedure provide for summary adjudication when the
15 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
16 affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant
17 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that
18 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
19 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
20 jury to return a verdict for the nonmoving party. *See id.* "Summary judgment is inappropriate if
21 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
22 in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th
23 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A

24
25 ⁴ Following the filings of these motions, the parties filed a Stipulation to Dismiss the Third Cause of Action of
Green Tree's SAC: "Violation of Automatic Bankruptcy Stay versus the HOA." (ECF No. 60). The Court
granted this Stipulation on January 26, 2016. (ECF No. 61).

1 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
2 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

3 In determining summary judgment, a court applies a burden-shifting analysis. “When
4 the party moving for summary judgment would bear the burden of proof at trial, it must come
5 forward with evidence which would entitle it to a directed verdict if the evidence went
6 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
7 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
8 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
9 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
10 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
11 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
12 party failed to make a showing sufficient to establish an element essential to that party’s case
13 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
14 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
15 the court need not consider the nonmoving party’s evidence. *See Adickes v. S. H. Kress & Co.*,
16 398 U.S. 144, 159–60 (1970).

17 If the moving party satisfies its initial burden, the burden then shifts to the opposing
18 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
19 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
20 the opposing party need not establish a material issue of fact conclusively in its favor. It is
21 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
22 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
23 *Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
24 summary judgment by relying solely on conclusory allegations that are unsupported by factual
25 data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go

1 beyond the assertions and allegations of the pleadings and set forth “specific facts” by
2 producing competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S.
3 at 324.

4 At summary judgment, a court’s function is not to weigh the evidence and determine the
5 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.
6 The nonmoving party’s evidence is “to be believed, and all justifiable inferences are to be
7 drawn in his favor.” *Id.* at 255. However, if the evidence of the nonmoving party is “merely
8 colorable, or is not significantly probative, summary judgment may be granted.” *See id.* at 249–
9 50 (citations omitted).

10 **III. DISCUSSION**

11 **A. Green Tree’s Motion for Summary Judgment**

12 Green Tree asserts, *inter alia*, that 12 U.S.C. § 4617(j)(3) “preempts any Nevada law . . .
13 that would otherwise permit the HOA’s foreclosure of its superpriority lien to extinguish
14 [Fannie Mae’s] interest in property while [Fannie Mae is] under FHFA’s conservatorship.”
15 (Green Tree MSJ 8:7–9). Green Tree also contends: “Fannie Mae’s interest here . . . was a
16 protected property interest under Section 4617(j)(3).” (*Id.* 10:4–6). Further, Green Tree argues
17 that the HOA foreclosure sale did “not extinguish the property interests of Fannie Mae under
18 Section 4617(j)(3) [when] conducted without FHFA’s consent.” (*Id.* 11:1–2). Ultimately,
19 Green Tree asserts that Section 4617(j)(3) “defeats Collegium [Fund]’s claim to an interest in
20 the Property free and clear of the Deed of Trust.” (*Id.* 8:4–5).

21 The Court addressed the applicability of 12 U.S.C. § 4617(j)(3) in *Skylights LLC v.*
22 *Byron*, 112 F. Supp. 3d. 1145 (D. Nev. 2015). After addressing many different arguments
23 regarding the applicability of Section 4617(j)(3), the Court held that the plain language of
24 Section 4617(j)(3) prohibits property of FHFA from being subject to a foreclosure without its
25 consent. *Skylights LLC*, 112 F. Supp. 3d. at 1158–59.

1 Here, Collegium Fund disputes that Fannie Mae owns an interest in the Property. (*See*,
2 *e.g.*, Collegium Resp. 9:3–12:20, ECF No. 64). However, Green Tree has provided a
3 Declaration from Fannie Mae, along with supporting business records. (Curcio Decl. & Ex. A,
4 ECF No. 59-3). This Court has previously acknowledged such an interest based on comparable
5 support. *See Elmer v. Freddie Mac*, No. 2:14-cv-01999-GMN-NJK, 2015 WL 4393051 (D.
6 Nev. July 13, 2015); *Williston Inv. Grp., LLC v. JP Morgan Chase Bank, N.A.*, No. 2:14-cv-
7 02038-GMN-PAL, 2015 WL 4276144 (D. Nev. July 13, 2015). Accordingly, the Court finds
8 that Fannie Mae has held an interest in the Property since January 29, 2010. (*See* Curcio Decl.
9 ¶ 4); (Ex. A to Curcio Decl. at 5).

