**IN THE SUPREME COURT OF THE STATE OF NEVADA**

KENNETH BERBERICH,

Appellant,

vs.

BANK OF AMERICA, N.A.; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Respondent.

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Case No. 76457

**APPEAL**
from the Eighth Judicial District Court, Department XXVI
The Honorable Gloria Sturman, District Judge
District Court Case No. A-18-768728-C

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# RESPONDENTS' ANSWERING BRIEF

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## NRAP 26.1 DISCLOSURE

The following are persons and entities as described in NRAP 26.1(a) and must be disclosed:

- Respondent Bank of America, N.A. (**BANA**) is a wholly owned subsidiary of BANA Holding Corp., which is a wholly owned subsidiary of BAC North America Holding Company, which is a wholly owned subsidiary of NB Holdings Corp., which is a wholly owned subsidiary of Bank of America Corporation.

- Respondent Mortgage Electronic Registration Systems, Inc. (**MERS**) is a wholly owened subsidiary of MERSCORP Holdings, Inc., which is owned by Marron Holdings, LLC. Intercontinental Exchange, Inc. is the only publicly held corporation that individually owns 10% of Marron Holding's stock.

- Akerman LLP, through Ariel E. Stern, Esq., Natalie L. Winslow, Esq., Rex D. Garner, Esq., and Scott R. Lachman, Esq., serves as counsel for BANA and MERS.

- Other persons involved in this case include appellant Kenneth Berberich and Connie Fernandez.

- The Law Office of Mike Beede, PLLC, through Michael N. Neede, Esq. and James W. Fox, serves as appellant's counsel.

- SFR Investments Pool 1, LLC filed an amicus curiae brief in support of appellant.

These representations are made so the justices of this court may evaluate possible disqualification or recusal.

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## ROUTING STATEMENT

The Nevada Supreme Court should retain this case. The appeal raises an important issue *potentially* of first impression: what is the statute of limitations for an HOA foreclosure buyer suing to have the deed of trust deemed discharged by the sale? While the district court found the limitations period is five years based on published opinions, appellant Kenneth Berberich challenges the precedential value and substance of the opinions. He also argues NRS 11.070 entitled him to wait more than five years to sue, and then win by default even though BANA made a perfect pre-sale tender. This offensive use of NRS 11.070 is a matter of first impression important to multiple HOA lien dispute cases in the state and federal courts.

SFR Investments Pool 1, LLC supports Berberich as an *amicus*, but urges a very different interpretation of NRS 11.070 and NRS 11.080. SFR also asks the court to impose a three-year statute of limitations against mortgage holders when they sue for declaratory relief that their deeds of trust survived HOA foreclosure sales. SFR invites an improper advisory opinion, one that would conflict with this court's precedent in *City of Fernley v. State Dep't of Tax.*, 132 Nev. Adv. Op. 4, 366 P.3d 699 (2016). SFR's request that the court change the law in this manner presents an issue of first impression with statewide importance. The Supreme Court should retain the appeal.

## STATEMENT OF JURISDICTION

The district court entered an order granting BANA and MERS' motion to dismiss on June 19, 2018. AA 149-54. Berberich filed a notice of appeal on July 17, 2018. AA 157-58. This court has jurisdiction under NRAP 3A(b)(1).

## ISSUES PRESENTED

- Whether *Las Vegas Dev. Group, LLC v. Blaha*, 134 Nev. Adv. Op. 33, 416 P.3d 233, 237 (2018), and *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. Adv. Op. 3, 388 P.3d 226, 232 (2017), are dispositive because Berberich commenced the action more than five years after he purchased the property.
- Whether the doctrine of *stare decisis* preserves *Blaha* and *Gray Eagle* even if the court concludes they were incorrectly decided.
- If *Blaha* and *Gray Eagle* are not dispositive, whether Berberich had four years to commence the action under NRS 11.220 where neither NRS 11.070, NRS 11.080, nor any other statute of limitations applies.
- Whether the court should address what statute of limitations applies when a mortgage holder is the plaintiff in a post-HOA sale declaratory relief action where that issue was not presented below, played no role in the district court's order, and was not raised by Berberich below or in his opening brief.

- If the court addresses the statute of limitations where a mortgage holder is the plaintiff in a declaratory relief action, whether any statute of limitations applies to the lender's action for prospective relief under *City of Fernley*.
- Whether the court should ignore the *amicus* brief's arguments regarding NRS 11.090(3)(a) and an alleged presumption of extinguishment when (a) those arguments were not made in the district court or in Berberich's opening brief and (b) are substantively wrong.

## TIMELINE

| Date | Event |
|---|---|
| 1/21/11 | BANA satisfied the superpriority component of the HOA's lien |
| 8/11/11 | Berberich purchased the property at an NRS Chapter 116 sale |
| 8/11/16 | Last day for Berberich file an action to strip the deed of trust |
| 1/31/18 | Berberich sued BANA and MERS to strip the deed of trust |

## STATEMENT OF THE CASE

This is a declaratory relief action following an HOA sale where the buyer claims the sale discharged the deed of trust. BANA paid the superpriority portion before the sale, so the deed of trust survived. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC,* 134 Nev. Adv. Op. 72, 427 P.3d 113, 121 (2018) (***Diamond Spur***). Since BANA satisfied the superpriority component, it does not need to file any lawsuit to

enforce the deed of trust. *Id.* at 120-121. Berberich attempts to overcome the tender by invoking NRS 11.070 aggressively, hoping to deny BANA the right to present a defense—but Berberich has his own limitation problem.

