IN THE SUPREME COURT OF NEVADA

U.S. BANK N.A., AS TRUSTEE FOR THE SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2006-BC4, Appellant, vs. THUNDER PROPERTIES, INC.; AND WESTLAND REAL ESTATE DEVELOPMENT AND INVESTMENTS, Respondents.	Supreme Court No. 81129

Certified Question from the United States Court of Appeals for the Ninth Circuit
Case No. 17-16399

REPLY BRIEF

Ariel E. Stern, Esq.
Nevada Bar No. 8276
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
(702) 634-5000
ariel.stern@akerman.com

RULE 26.1 DISCLOSURE

1. U.S. Bank is a wholly owned subsidiary of U.S. Bancorp.

2. U.S. Bancorp is a publicly held company whose shares are traded on the New York Stock Exchange. It has no parent company and no publicly held company owns more than 10% of U.S. Bancorp's shares.

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STATEMENT OF THE ISSUES

(1) When a mortgage holder seeks a judicial declaration that another lienholder's foreclosure did not extinguish its mortgage, is the declaratory action exempt from statutes of limitations under *City of Fernley v. Nevada Department of Taxation*, 366 P.3d 699 (Nev. 2016)?

(2) If a claim described in (1) is subject to a statute of limitations:

(a) Which limitations period applies?

(b) What causes the limitations period to begin to run?

SUMMARY OF THE ARGUMENT

The first certified question is whether *City of Fernley* applies, but appellee Thunder hardly mentions *Fernley*, and amicus SFR fails even to cite it. Thunder argues *Fernley* is inapplicable because U.S. Bank supposedly seeks retrospective relief, but *Fernley* contradicts Thunder's argument and Thunder does not respond to what U.S. Bank argued in its opening brief.

Instead of analyzing *City of Fernley*, Thunder and SFR both emphasize various presumptions that supposedly favor Thunder, but the most important—the presumption that the deed of trust was extinguished—does not actually exist in the law, and it would be inconsistent with the Court's holdings regarding tender and futility of tender. The other presumptions Thunder and SFR cite are no more than evidentiary presumptions that do not create substantive rights—the presumptions

merely fix the burden of proof on various issues. Thunder and SFR fail to explain what such presumptions have to do with statutes of limitations.

The heart of their arguments is policy: an intuition that some statute of limitations must apply to U.S. Bank's claim or else HOA buyers will live forever in fear of liens they claim to believe were extinguished. Yet even on this point they are mistaken. HOA buyers already have protection from old liens, including the ancient lien statute (NRS 106.240) and the common law of adverse possession. More importantly, the statute of limitations that Thunder and SFR advocate do nothing to help them. Thunder and SFR assume the expiration of the statute of limitations for declaratory relief conclusively extinguishes a bank's deed of trust, but no law says that, and the judgment under appeal included no such ruling. The only live issue in this appeal is whether U.S. Bank can timely sue for declaratory relief—not whether its security remains valid.

In the alternative, the Court should adopt the federal approach of allowing suits for declaratory relief whenever an equivalent suit for non-declaratory relief would be timely. U.S. Bank raised this possibility in its opening brief, and it appears neither Thunder nor SFR responded to it.

If, instead, the Court applies some specific statute of limitations to declaratory claims based on futility of tender, the most sensible choice is the five-year statute that would apply if Thunder had brought the suit. Thunder and SFR argue for shorter

limitations when the mortgage holder happens to be the plaintiff, but the statutes they cite are inapplicable, not analogous, or, in two instances, not even statutes of limitations. Even if they may be analogous to claims for equitable relief under *Shadow Canyon*, they are not analogous to declaratory suits based on tender or futility of tender—they do not bar a *legal* claim that a sale did not involve a superpriority component (due to tender or excuse) even if they may be analogous to an *equitable* claim to overcome a sale that did involve a superpriority component.

ARGUMENT

I. No Statute of Limitations Applies.

As U.S. Bank's opening brief argues, *Fernley* sets up a simple distinction between prospective and retrospective relief, and it holds statutes of limitations applicable only to retrospective relief. (Open. Br. 7–13.) As to prospective relief, "[N]o statutory limitation applies when a declaratory judgment will serve a practical end in determining and stabilizing an uncertain or disputed jural question, either as to present or prospective obligations." *City of Fernley v. Nev. Dep't of Tax.*, 366 P.3d 699, 706 (Nev. 2016) (citation omitted). Unless declaratory relief is available as *Fernley* envisions, parties like U.S. Bank will have to enforce their deeds of trust, provoking legal action and risking liability, before a court will decide whether the deeds of trust remain enforceable. (Open Br. 10–13, 35–36.)

