Case No. 77010
IN THE SUPREME COURT OF NEVADA

JP MORGAN CHASE BANK, National Association, a national association

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC,

Respondent.

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APPEAL
From the Eighth Judicial District Court, Clark County
The Honorable JIM CROCKETT, District Judge
District Court Case No. A-13-692304-C

AMENDED RESPONDENT'S ANSWERING BRIEF

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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 so the judges of this Court may evaluate possible disqualification or recusal.

Respondent, SFR Investments Pool 1, LLC, is a privately held limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

In District Court, SFR Investments Pool 1, LLC was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana S. Ebron, Esq., Karen L. Hanks, Esq. and Caryn R. Schiffman, Esq. of Kim Gilbert Ebron fka Howard Kim & Associates. The same attorneys represent Respondent on appeal.

DATED this 14th day of July, 2019.

KIM GILBERT EBRON

/s/ Jacqueline A. Gilbert
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTRODUCTION

This case presents ***one*** issue for this Court: whether HERA's[1] three-year statute of limitations barred Chase's claim(s) based on 12 U.S.C. § 4617(j)(3). Because Chase's claims are time-barred, this case is not about whether federal law preempts state law. This Court should affirm the District Court's holding that the three-year statute of limitations barred Chase's claims. What is more, in the unlikely event this Court disagrees with the District Court and finds Chase's claim was timely, this Court has alternative grounds to affirm the District Court's order. Here, because the District Court properly enforced the NRCP, and because Chase failed to timely produce the evidence it argues it needed, Chase's claims are unsupported to establish its claim under HERA. Accordingly, the District Court properly granted summary judgment in SFR's favor. Of note, Chase raised a variety of arguments that it never raised first at the District Court, in an attempt to circumvent proper granting of judgment in SFR's favor.

FACTUAL AND PROCEDURAL BACKGROUND

SFR purchased the subject Property as the highest bidder at the May 1, 2013

[1] In July 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), which established the Federal Housing Finance Agency ("FHFA" or "Agency") to regulate Federal Home Loan Mortgage Corporation ("Freddie") and Federal Housing Finance Agency ("Fannie Mae"). HERA contains the Federal Foreclosure Bar, 12 U.S.C 4617 (j)(3) and the statute of limitations 12 U.S.C 4617 (b)(12).

public foreclosure auction held on behalf of Pebble Canyon Homeowners Association (the "Association") pursuant to NRS 116.[2] At no time before the sale was Freddie Mac named as a beneficiary on the subject Deed of Trust. SFR purchased the Property, Freddie Mac was not the named beneficiary of the deed of trust.[3]

I. CHASE'S INITIAL COMPLAINT IS SILENT AS TO 12 U.S.C § 4617 (J)(3).

The initial complaint filed on or about **November 27, 2013**,[4] is devoid of any of the following allegations:

1) that the Federal Home Loan Mortgage Corporation ("Freddie") owned the note and deed of trust ("DOT"); **or**

2) that 12 U.S.C § 4617 (j)(3) preempted Nevada law to the extent that Nevada law would allow an Association foreclosure sale to extinguish a deed of trust securing a loan owned by Freddie.

Finally, after **833** days of litigation, for the first time in its amended complaint, filed on or about March 9, 2016, Chase raised 12 U.S.C § 4617(j)(3), arguing that the subject deed of trust was property of Freddie which later became the property of

[2]3263 Morning Springs Drive, Henderson, NV 89074; Parcel No. 177-24-514-043. 1AA_002. The former homeowners were Robert M. Hawkins and Christine V. Hawkins. 1AA_003. See 3AA_325-327.
[3] 3AA_333; SA_000033-35.

FHFA[5] when Freddie was placed in conservatorship; if true, Chase knew this at the initiation of litigation.[6] Yet, after obtaining leave of the court specifically to add 12 U.S.C § 4617(j)(3), Chase did not disclose its evidence to support this claim; evidence that should have been in its possession when it brought the motion to amend and disclosed immediately thereafter, which necessitated in part, SFR's counter-motion to strike.[7] The same evidence that Chase claims the District Court's striking amounted to case-ending sanctions.

II. CHASE FAILED TO TIMELY DISCLOSE EXHIBITS AND WITNESS— DEAN MEYER DURING DISCOVERY.

Chase failed to timely supplement its initial disclosures of documents and witnesses. Discovery closed on **May 2, 2016**.[8] While parties have an obligation to supplement, it is within the discovery period, and not anytime a party sees fit. ***All*** of Chases supplemental disclosures were late—after discovery closed.[9] The first supplemental disclosure was served on **May 6, 2016**, the second supplemental disclosure was served on **July 26, 2016**, and then shockingly, **707** days after discovery expired and the parties were back from remand, Chase serves SFR with

[5] Federal Housing Finance Agency.
[6] 1AA_071-080.
[7] *See* SFR's Counter-Motion to strike, 3AA_552-553; *see also* SFR's Reply in support, 4AA_595-599.
[8] *See* Scheduling Order filed on June 29, 2015, 1AA_035-037.
[9] *See* SFR's Reply in support of its Countermotion to Strike, 4AA_595-599.

its third supplemental disclosure on **April 13, 2018**.[10] ***All*** these were each ***well*** past the **May 2, 2016** deadline, a deadline that was *never* extended. Chase chose not to disclose during the discovery period. More telling, however, is that on **January 23, 2018**, Chase filed a motion to re-open discovery and then voluntarily withdrew after SFR opposed,[11] further evidencing Chase's purposeful violation of the scheduling order.

Chase and SFR filed competing motions for summary judgment in 2016 (collectively "First MSJs" individually, the "Bank's first MSJ" and "SFR's first MSJ").[12] SFR did not need to contest whether the exhibits attached to Chase's 2016 MSJ were properly before the District Court because SFR challenged Chase's standing to raise 12 U.S.C. § 4617 (j)(3) as defense or claim, which the District Court agreed and entered judgment in in SFR's favor.[13] While Chase's first appeal was pending, this Court issued its decision in *Nationstar*.[14] In light of this decision, the parties stipulated to remand back to the District Court only to brief issues related to 12 U.S. C. § 4617(j)(3).[15] SFR did not need to stipulate to remand, SFR ***only*** did so

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[10] *Id*.
[11] *See* Chase's Motion to Extend Discovery Deadlines at 2AA_268-274; *see also* SFR's Opposition, 2AA_275-286; *see* Chase's withdrawal, 2AA_287-289.
[12] Bank's 2016 MSJ 1AA_157-190; *see also*, SFR's 2016 MSJ 1AA_134-156.
[13] *See* Findings of Fact Conclusion of law ("FFCL"), 2AA_258-267.
[14] *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. ___, 396 P.3d 754 (2017).
[15] *See* Stipulation and Order to Remand filed on September 208, 2017 SA_000054-70.

because the District Court findings regarding the validity of the sale would remain intact, and Chase agreed.[16]

III. CHASE'S DILATORY BEHAVIOR CONTINUES.

Back in District Court after remand, Chase filed a motion to reopen discovery so it could cure untimely disclosures and, presumably to properly disclose the documents it later disclosed in its April 2018 supplement. But then, Chase voluntarily and purposefully withdrew its motion, which would have been a chance for Chase to cure/remedy its late disclosures.[17] In withdrawing its motion, Chase *knew* that it did not timely disclose all the documents it claimed it needed to disclose.

Chase's second MSJ used the Meyers declaration and the undisclosed documents.[18] The District Court was informed of these issues and exercised its discretion to consider the late disclosed documents. The District Court did not issue case-ending sanctions.

IV. CHASE FAILED TO PROPERLY RAISE ARGUMENTS AT THE DISTRICT COURT.

In 2018, after remand from the Nevada Supreme Court, the parties filed competing motions for summary judgment (collectively "Second MSJs" individually, "Chase's Second MSJ" and "SFR's Second MSJ").[19] SFR's Second

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[16] *Id.*
[17] *See* Withdrawal filed in February 1, 2018 at 2AA_287-289.
[18] *See* SFR's Counter-motion to strike, 4AA_548-567; *see specifically*, 3AA_552-553.
[19] Chase's 2018 MSJ 2AA_290-314; *see also*, SFR's 2018 MSJ 3AA_524-533.

MSJ raised statute of limitations barring Chase's HERA claims.[20] In opposition to SFR's Second MSJ, Chase *only* raised the following arguments: statute of limitations applies to claims brought by the FHFA, and since FHFA is not a party, the statute of limitations does not apply, only the quiet title statute of limitations applies, and even if three-year applied—it was timely.[21] Yet, in its reply in support of its Second MSJ, Chase raised a new argument for the first time: that Chase's claims are subject to the six year statute of limitations as the claims sound in contract ("new argument").[22] At the hearing, SFR moved the District Court to strike Chase's new argument raised in its reply in support of its Second MSJ because SFR was unable to address the new argument.[23] Due to this, and this alone, the District Court properly exercised its discretion and did not consider Chase's new argument.[24]

V. CHASE WAIVED ANY ARGUMENT REGARDING THE VALIDITY OF THE SALE.

After the *Nationstar* opinion, the District Court certified that it would reconsider its order on appeal.[25] Chase stipulated to limiting the issues on remand, agreeing that all prior findings and conclusions as to the validity of the sale would stand.[26] Yet, in its Second MSJ, Chase breached the stipulation by raising issues

[20] 3AA_528 at Sec. B
[21] 3AA_543-546.
[22] 4AA_591:7-592:2.
[23] 4AA_600-624; *see specifically*, 4AA_613:6-18.
[24] *Id*. at 4AA_613:19.
[25] SA_00055-58.
[26] SA_00062 at ¶¶10-11.

regarding the price SFR paid, i.e. the validity of the sale itself.[27] The District Court properly exercised its discretion to strike this argument.

