IN THE SUPREME COURT
OF THE STATE OF NEVADA

Case No.: 70786
District Court Case No.: A-16-733762-C

AMY FACKLAM,

Appellant,

vs.

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

Respondent.

RESPONDENT'S ANSWERING BRIEF

Respectfully submitted by,

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RESPONDENT'S NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) to be disclosed:

> Respondent HSBC BANK USA, NATIONAL ASSOCIATION is a national banking association under federal charter and regulated by the Office of the Comptroller of the Currency. It is the principal subsidiary of HSBC USA, Inc., an indirect, wholly-owned subsidiary of HSBC North America Holdings Inc., which, in turn, is a wholly-owned indirect subsidiary of HSBC Holdings PLC. No other publicly held company owns more than 10% of Respondent's stock.

The undersigned is the only counsel of record currently representing Respondent in these proceedings. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Dated this 17th day of January 2017.

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ISSUES PRESENTED FOR REVIEW

The issue on review is whether Appellant Amy Facklam ("Facklam") is entitled to declaratory relief prohibiting a foreclosure on property securing a loan held by the Trust pursuant to the six-year statute of limitations contained in NRS § 11.190(b)(1) where (1) the plain language of the statute is inapplicable to non-judicial foreclosures; (2) the notice of default she argues accelerated the loan was later rescinded; and (3) her own conduct tolled any applicable limitations period.

STATEMENT OF THE CASE

This appeal concerns the viability of a Complaint filed by Facklam against the Trust,[1] asserting two causes of action for (1) declaratory relief/quiet title, and (2) injunctive relief. Facklam's Complaint challenged a 2016 non-judicial foreclosure on property secured by a debt Facklam owed, asserting as the sole basis for the Complaint that a foreclosure initiated in 2016 was barred by a six-year statute of limitations applicable to actions for breach of contract because a prior non-judicial foreclosure had been initiated in 2009. After filing her Complaint, Facklam filed an immediate Motion for Summary Judgment ("MSJ") in her case, before the Trust's deadline to appear. The Trust opposed and filed a counter-motion to dismiss the Complaint, arguing that the Complaint failed to state a claim

[1] Respondent's complete name is HSBC Bank USA, National Association, as Trustee for Deutsche Alt-A Securities Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-AR2. (the "Trust.")

as a matter of law. The District Court agreed and denied Facklam's MSJ and dismissed the action. This Honorable Court should affirm.

STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

A. Facklam's Loan and 2009 Default

On or about December 21, 2006, Facklam took out a home loan and executed a Note in the original principal amount of $326,000 secured by a Deed of Trust against real property located at 1513 Shotgun Lane, Henderson, Nevada 89104. Collectively, the Note and Deed of Trust are referred to herein as the "Loan." The maturity date stated in the Loan is January 1, 2037. (Joint Appendix ("JA") Vol. I, pp. 115-140; Appellant's Opening Brief ("AB"), p. 3).

Less than three years later, Facklam defaulted on the Loan. The servicer of the Loan at the time, Bank of America, recorded a Notice of Default on September 25, 2009 (the "2009 NOD"). (JA Vol. I, pp. 141-143; AB, pp. 3-4). The 2009 NOD declared that a default had occurred for failure to pay installments of principal and interest due as of June 1, 2009, and noted:

> THE ENTIRE PRINCIPAL AMOUNT WILL BECOME DUE ON 01/01/2037 AS A RESULT OF THE MATURITY OF THE OBLIGATION ON THAT DATE.

(Id.). The 2009 NOD further stated in pertinent part:

> You may have the right to cure the default hereon and reinstate the one obligation secured by such Deed of Trust above described. Section NRS 107.080 permits certain defaults to be cured upon the

> payment of the amounts required by that statutory section without requiring payment of that portion of principal and interest which would not be due had no default occurred….

(JA Vol. I, pp. 141-143). The 2009 NOD did not state that the loan was accelerated or state a total indebtedness amount. (Id.).

A Notice of Trustee's Sale ("Notice of Sale") was later recorded on July 18, 2011. (JA Vol. II, pp. 186-187; AB, p. 4). The Notice of Sale stated the accelerated debt amount as follows:

> The total amount of the unpaid balance with interest thereon of the obligation secured by the property to be sold plus reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of sale is $365,616.53.

(JA Vol. II, p. 186).

On or about August 4, 2011 Facklam filed a lawsuit against Bank of America to stop the trustee's sale date stated by the Notice of Sale. The non-judicial foreclosure ceased as a result of Facklam's litigation, which lasted until 2014. (JA Vol. II, p. 158 ¶¶ 24-26).