The appeal focuses on the timeliness of the buyer's suit to invalidate the deed of trust. The district court applied NRS 11.080 to dismiss the case, leaving BANA free to foreclose on the deed of trust without further court action. Berberich claims NRS 11.070 entitles him to win by default, despite the tender. SFR filed an *amicus* brief over BANA's objection, urging a three-year statute against the lenders, along with a presumption that the bank needs a court order allowing it to foreclose non-judicially despite the tender. Berberich made neither argument below or in his opening brief. Berberich and SFR offer divergent, but equally groundless, positions.

Statute of limitations remains a contested matter in post-HOA sale cases. Affirming the district court with clarification that a mortgage lender does not need to get a court order to validate a tender as a condition precedent to non-judicial foreclosure would prevent this non-issue from clogging the courts' dockets.

## STATEMENT OF FACTS

### I. Factual Background

Connie Fernandez borrowed $197,359 on June 9, 2009, to purchase a home in southwest Las Vegas. AA 36-50. Fernandez agreed to pay off the loan over 30 years. AA 37. The loan was secured with a deed of trust recorded against the

property. AA 36-50. MERS, the nominal beneficiary, assigned the deed of trust to BANA in advance of the foreclosure sale. AA 52-53. Fernandez stopped paying HOA assessments in April 2010. AA 92, 124.

The HOA recorded a notice of delinquent assessment lien on October 6, 2010. AA 92. The HOA recorded a notice of default on November 9, 2009. AA 94-95. BANA sent the HOA a check in the amount of $300 (the superpriority amount) on January 21, 2011. AA 116, 124, 127-29. The HOA rejected the check. AA 119. On March 21, 2011, the HOA recorded of notice of trustee's sale. AA 97-98.

Berberich purchased the property, subject to the deed of trust, on August 11, 2011. AA 55-56; *Diamond Spur*, 427 P.3d at 121. Neither side sued for a judicial declaration regarding the foreclosure's impact on the deed of trust within five years of the sale. Berberich waited more than six years before suing.

## II. Procedural Background

Berberich sued BANA and MERS on January 31, 2018. AA 2-7.[1] He subsequently recorded a *lis pendens* against the property. AA 18. BANA moved to

[1] Berberich knows how to file timely quiet title claims but chose not to here. *See, e.g., U.S. Bank, N.A. v. Antigua Maintenance Corp.*, 2019 WL 189001 (D. Nev. Jan. 14, 2019); Nos. 78266 (acquisition in May 2013 and filed counterclaim in November 2014), 77930 (acquisition in June 2012 and filed counterclaim in June 2016), 76891 (acquisition in August 2011 and filed suit on September 2013), 70001(acquisition in August 2011 and filed suit in September 2013), 64871 (same), 64286 (acquisition in August 2011 and filed suit in July 2013). This case presents a deviation from his practice of timely filing—a tactic necessary for his strategy of invoking NRS 11.070 offensively to bar a defense by BANA.

dismiss pursuant to *Blaha* and *Gray Eagle*. AA 31-34. Berberich counter-moved for summary judgment, based on NRS 11.070. AA 71-90. BANA opposed the countermotion and sought NRCP 56(f) relief. AA 104-12. Berberich replied and argued NRCP 56(f) relief is inappropriate under NRS 11.070. AA 133-44.

The district court granted BANA and MERS' motion to dismiss and denied Berbrich's countermotion for summary judgment. AA 149-54. The district court concluded NRS 11.080 barred Berberich's claim. AA 154. The district court implicitly rejected Berberich's claim that BANA was itself time-barred under NRS 11.070 from defending, and did not address BANA's tender. AA 146-147.

Berberich is in default and BANA anticipates commencement of a non-judicial foreclosure. AA 106.

## SUMMARY OF THE ARGUMENT

BANA's tender satisfied the superpriority component and preserved the deed of trust as a matter of law. Berberich's apparent solution is to wait more than five years to sue, and then use NRS 11.070 as a tool to deny BANA the chance to defend its deed of trust. In *Blaha* and *Gray Eagle*, this court said NRS 11.080 provides a five-year statute of limitations for post-HOA foreclosure quiet title actions, calculated from the date of sale. BANA simply cited *Blaha* and *Gray Eagle* below, and the district court applied the on-point precedents in dismissing the action. AA 30-33; 146-147.

Berberich asks the court to abandon its pronouncements in *Blaha* and *Gray Eagle* as erroneous *dicta*, while SFR takes the more radical position that NRS 11.080 is not even a statute of limitations. *Stare decisis* bars such revisionism. Given Berberich invokes NRS 11.070 offensively as a statute of repose and SFR wants to saddle mortgage lenders with a three-year statute of limitations, the court should also confirm a lender-filed declaratory relief action is not subject to any statute of limitations under *City of Fernley*. At worst for lenders, their declaratory relief claims are subject to NRS 11.080 if buyers are also afforded a five-year period under it.

If the court reverses course from *Blaha* and *Gray Eagle*, it should hold that: (a) the buyer has four years after the sale pursuant to NRS 11.220 to sue for a declaration that the sale extinguished the deed of trust and (b) the mortgage holder is not subject to a statute of limitations pursuant to *City of Fernley*. Because a buyer has title and seeks to remove a deed of trust that pre-existed its title, the buyer seeks retrospective relief. Under *City of Fernley*, the buyer's claim is subject to a statute of limitations. NRS 11.220's four-year period applies because no other statute is on point. The lender seeks different relief when it sues. Contrary to SFR's *amicus* brief, the deed of trust is not presumptively extinguished; a lender who tendered does not seek to reinstate or revive the deed of trust. It merely wants a declaration that the deed of trust is presently valid and can be enforced in the future. Such relief is prospective, and no statute of limitations applies under *City of Fernley*.