All told, notwithstanding untimeliness of the federal foreclosure bar or 4617(j)(3) claim, Chase never properly disclosed admissible evidence to establish Freddie's ownership interest in the subject Property. Therefore, there are no genuine issues of material fact rebutting validity of the Association sale, and SFR's resulting deed. Therefore, this Court should affirm the District Court's judgment entered in favor of SFR

SUMMARY OF THE ARGUMENT

The District Court correctly found that Chase's 12 U.S.C § 4617(j)(3) claim is time barred. Here, the sale occurred on March 1, 2013. **1043** days later on March 9, 2016, Chase filed its amended complaint. However, the original complaint is silent as to any facts regarding the Federal Foreclosure Bar, or any allegations remotely related to the Federal Foreclosure Bar that would put SFR on notice that Freddie claimed an interest in the Property at the time of the sale. Accordingly, the District Court correctly concluded that relation back would not save the day for Chase as the original complaint did not implicitly or explicitly place SFR on notice of its claims under 12 U.S.C § 4617(j)(3). What is more, is at the hearing the District Court

[27] *See* Bank's 2018 MSJ; *see specifically*, Chase disputing the price SFR paid for the Property at 2AA_299:1-3; *see also*, 2AA_310 Sec. C&D.

properly disregarded Chase's new argument—that its claims are not barred as the six-year statute of limitations applies, which was raised in its reply in support of its own motion for summary judgment, which effectively deprived SFR of an opportunity to address it. This means that Chase is limited to the arguments raised in its 2018 Opposition and this Court should not consider *any* of the new arguments, which Chase is bringing for the first time on appeal. This Court should affirm the District Court's judgment in favor of SFR.

STANDARD OF REVIEW

Chase's stated standard is incorrect. While questions of law are reviewed *de novo* by this Court, a District Court's decision to strike an argument is under an abuse of discretion. *Century Steel, Inc. v. State, Div. of Indus. Relations, Occupational Safety & Health Section*, 122 Nev. 584, 588, 137 P.3d 1155, 1158 (2006). But this Court reviews a District Court's decision to strike arguments under an abuse of discretion, and will not interfere with the District Court's exercise of its discretion absent a showing of palpable abuse. *See Olausen v. State Dep't. of Corr*., 281 P.3d 1206 (Table) (Nev. 2009) (unpublished disposition) (A district court's dismissal for failure to oppose a motion to dismiss is reviewed for abuse of discretion.) *see also; Walls v. Brewster*, 112 Nev. 175, 912 P.2d 261 (1996). A district court's decision to grant a motion due to failure to oppose the same is reviewed for abuse of discretion. *Sheckler v. Chaisson JRJ Investments, LLC*, 373

P.3d 960 (Table) (2011) (unpublished disposition); *Las Vegas Fetish & Fantasy v. Ahern Rentals*, 124 Nev. 272, 277–78, 182 P.3d 764, 768 (2008).

Therefore, before reviewing the grant of summary judgment in SFR's favor, this Court must review for abuse of discretion the District Court's decision to strike the new argument raised in Chase's reply in support of its 2018 MSJ, and it's under the correct standard, this Court must affirm. Additionally, the District Court's decision to strike the purposefully late disclosed documents is also subject to an abuse of discretion standard, and under this standard this Court must affirm.

ARGUMENT

I. CHASE'S ASSERTION OF § 4617(J)(3) IS TIME-BARRED

A. The District Court Properly Found the Federal Foreclosure Bar is a Right that Must be Timely Asserted.

1. The "hook" for Chase' claims is the statute—12 U.S.C. § 4617(j)(3).

Chase's claim is entirely based on the enforcement of the Federal Foreclosure Bar (4617(j)(3)). Chase' amended complaint states that "SFR's claim of free and clear title to Property is barred by **12 U.S.C. 4617 (j)(3),** which precludes an Association foreclosure sale from extinguishing Freddie Mac's interest in the Property and preempts any state law to the contrary.[28]

There is no question that Chase's claim stems entirely from the assertion of a

[28] *See* Amended Complaint at 1AA_077 at ¶ 46.

statutory protection—4617(j)(3). Given the reliance upon a **statutory provision** to prevent extinguishment of the Deed of Trust, rather than any potential contract, Chase's claim/defense clearly constitute a "wrong independent of contract," which the Nevada Supreme Court has used to describe **tort** claims.[29] Black's defines a tort similarly: "[a] civil wrong, other than breach of contract, for which a remedy may be obtained. . . ."[30]

Therefore, Chase's claims arise from an alleged violation of a statute, which is clearly a "wrong independent of contract"[31] and something "other than a breach of contract,"[32] and, therefore, appropriately categorized as a tort. The three-year statute of limitations under 12 U.S.C. § 4617(b)(12) applies to claims—outright or masquerading as defenses—based on **4617(j)(3).**

2. 4617(b)(12) provides a three-year statute of limitations.

The District Court properly found HERA's three-year statute of limitations applies to any assertion of 4617(j)(3) in the context of a foreclosure sale, and also

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[29] *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (quoting *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 552 P.2d 885, 888 (1976)) (emphasis added); *see also David v. Hett*, 270 P.3d 1102, 1114 (Kan. 2011) (claim sounds in tort if plaintiffs allege breach of common-law or statutory duty independent from any contract).
[30] *See also* BLACK'S LAW DICTIONARY 1717 (10th Ed. 2009) (emphasis added).
[31] *Bernard*, 734 P.2d at 1240.
[32] BLACK'S at 1717.

properly found relation back was inapplicable.[33] 12 U.S.C. § 4617(b)(12) provides in relevant part:

> [T]he applicable statute of limitations with regard to **any action** brought by the Agency as conservator or receiver **shall be**—
> …
> (ii) in the case of any tort claim, the longer of— (I) the **3-year period beginning** on the date on which the claim accrues;

12 U.S.C. § 4617(b)(12) (emphasis added.)

The Federal Housing Finance Agency ("FHFA") has successfully argued and convinced the Second Circuit to hold that, "Congress intended one statute of limitations – 4617(b)(12) of HERA – to apply to *all* claims brought by the FHFA as conservator [and] supplant[s] any other limitations that otherwise might have applied." *Federal Housing Finance Agency v. UBS Americas Inc.*, 712 F.3d 136, 143-44 (2d Cir. 2013) (emphasis in original).

Under Nevada law, liability arising from a statute carries a three-year statute of limitations. NRS 11.190(3)(a). As set forth above, Chase's claim rests entirely on § 4617(j)(3). The liability for violating the federal statute is that due to preclusion, the deed of trust, if actually owned by Freddie, could not be extinguished and SFR's title remains clouded by that deed of trust. Thus, the extender-statute does not apply, as the applicable statute of limitations is the same as set forth in § 4617(b)(12)—3 years.

[33] *See* FFCL 4AA_625-630; *see specifically*, 4AA_628:11-29:6.

3. Chase steps into both shoes of the FHFA—to assert the right and accept the limitations that Congress placed on that right.

Here, the ***only*** reason Chase can even assert 4617(j)(3), is because this Court recognized that an authorized servicer could assert the right, under a principal/agency relationship.[34] In other words, Chase steps into the shoes of FHFA and asserts the right. In this case, Chase ***never***[35] proved it is an authorized servicer of Freddie Mac for the subject loan, and SFR does not concede this fact. But for purposes of this argument, even assuming Chase is the authorized servicer, Chase does not step into only one shoe, it steps into ***both*** shoes. In that regard, if it can assert the right, it is equally bound by the limitations that Congress placed on that right. Thus, Chase is bound by the statute of limitations set forth in 4617(b)(12) just as FHFA would be if it asserted the right. The District Court correctly found this, when it stated:

> "…but FHFA is not a party. We are, we claim the right to assert the federal foreclosure bar because we're a servicer acting in a representative capacity to the FHFA. So the problem with that logic in my way of thinking is this: It would mean that the servicer who claims a derivative right to assert the federal foreclosure bar is actually in a superior position is immune from the statute of limitations argument, and that would actually encourage the FHFA to not be a party and litigate its interests because to do so they would be foreclosed by the statute of limitations. Instead, they step back and say, well we don't want to a party because the statute of limitations would shut us out, but

[34] *See Nationstar*, 396 P.3d 754.

[35] The District Court granted SFR's Counter-Motion to strike on the basis that Chase disclosed its "evidence" too late; *see* FFCL at 4AA_629; *see also* transcript at 4AA_615:8-24.

