IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellant,

vs.

US BANK, N.A.; AND NATIONSTAR MORTGAGE LLC,

Respondents.

Case No. 81293

APPEAL
from the Eighth Judicial District Court, Clark County, Department IV
District Court Case No. A-14-705563-C

RESPONDENTS' ANSWERING BRIEF & OPENING BRIEF ON CROSS-APPEAL

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NRAP 26.1 DISCLOSURE

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

U.S. Bank, N.A., as Trustee for the Certificateholders if the LXS 2006-4N Trust Fund

Nationstar Mortgage LLC

Mr. Cooper Group Inc.

Nationstar Sub1 LLC

Nationstar Sub2 LLC

Nationstar Mortgage Holdings Inc.

KKR Wand Investors Corporation

Akerman LLP

These representations are made so the judges of this court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under NRAP 3A(b)(1) following the final order resolving all claims by and between the parties below. A notice of entry of order of the final appealable order was filed August 11, 2020. (8JA_1709.) appellant SFR Investments Pool 1, LLC timely appealed September 8, 2020. (8JA_1742.) U.S. Bank, N.A., as Trustee for the Certificateholders if the LXS 2006-4N Trust Fund (**U.S. Bank**) and Nationstar Mortgage LLC (**Nationstar**) (U.S. Bank and Nationstar, together, **the bank**) timely cross-appealed on August 12, 2020. (8JA_1731.)

STATEMENT REGARDING ROUTING

The bank states pursuant to NRAP 28(a)(5) that the court of appeals should retain this appeal. The supreme court's unpublished decision in *Glass v. Select Portfolio Servicing,* Case No. 78325, 2020 WL 3604042 (Jul. 1, 2020) (rehearing and *en banc* review denied) (unpublished), resolves this matter. At issue is whether NRS 106.240 applies where a mortgage servicer rescinds a notice of default and election to sell within 10 years of its recordation. The rescission language in this appeal is identical to the recorded rescission language in *Glass*, making this matter appropriate for the court of appeals.

ISSUES PRESENTED

1. Whether the *Glass* decision resolves this appeal in the bank's favor because the bank recorded a rescission less than 10 years after recording a notice of default using rescission language identical to the language in *Glass*.

2. Whether "wholly due" under NRS 106.240 refers to the deed of trust maturity date; and, if not, whether the mortgage loan at issue was "wholly due" under NRS 106.240.

3. Whether the district court appropriately applied equitable tolling where SFR invoked NRS 106.240 offensively to claim a substantive right, rather than defensively as a shield from litigation.

INTRODUCTION

Glass is persuasive. Its rationale fully resolves this appeal in the bank's favor. The bank rescinded the notice of default using the same language the court deemed effective in *Glass*. To avoid this outcome, SFR advocates for a complete rewriting of NRS 106.240—mischaracterizing it as a statute of repose. NRS 106.240 is not a statute of repose. It does not set a deadline for filing litigation, nor does it grant any rights that must be exercised judicially by a deadline. Instead, it is a means of clearing title or an "ancient mortgage statute." The district court correctly characterized it as such. Contrary to SFR's interpretation, NRS 106.240 creates no cause of action or time limitation on an action. It allows a record title holder—like

SFR—or a stranger to title—like a prospective purchaser or title company—to view the recorded title history to determine whether a deed of trust remains enforceable. Pursuant to the unambiguous text of NRS 106.240, one need only look to the "deed of trust" for the mortgage loan's maturity date, or "any recorded written extensions" of that maturity date, to find the answer. The statute is that clear and that simple.

SFR attempts to muddy this straightforward text by rewriting what is meant by the statute's use of the term "wholly due" to mean something other than the loan's maturity date. "Wholly due" does not mean "acceleration" of the loan's maturity date through either an unrecorded letter to the borrower or via recorded notice of default. Adopting SFR's interpretation would violate canons of statutory construction and this court's prior precedent. It would also unfairly interfere in the lender-borrower relationship to modify that relationship for SFR's benefit and to the detriment of both the lender and borrower. It would allow a third party to delve into unrecorded (confidential) communications sent by a lender to a borrower or recharacterize the lender's foreclosure activity into an unintended waiver of its right to foreclose, contrary to published case law. SFR's interpretation would allow a stranger to the loan to strip the lender and borrower of their secured interest, exposing the borrower to personal liability on a loan not yet "wholly due" according to express terms of his or her contract with the lender.