The Ninth Circuit's first certified question asks this Court to decide whether *City of Fernley* applies to cases like this one. Respondent Thunder does not address *Fernley* until page 31 of its brief, and amicus SFR does not even cite it.

A. U.S. Bank seeks prospective relief.

To the extent Thunder addresses *Fernley*, it simply asserts without any reasoning that U.S. Bank seeks retrospective relief. (Thunder Br. 33.) Its sole support for that position is a District of Nevada order concluding a suit was barred because, "to find in favor of BNY on this claim, the Court would first need to award retrospective relief by finding that the foreclosure sale did not extinguish the senior deed of trust or that the foreclosure sale was void." (*Id.* (quoting *Bank of N.Y. Mellon v. Ruddell*, 380 F. Supp. 3d 1096, 1100–01 (D. Nev. 2019).)

But the District of Nevada order provides no more reasoning for this position than Thunder's brief does—it simply asserts that a judgment about the effect of the foreclosure sale must be retrospective, without explaining why. *See Ruddell*, 380 F. Supp. 3d at 1100–01. And its assertion is inconsistent with *Fernley* itself, which draws a bright line between prospective and retrospective relief based on the sort of relief sought: "There are two types of relief: retrospective relief, such as money damages, and prospective relief, such as injunctive or declaratory relief." *Fernley*, 366 P.3d at 706. U.S. Bank seeks declaratory relief, which is prospective. Under *Fernley*, the question is no more complicated than that.

Thunder and SFR incorrectly suggest U.S. Bank seeks something beyond merely declaratory relief—some action reaching into the past and changing the effect of the foreclosure sale. (Thunder Br. 16 (describing U.S. Bank's suit as "contest[ing]" the foreclosure); SFR Br. 1 (describing U.S. Bank's suit as a "challenge to a foreclosure sale").) Thunder and SFR attack the wrong target. As U.S. Bank's opening brief acknowledges, their argument is plausible with respect to a claim for equitable relief under *Shadow Canyon*, since such claims ask courts to use their equitable powers retroactively to set aside an inequitable sale that would otherwise extinguish the deed of trust. (Open. Br. 15.) In other words, a claim for equitable relief under *Shadow Canyon* may not be simply declaratory and may therefore be retrospective under *Fernley*.

But a claim that the superpriority debt was tendered, or that tender was known to be futile, is not a claim for equitable relief under *Shadow Canyon*. As this Court already held, when the superpriority portion is tendered before a sale, the sale is void ab initio as to the superpriority portion, and the deed of trust survives "by operation of law" and not by retroactive application of equity. (Open Br. 15–17 (quoting *Bank of Am. N.A. v. SFR Invs. Pool 1 LLC* (*Diamond Spur*), 427 P.3d 113, 120 (Nev. 2018)). In this case, *Fernley* applies because the only relief needed is declaratory—did the deed of trust survive automatically, by operation of law, or did it not?

B. The Federal Foreclosure Bar case is irrelevant.

Thunder cites *JPMorgan Chase Bank N.A. v. SFR Investments Pool 1 LLC* as holding that a statute of limitations applies to suits to enforce the federal foreclosure bar. (Thunder Br. 21–23 (citing 475 P.3d 52 (Nev. 2020).) In *JPMorgan*, the Court did apply a statute of limitations to a claim for declaratory relief, but it appears not to have considered whether applying a statute of limitations was appropriate under *City of Fernley*—its opinion does not cite *City of Fernley*. And where a question is not presented or considered but an answer is merely assumed without argument, that assumption forms no part of the case's holding and has no precedential effect. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

The actual holding of *JPMorgan* is that, under 12 U.S.C. § 4617(b)(12), a claim under the Federal Foreclosure Bar is more like a contract than like a tort claim, so courts should apply either the six-year federal statute of limitations for contract suits by the FHFA or the six-year state statute of limitations for breach of contract. 475 P.3d at 56–57. This case does not involve the federal statute *JPMorgan* interpreted and applied, and *JPMorgan* did not consider the issues raised here.

II. Thunder and SFR's "Presumptions" Are Incorrect or Irrelevant

A. There is no presumption the deed of trust was extinguished.

Both Thunder and SFR make a great deal out of a supposed presumption that the senior deed of trust is extinguished by an HOA sale. Their reasoning seems to be that a buyer is entitled to presume the deed of trust extinguished, and the deed of trust's holder should have only a certain period to contest that presumption before it becomes un-rebuttable. (*See* Thunder Br. 5–10; SFR Br. 16–18.)

