**Case No. 81129**

IN THE SUPREME COURT OF NEVADA

U.S. BANK, N.A., AS TRUSTEE FOR THE SPECIALITY UNDERWRITING AND RESIDENTIAL FINANCE TRUST AND MORTAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2006-BC4

Plaintiff-Appellant,

vs.

THUNDER PROPERTIES, INC. AND WESTLAND REAL ESTATE DEVELOPMENT AND INVESTMENTS,

Defendant-Respondents.



# BRIEF OF AMICUS CURIAE SFR INVESTMENTS POOL 1, LLC, IN SUPPORT RESPONDENT'S BRIEF

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## NRAP 26.1 DISCLOSURE

The undersigned counsel to amicus SFR Investments Pool 1, LLC ("SFR") 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.

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

Amicus SFR is represented by Jacqueline A. Gilbert, Esq., and Karen L. Hanks, Esq. of Kim Gilbert Ebron.

DATED this 16th day of February, 2021.

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## INTEREST OF THE AMICUS CURIAE

SFR Investments Pool 1, LLC ("SFR") has purchased properties at association non-judicial foreclosure sales. *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 743, 334 P.3d 408, 409-10 (2014). Many of these properties are the subject of lawsuits in Nevada's state and federal courts.

DATED this 16th day of February, 2021.

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## INTRODUCTION

The Banks' suggestion that no statute of limitations should apply to a lienholder's challenge to a foreclosure sale not only runs contrary to Nevada law, but is absurd. At its root, the Bank's argument ignores an NRS 116 foreclosure sale is presumed valid, that certain recitals related to noticing and default are conclusive and the pre-2015 version of NRS Chapter 116 prohibited a challenge in equity. The mere fact this Court upended the conclusive recitals and the clear "without equity" language of NRS 116.31166(3), does not obviate the requirement that a lienholder (or any other party seeking to alter the presumptive validity of a sale) must file a lawsuit to invoke a court's equitable powers.

Not only must a party file a lawsuit, it also bears the burden of proving various facts depending on the challenge alleged. This is particularly true in light of the fact that for nearly every NRS 116 sale prior to 2015, the public record is completely devoid of anything amiss with the sale. Failure to file said lawsuit means the foreclosure sale is forever presumed valid and that a party having the potential to challenge the sale has forever waived the right to do so whether that be by claim or defense. To hold otherwise cuts against the public policy of finality behind non-judicial foreclosure sales.

While the Legislature intended to insulate bona fide purchasers from such lawsuits, this principle was also eroded by the Court when this Court ruled BFP status irrelevant in the context of a void sale. Despite the fact the law in Nevada draws no such distinction, bona fide purchasers found themselves ensnared in costly, lengthy litigation. All the while having their property rights hamstrung.

There is absolutely no basis for this Court to afford a party eternity to challenge a foreclosure sale. There is likewise no basis to even afford them anything in the range of five to 40 years to challenge a sale. A party knows, or reasonably should know, once a sale occurs, whether it has a basis to challenge the sale. Thus, the time-period for making such a challenge must be short. Otherwise, the principle behind BFP is further eroded. At most, such a challenge must be brought within three years, but frankly a few months would suffice. This short monthly period is consistent with the current versions of NRS Chapter 107 and NRS Chapter 116 and the policy behind BFP status.

## ARGUMENT

### I. A LIENHOLDER, LIKE THE BANK HERE, MUST FILE A CLAIM TO CHALLENGE THE VALIDITY OF A FORECLOSURE SALE.

This Court held "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." *SFR,* 130 Nev. at 743, 334 P.3d at 409-10. NRS 116.31166 provides default and noticing are

conclusive. Additionally, prior to 2015, NRS 116.31166 provided "the sale of a unit pursuant to NRS 116.31162 and 116.31164 and section 6 of this act vests in the purchaser the title of the unit's owner **without equity**…" NRS 116.31166(3) (emphasis added.). Now, the amended version of NRS 116.31166 expressly insulates a bona fide purchaser's title after the expiration of the 60-day redemption period. *See* NRS 116.31166(10).

This means noticing and default cannot be rebutted,[1] and equity cannot be used to challenge the sale. But this Court in *Shadow Wood*, held the conclusive recitals could be challenged in equity. S*hadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 366 P.3d 1105 (Nev. 2016). This is key because the only way to invoke the Court's jurisdiction to sit in equity is through a lawsuit. This Court even recognized as much recently. *See BDJ Investments, LLC v. U.S. Bank*, No. 77709, 472 P.3d 193 at *1 (Nev. Sept. 18, 2020) (unpublished disposition) (noting *Shadow Wood* requires that a party invoke equitable relief.)

