Case No. 81293

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant/Cross-Respondent, vs. U.S. BANK N.A., A NATIONAL BANKING ASSOCIATION, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE LXS 2006-4N TRUST FUND, ERRONEOUSLY PLED AS U.S. BANK, N.A., AND NATIONSTAR MORTGAGE, LLC, A FOREIGN LIMITED LIABILITY COMPANY Respondents/Cross-Appellants.	Electronically Filed Jan 21 2021 11:42 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable Gloria Sturman, District Judge
District Court Case No. A-14-705563-C

APPELLANT'S OPENING BRIEF

JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Telephone: (702) 485-3300
Facsimile: (702) 485-3301
Attorneys for SFR Investments Pool 1, LLC

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal. SFR Investments Pool 1, LLC's ("SFR") is wholly owned by SFR Investments, LLC. SFR Investments, LLC is wholly owned by SFR Funding, LLC. SFR Funding, LLC is owned by Xiemen Limited Partnership. Xiemen Investments, Ltd. and John Gibson are the partners of Xiemen Limited Partnership. No publicly held corporation owns 10% or more of Xiemen Investments, Ltd. stock. In district court, Appellant SFR Investments Pool 1, LLC was represented by Jacqueline A. Gilbert, Esq., Diana S. Ebron, Esq., Karen L. Hanks, Esq., and Jason Martinez, Esq. of Kim Gilbert Ebron. The same attorneys represent Appellant on appeal.

DATED: January 21st, 2021.

KIM GILBERT EBRON

/s/ Diana S. Ebron
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Email: jackie@kgelegal.com
Email: diana@kgelegal.com
Attorneys for SFR Investments Pool 1, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1). The action began as complaint in interpleader filed by Alessi & Koenig, LLC ("Alessi") who named U.S. Bank and Nationstar, among others, as defendants. (1JA_0001.) On August 18, 2015, U.S. Bank named SFR as a third-party defendant, asserting claims for quiet title, injunctive relief, and unjust enrichment. (1JA_0044.) On March 14, 2016, SFR brought cross/counterclaims for quiet title/declaratory relief, and injunctive relief against U.S. Bank, Nationstar, Kristen Jordal, as Trustee for the JBWNO Revocable Living Trust, a Trust, Stacy Moore, and Magnolia Gotera. (1JA_0301.) SFR also brought a slander of title claim against Nationstar. On June 20, 2016, SFR voluntarily dismissed Kristen Jordal, as Trustee for the JBWNO Revocable Living Trust, a Trust. (1JA_0335.)

On June 27, 2018, Clerk's defaults were entered against Magnolia Gotera and Stacy Moore. On November 29, 2018, the district court initially granted summary judgment in favor of SFR, and denied Nationstar's motion for summary judgment and U.S. Bank's joinder thereto, finding that, *inter alia*: (1) the Bank tendered $207.00, which was the amount of the Bank's superpriority lien; (2) the Bank's tender was rejected by Alessi, agent for Shadow Mountain Ranch Community Association (the "Association"); (3) the Bank failed to prove delivery of the purported tender or rejection of same, because the Bank merely provided a copy of

the purported check and a screenshot, neither of which was admissible, and the Bank's predecessor's witness, Doug Miles, was not disclosed, and there were defects in his affidavit; (4) if in fact a tender of the superpriority amount was made before the sale and rejected by Alessi, the rejection was in good faith, and SFR had no notice of the payment; (5) SFR was a bona fide purchaser for value ("BFP"), and Nationstar failed to protect its interest in the Property; (6) the Bank failed to set forth material issues of fact establishing fraud, unfairness, or oppression; and (7) U.S. Bank's unjust enrichment claim failed as a matter of law. The district court found the Association's non-judicial foreclosure sale extinguished the deed of trust, that Nationstar and U.S. Bank had no interest in the Property, and title was quieted in favor of SFR. (5JA_1180.)

On January 14, 2019, Nationstar filed a motion for reconsideration and/or to alter/amend judgment, asserting that the district court had made errors in its findings of facts and evidentiary rulings, and that the Nevada Supreme Court's recent ruling in *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev.604, 427P.3d 113 (2018) ("*Diamond Spur*") required a different result. (6JA_1215.) SFR opposed the motion. On June 28, 2019, the district court granted Nationstar's motion for reconsideration, basing its decision on errors in the prior evidentiary rulings, the existence of a genuine issue of material fact as to whether payment of the superpriority portion of the Association's lien was sent to or received by Alessi, and

setting the matter for trial. (7JA_1509.) The order did not disturb the district court's previous findings that SFR was a BFP.

After a bench trial, the district court issued findings of facts and conclusions of law on April 30, 2020, rejecting SFR's argument concerning NRS 106.240, and finding that U.S. Bank's predecessor tendered and satisfied the superpriority portion of the Association's lien prior to the sale and, therefore, SFR took the Property subject to the deed of trust. (8JA_1675.) On June 3, 2020, SFR filed its notice of appeal and case appeal statement, which turned out to be premature based on issues that remained unresolved by the district court's April 30, 2020 findings of fact and conclusions of law. On July 17, 2020, the district court entered a stipulation and order which amended the April 30, 2020 findings of fact and conclusions of law to dismiss U.S. Bank's claims for unjust enrichment against SFR as moot, and certified it as final to SFR, Nationstar, and U.S. Bank. (8JA_1697.) Notice of entry of the July 17, 2020 stipulation and order was filed on August 11, 2020. (8JA_1709.) SFR timely filed its amended notice of appeal on September 8, 2020. (8JA_1742.)