The problem with this argument is that the presumption does not actually exist—SFR and Thunder simply invented one out of necessity. At the time of this sale in February 2011, the only presumption in an HOA foreclosure was that specific recitals in the foreclosure deed are true, and those specific recitals follow:

- A default occurred.
- The notice of lien was mailed.
- The notice of default was recorded.
- The statutory ninety-day waiting period elapsed.
- The notice of sale was given.

See NRS 116.31166(1).[1] Note what these presumptively true recitals do not say:

[1] Unless otherwise noted, all statutory citations are to the version in effect on the sale date of February 10, 2011. (AA117 (foreclosure deed showing sale date).)

- They say nothing about the quality of title conveyed to the buyer. In fact, the foreclosure deed in this case expressly disclaims any "warranty, expresses [sic] or implied, regarding title, possession ***or encumbrances***." (AA117 (emphasis added).)
- They say nothing about whether the lien contained a superpriority component at the time of foreclosure.
- They say nothing about whether any tender occurred, or whether tender was excused as futile.
- They even say nothing as to whether the debt was paid off at some time after the initial default occurred and the sale notices were sent. The legislature, noticing this omission, added that presumption in 2015. *See* NRS 116.31166(8)(d) (2016).

In short, the recitals say nothing about whether the deed of trust was extinguished. Most damaging for Thunder and SFR, there is no basis to presume non-payment or excuse from payment.

Thunder cites cases from California—none from Nevada—saying foreclosures are presumed valid, but these cases are inapposite. One California case mentions in passing the sort of challenge addressed by Nevada's statutory presumptions: whether the sale was "conducted regularly and fairly." *Fontenot v. Wells Fargo Bank N.A.*, 198 Cal. App. 4th 256, 272 (1st Dist. 2011). The other

explains California's bona fide purchaser doctrine, *Moeller v. Lien*, 25 Cal. App. 4th 822, 831 (2d Dist. 1994), which, as *Diamond Spur* held, is irrelevant to suits alleging the superpriority debt was satisfied before the sale. 427 P.3d at 120. And U.S. Bank does not need to overcome any presumption of validity—just because the sale was valid does not mean that it involved a superpriority component. An HOA sale can be valid even if the superpriority component was satisfied through payment, rejected tender, or excuse of tender.

1. The statute does not prohibit equitable relief.

SFR further argues the deed of trust is presumed extinguished because NRS 116.31166(3) provides that an HOA foreclosure "vests in the purchaser the title of the unit's owner without equity or right of redemption." Supposedly, this means "equity cannot be used to challenge the sale." (SFR Br. 3.)

But that is not at all what the statute means. "Equity of redemption" is "[t]he right of a mortgagor in default to recover property before a foreclosure sale by paying the principal, interest, and other costs that are due. . . . In many jurisdictions, the mortgagor also has a statutory right to redeem within six months *after* the foreclosure sale . . . ." Black's Law Dictionary, *Equity of Redemption* (11th ed. 2019) (emphasis added). By decreeing there was no "equity or right of redemption" after an HOA foreclosure, the legislature was denying foreclosed owners the right

to redeem the property by paying the debt *after* the sale. It was not denying courts their ordinary equitable powers when hearing claims relating to an HOA foreclosure.

2. Equity is unnecessary if the bank tendered.

SFR argues that, because the deed of trust is supposedly presumed extinguished, a plaintiff like U.S. Bank must invoke a court's equity power to argue its deed of trust survived. (SFR Br. at 2–5.) SFR errs in conflating tender cases with non-tender cases. SFR is right that equity is needed in a case under *Shadow Wood*, in which a plaintiff challenges the statutory recitals or seeks "to set aside a defective foreclosure sale on equitable grounds." *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1111–12 (Nev. 2016).

As explained above, however, a plaintiff making arguments based on tender does not challenge statutory recitals, because the statutory recitals say nothing about tender and also say nothing about the priority of the HOA lien that was foreclosed. Such a plaintiff does not ask the court to "set aside" a "defective" but otherwise efficacious sale, *id.*, but merely to determine whether the deed of trust survived automatically "by operation of law." *Diamond Spur*, 427 P.3d at 120.