> you guys go ahead and assert it in your capacity as your derivative representative capacity."[36]

Having established the three-year statute of limitations applies, the District Court properly determined that Chase' amended complaint did not relate back to the original complaint because the original complaint did not implicitly or explicitly place SFR on notice of its claim under 12 U.S.C § 4617(j)(3).

B. The District Court Properly Found Relation Back Does Not Save the Day for the Bank.

Other than saying this Court should reverse the District Court's order finding that relation back was inapplicable, Chase's brief is devoid of any analysis explaining why the District Court abused its discretion. Of course, such challenge does not involve a de novo standard, rather it involves an abuse of discretion standard. *See State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004). A district court *only* abuses its discretion when it "bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. ___, ___, 367 P.3d 1286, 1292 (2016).

In the present case, at the District Court level Chase moved to amend after **833** days of litigation. At the hearing the District Court stated as follows:

> "Here's why I think you have to [do] more than you did: Because you say, we are claiming that the sale did not extinguish the first deed of trust. You go, okay that the result you are looking for, it didn't extinguish it but what's your theory? I don't think notice was given to

[36] 4AA_605:20-606:13.

SFR if your theory was Federal Foreclosure Bar."[37]

Here, Chase's original complaint was filed on November 27, 2013,[38] and contained ***no*** reference to Freddie, the Federal Foreclosure Bar or HERA. This is evident by the fact that Chase sought to amend its complaint specifically to add 12 U.S.C § 4617(j)(3). Had Chase truly alleged this claim in the first instance it would not have needed to amend its complaint: but it did. Chase knows it did not allege the claim of 12 U.S.C. § 4617(j)(3), either implicitly or explicitly. The amended complaint makes it apparent all the allegations regarding the federal interest that were completely absent from the original complaint.

The District Court did not abuse its discretion in finding relation back inapplicable.

1. Standard for relation back

NRCP 15(c) states, "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the ***original pleading***, the amendment relates back to the date of the original pleading." (Emphasis added). However, "where the original pleading does not give a defendant 'fair notice of what the plaintiff's [amended] claim is and the grounds upon which it rests,' the purpose of the statute of limitations has not

[37] 4AA_610:22-611:5.
[38] 1AA_001-7.

been satisfied and it is 'not an original pleading that [can] be rehabilitated by invoking Rule 15(c).'" *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 n. 3, 104 S.Ct. 1723 (1984) (internal marks and citation omitted). *See also, Glover v. F.D.I.C.*, 698 F.3d 139, 146 (3d Cir. 2012).

In other words, the analysis under NRCP 15(c) is "whether the original complaint adequately notified the defendants of the basis for liability the plaintiffs would later advance in the amended complaint." *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 866 (D.C. Cir. 2008) (emphasis added). Similarly, Nevada law will not allow a new claim based upon a new theory of liability asserted in an amended pleading to relate back under NRCP 15(c) after the statute of limitations has run. *Nelson v. City of Las Vegas*, 99 Nev. 548, 556–57, 665 P.2d 1141, 1146 (1983).

2. Chase's original complaint is silent as to HERA

Chase's complaint (filed on November 27, 2013), and answer (filed on August 11, 2015) are completely bereft of any mention of 4617(j)(3), any federal interest, preemption or anything even remotely indicating Chase intended to challenge the sale based on the Supremacy Clause due to an alleged interest by Freddie.[39] Chase's complaint and amended complaint allege "[Chase] is the lender and beneficiary under the…promissory note and corresponding deed of trust."[40]

[39] 1AA_001-007; 1AA_038-48.
[40] 1AA_004 at ¶ 10. Even Chase's answer alleges a total of 13 affirmative defenses, none of which allege preemption/4617(j)(3). 1AA_044-46.

Simply put, anyone reading Chase's complaint would have no idea that 4617(j)(3) would be alleged or that Freddie would claim an interest in the deed of trust. The absence of these allegations makes Chase's reliance on *Jackson v. Groenenyke*[41] unconvincing. In *Jackson*, this Court dealt with a water rights issue, and this Court allowed a party to amend his pleadings to include land access for maintenance and repair on the subject pipe. *Id.* at 366. The Court reasoned that these issues arise from the same transaction or occurrence as the vested right to receive water because the quest to assert water rights necessarily includes action to ensure the continued flow of that water. *Id.* at 366. In the present case, there is nothing for Chase's HERA claim to relate back to; Chase never alleged anything to do with a federal interest, and unlike *Jackson*, it does not necessarily follow that a bank challenging an NRS 116 sale will involve a claimed federal interest.

But Chase wants the rule to be read as if the "transaction" is the Association sale itself, and therefore any amendment would relate back, even a yet-to-be made one. But this defies the purpose of the rule. The "conduct, transaction, or occurrence" Rule 15(c) references, cannot be the event by which gave rise to the claim i.e. the car accident in a negligence case, the contract in a breach of contract case or the slip and fall in a premises liability case. A mere history of NRS 116 litigation demonstrates how protean bank claims are, so that SFR cannot be deemed to know

[41] *Jackson v. Groenenyke*, 369 P.3d 362 (Nev. 2016).

from a bare bones pleading what claims may arise, especially having had to litigate the interpretation of NRS 116.3116(2), constitutionality, commercial reasonableness, mortgage protection clause, tender, fraudulent transfer, and any number of other claims by which a deed of trust was somehow revived. In other words, even in this notice pleading state, a defendant has to have some idea of what claims it needs to defend. And, a plain reading of the complaint in this case gives no indication that a claim arising under § 4617(j)(3) should be anticipated.[42] If this was the standard then there would be no purpose for the rule because every amendment would relate back to the original pleading.

And yet, we have a rule that requires fair notice in the original pleading of the now asserted amendment such that it can relate back. Again, as this Court held, NRCP 15(c) does not allow a new claim based upon a new theory of liability to relate back. *See Nelson*, 665 P.2d at 1146. Thus, it stands to reason if there is nothing to relate back to, i.e. no allegations even remotely touching upon what a party now seeks to allege, then the mandates of Rule 15(c) are not met. That is exactly what we have in this case here.

All told, because there are zero allegations about any federal interest relation back does not apply, the District Court properly found this in its decision.

[42] 1AA_001-7.

3. ***Chase waived its legal theory argument by failing to properly raise it below—at the District Court.***

It is well-settled, "a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Here, Chase, in opposition to SFR's Second MSJ never asserted the Federal Foreclosure Bar was merely a theory not a claim.[43] [44] Accordingly, this Court should not consider this argument that is not properly before this Court. SFR has no desire to waive the waiver. Should this Court want to entertain this argument despite the fact that Chase failed to properly raise it before the District Court in the first instance, this Court can order additional briefing.

4. ***Chase waived its argument that relation back applies to motions by failing to raise it below.***

Waiver is defined as "the voluntary relinquishment or abandonment—express or implied—of a legal right or advantage. The party alleged to have waived a right must have a had both ***knowledge*** of the existing right and ***intention*** of foregoing it."[45] Here, Chase argues for the first time on appeal that relation back is from its motion to amend, a motion not yet considered by the District Court, let alone granted.

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[43] *See* Chase's Opposition to SFRs Second MSJ at 3AA_534-547; *see specifically*, pp. 543 at Sec. II "Chase's Claims are Timely."
[44] *See* Chase's Opening Brief ("AOB") at pg. 27 Sec. B.
[45] Black's Law Dictionary, 1813 (10th Ed. 2014) (emphasis added).

This argument was not first raised to the District Court. In opposition to SFR's Second MSJ, Chase raised relation back in its briefing but did not argue, as it is now that relation back is to its motion to amend.[46] It only argued what has already been addressed *supra*. After SFR filed its Second MSJ, Chase had ample time to file its opposition as allowed under the rules. Chase had both knowledge of SFR's arguments and by choosing the arguments to place in its opposition had an intention of foregoing other arguments. Accordingly, Chase waived its right to argue relation back to its motion before this Court. As a result, this Court should not entertain the new argument here.

In a last-ditch effort, Chase relies *Premier One*,[47] for the meritless proposition that Chase can save its waived argument. Yet, the case provides no guidance. In *Premier One*, the parties argued whether claim preclusion was applicable before the District Court and on appeal, appellant raised a subset of claim preclusion, whether non-mutual claim preclusion barred the claim.[48] In *Premier One*, this Court did not find waiver barred the use of non-mutual claim preclusion.[49] The reason for that is the parties there had all argued the elements and simply not used the proper name,

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[46] AOB 19-24; *see* Chase's Opposition to SFR's Second MSJ at 3AA_ 543 at Sec. II.
[47] *Premier One Holdings, Inc. v. Red Rock Financial Services, LLC*, 429 P.3d 649 (2018) (unpublished disposition).
[48] *Premie*r, 429 P.3d at *1.
[49] *Id.* at fn. 2.

"claim preclusion."[50] Thus, to enforce a waiver would be form over substance. This is not the case here. Here, where Chase is asking this Court to move the goal line for when relation back begins. Relation back is a doctrine that allows a claim plead outside the statute of limitations to be timely when the claim relates back to the original pleading. Before the District Court, Chase did not argue relation back is to its motion to amend, and should not be allowed to argue it now. Chase intentionally chose how it wanted to argue relation back and placed those arguments in its opposition to SFR's Second MSJ. It did not, like the parties in *Premier One*, simply fail to use proper nomenclature. Now on appeal, in an effort to circumvent the District Court's finding, Chase changes its relation back argument and wants a pass from this Court.