ROUTING STATEMENT

Oral Argument Requested

Pursuant to NRAP 28(a)(5) and NRAP 17, this case is presumptively retained by the Nevada Supreme Court as it does not fall into the presumptions under NRAP 17(b).

STATEMENT OF THE ISSUES

1) Whether the district court erred in finding that the Deed of Trust was not terminated by operation of NRS 106.240 despite the underlying loan being declared wholly due on or before January 22, 2008, with no clear and unequivocal action to decelerate the loan within the next 10 years, based on its determination that:

a) U.S. Bank's quiet title/declaratory relief lawsuit tolled the operation of NRS 106.240, and/or

b) NRS 106.240 does not work to protect third-parties like SFR who are not a party to the note?

INTRODUCTION

This litigation was triggered by a homeowners' association sale in January 2014 at which SFR was the highest bidder. But the problems really began back in September 2007, when the Borrower under the loan secured by a Deed of Trust ("DOT") stopped making payments to the Bank.[1] Around that same time, the Borrower stopped paying the Association dues and began letting the Property fall into disrepair.

Between September 1, 2007 and January 22, 2008, the Bank declared all sums

[1] "Bank" refers to the beneficiaries of the DOT and its loan servicers, including U.S. Bank, N.A., as trustee for the Certificateholders of the LXS 2006-4N Trust Fund ("U.S. Bank") and Nationstar Mortgage, LLC ("Nationstar"), and Bank of America, N.A.

secured by the DOT immediately due and payable. This acceleration was a remedy contemplated by the terms of the DOT. Then, on January 22, 2008, the Bank's agent executed and recorded a notice of default and election to sell ("NOD") against the Property. At no point in the next ten (10) years did the Bank take any clear and unequivocal action to decelerate/reinstate the loan underlying the DOT.

In *Pro-Max*, the Nevada Supreme Court noted that the statute of repose found under NRS 106.240 "creates a conclusive presumption that a lien on real property is extinguished ten years after the debt becomes due," and ruled that "the conclusive presumption contained in NRS 106.240 clearly and unambiguously applies without limitation to all debts secured by deeds of trust on real property."[2]

Here, the district court here twisted *Pro Max* to mean that not only is there no BFP requirement in NRS 106.240, but also that no BFP could ever have standing to raise NRS 106.240. This reads a "party to the note" requirement into the statute that simply does not exist and changes "without limitation" to "with limitations." Further, the district court found "that filing the quiet title action has stayed the preclusive effect of 106.240." NRS 106.240 is a statute of repose that does not allow for equitable tolling. Again, the district court's interpretation changes "applies without limitation" to "does not apply if the beneficiary is in court for some other

[2] *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 94, 97, 16 P.3d 1074, 1076, 1079 (2001).

unrelated reason."

Nothing in the plain language of the statute supports either of the district court's erroneous interpretations. Because the plain language of NRS 106.240 controls, the DOT was terminated and discharged at the latest on January 22, 2018. The district court correctly considered SFR's affirmative defense of NRS 106.240 on the merits, but erred in its interpretation of the statute.

FACTUAL BACKGROUND

I. THE TERMS OF THE DOT GIVES THE LENDER OPTIONS AS REMEDIES FOR DEFAULT, INCLUDING THE RIGHT TO ACCELERATE

Magnolia Gotera ("Borrower") obtained ownership of the real property known as **5327 Marsh Butte Street, Las Vegas, Nevada 89148** (the "Property") through a deed from Wei Hong Yang recorded on November 21, 2005 (1JA_0026-JA_0027.) That same day, a deed of trust ("DOT") executed by Magnolia Gotera ("Borrower") lists Countrywide Home Loans, Inc. as the Lender, Mortgage Electronic Registration Systems Inc. ("MERS") as the nominee beneficiary, and CTC Real Estate Services as the trustee. (8JA_1771-1797.) The DOT states that it secured a promissory note ("Note") in which the Borrower has promised to make periodic payments to pay the $508,250 debt in full no later than December 1, 2035. (8JA_1773.) On November 2, 2011, the DOT was assigned from MERS to U.S. Bank, National Association, as Trustee for the Certificateholders of the LXS 2006-4N Trust Fund. (9JA_2033-2034.) On October 1, 2013, a document purporting to

assign the DOT from Bank of America, N.A. to Nationstar Mortgage, LLC was recorded against the Property. (9JA_2065.)

A. Borrower's Breach/Default under the Terms of the DOT

According to the terms of the DOT, the Borrower could breach the DOT in a number of ways, including, but not limited to: failing to pay installment amounts for principal and interest (¶1), failing to fund an escrow account if required by the Lender (¶3), failing to pay Association dues, taxes, or fines (¶4), failing to maintain hazard insurance (¶5), allowing the Property to be damaged or to deteriorate (¶7), giving false or inaccurate information during the lending process (¶ 8), failing to maintain mortgage insurance if required by the Lender (¶10), selling the Property to someone else without Lender's approval (¶18), or using or storing Hazardous Substances on the Property (¶21).