This interpretation is confirmed by *Diamond Spur* itself, in which SFR argued (as it is still arguing) that *Shadow Wood* applies to claims that a bank tendered the superpriority portion of an HOA lien. *Id.* at 121. This Court rejected that argument in *Diamond Spur* and in several cases since then, and it should reject it again. *Id.* If

equitable relief were required for a court to conclude that a deed of trust survived by operation of law, then the foreclosure buyer could raise equitable defenses to prevent the court from reaching that conclusion. But a foreclosure buyer cannot use equitable defenses to defeat a claim under *Diamond Spur*—for example, "[a] party's status as a BFP [i.e., bona fide purchaser] is irrelevant when a defect in the foreclosure proceeding renders the sale void," rather than merely voidable as in *Shadow Wood*. *Id.*

B. Evidentiary presumptions are irrelevant.

Thunder also invokes a number of presumptions outside NRS chapter 116: the presumptions "that the law has been obeyed"; that a trustee with a duty to convey a property actually conveyed the property; "that private transactions have been fair and regular"; and "that the ordinary course of business has been followed." (Thunder Br. 8 (citing NRS 47.250).) These are no more than disputable evidentiary presumptions, listed in the same section that establishes the presumption that a mailed letter was received and that the date in a dated document is correct. *See* NRS 47.250; *see also* NRS 47.180, 47.190 (explaining effect of presumptions).

These presumptions apply only to factfinding in court—the statute does not provide that all parties everywhere are entitled to rely on these presumptions in their private affairs. Worse for Thunder and SFR, these evidentiary presumptions are

irrelevant to the certified question—even if they applied, they would not resurrect the superpriority component from the effect of U.S. Bank's tender.

C. The presumption in favor of a record title holder is irrelevant.

Finally, Thunder relies on the "presumption [that] exists in favor of the record title holder," citing *Breliant v. Preferred Equities Corp.* and *Shadow Canyon* (Thunder Br. 6.) But this is merely a statement of the burden of proof in a quiet title action. *See, e.g.*, *Breliant v. Preferred Equities Corp.*, 918 P.2d 314, 318 (Nev. 1996). It should not even apply in case involving tender or futility of tender—it governs disputes between recorded and unrecorded interests. *See id.* (presumption in favor of record title holder based on case involving an "adverse possession claimant"). This case does not involve an unrecorded interest but is a priority dispute between holders of recorded interests, i.e., the recorded foreclosure deed and the recorded deed of trust. Regardless, doctrines allocating the burden of proof in quiet title claims say nothing about whether a particular quiet title claim is timely.

SFR makes the same mistake when it argues the suit is untimely because a party claiming it tendered payment bears the burden of proof. Again the question of when a suit must be filed has nothing to do with the question of who must produce evidence once the suit has been filed. SFR's argument is a red herring.

III. A Statute of Limitations Would Not Serve Finality, but Other Laws Do

Lacking a legal basis not to apply *City of Fernley*, Thunder and SFR emphasize policy. Both argue the Court should apply a statute of limitations to protect the finality of HOA sales and the expectations of HOA foreclosure buyers. (Thunder Br. 9, 16–18, 31–39; SFR Br. 7–15.)

These arguments confuse two fundamentally different issues: (1) whether the passage of time can prevent a party like U.S. Bank from suing for a declaration regarding an HOA sale's effect, and (2) whether the passage of time can extinguish a deed of trust that initially survived the HOA sale by operation of law under *Diamond Spur* and related cases regarding the futility of tender.

Of the these two questions, only the first is at issue in this case. The district court's judgment, which led to the Ninth Circuit appeal and to the present certified question, did not rule the passage of time can extinguish a deed of trust that survived the HOA sale by operation of law. It ruled only that U.S. Bank could not sue for declaratory relief because the statute of limitations had passed, and it expressed no opinion regarding the deed of trust's survival. (AA25–34 (order granting other parties' motion to dismiss); AA192–96 (order granting Thunder's motion to dismiss).) It is not *res judicata* on the issue of whether the deed of trust survived, as U.S. Bank's brief argued and Thunder and SFR do not contest. (Open Br. 5–6.)

Because the district court's statute of limitations order is not *res judicata* regarding the deed of trust's status, it and orders like it do nothing to serve the public policies behind statutes of limitations. They do not leave settled expectations in place but rather leave matters unsettled, and more difficult to settle. They do not promote the prompt resolution of disputes but delay resolution by locking the courthouse doors and forcing parties like U.S. Bank to assert their rights out of court.