SFR also incorrectly rejects the district court's application of equity to find the underlying quiet title action tolled the application of NRS 106.240. As NRS 106.240 is not a statute of repose, equitable tolling applies. Allowing equity to toll NRS 106.240's ten-year time period comports with precedent, fairness, and policy. If not resolved under *Glass*, this court should affirm the district court's finding equity tolls NRS 106.240's time period.

STATEMENT OF FACTS

I. Relevant Factual Background

A. The Borrower Executes a Deed of Trust

Magnolia Gotera (**borrower**) purchased a house on November 21, 2005. (3JA_629-30.) The borrower executed a deed of trust, naming Countrywide Home Loans, Inc. as the lender on November 15, 2005. The deed of trust granted Countrywide a security interest in the property to secure the repayment of a loan in the amount of $508.250.00. (3JA_632-57.)

B. The Lender Records a Notice of Default in January 2008

Borrower fell behind on her obligations under the deed of trust, as evidenced by a notice of default and election to sell under deed of trust recorded January 22, 2008. (9JA_2100-01.)

C. The Lender Rescinds the Notice of Default in March 2008

Two months later, on March 20, 2008, the record beneficiary, through its trustee, recorded a rescission of election to declare default. (9JA_2103.) The rescission states:

> [T]his 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 and 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 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 contained.

(9JA_2103.)

D. The Bank's Interests in the Deed of Trust

U.S. Bank became record beneficiary of the deed of trust by assignment recorded November 2, 2011. (2JA_430.) Nationstar is the loan servicer. (2JA_440; 3JA_702.)

II. Relevant Procedural Background

A. SFR Raised NRS 106.240 after the Trial Evidence Confirmed Tender Preserved the Deed of Trust

The court held a trial on whether the then-lender delivered the superpriority tender check. The district court found the tender check delivered, preserving the deed of trust. (8JA_1681 ¶ M.) SFR does not appeal this ruling.

At the close of the bank's evidence, SFR moved for judgment under NRCP 52(c) on its NRS 106.240 argument. SFR argued: (1) NRS 106.240 is a statute of repose not subject to equitable tolling, AOB 23-27; (2) NRS 106.240's "wholly due" language includes "acceleration" of the mortgage loan, AOB 27-30; and (3) the district court improperly rewrites NRS 106.240 statutory text, AOB 21-23.

B. The Bank's Objections to SFR's NRS 106.240 Argument

The bank raised several objections to SFR's NRS 106.240 arguments. **First**, NRS 106.240 is not a statute of repose. It is an ancient-mortgages statute intended

to clear old liens. (Respondent's. Appendix (**RA**) 6-7.) **Second**, NRS 106.240's "wholly due" language means the loan's maturity date stated in the recorded deed of trust or any recorded extension thereof; it does not mean acceleration. (RA 8-10.) **Third**, even if "wholly due" could mean acceleration, no acceleration occurred or, if it did, was timely decelerated by recording a rescission within ten years. (RA 10-12.) **Fourth**, the court should equitably toll NRS 106.240's 10-year period during the pendency of the quiet title litigation following the HOA sale. (RA 12-13.)

C. The District Court Finds NRS 106.240 Inapplicable

The district court took judicial notice and admitted into evidence the January 2008 notice of default and the March 2008 rescission. (7JA_1578.) It then considered SFR's NRS 106.240 argument on its merits, ultimately finding in the bank's favor on two grounds: (1) the bank's filing of the underlying quiet title action tolled NRS 106.240's ten-year time period, and (2) SFR lacked standing to raise NRS 106.240 as a non-party to the promissory note and deed of trust. (7JA_1661; 8JA_1681 ¶¶ N-P.)

