CASE NO. 70786

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMY FACKLAM, an individual,

Appellant,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE **HONORABLE ELISSA CADISH,**

Appellees**,**

HSBC BANK USA, National Association, as TRUSTEE for DEUTCHE ALT-A SECURITIES MORTGAGE LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-AR2,

Real Parties In Interest.

APPELLANT'S OPENING BRIEF

On appeal from the Eight Judicial District Court,
Clark County, Nevada
District Court Case No. A-16-733762-C
The Honorable Elissa Cadish

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November 15, 2016

NRAP 26.1 DISCLOSURE

Appellant, Ms. Facklam, is an individual and there are no corporate entities that are related to this case. The undersigned counsel of record has served as Ms. Facklam's counsel throughout this case, for all proceedings, and, as such, there are no other attorneys or firms to disclose.

DATED this 15th day of November, 2016.

HAFTERLAW

By: _____

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Nev.R.App.P. 3A(b)(1), as the order appealed denied Appellant's summary judgment motion and granted Real Party in Interest, HSBC's counter-motion to dismiss the complaint.

The order being appealed was issued on or about June 23, 2016, by the Honorable Elissa Cadish of the Eighth Judicial District Court for the State of Nevada. Joint Appendix ("APPX") 250-254.

Appellants timely filed a Notice of Appeal on July 11, 2016. APPX_263-265.

NRAP 28(a)(5) ROUTING STATEMENT

Pursuant to NRAP 17(a)(13), this case should remain with the Supreme Court as, this case raises an issue of first impression – namely, whether a party seeking to enforce its one or all of its contractual remedies as a result of a breach of contract, can reset the statute of limitations by rescinding their notice of breach, an initial required step in the pursuit of one's contractual remedies, and, whether the language of the document is relevant to its effect on the statute of limitations.

ISSUES PRESENTED

Can a party that has begun its pursuit of its contractual remedies as a result of a breach of contract, reset the statute of limitations by rescinding their notice of breach, the initial required step for the pursuit of one's contractual remedies. And, if so, does the language of the rescission have any effect on the filing's resetting of the statute of limitations.

Specifically, this issue arises in the realm of mortgages and foreclosures of real property.

STATEMENT OF THE CASE

Ms. Facklam filed the instant case seeking declaratory and injunctive relief related to HSBC's on-going attempt to foreclose on her home. Shortly after the filing of the complaint, Ms. Facklam filed a motion for injunctive relief. The injunctive relief was denied without prejudice since no foreclosure sale date had been set.

Since Ms. Facklam's declatory relief action hinges on a question of law, not fact, a motion for summary judgment was then filed. An opposition and counter-motion to dismiss was filed by HSBC. The district court denied summary judgment and granted dismissal because it found that the 2011

Rescission rescinded any acceleration which occurred through the filing of the 2009 notice of default, making any time which may have begun to run with that notice no longer applicable.

This is an appeal from that order.

STATEMENT OF THE PERTINENT FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

1. This case involves real property located at 1513 Shotgun Lane, Henderson, Nevada 89104, and bearing Assessor's Parcel Number 178-04-514-044 (the "Property").

2. On or about December 21, 2006, Appellant executed a deed of trust naming GreenPoint Mortgage Funding, In., as the "Lender", and Marin Conveying Corp., as the "Trustee", and encumbering the Property with an indebtedness in the amount of $326,000.00 ("Deed of Trust"). APPX_115-140.

3. In or around June 2009, Appellant missed a payment (based upon the recommendation of the servicer of the Mortgage, at the time).

4. On September 25, 2009, the First Notice of Default was recorded on the title records for the Property. APPX_ 142-143.[1]

5. On or about July 18, 2011, Recon Trust executed a Notice of Trustee's Sale in the official records of Clark County Recorder as Instrument No. 20110720-0001856.

6. The Notice of Trustee's Sale set the date of sale for August 8, 2011.

7. On or about December 5, 2011, a rescission of the First Deed of Trust ("Rescission") was filed in the official records of the Clark County Recorder as document 20111205-0000543. APPX_145-146.