Thunder and SFR are right that there is a public policy favoring finality and certainty in rights to real estate, but this public policy is pursued through other statutes and doctrines. It is pursued through the conclusive presumptions in NRS 116.31166, which U.S. Bank addressed above. It is pursued through the ancient lien statute. *See* NRS 106.240. And it is pursued through the doctrines of adverse possession, through which title can be quieted in a property's possessor if the possessor satisfies various requirements throughout the relevant statutory period. *See* NRS 11.100 through 11.140 (describing requirement of adversity); NRS 11.150 (codifying requirements of continuous occupation and payment of taxes).[2]

What Thunder and SFR request is adverse possession without the strings attached—extinguishing deeds of trust that survived HOA sales by operation of law,

[2] There are other common solutions for doubtful titles such as warranty deeds and title insurance. The threat of not having good title is not unique to foreclosure purchasers, and the law has given parties multiple tools to navigate around these problems for centuries.

simply by claiming the deeds are extinguished and then waiting a few years, without proving actual, open and notorious, exclusive, hostile, and continuous possession of the property, and without paying any tax. The Court should not let them do this because it would effectively replace the doctrine of adverse possession with a much laxer doctrine of "claim it and wait."

This would lead to problems, for example, if a homeowner forged and recorded an instrument reconveying her trust deed[3] and then the deed's beneficiary failed to contest the reconveyance within the statute of limitations. A forged instrument is void and conveys no interest at all—but then, the same is true of a superpriority sale after the superpriority debt is tendered. *Diamond Spur*, 427 P.3d at 612 ("[W]hen [a] defect renders a sale wholly void, no title, legal or equitable, passes to the purchaser." (citation omitted)). Any doctrine advocated by Thunder and SFR that would let void superpriority sales become valid with the passage of time will apply equally to other sorts of void property transfers, and the Court should think twice before following Thunder and SFR down that road.

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[3] U.S. Bank does not suggest any homeowner recorded a forged reconveyance in this case, but its counsel is aware of it happening in other Nevada cases. More generally, criminals recording forged deeds has become a problem. Kevin Krause, *Men Made Millions Stealing Homes with Forged Deeds, Feds Say*, DALLAS MORNING NEWS (Oct. 3, 2017), https://www.dallasnews.com/news/crime/2017/10/03/men-made-millions-stealing-homes-with-forged-deeds-feds-say/; *see also* Federal Bureau of Investigation, *House Stealing: The Latest Scam on the Block* (Mar. 25, 2008), https://archives.fbi.gov/archives/news/stories/2008/march/housestealing_032508.

That is, the Court should think twice about it when some case before it presents that question. This case does not. The effect of the statute of limitations on a deed of trust's validity is not before the Court because it was not certified, and it was not certified because it was not before the Ninth Circuit either. It is outside the scope of the judgment under appeal—a judgment that, as explained above, determined only that a suit for declaratory relief was untimely and not that U.S. Bank's lien had been extinguished. If Thunder wanted an order saying the lien was extinguished, it should have filed its own appeal.

IV. In the Alternative, the Court Should Apply the Limitation from *Berberich*.

U.S. Bank's opening brief argued that, if some statute of limitation applies, the Court should eschew the four-year catch-all and analogize to a statute applicable to similar actions—most obviously, to the five-year statute that would have applied if Thunder had brought the suit. (Open. Br. 20–35.) Thunder and SFR disagree, but they fail to argue the five-year statute is not analogous, beyond pointing out that Thunder has possession while U.S. Bank has never claimed a right to it.

A. This is not a suit on a liability created by statute.

Instead Thunder and SFR argue the Court should apply NRS 11.190(3)(a)'s three-year statute of limitations for "action[s] upon a liability created by statute, other than a penalty or forfeiture." (Thunder Br. 27–28; SFR Br. 16–18.) U.S. Bank's opening brief already addressed this possibility at greater length than

Thunder or SFR, and U.S. Bank largely rests on those arguments. (Open. Br. 23–25.)

U.S. Bank will respond briefly to SFR's effort to stretch the word "liability" to include any sort of legal relief that might affect a party financially. SFR argues, "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." (SFR Br. 18.) That is false on several levels. To begin with, U.S. Bank's claim that tender was futile does not depend on any breach of NRS chapter 116. *See Diamond Spur*, 427 P.3d at 607, 612 (explaining requirements and effect of tender based on common law rather than NRS chapter 116); *7510 Perla Del Mar Ave. Trust v. Bank of Am. N.A.*, 458 P.3d 348, 351–52 (Nev. 2020) (explaining futility of tender based on common law rather than NRS chapter 116). Even U.S. Bank's claim for equitable relief is based on equitable doctrines that predate NRS chapter 116. *See Golden v. Tomiyasu*, 387 P.2d 989, 995–96 (Nev. 1963) (acknowledging, thirty years before NRS chapter 116 was passed, possibility of equitable relief from inequitable foreclosure).