Chase is not entitled to a second bite at the apple. Accordingly, this Court should not consider this argument that is not properly before this Court. As such, this Court can affirm the District Court's order, finding that relation back is not available to Chase as the original complaint did not place SFR on notice of 4617(j)(3).

Without waiving the waiver, Chase wrongly asserts its motion should be the relation-back deadline. A party should be held to the language of the Rule which discusses pleadings, not motions. Further, an amended pleading is not the operant

[50] *Id.*

document until or unless it is actually filed. Allowing parties to relate back to a motion, rather than an actual pleading as required by the rule, encourages delay and ambiguity in the system, especially if the moving party fails to actually file the amended pleading itself.

C. The District Court Properly Exercised its Discretion in Striking Chase's New Argument – Six Year Statute of Limitations.

It is well settled that a movant cannot raise new arguments in its reply which deprives the non-moving party of an opportunity to respond in writing before the hearing. This Court addressed a variation of this issue in *Valley Health*.[51] In that case, the real party in interest Roxanne Cagnina ("Cagnina") sued Valley Health for an alleged sexual assault while under the care and treatment at the hospital.[52] Cagnina filed a motion to compel before the discovery commissioner.[53] The discovery commissioner granted the motion to compel, Valley Health filed an objection before the District Court.[54] Valley Health failed to raise an argument—privilege—before the discovery commissioner and raised privilege for the first time before the District Court.[55] This Court affirmed the District Court's order striking

[51] *Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 127 Nev. 167, 252 P.3d 676 (2011).
[52] *Id*. at 170, 252 P.3d at 678.
[53] *Id.*
[54] *Id.*
[55] *Id*. at 127 Nev. 172, 252 P.3d at 679.

the new argument raised for the first time before the District Court.[56] This Court stated the following in its holding: "Additionally, consideration of such untimely raised contentions would unduly undermine the authority of the Magistrate Judge by allowing litigants the option of waiting until a Report is issued to advance additional arguments. . . ."[57]

1. ***Chase ambushed SFR with new arguments in its reply brief before the district court***

The case here is analogous to *Valley Health*. Like Valley Health with privilege, Chase waited until its reply to raise six-year statute of limitations rather than argue it in opposition to SFR's second MSJ, thereby depriving SFR of a meaningful opportunity to respond.[58] SFR, akin to Cagnina, was unable to respond to in writing to the "new argument," thereby ambushing SFR at the hearing. Accordingly, SFR properly moved to strike and the District Court properly exercised its discretion in striking Chase's new argument.[59]

2. ***If the district court allowed the new argument it would lead to inefficient use of judicial resources.***

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[56] *Id.*,

[57] *Id. quoting Abu–Nassar v. Elders Futures, Inc.*, No. 88 Civ. 7906 (PKL), 1994 WL 445638, at *4 n. 2 (S.D.N.Y. Aug. 17, 1994)

[58] *See* Chase's Opposition to SFR's Second MSJ regarding statute of limitations arguments raised 3AA_543:1-546:3; *see also* Chase's Reply in support of its Second MSJ at, 4AA_575-594; *see specifically*, 4AA_590:8-592:2, which raises six-year contract claim for the first time.

[59] *See* Transcript at 4AA_600-624; *see specifically*, 4AA_613:6-19.

What is more, as this Court noted in *Valley Health*, parties need to present all arguments, issues, and evidence in the first instance and not wait for a reply to avoid wasting judicial resources.

> [a] contrary holding would lead to the inefficient use of judicial resources and allow parties to make an end run around the discovery commissioner by making one set of arguments before the commissioner, waiting until the outcome is determined, then adding or switching to alternative arguments before the district court. All arguments, issues, and evidence should be presented at the first opportunity and not held in reserve to be raised after the commissioner issues his or her recommendation.[60]

Again, this analysis is applicable here too. Chase should be able to place all its arguments that are in opposition to SFR's arguments in one responsive pleading to which SFR can timely respond in writing. Allowing Chase to place new arguments in its reply in effect allows Chase to make one set of arguments in its opposition to which SFR can respond by timely filing a reply and different arguments in its reply to which SFR does not have a meaningful opportunity to respond in writing and is in effect ambushed at the hearing.

Here, as in *Valley Health*, if the District Court allowed the new argument it would have "frustrated the purpose" of having a hearing after briefing. Thus, by analogy this case is applicable and this Court should not consider Chase's new

[60] *See Valley Health*, 127 Nev. at 679-80, 252 P.3d at 172-73..

argument.

This Court has also declined to consider new arguments raised in a reply brief on appeal. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011).[61] The District Court did not abuse its discretion for failing to consider Chase's new argument in its reply.

This Court should affirm the District Court's order striking Chase's new argument, and not consider whether Chase's claim is entitled to a six year statute of limitations under 4617(b)(12). However, in the unlikely event this Court disagrees with SFR and determines that the District Court abused its discretion in deciding it would not consider the argument, SFR asks this Court to allow it to supplement its briefing.

D. Chase and SFR have No Contract On Which to Base Chase's Claim.

While the District Court properly struck Chase's arguments that its claim arising from 4617(j)(3) sounds in contract, Chase is also wrong. Chase clings to the idea that the mere existence of a contract—between other parties, regarding other things that are not being enforced here—is a sufficient "similarity" to categorize Chase's claims—based ***entirely*** on a ***statute***—as sounding in contract. In other words, Chase asks this Court to look for some non-existent similarity between its

[61] SFR believes there is only one exception to this rule, subject matter jurisdiction, which can be raised at anytime even by the Court sua sponte.

claim that NRS 116.3116(2) and the Association foreclosure sale violate § 4617(j)(3) and a contract action as defined under Nevada law.

1. A contract action necessarily requires a contract – between the parties.

A contract action first requires an ***actual contract***. Additionally, said contract action must be ***based on the obligations set forth in that contract*** and must be ***between the parties to the contract***. *See Nevada Contract Services, Inc. v. Squirrel Companies, Inc*., 119 Nev. 157, 161, 68 P.3d 896, 899 (2003) (an essential element to a contract claim is that an agreement existed between the parties). Here, the analysis ends swiftly—there is no contract between Chase and SFR. Without said contract, Chase and SFR are not parties to a contract, the claims brought cannot be based on said non-existent contract, nor can it be based on non-existent obligations within said non-existent contract. Chase does not dispute there is no contract between Chase and SFR. Chase admits it is not seeking to enforce a contract here, and certainly not against SFR. In other words, simply because contracts exist between other parties Thus, Chase's claim cannot be a breach of contract claim. Given these undisputed facts, the contractual "hook" to latch Chase's claims to does not exist. Thus, the claim cannot sound in contract, and Chase is not entitled to the 6-year statute of limitations associated with a contract. Rather, the Court must look at the substance of Chase's defense, and that substance reveals *one* resounding

theme—12 U.S.C. § 4617(j)(3).

2. **Wise *and* FDIC *have no bearing here.***

Chase overstates any relevance or persuasive value of Wise[62] and FDIC.[63] Here, there are not "multiple potentially-applicable statutes"[64] under which a claim could reside, nor is this a case where there is a "'substantial question' which of two conflicting statutes" apply.[65] The question here is the nature of the claim itself.

Wise dealt with a claim to recover employee insurance benefits under 29 U.S.C. § 1132(a)(1)(B). The court had to look elsewhere for a proper statute of limitations because "ERISA [(Title 29)] does not contain its own statute of limitations for suits to recover benefits under 29 U.S.C. § 1132(a)(1)(B)."[66] Wise sued because she had returned to her prior employer, GTE, **under the promise** that she would be eligible for all her prior benefits, including long-term disability.[67] In other words, **Wise and GTE had an oral contract**. The Ninth Circuit was called upon to determine which of Washington State's two statutes of limitations for contract claims applied for Wise's contract claims: three-year oral or six-year

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[62] *Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180 (9th Cir. 2010)
[63] *FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304 (9th Cir. 1989
[64] *Wise*, 600 F.3d at 1187 n.2.
[65] *FDIC*, 884 F.2d at 1307.
[66] *Wise*, 600 F.3d at 1184.
[67] *Id*. 1183.

written.[68] Thus, there were at least two statutes of limitations for contract claims that could be applied. The Ninth Circuit ultimately determined that ERISA meant for there to be only one statute of limitations and applied the six-year statute to Wise's claim.[69] But what distinguishes *Wise* from this case, is that there was no question the court was addressing a contract claim. Not trying to determine the actual nature of the claim itself. Here, because there is no contract being enforced, but rather a statutory prohibition, there is no question that a six-year statute of limitations cannot apply.

FDIC dealt with the FDIC's breach of fiduciary duties claims based on **express and implied contracts *between the parties***. Further, with regard to breach of fiduciary duties, the Ninth Circuit noted that several courts had determined that such claims sound in contract.[70] Neither of these cases, nor the propositions for which they stand apply here.