8. The Rescission stated:

> NOTICE IS HEREBY GIVEN that RECONTRUST COMPANY, N/A/, Trustee for the Beneficiary does hereby rescind, cancel and withdraw the Notice of Default and Election to Sell herein described, ***provided, however, that this rescission shall not be construed as waiving, curing, extending to, or affecting any default, either past, present or future, under such Deed of Trust, or as impairing any right or remedy thereunder,*** and it is as shall be deemed to be, only an election without prejudice not to cause a sale to be made pursuant to such Notice of Default and Election to Sell, and it shall not in any way alter or change any of the rights remedies or privileges secured to the Beneficiary and/or Trustee under such Deed of Trust, nor modify, nor alter in any respect any of the terms, covenants, conditions or obligations therein

[1] Appellant alleges that by filing the First Notice of Default, the Real Party in Interest, HSBC, through its predecessor, initiated a six year statute of limitations as a result of her alleged breach of the Mortgage.

> contained. Said NOTICE OF DEFAULT AND ELECTION TO SELL under Deed of Trust specifically described therein was:
>
> Recorded on 09/25/2009, as Instrument 200909250003750, in Book _____, Page _____, of the Official Records of Clark County, Nevada.
>
> The DEED OF TRUST affected by this notice recorded on 01//08/2007 as Instrument No. 0001436 in Book 20070108 Page ., executed by AMY B. FACKLAM, A SINGLE WOMAN, in Trustor in Clark County, Nevada.

APPX_145 (***emphasis added***).

9. On December 11, 2015, a substitution of trustee was filed as Instrument No. 20151211-0002092 of the official Clark County Recorder's records naming Western Progressive-Nevada, Inc., as Trustee under the Mortgage ("Substitution").

10. On January 25, 2016, Real Parties in Interest, HSBC, through its agent, predecessors, or predecessors' agents, specifically, Western Progressive-Nevada, Inc., filed another Notice of Default and Election to Sell the Property, in the official records of Clark County, Nevada, which was assigned document number 20160129-0000551 ("Second Notice of Default"). APPX_148-154.

11. It is believed that since both the Substitution and the Second Notice of Default were filed after six years from when the First Notice of Default was filed, the statute of limitations to seek a remedy under contract had expired,

extinguishing the ability of the Real Party in Interest, HSBC, to seek its contractual remedies, including foreclosure.

12. This suit was filed shortly thereafter.

SUMMARY OF ARGUMENT

The district court granted the counter-motion to dismiss and denied Appellant's motion for summary judgment based on the following findings:

> 1. The December 5, 2011, rescission rescinded any acceleration by the 2009 notice of default.
>
> 2. Even under Plaintiff's statute of limitations arguments, any time which may have begun to run with that notice no longer applied.

APPX_251.

In doing so, the district court failed to recognize the plain language of the document upon which the district court relief – the Rescission – which clearly stated that such document "***provided, however, that this rescission shall not be construed as waiving, curing, extending to, or affecting any default, either past, present or future, under such Deed of Trust, or as impairing any right or remedy thereunder***." APPX_145 (***emphasis added***). Moreover, the district court failed to recognize the policy implications of such a decision – that putting control of the statute of limitations in the hands

to the party that is the one whose rights are limited by that statute would make a statute of limitations legally impotent. For these reasons, the district court erred.

The district court then granted HSBC's motion to dismiss for the same reasons which the district court denied Ms. Facklam's motion for summary judgment. This, too, was clearly erroneous.

STANDARD OF REVIEW

A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

This Court applies a de novo standard of review for summary judgment orders. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. Id. A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Kennedy v. Carriage Cemetery Services, Inc., 727 F.Supp.2d 925, 928 (D. Nev. July 19, 2010). "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." Diaz v. Eagle Produce Ltd. P'ship, 521 F.3d 1201,

1207 (9th Cir.2008) (*citing* United States v. Shumway, 199 F.3d 1093, 1103–04 (9th Cir.1999)).

B. TIMING OF A SUMMARY JUDGMENT MOTION

"A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." NRCP 56(a).