On December 5, 2011, a Rescission of Election to Declare Default was recorded to rescind the non-judicial foreclosure initiated by the 2009 NOD after Facklam entered into a temporary loan modification plan to reinstate the loan. (JA, Vol. I pp. 145-146; Vol. II, pp. 235-236 lns. 25-4).

B. Facklam's 2015 Default

On or about November 30, 2013, servicing of the Loan was transferred from Bank of America to Ocwen Loan Servicing, LLC ("Ocwen") on behalf of the Trust. (JA Vol. I, p. 5; Vol. II, p. 165).

Facklam eventually defaulted on her modification plan. Ocwen offered Facklam further options to avoid foreclosure up through 2015, but she failed to follow through on her obligations. On January 25, 2016, HSBC recorded a notice of default to commence a non-judicial foreclosure pursuant to NRS § 107.080(2)I. (JA Vol. I, pp. 6 ¶¶ 22-23, 106 ¶¶ 12-13; Vol. II, pp. 147-154, 158-159 ¶ 28, 165). The 2016 NOD explained that Facklam was "behind in [her] payments" which if not cured could lead to issuance of a notice of sale for the "entire debt…without any court action." The notice also gave Facklam instructions on how to "cure" the "past due" arrearages and bring her loan current "within the time permitted by law for reinstatement" pursuant to "NRS 107.080." (JA Vol. II, pp. 147-154).

C. Facklam's Complaint

Instead of curing her default on the loan, Facklam filed a Complaint against the Trust on March 21, 2016. Facklam asserted two causes of action for declaratory and injunctive relief and sought "an order removing the deed of trust from title records." (JA Vol. 1, pp. 2-15; JA Vol. II, pp. 190-191). Her claims were premised on the argument that the Trust's 2016 non-judicial foreclosure was

barred under NRS § 11.190 (b)(1) which provides a six-year statute of limitations for an "action upon a contract, obligation or liability founded upon an instrument in writing . . . ." According to Facklam, the six-year limitations period commenced on the date the prior 2009 NOD was recorded, and precluded a non-judicial foreclosure initiated more than six years after that date. (JA Vol. I, pp. 2-15).

Facklam filed an immediate Motion for a TRO and Preliminary Injunction against the Trust's non-judicial foreclosure, which the District Court denied on April 12, 2016. (JA Vol. I, pp. 16, 70, 100-102). The next day, Facklam filed a MSJ before the Trust's deadline to respond to the Complaint or any discovery had taken place. (JA Vol. I, p 103). Facklam's MSJ argued that the Trust's right to foreclose was forever barred under the six-year statute of limitations as a result of the NOD recorded on September 29, 2009 by the prior Loan servicer. More specifically, Facklam asserted the 2009 NOD accelerated the Loan which would have required the Trust to foreclose within six years regardless of the Rescission of the NOD recorded on December 5, 2011, the reinstatement of the Loan with Facklam's temporary modification plan, or the other holds on foreclosure. (JA Vol. I, p 103 *et seq.*).

The Trust filed an Opposition to the MSJ and Counter-Motion to Dismiss Facklam's Complaint ("MTD") under Nevada Rule of Civil Procedure 12(b)(5). (JA Vol. II, pp. 160-177, 178-188). The Trust's Opposition and MTD explained

that Facklam's theory of relief was erroneous because (1) the six-year statute of limitations defense does not apply to a non-judicial foreclosure; (2) the 2009 NOD did not accelerate the Loan pursuant to Nevada's governing foreclosure statutes; and (3) even if the 2009 NOD was deemed to accelerate the Loan, it was appropriately rescinded in 2011. (Id.). The District Court adopted the Trust's reasoning, denied Facklam's MSJ and granted HSBC's MTD. (JA Vol. II, pp. 250-254).

D. Facklam's Appeal

On July 11, 2016, Facklam appealed the District Court's judgment of dismissal in favor of the Trust. Facklam then obtained a preliminary injunction against the non-judicial foreclosure pending this appeal.

On appeal, Facklam abandons her claim that requested an order removing the deed of trust from title records. Her Opening Brief states that her Complaint was "grounded in one primary claim – a request for declaratory relief – and injunctive relief against foreclosure. (AB p. 10). In support, she reasserts the same arguments raised in the District Court.

SUMMARY OF ARGUMENT

The Trust's present non-judicial foreclosure is timely and not barred by the six-year statute of limitations for multiple reasons. First, NRS § 11.190 provides a limitations period as a defense only to "[a]n action upon a contract, obligation or

liability . . . .” A non-judicial foreclosure under a deed of trust is not an “action” filed in a court. Holt v. Regional Trustee Services. Corp., 127 Nev. 886, 891-892, 266 P.3d 602, 605-06 (2011); see also, Beach v. Ocwen Federal Bank, 523 U.S. 410, 416 (1998) (statutes of limitation “are aimed at lawsuits...”). Consequently, the six-year statute of limitations precluding “actions” after six years is inapplicable and cannot bar a non-judicial foreclosure.

