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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Ditech Financial LLC, et al,
Plaintiffs
v.
Lockmor Holdings, LLC,
Defendant

2:17-cv-01829-JAD-PAL

**Order Staying Case and
Denying Pending Motions**

[ECF Nos. 14, 15, 27]

Ditech Financial LLC filed this action to challenge a homeowners association’s (HOA’s) non-judicial foreclosure sale of a home on which the bank held a first deed of trust, after the Nevada Supreme Court held in *SFR Investments Pool 1, LLC v. U.S. Bank* that an HOA’s proper foreclosure under Nevada’s statutory scheme “will extinguish a first deed of trust.”¹ A federal-state split in the interpretation and effect of the statute has arisen, and the parties in this case have filed dispositive motions based on these competing approaches.² Because an impending answer to a question certified to the Nevada Supreme Court may soon resolve this split, I *sua sponte* stay this case pending that answer and deny these dispositive motions. I also deny Lockmor Holdings, LLC’s countermotion for attorneys fees and costs on its merits.

Background

In the decade since Las Vegas’s real estate crash, lenders and investors have battled over the legal effect of an HOA’s nonjudicial foreclosure of a superpriority lien on a lender’s first trust deed. After the Nevada Supreme Court held in *SFR* that a properly conducted foreclosure sale extinguishes a first-trust-deed interest, the banks’ emphasis shifted to their constitutional challenge—they contend that the statute on its face violated their due process rights before it was

¹ *SFR Investments Pool 1, LLC v. U.S. Bank*, 334 P.3d 408, 419 (Nev. 2014).

² ECF Nos. 14, 15.

1 amended in 2015 because it did not require HOAs to give notice to first-trust-deed holders. The
2 Ninth Circuit panel in *Bourne Valley Court Trust v. Wells Fargo Bank* agreed.³ The lynchpin of
3 that holding is the panel’s interpretation of Chapter 116’s notice requirements: it found that the
4 statute’s scheme was an opt-in one that required notice of the foreclosure “only if the lender had
5 affirmatively requested notice,” expressly rejecting the notion that NRS Chapter 116
6 incorporated the notice rules from NRS 107.090 so foreclosing HOAs “were required to provide
7 notice to mortgage lenders even absent a request.”⁴

8 The Nevada Supreme Court expressly “declined to follow” *Bourne Valley* in *Saticoy Bay*
9 *v. Wells Fargo* and held that “the Due Process Clauses of the United States and Nevada
10 Constitutions are not implicated in an HOA’s nonjudicial foreclosure of a superpriority lien.”⁵
11 But the *Saticoy Bay* decision turned on the absence of state action, so the court did “not
12 determine whether NRS 116.3116 *et seq.* incorporates the notice requirements set forth in NRS
13 107.090.”⁶

14 The *Bourne Valley* purchaser petitioned for a writ of certiorari in the United States
15 Supreme Court to resolve the federal-state split, but cert was denied.⁷ So, this court is now
16 bound to follow *Bourne Valley* unless and until the Nevada Supreme Court indicates that the
17 panel’s interpretation of NRS 116.3116 was incorrect.⁸

18 That indication may be on its way. In accepting a certified question from Judge Boulware
19 from this district, the Nevada Supreme Court has agreed to address the issue it shelved in *Saticoy*

21 ³ *Bourne Valley Ct. Trust v. Wells Fargo Bank*, ___ F.3d ___, 2016 WL 4254983, at *5 (9th Cir.
22 Aug. 12, 2016).

23 ⁴ *Id.* at *1, 4.

24 ⁵ *Saticoy Bay v. Wells Fargo*, 388 P.3d 970, 974–75 & n.5 (2017).

25 ⁶ *Id.* at 974.

26 ⁷ *Bourne Valley Court Trust v. Wells Fargo Bank*, Case No. 16-1208 (cert. pet. denied 6/26/17).

27 ⁸ *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 885 n.7 (9th Cir. 2000) (quoting
28 *Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983)).