C. STANDARD OF REVIEW FOR MATTERS SEEKING DECLARATORY RELIEF

"When legal, not factual, issues are at play, [the Nevada Supreme Court] reviews de novo a district court order resolving a request for declaratory relief." Las Vegas Taxpayer Accountability Comm. v. City Council of Las Vegas, 125 Nev. 165, 172, 208 P.3d 429, 433 (2009); see also Educ. Initiative PAC v. Comm. to Protect Nev. Jobs, 129 Nev. 35, 41, 293 P.3d 874, 878 (2013).

D. STANDARD OF REVIEW FOR MOTION TO DISMISS

The standard of review for a dismissal under NRCP 12(b)(5) is rigorous, as this court must presume all facts alleged in the complaint as true and draw all inferences in favor of the non-moving party. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). On appeal from an order granting an NRCP 12(b)(5) motion to dismiss, "[t]he sole issue presented . . . is whether a complaint states a claim for relief." Merluzzi v. Larson, 96 Nev. 409, 411, 610 P.2d 739, 741 (1980), *overruled on other grounds by* Smith v. Clough, 106 Nev. 568, 569-70 n.1 & n.2, 796 P.2d 592, 593-94 n.1 & n.2 (1990). This court's "task is to determine whether . . . the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief." Edgar v. Wagner, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). "The test for determining whether the allegations of a [complaint] are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of [a legally sufficient] claim and the relief requested." Ravera v. City of Reno, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984); see also W. States Constr., Inc. v. Michoff, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992).

ARGUMENT

This action is grounded in one primary claim – a request for declaratory relief. In sum, Ms. Facklam was seeking a judicial determination that, as a matter of law, pursuant to the statute of limitations for contractual breaches, HSBC is no longer able to foreclose on Ms. Facklam's home, or otherwise seek any damages as a result of her alleged breach of her mortgage.

The district court did not find that the six year contract statute of limitations under NRS §11.190 was not applicable to her breach; but, rather, that because a Rescission had been filed, the statute of limitations was reset. This was clearly erroneous, as the plain language of the Rescission stated that the filing of such did not alter the underlying breach. The district court's ruling was further erroneous because the one whose claim is precluded under a statute of limitations cannot be authorized to control when the statute begins to run.

As the district court also based its dismiss of the case on the same findings, that decision was erroneous, as well.

A. BACKGROUND

Under Nevada law, the Mortgage is a contract between Ms. Facklam and the beneficiary of the Mortgage. The remedy of any breach of the

obligations contained in the Mortgage would fall under a breach of contract action. While a foreclosure is a remedy provided for in the mortgage contract, the procedure for legally effectuating such has been codified in statute. See NRS Chapter 107. As NRS Chapter 107 addresses the procedure for accomplishing a foreclosure, it is silent as to any statute of limitations. Hence, to determine the statute of limitations, one must look to the underlying source authorizing the specific foreclosure, inevitably and always, one found in a contract – a mortgage. Under Nevada law, no breach of contract action shall be brought after six years from when the breach is alleged to have occurred. NRS §11.190.

A statute of limitations prohibits a suit after a period of time that follows the accrual of the cause of action. Allstate Ins. Co. v. Furgerson, 104 Nev. 772, 775 n. 2, 766 P.2d 904, 906 n. 2 (1988). A statute of limitations conditions the cause of action on filing a suit within the statutory time period and "defines the right involved in terms of the time allowed to bring suit." P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 102 (2d Cir.2004). Such a statute seeks to give a defendant peace of mind by barring delayed litigation, so as to prevent unfair surprises that result from the revival of claims that have remained dormant for a period during which the evidence vanished and memories faded. See Underwood Cotton Co. v. Hyundai Merch. Marine

(Am.), Inc., 288 F.3d 405, 408–09 (9th Cir.2002) (providing that statutes of limitations are concerned with a defendant's peace of mind); Joslyn v. Chang, 445 Mass. 344, 837 N.E.2d 1107, 1112 (2005) (noting that statutes of limitations prevent stale claims from springing up and surprising parties when the evidence has been lost). While statutes of limitations are intended to protect a defendant against the evidentiary problems associated with defending a stale claim, these statutes are also enacted to "promote repose by giving security and stability to human affairs.... They stimulate to activity and punish negligence." Wood v. Carpenter, 101 U.S. 135, 139, 25 L.Ed. 807 (1879).