B. Lender's Options/Remedies under the Terms of the DOT

When there is a breach, the terms of the DOT gives a Lender options for remedies. As set forth in Paragraph 22, a Lender may accelerate the loan for any breach of any covenant or agreement in the DOT, so long as the Borrower is given proper notice and at least 30 days to cure the default:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrowers breach of any covenant or agreement in this security instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that the failure

> to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property.
>
> (8JA_1785.)

Then, "[i]f the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may **invoke the power of sale**, including **the right to accelerate** full payment of the Note, **and any other remedies permitted by Applicable Law**." (*Id.*) (Emphasis added.)

In addition to accelerating full payment of the Note and invoking the power of sale, the Lender may seek other remedies allowed by law. For example, Paragraph 9 allows the Lender to remedy its situation by doing and paying for whatever is reasonable and appropriate to protect itself, including paying off liens, appearing in court, paying attorney's fees, entering the Property to make repairs, etc., adding the amounts as debts secured by the DOT. At the same time, the Lender is under no obligation to make repairs or to pay off liens. The Lender has the option to act or not.

Paragraph 20 of the DOT allows the Lender to commence or join the Borrower to a judicial action after notifying the Borrower of a breach and giving a reasonable time to take corrective action. (8JA_1784.) Paragraph 20 specifically contemplates the Lender accomplishing this requirement by following the steps of notice of

acceleration and opportunity to cure in Paragraph 22. Nothing in Paragraph 20 requires the judicial action to be for judicial foreclosure. (*Id.*)

Nothing in the DOT suggests that the Lender is limited to only pursuing non-judicial foreclosure after giving a notice of intent to accelerate as described in Paragraph 22. Nor do the terms of the DOT suggest that the Lender could only choose one remedy at a time if allowed by Applicable Law.

Under the plain language of the DOT, if a Borrower allowed the Property to fall into disrepair, failed to pay the Association and failed to make payments under the loan, a Lender could choose to accelerate the loan and then begin pursuing non-judicial foreclosure by filing a NOD. If the Borrower paid the past due amounts under the DOT, the Lender could decide to rescind the NOD, but still refuse to reinstate/decelerate the loan until the Borrower paid the delinquent Association dues and/or repaired the Property. Or, in a case where the past due amounts were not paid, for any number of reasons, the Lender could choose to file a lawsuit against the Borrower instead of pursuing non-judicial foreclosure. In that circumstance, the Lender may choose to rescind the NOD, but keep the loan accelerated so it could judicially foreclose or obtain money damages.

II. THE BORROWER STOPPED PAYING THE BANK; THE BANK DECLARED ALL SUMS IMMEDIATELY DUE AND PAYABLE

The Borrower defaulted under the Note and DOT by failing to make the payments due beginning September 1, 2007. (9JA_2101.) On January 22, 2008, the

substituted trustee of the DOT, Recontrust Company, recorded a notice of default and election to sell under deed of trust ("NOD"). (*Id.*)

A. Language in First Paragraph of NOD

The first paragraph of the NOD identifies the DOT and Note. (*Id.*) The last sentence of the first paragraph sets up the second paragraph by explaining a breach of the obligations secured by the DOT has occurred, stating "[t]hat a breach of, and default, in the obligations for which such [DOT] is security has occurred in that payment has not been made of:" (*Id.*)

B. Language in Second Paragraph of NOD

The second paragraph of the NOD follows the colon at the end of the last sentence of the first paragraph. A colon is typically used as a signal that what comes next summarizes, sharpens or explains the previous sentence. And that is precisely what the NOD's second paragraph does—it summarizes, sharpens and explains the breach and the obligations secured by the DOT.

In all-caps, the second paragraph identifies the default date, the fact that the defaulted and subsequent payments include obligations for installments of principal, interest, impounds, late charges, advances made and costs incurred by the beneficiary (including foreclosure fees and costs, and/or attorney's fees). It then describes the time-frame set forth in the DOT for installments of principal by stating the maturity date of 12/01/2035. This itemized list of obligations captures all of the

expenses to which the beneficiary of the DOT is entitled to have secured by the Property—not just past due installments of principal, but also "all subsequent installments of principal," meaning the entire accelerated principal amount.

C. Language in Third Paragraph of NOD

The third paragraph is where the trustee explains the steps the beneficiary has already taken towards enforcing the DOT before the NOD was prepared, executed or recorded. **First**, it explains that the beneficiary has "executed and delivered" to the trustee a "Written Declaration of Default and Demand for Sale." **Second**, the third paragraph states the beneficiary "has deposited" with the trustee the DOT and all documents evidencing the obligations secured by the DOT. **Third**, at some point before the NOD was prepared, executed or recorded, the beneficiary declared (and does hereby declare) all sums secured by the DOT immediately due and payable. **Fourth**, the beneficiary previously elected to sell the Property and does hereby elect to sell the Property. (*Id.*)

The indication in paragraph three that all sums had previously been declared immediately due and payable is consistent with the requirements of Paragraph 22 of the DOT, which require notice that the loan could be accelerated if the default was not cured within a 30-day time period. It is also consistent with the portion of Paragraph 22 of the DOT that specifies that, after expenses of sale, the proceeds of

any sale under the DOT shall be applied "(b) to all sums secured by this Security Instrument." (8JA_1785.)