Berberich and SFR both make outlandish arguments. For example, Berberich says he wins by default, despite the tender, under NRS 11.070 if he delays his action by more than five years—all the while knowing a deed of trust is recorded against the property and he cannot obtain clear title absent a court order. Berberich not only invites the court to violate due process and create moral hazards that encourage gamesmanship and delay, his argument depends on an erroneous interpretation of NRS 11.070. Not to be outdone, SFR says a mortgage holder seeking declaratory relief that its deed of trust remains valid is really trying to impose liability created by a statute. The court should not give SFR's argument the time of day—not only was it not raised below or in Berberich's opening brief, it is absurd on its face. NRS Chapter 116 creates no liability by a foreclosure buyer.

This court should affirm based on *stare decisis*. If the court abandons *Blaha* and *Gray Eagle*, it should find NRS 11.220 applies to a buyer's declaratory relief action. The court should reject Berberich's attempt to profit from his own delay by using NRS 11.070 offensively.

## ARGUMENT

### I. Standard of Review

This court reviews *de novo* an order granting an NRCP 12(b)(5) motion to dismiss. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A district court must dismiss the complaint for failure to state a

claim upon which relief can be granted if a statute of limitations bars the action. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998).

## II. The District Court Correctly Applied NRS 11.080

The district court was right to dismiss the complaint; it was under two precedents holding the clock strikes on the buyer five years after the sale. The district court followed the law, and that law is entitled to deference in this court. Berberich incorrectly argues the portions of *Blaha* and *Gray Eagle* applying NRS 11.080 are erroneous *dicta*. Berberich misses the mark; finding the statute of limitation was five years under NRS 11.080 was not superfluous—it resolved issues actually present and in controversy. He also fails to account for *stare decisis*, which counsels against reversing precedents. As part of its affirmance, the court should reject Berberich's NRS 11.070 argument and hold there is no statute of limitations on the bank's potential claim under *City of Fernley*. NRS 11.070 is not an offensive statute of limitation, and adopting a three-year statute would require the court to misread NRS 11.090(3)(a), Chapter 116, and *Diamond Spur*.

### A. *Blaha* and *Gray Eagles'* Discussions of NRS 11.080 are not *Dicta*

*Blaha* and *Gray Eagle* are on-point because the statute of limitations issues were actually and necessarily litigated. *See St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009); Black's Law Dictionary 1100 (7th ed. 1999) (defining *dictum* as a statement in an opinion that is "unnecessary to the

decision in the case and therefore not precedential"). Berberich waived the argument that *Gray Eagle's* discussion of NRS 11.080 is *dictum* because he did not raise it below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

The history of *Gray Eagle* shows the limitations issue was necessarily decided. In 2009, a homeowner filed a complaint against an HOA relating to a 14,349 square-foot property. *Gray Eagle*, 388 P.3d at 228. In 2013, a buyer purchased the property at an HOA foreclosure sale. *Id.* Rather than commence its own action, the buyer moved to intervene as a party in the 2009 lawsuit. *Id.* In 2015, the district court *sua sponte* issued a show cause order pursuant to NRCP 41(e), and ultimately dismissed both the homeowner's complaint and the investor's complaint with prejudice. *Id.* at 228-29.

On appeal, the court held mandatory dismissal under NRCP 41(e)'s five-year rule includes complaints in intervention despite argument the investor had been a party to the action for just over a year. *Id.* at 229. The court also said the district court erred in dismissing the complaint with prejudice. *Id.* at 230. There were two primary questions involved in *Gray Eagle*, both involving five-year rules. The first question was whether a complaint in intervention must be dismissed under NRCP 41(e)'s five-year rule. The second was whether the complaint in intervention must be dismissed under NRS 11.080's five-year rule if a subsequent action is brought. The court answered yes to the first question, making the second question necessary

to the decision in the case. Since the intervener had to file a new complaint, the statute of limitations was highly relevant—it is futile to file a new complaint if the new complaint is time-barred.

In making this ruling, the court answered a necessary question: whether the buyer's subsequent action was barred by NRS 11.080's five-year statute of limitation. *Id.* at 232. It would have been pointless to require dismissal without prejudice if the putative amended complaint is untimely. On the key issue of when the limitations period starts, the court said the sale itself triggers the limitation. This makes sense because the buyer knew at time there was a deed of trust and that the lender could have paid the superpriority lien before the foreclosure. These findings were central to the holding.

Several federal judges have cited *Gray Eagle* with approval multiple times, confirming its application of NRS 11.080 is not *dictum*. *See City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 540, 267 P.3d 48, 52-53 (2011) (concluding a prior decision was not *dictum* because courts across the country recognize the viability of that decision). *Gray Eagle* is cited as authority in, among other cases, *Bank of Am., N.A. v. Lake Mead Court Homeowners' Ass'n*, 2019 WL 208864, at *3 (D. Nev. Jan. 15, 2019); *U.S. Bank N.A. v. SFR Invs. Pool 1, LLC*, 2018 WL 4566671, at *3 (D. Nev. Sept. 24, 2018); *Newlands Asset Holding Trust v. SFR Invs. Pool 1, LLC*, 2017 WL 5559956, at *3 (D. Nev. Sept. 17, 2017);

*JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, 2017 WL 3317813, at *2 (D. Nev. Aug. 2, 2017).