"[W]here contract obligations are payable by installments, the limitations statute begins to run only with respect to each installment, when due, unless the lender exercises his or her option to declare the entire note due." Clayton v. Gardner, 107 Nev. 468, 470, 813 P.2d 997, 999 (1991) (citations omitted). Courts will seldom allow lenders to accelerate a contract obligation unless the "acceleration [is] exercised in a manner so clear and unequivocal that it leaves no doubt as to the lender's intention." Id. (*quoting* United States v. Feterl, 849 F.2d 354, 357 (8th Cir.1988)). Some "affirmative action by the creditor must be taken to make it known to the debtor that [the creditor] has exercised his option to accelerate." Feterl, 849 F.2d at 357.

B. A FORECLOSURE IS A REMEDY ESTABLISHED UNDER CONTRACT LAW

NRS §11.190(1)(b) places a six year statute of limitations on "[a]n action upon a contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding sections of this chapter."

In 1972, this Court discussed this statute in relates to mortgage law. El Ranco, Inc. v. New York Meat & Provision Co., 493 P.2d 1318, 88 Nev. 111 (1972). In that opinion, the Court provided a history of NRS §11.190(1)(b), stating:

> The peculiar language of NRS 11.190(1)(b) is derived from a California statute adopted in 1850, allowing four years for: "An action upon any contract, obligation, or liability, founded upon an instrument of writing." 1850 Calif.Stats., Ch. 127 (ch. III § 17). It should be noted that the statute is not limited to actions upon "contracts in writing," but relates to any "obligation or liability founded upon an instrument of writing." In 1855, before the statute was adopted in Nevada, the California Supreme Court placed a broad interpretation on the words 'founded upon an instrument in writing.' In Sannickson v. Brown, 5 Cal. 57 (1855), the California court held accounts the defendant had marked 'audited and approved' and 'certified to be correct' were sufficient to constitute 'instruments in writing' within the meaning of the statute, so that an action 'founded' or based upon them was entitled to a longer statute of limitations than an action brought upon a mere account not evidenced in such a way.

> In 1861, Nevada adopted the California statute with its judicial gloss. Laws of the Territory of Nevada, First Regular Session, ch. XII, § 16 (1861). In adopting the practice act of California, it must be presumed to have been adopted as interpreted by the highest court of judicature of that state. Williams v. Glasgow, 1 Nev. 533, 538 (1865); Harris v. Harris, 65 Nev. 342, 346, 196 P.2d 402 (1948); Astorga v. Ishimatsu, 77 Nev. 30, 32, 359 P.2d 83 (1961). The statute has been carried forward with the only substantial change being that the limitation period was extended to six years. (1867 Nev.Stats., ch. XLIX § 5; 1869 Nev.Stats., ch. 196, tit. I; 1911 Civil Practice Act § 25; Revised Laws of Nevada § 4967 (1912); NCL § 8524 (1929).)

Id. The Court then held, citing a number of jurisdictions, that "[i]n order to be founded upon an instrument in writing, the instrument must itself contain a contract (obligation or liability) to do the thing for the nonperformance of which the action is brought." Id.

The Court in El Rancho then provided the following gathering of cases:

> This court has long recognized that separate sections of the statute of limitations can be applicable to a given business transaction. See: Henry v. Confidence Mining Co., 1 Nev. 619 (1866), holding that although a debt secured by a mortgage was extinguished by the statute of limitations, the mortgage was not extinguished; Mackie v. Lansing, 2 Nev. 302 (1866), ***holding that although the principal debt was barred by the statute of limitations a right to foreclose the mortgage securing the debt was not barred until lapse of the longer statute of limitations;*** *cf*. Cookes v. Culbertson, 9 Nev. 199 (1874); Shoecraft v. Beard, 20 Nev. 182, 19 P. 246 (1888); State v. Murphy, 23 Nev. 390,

> 48 P. 628 (1897), holding that although the two-year statute for forfeitures and penalties had expired, an action upon the bail bond itself was an action upon an obligation founded upon an instrument in writing, so that the six-year statute applied.