Second, even if a non-judicial foreclosure constituted an “action” or the instant case concerned a **judicial** foreclosure, NRS § 11.190 is still inapplicable because the statute specifically excludes proceedings “for recovery of real property” from the limitation period. Thus, Section 11.190 does not apply to the Trust’s non-judicial foreclosure under the Deed of Trust.

Third, the 2009 NOD did not accelerate the loan pursuant to the plain language of the notice and the Nevada foreclosure statutes found in NRS §§ 107.080 *et seq.*

Fourth, Facklam’s argument fails to account for intervening events that delayed, tolled, and/or terminated the running of any statute of limitations. For example, the 2009 NOD was rescinded in 2011. Even if a limitations period ran from the date of the 2009 NOD, the Rescission terminated any running of the limitations period.

Fifth, Nevada law precludes Facklam from challenging a non-judicial foreclosure without tendering the amounts necessary to reinstate the Loan. Facklam has both an obligation and statutory right triggered by the 2016 NOD to bring the loan current in order to avoid the Trust's present foreclosure. NRS § 107.080. She has failed to tender the amounts necessary to avoid foreclosure and, consequently, she cannot bring suit to challenge it. (JA Vol. II, pp. 173-174). See, Collins v. Union Federal Savings & Loan Ass'n., 99 Nev. 284, 304, 662 P.2d 610, 623 (1983); and see, Ernestberg v. Mortgage Investors Group, No. 2:08-cv-01304-RCJ-RJJ, 2009 WL 160241, at *6 (D. Nev. 2009 Jan. 22, 2009).

Rather than cure her delinquent Loan, Facklam has filed lawsuits and appeals to interfere with foreclosure, and previously entered into temporary modifications or applications for foreclosure preventative alternatives, in an effort to delay foreclosure and keep the secured property as long as possible essentially mortgage and tax free. (JA Vol. I, p. 115-140; Vol. II, p. 169). On appeal, Facklam argues that the Trust is now barred from ever foreclosing. If adopted, this argument would allow her to reap a further windfall on her secured debt.

Facklam's argument is contrary to foreclosure law and policy, and seeks to create an avenue for abuse by borrowers. Under Facklam's theory, a borrower could default on her secured loan triggering a non-judicial foreclosure, negotiate a loan modification and reinstate the loan inducing the lienholder to discontinue the

foreclosure, wait six years and then assert she gets the home free and clear as a result of the now-resolved non-judicial foreclosure. Adoption of Facklam's theory would fly in the face of the important public policy favoring arrangements between lenders and borrowers to prevent foreclosure and keep paying borrowers in their homes. It would also eviscerate lenders' incentives to work with borrowers for alternative solutions to foreclosure.

In sum, the six-year statute of limitations for breach of contract actions does not bar the Trust's non-judicial foreclosure as a matter of law, evidence, and equity. The Honorable Court should affirm the District Court.

ARGUMENT

It is undisputed that "[t]his case involves questions of law, not fact." (JA Vol. II, pp. 190-191). The sole legal issue presented by Facklam's appeal is whether the Trust's non-judicial foreclosure commenced in 2016 is time-barred under the six-year statute of limitations for contract actions by virtue of the fact that another non-judicial foreclosure was previously initiated in 2009. As discussed below, Nevada law establishes that there is no limitations bar.

A. The Statute of Limitations For Enforcing the Loan Will Not Expire Until Ten Years after the Loan's Maturity Date of January 2037

In the context of enforcement by non-judicial foreclosure of a loan secured by a deed of trust, there is a 10-year statute of limitations triggered upon

affirmative acceleration of the total loan debt under NRS § 106.240. If the debt is not accelerated, the statute runs from the date of maturity. See, Pro-Max Corp v. Feenstra, 117 Nev. 90, 94, 16 P.3d 1074, 1077 (2001). In Pro-Max, the borrower made no payments on a secured note for the entirety of the loan and did not pay when the note became wholly due on the maturity date of May 14, 1984. The Nevada Supreme Court held that the deed of trust securing the note did not expire until 10 years after the note matured in its entirety despite general nonpayment on the note itself in the interim. Id. at 94.

Here, the maturity date stated in Facklam's Note and Deed of Trust is January 1, 2037. The maturity date was reiterated in the 2009 NOD as well. (JA Vol. I, pp. 116, 142; Vol. II, p. 208). The District Court correctly applied Nevada law in holding that, even if the Loan was deemed accelerated under the 2009 NOD, it was later de-accelerated with the 2011 Rescission and, consequently, the statute of limitations ran from the 2036 maturity date which had not yet commenced. (JA, Vol. II, pp. 223-224 lns. 22-15).