Chase and FHFA are asking this Court to contort the definition of a contract claim to the point of breaking. Under Nevada law, if a claim is not a contract, it is a tort. Accordingly, Chase's claims must fall into the tort categorization of 12 U.S.C. § 4617(b)(12).

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[68] *Id.* at 1184-1185.
[69] *Id.* at 1187.
[70] *FDIC*

E. There Is No Five-Year Statute Of Limitations Applicable To Chase's Claims

1. The District Court correctly found the five-year does not apply to Chase.

"Let us make distinctions, call things by the right names."[71]

The District Court correctly found that Chase's claims were barred by the three-year statute of limitations.[72] Chase's arguments for the five-year statute of limitations fail as neither NRS 11.070 and/or NRS 11.080 are not time-bar statutes, instead, these are standing statutes. In Nevada, "quiet title" is just a slang term used to identify any action where one party claims an interest in real property adverse to another. NRS 40.010 or NRS 30.040 do not have express statute of limitations. Thus, the *title* of Chase's claim does nothing to assist the court in determining which statute of limitations applies. In order to determine this, the Court must look at the nature of the grievance to determine the character of the action, rather than the labels in the pleadings. *Torrealba v. Kesmetis*, 124 Nev. 95, 178 P.3d 716, 723 (2008). Here, Chase sought to amend to allege HERA. But HERA has its own statute of limitations: six-years for contract claims and three-years for torts i.e. non-contract claims. 12 U.S.C. § 4617(b)(12). There is no basis to look outside of HERA given

[71]Henry David Thoreau, Journal, 28 November 1860 at 278, available at https://www.walden.org/wp-content/uploads/2016/02/Journal-14-Chapter-4.pdf. Last visited April 17, 2019.
[72] 4AA_628 at ¶¶ B_C.

that HERA is the claim/right Chase seeks to assert.[73] Regardless, Chase's reliance on NRS 11.070 and 11.080 is fatal because neither provide a statute of limitations for Chase, and even if they did, neither apply to Chase.

2. NRS 11.070 does not provide a five-year statute of limitations for Chase.

NRS 11.070 is not a time-bar statute; instead, it is a standing statute. Regardless, it does not apply to Chase as Chase was never seized[74] nor possessed of the subject property.

3. NRS 11.070 is a standing statute.

Under Nevada rules of statutory interpretation, the Court must first look to the statute's plain language. *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013). If the statute's, "language is clear and unambiguous," the Court

[73] Because there is no analogous state law Federal Foreclosure Bar provision, the extender provision of HERA does not apply.

[74] Seisin is defined as possession of a freehold estate in land. Black's Law Dictionary 1564 (10th Ed. 2014). "Originally, seisin meant simply possession and the word was applicable to both land and chattels. Prior to the fourteenth century it was proper to speak of a man as being seised of a land or seised of a horse. Gradually, seisin and possession became distinct concepts. A man could be said to be in possession of chattels, or of lands wherein he had an estate for years, but he could not be said to be seised of them. Seisin came finally to mean, in relation to land, possession under claim of a freehold estate therein. The tenant for years had possession but not seisin; seisin was in the reversioner who had the fee." *Id*. (citing Cornelius J. Moynihan, *Introduction to the Law of Real Property* 98-99 (2d ed. 1988)). Further, seisin "has nothing to do with 'seizing,' with its implication of violence." *Id*. (citing Robert E. Megarry & M.P. Thompson, *A Manual of the Law of Real Property* 27-28 (6th ed. 1993)). In other words, seisin lies with the record titleholder.

must enforce it "as written." *Id.* (quotation omitted). The Court must "avoid[] statutory interpretation that renders language meaningless or superfluous," and "interpret a rule or statute in harmony with other rules and statutes." *Id.* (quotation omitted).

Rather than define a time-period in which a party must file suit, "founded upon title to real property," NRS 11.070 sets a condition precedent which gives a party standing to bring an action **or** defend an action, and that condition is the party must have been seized i.e. ownership in fee[75] or possessed of the real property in question, five years prior to bringing the action **or** defending the action. Both the title of the statute and the language within, namely "no cause of action…unless" make it clear that the statute is a standing statute. The fact that the statute also limits the **defense** of such an action "unless" the condition precedent exists also makes it clear that NRS 11.070 is not a time-bar statute, but rather a standing statute. This Court, in 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

[75] *South End Minding Co. v. Tinney*, 22 Nev. 19, ___, 35 P. 89, 92 (1894) ("the word 'seised' means something different from simple possession of a claim…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.")

Nev. 365, 369 (1867).

NRS 11.070 makes no mention of an accrual of a claim "founded upon title;" instead, it only discusses the necessary condition a party must have in order to have standing to assert a claim or defense. In this regard, while NRS 11.070 may bar a claim/defense, it will not be because of any time-limitation; it will be because the party was not seized or possessed of the property i.e. the party lacks standing.

4. NRS 11.070 does not apply to the Bank.

NRS 11.070 states in relevant part

> No cause of action…founded upon the **title to real property**,…shall be effectual, unless it appears that **the person prosecuting the action…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…

NRS 11.070 (emphasis added.)

In the present case, Chase sought a declaration that the deed of trust remained a valid lien on the property. Simply because Chase uses the slang term "quiet title" or that it claims the deed of trust still clouds title does not morph the claim into one "founded upon title to real property." *See e.g. Bank of America, N.A. v. Country Garden Owners Association*, Case No. 2:17-cv-01850-APG-CWH, 2018 WL 4305761 (D. Nev. March 14, 2018) (finding NRS 11.070 does not apply to bank's claim); *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:17-

cv-01757-JAD-VCF, 2018 WL 2292807 (D. Nev. May 18, 2018) (finding neither NRS 11.070 nor 11.080 apply to the bank's claim).

As this Court held, while a lien is a monetary encumbrance on property which clouds title, "it exists separately from that title," and therefore an action involving the lien does not relate to title. *Hamm v. Arrowcreek Homeowners Ass'n*, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008). In *Hamm*, this Court noted "a lien right alone does not give the lienholder right and title to the property." *Id.*, quoting *In re Marino*, 205 B.R. 897, 899 (Bankr.N.D.Ill.1997). Rather, "title 'which constitutes the legal right to control and dispose of property' remains with the property owner until the lien is enforced through foreclosure proceedings."' *Id.* quoting Black's Law Dictionary 1522 (8th Ed.2004).

With this principle in mind, NRS 11.070 does not apply to Chase's unpled claim because the claim is not one "founded upon title to real property." Chase, as mere lienholder, claims a lien right, and nothing more. The unpled claim is an attempt to obtain a determination that the lien survived the sale based on HERA; it is not a claim founded upon title. If that was not enough, as discussed above, NRS 11.070 is not a time-bar statute, it is a standing statute; Chase as mere lienholder would never have standing to assert a claim or defend a claim founded upon title to real property because it was neither seized nor possessed of the property.

Chase's attempt to rely on the homeowner's prior seisin or possession of the

Property is unavailing. The statute is clear: "whose title the action is prosecuted" precedes the identification of "ancestor, predecessor or grantor" meaning only if those three categories of people are prosecuting or defending for the title rights of the person who was seized or possessed of the property, will the conditions precedent of NRS 11.070 be met. But Chase does not seek to vindicate the title rights of the prior homeowner; instead, it has no problem with validating part of the sale, the part that divested the homeowner of title, and only seeks to invalidate the part that extinguished the deed of trust. *See Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Association*, 134 Nev. __, 417 P.3d 363 (2018) (recognizing Agency can consent to sale but still assert HERA to prevent extinguishment of deed of trust.)

A plain reading of NRS 11.070 shows the statute has no application whatsoever to Chase. The District Court, therefore, did not err as a matter of law in rejecting a five-year statute of limitations as to Chase's HERA claim. This Court should affirm.

F. NRS 11.080 Does Not Provide a Five-Year Statute of Limitations for Chase.

1. NRS 11.080 is a standing statute.

NRS 11.080 sets the same condition precedent for actions for the "recovery of real property" or the "recovery of the possession thereof." Again, the statute does

not state the action must be filed within five years; instead, the statute states that "no action for the recovery of real property, or for the recovery of the possession thereof… shall be maintained, unless…" the party bringing the action was seized or possessed of the premises five years before commencing the action. The terms "maintained" and "unless" make it clear, that NRS 11.080 is a standing statute.

2. NRS 11.080 does not apply to the Bank.

> NRS 11.080 states in relevant part
>
> > No action for the **recovery** of real property, or for the **recovery** of the possession thereof . . . shall be maintained, unless it appears that the plaintiff . . . **was seized or possessed of the premises in question**, within 5 years before the commencement.

NRS 11.080 (Emphasis added.)

Again, Chase, as a lienholder, sought a declaration that the deed of trust remained a valid lien on the property based on HERA. By way of this unpled claim, Chase does not seek "recovery" or "recovery of possession" of the property. *Bank of America, N.A. v. Country Garden Owners Association*, Case No. 2:17-cv-01850-APG-CWH, 2018 WL 4305761 (D. Nev. March 14, 2018) (finding NRS 11.070 does not apply to bank's claim); *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:17-cv-01757-JAD-VCF, 2018 WL 2292807 (D. Nev. May 18, 2018) (finding neither NRS 11.070 nor 11.080 apply to the bank's claim).