D. Language in Rescission of NOD

On March 20, 2008, the trustee of the DOT recorded a rescission of the NOD against the Property ("Rescission"). Notably, the Rescission takes great pains to say how the Rescission shall not be construed and clearly states that "it is and shall be deemed only an election" not to sell the Property, not any rescission of the declaration of all sums immediately due and payable.

E. NOD Language vs. Rescission Language

Comparing what the NOD states happened before it was recorded with the language stating what the Rescission was designed to accomplish shows that the loan underlying the DOT was declared wholly due before the NOD was recorded and that the Rescission did not operate to reinstate or decelerate the payments on the loan:

NOD	"[T]he present beneficiary under such [DOT] . . . [1] **has declared** and does hereby declare **all sums secured thereby immediately due and payable** and [2] **has elected** and does hereby elect **to cause the trust property to be sold** to satisfy the obligations secured thereby." (9JA_2101-2102.)(emphasis added.)
Rescission	"…does hereby rescind, cancel and withdraw the [NOD] hereinafter described, provided however, that **this rescission** [1] **shall not be construed as waiving, curing, extending to, or affecting any default, either past, present or future, under such [DOT], or as impairing any right or remedy** thereunder, and [2] **it is and shall be deemed to be, only an election without prejudice not to cause a sale** to be made pursuant to such [NOD] and it [3] **shall not in any way alter or change any of the rights remedies or privileges secured…under such [DOT]**, nor modify, nor alter in any respect any of the terms, covenants, conditions or obligations therein contained." (9JA_2104.)(emphasis added.)

The Rescission specifically insisted that it *shall not* be construed as the default being cured or waived. The Rescission reserved all rights remedies, privileges available to the Bank in the DOT. What it did not do was contain any language to

decelerate or reinstate the loan underlying the DOT. As such the Rescission operated only as an election not to cause sale.

F. No Evidence of Deceleration; Evidence of Ongoing Breach of the DOT in the Public Record

The public record does not show any evidence of deceleration or reinstatement. Instead, the public record contains evidence of multiple, continuing breaches of the terms of the DOT by the Borrower in the form of multiple notices of liens (8JA_1848, 9JA_2040-2044 and 9JA_2053), notices of delinquent assessments, Association notices of default, Association notices of sale, and an Association notice of violation lien recorded against the Property as Instrument No. 201305150001840.

III. THE BORROWER STOPPED PAYING THE ASSOCIATION AND REPUBLIC SERVICES, LET THE PROPERTY FALL INTO DISREPAIR, AND TRANSFERRED HER INTEREST IN THE PROPERTY

Sometime in 2007, the Borrower also stopped making payments to Shadow Mountain Ranch Community Association ("Association"). The Association was entitled to collect assessments pursuant to the CC&Rs that had been recorded against the Property on June 21, 2000. According to NRS 116.3116, the Association had a lien for assessments prior to all other liens, including a first DOT to the extent of nine months of periodic assessments and nuisance, abatement, and maintenance charges.

The Association's ledger shows that the Borrower had not been current since sometime before December 1, 2005, with the last sporadic payment being made on November 27, 2007. (9JA_1932.) By February 8, 2008, the Borrower was delinquent to the Association in the amount of $294. (8JA_1809.) Around that time, the Association hired Alessi Trustee Corporation, which later became Alessi & Koenig, LLC ("Alessi") in an effort to collect the delinquent assessments. (8JA_1802-1808.) For years, the Borrower did not pay the ongoing $23 monthly periodic assessments or late fees. (8JA_1894-1895, 9JA_2055-2056.)

Also, because letters and notices to all of the proper parties required by statute required the Association to incur hard costs like title reports and postage as well as labor, the amounts the Borrower owed to the Association steadily increased. (9JA_1938, 9JA_2095-2096.)

Between 2008 and 2010, in addition to delinquent monthly assessments, late fees, and costs of collection, the Borrower incurred fines for violating the CC&Rs, including maintenance charges. (9JA_1934-1937.) The Association's ledger shows entries in November 2010 for "Nuisance abatement-landscaping" and "Nuisance abatement-pigeon clean up/contro." (9JA_1981.)

On May 27, 2011, a deed transferring the Borrower's interest in the Property to JBWNO revocable living trust ("JBWNO") was recorded against the Property.

(9JA_2045-2048.) On that same day, a deed transferring the Property from JBWNO to Stacey Moore was recorded against the Property. (9JA_2049-2052.)

After the transfer of the Property to Stacey Moore, the Association, through Alessi gave her a chance to come current, and then filed a new notice of delinquent assessments in 2012, a notice of violations lien in 2013, and new notices of default and a new notice of sale in 2013. The Bank was sent the notices of default and the 2013 notice of sale.

IV. SFR IS A BFP THAT PURCHASED AT PUBLIC AUCTION WITH NO NOTICE OF ANY DEFECTS OR ATTEMPTS TO PAY

At a public auction on January 8, 2014, SFR—who had no notice of any defects in the sale and no notice of any rejected payment nearly three and a half years before the sale[3]—was the highest bidder. (5JA_1185-1192.) SFR received a foreclosure deed containing conclusive recitals of default and that the sale was

[3] Unbeknownst to SFR, in September 2010, an exchange apparently took place in which Alessi provided Miles Bauer, an agent for the beneficiary of the DOT, with a payoff demand with a ledger. Alessi also sent Miles Bauer a separate letter explaining that current case law prevented accepting partial payments on the Association's lien. The district court found that on September 28, 2010, Miles Bauer delivered a check for $207 to Alessi, which represented nine month of common assessments at $23.00 per month. (8JA_1678, ¶10.) The district court found that Alessi received and rejected the September 28, 2010 letter and payment (8JA_1679, ¶12.) Miles Bauer, the beneficiary of the DOT, and Alessi all kept this exchange a secret from the general public and potential bidders.

noticed properly. (9JA_1798.) The district court found SFR to be a BFP. (5JA_118591-1192.)