B. The 2009 Notice of Default Did Not Accelerate the Loan to Trigger a Statute of Limitations for Breach of Contract Actions

Facklam argues that the six-year statute of limitations contained in NRS § 11.190(1)(b) prevents the Trust from proceeding with a non-judicial foreclosure more than six years after recording the 2009 NOD. As discussed below, the statute does not apply. First, NRS § 11.190(1)(b) does not apply to actions for recovery of

real property. The statute of limitations precludes lawsuits, not non-judicial foreclosures. Second, the statute of limitations cannot be used to assert the affirmative relief sought by Facklam. Third, the 2009 NOD did not accelerate the Loan, and therefore did not trigger the running of the limitations period.

1. NRS § 11.190(1) is Inapplicable Because it Does Not Govern Actions for Recovery of Real Property and Also Does Not Apply to Non-Judicial Foreclosures

NRS § 11.190 expressly states that it applies to "actions other than those for the recovery of real property . . .". Thus, Section 11.190(b)(1) cannot apply to a non-judicial foreclosure of property under a deed of trust.

Further, even if Section 11.190 did apply to an action to recover real property, it does not apply to a non-judicial foreclosure. The statute limits the time period for an "action upon a contract, obligation or liability founded upon an instrument in writing, except those mentioned in this chapter." (AB p. 13). Nothing in Section 11.190(1)(b) mentions time limits for non-judicial foreclosures of secured loans. A non-judicial foreclosure is not a judicial action, it is a statutorily prescribed process governed explicitly by the provisions of NRS §§ 107.080 *et seq*. See, Holt, 127 Nev. at 891, 266 P.3d at 605 (2011) (a "nonjudicial foreclosure is not a judicial 'action,' giving rise to a claim or defense of foreclosure…"). The limitations period under NRS § 11.190(1)(b) is explicitly

pertinent only to an "action" or lawsuit, not other conduct such as a non-judicial foreclosure.

There is no sound argument for the inclusion of "non-judicial foreclosures" in the definition and scope of "action" under NRS § 11.190. The term "action" is defined in its legal sense as "a lawsuit brought in a court." *Black's Law Dictionary* (6th ed. 1990); see, also, Costello v. Casler, 111 Nev. 436, 439, 254 P.3d 631, 633 (Nev. 2011) ("institution of an action" is a phrase used to discuss the pleadings of a lawsuit); Beach, 523 U.S. at 416 (statutes of limitations apply to "a cause of action" in a lawsuit which must be "brought within a certain period of time."). Even the cases cited by Facklam apply the defense of the statute of limitations to bar a "cause of action" or "claim" in a "suit." (AB pp. 11-12, 19-20; JA, Vol. II, p. 231 lns. 2-6).

Additional provisions contained in Chapter 11 also make clear that the word "action" refers to a lawsuit. For instance, NRS § 11.010, entitled "Commencement of civil actions" states: "Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute." Further statutes within the chapter refer to examples of actions that are necessarily lawsuits, such as an "action for the recovery of mining claims," NRS § 11.060, an "action against an attorney or veterinarian . . . for malpractice," NRS § 11.207(1); and numerous

other types of actions described in NRS § 11.190, such as an "action against a person alleged to have committed a deceptive trade practice . . . ." NRS § 11.190(2)(d).

The plain language of the statute is also consistent with Nevada law, historically. Facklam's Opening Brief discusses the Court's early opinion over 150 years ago in Henry v. Confidence Gold & Silver Mining Co., 1 Nev. 619 (1866). In Henry, the Court confirmed that the statute of limitations does not destroy a debt, but indicated it may bar some other suit or remedy under the contract. The Henry Court stated that even if "a debt…secured by a mortgage is barred by the statute of limitations, the mortgage is not thereby extinguished" and "may still have an existence for some purposes [e.g. foreclosure and possession]." Id. at 619, 622.

Thus, under Henry, even where a party loses the remedy of filing a breach of contract action because the statute of limitations expired, it does not lose the power to foreclose pursuant to a deed of trust securing the note. Id.; see also, Mackie v. Lansing, 2 Nev. 302, 302-303 (1866). Facklam's argument that the statute of limitations bars the Trust's right to foreclose under the Deed of Trust is contrary to these cited authorities.