In light of the conclusive recitals, as well as the "without equity" language, there should have been no way for a bank to challenge any aspect of the sale, and this Court recognized as much in *Shadow Wood*. *Shadow Wood*, 132 Nev. at 56, 366

[1] *See Flangas v. State*, 104 Nev. 379, 381, 760 P.2d 112, 113 (1988) (discussing how a conclusive presumption is not disputable whereas a rebuttable presumption is).

P.3d at 1110. Specifically, this Court acknowledged NRS 116.31166 could be read to establish a default justifying a foreclosure even when no such default existed. The Court rejected such a "breathtakingly broad" and "probably legislatively unintended" reading of NRS 116.31166, and instead, found "**courts** retain the power, in an appropriate **case**, to set aside a defective foreclosure sale on **equitable grounds**." *Id.* at 1111 (emphasis added). The Court dedicated a rather lengthy string cite to support this conclusion, and each and every authority has one thing in common: they all discuss a challenge to the sale and proof/grounds to set aside the sale. *Id.* at 56, 1111-1112. In other words, they all contemplate a lawsuit challenging the sale, and then some proof as to why the sale should be set aside/voided.

One source cited by this Court even uses the phrase "equitable action." *Id.* at 59, 1112 citing 1 Grant S. Nelson, *Real Estate Finance Law, supra,* § 7:23, at 986–87 ("After a defective power of sale foreclosure has been consummated, mortgagors and junior lienholders in virtually every state have an **equitable action** to set aside the sale.") (emphasis added). Yet another source explains conclusive recitals are "conclusive, *in the absence of grounds for equitable relief*." *Id.* citing *Holland v. Pendleton Mortg. Co.,* 61 Cal.App.2d 570, 143 P.2d 493, 496 (1943) (emphasis in original). Put another way, noticing and default are conclusive until proven otherwise, in a court of law. In the context of an association sale, this means the validity of the sale is conclusive until a bank comes into court and proves otherwise.

And, that the relief to be granted is also equitable, even a challenge to default. See Shadow Wood, 132 Nev. at 58-59, 366 P.3d at 1110-1112 (discussing giving equitable relief where the challenge is to default). But it is axiomatic, before a party can invoke the Court's equitable powers, it must file a timely lawsuit to challenge the sale. See id at 57-58, 366 P.3d at 1111 (a person not in possession must invoke the court's equitable jurisdiction to challenge title).

## II. A LIENHOLDER MUST PROVE IT DELIVERED A VALID TENDER

A lienholder must establish all aspects of a valid tender because until adjudication of the facts surrounding tender, a lienholder only speculates it did what was necessary. A valid tender is payment of the super-priority portion in full. *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 607, 427 P.3d 113, 118 (2018) ("*Diamond Spur*"). The super-priority portion of the Association's lien consists of an amount equal to nine months of assessments for common expenses and any maintenance and nuisance-abatement charges incurred pursuant to NRS 116.310312. *Id.* at 606. NRS 116.310312, in addition to the actual costs for the abatement or maintenance also includes "reasonable inspection fees, notification and collection costs and interest…" NRS 116.310312(4) (emphasis added).

Further, this Court held in *Diamond Spur*, "[i]n addition to payment in full, valid tender must be unconditional, or with conditions on which the tendering party

has a right to insist. *Diamond Spur*, 134 Nev. at 607, 427 P.3d at 118. Thus, it is not sufficient a lienholder paid money to an association; instead, it must have delivered the right amount and without conditions. The only way to adjudicate this is through a court action. Even where no money is delivered, the lienholder must still prove a known policy of rejection. *7510 Perla Del Mar Ave Trust v. Bank of America, N.A.*, 136 Nev. 62, 458 P.3d 348 (2020).

What is more, this Court has confirmed the burden of proving a valid tender lies with the tendering party. *Resources Group, LLC v. Nevada Association Services, Inc.*, 135 Nev. 48, 49, 437 P.3d 154, 156 (2019). In *Resources Group*, the issue was not even valid tender, it was whether the tender was delivered prior to the sale. *Id.* at 156-57. Because the tendering party did not prove its tender arrived prior to the sale, it was divested of title to the property, and title passed to the third-party bona fide purchaser. *Id.* at 159. Thus, the timing of delivery is yet another issue that must be adjudicated by a court before it can be said a lienholder tendered such that the deed of trust avoided extinguishment.