### B. The District Court Applied NRS 11.080 Correctly

Based on *Gray Eagle* and its progeny, Berberich had five years from the date of the HOA foreclosure sale—or until August 11, 2016—to file a declaratory relief action. Berberich, who has been in possession of the property since the sale, did not file the action until January 31, 2018. On appeal, Berberich says the statute of limitations does not start running against him until he loses title or possession to BANA's foreclosure. That runs counter to this court's interpretation in *Blaha* and *Gray Eagle*. The statutory text also does not support Berberich's interpretation.

In his opening brief, Berberich posits a hypothetical in which an owner enjoys quiet possession for seven years and then finds itself unable to sue to oust a trespasser. *See* Op. Br. at p. 24. The example gives away the argument, because it assumes "the County Recorder's Records indicate no recorded encumbrances." *Id*. Reality mars this hypothetical—in this case, there *is* a recorded encumbrance: the deed of trust. The deed of trust was recorded before Berberich took title, and has clouded his property from the beginning. According to Berberich, he gets to do nothing despite the known encumbrance. This stands in contrast to the hypothetical in his brief, which assumes all is good at the beginning. Berberich had a duty to act timely as soon as he acquired title subject to an encumbrance.

The statute commences the limitations period when the party bringing the action "was seized or possessed" the property. This refers to *acquisition* of the property rights, not merely the passive holding of title and possession. When the title holder's objective is to remove a pre-existing cloud, NRS 11.080 does not allow him to sit idly until he loses title. BANA's deed of trust has clouded Berberich's title from the outset, giving Berberich a reason to act.

If the court determines NRS 11.080 does not begin to run until Berberich loses title or possession, then NRS 11.080 cannot be the applicable statute of limitations to *this* case because Berberich has title and possession. A statute of limitations begins to run when the claim accrues, and a plaintiff cannot commence an action unless the claim has in fact accrued. *See* NRS 11.010 ("Civil actions can only be commenced ***within*** the periods prescribed in this chapter, ***after the cause of action shall have accrued***, except where a different limitation is prescribed by statute.") (emphasis added).

If NRS 11.080 works as Berberich claims, his cause of action would have to be dismissed as non-justiciable because his cause of action has not accrued. This court's duty is not to render advisory opinions but, rather, to resolve actual controversies. *NCAA v. University of Nevada*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981); *see Capanna v. Orth*, 134 Nev. Adv. Op. 108, 432 P.3d 726, 735 (2018) (the court does "not have constitutional permission to render advisory opinions"); *Archon*

*Corp. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. 101, 407 P.3d 702, 708-09 (2017) (advisory opinions on a "legal issue not properly raised and resolved in district court does not promote sound judicial economy and administration, because the issue comes to us with neither a complete record nor full development of the supposed novel and important legal issue to be resolved.").

By filing the complaint, Berberich admits he has a live controversy against BANA. If he has an accrued, justiciable controversy, then the claim has in fact accrued for purposes of NRS 11.010 and NRS 11.080. If he in fact is right that the clock has not started running, then he merely requested an advisory opinion and dismissal was proper for that reason. Berberich's complaint is barred by operation of NRS 11.080's five-year statute of limitations based on *Gray Eagle*.[2]

### C. *Stare Decisis* Requires Reaffirmation of *Blaha* and *Gray Eagles*

#### *1. NRS 11.080 Begins Running Against the Buyer on the Sale Date*

*Stare decisis* plays a critical role in our jurisprudence, especially when property rights are at stake. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("[c]onsiderations of *stare decisis* are at their acme in cases involving property and

[2] This court has generally reversed *dictum* rulings where the case relied on is more than a year or two old. *See Boonsong Jitnan v. Oliver*, 127 Nev. 424, 434 n. 2, 254 P.3d 623, 630 n.2 (2011) (holding a case from 1909 was *dictum*); *Argentena Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009) (concluding a 1964 decision was *dictum*). It would be difficult to imagine this court calling its 2017 decision in *Gray Eagle dicta* in order to overrule itself two years later.

contract rights, where reliance interests are involved"); *Or. ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977). "The reason for this is the special reliance that these decisions command-they become rules of property, and many titles may be injuriously affected by their change." *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 960 (9th Cir. 1982) (quotations omitted); *see U.S. v. Milner*, 583 F.3d 1174, 1184 (9th Cir. 2009) (*stare decisis* applies with "special force" to decisions affecting title to land).

As the United States Supreme Court stated, "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open." *Minn. Mining Co. v. Nat'l Mining Co.*, 70 U.S. 332, 334 (1865); *United States v. Title Ins. Co.*, 265 U.S. 472, 486–87, (1923). As early as 1851, the Supreme Court explained "*stare decisis* is the safe and established rule of judicial policy, and should always be adhered to" when dealing with cases establishing rules of property. *The Genesee Chief v. Fitzhugh*, 53 U.S. 443, 458 (1851). This court has respected the special force of *stare decisis* when property rights and title are affected on multiple occasions. *Jensen v. Reno Central Trades and Labor Council*, 68 Nev. 269, 282, 229 P.2d 908, 914 (1951) (citing *Minnesota Mining*); *Barstow v. Union Consol Silver-Min. Co.*, 10 Nev 386, 387 (1875) ("It is essential that there should be some stability in the decisions under which rights of property have been acquired.").

