IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH BERBERICH, Appellant, v. BANK OF AMERICA, N.A.; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Respondents.	Supreme Court No. 76457 District Court No. A768728

APPEAL

From the Eighth Judicial District Court, Department XXVI
The Honorable Judge Gloria Sturman, District Judge

APPELLANT'S OPENING BRIEF

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ATTORNEY'S NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Kenneth Berberich-- Appellant

The Law Office of Mike Beede, PLLC – Attorney for Appellant

James Fox, Esq – Attorney for Appellant

Michael Beede, Esq. – Attorney for Appellant

The Law Office of Mike Beede, PLLC
/s/ Michael Beede, Esq.
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JURISDICTIONAL STATEMENT PURSUANT TO NRAP 28(a)(4)

This Court has jurisdiction over this matter pursuant to NRAP 3A(b)(1), as this matter is an appeal from a final judgment as to Appellant Kenneth Berberich (hereafter "Appellant" or "Berberich") and Respondents Bank of America, NA (hereafter "BANA," or "Bank of America,") and Mortgage Electronic Registrations Systems, Inc. (hereafter "MERS)(collectively referred to as "Respondents"). Appellant Berberich's Complaint was dismissed as to Respondents under NRCP 12(b)(5) through the "Order Granting Motion To Dismiss Complaint And Denying Countermotion for Summary Judgment" filed June 15, 2018 (APP0146-7) and the "Notice of Entry of Order Granting Motion To Dismiss Complaint And Denying Countermotion for Summary Judgment" (APP0149-54) filed on June 19, 2018. Default Judgment was entered as to Connie Fernandez on September 11, 2018 and notice of entry thereof was filed on September 12, 2018. Appellant's appeal is timely because it complies with NRAP 4(a)(1).

ROUTING STATEMENT PURSUANT TO NRAP 28(a)(5)

NRAP 28(a)(5) requires all Appellants' briefs to contain a routing statement "setting forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and citing the subparagraph(s) of the Rule under which the matter falls." NRAP 17(a) specifies that the Supreme Court

"shall hear and decide … proceedings invoking the original jurisdiction of the Supreme Court" except for those presumptively assigned to the Court of Appeals. NRAP 17(a).

In the present case, Appellant contends that the Supreme Court retains jurisdiction because the issues on appeal concern a grant of summary judgment regarding interpretation of NRS 116, and these property law and foreclosure issues do not fall within the categories where the Court of Appeals has presumptive jurisdiction. Therefore, for the foregoing reasons, this Appellant's Opening Brief should be assigned to the Nevada Supreme Court.

STATEMENT OF THE ISSUES PRESENTED

1. Whether an owner in possession of real property is ever time-barred from seeking quiet title under NRS 11.070 or NRS 11.080.
2. Whether the grantee of a deed of trust against real property is time-barred from defending against a quiet title action 5 years after the grantor of the deed of trust has been dispossessed of the property under NRS 11.070 or NRS 11.080.
3. Whether the statute of limitations alluded to in *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388 P.3d 226, 232 (Nev. 2017) is non-controlling dicta.

STATEMENT OF THE CASE

This appeal arises out of an declaratory relief action in Clark County, Nevada, and specifically, involves the question of whether a landowner who has never been dispossessed of real property in Nevada is ever time-barred from asserting the sale of the subject property, 8735 Mount Mira Loma Ave (hereafter, the "Property"), at an NRS 116 HOA foreclosure sale to Plaintiff/Appellant Berberich's, extinguished Defendant/Respondent Ditech's first deed of trust (hereafter, "Deed of Trust").

On January 31, 2018, Berberich filed his Complaint for Quiet Title, seeking to have the District Court declare that Berberich bought the property free and clear of all other liens and encumbrances. Appellant named Bank of America, NA, Mortgage Electronic Registration Systems, Inc.; and the Previous Owner, Connie Fernandez as Defendants in its Complaint. On April 16, 2018 BANA and MERS filed their Motion to Dismiss. Berberich filed his Opposition to Bank of America and Mortgage Electronic Registration Systems, Inc.'s Motion to Dismiss and Countermotion for Summary Judgment on May 3, 2018. Following additional briefing, the competing motions came on for hearing on May 22, 2018. On that date The Honorable Judge Gloria Sturman held a hearing and granted Respondents' Motion to Dismiss, and denied Appellant's countermotion for summary judgment.

STATEMENT OF FACTS

On August 11, 2011, Appellant purchased the property located at 8735 Mount Mira Loma Avenue, Las Vegas, Nevada. (APP0055) Appellant acquired this property at an HOA foreclosure sale conducted pursuant to NRS 116.3116. *Id.* All notices were appropriately recorded and mailed in accordance with the procedures set out in NRS 116.3116 for the foreclosure of a Homeowners Association Lien. Appellant remains in possession of the Property to date. Respondents allege that they hold an interest in the property by virtue of a Deed of Trust which they contend encumbers the property. The grantor of the deed of trust, Connie Fernandez, was dispossessed from the Property by Appellant's purchase on August 11, 2011.