All told there is no conceivable challenge a lienholder could have that does not require court adjudication. Unlike validity of the foreclosure sale and its results, there is no presumption of tender, excuse or unfairness. Moreover, a party challenging on these bases does not have a right to presume any attempted payment, excuse thereof or alleged unfairness will be validated by a court. All of the

challenges allowed by the Court require factual proof and such proof can only be made by invoking the Court's equitable powers through a lawsuit. This factual proof is particularly imperative when the public record shows no evidence whatsoever that any of the challenges this Court has allowed to permeate this area, exist in the first place.

## III. FAILURE TO TIMELY FILE A CLAIM RENDERS THE VALIDITY OF THE SALE FOREVER UNASSAILABLE.

If a lienholder fails to timely file a judicial action challenging the validity of the sale, that lienholder has forever waived the right to challenge the sale, whether that be by way of a claim or a defense. Again, the Legislature intended foreclosure sales to be final. Thus, bona fide purchasers, title companies and the world should be able to rely on a specified time frame after the sale as the benchmark upon which the validity of the sale can no longer be assailable. Put differently, there must be a point where a bona fide purchaser can obtain title insurance. Contrary to the Bank's contention, a bona fide purchaser should not be in an endless state of flux and prevented from obtaining title insurance perpetually. By finding a lienholder must timely file suit to challenge a foreclosure sale, and that failure to do so means the conclusive and presumptive validity of the sale, which necessarily includes presumptive extinguishment of all deeds of trust, is final and unassailable, provides

the security the Legislature intended bona fide purchasers to have in relation to a foreclosure sale in the first place.

What cannot be permitted is to allow a lienholder to ignore the effects of the association foreclosure sale and proceed as if the deed of trust was not extinguished based on non-public actions. *See SFR Investments Pool 1, LLC v. U.S. Bank*, Case No. 3:20-cv-00604-LRH-WGC ("Sand Crane") (federal court dismissed U.S. Bank's complaint for lack of Article III standing and U.S. Bank proceeded with a non-judicial foreclosure forcing a lawsuit by SFR to stop the sale.) In *Sand Crane*, there is no cognizable challenge to the sale, and yet SFR is locked in more litigation, after already being locked in litigation since 2016. Additionally, a lienholder facing an imminent decision by a court finding its quiet title claim filed four years after the foreclosure sale time-barred should not be able to conduct a non-judicial foreclosure sale during the pendency of the quiet title claim. *See The Bank of New York Mellon v. The Foothills at MacDonald Ranch*, Case No. 2:17-cv-1195-APG-PAL ("Liege").

Even worse, a lienholder cannot have its claim challenging an association foreclosure sale, filed nearly six years after the sale, ruled time-barred by a Court of law, and then turn around and proceed with a non-judicial foreclosure. *See SFR Investments Pool 1, LLC v. The Bank of New York Mellon*, No. 81604 (the underlying case numbers are Case No. 2:18-cv-00599/Case No. A-19-790150) ("Droubay.") Like that in Sand Crane, in Droubay, SFR was forced to file suit to stop the bank

foreclosure only to be met with defenses of tender, despite the fact that the previous quiet title claim that was ruled time-barred was based on tender.

In yet another case, after no claim was filed by Bank of America, during the five years after the association foreclosure sale, SFR had to file suit in order to get title insurance. *See SFR Investments Pool 1, LLC v. Bank of America*, N.A., Case No. 2:19-cv-01534-JCM-DJA ("Badby"). In Badby, Bank of America had the audacity to argue SFR's claim was time-barred, which the court initially agreed with, but then SFR filed a motion for reconsideration based on this Court's decision in *Berberich*,[2] which was granted. Now, despite there being no tender or any other known challenge to the sale, SFR is marred in litigation while Bank of America goes on a fishing expedition to find some scintilla of a reason to challenge the sale.

Worst yet, while SFR's appeal was pending before the Ninth Circuit on the sole issue of *Bourne Valley*, after this Court issued *Star Hill*,[3] BNY Mellon conducted a non-judicial foreclosure sale, and the property sold to a third-party. The *Bank of New York Mellon v. Meister Park Homeowners Association*, Case No. 2:16-cv-01969-GMN-GWF ("Ben Johnson"). Because of the procedural posture of the case, SFR was forced to wait until the sale, before it could file a separate action for

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[2] *Berberich v. Bank of America, N.A.*, 136 Nev. 93, 460 P.3d 440 (2020).
[3] *SFR Investments Pool 1, LLC v. Bank of New York Mellon*, 134 Nev. 483, 422 P.3d 1248 (2018) ("*Star Hill*").

wrongful foreclosure. After which, the Ninth Circuit reversed and remanded the case, only for BNY Mellon to now argue because the 107 sale buyer was not part of the underlying litigation, the Court cannot enter judgment in favor of SFR.[4] To avoid SFR's tenant being disrupted by the 107 purchaser (an act threatened by the 107 purchaser) SFR was forced to deposit the rents, less expenses, into a trust account.