The doctrine is designed to promote stability, predictability, and certainty. *See Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, J., dissenting); *Grotts v. Zahner*, 115 Nev. 339, 342, 989 P.2d 415, 417 (1999) (Rose, J., dissenting) (*stare decisis* not only plays an important role in orderly adjudication, it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules (citing *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272, (1980))). Disregarding the doctrine creates confusion and uncertainty in the law, and could leave persons with property interests "in a state of wonderment." *D'Angelo v. Garner*, 107 Nev. 704, 754, 819 P.2d 206, 239 (1991) (Steffen, J., dissenting).

This court will not overturn precedent absent a compelling reason for doing so. *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (there was not a compelling reason to negate "the voters' decade-long expectation" regarding term limits). The party asking the court to disavow precedent must demonstrate prior decisions were clearly erroneous (i.e., the court manifestly abused its discretion). *Child v. Lomax*, 124 Nev. 600, 607, 188 P.3d 1103, 1108 (2008); *State v. Eighth Judicial Dist. Court*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) ("A manifest abuse of discretion is clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." (quotation omitted)).

NRS 11.080 has been the statute of limitation for quiet title claims for decades. In 1958, this court recognized NRS 11.080 as a five-year limitations statute for quiet

title actions. *Kerr v. Church*, 74 Nev. 264, 272, 329 P.2d 277, 281 (1958).[3] The court verified this five-year statute in *Lanigir v. Arden*: "the applicable statute of limitation to a quiet title action is NRS 11.080. That statute specifies a 5-year limitation period." 82 Nev. 28, 36 n.3, 409 P.2d 891, 895 n.3 (1966). BANA and other lenders relied on this understanding of the law in setting its deadlines for filing suits for declaratory relief.

The five-year statute was applied again in 2012, reaffirming the expectation of lenders. *Wagontex, Inc. v. Estate of Chadwick*, No. A-11-640301-C, 2012 WL 12811795 (Nev. Dist. Ct. April 24, 2012). In *Wagontex*, a state trial court applied NRS 11.080 where the five-year clock began in 2004 but the quiet title action was not filed until 2012. *Id.* The court concluded the claim for quiet title was barred by the five-year statute of limitation. *Id.*

The Ninth Circuit Court of Appeals and the federal district court for Nevada have also applied the five-year statute of limitation to quiet title claims. *Weeping Hollow Ave. Trust v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016); *Scott v. MERS*,

[3] Berberich uses misleading ellipsis when discussing *Kerr* in his opening brief. In *Kerr*, this court held NRS 11.080 inapplicable because the plaintiff sought to nullify his deed on the account of fraud as opposed to seeking quiet title like here. 74 Nev. at 272, 329 P.2d at 277. The court cited a California case involving a similar quiet title statute and stated the statute is "limited to cases which involve the features of an action in ejectment or to quiet title and has no application to an action seeking to nullify the act procured by fraud or mistake." *Id.* The reason NRS 11.080 was inapplicable in *Kerr* has no relevance to this case.

605 Fed.Appx. 598, 600 (9th Cir. 2015); *U.S. Bank Home Mortg. v. Jensen*, 2018 WL 3078753, at *4 (D. Nev. June 20, 2018); *Federal National Mortg. Ass'n v. Kree, LLC*, 2018 WL 2697406, *2 (D. Nev. June 5, 2018); *Bank of America, N.A. v. Desert Canyon Homeowners Ass'n*, 2017 WL 4932912, at *2 (D. Nev. Oct. 31, 2017); *Goldsmith Enters., LLC v. U.S. Bank, N.A.*, 2017 WL 4172266, at *3 (D. Nev. Sept. 20, 2017); *Nationstar Mortg., LLC v. Falls at Hidden Canyon Homeowners Ass'n*, 2017 WL 2587926, at *3 (D. Nev. June 14, 2017); *U.S. Bank N.A. v. Woodland Village*, 2016 WL 7116016, at *3 (D. Nev. Dec. 6, 2016); *Bank of New York Mellon v. Jentz*, 2016 WL 4487841, * 3 (D. Nev. Aug. 24, 2016).

Unlike the buyers in *Blaha* and *Gray Eagle*, Berberich did not file his quiet title action within five years. He needed to sue, due to BANA's tender. Instead, he waited long enough to time himself out of a claim in the hope that he could apply NRS 11.070 to bar BANA's defense. The HOA foreclosed on the property on August 11, 2011 and Berberich did not file his complaint until January 31, 2018. Berberich's complaint, filed 2,365 days after the sale, is time-barred under NRS 11.080. The statute of limitation ran in August 2016. The court should affirm the district court's judgment based on NRS 11.080's five-year statute of limitation and the doctrine of *stare decisis*. *Blaha*, 416 P.3d at 237; *Gray Eagle*, 388 P.3d at 232.

### *2. The Court Should Make Clear NRS 11.080 Would Also Give Lenders at Least Five Years From the Sale Date to Sue*

If the court affirms on *stare decisis*, then it should confirm lenders *have at least*[4] five years to file a declaratory relief action. The statute of limitations applicable to a lender's declaratory relief claim is not before the court because BANA is the defendant here, and the issue was not raised below or in Berberich's opening brief. SFR's *amicus* brief tries to expand the scope of the appeal to include the statute of limitations applicable when the lender is the plaintiff. If the court reverses and remands to the district court, BANA would likely file a counterclaim for declaratory relief that could be challenged on timeliness. For that reason, it makes sense for the court to clarify that NRS 11.080 would provide *at least* five years for the bank to sue for declaratory relief.