Even if Chase succeeded on its unpled claim, and SFR took subject to the deed of trust, Chase would still have to foreclose on the deed of trust to get possession of

the property. *Hamm*, 124 Nev. at 298, 183 P.3d at 902. Also, just like NRS 11.070, NRS 11.080 likewise requires that before a party can maintain an action to recover real property it must have been seized or possessed of the property. In the context of challenging an NRS 116 sale as a lienholder, Chase does not have standing to assert a claim because it cannot establish it was seized or possessed of the property.

NRS 11.080 has no application whatsoever to Chase. The District Court, therefore, did not err as a matter of law in rejecting a five-year statute of limitations as to Chase's unpled HERA claim. This Court should affirm.

3. The authorities cited by Chase fully support SFR's argument.

Chase bewilderingly cites to *Gray Eagle*,[76] *Weeping Hollow*,[77] *Raymer*[78] and *Scott*[79] to support its position its claim carries a 5-year statute of limitations pursuant to NRS 11.070/11.080. These cases in fact prove beyond any doubt that a five-year statute of limitations cannot apply to Chase's defense. Notably, nowhere in NRS Chapter 11 does the term "quiet title" even appear. There is good reason for this, as the applicable statute of limitation depends on the ownership interest of the party seeking to assert it. As discussed in more detail, *infra*, Chase's confusion—or

[76] *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.*, 133 Nev. Adv. Op. 3, 388 P.3d 226 (Jan. 26, 2017) ("Gray Eagle").
[77] *Weeping Hollow Ave., Trust v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016).
[78] *Raymer v. U.S. Bank*, No. 16-A-739731-C, 2016 WL 10651933 (Nev. Dist. Ct. Dec. 28, 2016).
[79] *Scott v. Mortg. Elec. Registration Sys., Inc.*, 605 F. App'x 598, 600, 2015 WL 657874 (9th Cir. 2015) (unpublished).

purposeful misrepresentation—ignores the fact that the limitations period depends on the precise ownership interest of the party seeking to assert quiet title, an interest which Chase simply does not have.

4. Unlike the parties suing in the cases, Chase has neither title nor possessory interest

Unlike Chase—which has neither title nor possessory interest—the parties suing in *Gray Eagle*, *Weeping Hollow*, *Raymer* and *Scott* actually had title or possessory interest in the property, and therefore there was "seisin" and the claimants seeking to quiet title were therefore "seized or possessed of the premises in question, within 5 years before the commencement thereof."[80] *Gray Eagle* makes this distinction perfectly clear. The Appellant in *Gray Eagle* actually purchased two of the subject lots at a non-judicial Association foreclosure sale pursuant to NRS 116.3116, and had actual title to all three lots, entitling it to seek a true quiet title action. *Gray Eagle*, 388 P.3d at 228-229. Thus, unlike Chase here, which has neither title nor even possessory interest, the party in *Gray Eagle* seeking to quiet title was qualified to bring suit under the seisen statutes. *Gray Eagle*, 388 P.3d at 232 (emphasis added).

5. Neither Raymer *nor* Scott *aid Chase's argument.*

It is the same with the relevant parties in *Raymer* and *Scott*: the former

[80] *See* NRS 11.080 and NRS 11.070 cited herein.

homeowners with possessory interest were seeking to set aside the sale and get clear title. In *Scott,* **the defendant** was a bank with a mere lien interest as is the case here. *Scott,* 605 Fed.Appx. at 600. Nothing in that case supports that a bank has the standing to bring a claim that falls within the parameters of NRS 11.070 or NRS 11.080. Chase also cites to *Weeping Hollow*, which, citing NRS 11.070 correctly states "[u]nder Nevada law, **Spencer** could have brought claims challenging the HOA foreclosure within five years of the sale[.]" *Weeping Hollow Tr. v. Spencer*, 831 F.3d 1110, 1114 (9th Cir. 2016). Put simply, that case addressed only whether the current title holder, Weeping Hollow Trust, had properly named the prior title holder in its action to clear title, not how long the bank had to challenge the extinguishment of the deed of trust. In each of the cases relied on by Chase—*Gray Eagle*, *Weeping Hollow*, *Raymer* and *Scott*—it was the parties who had, or had recently had, a title or possessory interest who could take advantage of NRS 11.070 and NRS 11.080.

Chase's attempt to apply a five-year limitations period under NRS 11.070 and 11.080 fails. Here, Chase has no possessory or other rights to use, enter, or otherwise enjoy the Properties, until and unless it forecloses. Instead, Chase, at best, is a mere lienholder NRS 11.070 or 11.080 do not apply to its claims. Yet, in a last-ditch effort to convince this Court that the five-year statute of limitations is applicable, Bank mistakenly relies on *The Bank of New York Mellon v. Jentz*, Case No. 2:15-cv-1167-

RCJ-CWH, 2016 WL 4487841 (D. Nev. Aug. 24, 2016). But *Jentz* begins with the same mistaken premise that Chase asks this Court to apply—that "quiet title" is but one claim rather than a mere descriptor that requires a court to look at the nature of the claim rather than its name to determine the proper statute of limitations. Thus, *Jentz* provides no persuasive value when NRS 11.070 and 11.080 are interpreted as above.

At bottom, NRS 11.070 and 11.080 do not apply to mere lienholders. Further, 11.070 and .080 provide standing; the statute of limitations to bring the action can be much shorter.

G. There Is No Four-Year Statute of Limitations Applicable to Chase's Claims and Chase Waived this Argument.

Again, Chase waived all alternative statute of limitation arguments by not raising them below. It certainly did not raise an alternative four-year statute of limitations argument. As this Court has enforced time and again, "a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Here, Chase, in opposition to SFR's Second MSJ never asserted this argument in a manner for SFR to respond.[81] [82] Accordingly, this Court should

[81] *See* Chase's Opposition to SFRs Second MSJ at 3AA_534-547; *see specifically*, pp. 543 at Sec. II "Chase's Claims are Timely."
[82] *See* Chase's Opening Brief ("AOB") at pg. 27 Sec. B.

not consider this argument that is not properly before this Court.

H. HERA Bar's Chase's Claims Regardless of Whether the FHFA is a Party

At the District Court, Chase argued that the HERA statute of limitations only applies if FHFA is a party. The District Court correctly rejected this argument.[83] In rejecting this argument, the District Court astutely noted that if this were the case, "it would encourage the FHFA to not be a party."[84] Chase has failed to properly explain why or how the District Court was in error.

The ***only*** reason Chase can even assert 4617(j)(3), is that this Court recognized that a contractually authorized servicer could assert the right, under a principal/agency relationship.[85] In other words, Chase does not have the right, it merely steps into the shoes of FHFA and asserts the right. In this case, Chase ***never***[86] proved it is a contractually authorized servicer of Freddie Mac for the subject loan, and SFR does not concede this fact. But for purposes of this argument, even assuming Chase is the contractually authorized servicer, Chase does not step into only one shoe, it steps into ***both*** shoes. In that regard, if it can assert the right, it is

[83] 4AA_628 at ¶ C-D.
[84] Id. at ¶ D.
[85] *See* Nationstar, 396 P.3d 754.
[86] The District Court granted SFR's Counter-Motion to strike on the basis that Chase disclosed its "evidence" too late; *see* FFCL at 4AA_629; *see also* transcript at 4AA_615:8-24.

equally bound by the limitations that Congress placed on that right. Thus, Chase is bound by the statute of limitations set forth in 4617(b)(12) just as FHFA would be if it asserted the right.

II. CHASE FAILED TO PROVE § 4617(J)(3) APPLIES

A. The District Court Properly Exercised its Discretion Granting SFR's Counter-Motion to Strike.

The District Court did not abuse its discretion in granting SFR's counter-motion to strike. A District Court abuses its discretion when it "bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. ___, ___, 367 P.3d 1286, 1292 (2016). Following the rules and holding a party to the consequences from failing to comply cannot be an abuse of discretion. Otherwise, he rules have no purpose, and certainly no teeth.

Further, all of Chase's arguments ring hollow, when it *voluntarily withdrew* the one motion that might have cured its evidentiary deficiencies—a motion to reopen discovery. Chase sheds crocodile tears over something it had a chance to avoid and, instead, argues the District Court put decided to take the risk that the District Court would strike its untimely exhibits.

1. Chase waived case ending sanctions.

It is well-settled, "a point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered

on appeal. *Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983 . Yet again, Chase for the very first time asserts on this appeal, not in its opposition to SFR's counter-motion to strike,[87] not at the hearing before the District Court, not in **any** pleading before the District Court—but on appeal raises the following new arguments:

1) that the District Court in striking Freddie's late disclosed evidence;

2) that the District Court failed to consider the *Young* factors in issuing its findings, resulting in the District Court abusing its discretion, something it did not argue would be necessary when it opposed SFR's motion;[88]

3) that SFR failed to conduct a meet and confer;

4) that the failure to disclose was harmless.