All of these examples highlight why a lienholder who fails to timely challenge a sale cannot then masquerade a time-barred claim as a defense. *City of Saint Paul v. Evans*, 344 F.3d 1029, 1035-36 (9th Cir. 2003) (barring City's defense under statute of limitations because defenses were "mirror images of time-barred claims"). In *Evans*, the Ninth Circuit, noted a party cannot "engage in a subterfuge to characterize a claim as a defense in order to avoid a temporal bar." *Evans*, citing *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1488 (1983) (holding laches barred a pre-enforcement declaratory judgment action alleging a price regulation was invalid). *See also Gilbert v. City of Cambridge*, 932 F.2d 51, 58 (1st Cir. 1991) (holding temporal bar cannot be sidestepped by asserting a defensive declaratory judgment claim); *Clark v. Slack Steel & Supply Co.*, 611 P.2d 80, 83 (Alaska 1980)

[4] It bears noting the 107 sale buyer is not a bona fide purchaser in this case because SFR recorded a lis pendens and announced at the sale the appeal was pending.

(dismissing, as barred by statute of limitations, plaintiff's affirmative claim a contract be declared void because it was formed under duress).

What should be prohibited is permitting a lienholder to avoid the temporal bar by forcing a lawsuit by the bona fide purchaser, only to then masquerade the time-barred claim as a defense. *See Davis v. 24 Hour Fitness Worldwide, Inc.*, 75 F. Supp. 3d 635 (D. Del. 2014). In *Davis*, the Court applied *Evans* to find a defendant's defense time-barred because the defendant—like the banks here—invited the lawsuit by its conduct, then attempted to assert identical time-barred affirmative defenses and counterclaims. The *Davis* court refused to permit the same chicanery present in SFR's examples, finding the defendant attempted the same subterfuge recognized in *Evans* and refused to condone it:

> [R]ather than initiate a lawsuit of its own, 24HFW elected simply to repudiate the PSA and invite a lawsuit from Davis. And after the lawsuit was filed, 24HFW asserted identical affirmative defenses and counterclaims for affirmative relief, seeking declaratory judgment and damages….24HFW abandoned its right to seek solace in the status of a defendant [and] cannot hide behind the maxim applicable to defenses asserted in the normal course nor may it sidestep the temporal bar to its claims.

*Id.* at 1036.

This Court should similarly refuse to invite such chicanery. A quiet title action necessarily requires a decision as to the property right between the parties. But when a lienholder fails to timely file such a claim, it forever waives the right to thereafter

challenge the sale by way of a claim or a claim masquerading as a defense after forcing the hand of the bona fide purchaser.

## IV. THE LEGISLATURE INTENDED FOR BFPS TO BE INSULATED FROM ANY CHALLENGES TO FORECLOSURE SALES

The concept of a bona fide purchaser has long been recognized in Nevada,[5] but in 2013, the Legislature codified the definition in NRS 111.180(1). NRS 111.180(1) defines a BFP as

> Any purchaser who purchases an estate or interest in any real property in good faith and for valuable consideration and who does not have actual knowledge, constructive notice of, or reasonable cause to know that there exists a defect in, or adverse rights, title or interest to, the real property is a bona fide purchaser.

NRS 11.180(1).

Additionally, NRS 111.180(2) has long protected BFPs even where fraud is involved. The Legislative minutes which brought about codification of BFP support the notion that BFPs were always intended to be protected from any challenge to a foreclosure sale. As Sylvia Smith, President of Nevada Land Title Association testified, BFP "is vital if the former owner shows up to claim title, since the BFP

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[5] *Swartz v. Adams*, 93 Nev. 240, 246, 563 P.2d 74, 77 (1977) (finding that where notice of sale was not given to owners, property still could not be returned to owners because property was purchased by a BFP); *see also*, NRS 111.325, NRS 645F.440 and NRS 205.372.

will keep the asset and the former owner or party who claims to have an interest would have to look to the fraudulent seller for financial compensation." *See* Minutes of the Senate Committee on Judiciary 77th Session, April 1, 2013. This is not to say a party cannot challenge a foreclosure sale, but that party "cannot kick out the new purchaser from the property who in good faith bought the property as a BFP." *Id.* at p. 28. As Russell Dalton, Chairman of Nevada Land Title Association testified,

> This bill protects an innocent party who buys a property at a foreclosure sale…It requires that the former borrower or any other party that claims a defect in the foreclosure process to seek monetary damages against the bank or those parties who wronged that borrower as opposed to disrupting the title, interest and ownership of the buyer after the foreclosure sale.