2. Nevada Law Does Not Support Utilizing the Statute of Limitations to Obviate the Loan a Debt in a Court Action

Facklam's use of a declaratory relief action essentially seeking to obviate her debt is not supported by the Nevada authorities. Indeed, the Henry Court considered whether such an action had merit in a court of equity. The Court commented:

> This renders it unnecessary to determine another point which suggested itself to our mind. Could the plaintiff come into a court of equity and ask such affirmative relief as the plaintiff asks here whilst acknowledging that the debt for which the property was pledged remains unpaid. The statute of limitations is a statute of repose, a statute to protect defendants, not to afford new causes of action to plaintiffs.

Id. at 622.

Facklam's Complaint turns the statute of limitations on its head by using it as a sword in her own affirmative action, rather than its intended use as a defense to shield against a contract action. Even if it applied, the six-year statute for contract actions would not come into play unless the Trust filed a court action against Facklam for judicial foreclosure (assuming the 2009 NOD accelerated the loan and was not rescinded), a breach of contract on her note if it were rendered unsecured, or an action for deficiency judgment after a completed foreclosure.[2] The Trust did not file any such actions against Facklam.

[2] A non-judicial trustee's sale must be attempted or completed before an action for breach of contract action or deficiency on the loan could even be filed by the loan servicer under the 'security first' and 'one action' rules. Nevada Wholesale

3. Notices of Default Do Not Accelerate a Loan

Even if NRS § 11.190 were applicable and allowed an affirmative action to void a lien, the statute's limitations period has not been triggered under the facts of this case. The limitations period would not be triggered until the expiration of the loan maturity date or an unequivocal acceleration of the full loan debt. Facklam's appeal is based on a fundamental flaw contrary to the purpose and effect of the 2009 NOD under Nevada's foreclosure statutes.

Facklam's Deed of Trust affords a power of sale by non-judicial foreclosure. NRS § 107.080(1) governs non-judicial trustee's sales authorized pursuant to a deed of trust securing the borrower's underlying loan obligation. Under Section 107.080(2)(c), a notice of default is recorded to commence a non-judicial foreclosure of a secured loan by estimating the amount of the arrearages in default at the time and affording at least 90 days thereafter for a borrower to reinstate or cure the default. These Sections do not provide that a notice of default state or may effect an acceleration of the total loan debt. Rather, the notice of default and 90 day time period is a statutory pre-requisite to acceleration of the loan.

If the borrower has not cured the default after 90 days and there has been no timely elected pre-foreclosure mediation under pursuant to NRS § 107.086 and the Foreclosure Mediation Rules, then a notice of trustee's sale may be recorded

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Lumber Co. v. Myers Realty, Inc., 92 Nev. 24, 28, 544 P.2d 1204, 1207 (1976).

stating the accelerated secured debt amount at that time and a scheduled trustee's sale date. NRS § 107.080(4).

In 2016, the Court affirmed the dismissal of a complaint similar to Facklam's asserting that the six-year statute of limitations of NRS § 11.190(1)(b) barred the foreclosure of a secured loan. See, Penrose v. Quality Loan Service Corp., No. 68946, 2016 WL 1567517 at *1 (Nev. Apr. 15, 2016). The Court stated as follows:

> Having considered the parties' arguments and the record, we conclude that the district court properly dismissed appellant's action. *See, Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (reviewing de novo a district court NRCP 12(b)(5) dismissal). Specifically, at the time when appellant filed his complaint, there was no set of facts that appellant could have established under which Nationstar Mortgage would have been time-barred from foreclosing on the subject property. *See id.; Henry v. Confidence Gold & Silver Mining Co.*, 1 Nev. 619, 621-22 (1865) (recognizing that a mortgagee may seek to nonjudicially foreclose on secured property even if an **action** on the secured debt would be time-barred); *cf. Miller v. Provost*, 33 Cal. Rptr. 2d 288, 289-90 (Ct. App. 1994) (observing that this rule is "based on the equitable principle that a mortgagor of real property cannot, without paying his debt, quiet his title against his mortgagee"). (**Emphasis** added).

Id. at, *1. Here, the facts do not establish that the Trust is time-barred from foreclosing on the secured property. Facklam's MSJ failed to provide admissible factual evidence to establish that the 2009 NOD accelerated the Loan. On its face and under the Nevada foreclosure statutes, the Loan was not accelerated with the 2009 NOD.

Nevada courts have held that prior to the acceleration of a loan, the six-year statute of limitations may begin to run only with respect to each particular installment when due, unless the servicer exercises its option to declare the entire note due. Clayton v. Gardner, 107 Nev. 468, 470, 813 P.2d 997, 999 (1991) ("The law is well settled that where the acceleration of the installment payments in cases of default is optional on the part of the holder, then the entire debt does not become due on the mere default on payment but affirmative action on the part of the creditor must be taken..").