It is also false because, though U.S. Bank's success would certainly affect Thunder, that does not mean Thunder would become "legally responsible" for the HOA's actions. Thunder would have no personal liability of any sort, for anything. The point of U.S. Bank's suit is not to hold Thunder liable but to clarify the parties'

respective rights in real property, and a suit asking "who owns this parcel?" is not the same thing as a suit saying "give me money to redress a wrong you committed."[4]

Even if this were a suit upon a liability, it would not be a suit upon a liability "created by statute." SFR argues this suit involves a liability because, if successful, it will force Thunder to pay the debt or face foreclosure. (SFR Br. 18.) But Thunder's "liability" to foreclosure was not created by any statute—it was created by Thunder's predecessor in interest, the homeowner who borrowed the money and signed the deed of trust. The "liability" would exist regardless of whether NRS chapter 116 contained any lien or foreclosure provisions at all, and U.S. Bank's suit merely seeks a declaration that NRS chapter 116 failed to extinguish it.

B. The shorter statutes of limitations are not analogous.

SFR also argues for the application of still-shorter limitations periods, drawn by analogy from NRS chapter 107 and trustee's sales. (Thunder seems not to argue for those statutes' application, but it does make policy arguments based on one of them.) Specifically, SFR identifies the following statutes as analogous:

- NRS 107.080, allowing "30-90 days – for noticing";
- NRS 116.31166(3), allowing a 60-day redemption period; and
- NRS 361.600, allowing two years for property tax liens.

[4] Taken to its logical conclusion, SFR's view of "liability" would make a gambler who did not win at a casino "liable" in the amount she did not win.

(SFR Br. 22.)[5] None of the statutes is actually analogous.

Starting with the most obvious: NRS 116.31166(3)[6] is not a statute of limitations governing "challenges to foreclosure sales" as SFR argues. (SFR Br. 22.) It is not a statute of limitations at all. It creates a redemption period during which a unit's owner or a lienholder can buy the property from the new owner at the foreclosure sale price, plus interest and costs.

As for NRS 107.080, it also contains no statute of limitations, but that is somewhat less obvious. NRS 107.080(5) creates a special cause of action to void a trustee's sale if the trustee "does not substantially comply" with the statute, and this cause of action must be filed within either thirty or ninety days after the trustee's deed is recorded. However, the deadline is actually one of the elements of the cause of action and not, strictly speaking, a statute of limitations. *See* NRS 107.080(5)(b). If it were a statute of limitations, it would not be analogous to U.S. Bank's suit because it applies only to a special statutory cause of action for voiding the sale—not to a suit to set aside the sale under the common law or some other statute, and certainly not to a suit seeking a declaration that the sale was void ab initio.

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[5] At this point SFR also cites NRS 11.190(3)(a) as applying to "[a]ny" lien, but it is not clear what that means. By its terms, NRS 11.190(3)(a) does not apply to liens but to actions for actions "upon a liability created by statute," as discussed above.

[6] This citation to NRS chapter 116 refers to the current version. The version in effect at the time of the sale did not contain the relevant "right of redemption" provision, which is another reason it does not help SFR's position.

NRS 107.080(7) then provides that, "[u]pon expiration of the time for commencing an action which is set forth in subsections 5 and 6, any failure to comply with the provisions of this section or any other provision of this chapter does not affect the rights of a bona fide purchaser as described in NRS 111.180." This is not a statute of limitations, either. It does not prohibit parties from filing suits after thirty or sixty days; it only establishes a strong bona fide purchaser defense.

Finally, NRS 361.600 is not analogous because it applies only to suits "for the recovery of lands sold for taxes." NRS 361.600. U.S. Bank's suit does not seek to recover any land; if it did, then it would be governed by NRS 11.080's provision limiting "action[s] for the recovery of real property" and the Court could apply that statute instead of seeking an analogue.