*Id.* at p. 28.

When Senator Ford questioned the need for codification given the concept of BFP has been in existence forever, Zachary Ball of Nevada Land Title Association testified, "the concept is not secured. That is what we are attempting to do." *Id.* at 28-29. Mr. Ball further noted that while the concept of BFP appears in other parts of the Nevada Revised Statutes,[6] those statutes protect a BFP only from a specific group of wrongdoers. As Mr. Ball testified,

> It will be greatly strengthened by codification within the statute. We are looking at a specific court function. In order to prevent those lawsuits,

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[6] *See* NRS 111.325, NRS 645F.440 and NRS 205.372.

> this gives the title industry the ability to better rely on the Nevada statutes and law at the transactional phase.

*Id.* at 30.

Finally, as Senator Hutchison questioned, "I assume you want to strengthen the BFP status to provide the subsequent purchasers some certainty and let them move on with life" to which Mr. Ball responded, "[t]hat is correct." *Id.* at p. 31.

What is clear from the legislative history of NRS 111.180, the driving force was to strengthen BFP status in Nevada such that courts understood this status cloaked every real estate transaction in Nevada, including all foreclosure sales. And this is irrespective of whether the particular statute mentioned BFP because NRS 111.180 applies whole cloth to any and all real estate transactions. Most importantly, this status is intended to insulate BFPs from lawsuits which challenge foreclosure sales; the idea being a BFP's title will not be affected by any such challenge because the remedy for the aggrieved party is limited to money damages, if in fact it would be entitled to any.

In that regard, when this Court issued *Diamond Spur*, and held SFR's status as a BFP was irrelevant because the sale was void, this was in direct contravention of NRS 111.180 because the application of NRS 111.180 does not depend on any distinction between void and voidable sales. Instead, BFP status overrides any challenge to a foreclosure sale unless otherwise specified in a separate statute. There

being no such statute governing an NRS 116 sale prior to 2015,[7] BFP status is always relevant. *See In re Fountainbleu Las Vegas Holdings*, 128 Nev. 556, 577, 289 P.3d 1199, 1212 (2012) ("We have recognized that…equitable principles will not justify a court's disregard of statutory requirements.") Additionally, "[w]hen a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch." *Id.*

To be clear, SFR does not raise this issue to rehash *Diamond Spur*. Instead, SFR raises this issue to highlight the absurdity of the Bank's suggestion it should have unlimited time to challenge a foreclosure sale. The Legislature intended foreclosure sales to have finality. But this Court has eroded this policy behind finality by first finding conclusive recitals are rebuttable, then allowing a party to invoke equity, and then finding BFP status is irrelevant when the challenge involves tender. This Court should not further erode the Legislature's intent by finding no statute of limitations.

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[7] Now, the only relevant time period is the 60-day redemption period. Once this time expires, a BFP's title is forever protected from any challenge to the sale. *See* NRS 116.31166(10).

## V. AT MOST, THREE-YEAR STATUTE OF LIMITATIONS SHOULD APPLY

The Bank concedes the five-years referenced in NRS 11.070 and 11.080 do not apply to it. But the answer is not the statute of limitations should thus be considerably more. That is absurd. In every case where a bank, as lienholder, challenges an NRS 116 sale, whether the allegations sound in tender, fraud, unfairness or oppression, lack of compliance or constitutionality, all the allegations challenge how the Association conducted the foreclosure.

NRS 11.190(3)(a) provides that an "action upon a liability created by statute, other than a penalty or forfeiture" must be commenced within three years. "The phrase 'liability created by statute' means a liability which *would not exist but for the statute*." *Torrealba v. Kesmetis*, 124 Nev. 95, 102, 178 P.3d 716, 722 (2008). Regardless of how the allegations and causes of action are labeled, "it is the nature of the grievance rather than the form of the pleadings that determines the character of the action." *Id*. at 723. *See also*, *Stalk v. Mushkin,* 125 Nev. 21, 25, 199 P.3d 838, 841 (2009) (noting that the nature of the claim, not its label, determines what statute of limitations applies).