1 Bay:

2 Whether NRS § 116.31168(1)'s incorporation of NRS § 107.090
3 required a homeowner's association to provide notices of default
4 and/or sale to persons or entities holding a subordinate interest
5 even when such persons or entities did not request notice, prior to
6 the amendments that took effect on October 1, 2015?⁹

7 Briefing is underway and is scheduled to be completed later this month. And if the footnotes in
8 the Nevada Supreme Court's recent unpublished orders are any indication, the answer will likely
9 be yes.¹⁰ So, to save the parties from the need or inclination to invest resources further briefing
10 the effect of *Bourne Valley* before the Nevada Supreme Court answers this certified question, I
11 *sua sponte* stay this case pending the answer to the certified question and deny the pending
12 dispositive motions¹¹ without prejudice to their refile after the stay is lifted.

11 Discussion

12 A. The posture of this case justifies a *Landis* stay.

13 A district court has the inherent power to stay cases to control its docket and promote the
14 efficient use of judicial resources.¹² When determining whether a stay is appropriate pending the
15 resolution of another case—often called a “*Landis* stay”—the district court must weigh: (1) the
16 possible damage that may result from a stay, (2) any “hardship or inequity” that a party may
17 suffer if required to go forward, (3) “and the orderly course of justice measured in terms of the
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20 ⁹ Nev. S. Ct. Case No. 72931 (Order Accepting Certified Question, Directing Briefing and
21 Directing Submission of Filing Fee, filed June 13, 2017); *Bank of New York Mellon v. Star Hill
22 Homeowners Association*, 2:16-cv-2561-RFB-PAL, ECF No. 41.

23 ¹⁰ See, e.g., *PNC Bank v. Saticoy Bay LLC Series 5633 Desert Creek*, Case No. 70909, at n.1
24 (Nev. Oct. 13, 2017) (unpublished) (noting that the court observed in *SFR* that NRS 116.31168
25 “incorporated NRS 107.090 (2013), which required that notices be sent to a deed of trust
26 beneficiary” and citing to the *Bourne Valley* dissent); see also *Premier One Holdings, Inc. v.
27 Wells Fargo Bank*, Case No. 70638 (Nev. Jul. 11, 2017) (unpublished) (same).

28 ¹¹ ECF Nos. 14, 15.

¹² *Landis v. North American Co.*, 299 U.S. 248, 254–55 (1936); *Dependable Highway Exp., Inc.
v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007).

1 simplifying or complicating of issues, proof, and questions of law” that a stay will engender.¹³ I
2 find that a *Landis* stay is appropriate here.

3 **1. A stay will promote the orderly course of justice.**

4 At the center of this case is an HOA-foreclosure sale under NRS Chapter 116 and the
5 competing arguments that the foreclosure sale either extinguished the bank’s security interest or
6 had no legal effect because the statutory scheme violated the bank’s due-process rights. When a
7 federal right depends on the interpretation of state law as this due-process challenge does, the
8 federal courts must apply the interpretation of that law ascribed by the state’s highest court.¹⁴
9 And when “the state’s highest court has not adjudicated the issue, a federal court must make a
10 reasonable determination of the result the highest state court would reach if it were deciding the
11 case.”¹⁵ But that determination is just an educated guess of how the state’s highest court would
12 interpret its law.¹⁶ And a panel’s prediction binds lower courts only “in the absence of any
13 subsequent indication” from the state’s highest court that the panel’s “interpretation was
14 incorrect.”¹⁷

15 For *Bourne Valley*’s interpretation of NRS 116.3116, that “subsequent indication” may be
16 nigh. The Nevada Supreme Court’s acceptance of a certified question about its foundational

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18 ¹³ *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

19 ¹⁴ *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (“Neither this Court nor any other federal
20 tribunal has any authority to place a construction on a state statute different from the one
21 rendered by the highest court of the State”); *see also Knapp v. Cardwell*, 667 F.2d 1253, 1260
22 (9th Cir. 1982) (“Normally the construction of a state statute by the highest court of that state
23 must be treated as if it had been incorporated into the words of the statute” because “[s]tate
24 courts have the final authority to interpret and, where they see fit, to reinterpret that state’s
25 legislation”); *see also New York v. Ferber*, 458 U.S. 747, 767 (1982) (discussing the federal-state
26 allocation of power for the separate tasks of interpreting state laws and assessing their
27 constitutionality).

25 ¹⁵ *Aetna Cas. & Sur. Co. v. Sheft*, 989 F.2d 1105, 1108 (9th Cir. 1993).

26 ¹⁶ *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002).

27 ¹⁷ *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 885 n.7 (9th Cir. 2000) (quoting
28 *Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983)).