Plaintiff purchased the Property at a public foreclosure auction on August 11, 2011, conducted by Allied Trustee Services. *Motion to Dismiss* (APP0030-APP0058) This Deed dispossessed Connie Fernandez (the "Previous Owner") of the Property. *Id*. The deed contained the following recitals:

> This conveyance is made pursuant to the powers granted to VIA VALENCIA / VIA VENTURA HOMEOWNERS ASSOCIATION and conferred upon appointed trustee by the provisions of the Declaration of Covenants, Conditions and Restrictions recorded 08-04-2005 as Intrument No. 0004194 Book 20050804 Page County of CLARK and pursuant to N.R.S. 117.070 et. Seq. or N.R.S. 116.3115 et. Seq. and N.R.S. 116.3116 through N.R.S. 116.31168 et. Seq. and that certain Notice of Delinquent Assessment dated 09-30-2010 and

> recorded 10-06-2010 in Book 20101006 Page as Instrument No. 0002672 of Official Records of CLARK County, Nevada.
>
> The Name of the owner(s) of the property (trustor) was CONNIE FERNANDEZ.
> Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the Reorder of said County. After expiration of ninety (90) days from the recording or mailing of copies of the Notice of Default and Election to Sell, a Notice of Trustee's Sale was recorded in the Office of the Recorder of Said County and the association claimant, VIA VALENCIA / VIA VENTURA HOMEOWNERS ASSOCIATION, demanded that such sale be made.
>
> All requirements of law regarding the recording and the mailing of copies of the Notice of Delinquent Assessment, Notice of Default, and the recording, mailing, posting and publication of copies of the Notice of Trustee's Sale have been complied with.
>
> Said property was sold by said Trustee at public auction on 08-11-2011 at the place named in the Notice of Trustee's Sale, in the County of CLARK, Nevada, in which the property is situated. Grantee, being the highest bidder at such sale became the purchaser of said property and paid therefore to said trustee the amount bid, being $4,101.00, in lawful money of the United States, or by satisfaction, pro tanto of the obligations then secured by said Notice of Delinquent Assessment. *Id* (Emphasis in Original).

The Previous Owner granted a deed of trust in favor of Bank of America, naming MERS as beneficiary, which was recorded as an encumbrance to the Property on June 9, 2009, as instrument and book number 20090609-0004584. *Id* at APP0036-APP0050. On November 15, 2011, an assignment of the aforementioned Deed of Trust was recorded which purported to transfer the

beneficial interest thereof to Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP. *Id* at APP0052-APP053. A Notice of Delinquent Assessment Lien claimed by the HOA, VIA VALENCIA / VIA VENTURA HOMEOWNERS ASSOCIATION, which complies with NRS 116.31162, was recorded on October 6, 2010. (APP0092)

The Notice of Default and Election to Sell was recorded on November 9, 2010 and was mailed pursuant to NRS Chapter 116 to all parties entitled to receive notice. (APP0094-APP0095) A Notice of Trustee Sale was recorded on March 21, 2011 and was mailed to all required parties. (APP0097-APP0098).

Defendants claim an interest in the property by virtue of a Deed of Trust granted by Connie Fernandez on June 4, 2009. APP0055. More than five years have passed since Connie Fernandez was dispossessed from the property. *Id* at APP0055.

STANDARD OF REVIEW

A. MOTIONS TO DISMISS REVIEWED DE NOVO

The standard of review for a dismissal under NRCP 12 (b)(5) is rigorous as this court must construe the pleading liberally and draw every fair inference in favor of the nonmoving party. *Vacation Village v. Hitachi America,* 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). All factual allegations of the complaint must be accepted

as true. *Id*. A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Id*.

A motion to dismiss for failure to state a claim should not be granted, unless it appears beyond a doubt that plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim. *See Buzz Stew, LLC*, 124 Nev. at 228, 181 P.3d at 672; *Stockmeier v. Nevada Dep't of Corr*., 124 Nev. 313, 316, 183 P.3d 133, 135 (2008); *Pankopf v. Peterson*, 124 Nev. 43, 175 P.3d 910, 912 (2008). In *Buzz Stew*, the Nevada Supreme Court clearly stated that the appropriate standard for a motion to dismiss based on a failure to state a claim is "beyond a doubt" and not "beyond a reasonable doubt." 124 Nev. at 228 n.6, 181 P.3d at 672 n.6. All cases using the "beyond a reasonable doubt" standard were expressly overruled.

When ruling on a NRCP 12(b)(5) motion, a court must accept the allegations of the complaint as true, and draw all inferences in favor of the non-moving party. *See Buzz Stew*. at 228, 181 P.3d at 672; *Seput v. Lacayo*, 122 Nev. 499, 501, 134 P.3d 733, 734 (2006) (abrogated on other grounds) *Stockmeier*, 124 Nev. at 316, 183 P.3d at 135; *Snyder v. Viani*, 110 Nev. 1339, 885 P.2d 610 (1994); *Haertel v. Sonshine Carpet Co*., 102 Nev. 614, 730 P.2d 428 (1986). " 'Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief.' "

Stockmeier, 124 Nev. at 316, 183 P.3d at 135 (*quoting Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002)); *see Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) ("this court accepts the plaintiffs' factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claim asserted").

B. MOTIONS FOR SUMMARY JUDGMENT REVIEWED DE NOVO

"This [C]ourt reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (Nev. 2005). Summary judgment is only appropriate where "the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury." *Caughlin Ranch Homeowners Ass'n v. Caughlin Club,* 109 Nev. 264, 266, 849 P.2d 310, 311 (1993) (quoting *Short v. Hotel Riviera, Inc.*, 79 Nev. 94, 103, 378 P.2d 979, 984 (1963)).

When reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from the evidence, must be viewed in a light most favorable to the non-moving party. *See Allstate*, 125 Nev. at 137, 206 P.3d at 575; Waldman v. Maini, 124 Nev. 1121, 1136, 195 P.3d 850, 860 (2008); The burden on the nonmoving party to "set forth specific facts [by affidavit or otherwise]

demonstrating the existence of a genuine issue for trial" only applies if the moving party has properly supported its motion for summary judgment as required by NRCP 56. *Wood*, 121 Nev. at 731-32, 121 P.3d at 1031 (internal quotation marks omitted); *see also* Maine v. Stewart, 109 Nev. 721, 727, 857 P.2d 755, 759 (1993).

C. ISSUES OF STATUTORY CONSTRUCTION ARE REVIEWED DE NOVO

"[I]ssues of statutory construction are questions of law reviewed de novo." *Simmons v. Briones*, 133 Nev., Adv. Op. 9, 133 Nev. 9, 390 P.3d 641, 643 (2017). When the language of a statute is unambiguous, this court will give that language its plain and ordinary meaning and not go beyond it. *Id.* at 644. "A statute's express definition of a term controls the construction of that term no matter where the term appears in the statute." *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 682, 627, 310 P.3d 560, 566 (2013)(quoting *Williams v. Clark County DA*, 118 Nev. 473, 485, 50 P.3d 536, 544 (2002)). *Delucchi v. Songer*, 396 P.3d 826, 831 (Nev. 2017)

SUMMARY OF THE ARGUMENT

By applying the dicta set forth in *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 388 P.3d 226, 232 (Nev. 2017), the district court adopted an unworkable standard for property owners and quiet title. When a landowner remains in possession of the property at issue, the statutes of limitations

embodied in NRS 11.070 and NRS 11.080 cannot run against her. As a result, it is BANA's interest which should have been extinguished by operation of law in this case, and Appellant was entitled to summary judgment.

ARGUMENT

I. NRS 11.080 and NRS 11.070 Do Not Bar A Landowner In Possession From Seeking Declaratory Relief

The interpretation and construction of NRS 11.070-80 is the central issue of this appeal. Specifically, Appellant asks this Court to decide whether NRS 11.070 and NRS 11.080 act as a time-bar to a property owner in possession of real property from seeking declaratory relief for quiet title. Appellant respectfully urges this Court to reaffirm the plain language meaning of the statutes, which makes clear that NRS 11.070 and NRS 11.080 (hereinafter collectively referred to as "The Statutes") only govern the claims of a litigant who has been "seized or possessed of the premises in question within 5 years…" before initiation of the action. As put by this Court in 1867, this the statute "imposes a general inability to sue or defend upon any right claimed in real estate, unless the party suing or defending shall have been in possession of the real estate within five years last past." *Chollar-Potosi Mining Co. v. Kennedy & Keating*, 3 Nev. 365, 369 (1867)

A. **"Seized or Possessed" Means Fee Simple Ownership or Physical Possession**

Put simply, any person who has been "seized or possessed" of the property in the five years preceding the initiation of the action is not time-barred from asserting its claims under NRS 11.070-80. As such, so long as plaintiff retains a fee-simple interest or physical control of real property, NRS 11.070 and 11.080 have no preclusive effect on his or her ability to bring suit to quiet title.

> **NRS 11.070 No cause of action effectual unless party or predecessor seized or possessed within 5 years.** No cause of action or defense to an action, founded upon the title to real property, or to rents or to services out of the same, shall be effectual, unless it appears that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within 5 years before the committing of the act in respect to which said action is prosecuted or defense made. (emphasis added)

> **NRS 11.080 Seisin within 5 years; when necessary in action for real property.** No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof. (emphasis added)

While there is no doubt that The Statutes are both designed to create a statute of limitations for the institution or maintenance of an action, claim, or defense, the key question presented here is against whom The Statutes are aimed. Whereas NRS

11.070 contemplates actions related to the title of real property, NRS 11.080 contemplates actions for the recovery of real property. While the subject matter of each of The Statutes is similar, they are not identical. The common threads between the Statutes is the phrase "was seized or possessed of the premises in question within 5 years before…"

The Statutes[1] have been in effect in Nevada in substantially the same form since before Nevada was awarded statehood in 1864.[2] As such, the language therein should be construed as it was understood at the time of authorship. The phrase "seized and possessed" was interpreted by this Court in 1894:

> Section 3664 reads: 'No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within five years before the commencement thereof.'…
> We are not to suppose that any of these terms were needlessly used, or used without meaning; and, if not, the word "seized" means something different from simple possession .... If so, it must mean, as it would naturally import, an ownership in fee, for this is the only other kind of ownership known to the law.