### A. An NRS 116 Sale is a Statutory Foreclosure

Again, there is a presumption an association sale was properly conducted, and a properly conducted association foreclosure sale extinguishes all junior interests, including deeds of trust. *Nationstar Mortgage, LLC v. Saticoy Bay Series 2227*

*Shadow Canyon*, 133 Nev. 740, 745, 405 P.3d 641, 646 (2017). Thus, any challenge to the presumptive extinguishment of the deed of trust is, by its very nature, a challenge to an association's actions under the statute in conducting the foreclosure. And this is evident by the countless complaints banks have filed. All of the allegations involve complaints as to how the association failed to comply with NRS 116 or failed to conduct the foreclosure in a way that was consistent with NRS 116. This is true even where a bank alleges tender because any allegation that the super-priority portion was paid, is challenging the fact that a default existed thereby challenging the association's authority to foreclose. *See Diamond Spur,* 134 Nev. at 611, 427 P.3d at 121 (noting a trustee has no power to convey an interest in land where the obligation is not in default). This is consistent with other opinions from this Court on wrongful foreclosure. *See Collins v. Union Fed. Sav. & Loan A''m*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983) ("An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale."). *See also, McKnight Family, LLP v. Adept Management Services, Inc*., 129 Nev. 610, 616, 310 P.3d 555, 559 (2013) ("A wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself.").

Because any challenge to an NRS 116 sale raised by a bank as a lienholder, challenges the conduct of the Association under NRS 116, a bank's claim, no matter how titled, is an "action upon a liability created by statute," and therefore carries a three-year statute of limitations.

### B. Declaratory Relief is a Form of Liability

Black's Law Dictionary defines "liability" as "legally accountable" and "legal responsibility to another…enforceable by a civil remedy." Liability, Black's Law Dictionary (11 ed. 2019). While the Bank may attempt to distinguish declaratory relief as relief not holding SFR and other purchasers liable, this is a misnomer. When a lienholder seeks to set aside a sale or seeks a declaration a deed of trust still encumbers the property by way of an NRS 40.010 claim, rest assured the purchaser is held accountable for the association's failure to comply with NRS 116. Whether a purchaser like SFR loses its fee simple ownership or takes the property subject to a six figure plus deed of trust, the purchaser becomes legally responsible for an association's breach of NRS 116. In fact, where the property remains subject to the deed of trust, the title holder becomes legally responsible to pay the debt underlying the deed of trust or face enforcement via a foreclosure. Calling this just a declaration of rights as opposed to liability is a distinction without a difference.

## VI. IT IS UNTENABLE CLAIMS CHALLENGING THE SALE AGAINST THE ASSOCIATION CARRY A THREE-YEAR STATUTE OF LIMITATIONS, BUT WHEN ALLEGED AGAINST A PURCHASER, WOULD NOT CARRY THE SAME THREE-YEAR STATUTE OF LIMITATIONS.

This Court has previously found a bank's claims for wrongful foreclosure and breach of statutory duty, pled against an association, carry a three-year statute of limitations pursuant to NRS 11.190(3)(a). *See U.S. Bank v. SFR Investments Pool 1, LLC*, 461 P.3d 159 (Nev. 2020) (unpublished disposition). The same should hold true for an NRS 40.010 claim asserted against a purchaser. To be clear, the statute in question is not NRS 40.010, but rather NRS 116. Specifically, the very same allegations that form the basis for the claims against an association are the same allegations that form the basis for the quiet title claim against a purchaser. This is so because what drives the "adverse claim" against a purchaser is not found in NRS 40.010 (this is just the vehicle); instead, the engine that drives the "adverse claim" is the lienholder's challenge to the validity of the association sale, either in whole, or in part. And the only way a lienholder invalidates the sale—in whole or in part—is to attack an association's compliance with NRS 116 or authority to even act under NRS 116.

This is why when quiet title is pled, it becomes imperative to analyze the underlying basis for the "adverse claim," as opposed to focusing on the label of the claim. 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,* 124 Nev. at 102, 178 P.3d at 723; *Stalk*, 125 Nev. at 25, 199 P.3d at 841. In that regard, depending on what gives rise to the "adverse claim" under NRS 40.010, the statute of limitations can vary. For instance, if the premise of the "adverse claim" under NRS 40.010 is fraud, this would carry a three-year statute of limitations. *See* NRS 11.190(4)(c).

When a lienholder's "adverse claim," like the Bank's here, is contingent upon challenging the validity of the sale—in whole or in part—then at most, this type of quiet title claim carries a three-year statute of limitations because the claim attacks an association's compliance with NRS 116. Thus, it makes absolutely no sense NRS 11.190(3)(a) governs claims against an association, but does not equally govern the quiet title claim against a purchaser. The claims are all the same; they just carry different labels. As this Court held, "[t]he general rule for determining which statute of limitations should apply by analogy to a suit in equity is that the applicable statute of limitations should be applied as a bar in those cases which fall within that field of equity jurisdiction which is concurrent with analogous suits at law." *Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 771, 383 P.3d 257, 260 (2016) *quoting Whittington v. Dragon Grp., LLC*, 991 A.2d 1, 9 (Del. 2009). *See also, In re Hoopiiaina Tr.*, 144 P.3d 1129, 1137 (Utah 2006) (holding that where a purported

quiet title claim actually depended on the resolution of an underlying claim, the statute of limitations for the underlying claim was applicable).