V. AT TRIAL, THE DISTRICT COURT MISAPPREHENDED NRS 106.240 AND *PRO MAX*

At trial, SFR argued its affirmative defense of statute of repose in a Rule 52(c) motion. Specifically, SFR argued the DOT was terminated by operation of NRS 106.240 because the loan underlying the DOT was accelerated, making it wholly due, on or before January 22, 2008 and the Bank took no action to decelerate/reinstate or to foreclosure before January 22, 2018. As explained above, the Rescission of the NOD did not contain any deceleration or reinstatement language. Quite the contrary, the Rescission reserved all rights and remedies under the DOT and unequivocally stated that its purpose was to elect not to cause sale.

The Bank argued that the NRS 106.240 argument should not be considered on the merits, despite SFR pleading "statute of repose" as an affirmative defense. SFR explained that, even if it had not plead it as a defense, which it did, Nevada law does not allow for waiver of a statute like NRS 106.240. The district court considered the defense on the merits, but found in error that the Bank protected itself even though it did not decelerate or reinstate the loan within the ten year period. It stated:

> THE COURT: And so I considered the 106.240 defense. I denied the Rule 52 motion on the grounds that **I believe that filing the quiet title action has stayed the preclusive effect of 106.240**.
>
> (9JA_1960.)(Emphasis added.)

The district court further explained that NRS 106.240 does not apply because it believes this Court held that NRS 106.240 is "not to protect third parties":

> MS. HANKS: **So you don't think 106.240 applies?**
>
> THE COURT: **No** because this is, as you pointed out, not a judicial foreclosure action. It's not against some third party. **They've already told us in this other case we're not here to protect third parties. I don't know why we have it if we're not, but the Supreme Court said it's not to protect third parties.** Fine. What is it for? It's to protect somebody who owes a debt on a mortgage. It's going to be gone after ten years so that you can clear up your title. Because like I said, I did one of these like last Thursday. So what have they done? They've protected their title interest because they've said we want a declaration that the title should be quieted in the /name of Bank of America. Okay.
>
> (9JA_1962-1963.)

Based on this faulty interpretation, the district court found that the DOT was not terminated and SFR's title is subject to the DOT.

SUMMARY OF ARGUMENT

The district court erred in when it found "that filing the quiet title action has stayed the preclusive effect of 106.240" and when it held that NRS 106.240 does not apply to third parties, like SFR, who are not parties to the promissory note. Nothing in the plain language of the statute supports these interpretations. This Court has already held the language in NRS 106.240 as plain and unambiguous, meaning that it is not subject to further interpretation. The district court's interpretation requires it to change "without limitation" to "with limitations." This is clear error.

In *Pro-Max*, the Nevada Supreme Court noted that the statute of repose found

under NRS 106.240 "creates a conclusive presumption that a lien on real property is extinguished ten years after the debt becomes due," and ruled that "the conclusive presumption contained in NRS 106.240 clearly and unambiguously applies without limitation to all debts secured by deeds of trust on real property."[4] There are two time periods which govern the note and deed of trust. The note is governed by the contracts statute of limitations, *i.e.* six years, and the deed of trust is governed by the statute of repose found in NRS 106.240, *i.e.* ten years.[5]

Typically, the statute of repose will not run until ten years from the maturity date of the note. However, if this maturity date is accelerated, then the statute of repose runs from the accelerated date because by accelerating the due date, the lender has fast-tracked the maturity date.

In this case, on January 22, 2008, the Bank recorded a NOD stating it had declared all sums secured by the DOT immediately due and payable. By accelerating the loan, the statute of repose in which to enforce the loan via the DOT began running at the latest on January 22, 2008, and then expired at the latest on January 22, 2018. The Bank could have stopped the running of the statute of repose by timely decelerating the loan or foreclosing before ten years passed. It did neither.

---

[4] *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 94, 97, 16 P.3d 1074, 1076, 1079 (2001).

[5] *Facklam v. HSBC Bank*, 401 P.3 1068 (Nev. 2018).

NRS 106.240 is a statute of repose. Because the time limit in NRS 106.240 expressly qualifies the right, it cannot be waived or tolled. Further, the U.S. Supreme Court recently reaffirmed that the legislature's intent derived solely from the plain language of a statute controls and "displaces the traditional power of the courts to modify statutory time limits in the name of equity."[6]

As a sophisticated banking entity, the Bank is charged with knowledge of the law, including Nevada's statute of repose in NRS 106.240.