South End Mining Co. v. Tinney, 22 Nev. 19, 35-36, 35 P. 89, 92 (1894)

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[1] Then Codified as Section Gen. Stats., sec. 3632 and 3664
[2] See generally *South End Mining Co. v. Tinney*, 22 Nev. 19, 34, 35 P. 89, 92 (1894)

As is clear from *South End Mining, "*seized" means "ownership in fee" whereas to be "possessed of the premises" means to be in actual, physical possession or control. When employing the definition of these terms as previously adopted by this court more than 120 years ago, NRS 11.070 and NRS 11.080 can be easily interpreted:

> **NRS 11.070 No cause of action effectual unless party or predecessor seized or possessed within 5 years.** No cause of action or defense to an action, founded upon the title to real property, or to rents or to services out of the same, shall be effectual, unless it appears that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, [had a fee simple interest] or [was in possession] of the premises in question within 5 years before the committing of the act in respect to which said action is prosecuted or defense made.
>
> **NRS 11.080 Seisin within 5 years; when necessary in action for real property.** No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor [had a fee simple interest] or [was in possession] of the premises in question, within 5 years before the commencement thereof.

Thus, the meaning of NRS 11.070 is that unless a person[3] who has had fee simple ownership or physical possession of real property within the preceding five

[3] (Or the ancestor, predecessor, or grantor of such person)

years shall, that person shall not be permitted to bring or defend against an action founded upon title to real property. Similarly, the meaning of NRS 11.080 is that unless a person[4] who has had fee simple ownership or physical possession of real property within the preceding five years, her or she shall not be permitted to bring an action for the possession or recovery of real property.

Neither statute contemplates an absolute time-bar to declaratory relief actions related to real property. To the contrary, so long as a person retains fee-simple ownership of property or is in physical possession thereof, his statute or limitations does not begin to run.

B. Appellant Has Never Been Dispossessed of the Property and Therefore NRS 11.070-080 Do Not Preclude His Claims

Appellant Berberich's claims were dismissed as a result of an NRCP 12(b)(5) motion brought by Respondents, Bank of America, NA and Mortgage Registration Systems, Inc. under the theory that he was time-barred by NRS 11.080. (APP0146-7) However, because it is undisputed that Berberich retains exclusive possession and fee-title to the property, no statute of limitations has ever begun to run against him. Thus, through this Court's de novo review of Respondents' Motion to Dismiss

[4] (Or the ancestor, predecessor, or grantor of such person)

it can and should find that Berberich's claims were not time-barred by NRS 11.080 and that the order granting Respondent's motion to dismiss should be reversed.

C. Respondent's Grantor Under Its Deed of Trust Was Dispossessed More Than Five Years Prior to the Complaint, Time-Barring and Defense by Respondents

BANA and MERS have never been in possession, and as such NRS 11.080's statute of limitations began running against any affirmative claims by BANA or MERS in this litigation when their grantor, Connie Fernandez, was dispossessed on August 11, 2011 by the HOA's foreclosure sale. Pursuant to the express terms of NRS 11.080, Respondents are time-barred from maintaining a claim to recover possession of the property. NRS 11.070 further restricts Defendants from maintaining any defenses to Appellant's right to clear title, providing in relevant part:

The Nevada Supreme Court interpreting the identical predecessor to NRS 11.070 stated that the statute, "imposes a general inability to sue or defend upon any right claimed in real estate, unless the party suing or defending shall have been in possession of the real estate within five years last past." *Chollar-Potosi Mining Co. v. Kennedy & Keating*, 3 Nev. 365, 369 (1867). Here, Respondents' property interest was never possessory, the Deed of Trust only created a non-possessory

security interest in the Property. *See*, NRS 107.020. Defendants' grantor however enjoyed the possessory rights to the property until the foreclosure sale through which Plaintiff became owner of record. This foreclosure sale undisputedly occurred on August 11, 2011. Plaintiff has remained in continuous possession since the sale. As such Defendants could validly bring an action to recover the Property or defend against Plaintiff's interest until August 11, 2016 at the latest. Defendants are barred by NRS 11.070-80 from maintaining any defense to Berberich's claims.

Under the summary judgment standard, this Court need only consider a very narrow set of facts and legal issues. The only legal issues for this Court to reach are whether The Statutes describe the applicable statute of limitations, and whether that statute of limitations bars the Defendants from defending against Plaintiff's claims. The clear controlling case law referenced herein makes clear that both questions should be answered in the affirmative. The only factual issue that the Court need consider is whether the grantor of the Defendant's deed of trust has been in possession of the property in the last five years. The undisputed facts demonstrate that he has not. As such, there are no material issues of fact and Plaintiff is entitled to judgment as a matter of law. Therefore, this Court should award summary judgment to Berberich on its de novo review of his Countermotion.

Plaintiff has presented a prima facia case of good title in himself. Following such a showing it becomes the burden of Defendants BANA and MERS to defend against Plaintiff's claims. NRS 11.070 as interpreted in the *Chollar-Potosi Mining Co.* decision bars any defense by Defendants.

To preserve or recover their purported interest in the property BANA and MERS were required to take affirmative action within the five years after their grantor was dispossessed. See: NRS 11.070 and NRS 11.080. Due to their unequivocal failure to act within the statute of limitations, they are now barred from asserting their interest or mounting a defense to Plaintiff's claims.