SUMMARY OF THE ARGUMENT

SFR transformed the underlying action from one involving the HOA foreclosure into one alleging the presumptive satisfaction of the deed of trust under NRS 106.240. SFR raised NRS 106.240 for the first time at trial in attempt to salvage its quiet title case after the bank established its superpriority tender. The

tender evidence was so clear that SFR does not even challenge it on appeal. Instead, SFR focuses on NRS 106.240 despite the bank having recorded a rescission of a notice of default after only three months, well before NRS 106.240's 10-year time period expired. Despite the bank's objection to the trial court considering NRS 106.240 based on SFR's failure to plead the issue, the bank consents to the court considering it on appeal. By consenting to consideration of NRS 106.240, the bank does not concede the statute is a statute of repose.[1]

This appeal can be fully resolved under *Glass*. The March 2008 rescission "effectively retracted" the January 2008 notice of default "because [the lender] rescinded the Notice of Default." *Glass*, 2020 WL 3604042, at *1. Not only does *Glass*'s factual scenario apply—here, the bank rescinded the notice of default three months later—the rescission language used in the March 2008 rescission is the *exact* language used in *Glass*'s rescission. SFR's contention the March 2008 rescission only rescinded the bank's election to sell undermines *Glass*.

To the extent this court does not affirm under *Glass*, it should reject SFR's arguments that NRS 106.240 terminated the deed of trust. **First**, NRS 106.240 is not a statute of repose; the district court correctly concluded it is an ancient mortgage

[1] At trial, the bank objected that SFR waived NRS 106.240 by not pleading it. SFR responded by incorrectly arguing NRS 106.240 is a statute of repose. (Statute of repose was generically pled as an affirmative defense.) By now consenting to the court considering NRS 106.240, the bank does not concede NRS 106.240 is a statute of repose. It is ***not*** a statute of repose and consequently may be tolled.

statute. The statute's purpose to clear old mortgage liens is evident from its text. The statute does not impose a firm deadline after which a lender loses the ability to enforce a substantive right in court; to the contrary, it allows a lender to extend the deed of trust in perpetuity. **Second**, NRS 106.240's "wholly due" language refers to the deed of trust's maturity date, as outlined in either the deed of trust or a recorded extension thereof. The deed of trust or recorded extension are the only two instruments NRS 106.240 mentions. Contrary to this express statutory text, SFR reinterprets NRS 106.240's "wholly due" language to include an acceleration of the loan's balance. Canons of statutory construction do not permit extraneous words be read into the statute.

Third, even if "wholly due" could mean acceleration, the loan was never accelerated, either under the deed of trust or the recorded notice of default. The documents SFR relies to show acceleration allow the borrower the right to cure her default *before* acceleration occurs. SFR has simply not shown the bank accelerated the loan. **Finally**, to the extent NRS 106.240 is applicable, equity should overrule its application. This court has previously applied equitable principles to NRS 106.240, and has done so in similar contexts, for example, to the "conclusive" deed recitals in NRS Chapter 116. The district correctly applied equity to find application of NRS 106.240 tolled during the pendency of the HOA quiet title action.

STANDARDS OF REVIEW

This court reviews a trial court's conclusions of law and statutory interpretations de novo. *Chandra v. Schulte*, 135 Nev. 499, 501, 454 P.3d 740, 743 (2019). "When the material facts of a case are undisputed, the effects of the application of a legal doctrine to those facts are a question of law that this court reviews de novo." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010). This court may affirm the district court's ruling on any basis supported by the record. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

ARGUMENT

I. This Court Should Resolve the Parties' NRS 106.240 Dispute

The district court heard argument on SFR's Rule 52(c) motion concerning NRS 106.240 over the bank's objection. (7JA_1576.) Despite the bank's objection, SFR and the bank made appropriate records. The relevant evidence before the district court included the deed of trust, the January 2008 notice of default and the March 2008 rescission. (8JA_1771-97; 9JA_2100-02; 9JA_2103-04.)

While the bank does not concede it was given reasonable notice SFR would raise NRS 106.240 at trial or that the underlying quiet title action included within its scope the issue of enforceability of the deed of trust, the bank does not challenge in this appeal the district court's consideration of NRS 106.240. *See Williams v.*

Cottonwood Cove Development Co., 96 Nev. 857, 861, 619 P.2d 1219, 1221 (1980) ("Under Nevada law, '[f]ailure to timely assert an affirmative defense may operate as a waiver if the opposing party is not given reasonable notice and an opportunity to respond.'"); *Saavedra-Sandoval*, 126 Nev. at 599, 245 P.3d at 1202 (the court may affirm on any basis supported by the record); (7JA_1661) (the district court explaining it considered SFR's NRS 106.240 argument because the bank joined all parties necessary to resolve the issue).