To the extent NRS 361.600 is analogous, it is not more closely analogous than the statutes U.S. Bank cites as analogs; it attracts SFR only because it is shorter. But when there is a question as to which statute of limitations applies, the ordinary practice is to apply the longest one, so as not to surprise parties who might reasonably have relied on it. *See M & T Bank v. SFR Invs. Pool 1 LLC*, 963 F.3d 854, 858 (9th Cir. 2020); *FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304, 1307 (9th Cir. 1989) ("[W]hen there is a substantial question which of two conflicting statutes of limitations to apply, the court should apply the longer.");

Hughes v. Reed, 46 F.2d 435, 440 (10th Cir. 1931) ("Where doubt exists as to the nature of the action, courts lean toward . . . the longer period of limitations.").

Finally, if the Court decides NRS 361.600 is the most analogous statute, it should be aware that NRS 361.600 would not prohibit banks from claiming deeds of trust survived under the doctrines of tender or futility of tender. Such a claim asserts the sale was void ab initio with respect to the superpriority portion, and this Court recognized nearly a half-century ago that NRS 361.600 distinguishes between sale defects that "render" a deed "void" and those that make it merely voidable. *Bogart v. Lathrop*, 523 P.2d 838, 840 (Nev. 1974). When a defect renders the deed void—as U.S. Bank alleges in this case—"the 3-year limitation [now 2 years] does not apply." *Id.* (citing *Davison v. Gowen*, 249 P.2d 225, 226 (Nev. 1952) ("[T]he majority rule is that if there were jurisdictional or fundamental defects in the sale which rendered the proceedings absolutely void, the statute will not sustain the tax deed . . . . [and] such special statutes of limitation ***do not run***." (emphasis added)).

V. Much of SFR's Briefing Is Irrelevant

This Court accepted certification of two questions: (1) whether a statute of limitations applies and (2) if so, which one it is and when it starts running.

Much of SFR's briefing has nothing to do with these questions. To begin with, much of it is devoted to arguing (incorrectly) that *Diamond Spur* and *Shadow Wood* are wrongly decided because NRS chapter 116 deprives courts of any equitable

power to question HOA sales. (*See* SFR Br. 2–5; 12–15, 26 ("[T]he Legislature made it so an NRS 116 sale could not be challenged, but this Court in *Shadow Wood* gave banks an out by finding a court could sit in equity and hear a challenge.").) This is the only possible relevance of SFR's long discussion of the bona fide purchaser doctrine, which, legally, has nothing to do with the certified questions.

SFR also takes a detour to condemn various approaches banks have used to defend their deeds of trust when a statute of limitations or other obstacle interfered with their efforts to obtain declaratory relief. SFR is particularly incensed about banks attempting to foreclose nonjudicially without first obtaining a declaratory judgment in their favor, but it also chides one bank because, when SFR sued it, the bank "had the audacity" to assert defenses against SFR's claim. (SFR Br. 8–12)

Those issues are not before the Court, and it may safely skip those pages of SFR's brief. The Court may wish to note the following point, however: if SFR finds it so unconscionable for a bank to foreclose a deed of trust whose validity is still disputed, then perhaps it should support banks' efforts to resolve such disputes through declaratory judgment suits instead of just foreclosing nonjudicially.

In other words, SFR's complaints about banks' conduct only support U.S. Bank's chief argument: that when a live dispute exists between two parties, applying a statute of limitations to make declaratory relief unavailable does neither party any good. It simply forces parties to resort to self-help—for example by trying to

foreclose nonjudicially. (Open. Br. 10–13, 35–36.) All parties would be better off if they could obtain declaratory relief and avoid escalating the dispute.

VI. The Equities Are Irrelevant

U.S. Bank's opening brief makes numerous arguments that neither Thunder nor SFR addresses:

- U.S. Bank argues in the alternative for the Court to follow federal case law allowing a suit for declaratory relief wherever a suit for non-declaratory relief would be timely. In this case, the non-declaratory relief at issue is foreclosure, and it is timely. (Open. Br. 18–20.)
- U.S. Bank argues that statutes of limitations apply to claims, not issues or defenses, and U.S. Bank would still be able to raise these issues in response to a suit by Thunder. (Open Br. 14–15.)
- U.S. Bank argues that where no statute of limitations cleanly applies, the Court should analogize to similar statutes rather than apply the catch-all. The most closely analogous statutes in this case are the five-year statutes for title disputes, which would apply if Thunder were the plaintiff. (*Id.* at 26–31.)
- U.S. Bank argues that, if a five-year statute applies, the statute did not begin running until Thunder took some action inconsistent with U.S. Bank's rights in the property. (*Id.* at 31–34.)