Id., 88 Nev. at 115-116 (***emphasis added***). These cases are very instructive to this case.

In Mackie, a suit was brought on a note executed in the state of Nevada (a territory at the time) in the year 1862, and secured by mortgage on real estate. The note, after it became due and was barred by the statute of limitations of the then territory of Nevada, was renewed by a special promise in writing. Id. But before this renewal, another and intervening mortgage had been executed by the defendant to a third party. The district court held that the plaintiff's note having been barred at one time by the statute of limitations, the security was gone, and the second mortgage took precedence. This Court reversed. Citing Henry v. Confidence Co., 1 Nev. 619 (1866), this Court held that although the plaintiff's right to sue on the note itself may have been barred at one time, his right to foreclose the mortgage is not barred until the lapse of four years.[2] Mackie, 2 Nev, 302-303.

[2] This is a reference to NRS §11.190, which, when adopted from California was four years for contracts, but has been expanded to six. See El Rancho, *supra*.

In Henry v. Confidence, the Nevada Supreme Court weighed two propositions: when "the debt [is] barred by the statute of limitation, the mortgage is in effect extinguished," as noted by the California supreme court in the case of Lord v. Morris, 18 Cal. 482 (Cal.,1861), compared to "a decision of the circuit court of the United States for the northern district of California (Sparks & Kelsey v. Pico, 1 McAll. 497, 22 F. Cas. 881 (U.S.C.C.,1851), as establishing a contrary doctrine." Henry, 1 Nev at 620. The Nevada Supreme Court held that "the supreme court of California was right." Id., at 621.[3]

[3] The Supreme Court in Henry, addressed a situation where a mortgage may be created upon an oral agreement to repay money (as mortgages, as we currently know them, did not exist back then). In that case, there would be two different statute of limitations – one for an oral promise and a written mortgage which was then created as a result of the promise. In that situation, the Court noted:

> We think whilst an action on the note would be barred by the 34th section, a bill to foreclose the mortgage would not be barred until four years had elapsed since the cause of action arose thereon.

Id. It should be noted that the "34th section" was referring to the law of the Territory, that law which was in place before Nevada became a state. Section 34 of the same act, as amended in December, 1862, reads as follows:

> "An action upon any judgment; contract, obligation or liability, for the payment of money or damages, obtained, executed or made out of this territory, can only be commenced within

As such, it is clear that the right to foreclose is not indefinite. Rather, as the foreclosure is an "obligation or liability founded upon an instrument of writing," the written contract statute of limitations within NRS §11.190 would apply. Once six years has elapsed from the date of acceleration (as discussed above), a creditor may no longer foreclose on a mortgage.

C. THE RESCISSION DID NOT ALTER THE ACCELERATION OR DEFAULT IN THIS CASE.

The district court erred in accepting HSBC's argument that the Rescission that was filed in 2011, rescinded the acceleration.

This Court is steadfast in trying to use the plain meaning of contract language whenever possible. See, e.g., Am. First Fed. Credit Union v. Soro, 359 P.3d 105, 108, 131 Nev. Adv. Op. 73 (Nev., 2015) (*citing* Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir.1987) ("A primary rule of interpretation is that '[t]he common or normal meaning of language will be given to the words of a contract unless circumstances show that in a

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> six months from the time the cause of action shall accrue."

Id., 1 Nev at 620-21. This furthers the argument that a deed of trust is extinguished when the, now, 6 year statute of limitations would run on the note.

particular case a special meaning should be attached to it.' ") (*quoting* 4 Samuel Williston & Walter H.E. Jaeger, A Treatise on the Law of Contracts § 618 (3d ed.1961)).