D. **Alternatively, NRS 11.220's Four-Year Statute of Limitations Applies, Barring Respondent's Claims and Defenses.**

Since the holding by the District Court in this matter, Plaintiff has become aware of an alternative interpretation of the statute of limitations applicable to Bank of American and MERS which has been employed by certain judicial officers within the US District Court of Nevada. Plaintiff contends that this approach may be equally applicable in barring Respondents' claims and defenses:

> Nevada Revised Statutes § 11.070 provides the limitation period for quiet title actions…
> This statute does not apply to Bank of America's claims because Bank of America holds only a lien interest, it has no claim to title to the property, and it seeks only to validate its lien rights. Bank of America's

> claim thus is not "founded upon the title to real property," nor was Bank of America "seized or possessed of the premises."
>
> Section 11.190(3)(a) also does not apply. That section provides a three-year period for "[a]n action upon a liability created by statute, other than a penalty or forfeiture." Bank of America's claim is not an action upon liability created by statute. Instead, Bank of America seeks a declaration under § 40.010 that its lien was not extinguished by the HOA foreclosure sale. Section 40.010 does not create liability, and a party cannot impose liability upon another through that statute. Rather, the statute allows for a proceeding to determine adverse claims to property. And Bank of America does not seek to impose liability in its quiet title/declaratory relief claim. Its question is whether its lien still encumbers the property, not who is personally liable for the underlying debt.
>
> Consequently, I conclude that the catchall four-year limitation period in § 11.220 applies. The foreclosure sale took place on September 5, 2012, and the trustee's deed upon sale was recorded on February 14, 2013. The complaint was filed more than four years later, on July 6, 2017. Bank of America's quiet title/declaratory relief claim is therefore untimely.

Bank of Am., N.A. v. Country Garden Owners Ass'n, No. 2:17-cv-01850-APG-CWH, 2018 U.S. Dist. LEXIS 42446, at *4-6 (D. Nev. Mar. 14, 2018). As announced by the District of Nevada Court, the four-year statute of limitations can apply and bar the claims and defenses raised by BANA and MERS.

II. The Statute of Limitations Alluded to in *Gray Eagle* is Non-Controlling Dicta and Is Inconsistent With Prior Nevada Supreme Court Precedent

In *Gray Eagle* the Nevada Supreme Court wrote the following in dicta[5]:

> The district court erred in concluding that Saticoy could not refile a subsequent action following dismissal. Such action would be a complaint for quiet title to have its rights determined on the merits and would be governed by NRS 11.080. NRS 11.080 provides for a five-year statute of limitations for a quiet title action beginning from the time the "plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question." Saticoy did not acquire its interest in the Property until it purchased Lots 21 and 26 at the HOA foreclosure sale held in 2013. Therefore, the statute of limitations for a quiet title action under NRS 11.080 will not run until July 2018.

Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A., 388 P.3d 226, 232 (Nev. 2017). Appellant respectfully contends that 1) This Court's interpretation of NRS 11.080 in *Gray Eagle* is non-controlling dicta and 2) that the interpretation of NRS 11.080 is inconsistent with the plain-language meaning of NRS 11.080 and this Court's prior holdings.

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[5] *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009) ("Dicta is not controlling." *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 282, 21 P.3d 16, 22 (2001). A statement in a case is dictum when it is "unnecessary to a determination of the questions involved." *See St. James Village, Inc. v. Cunningham*, 125 Nev. , , 210 P.3d 190, 193 (2009) (quoting *Stanley v. Levy & Zentner Co.*, 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941))").

A. The Interpretation of NRS 11.080 in *Gray Eagle* is Dicta and Contradicts *Kerr v. Church, Bissell v. College,* and *Chollar-Potosi Mining Co. v. Kennedy & Keating*

"Dicta is not controlling." *Kaldi v. Farmers Ins. Exch.,* 117 Nev. 273, 282, 21 P.3d 16, 22 (2001). A statement in a case is dictum when it is "unnecessary to a determination of the questions involved." *See St. James Village, Inc. v. Cunningham,* 125 Nev., 210 P.3d 190, 193 (2009) (quoting *Stanley v. Levy & Zentner Co.,* 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941))").

The question presented to this Court in *Gray Eagle* was whether NRS 116.3116(6) created a 3-year time-bar for actions to quiet title following an HOA foreclosure. The proper application of NRS 11.080's statute of limitations was not directly at issue[6], and any analysis thereof was unnecessary to resolve the issue there-presented to this Court. This Court correctly concluded that NRS 116.3116(6) does not create any such time-bar. *Id* at 232

While it was arguably necessary to clarify that the statute of limitations for the causes of action brought in *Gray Eagle* had not yet run, it was *unnecessary* to

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[6] *Id* at 231-232

declare that the statute of limitations expired five years from the date of appellant's acquisition of the property.[7] This conclusion, is therefore, non-controlling dicta.[8]

Appellant respectfully contends that this Court's interpretation is contrary to the plain language of NRS 11.080, which states:

> No action for the recovery of real property . . . shall be maintained, unless it appears that **the plaintiff or the plaintiff's ancestor, predecessor, or grantor was seized or possessed of the premises in question**, within 5 years before the commencement thereof.

In applying the five-year statute of limitations under NRS 11.080 the triggering event is the loss of seizin or possession of the property. When interpreting a statute, the statute's language should be given its plain meaning. *Nevada State Democratic Party v. Nevada Republican Party*, 256 P.3d 1, 4 (Nev. 2011). The statutory bar in NRS 11.080 is expressly applicable to quiet title actions. *Kerr v. Church*, 74 Nev. 264, 272, 329 P.2d 277, 281 (1958). In assessing the application of

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[7] Appellant recognizes that Saticoy Bay, the Appellant in *Gray Eagle* advocated for a five-year statute of limitation from the date of acquisition as an alternative to the three-year statute of limitations urged by the respondent in that matter. Nonetheless, it was ultimately unnecessary for the Gray Eagle court to interpret NRS 11.080 to reach to the conclusion that NRS 116.3116(6) did not act as a time-bar to a declaratory relief action. That Saticoy Bay did not advance the correct standard in *Gray Eagle* should not merit a reversal of long-controlling precedent as set forth below.