1 statutory interpretation leaves the continued viability of *Bourne Valley* uncertain. Because that
2 answer—which may be dispositive of the central issues in this case—is imminent, it makes
3 judicially economical sense to wait for it before making dispositive rulings in this case. Each
4 time the jurisprudence in this area of unique Nevada law evolves, the parties in the scores of
5 foreclosure-challenge actions pending in this courthouse file new motions or move to supplement
6 the ones that they already have pending, often resulting in docket-clogging entries and an
7 impossible-to-follow chain of briefs in which arguments are abandoned and replaced. Staying
8 this case pending the answer to the certified question will permit the parties to evaluate—and me
9 to consider—the viability of the claims under the most complete authority. This will simplify
10 and streamline the proceedings and promote the efficient use of the parties’ and the court’s
11 resources.

12 **2. Hardship and inequity**

13 All parties face the prospect of hardship if I resolve the claims or issues in this case
14 before the certified question is answered. A stay and denial of all pending motions will prevent
15 unnecessary briefing and the expenditures of time, attorney’s fees, and resources that could be
16 wasted in the event that *Bourne Valley*’s interpretation is deemed incorrect by the Nevada
17 Supreme Court.

18 **3. Damage from a stay**

19 The only potential damage that may result from a stay is that the parties will have to wait
20 longer for resolution of this case and any motions that they have filed or intend to file in the
21 future. But a delay would also result from any rebriefing or supplemental briefing that may be
22 necessitated once the Nevada Supreme Court answers the certified question. So it is not clear to
23 me that extending this stay pending the answer to that question will ultimately lengthen the life
24 of this case. I thus find that any possible damage that the extension of this stay may cause the
25 parties is minimal.

26 **4. The length of the stay is reasonable.**

27 I also note that a stay of this case pending the anticipated answer to the certified question
28 is expected to be reasonably short. Briefing is scheduled to be completed in just a couple of

1 weeks. Because the length of this stay is directly tied to the certified-question proceeding, it is
2 reasonably brief, and it is not indefinite.

3 **B. Lockmor has not shown that it is entitled to attorneys fees and costs.**

4 Finally, I take this opportunity to address Lockmor’s countermotion for attorney’s fees
5 and costs on its merits,¹⁸ primarily to discourage similar hair-trigger motions in this case’s future.

6 The court does not award attorneys fees and costs as a sanction lightly. And it takes far
7 more than a dispute over the applicability of a Ninth Circuit panel decision and an early motion
8 for summary judgment to justify them.¹⁹ Lockmor has cited zero authority for its three-sentence
9 “countermotion” for fees and costs. It has also ignored Local Rule 54-14, which requires a
10 motion for attorney’s fees to include an attorney affidavit containing a long list of items.²⁰ Local
11 Rule 54-14(d) expressly authorizes this court to summarily deny any motion for fees that lacks
12 that affidavit or those items. Accordingly, Lockmor’s motion is denied because it lacks both
13 merit and any of the information that the rules of this court require.

14 **Conclusion**

15 IT IS THEREFORE ORDERED that **THIS CASE IS STAYED for all purposes.**²¹
16 Once the Nevada Supreme Court has answered the certified question in *Bank of New York*
17 *Mellon v. Star Hill Homeowners Association*, 2:16-cv-2561-RFB-PAL/Nev. S. Ct. Case No.
18 72931, any party may move to lift this stay.

19 . . .

22 ¹⁸ I find this motion suitable for resolution without oral argument. L.R. 78-1.

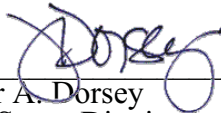
24 ¹⁹ To be considered “frivolous” under Ninth Circuit precedent, a filing must be both “baseless
25 and made without a reasonable and competent inquiry.” *Townsend v. Holman Consulting Corp.*,
929 F.2d 1358, 1362 (9th Cir. 1990).

26 ²⁰ L.R. 54-14.

27 ²¹ Except that this stay has no impact on any party’s obligation to timely serve process and file
28 proof of service.

1 IT IS FURTHER ORDERED that the pending dispositive motions [ECF Nos. 14, 15] are
2 **DENIED** without prejudice to their refiling once the stay is lifted, and Lockmor's counter-motion
3 for attorney's fees and costs [ECF No. 27] is **DENIED**.

4 DATED: November 14, 2017

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7 Jennifer A. Dorsey
8 United States District Judge
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