Both *Blaha* and *Gray Eagle* involved lenders invoking the statute against buyers. And while it can be inferred that NRS 11.080 applies equally when lenders are plaintiffs, some federal district judges have applied NRS 11.220 if the plaintiff is a lender. This approach is incorrect; if NRS 11.080 applies to the buyer then it applies equally to the lender. The judges who have applied NRS 11.220 base their

[4] As discussed below, lenders have no statute of limitations under *City of Fernley* because lenders seek prospective—not retrospective—relief. If this court determines a lender's declaratory relief action seeks retrospective relief under *City of Fernley*, it should hold NRS 11.080 gives the lender five years to sue.

approaches on the text of NRS 11.080, which reads in pertinent part as follows: "No action for the recovery of real property, or for the recovery of the possession thereof . . ." NRS 11.080. Since a lender's declaratory relief action does not seek to "recover" the property, these judges have held the statute does not apply. However, an HOA buyer *also* does not seek to recover the property—it already has title and possession by virtue of having purchased the property. A buyer seeks only to remove the deed of trust, which is a lien interest. Removing the deed of trust does not "recover" title or possession. The plain language analysis some federal judges have applied to hold NRS 11.080 inapplicable to lenders requires the same result if the plaintiff is the buyer.

Nothing in the statutory language supports applying NRS 11.080 to buyers but NRS 11.220 to lenders. If the court confirms NRS 11.080 applies to buyers then it should make clear that the same statute affords lenders at least five years to sue.

## III. If the Court Repudiates *Blaha* and *Gray Eagle*, it Should Apply NRS 11.220 to Berberich's Claim and Hold BANA is Not Subject to Any Limitation Under *City of Fernley*

This court has long applied NRS 11.080 as the statute of limitations for quiet title cases. *See, e.g.*, *Lanigir v. Arden*, 82 Nev. 28, 36, 409 P.2d 891, 895 (1966); *Kerr v. Church*, 74 Nev. 264, 272, 329 P.2d 277, 281 (1958). Should this court agree

with Berberich and SFR,[5] and declare NRS 11.080 is not the applicable limitation statute, it should apply NRS 11.220 against Berberich. And, it should not apply any statute of limitations against lenders. Lenders have no obligation to sue; this court already held in *Diamond Spur* that a lender does not need to commence any litigation to validate its tender. *See Diamond Spur*, 427 P.3d at 120-21. Despite that, declaratory relief serves several practical objectives prospectively and lenders are not subject to limitation when seeking that type of relief.

### A. BANA is not Barred From Defending Itself

If the court retreats from NRS 11.080, the statute of limitations needs to be determined based on the nature of the claim as pled. BANA did not plead any claims below, but would likely file a counterclaim for declaratory relief if this court reverses. A lender that requests declaratory relief that its deed of trust is valid and may be foreclosed is not subject to any statute of limitations. *City of Fernley v. State Dep't of Tax.*, 132 Nev. Adv. Op. 4, 366 P.3d 699 (2016).

#### *1. NRS 11.070 Does Not Apply to Bar BANA's Defense*

Berberich seizes on NRS 11.070's bar of defenses "founded upon title to real property" to argue BANA cannot assert any defense against him. NRS 11.070 is inapplicable against BANA because BANA's rights derive from its deed of trust and

[5] Berberich wants the court to apply NRS 11.070 while SFR says NRS 11.070 and NRS 11.080 are standing statutes rather than statutes of limitations.

its pre-sale satisfaction of the HOA's superpriority lien—they are not "founded upon title to real property." The defense of payment is not "founded upon title" merely because it allows BANA to preserve its lien. BANA has never claimed any right founded upon title to real property. It claims a deed of trust, which "exists separately from title" and "does not give [BANA] right and title to the property." *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008) (citations omitted). Title constitutes the legal right to control and dispose of property, and that remains with Berberich until BANA forecloses on its deed of trust. While BANA has a property right in its deed of trust, and while the deed of trust clouds Berberich's title, an action to remove the deed of trust does not "relate to" Berberich's title:

> We now take this opportunity to clarify that, while a lien clouds title, it exists separately from that title, and therefore, an action simply to remove the lien does not "relate to" residential title so as to fall outside the scope of NRS 38.310.

*Hamm*, 124 Nev. at 298, 183 P.3d at 901-02. *Hamm* was decided in the context of NRS 38.310, but its logic applies equally to NRS 11.070—if an action to remove a lien does not "relate to" title to real property, there is no way an action to remove a lien can be "founded upon title" to real property. BANA has no right to title; it only has a priority to the property and a right to compensation. *Id.*

BANA's claims and defenses are founded upon (a) the deed of trust (a non-title lien interest) and (b) the tender of payment to the HOA. That Berberich brought

a quiet title action does not change the substantive nature of BANA's defense. If the Nevada legislature intended NRS 11.070 to apply to any defense that relates to or may impact title, it would have said so. Instead, it stated the defense must be "founded upon" title. BANA's defense is founded on payment to the HOA and the deed of trust. BANA was never seized or possessed of the premises by virtue of Berberich purchasing the property subject to the deed of trust. This is not a title issue or a "seizure/possession" issue as required by NRS 11.070.

Even if NRS 11.070 applied, BANA has not enforced its deed of trust such that the statute of limitations would apply. *See Bentley v. State, Office of State Engineer*, Nos. 64773, 66303, 66932, 2016 WL 3856572, at *10 (Nev. July 14, 2016) (concluding 11.070's limitations period accrued when the property right at issue (water rights in that case) is challenged) (unpublished disposition). Berberich misunderstands the applicable statutes of limitation.