Any attempt by the Bank to define "wholly due" as something other than acceleration as defined by the NOD, which makes "all amounts secured by [the DOT] immediately due and payable" would be disingenuous. While this should be self-evident, Nevada recognizes lenders can accelerate debts underlying deeds of trust before such "pay the debt in full not later than …" dates.[7]

In fact, any argument to the contrary makes no sense. ***If*** the DOT had a provision stating the underlying debt could not be "wholly due" before the date of maturity, and this date was fixed in stone and could never be altered, even by companion provisions in the DOT itself, ***then***, by the Bank's logic, it could NEVER

---

[6] *California Public Employees' Retirement System v ANZ Securities, Inc.*, 137 S.Ct. 2042, 2050, 2051 (U.S. 2017) ("*CPERS*") (emphasis added).

[7] *See, e.g., Boyes v. Valley Bank of Nevada*, 701 P.2d 1008, 1009-10 (Nev. 1985) ("Valley Bank corresponded with the Boyeses and **demanded that they pay in full their promissory note in accordance with the 'due-on-sale' clause contained in paragraph 17 of the deed of trust.**") (Emphasis added).

accelerate the debt, and could NEVER foreclose on the full amount of the debt. As the DOT itself allows, if, as the Bank did here in 2008, exercises the option to accelerate the debt, then the debt clearly is no longer due on the regular maturity date. By the plain language of the NOD, the debt became wholly due at the latest January 22, 2008.

STANDARD OF REVIEW

A district court's conclusions of law, including statutory interpretations, are reviewed de novo.[8]

ARGUMENT

I. THE PLAIN LANGUAGE OF NRS 106.240 GOVERNS THIS CASE RESULTING IN TERMINATION OF THE DEED OF TRUST

The district court erred when it deviated from the plain language of NRS 106.240. NRS 106.240 is clear and leaves no room for misinterpretation:

> The lien…created of any mortgage or deed of trust…shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.

The statute produces three effects ten (10) years after the underlying debt becomes "wholly due": (1) the DOT is "terminated"; (2) the lien is "conclusively presumed"

[8] *Borger v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004).

to be "discharged"; and (3) the underlying debt is "conclusively presumed" to have been "regularly satisfied."

In 2001, this Court declared that the statute is "clear and unambiguous" and "applies without limitation to all debts secured by deeds of trust on real property," and that "no further interpretation is required or permissible."[9]As this Court has noted, it is not a reviewing court's job to "speculate upon [legislative] motive," and that even if it were to do so, "the best evidence for that would be found in the statute."[10] This Court echoed this sentiment many years ago, noting that "[i]t is not the province of courts to confound by construction what the Legislature has made clear,"[11] and more recently reiterated that "[o]pponents of a valid statute must look to the Legislature rather than the judiciary to amend the law."[12]

II. THE DISTRICT COURT'S INTERPRETATIONS OF NRS 106.240 REQUIRE REWRITING THE PLAIN LANGUAGE

Rather than applying NRS 106.240 "without limitation" to "all debts secured by deeds of trust" as this Court demanded in *Pro Max*, the district court

[9] *Pro-Max Corp. v. Feenstra*, 16 P.3d 1074, 1077, 1079 (Nev. 2001) (emphasis added).
[10] *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326 & n.5 (2008); *see also Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978) ("[I]t is not our prerogative to substitute our judgment for that of the legislature.")
[11] *W. Indies, Inc., v. First Nat. Bank of Nev.*, 214 P.2d 144, 154 (Nev. 1950); *see also* NRS 1.030 (allowing common law "so far as it is not repugnant to or in conflict with" statutes and the Constitution.)
[12] *Williams v. State*, 50 P.3d 1116, 1122 (Nev. 2002).

impermissibly found that it could pick and choose whether to limit application when raised by a third-party like SFR. Similarly, the district court chose not to apply NRS 106.240 "without limitation" when it held that filing an unrelated quiet title/declaratory relief lawsuit against SFR excused the Bank from independently decelerating the loan or foreclosing on the Property before the ten-year period expired. *Pro Max* did not say "applies without limitation" *unless the beneficiary of the DOT is in court trying to prove it protected the DOT from an association foreclosure sale*. The district court's interpretations are contrary to *Pro Max* and contrary to the statute. This is clear error.

III. NRS 106.240 IS A STATUTE OF REPOSE; ITS OPERATION MUST BE ACCORDING TO ITS PLAIN LANGUAGE AND PRECLUDES ANY TOLLING OR EQUITABLE CONSIDERATIONS.

NRS 106.240 is a statute of repose.[13] Because the time limit in NRS 106.240 expressly qualifies the right, it cannot be waived or tolled.[14] As a sophisticated banking entity, the Bank is charged with knowledge of the law, including Nevada's

[13] *See Bank of Am., N.A. v. Madeira Canyon Homeowners Ass'n*, 423 F. Supp. 3d 1029, 1034 (D. Nev. 2019).

[14] *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1985) (statute of repose may not be waived because the time limit expressly qualifies the right which the statute creates); *see also*, *Miller v. Vitner*, 546 S.E.2d 917 (Ga.App. 2001); *Roskam Baking Co. v. Lanham Machinery Co.*, 288 F.3d 895, 903 (6th Cir. 2002) (statute of repose is a substantive provision which may not be waived); *Hinkle v. Henderson*, 85 F.3d 298, 302 (7th Cir. 1996) (statutes of repose, unlike statutes of limitation, may not be waived); *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014); *Simmons v. Sonyika*, 614 S.E.2d 27, 30 (Ga.2005).

statute of repose in NRS 106.240.