The Court did not strike the untimely evidence and new claim *sua sponte*. It did so after full briefing and a hearing, where Chase never complained of these failures.[89] In that briefing, Chase never raised, at the hearing or in its briefing, that by the District Court using its discretion to strike the exceedingly late disclosed evidence would result in effect, case ending sanctions. Nowhere in its opposition does Chase argue that the failure to disclose was harmless or case ending sanctions.[90]

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[87] The Bank's opposition to SFR's Counter-Motion regarding striking the undisclosed documents and witness, only argues that the Bank had "an on-going obligation to supplement its NRCP 16.1 disclosures." 3AA_576 lines 16-19.
[88] *See* Appellant's Answer Brief at pp. 48-56, citing *Young v. Ribeiro Bldg., Inc*., 106 Nev. 88, 787 P.2d 777 (1990) ("*Young*").
[89] 4AA_600-624; *see also* transcript of hearing, 4AA_600-618.
[90] 4AA_592 at sec. V; *see also* transcript of hearing, 4AA_600-618

Rather, Chase argues that there is an ongoing obligation to supplement. While that is true, it is timely during discovery. Since these arguments were not raised below, this Court should not consider them.

2. Chase disingenuously over-expands SFR's counter-motion.

Chase blatantly misrepresents SFR's counter-motion to strike, and the District Court's order granting it. The *only* remedy SFR was seeking to obtain from the District Court was for it not to consider the late disclosed exhibits and witness, which the District Court properly exercised its discretion when granting.[91] [92] It followed the Rules of Civil Procedure. This is entirely different from seeking case ending sanctions, which Chase is asserting occurred, which did NOT occur. SFR's Counter-motion **did not** request that the District Court strike Chase's complaint, claims, or otherwise. Neither did SFR seek case ending sanctions, nor did the District Court's order strike Chase's Complaint. Further, SFR did not request that any timely disclosed documents be stricken.

SFR's counter-motion to strike was based on the premise that Chase failed to timely disclose exhibits, and its witness, which should have been in its mandatory

[91] *See* SFR's Counter-motion to strike, 4AA_552-553; *see also* SFR's Reply in support, 4AA_595-599.
[92] *See* District Court's Finding of Facts Conclusion of Law, 4AA_626-630; see also Transcript from hearing, 4AA_600-618; *see specifically*, 4AA_60314-17; 4AA_615:8-19.

initial disclosure.[93] Thus, due to the failure to disclose, SFR asked the District Court to not consider the evidence— which it properly did not consider. *See* NRCP 37(c)(1) ("the party is not allowed to use that information or witness **to supply evidence on a motion, at a hearing**, or at trial, unless the failure was substantially justified or is harmless.") (Emphasis added).

3. ALL of Chase's supplemental disclosures were after the close of discovery.

Here, all of Chase's supplemental disclosures were ***late***. Chase's first supplemental disclosure was served on **May 6, 2016**, the second supplemental disclosure was served on **July 26, 2016**, and then shockingly, **707** days ***after*** discovery expired when the parties were back on remand, Chase served SFR with its third supplemental disclosure on **April 13, 2018**.[94] ***All*** these were each ***well*** past the **May 2, 2016** deadline, a deadline that was *never* extended. Chase chose not to disclose during the discovery period. And, Chase never made an argument to the District Court that its actions were substantially justified or harmless.

The failure to timely disclose was prejudicial to SFR, i.e. not harmless. SFR was unable to defend itself. SFR was deprived of the ability to notice a deposition of Freddie. SFR faced an uphill battel in conducting discovery. Chase should have

[93] *See* SFR's Counter-motion to strike, 4AA_552-553; *see also* SFR's Reply in support, 4AA_595-599.
[94] *Id*.

disclosed the witness and the exhibits in a mandatory initial disclosure. NRCP 16.1(a)(1)(B) and NRCP 26(b).

4. Chase was dilatory, which should end any analysis: it never attempted to re-open discovery.

This Court should not fall for Chase's crocodile tears that the failure to disclose was harmless; it was the opposite. Chase chose the route it took. In fact, Chase knew it had to reopen discovery to use the late disclosed documents in its prior supplements. Therefore it knew it needed to reopen to disclose the documents and witness it eventually put in its last supplement.

In fact, Chase actually filed a motion to reopen after remand. The then bemoans the fact that SFR opposed so it withdrew its motion.[95] Then it did a third supplemental disclosure with the Meyers declaration and exhibits. This is inexcusable for a new claim which Chase had to have the evidence before making the claim, even then Chase did not disclose the evidence it claims it needed.

Yet, failing to follow through on its own motion, Chase now argues that SFR could have moved to re-open discovery. To be clear, **it is not** SFR's duty or responsibility to seek evidence to prove Chase's claims; Chase bears that burden. And Chase failed to seek to re-open discovery. Chase's attempt to shift the focus on

[95] *See* Chase's Motion to Extend Discovery Deadlines at 2AA_268-274; *see also* SFR's Opposition, 2AA_275-286; *see* Chase's withdrawal, 2AA_287-289.

to what SFR might have done, rather than what it should have done is outlandish. attempt to shift the focus on SFR is so outlandish

Examining the timeline of events reveals that the District Court's analysis was correct, and did not abuse its discretion in finding that Chase was not diligent. Chase was dilatory and the inquiry should end there for this Court, as it did with the District Court.

5. Chase knew it needed the evidence and it knew late disclosed evidence may not be considered.

It took **833 days of litigation** for Chase to even plead HERA in its Amended Complaint.[96] If the facts are as Chase says they are, which SFR is not conceding, that the note and deed of trust are Freddie's since September 27, 2006,[97] it begs the following questions:

1) why not allege 12 U.S.C § 4617 (j)(3) in the initial complaint if Freddie purportedly obtained its interest shortly after origination; and for the same reason

2) why not disclose Mr. Meyer and the relevant documents purporting to "prove" Freddie's interest **in its mandatory initial disclosures**?

Assuming for the sake of argument, that this allegation is true, which SFR is not conceding, **then HERA should have been plead in the initial complaint** and

[96] *See* Amended Complaint, 1AA_071-081.
[97] *See* Bank's First MSJ, 1AA_163:16-18.

any and all witnesses, and documents which purport to establish Freddie's purported interest should have been timely disclosed in Chase's initial disclosures at best, at bottom in a timely supplemental disclosure, which left time remaining for SFR to have a meaningful opportunity to defend itself. These are documents Chase should have had in its possession when it amended.[98]

NRCP 16.1(a)(1)(A)(i)-(v) states the required initial disclosures, "**without awaiting a discovery request**" is the name of *any* witness likely to have discoverable information, as well as all documents. *Id*. (Emphasis added).

Here, according to Chase, Mr. Meyer is a witness "likely to have discoverable information."[99] Accordingly, Chase should have disclosed Mr. Meyer *immediately* after the District Court granted Chase's motion to amend its complaint to add 12 U.S.C § 4617(j)(3). Chase failed to timely disclose Mr. Meyer in its mandatory disclosure. This, not an attempt to inflict case ending sanctions, was the basis for the District Court's decision to grant SFR's countermotion to strike. *See* 4AA_629:8-12.

6. Chase withdrew its motion to re-open discovery.

It cannot be repeated too often.: Chase ***voluntarily withdrew*** its motion to re-

[98] Currently before the Nevada Supreme Court is case number 76952, JP Morgan Chase Bank, N.A, c. SFR, where the circumstances are very similar. See SFR's Answering Brief, filed on June 12, 2019.
[99] 2AA_268-274; 2AA_290-314.

open discovery.[100] It just attached the same undisclosed items to its 2018 motion for summary judgment. Chase then blames its choice to withdraw on SFR's opposition. Of course, SFR opposed, for the very reasons set forth in section I 2-5. If Chase needed the witness and exhibits, it should not have voluntarily withdraw its motion to re-open discovery. Of course, SFR opposed. If Chase needed the evidence, which it knew it did base on the First MSJ, it should have argued the motion to the District Court. What is more, the withdrawing of its request would not satisfy the good cause to extend discovery. This is why Chase's cry of "case ending sanctions" rings hollow. If it knew it needed these documents and had every opportunity to plead its case to the District Court in its motion to re-open discovery.

7. The case law Chase relies on is distinguishable.

Chase argues that litigation on the merits is not being penalized by the rules.[101] Recall, again, Chase chose not to play by the rules. It withdrew its motion to re-open. That is why this argument rings hollow. Chase is twisting the concept of litigation on the merits; suffering the consequences designed by the rules is indeed litigating on the merits.

Chase relies on a U.S. District Court order, *Benezette*.[102] In that case, the bank

[100] *See* Withdrawal of Motion, 2AA_287-289.
[101] AOB pg. 49-58.
[102] *Capital One Nat'l Ass'n v. SFR Invs. Pool 1, LLC*, Case No. 2:15-cv-01324-KJD-PAL, 2019 WL 1596656 (D. Nev. 2019), and is attached hereto in SA_00010-13.

made disclosures *seven months* after the close of discovery. The judge in that case, decided in part due to stays, to re-open discovery which would cure any prejudice to SFR.[103] That decision was not only distinguishable but as this Court noted the District Court's decision was discretionary and this Court would not reverse.