As pointed out by Facklam, courts seldom find that a loan has actually been accelerated unless it is "exercised in a manner so clear and unequivocal that it leaves no doubt as the lender's intention." Clayton, at 470, 999. So unless there is clear and unequivocal further action by the loan servicer leaving no doubt as to whether the loan has in fact been accelerated, the six-year statute of limitations would not commence to run on the entirety of the secured loan and would not bar foreclosure under the deed of trust and foreclosure statutes.

Facklam's MSJ presented no evidence to support her piece-meal interpretation of selected language from the 2009 NOD or her suggestion that it accelerated the full loan debt for a trustee's sale. The NOD stated only the amount of the monthly payments in default as of "06/01/2009." It also stated an "election" had been made to proceed further with the statutory non-judicial foreclosure, a

process which requires a separate notice of trustee's sale with a stated accelerated debt amount and sale date. The NOD advised Facklam that she had "the right to cure the default" pursuant to "Section NRS 107.080." The NOD further reiterated the maturity date of the secured loan as follows: "THE ENTIRE PRINCIPAL AMOUNT WILL BECOME DUE ON 01/01/2037 AS A RESULT OF THE MATURITY OF THE OBLIGATION ON THAT DATE." (JA Vol I., pp. 141-143).

The 2009 NOD was not a notice of trustee's sale. Nowhere in the NOD did it state, whether clearly or otherwise, that the loan has been accelerated with a total secured debt amount given or a scheduled trustee's sale. The NOD was not clear and unequivocal evidence that the loan was immediately accelerated upon its recordation. Consequently, the Loan was not accelerated by the 2009 NOD.

Facklam's contention that the 2009 NOD effected a loan acceleration that commenced the running of the six-year statute on the entire secured debt would eviscerate the 2037 maturity date stated in the Note, Deed of Trust, and the 2009 NOD. It would also eviscerate the statutorily required notice procedure for trustee's sales under NRS § 107.080 *et seq.*, including the requirement that a subsequent notice of sale must issue, stating the entire accelerated indebtedness and the date of the of the scheduled trustee's sale under NRS § 107.080(4).

At most, the six-year statute for the filing of a breach of contract action on the note, if it applied, commenced with the subsequently issued Notice of Sale recorded on July 20, 2011. The Notice of Sale was recorded within the six-year period prior to **Facklam's filing of her Complaint** below on March 21, 2016. For the reasons set forth above, the Trust's 2016 non-judicial foreclosure is not barred by the statute of limitations.

C. Facklam's Action and Appeal Fail to Account for the Intervening Events and Tolling of Any Statute of Limitations

The running of statutes of limitations are subject to equitable tolling to protect a defendant from circumstances and delays caused by a plaintiff. See, FDIC v. Rhodes, 130 Nev. Adv. Op. 88, 336 P.3d, 961, 965 (Nev. 2014) (surveying cases for equitable tolling).

Assuming *arguendo* that the six-year statute would somehow apply to the September 2009 NOD, Facklam's Brief ignores the importance of at least five intervening events which would have delayed, tolled or terminated the running of that six-year period. These events were as follows:

First, the Notice of Sale stating a trustee's sale date was not recorded until almost two years later on July 20, 2011 stating the amount of the accelerated debt at that time pursuant to NRS § 107.080(4). (JA Vol. I, pp. 5 ¶¶ 16-17, 107 ¶¶ 6-7; Vol II, p. 158 ¶¶ 22-23). Specifically, the Notice stated the Trust was entitled to:

> The total amount of the unpaid balance with interest thereon of the obligation secured by the property to be sold plus reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of sale is $365,616.53.

(JA Vol. II, p. 186). Thus, the running of any statute of limitations would not have commenced until July 20, 2011.

Second, on or about August 4, 2011, Facklam filed a prior lawsuit against the previous loan servicer to stop the trustee's sale date stated in a Notice of Sale. The non-judicial foreclosure was stayed as a result of the lawsuit which was not ultimately resolved until 2014. (JA Vol. II, p. 158 ¶¶ 24-26). So the ability to proceed with foreclosure was effectively prevented for approximately three years as a result of Facklam's litigation which tolled any statute of limitations period triggered by that July 20, 2011 Notice of Sale.

Third, the non-judicial foreclosure commenced with the 2009 NOD and 2011 Notice of Sale was rescinded by a notice of rescission recorded on December 5, 2011. (JA Vol. I, p. 5 ¶ 18, pp. 144-146; Vol. II, pp. 157-158 ¶¶ 10-13, 18). So even if the statute of limitations had been initiated by the 2009 NOD or Notice of Sale, it was terminated upon the rescission as confirmed by the District Court.