Thus, if the Court is not inclined to apply a shorter, as discussed more fully below, then at the very least, this Court should hold NRS 11.190(3)(a) governs a lienholder's quiet title claim against a purchaser.

## VII. THE ANALOGOUS LIMITATIONS PERIODS FOR CHALLENGES TO FORECLOSURE SALES DO NOT EXCEED THREE YEARS.

Typically, "[w]hen a statute lacks an express limitations period, courts look to analogous causes of action for which an express limitations period is available either by statute or by case law." *Perry,* 132 Nev. at 771, 383 P.3d at 260 quoting *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.,* 962 S.W.2d 507, 518 (Tex. 1998); citing *Bellemare v. Wachovia Mortg. Corp.,* 284 Conn. 193, 931 A.2d 916, 921 (2007) ("[W]hen a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature of the cause of action or of the right sued upon.").

In *Perry*, this Court was faced with a statute that had no limitation period, and analyzed whether Nevada required using the catch-all four-year limitation period under NRS 11.220 or an analogous statute with a shorter limitation period. This Court found the solution is not always going with the four-year catch-all under NRS

11.220. NRS Chapter 116 does not provide a statute of limitations for a bank's quiet title claim, and neither does NRS 40.010 itself, but this Court, under the *Perry* precedent, found that courts must look to analogous limitations periods.

In Nevada, the following limitations apply to challenges to foreclosure sales:

| TYPE OF LIEN | TYPE OF FORECLOSURE | STATUTE OF LIMITATIONS | STATUTE |
|---|---|---|---|
| Deed of Trust | Non-Judicial | 30-90 days – for noticing[8] | NRS 107.080 |
| HOA Lien | Non-Judicial | 60 day redemption period[9] | NRS 116.3166(3) |
| Any | Any | 3 years – for Other | NRS 11.190(3)(a) |
| Property Tax | Non-Judicial | 2 years | NRS 361.600 |

Under *Perry*, this Court should apply anywhere between a 30-90-day limitation period because nearly ever challenge brought by a bank is based on information already in its possession even before the sale occurs. For example, a bank knows it tendered well before the sale. In fact, Bank of America maintained a master spreadsheet that was readily available and routinely referenced by its

[8] After the expiration of 90 days, a BFP is insulated from any lawsuit challenging the sale for failure to comply with NRS Chapter 107, and its title cannot be disturbed. *See* NRS 107.080(7).

[9] After the expiration of the 60-day redemption period, a BFP is insulated from any lawsuit challenging the sale and its title cannot be disturbed. *See* NRS 116.31166(10).

employees which tracked all loans subject to association foreclosure sales in Nevada and documented all attempts at payment. *See SFR Investments Pool 1, LLC v. Green Tree Servicing, LLC*, Case No. 71176, Appellant's Appendix, Vol. 13, pages 2854-2859.

Thus, just like a noticing deficiency, which a party knows about the moment a foreclosure sale happens, hence, the short limitations period, a bank knows if grounds exist to challenge the sale well before the sale occurs. Bank of America, without doubt, had information regarding all of its loans years before any particular sale. Bank of America's conduct of lying in wait and ambushing bona fide purchasers, like SFR, years after it attempted to tender is particularly reprehensible. Bank of America knew years before the sales occurred it tried to tender; it intentionally hid its attempts allowing a bona fide purchaser to purchase the property only to then wait more years to finally file suit.

As a result, as soon as the sale occurs, and a bona fide purchaser purchases the property, a claim challenging the sale must be filed immediately. As this Court noted in *Perry*, "[s]tatutes of limitation exist 'to provide a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security.'" *Perry*, 132 Nev. at 771, 383 P.3d at 260 citing *Winn v. Sunrise Hosp. & Med. Ctr.,* 128 Nev. 246, 257, 277 P.3d 458, 465 (2012). It bears repeating, this Court already eroded the security the Legislature afforded buyers at foreclosure

sales; this security should not be further eroded by giving parties years to file a challenge to a foreclosure sale. There is no reason to prolong such insecurity on the part of a buyer, particularly a bona fide buyer. The Legislature clearly intended BFPs to be fully insulated from any such challenges. To allow lawsuits years down the road only hamstrings buyers' property rights even more. Not to mention creates issues with lost evidence and parties no longer existing.