Even if NRS 106.240 were called by another label, its plain language forbids any equitable interference with its operation. As the U.S. Supreme Court most recently explained, whether or not equity applies to a particular limitation hinges not on the label of that limitation (*i.e*., statute of limitation vs. statute of repose), but rather is based on the intent of the legislative enactment involved:

> **…[T]he question whether a tolling rule applies to a given statutory time bar is one "of statutory intent."** *Lozano v. Montoya Alvarez*, 572 U.S. 1, ——, 134 S.Ct. 1224, 1232, 188 L.Ed.2d 200 (2014) . **The purpose of a statute of repose is to create "an absolute bar on a defendant's temporal liability,**" *CTS*, 573 U.S., at ——, 134 S.Ct., at 2183 (alteration and internal quotation marks omitted); and **that purpose informs the assessment of whether, and when, tolling rules may apply**.
>
> **… Tolling is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose** but instead anticipated the extension of the statutory period under certain circumstances**.**
>
> For example, **if the statute of repose itself contains an express exception, this demonstrates the requisite intent to alter the operation of the statutory period**. *See* 1 C. Corman, *Limitation of Actions* § 1.1, pp. 4–5 (1991) (Corman).
>
> *** The purpose and effect of a statute of repose, by contrast, is to override customary tolling rules arising from the equitable powers of courts**. By establishing a fixed limit, a statute of repose implements a " 'legislative decisio[n] that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability**.' " *CTS*, 573 U.S., at ——, 134 S.Ct., at 2183. **The unqualified nature of that determination supersedes the courts' residual authority and forecloses the extension of the**

> **statutory period based on equitable principles.** For this reason, the Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling. *See, e.g., id.*, at ——— – ———, 134 S.Ct., at 2183–2184*; Lampf, Pleva*, 501 U.S., at 363, 111 S.Ct. 2773.
>
> *** **[The statute's] purpose and design are to protect defendants against future liability**. **The statute displaces the traditional power of courts to modify statutory time limits in the name of equity**.[15]

The "without limitation" language used by this Court in *Pro-Max* concerning NRS 106.240 is important, because it means the legislature intended the statute to supply complete repose and cut off any future liability, not subject to any exceptions whatsoever, equitable or otherwise.[16]

Moreover, Nevada follows the principle set forth in *CPERS* of requiring express exceptions to statutes of repose like NRS 106.240, as evidenced by the fact that when the Legislature chose to override the statute of repose found for NRS Chapter 40 construction defect claims, it passed a separate statute to expressly execute that exception.[17] No such statute exists in relation to NRS 106.240. Additionally, *Limitation of Actions*, as cited by the U.S. Supreme Court in *CPERS*, is also instructive:

> [S]tatutes of limitations bear on the **availability of remedies** and, as such, are subject to equitable defenses ..., the various forms of tolling, and the potential application of the discovery rule. In contrast, **statutes of repose affect the availability of the underlying right: That right is no longer available on the expiration of the specified period of**

[15] *CPERS*, 137 S.Ct. at 2050-51, 2055 (emphasis added).
[16] *Pro-Max*, 16 P.3d at 1079.
[17] *Dykema v. Del Webb Communities, Inc*., 385 P.3d 977, 980 (Nev., 2016) .

time.[18]

Thus, the operative *characteristic and purpose* of a statute of repose that precludes the application of equity is the legislature's decision to destroy the underlying right, **not** whether the statute contains express language barring commencement of cause of action after a certain time period as the *means* to carry out that destruction. It is true that most statutes of repose do in fact carry out the destruction of the underlying right by expressly setting a time period after a certain event occurs after which no suit may be filed, *but this does not mean that all statutes of repose must operate in such a manner*.

This would confuse the *purpose* of statutes of repose with the *means used to effect that purpose.* The Bank's argument ignores foundational legal principle and pretends that all statutes of repose must effect the destruction of the underlying right *solely by using language that sets the time in which to bring a cause of action.* According to *CPERS*, this is wrong. A statute of repose "effect[s] a legislative judgment that **a defendant should be free from liability after the legislatively determined period of time**."[19]

If a statute sets the time after which the underlying right is destroyed and after

---

[18] Calvin W. Corman, *Limitation of Actions*, § 1.1, at 4-5 (1991) (emphasis added). This Court regularly relies on this resource. *See, e.g.*, *Gregg v. Hawaii, Department of Public Safety*, 870 F.3d 883, 887 (9th Cir.2017).

[19] *Madeira Canyon*, 423 F. Supp. 3d at 1034 (*citing CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014) (internal citations omitted, emphasis added).

which a person should be free from liability—as NRS 106.240 does here—it does not matter whether or when a legal action was commenced, or whether litigation was pending at the time the destruction took place. This is especially true because the Bank easily could have stopped the operation of the statute by decelerating the debt, a matter completely under the Bank's control.

Regardless of the label given to NRS 106.240, it must be strictly applied according to its plain language. It contain no express exception that alters or tolls the ten-year statutory period that begins to run once the underlying debt is wholly due, and according to *CPERS*, its plain language "displaces the traditional power of courts to modify [its] statutory time limits in the name of equity."[20]

After NRS 106.240's ten-year period, the lien is terminated and discharged, and the underlying debt is satisfied. The Nevada Legislature intended it as an absolute bar, not subject to any exceptions whatsoever, be it any equitable considerations, tolling of any kind, the initiation of litigation, bankruptcy, or stays.