Fourth, Facklam's loan was reinstated with her temporary modification plan resulting in the Rescission of the 2009 NOD and any related non-judicial

foreclosure efforts at that time. Facklam confirmed as much during her counsel's discussion with the District Court in the proceedings below:

> MR. HAFTER: …And a matter of fact we went into – Ms. Facklam went into loan modification trying to do – trying to work with her. She not only made the three payments, I think she made 7, 8, or 9 payments.
>
> THE COURT: Uh-huh.

(JA, Vol. II, pp. 235-236 lns. 25-4). Thus, the running of any statute of limitations terminated upon the rescission in 2011 such that it was no longer triggered by the non-judicial foreclosure initially commenced in 2009. After Facklam defaulted on her modification plan, there were additional efforts to provide her with a loan modification or other alternatives up through late 2015 to no avail, so the Trust recorded the NOD on January 25, 2016 to commence a new non-judicial foreclosure on the failed modification plan. (JA Vol. I, pp. 6 ¶¶ 22-23, 106 ¶¶ 12-13; Vol. II, pp. 158-159 ¶ 28).

Fifth, Facklam filed her second lawsuit below on or about March 21, 2016. As a result, the Trust's new non-judicial foreclosure was put on hold. After the District Court entered the dismissal judgment against Facklam, the Trust recorded a Notice of Sale scheduling a trustee's sale. However, Facklam filed the instant appeal and then obtained a preliminary injunction in the District Court against the non-judicial foreclosure pending this appeal. [See Docket Filing No. 16-24664, followed by motion and order entered in District Court below on 8/16/16]. As a

result, the running of any statute of limitations is again tolled until, at a minimum, the conclusion of Facklam's appeal herein. NRS § 11.350 ("When the commencement of one action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.").

The total tolling time for these superseding events prior to Facklam's instant appeal was at least 50 months after the September 2009 NOD. So even if the six-year statute was somehow applicable to the 2009 NOD despite subsequent events and the rescission thereof in 2011, that limitation period would only have run approximately 22 months as opposed to six years.

D. Any Running of the Statute of Limitations was Terminated by the 2011 Rescission

Even if this Honorable Court should find that the 2009 NOD initiated the running of the statute of limitations period, the matter is irrelevant because the subsequently recorded Rescission terminated any running of the time period under the 2009 NOD. As explained in Holt, "[a] notice of rescission renders moot disputes concerning the notice of default or its timing." 127 Nev. at891-92, 266 P.3d at 605-606. The Court in Holt cited with favor the following cases: Coley v. Accredited Home Lenders, Inc., No. 4:10CV01870 JLH, 2011 WL 1193072, at *4 (E.D. Ark. Mar. 29, 2011) ("Whether the Notice of Default was valid is moot because the nonjudicial foreclosure sale described in the notice was cancelled.");

Sakugawa v. MERS, Inc., No. 10-00028 JMS/BMK, 2011 WL 776051, at *6 (D. Haw. Feb. 25, 2011) ("the Notice of Rescission moots Plaintiff's claims for equitable relief—there is no existing controversy regarding the Notice of Foreclosure because it was rescinded…").

The 2009 NOD and the non-judicial foreclosure process commenced thereby was rescinded with the Rescission of Election to Declare Default recorded on December 5, 2011. (JA Vol. I, pp. 59-61; Vol. II, p. 246 lns. 15-17). Facklam agreed to reinstate her Loan monthly modified payments under a temporary payment plan with the prior servicer, Bank of America. (JA Vol. II, pp. 157-158). The Trust was entitled to allow her to reinstate, rather than foreclose. Trident Center v. Connecticut Gen. Life Ins., 847 F.2d 564, 567 (9th Cir. 1988) (a lender or servicer pursuing non-judicial foreclosure options in Nevada ordinarily has the option under the loan documents whether to declare a default, whether and when to accelerate, and to rescind the process before completion). Upon reinstatement, any running of the six-year statute of limitations, if applicable, was terminated as of December 5, 2011 with the recorded Rescission.

Facklam attempts to pick apart the Rescission by focusing on her interpretation of select language in it taken out of context. Specifically, she notes a sentence in the rescission that indicated that any prior, past, or future arrearages in default, and any remedy or right thereon, were not waived. Based thereon,

Facklam makes the circular argument that although the Rescission rescinded the 2009 NOD and halted the foreclosure, it did not rescind the acceleration of the Loan which she contends occurred with the 2009 NOD. Facklam supports her argument under cited general canons of express contract interpretation. (AB pp. 17-18). She ignores the Nevada foreclosure statutes, and discounts the plain language of the 2009 NOD and the 2011 Rescission taken in their entirety. See, NRS §§ 107.080 *et seq*. Neither the 2009 NOD nor the Rescission were contracts between Facklam and the Trust, so the canons of contract interpretation do not apply.