Because the pertinent facts are not in dispute and because the parties to this appeal made their full records below, this court may—and should—resolve the parties' NRS 106.240 dispute. *Am. Sterling*, 126 Nev. at 428, 245 P.3d at 538 (a district court's application of law to undisputed facts is reviewed de novo).

II. *Glass* Resolves This Appeal in the Bank's Favor

Following the parties' February 10, 2020 trial, the supreme court issued *Glass*. NRAP 36(c)(3). It resolves the very NRS 106.240 issue front and center to this appeal: whether NRS 106.240's ten-year clock stops when the lender rescinds its notice of default. As *Glass* holds, the answer is yes.

In *Glass*, a homeowner sued to quiet title based on a notice of default she alleged accelerated the loan, making the deed of trust expire 10 years later under NRS 106.240. The district court granted summary judgment for the defendant lender. The homeowner appealed. This court then held the lender's recorded

rescission less than ten years later "effectively retracted" the notice of default and "restored the parties to the prior status they held before" the notice of default had been recorded. *Glass*, 2020 WL 3604042 at *1 (citing *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 892, 266 P.3d 602, 606 (2011) (concluding that a rescission of a notice of default rendered challenges to the notice of default moot)). By cancelling the notice of default via recorded rescission, the secured lender "effectively cancelled the acceleration." *Glass*, 2020 WL 3604042, at *1.

The language contained in the March 2008 rescission is **identical** to the rescission language evaluated in *Glass*. Both the rescissions recite the following:

Rescission Language: *Glass* case	Rescission Language: this case
[T]his 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 and 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 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 contained.	[T]his 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 and 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 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 contained.

(9JA_2103, 2008 rescission); (RA 65.)[2]

As in *Glass*, the March 2008 rescission operated to "effectively retract[]" the January 2008 notice of default "because [the lender] rescinded the Notice of Default." *Glass*, 2020 WL 3604042, at *1; *see also Holt*, 127 Nev. at 892, 266 P.3d at 606 (finding the notice of default was necessarily rescinded because "[a] notice of rescission renders moot disputes concerning the notice of default or its timing.").

The district court's judgment should be affirmed under the same rationale and bases advanced in *Glass*. *Saavedra-Sandoval*, 126 Nev. at 599, 245 P.3d at 1202 (the court may affirm on any basis supported by the record).

III. SFR's Arguments Do Not Overcome *Glass*'s Application

None of the arguments SFR advances in its opening brief overcome the proper application of *Glass*. Specifically, SFR argues: (1) NRS 106.240 is a statute of repose, AOB 21-27; (2) the underlying loan became "wholly due" as a result of "acceleration" of the loan balance, AOB 27-30; and (3) the district court erred in considering the equities, AOB 23-27.

[2] The bank requests the court take judicial notice of the rescission language in *Glass*. *See Realmuto v. Realmuto*, Case No. 51169, 2009 WL 1469372, at *1, 125 Nev. 1071 (table) (Nev. Feb. 20, 2009) (taking judicial notice of bankruptcy filings included as support for a writ petition); *see also In re Amerco Derivative Litig.*, 127 Nev. 196, 221, 252 P.3d 681, 699 (2011) (explaining the Nevada supreme court may take judicial notice of filings in another case where "the party seeking such notice demonstrates a valid reason for doing so.").

A. NRS 106.240 is an "Ancient Mortgage Statute," Not a Statute of Repose

SFR wrongly assumes NRS 106.240 is a statute of repose. AOB 23-27. The district court rightfully rejected SFR's mischaracterization, instead calling NRS 106.240 what it is—an ancient mortgage statute intended to clear old liens. (7JA_1632-33, 1651, 1659) (at 1651, "explaining NRS 106.240 "doesn't make any sense as anything other than the . . . 'ancient mortgage statute.'").

The policy of ancient mortgages statutes, like NRS 106.240, is to "streamline conveyancing and provide remedies to clear title blemished by mortgages," which is not served by "changing the enforceable period of the mortgage as a result of acceleration on the note." *Junior et al v. Wells Fargo Bank, N.A. et al*, 2017 WL 1199768, at *1 (D. Mass. Mar. 30, 2017); *see also Cunningham v. Haley*, 501 So.2d 649, 652 (Fla. App. 1986) ("Good public policy decrees that there be a limit to which these matters are permitted to adversely affect the marketability of land titles. The past should not be able to forever rule the present from the grave."). If a secured lender accelerates the loan before the stated loan term set forth in the deed of trust, and such acceleration advances the mortgage's expiration under NRS 106.240 to something less after its recordation, this hastened expiration serves no purpose and certainly does not serve the policy underlying NRS 106.240.[3]

[3] The sparse legislative history of NRS 106.240 supports its use as "a basis for clearing a title." March 13, 1965 comments of Mr. Hale to AB 426.