[8] *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 282, 21 P.3d 16, 22 (2001)

a statute of limitations the critical question which must be addressed by the court is when the "triggering event" occurred. *See, Stalk v. Mushkin,* 125 Nev. 21, 27 (2009) (applying the three-year statute of limitations for intentional interference with a prospective business advantage based upon the "triggering event" of contract termination).

In *Bissell v. Coll. Dev. Co.,* 86 Nev. 404, 405, 469 P.2d 705, 706 (1970) this Court demonstrated that the five-year statute of limitations for an action quieting title does not time-bar a party in possession of property from bringing an action. In *Bissell,* The Appellants took possession of the property at issue in 1961 and did not bring suit to quiet title until 1967. The *Bissell* Court ultimately found that the Respondents were time-barred from defending against a claim to quiet title, but took no issue with the Appellants right to seek quiet title, despite having taken possession of the property more than five years prior.[9]

[9] "It is respondents' position that appellants are barred from asserting a claim to the property by the 5-year statute. We agree." *Bissell v. Coll. Dev. Co.*, 86 Nev. 404, 407, 469 P.2d 705, 707 (1970)

This Court concluded in Kerr v. Church[10] that the triggering event under NRS 11.080 is loss of seizin or dispossession of the Property as it relates to the Plaintiff or the Plaintiff's grantor:

> Appellants further contend that plaintiff's action is barred by the statute of limitations. NRS 11.080 provides: "No action for the recovery of real property, or for the recovery of possession thereof . . . shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof." The deed in question was executed by respondent April 27, 1946. His action to set aside the conveyance was commenced May 5, 1955 -- beyond the period of limitations **if** the statute is applicable… It additionally appears here that the present action was neither for the recovery of the property or the recovery of the possession thereof, as respondent, under the very terms of the 1946 deed, retained joint possession and was in such possession up to the very time when he commenced his action to set such deed aside. We, accordingly, find no error in the action of the court denying the two motions to dismiss based upon this ground.

Kerr v. Church, 74 Nev. 264, 272-73, 329 P.2d 277, 281 (1958)(emphasis added).

Ultimately, the *Kerr* Court concluded that NRS 11.080 did not apply because the Plaintiff was in possession of the property at the time he filed his complaint. This conclusion supports the plain language meaning of the statute. Appellant

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[10] 74 Nev. 264, 273, 329 P.2d 277, 281 (1958)

respectfully contends that this Court did not intend to overturn *Kerr* through *Gray Eagle* where the triggering event described in NRS 11.080 was not directly at issue. "[U]nder the doctrine of stare decisis, [this court] will not overturn [precedent] absent compelling reasons for so doing. Mere disagreement does not suffice." *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011) (quoting *Secretary of State v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008)) "Those compelling reasons must be 'weighty and conclusive.'" *Id.* *Gray Eagle* did not provide any rationale for contradictory treatment of NRS 11.080, let alone any that was "weighty and conclusive."

B. The Reasons to Uphold the Standard Set Forth in *Kerr v. Church, Bissell v. College,* and *Chollar-Potosi Mining Co. v. Kennedy & Keating* are Weighty and Significant

The reasons for upholding this Court's prior interpretation of NRS 11.080 are weighty and significant:

1) Plain language meaning of the statute.

The Plain language of The Statutes make clear that the statutes of limitations for the action contemplated therein only run once a person has lost their fee simple interest or has been dispossessed of the property. To revise the meaning of this statute without any legislative amendment be a fundamental abridgment of the

legislature's power. "It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act. Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)(internal citations omitted)

2) Marketability of Title

The *Gray Eagle* interpretation prevents the marketability of real estate and leaves parties with conflicting claims with no mechanism for resolution. If the Court were to reaffirm the dicta described in the foregoing pages, it would leave conflicting property claimants with no mechanism for resolution and would ultimately leave real property permanently disputed. Neither the title-holder nor the adverse claimant could ever receive a declaration as to their respective rights, meaning that neither could ever realistically sell, foreclose, finance, or otherwise make full use of the property. This was not the intent of the legislature. The intent of the legislature appears to be to prevent a party from abandoning and ignoring property for five or more years and then subsequently asserting a claim.

3) Adopting *Gray Eagle* Dicta Would Lead to Absurd Results

To overturn this Court's holding in *Kerr* in favor of the dicta contained in *Gray Eagle* is likely to lead to absurd results. "When interpreting a statute, this court

must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory. Further, it is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes" and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005)(internal citations omitted)

Under the *Gray Eagle* dicta, a property-owner in possession of real property could only quiet title for the first five years he owns property, regardless of when an adverse claim is asserted. Appellant therefore presents the following illustrative hypothetical: Owner purchases Greenacre and records his deed against the property with the Clark County Recorder. The County Recorder's records indicate no recorded encumbrances. Seven years following Owner's purchase and recordation, during which time Owner has enjoyed uninterrupted possession, an Adverse Claimant fraudulently asserts that he is the true owner of the property and records a Deed. Because Owner acquired title more than five years earlier, he would be barred (under the *Gray Eagle* dicta interpretation) from seeking declaratory relief for quiet title and would have no remedy.