For these same reasons, this Court should reject the Bank's suggested analogies that range from a five to 40 years. With respect to NRS 11.070 and 11.080, the Bank concedes both statutes do not apply to it, but then asks this Court to expand the parties to which it applies under the guise of analogy. As for NRS 106.240, this is a statute of repose, not a statute of limitations, thus it has no analogy whatsoever to a claim challenging a foreclosure sale. With respect to NRS 104.3118(1), this is a statute of limitations that governs enforcement of a note. There is nothing similar between enforcing a contract and challenging a statutory sale. But if this Court was to consider NRS 104.3118 it should consider subsection (7) which provides a three-year statute of limitations for those cases involving payment or tender of payment for an obligation

> Unless governed by other law regarding claims for indemnity or contribution, an action for conversion of an instrument, for money had and received, or like action based on conversion, for breach of warranty, **or to enforce** an obligation, duty or **right** arising under this article and

> not governed by this section must be commenced within 3 years after the cause of action accrues.

NRS 104.3118(7) (emphasis added). Thus, arguably when a challenge is based on tender, a three-year statute of limitations should apply. Finally, adverse possession is an entirely different beast than challenging a foreclosure sale.

All told, there is no conceivable reason why a lienholder, or any other party for that matter, needs more than 30-90 days to file a challenge to a foreclosure sale, but certainly this time should not exceed three years. There is no basis to deviate from the analogous foreclosure limitation periods. Because the longest limitations period recognized is three-years, there is no basis to extend any longer period for a bank's claim challenging an NRS 116 sale that occurred prior to 2015.

## VIII. POLICY BEHIND FINALITY TO FORECLOSURE SALES, SUPPORTS A THREE-YEAR OR LESS LIMITATION PERIOD.

As this Court noted in *Perry*, "[s]tatutes of limitation exist 'to provide a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security.'" *Perry*, 132 Nev. at 771, 383 P.3d at 260 quoting *Winn,* 277 P.3d at 465. There is nothing under the law that makes an NRS 116 sale immune to this idea, and public policy dictates that foreclosure sales have finality. *See 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.*, 102 Cal.Rptr.2d 711, 716 (Cal. Ct. App. 2001) (noting "[t]he public policy underlying the comprehensive

framework governing foreclosure sales is a concern for swift, efficient, and final sales.") citing *Moeller v. Lien,* 30 Cal.Rptr.2d 777, 782 (Cal. Ct. App. 1994).

To be clear, for sales conducted prior to 2015, NRS 116 gave no equity or right of redemption. *See* NRS 116.31166(3). In other words, the Legislature made it so an NRS 116 sale could not be challenged, but this Court in *Shadow Wood*[10] gave banks an out by finding a court could sit in equity and hear a challenge. But this reprieve is not without its limitations (at least it should not be); there must be a time in which a bank must bring the challenge, otherwise, the sale remains final i.e. it extinguishes the prior owners title and all junior liens, which includes deeds of trust.

To hold otherwise, vitiates the entire non-judicial foreclosure process, in derogation of the Legislative intent behind the framework that governs all non-judicial foreclosures in Nevada. As the *Moeller* Court recognized, the purposes behind a comprehensive non-judicial foreclosure scheme is threefold: "(1) to provide the creditor/beneficiary[/Association] with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor[/homeowner]; (2) to protect the debtor/trustor[/homeowner/first security interest holder] from wrongful loss of the property[/lien]; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser." *Moeller*, 30 Cal.Rptr.2d at 782

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[10] *Shadow Wood,* 132 Nev. at 51, 366 P.3d at 1106.

citing 4 Miller & Starr, Cal. Real Estate (2d ed.1989) §§ 9:121, p. 388, 9:154, pp. 505, 516.

Thus, the policy favoring finality to foreclosure sales supports applying at most a three-year statute of limitations, but really less i.e. 30-90 days.

## CONCLUSION

This Court should find the following: (1) a lienholder must file an action challenging an association foreclosure sale, otherwise the presumptive validity of the sale, including the presumptive extinguishment of all deeds of trust, remains forever unassailable; (2) the statute of limitations governing said action is three years or less.

DATED this 16th day of February, 2021.

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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 is 27 pages and contains 6,573 words, which includes interest of amicus statement.
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 16th day of February, 2021.

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## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of February, 2021. Electronic service of the foregoing **Brief of Amicus Curiae SFR Investments Pool 1, LLC, in Support of Respondent's Brief** was made pursuant to the Master Service List.

Dated this 16th day of February, 2021.

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