10 Previously, this Court has held that if FHFA held an interest in the Deed of Trust as
11 conservator for Fannie Mae prior to the HOA foreclosure, then § 4617(j)(3) prevents the
12 HOA’s foreclosure on the Property from extinguishing the Deed of Trust. *See Skylights LLC*,
13 112 F. Supp. 3d 1145; *Elmer*, 2015 WL 4393051; *Williston Inv. Grp.*, 2015 WL 4276144.
14 Here, however, unlike in *Skylights* and the other eight cases from this District cited by Green
15 Tree for the same proposition (*see* Green Tree MSJ 3:16–4:3), neither FHFA nor Fannie Mae
16 are parties or intervenors in this case. As such, the Court finds it proper to conduct an analysis
17 regarding prudential standing. *City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 845–46 (9th
18 Cir. 2009) (indicating that the Court may raise prudential standing *sua sponte*).

19 Prudential standing is “not compelled by the language of the Constitution.” *Valley Forge*
20 *Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471, 474–
21 75 (1982). Rather, prudential standing involves “judicially self-imposed limits on the exercise
22 of federal jurisdiction.” *Kern*, 581 F.3d at 845 (quotation omitted). “Among other
23 requirements, the plaintiff generally must assert his own legal rights and interests, and cannot
24 rest his claim to relief on the legal rights or interests of third parties.” *Mills v. United States*,
25 742 F.3d 400, 406 (9th Cir. 2014) (quoting *Valley Forge*, 454 U.S. at 474). Consequently,

1 courts “typically decline to hear cases asserting rights properly belonging to third parties rather
2 than the plaintiff.” *McCollum v. Cal. Dept. of Corr. & Rehab.*, 647 F.3d 870, 878 (9th Cir.
3 2011).

4 There are two rationales for this aspect of prudential standing. First, it avoids
5 unnecessary adjudication of third party’s rights, and “it may be that in fact the holders of those
6 rights either do not wish to assert them, or will be able to enjoy them regardless of whether the
7 in-court litigant is successful or not.” *Singleton v. Wulff*, 428 U.S. 106, 113–14 (1976).
8 “Second, third parties themselves usually will be the best proponents of their own rights.” *Id.* at
9 114. However, a plaintiff may be allowed to assert a third party’s rights “when (1) the party
10 asserting the right has a close relationship with the person who possesses the right and (2) there
11 is a hindrance to the possessor’s ability to protect his own interests.” *Mills*, 742 F.3d at 407
12 (quotation omitted).

13 Here, as explained above, Green Tree seeks to assert legal rights and interests that
14 belong to FHFA and Fannie Mae under 12 U.S.C. § 4617(j)(3). Although Green Tree has
15 alleged a close relationship between itself and Fannie Mae as Fannie Mae’s servicer, it has not
16 provided evidence demonstrating any hindrance to FHFA and Fannie Mae’s ability to protect
17 their own interests. FHFA and Fannie Mae are the best proponents of their own rights. *See*
18 *Singleton*, 428 U.S. at 114. Green Tree therefore lacks prudential standing to raise these third
19 parties’ interests. Accordingly, Green Tree’s Motion for Summary Judgment is denied.

20 **B. Collegium Fund’s Motion for Summary Judgment**

21 Collegium Fund asserts, *inter alia*, that the HOA foreclosure sale at which it bought the
22 Property did not violate due process, and Collegium Fund believes it is entitled to free and clear
23 title to the Property. (*See* Collegium Fund MSJ 10:6–14:3, ECF No. 58).

24 Lenders and investors have been at odds over the legal effect of an HOA nonjudicial
25 foreclosure of a superpriority lien on a lender’s first trust deed pursuant to Nevada Revised

1 Statutes § 116.3116. See *Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC*, 106 F. Supp. 3d
2 1174, 1180 (D. Nev. 2015). The Nevada Supreme Court seemed to have settled the debate in
3 *SFR Invs. Pool 1, LLC v. U.S. Bank*, 334 P.3d 408, 419 (Nev. 2014), holding that “NRS
4 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish
5 a first deed of trust.” *SFR*, 334 P.3d at 419.

6 However, on August 12, 2016, two members of a Ninth Circuit panel held in *Bourne*
7 *Valley Court Trust v. Wells Fargo Bank* that Chapter 116’s nonjudicial foreclosure scheme
8 “facially violated mortgage lenders’ constitutional due process rights” before it was amended in
9 2015. *Bourne Valley Ct. Trust v. Wells Fargo Bank*, 2016 WL 4254983, at *5 (9th Cir. Aug. 12,
10 2016). As a result, *Bourne Valley* is likely dispositive of this and the hundreds of other
11 foreclosure cases pending in both state and federal court. To save the parties from the need to
12 invest resources briefing the effect of the *Bourne Valley* opinion before the finality of that
13 opinion has been determined, the Court **STAYS** all proceedings in this case pending exhaustion
14 of all appeals of *Bourne Valley*.