4) Adopting *Gray Eagle* Dicta Would Effectively Require a Judicial Action to Follow All Non-Judicial Foreclosure Sales

Under the *Gray Eagle* dicta, all non-judicial foreclosures would need to be ratified within five years to be truly effective. A purchaser at sale who relies on the efficacy of the statutory priority scheme would be placed at great peril of having his title harmed if he did not affirmatively bring claims against all *potential* claimants, known or unknown, within five years. Despite this Court's recent decisions establishing that a foreclosed HOA lien is generally comprised of assessments[11] and that "the burden falls on the party challenging the foreclosure sale to demonstrate sufficient facts to justify setting it aside,"[12] a purchaser would essentially bear the affirmative duty to quiet title. Even those persons or entities who acknowledge the extinguishment of their interest in property would be needlessly dragged into litigation so that a purchaser would not find himself unable to defeat a later-asserted challenge to his title.

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[11] *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014)
[12] *HSBC Bank, USA, N.A. v. SFR Invs. Pool 1, Ltd. Liab. Co.*, 408 P.3d 547 (Nev. 2017)

III. Berberich Has Met His Burden to Demonstrate That He Is Entitled to Summary Judgment

By its clear terms, NRS 116.3116 (2) provides that the super-priority lien for assessments which have come due in the 9 months prior to the initiation of an action to enforce the lien are "prior to all security interests described in paragraph (b)." The deed of trust held by Defendant falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this "priority" in any way. In *SFR*, this Court held that the foreclosure of the HOA lien extinguishes first deeds of trust. Here, the underlying foreclosure was conducted properly and in accordance with all relevant provisions of NRS 116.

A. The documents recorded in relation to the Property demonstrate compliance with all relevant portions of NRS 116.

Pursuant to NRS 116.31162, a Notice of Delinquent Assessment Lien (NODAL) must be mailed to the unit/property's owner or his/her successor in interest. This notice must also contain a description of the unit/property against which the lien is imposed and the name of the record owner of the unit/property. A copy of the NODAL which complies with NRS 116.31162, recorded on October 6, 2010 was attached to Appellant's Motion. APP0092.

Pursuant to NRS 116.31163, after recording the Notice of Default and Election to Sell, the HOA is required to mail a copy of the Notice of Default and

Election to Sell to any person which falls into any of the three categories described therein. The Notice of Default recorded on November 9, 2010 was attached to Appellant's Motion. APP0094-95.

After the 90-day period has expired, but before selling the unit/property, the HOA must also give notice of the time and place of the sale. Once the NRS 116.31163 requirements are met, if the lien has not been paid off within 90 days, the HOA may continue with the foreclosure process. *See* Nev. Rev. Stat. § 116.31162(1)(c). As a prerequisite to sale, the HOA must mail a Notice of Sale to all parties with a recorded interest. Additionally, the association must mail the notice of the sale to: each person entitled to receive a copy of the notice of default and election to sell under NRS 116.31163, any holder of a recorded security interest or the purchaser of the unit/property, and the Ombudsman. The Notice of Sale recorded March 21, 2011 was attached to Appellant's Motion. APP0097-98.

As the Foreclosure Deed shows, Plaintiff purchased the Property at a public foreclosure auction on August 11, 2011, conducted by Allied Trustee Services. APP0055-58. A Foreclosure Deed was granted in favor of Plaintiff on August 22, 2011. *Id*.

NRS 116.3116 grants HOA liens priority over a first deed of trust for at least the "assessments for common expenses based on the periodic budget adopted by

the association pursuant to NRS 116.3116 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien."

B. This Quiet Title Action May Be Summarily Adjudicated Based On The Pre-Sale Notices

This Court has confirmed that presentation of the presale notices and a foreclosure deed may be sufficient to establish a prima facie case that an HOA lien foreclosure sale extinguished a first deed of trust. "[W]e conclude that the language in the pre-sale notices constituted prima facie evidence that the HOA was foreclosing on a lien comprised of monthly assessments. *See* [*Cuzze v. Univ. & Cmty. Coll. Sys. of Nev*., 123 Nev. 598, 602, 172 P.3d 131, 134 (2007)]; cf. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014) (observing that an HOA's lien will generally be comprised of monthly assessments). Thus, even without the recitals in respondent's deed, respondent produced evidence sufficient to entitle it to summary judgment in the absence of contrary evidence." *PNC Bank, N.A. v. Saticoy Bay LLC Series 9320 Mt. Cash Ave. UT 103*, No. 69595, 2017 Nev. Unpub. LEXIS 395, at *3-4 (May 25, 2017)

Here, Berberich produced all of the presale notices. As discussed in detail above, the applicable statute of limitations prohibits Respondents from maintaining a defense against Plaintiff's claim for Quiet Title.