In arguing NRS 106.240 is a statute of repose, SFR relies on a federal district court case holding the same. AOB 23 n.13 (citing *Bank of Am., N.A. v. Madeira Canyon Homeowners Ass'n*, 423 F. Supp. 3d 1029, 1034 (D. Nev. 2019)). A closer look at the *Madeira Canyon* case reveals a fatal flaw in its reasoning. The *Madeira Canyon* court cites *CTS Corp v. Waldburger*, 573 U.S. 1 (2014) to conclude NRS 106.240 is a statute of repose. But *Waldburger* explains the proper function of a statute of repose, to bar the filing of an action after a prescribed passage of time:

> A statute of repose. . . puts an outer limit ***on the right to bring a civil action***. That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant. A statute of repose bars any suit that is brought after a specified time ***since the defendant acted*** (such as by designing or manufacturing a product), even if this period ends before the plaintiff suffered a resulting injury.

Waldburger, 573 U.S. at 8 (emphasis added) (internal quotation marks and brackets omitted). A statute of repose pertains only on the right to bring a civil action, and SFR never suggested—nor could it—that NRS 106.240 bars this action. Nor does SFR claim—again, because it cannot—that NRS 106.240 specifies any period of time to sue after SFR (i.e, the defendant) acted.

As *Waldburger* further explains, a statute of repose is designed to "encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons [as a statute of limitations]. But the rationale has a different emphasis. Statutes of repose effect a legislative judgment that a defendant should be free from liability

after the legislatively determined period of time." *Waldburger*, 573 U.S. at 9 (citing to C.J.S. § 7, at 24) (internal quotation marks omitted). "[A]t some point, a defendant should be able to put past events behind him." *Id.* (citation omitted).

This court similarly explains: "'Statutes of repose' bar causes of action ***after*** a certain period of time, regardless of whether damage or injury has been discovered. In contrast, 'statutes of limitation' foreclose suits ***after*** a fixed period of time following occurrence or discovery of an injury." *Allstate Ins. Co. v. Furgerson*, 107 Nev. 772, 775 n. 2, 766 P.2d 904, 906 n. 2 (1988) (emphasis added); *see also Davenport v. Comstock Hills-Reno*, 118 Nev. 389, 391-92, 46 P.3d 62, 64 (2002).

NRS 106.240 does not serve any of the functions of a statute of repose. The statute does not terminate a right to sue measured from some period after a defendant acted. It does not bar any cause of action, nor does it terminate a right to sue—it does not mention litigation in any way. NRS 106.240 does not reflect a legislative judgment that SFR should be free from all liability after a legislatively determined time period. In fact, SFR has no liability—even if SFR loses this litigation on the merits, it is not "liable" in any way. SFR's opening brief assumes the bank tries to hold it liable, but that is not correct. SFR is not "liable" if it fails to take the property free and clear of the deed of trust. "Liability" is the "state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility." Liability Definition, *Black's Law Dictionary Free Online Legal Dictionary* 2nd Ed. The bank

seeks no liability from SFR—it does not seek to bind or oblige SFR to do anything. The bank simply wants to preserve its deed of trust. SFR does not become liable to the bank if it loses its claim to clear title any more than a gamble becomes "liable" to a casino simply because it bet on the wrong horse.

NRS 106.240 differs from a statute of repose in another critical way: it expressly allows lenders to extend the statutory period. The statute applies "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*** becomes wholly due." NRS 106.240 (emphasis added). Statutes of repose do not allow the parties to extend the term, but NRS 106.240 does.

Contrary to a statute of repose, NRS 106.240 is an ancient mortgage statute. Its purpose is to clear an old lien from title where a lender never records a satisfaction or release of that lien. It creates a presumption of expiration of a lien. *See Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 97, 16 P.3d 1074, 1079 (2001) (NRS 106.240 asserted as an affirmative claim, providing the lender with the opportunity to plead affirmative defenses against the extinguishment of the deed of trust under the statute). The district court correctly determined NRS 106.240 is an ancient mortgage statute, not a statute of repose.