So far as U.S. Bank can tell, Thunder and SFR's briefs fail to address these arguments. They do not say why the federal doctrine should not be followed, why the five-year quiet title statutes are not analogous, or when the statute of limitations should start running. As to these issues, U.S. Bank rests on its opening brief.

Instead of addressing U.S. Bank's legal contentions, both Thunder and SFR spend much of their briefs on freeform policy argument, often citing nothing, or citing adjudicative facts outside the record. (SFR Br. 22–23 (citing appellant's appendix from unrelated case).) U.S. Bank will respond briefly.

Thunder and SFR know very well why banks did not file a lawsuit within ninety days of every HOA sale, as SFR contends they should have done.[7] To begin with, banks maintained until September 2014 that no lawsuits were necessary because nonjudicial HOA foreclosures could not extinguish their interests under any circumstances—a position that fell one vote short of becoming binding precedent. *SFR Invs. Pool 1 LLC v. U.S. Bank N.A.*, 334 P.3d 408 at 758 (Nev. 2014). The banks still maintain lawsuits are unnecessary in cases where they tendered the

[7] Thunder also argues that the banks' decision to file lawsuits proves they needed to file lawsuits in order to protect their interests, which proves there is a presumption of extinguishment and a statute of limitations applies. (Thunder Br. 16.) By that logic, Thunder and SFR's decisions to file similar lawsuits proves there is a presumption against extinguishment; if parties like Thunder and SFR "were not required" to file lawsuits, then "why would [it] be the case" that they filed them? (Thunder Br. 16.) In any case the banks' reason for filing the suits is obvious: to resolve disputes about the trust deeds' validity so they can foreclose.

superpriority debt, and on that issue, this Court agrees. *Diamond Spur*, 427 P.3d at 610–11 (tendering banks not required to file litigation over tender and pay tender into court). Once banks decided to file lawsuits to clarify the sales' effect, they had to file "hundreds or thousands" of them, as Thunder acknowledges. (Thunder Br. 38.) It is hardly surprising the process took some time.

As to Thunder and SFR, it is more than a little disingenuous for them to complain that lawsuits like this one surprise HOA buyers, unfairly upsetting their supposedly settled expectations, when they bought the properties for pennies on the dollar amidst legal uncertainties and controversies they were fully aware of. Thunder's first HOA decision from this Court appears to have been issued in November 2014, suggesting it has been litigating HOA sales continuously since at least 2013 or 2012. *See Thunder Props. Inc. v. Greater Nev. Mortg. Servs. LLC*, No. 64943, 2014 WL 6449851, at *1 (Nev. Nov. 14, 2014). SFR's first decisions from the District of Nevada were issued in 2013. *See Bayview Loan Servicing LLC v. Alessi & Koenig LLC*, 962 F. Supp. 2d 1222, 1223 (D. Nev. 2013) (listing SFR as a defendant). And the Court should not forget that this proceeding is part of an appeal from a dismissal for failure to state a claim—factual questions must be resolved in U.S. Bank's favor, and the Court must assume (with perfect accuracy, as would be proved at trial) that Thunder anticipated this title dispute when it bought the property.

That said, none of this is relevant to the questions before the court: are declaratory suits about a lien's validity subject to a statutory limitation? If so, which one applies, and when does it start running? These are questions that reach beyond the HOA foreclosure saga and will affect unrelated litigation for decades to come. Deciding the certified questions based on the Court's perceptions of whether banks or HOA buyers have behaved better during this long controversy, as Thunder and SFR invite the Court to do, would be both improper and foolish.

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CONCLUSION

Thunder and SFR's position is that U.S. Bank cannot sue for a declaration of its rights in this matter—that U.S. Bank must simply accept its deed of trust was extinguished even though, as yet, no court has said it was extinguished and foreclosure would still be timely if the deed of trust is valid.

In a modern legal system, that position is indefensible. As long as there is a live dispute about the HOA foreclosure's effect on the deed of trust, either party should be able to ask a court to resolve the dispute. Because allowing U.S. Bank's suit to proceed would serve a practical end in determining and stabilizing an uncertain jural question, *City of Fernley* governs and no statute of limitations applies.

DATED: April 2, 2021.

AKERMAN LLP

/s/ Ariel E. Stern
ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

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

I FURTHER CERTIFY that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 6,843 words.

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

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

DATED: April 2, 2021.

AKERMAN LLP

/s/ Ariel E. Stern
ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that I electronically filed on April 2, 2021, the foregoing **REPLY BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

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

/s/ Carla Llarena
An employee of AKERMAN LLP