*2. No Statute Applies if BANA is the Plaintiff Under City of Fernley*

While a buyer like Berberich gets five years from the date of purchase, a lender like BANA is not subject to a statute of limitations. *City of Fernley* holds there is no statute of limitations on suits "for injunctive and declaratory relief" seeking to establish parties' current and future rights and duties. *City of Fernley*, 366 P.3d at 707-708. The opinion held:

> The statute of limitations applies differently depending on the type of relief sought. *Taxpayers Allied for Constitutional Taxation v. Wayne Cty.*, 450 Mich. 119, 537 N.W.2d 596, 599 (1995); *Kirn v. Noyes*, 262 A.D. 581, 31 N.Y.S.2d 90, 93 (1941) (holding that **no statutory limitation applies "when a declaratory judgment will serve a practical end in determining and stabilizing an uncertain or disputed jural question, either as to present or prospective obligations"**). There are two types of relief: retrospective relief, such as money damages, and **prospective relief**, **such as injunctive or declaratory relief**. *Tenneco, Inc. v. Amerisure Mut. Ins. Co.*, 281 Mich.App. 429, 761 N.W.2d 846, 862–63 (2008).

*Id.* at 707 (emphasis added).

In *City of Fernley*, Fernley challenged the constitutionality of a tax law. This court found that because Fernley was aware of the issue as of its incorporation in 2001, the limitations period began to run in 2001 and NRS 11.220 barred the claim for *retrospective* relief in the form of damages. *Id.* at 108. As to Fernley's request for injunctive and declaratory relief, the court held that the statute of limitations did ***not*** bar it from seeking to prevent future violations of its constitutional rights. *Id.* The opinion's underlying rationale is that *all* declaratory actions "serve a practical end in determining and stabilizing an uncertain or disputed jural question" as to the parties' current or future obligations. *Id.* at 706.

That is precisely what happens when a mortgage lender files a declaratory relief action: the suit serves a practical end in determining a disputed jural question—whether the lender can foreclose on its deed of trust without future challenge from a litigious investor like Berberich or SFR. The potential complications from foreclosing

the deed of trust without a declaratory judgment illustrate practicality of declaratory relief in this context. BANA can foreclose because it has a valid deed of trust. However, a buyer like Berberich is likely to challenge BANA's foreclosure post-sale, and the ongoing uncertainty from such litigation would chill the post-sale market, would complicate eviction proceedings involving Berberich's tenant, would make title insurance difficult to obtain, etc. A pre-foreclosure declaratory judgment simplifies these complications, confirming declaratory judgment has a practical, prospective effect. Under *City of Fernley*, this is prospective relief; there is no time bar.

*3. There is no Limitation Against Nonjudicial Foreclosure*

This court confirmed a nonjudicial foreclosure based upon the deed of trust is not subject to a statute of limitations under NRS Chapter 11. *Facklam v. HSBC Bank*, 133 Nev. Adv. Op. 65, 401 P.3d 1068, 1070 (2017). The court said: "For over 150 years, this court's jurisprudence has provided that lenders are not barred from foreclosing on mortgaged property merely because the statute of limitations for contractual remedies on the note has passed." *Id*.

BANA is well within its right enforce its deed of trust through its defense of this action. NRS 106.240, a statute of repose, preserves a deed of trust for ten years after the loan is wholly due. *See Bergenfield v. U.S. Bank, N.A.*, 2017 WL 4544422, at *3-4 (D. Nev. Oct. 10, 2017) (concluding that NRS 106.240 provides the only statutory limitation on foreclosure actions based upon a deed of trust). The loan is

due in July 2039, thus BANA has until July 2049 to enforce its recorded deed of trust. AA 37. As long as BANA has a valid deed of trust under NRS 106.240, it can timely sue for declaratory relief under *City of Fernley*.

### B. NRS 11.220 Would Apply to Berberich

A buyer like Berberich seeks different relief in a post-sale declaratory action. Berberich does not seek prospective relief because he already has title and possession—there is nothing a court can give him that he does not already have. What he wants is for the court to subtract something he has but does not want: the cloud on his title created by the deed of trust. That cloud pre-dated his acquisition of the property, and has burdened the property throughout the entire time he has held title and possession. A judicial order removing that cloud would be retrospective—it would leave Berberich in the same position (as title holder). Because Berberich seeks to remove a property interest that has existed from even before the sale, he seeks retrospective relief. Under *City of Fernley*, he is subject to a statute of limitations. If the court decides NRS 11.080 is not that statute, it must apply NRS 11.220—the four-year catch-all statute of limitations—because no other statute directly applies to this type of lawsuit.

## IV. The Court Should Reject SFR's NRS 11.090(3)(a) and "Presumptive Extinguishment" Arguments Without Consideration

Berberich's declaratory relief action is an *investor challenge* to a Chapter 116 sale. BANA did not challenge the sale and it will not do so. If this court remands, it would assert affirmative defenses based on its tender and would file a counterclaim for a declaration that its deed of trust is valid, but it would not challenge the sale itself. SFR's *amicus* brief says BANA's claim would seek to impose statutory liability on Berberich. This court should disregard this argument because it was not made below or in Berberich's opening brief. *See U.S. v. United Foods, Inc.*, 533 U.S. 405, 417 (2011) (declining an invitation by an *amicus curiae* to entertain new arguments to overturn a judgment in favor of a party with a differing view); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("An amicus curiae generally cannot raise new arguments on appeal," and "arguments not raised by a party in an opening brief are waived").