"The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. If such a showing is made, then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact." *Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) As discussed above, Plaintiff's presentation of the pre-sale notices and deed are sufficient to establish a prima facie case. Meanwhile Defendant has not established a genuine issue of fact as to inquiry in this case. An issue/dispute is not "genuine" if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational fact finder, applying the applicable quantum of proof, to find for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1435–36 (9th Cir. 1995). Because the Defendant is barred from presenting any contrary evidence to either support its arguments or to refute Plaintiff's arguments, this Court can and should grant summary judgment in favor of Plaintiff, because Defendant has not established any material issue of fact. "The supreme court has often stated that the nonmoving party may not defeat a motion for summary judgment by relying on the gossamer threads of whimsy, speculation and conjecture. As the Nevada Supreme Court has made abundantly clear, when a motion for summary judgment is made

and supported as required by Nev. R. Civ. P. 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Wood v. Safeway, Inc.*, 121 Nev. 724, 727, 121 P.3d 1026, 1028 (2005).

C. The Recitals in the Foreclosure Deed are further "conclusive proof" that the HOA complied with the notice requirements of NRS Chapter 116.

This Court may also look to the deed recitals in this case for further evidence that all parties received the required notice under NRS 116. Such recitals are afforded a conclusive presumption demonstrating compliance with relevant notice requirements, unless affirmative evidence is provided which specifically demonstrates a defect in the notice. The recitals in the Foreclosure Deed in this case corroborate both the default by the Previous Owners, and the HOA's compliance with each of the notice requirements of NRS 116.31162 through 116.31168 for the public auction held on August 11, 2011. In particular, the Foreclosure Deed includes the following recitals:

> This conveyance is made pursuant to the powers granted to VIA VALENCIA / VIA VENTURA HOMEOWNERS ASSOCIATION and conferred upon appointed trustee by the provisions of the Declaration of Covenants, Conditions and Restrictions recorded 08-04-2005 as Intrument No. 0004194 Book 20050804 Page County of CLARK and pursuant to N.R.S. 117.070 et. Seq. or N.R.S. 116.3115 et. Seq. and N.R.S. 116.3116 through N.R.S. 116.31168 et. Seq. and

> that certain Notice of Delinquent Assessment dated 09-30-2010 and recorded 10-06-2010 in Book 20101006 Page as Instrument No. 0002672 of Official Records of CLARK County, Nevada.
>
> The Name of the owner(s) of the property (trustor) was CONNIE FERNANDEZ.
> Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the Reorder of said County. After expiration of ninety (90) days from the recording or mailing of copies of the Notice of Default and Election to Sell, a Notice of Trustee's Sale was recorded in the Office of the Recorder of Said County and the association claimant, VIA VALENCIA / VIA VENTURA HOMEOWNERS ASSOCIATION, demanded that such sale be made.
>
> All requirements of law regarding the recording and the mailing of copies of the Notice of Delinquent Assessment, Notice of Default, and the recording, mailing, posting and publication of copies of the Notice of Trustee's Sale have been complied with.
>
> Said property was sold by said Trustee at public auction on 08-11-2011 at the place named in the Notice of Trustee's Sale, in the County of CLARK, Nevada, in which the property is situated. Grantee, being the highest bidder at such sale became the purchaser of said property and paid therefore to said trustee the amount bid, being $4,101.00, in lawful money of the United States, or by satisfaction, pro tanto of the obligations then secured by said Notice of Delinquent Assessment. (APP0056-58)

The recitals in the Foreclosure are sufficient and conclusive proof that copies of the required notices were mailed by the HOA to all interested parties, including Defendant under NRS 116.31166. NRS 47.240(6) also provides that conclusive presumptions include "[a]ny other presumption which, by statute, is expressly

made conclusive." Nev. Rev. Stat. § 47.240(6). Because NRS 116.31166 contains such an expressly conclusive presumption, the recitals in the Foreclosure Deed are "conclusive proof" that the HOA complied with all notice and mailing requirements for the underlying foreclosure sale.

The conclusive presumption contained in NRS 116.31166 is also consistent with the common law presumption that "[a] nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly; one attacking the sale must overcome this common law presumption 'by pleading and proving an improper procedure and the resulting prejudice.'" *Fontenot v. Wells Fargo Bank,* 198 Cal. App. 4th 256, 272, 129 Cal. Rptr. 3d 467 (2011). Furthermore, "[t]he conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption." *Moeller v. Lien,* 25 Cal. App. 4th 822, 831, 30 Cal. Rptr. 777 (1994). The detailed and comprehensive statutory requirements for a foreclosure sale are indicative of a public policy which favors a final and conclusive foreclosure sale as to the purchaser. *See* Miller & Starr, California Real Property 3d §10:210.

Therefore, the deed recitals in this case are "conclusive" proof as to compliance with the statutory prerequisites of a valid HOA foreclosure. Due to the

applicable statute of limitations Defendant cannot make an equitable challenge to the sale, therefore the deed recitals are conclusive proof that the sale was conducted in compliance with all relevant law. Based on the foregoing, upon this Court's *de novo* review, it should reverse the district court's order and enter summary judgment in favor of Berberich.

CONCLUSION

For the reasons set forth herein, the Appellant respectfully requests that this Court reverse the decision of the district court below, and grant judgment in favor of Appellant.

Dated this 10th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14-point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 point, or more, and complies with the type-volume limitation because it contains 7,863 words.

FINALLY, I CERTIFY that I have read Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event

that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure

Dated this 10th day of December, 2018.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On November 30, 2018, I caused to be served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

X **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

/s/Michael Beede
An Employee of The Law Office of Mike Beede, PLLC