IV. WHOLLY DUE IS NOT LIMITED TO MATURITY DATE.

"Wholly due" is not limited to maturity date. The statute reads, "according to the terms thereof…become wholly due…" Paragraph 22 of the DOT contemplates accelerating the loan maturity date when the Borrower defaults, thus when the

[20] *CPERS*, 137 S.Ct. at 2050-51, 2055 (U.S., 2017) (emphasis added).

Borrower defaulted, and the Bank made the debt immediately due and payable, as memorialized in the NOD, it made the loan wholly due "according to the terms" of the DOT.

This is supported by Nevada law and legislative history. In Nevada, a lender can accelerate and decelerate debts by taking "some affirmative action ... to make it known to the debtor that [the creditor] has exercised his option to accelerate" or decelerate.[21] Acceleration clauses in notes have been prevalent since the mid-1800s and had reached the U.S. Supreme Court before the turn of the century.[22]

The Nevada Legislature was surely aware of them in 1917 when NRS 106.240 was first drafted and in 1965 when it was amended. Acceleration clauses making notes wholly due had reached this Court by 1866, long before the original passage of NRS 106.240, and regularly thereafter.[23] This Court addressed a mortgage with an acceleration clause in 1916, *before* the original passage of NRS 106.240,

[21] *Clayton v. Gardner*, 813 P.2d 997, 999 (Nev. 1991); *Cadle Co. II v. Fountain*, No. 49488, 281 P.3d 1158, 2009 WL 1470032 (Nev. 2009) (unpublished).
[22] *See, e.g., Building & Loan Ass'n of Dakota v. Price*, 169 U.S. 45, 48-49 (1897).

[23] *See, e.g., McLane v. Abrams*, 2 Nev. 199, 203, 1866 WL 1616, at *1 (1866) (… and if said interest is not so paid, then the whole sum, principal and interest, shall become at once due, payable, and collectible."); *Winnemucca State Bank & Trust Co. v. Corbeil*, 178 P. 23, 23 (Nev. 1919) (same); *Robertson v. Robertson*, 180 P. 122, 122–23 (Nev. 1919) (same); *W.M. Barnett Bank v. Chiatovich*, 232 P. 206, 208 (Nev. 1925) (same).

continued to do so prior to the 1965 amendments, and still does so today.[24] When NRS 106.240 first appeared in 1917, "wholly due" meant then what it means now, and clearly included accelerated debts, not just debts that had reached their maturity date.

Thus, rather than limiting wholly due to maturity date, the language includes either maturity date and/or acceleration because the Legislature chose to allow ALL terms of the DOT to control, thus **placing the power, in terms of starting and stopping the 106.240 clock, wholly in a lender's hands**.

In fact, the very acceleration clause the Bank seeks to ignore and nullify is the one it placed in the DOT to make the debt "wholly due" for its own benefit: to claim the whole underlying debt rather than merely a few installments, for purposes of foreclosure. But the Bank asks this Court to ignore the statute's *actual* language—*i.e.*, "according to the terms thereof,"— and rewrite the language to read "10 years after the maturity date in the DOT." This Court has no power to re-write Nevada legislation. What is more, this Court found acceleration of a note in an NOD made the debt wholly due.[25]

---

[24] *See Southern Pac. Co. v. Miller*, 154 P. 929, 930 (Nev. 1916); *Cornell v. Sagouspe*, 295 P. 443, 444 (Nev. 1931); *Lubritz v. Circus Circus Hotels, Inc.*, 693 P.2d 1261, 1262 (Nev. 1985)

[25] *First Am. Title Ins. Co. v. Coit*, 412 P.3d 1088, 2018 WL 1129810 at *1 n.1 (Nev. 2018) (unpublished) ("*Coit*").

All told, any argument that "wholly due" is limited to "maturity date" should be rejected.

CONCLUSION

Based on the foregoing, SFR asks this Court to reverse and remand the District Court with instructions to enter an order finding that the Deed of Trust was terminated and discharged by January 22, 2018 and quieting title free and clear of the Deed of Trust in favor of SFR.

DATED this 21st day of January, 2021.

KIM GILBERT EBRON

/s/ Diana S. Ebron
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
(702) 485-3300
Email: jackie@kgelegal.com
Email: diana@kgelegal.com
Attorneys for Appellant / Cross-Respondent SFR Investments Pool 1, LLC

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 30 pages long, and contains 8,713 words.
3. I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.
4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada

Rules of Appellate Procedure.

Dated this 21st day of January, 2021.

KIM GILBERT EBRON

/s/ Diana S. Ebron
JACQUELINE A. GILBERT, ESQ.
Nevada Bar No. 10593
DIANA S. EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorneys for SFR Investments Pool 1, LLC

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 21st day of January, 2021. Electronic service of the foregoing **Appellant's Opening Brief** shall be made in accordance with the Master Service List.

Master Service List

Docket Number and Case Title:	81293 - SFR INVS. POOL 1, LLC VS. U.S. BANK, N.A.
Case Category	Civil Appeal
Information current as of:	January 21st, 2021 at 11:35 p.m.

Electronic notification will be sent to the following:

Ariel Stern
Donna Wittig
Jacqueline Gilbert
Karen Hanks
Melanie Morgan
Douglas Gerrard

/s/ Diana S. Ebron
an employee of Kim Gilbert Ebron