The District Court agreed concluding that, even if the 2009 NOD somehow accelerated the entire amount due under the Note and Deed of Trust, the Rescission which was recorded on December 5, 2011 rescinded that NOD. The District Court rejected as unmeritorious Facklam's argument that the Trust's 2016 foreclosure is barred because the Rescission somehow reserved an acceleration of the Loan under the rescinded 2009 NOD. (JA, Vol. II, pp. 246-247 lns. 20-24). This Honorable Court should affirm.

E. Facklam Has Not Tendered Monies to Reinstate the Loan

An action challenging a foreclosure will not lie if the borrower does not "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 power of sale." See, Collins v. Union Federal Savings & Loan Ass'n., 99 Nev. 284, 662 P.2d 610, 623 (1983); Pimental v. Countrywide Home Loans, Inc., No. 2:10-CV-02125-KJD-LRl, 2011 WL 2619093, at *2 (D. Nev. Jul. 1, 2011) ("Nevada recognizes the tort of wrongful foreclosure only where a homeowner essentially asserts a lender wrongfully exercised the power of sale and foreclosed upon his or her property when the mortgagor was not in default on the mortgage loan."); Ernestberg, 2009 WL at *6.

This requirement comes from the age old maxim, he who seeks equity must do equity. See, McQuiddy v. Warem, 87 U.S. 14, 19 (1873). Thus, a borrower must show they were not "in default when the power of sale was exercised." Collins, 99 Nev. at 304.[3] Without such a claim, the presumption is that a borrower cannot maintain an action challenging foreclosure of a loan. Id.

[3] Nevada follows to a large extent California foreclosure law. California courts have also long established the "tender rule," i.e. in order to maintain an action based on any claims challenging foreclosure, the borrower must first offer or actually pay the entire loan amount or at least the amount reasonably due. See, Munger v. Moore, 11 Cal. App. 3d 1, 6, 89 Cal. Rptr. 323 (1970); FPCI Re-Hab 01 v. E & G Investments, Ltd., 207 Cal. App. 3d 1018, 1022 (1989); United States Cold Storage v. Great Western Savings & Loan Association, 165 Cal. App. 3d 1214, 1225, 212 Cal. Rptr. 232 (1985); Bisno v. Sax, 175 Cal. App. 2d 715, 346 P.2d 814 (1995); Arnolds Management Corp. v. Eischen, 158 Cal. App. 3d 575, 577-80, 205 Cal. Rptr. 15 (1984); Karlsen v. American Savings & Loan Ass'n, 15 Cal. App. 3d 112 (1971); Abdallah v. United Savings Bank, 43 Cal. App. 4th 1101, 1109 (1996) (a party must tender the undisputed amount due and owing to challenge the validity of the foreclosure sale). Courts in Nevada have followed an

Facklam does not dispute that she defaulted on her loan modification plan, which resulted in the January 2016 NOD. (JA Vol. II, p. 165). Facklam has not demonstrated in her action below or this appeal that she is not in default of her loan at the time of the 2016 NOD, the filing of her action below, or to date. The District Court correctly dismissed Facklam's action against the Trust.

CONCLUSION

For the foregoing reasons, Respondent the Trust respectfully requests that this Honorable Court affirm the District Court, and for such other and further relief that may be appropriate.

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analogous tender rule as well. The tender rule was again recognized by the Court stating that "reversing a [foreclosure] sale would be an extraordinary act of equity in a case where there is in fact a default, and Plaintiffs have not indicated any ability or willingness to do equity (by paying the mortgage arrearage) to receive such a remedy." Olivas v. Carrington Mortg. Loan Trust, No. 3:10-cv-00133-RCJ-VPC, 2011 WL 240229, at *4 (D. Nev. Jan. 20, 2011); see also, Smith v. Community Lending, Nos. 3:10-cv-00651-RCJ-VPC & 3:10-cv-00653-RCJ-VPC, 2011 WL 1127046, at *2 (D. Nev. March 29, 2011) (Under Nevada law, "no damages claim for wrongful foreclosure lies where there is in fact a default.").

Dated this 17th day of January, 2017.

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CERTIFICATE OF COMPLIANCE

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 in 14 point Times Roman font.

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 proportionately spaced, has a typeface of 14 points or more, and contains 6,754 words, or does not exceed 30 pages.

Finally, I certify that I have read this Respondent's Answering Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for an 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 assertions in the brief regarding matters in the record to be supported by a reference to the page and volume number, in any, of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of January, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 17th day of January, 2017. Electronic service of the foregoing **RESPONDENT'S ANSWERING BRIEF** shall be made as follows:

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