SFR's argument for NRS 11.090(3)(a) is absurd. BANA has a right to pay the superpriority lien. The drafters of the superpriority lien statute expected that lenders would pay the HOA. *See, e.g., SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 748, 334 P.3d 408, 413 (2014), citing 1982 UCIOA § 3-116 cmt. 1; 1994 & 2008 UCIOA § 3-116 cmt. 2 ("As a practical matter, secured lenders will most likely pay the 6 [in Nevada nine []] months' assessments demanded by the association

rather than having the association foreclose on the unit."). The law expected the banks to pay, and BANA did pay. Its payment cannot be seen as creating a liability on anybody's part. Berberich incurred no liability from BANA's pre-sale payment—much less a liability created by a statue.

SFR essentially argues NRS 11.190(3)(a)'s three-year statute of limitation is applicable to one of BANA's affirmative defenses. The three-year statute, NRS 11.190(3)(a), applies to "action[s] upon a liability created by statute, other than a penalty or forfeiture." BANA did not file an action as NRS 11.190(3)(a) contemplates. BANA's defense does not allege Berberich is liable at all—BANA does not demand damages from Berberich or otherwise seek to redress an injury. BANA does not allege Berberich violated a duty that exists only by virtue of a statute. Liabilities created by a statute involve a specific grant of rights to a party in the statute, and the right to sue a party that deprives if of the rights.

SFR's amicus brief make a passing reference to the "presumptive extinguishment" of the deed of trust. The court should ignore this so-called presumption, for two reasons. First, it is not at issue in this appeal—Berberich did not invoke it in the district court or in his opening brief. Second, there is no such presumption. Nothing in Chapter 116, or this court's precedents, creates a presumption that an HOA lien foreclosure involves a superpriority component. To

the contrary, forcing lenders to sue to overcome a "presumption of extinguishment" would contradict the purpose of non-judicial foreclosure.

Writing in *Diamond Spur* on a related issue (whether a lender must deposit tendered funds into court), this court noted:

> Neither NRS 116.3116, the related statutes in NRS Chapter 116, nor the UCIOA, indicates that a party tendering a superpriority portion of an HOA lien must pay the amount into court to satisfy the lien.
>
> To judicially impose such a rule would only obstruct the operation of the split-lien scheme. The practical effect of requiring the first deed of trust holder to pay the tender into court is that a valid tender would no longer serve to discharge the superpriority portion of the lien. Instead, the tendering party would have to bring an action showing that the tender is valid and paid into court before the lien is discharged. With such conditions, ***a tendering party could only achieve discharge of the superpriority portion of the lien by litigation. This process negates the purpose behind the unconventional HOA split-lien scheme: prompt and efficient payment of the HOA assessment fees on defaulted properties***.

*Diamond Spur*, 427 P.3d at 120-21 (emphasis added).

SFR's "presumption of extinguishment" would create exactly the same problem—it would force banks that paid the superpriority component to sue for a declaratory order. There is no reason to impose a judicial-action requirement, especially when nothing in Chapter 116 or this court's precedents supports a presumption of extinguishment. Many HOA sales involve a superpriority component, but not all—for example, a sale can occur after a homeowner pays off all the delinquent assessments but not the costs of collection or the lender can tender.

The statute expects lenders to pay, as BANA did here—there is no presumption of non-payment. The court should disregard SFR's so-called presumption of extinguishment, giving it no weight.

## V. Berberich's Deed Recitals Argument is Irrelevant

Berberich is not entitled to summary judgment based on deed recitals especially here where he failed to timely file this action and BANA tendered the superpriority portion of the HOA's lien in advance of the sale. *Shadow Wood HOA v. N.Y. Cmty Bancorp.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1100-12 (2016); *see PROF2013-S3 Legal Title Trust IV by U.S. Bank N.A. v. REO Investment Advisors V*, 2018 WL 6419292, at *4-5 (D. Nev. Dec. 6, 2018) (granting summary judgment on tender and rejecting a deed recitals argument); *PROF-2013-S3 Legal Tile Trust V v. Saticoy Bay LLC*, 2018 WL 6003847, at *5 (D. Nev. Nov. 14, 2018) (same). Berberich raises deed recitals to distract this court from real issues on appeal. .

## VI. The Court Should Affirm Dismissal of MERS

Berberich acknowledges MERS has no current interest in the property, and in fact, MERS assigned the deed of trust on November 9, 2011. AA 142; *see* AA 52-53, 109. Yet, he refused to voluntarily dismiss MERS below. The district court dismissed MERS based on NRS 11.080's five-year statute of limitations. AA 154. This court should affirm dismissal of MERS because it has no interest in the property regardless of how it rules on limitations because it already assigned the deed of trust.

## CONCLUSION

Berberich and SFR try to confuse the issues, but the district court got it right. It saw that Berberich waited too long to sue, correctly dismissed his claim under NRS 11.080. Berberich wanted to lie dormant for more than five years, and then spring NRS 11.070 as an offensive tool to deny the consequence of BANA's tender. He had every right to refrain from suing, but his cause is time barred as a result. This court should affirm and order Berberich cancel the lis pendens.

DATED this 22nd day of March, 2019.

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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 answering 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 points or more and contains 7,215 words.

FINALLY, I CERTIFY that I have read this **Respondents' Answering 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 answering 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of March, 2019.

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## CERTIFICATE OF SERVICE

I certify that I electronically filed on March 22, 2019, the foregoing **RESPONDENTS' ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

*/s/ Carla Llarena*
An employee of Akerman LLP