Our case is distinguishable. Chase ***withdrew*** its motion to re-open discovery. Chase failed to disclose the evidence it claims it needed. Thus, its voluntary withdrawal of its motion to re-open flies in the face of its arguments that, somehow, the District Court should have granted additional discovery *sua sponte*. It cannot complain that the District Court issued case-ending sanctions when Chase itself, didn't think enough of the evidence to argue its motion to the Court.

Chase's additional arguments all fail. **First**, Chase asserts that "SFR knew for more than three years that [Chase] is relying on the Federal Foreclosure Bar."[104] Chase does not explain how SFR *knew* for this particular case, that Chase is the purported servicer for Freddie, and that Freddie purportedly owned the Note and DOT at the time of the Association foreclosure sale. Something Chase had the burden to prove, through timely disclosed evidence.

Again, Chase has misplaced reliance on case law. Chase relies upon *Capanna*[105] for the proposition that since SFR knew that Chase was relying on the

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[103] *Id.*
[104] AOB at pg. 53.
[105] *Capanna v. Orth*, 134 Nev. ___, 432 P.3d 726 (2018).

Federal Foreclosure Bar, the District Court should have denied SFR's counter-motion to strike. Again, the facts of *Capanna* are distinguishable.

In *Capanna* the District Court "carefully considered the **timeliness** of Orth's disclosures and found that Orth **satisfied his duty to supplement the disclosures at appropriate intervals**." *Capanna*, 432 P.3d at 734, (emphasis added); *see also* NRCP 26(e)(1). This decision too, was discretionary.

Here, Chase did not "satisfy its duty to supplement at appropriate intervals" Chase did the exact opposite by not disclosing the evidence and witness it needed. Here, the District Court properly exercised its discretion in finding Chase did not supplement at the appropriate intervals, and certainly not timely.

The cases cited by Chase, instead support affirming the district court – a district court's decision on whether to accept or strike evidence is discretionary and this Court will not disturb it absent some real showing of abuse.

8. Knowledge of a claim does not equate to knowing the evidence the claimant will produce

Chase absurdly argues that SFR was on notice of Chase's claims arising under the Federal Foreclosure Bar for at least three years. While SFR may have gleamed this knowledge from a plain reading of the allegations contained in the Amended Complaint, Chase ignores a crucial factor—that it still needs to establish those same allegations with admissible evidence, i.e. **it is Chase's burden to prove**; not SFR's

to disprove. Just because Chase's amended complaint literally contains the magic words "Federal Foreclosure Bar" does not mean Chase automatically wins, nor does it wipe all their failures away. Chase then needs to satisfy its burden by timely producing admissible evidence. One aspect of what makes evidence admissible, is that it is timely disclosed. Thus, it goes without saying that if Chase failed to timely disclose the evidence to establish its purported claims, then Chase cannot prove its claims, and Chase knew that. Whether SFR knew from reading the Amended Complaint about Chase's claim is not the issue; the real issue is whether Chase can establish its claims via admissible evidence, which it cannot. This is just like a plaintiff alleging it slipped and fell at defendant's casino. Plaintiff can allege this in its complaint, but if plaintiff cannot meet its burden of establishing duty, breach, causation and damages, by timely disclosing necessary documents and timely disclosing an expert witness, then the allegations contained in the complaint are meaningless. And again, SFR should not be required to reopen discovery to prove Chase's case.

Chase argues that any surprise surrounding Chase's late disclosure was "dissipated" in the years post disclosure. Again, this argument fails. Chase acts as if somehow length of time acts as a vaccination for their failure to timely disclose, it does not. The rules or the law in Nevada do not have such an exception. Surprise is not the issue. Again, Chase could have moved to reopen and made this argument

there; it did not. Chase sued SFR in this specific case, regarding this specific Property. This means that Chase needs to prove its allegations contained in its complaint as to this specific Property—i.e. this is a closed universe for the parties and this Court. This Court must consider what occurred HERE, which is nothing. Chase did not timely disclose Mr. Meyer or the exhibits. And again, the real issue is not "surprise," or length of time. **The issue is whether Chase timely disclosed: it did not.**

Chase argues that SFR "has extensive" litigation regarding the Federal Foreclosure Bar. The same applies to Chase. And again, the argument is non-responsive to whether the District Court abused its discretion in granting SFR's counter-motion. Again, this is a closed universe about the legal and factual issues as they relate to this particular case. This means that Chase needs to prove that the note and DOT were property of the Agency, such that 12 U.S.C. § 4617(j)(3) is triggered, and that this purported interest was in place when the sale occurred, which Chase cannot do here. If this evidence was so necessary, then Chase knew its case depended on timely disclosure. Instead Chase relies upon cases where a judge exercised its discretion in a contrary matter. But again, the standard is here is discretion.

This Court recently affirmed a district court's order that declined to consider a declaration **that was not provided during the discovery period**. *See Green Tree*

Servicing, LLC v. SFR Investments Pool 1, LLC, 435 P.3d 666 (Nev. 2019) (unpublished disposition) ("*Grey Spencer*"). Just as this Court affirmed the District Court's discretion in *Grey Spencer*, the same result should apply here.

In light of this, the District Court properly exercised its discretion by granting SFR's countermotion to strike.

Accordingly, the District Court's order should be ***affirmed***.

B. The District Court did not make Findings as to Freddie's Ownership Absent the Documents It Struck.

After first bemoaning "case-ending sanctions," Chase then argues that SFR's counter-motion to strike was immaterial because Chase had evidence sufficient to grant its motion for summary judgment. First, no matter the evidence actually produced, the District Court found Chase's claim time-barred and, as a result, the District Court did not need to reach findings and conclusions on the counter-motion because finding Chase's claims as time-barred is case dispositive.

As to the finding in the District Court's Order of Freddie's ownership, it must be remembered that the findings related to pages 3-7 of Chase's opposition to SFR's motion for summary judgment.[106] But a review of those pages demonstrate that Chase relied almost exclusively on the documents the Court struck.[107] And during

[106] 4AA_625-630.
[107] 2AA_290-314; 3AA_315-523; 4AA_548-567.

the hearing, the District Court expressed its favor of the "reasoning" in those pages before it ever decided the motion to strike.[108] Thus, it cannot be said that the District Court did not adopt pages 3-7 whole cloth, based on argument relying on the documents that it struck. The District Court never expressly stated that it found Freddie ownership in the absence of the Freddie records and declaration. Thus, if this Court were to disagree with the District Court on the statute of limitations, this Court must remand for the District Court to make findings and conclusion based on the evidence actually before it. As this court recognized "[t]his Court is not a fact-finding tribunal; that function is best performed by the District Court." *Zugel*, 99 Nev. at 100, 659 P.2d at 296. *citing*, *Zobrist v. Sheriff*, 96 Nev. 625, 614 P.2d 538 (1980) Even on summary judgment, factual issues should be decided by the District Court in the first instance. *See Id*.

III. ALL ARGUMENTS WAIVED OR OTHERWISE NOT PRESERVED AS DISCUSSED ABOVE, ARE LIKEWISE WAIVED AS TO AMICI

The Amicus Brief by the FHFA raises the same arguments that Chase raised in its Opening Brief, including the same arguments which Chase waived, which SFR objected to. If this Court considers the waived arguments in the Amicus Brief, it would circumvent *Old Aztec* and waiver. Accordingly, this Court should adopt the rule from sister jurisdictions where this practice is not allowed. "It is settled that an

[108] 4AA_600-624.

amicus 'cannot raise issues that have not been preserved by the parties,'" the court held in *Alliance Home of Carlisle, Pa. v. Board of Assessment Appeals*, 919 A.2d 206, 221 n. 8 (Pa. 2007). Amicus parties are limited to issues "preserved or raised by the parties themselves," as the court held in *Commonwealth v. Allshouse*, 36 A.3d 163, 179 n.18 (Pa. 2012). Appellate courts "will not permit [an] amicus curiae to raise issues which the petitioner himself is barred from raising by failing to argue them below," the court held in *Seidman v. Insurance Commissioner*, 532 A.2d 917, 920 (Pa. Cmwlth. 1987).

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CONCLUSION

In this case, Chase presented a plethora of failures: failure to timely plead HERA, failure to follow through with its attempt to re-open discovery, failure to timely disclose exhibits and witnesses, and failure to properly raise arguments before the District Court. An Appeal is not a place for an appellant to try to correct us own failures. The District Court correctly found and concluded that Chase's claims are time-barred. Therefore, this Court must affirm the District Court's order.

DATED: July 14, 2019. **KIM GILBERT EBRON**

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CERTIFICATE OF COMPLIANCE

1. I 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 with 14-point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, is 55 pages long and contains 13,083 words.
3. I hereby certify that I have read this appellate 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), 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.

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4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of July, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 14th day of July, 2019. Electronic service of the foregoing **Amended Respondent's Answering Brief** shall be made in accordance with the Master Service List as follows:

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Dated this 14th day of July, 2019.

/s/ Jacqueline A. Gilbert
An employee of KIM GILBERT EBRON