15 **i. Legal Standard regarding Stay**

16 “[T]he power to stay proceedings is incidental to the power inherent in every court to
17 control the disposition of the causes of action on its docket with economy of time and effort for
18 itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). “A trial
19 court may, with propriety, find it is efficient for its own docket and the fairest course for the
20 parties to enter a stay of an action before it, pending resolution of independent proceedings
21 which bear upon the case.” *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir.
22 1979). In deciding whether to grant a stay, a court may weigh the following: (1) the possible
23 damage which may result from the granting of a stay; (2) the hardship or inequity which a party
24 may suffer in being required to go forward; (3) the orderly course of justice measured in terms
25 of the simplifying or complicating of issues, proof, and questions of law which could be

1 expected to result from a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

2 However, “[o]nly in rare circumstances will a litigant in one case be compelled to stand aside
3 while a litigant in another settles the rule of law that will define the rights of both.” *Landis*, 299
4 U.S. at 255. A district court’s decision to grant or deny a *Landis* stay is a matter of discretion.
5 *See Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir.
6 2007).

7 **ii. Discussion regarding Stay**

8 At the center of this case are the HOA-foreclosure sale conducted pursuant to Nevada
9 Revised Statutes § 116.3116 and the competing arguments that the foreclosure sale either
10 extinguished the bank’s security interest under the *SFR* holding or had no legal effect because
11 the statutory scheme violates due process. Because the Ninth Circuit in *Bourne Valley* held that
12 the scheme was facially unconstitutional, *see Bourne Valley*, 2016 WL 4254983, at *5, the
13 *Bourne Valley* opinion and any modification of that opinion have the potential to be dispositive
14 of this case. Under this circumstance, the *Landis* factors weigh strongly in favor of staying this
15 action pending final resolution of the *Bourne Valley* decision. Indeed, the possible prejudice to
16 the parties is minimal as the only potential harm is that the parties may wait longer for
17 resolution of this case if it is stayed. However, if this case is not stayed, a delay would also
18 result from any motions for reconsideration that may be necessitated if the current decision in
19 the *Bourne Valley* case does not stand. Accordingly, a stay is not likely to appreciably lengthen
20 the life of this case. Further, in the absence of a stay, judicial resources may be unnecessarily
21 expended to resolve issues which may ultimately be decided by higher courts to which this
22 Court is bound to adhere. Because the *Bourne Valley* decision is squarely on point, the orderly
23 course of justice likewise weighs in favor of a stay. Accordingly, the Court finds that staying
24 this action pending final resolution of *Bourne Valley* would be efficient for the Court’s own
25 docket and the fairest course for the parties. *See Leyva*, 593 F.2d at 863.

1 **IV. CONCLUSION**

2 **IT IS THEREFORE ORDERED** that this case is administratively **STAYED** pending
3 exhaustion of all appeals of *Bourne Valley Court Trust v. Wells Fargo Bank*, No. 15-15233 (9th
4 Cir. Aug. 12, 2016). Once exhaustion occurs, any party may move to lift the stay. Until that
5 time, all proceedings in this action are stayed.

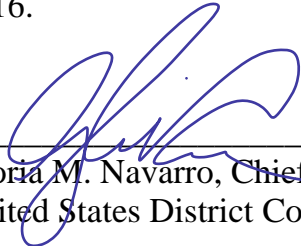
6 **IT IS FURTHER ORDERED** that all pending motions are **DENIED** without prejudice
7 with leave to refile within twenty-one days after the stay is lifted.

8 **IT IS FURTHER ORDERED** that Collegium Fund shall care for, preserve, and
9 maintain the Property.

10 **IT IS FURTHER ORDERED** that, beginning on March 22, 2017, the parties must file
11 a joint status report updating the Court on the status of this case every one-hundred and eighty
12 days. Along with the joint status report, Collegium Fund shall submit a statement affirming
13 that all expenses necessary to maintain the property, including but not limited to, timely and
14 full payment of all homeowners association assessments, property taxes, and property insurance
15 premiums due and owing or past due at any time during the effective period of this Stay are
16 current and up to date.

17 **IT IS FURTHER ORDERED** that this Order does not prevent the parties from
18 continuing to engage in settlement conference negotiations with the assistance of the Magistrate
19 Judge.

20 **DATED** this 27 day of September, 2016.

21
22 
23 _____
24 Gloria M. Navarro, Chief Judge
25 United States District Court