For that reason, Ms. Facklam respectfully asks that this Court look at the language of the Rescission, not just the title of that document, the analysis that the district court used. If HSBC wanted to use the Rescission to terminate the acceleration caused by the filing of the First Notice of Default (the triggering event for purposes of the statute of limitations), it should have said so in that document.[4]

But, it did not. The plain language of the Rescission states that the Rescission did not "waiv[e], cur[e], extend[] to, or affect[] ***any*** default, either past, present or future, under such Deed of Trust, or as impair[] any right or remedy thereunder." APPX_145 (***emphasis added***). Since the First Notice of Default specifically accelerated all amounts due and owing as a result of the underlying breach which occurred in June, 2009, then, by the exact

[4] In fact, in defending countless homeowners in foreclosure actions, HafterLaw has had the ability to review hundreds, if not thousands of recordings made on various property records in this State. It is interesting to note that while many rescissions filed before the foreclosure crisis had made its way to our courts did look like the Rescission in this case, many filed after 2010 started to be much more specific, stating that the rescission did, in fact, terminate the prior acceleration caused by the notice of default that the rescission was rescinding.

language of the Rescission, that acceleration was not "waiv[ed], cur[ed], extend[ed] to, or affect[ed]" by the Rescission. Moreover, since HSBC, or its predecessor, was the one who wrote and filed the Rescission, it had complete control over its language. In contract interpretation, ambiguity should be construed against the drafter. See Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 215–16, 163 P.3d 405, 407 (2007).

Accordingly, the district court erred in disregarding the plain language of the Rescission and finding that the mere filing of that document on title, notwithstanding its language, rescinded the First Deed of Trust. For that reason, this Court must reverse the denial of summary judgment.

D. THE DISTRICT COURT'S DETERMINATION VIOLATES THE POLICY FOR HAVING A STATUTE OF LIMITATIONS

Limitation periods are meant 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. See Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18, 19 (1990) ("[S]tatutes of limitation embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." (internal quotation marks omitted)).

Justice Holmes succinctly stated that the primary purpose of such statutes is to "[prevent] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). Although statutes of limitation are generally adopted for the benefit of individuals rather than public policy concerns, see, e.g., Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 207 A.2d 513, 519 (1965), it has been stated that:

> Viewed broadly, ... statutes of limitation embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. Thus, statutes of limitation rest upon reasons of sound public policy in that they tend to promote the peace and welfare of society, safeguard against fraud and oppression, and compel the settlement of claims within a reasonable period after their origin and while the evidence remains fresh in the memory of the witnesses.

Petersen, 106 Nev. at 274 (citing 51 Am.Jur.2d Limitation of Actions § 18 (1970) (footnotes and citations omitted)).

Because the policy underlying statutes of limitations is meant to favor the defendant, allowing the plaintiff control of when the statute runs would be counter-intuitive to the policy supporting statute of limitations. To allow a creditor to reset the statute of limitations for an indebtedness which it

already accelerated and began the breach procedures, at any time, through the filing of a rescission, would never safeguard against fraud and oppression, compel the settlement of claims, or provide a defendant with peace of mind. It would also work against judicial economy, allowing the pursuit of stale claims that just happened to be revived by the unilateral actions of the creditor.

Hence, the district court's ruling was erroneous in that it contravenes the public policy reasons for having a statute of limitations.

E. THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT WAS ERRONEOUS

The district court dismissed the complaint for the same reasons it denied summary judgment. As that reason was erroneous, the granting of HSBS's motion for dismissal must be reversed, as well.

CONCLUSION

For the foregoing reasons, the district court's decision and order should be reversed.

Moreover, Ms. Facklam asks this Court to resolve her request for declaratory judgment, as there are no genuine issues of fact which remain,

allowing this Court to, as a matter of law, resolve this case, and issue an order that provides Ms. Facklam the declaratory relief that she seeks.

DATED THIS 15TH day of November, 2016.

HAFTERLAW

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[XX] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style]

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[**XX**] **Proportionately spaced, has a typeface of 14 points or more, and contains 4,613 words**; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED THIS 15TH day of November, 2016.

HAFTERLAW

By: _____

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HAFTERLAW, and that on this 15TH day of November, 2016, I served a copy of the **APPELLANT'S OPENING BRIEF** as follows:

☑ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☑ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or

□ Hand Delivery—By hand-delivery to the addresses listed below.

☑ Electronic Delivery—By e-mailing a true copy to the addresses listed below.

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Honorable Elissa Cadish
Eighth Judicial District Court

/s/ Kelli N. Wightman
An Employee of the HAFTERLAW