B. "Wholly Due" Refers to the Recorded Loan's Maturity Date

1. SFR's Improperly Reads New Words into NRS 106.240

SFR contends NRS 106.240's reference to "wholly due" includes a lender's acceleration of loan's payment obligations. AOB 27-30. While neither the Nevada legislature nor this court has defined "wholly due" as used in NRS 106.240, the only plausible reading of "wholly due" is the maturity date stated in the deed of trust, or, if recorded, a written extension of that date.[4] Such a reading comports with the black-letter law above, along with the text of NRS 106.240, the structure of Chapter 106, the purpose of ancient lien statutes and the legislative intent.[5]

NRS 106.240—a one-sentence statute enacted over 100 years ago and last amended in 1965—provides a deed of trust "appearing of record, and not otherwise satisfied and discharged of record," terminates "ten years after the debt secured by . . . the deed of trust become[s] wholly due" under "***the terms thereof*** or any ***recorded written extension thereof***." (emphasis added). By its plain language, the statute makes clear only two written instruments are relevant in determining when the obligation a lien secures becomes "wholly due"— (1) the "deed of trust" itself, and

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[4] Here, the deed of trust states that "Borrower owes Lender [a certain sum] plus interest[,]" and "has promised to pay this debt in regular Periodic Payments and *to pay the debt in full not later than December 1, 2035*," a date still far in the future. (1JA_76) (definition of "Note") (emphasis added).

[5] As this court noted in *Pro-Max*, NRS 106.240's legislative history is sparse. 16 P.3d 1074, 1078 n.7 (Nev. 2001).

(2) "any recorded extension thereof." NRS 106.240; *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) (explaining the court will attribute the plain meaning to a statute that is not ambiguous).

According to SFR, the bank "accelerated" the loan's due date either by private letter to the borrower or the recorded notice of default. AOB 4-5 (surmising the loan was accelerated "[b]etween September 1, 2007 and January 22, 2008," the latter date being the date the January 2008 notice of default was recorded (9JA_2101.)). Reading NRS 106.240 as permitting unrecorded letters or the notice of default to affect the statute's application conflicts with well-established canons of statutory interpretation. "[T]he 'doctrine of expressio unius est exclusio alterius as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.'" *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1054 (9th Cir. 2018) (citation omitted). As this court has confirmed, "[t]he maxim 'Expressio Unius Est Exclusio Alterius', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Nevada Revised Statute 106.240's explicit references to "deeds of trust" and "recorded extensions" setting the date a loan becomes "wholly due" for purposes of triggering the ten-year clock precludes other documents, such as letters to borrowers and a notice of default, from doing so.

Nor does *Pro-Max* support SFR's argument "wholly due" can mean a date other than the loan's recorded maturity date stated in the deed of trust or recorded extension thereof. AOB 22-25. A close read of *Pro-Max* confirms the bank's interpretation of NRS 106.240 that "wholly due" means expiration of the loan term stated in the deed of trust or recorded extension. In *Pro-Max*, the noteholders executed promissory notes in 1982 with a two-year repayment term, rendering the notes "wholly due" in **1984**. *Pro-Max*, 117 Nev. at 96, 16 P.3d at 1076. Some of the noteholders agreed to extend the term, but not all noteholders agreed. *Id.* at 97, 1077. After the passing of ten years, certain noteholders sued and relied on NRS 106.240 to argue the notes were unenforceable. *Id.* This court agreed, finding "the deeds of trust were conclusively presumed to have been satisfied in **1994**, which is ten years after the notes became due." *Id.* (emphasis added).

As the bank urges here, the *Pro-Max* court looked to when the notes became due ***according to the terms thereof***—or, according to the deed of trust. Here, the loan is not due until maturity in 2035. (1JA_76.) The court in *Pro-Max* also noted: "it is undisputed that no written agreements to extend the notes and deeds of trust were executed or recorded." *Pro-Max*, 117 Nev. at 94, 16 P.3d at 1077. This is consistent with the language of NRS 106.240 stating a lien "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." NRS 106.240 (emphasis added).

Finally, in *Pro-Max*, the court rejected attempts to read words into NRS 106.240 that do not appear within the text of the statute: "We conclude that the statute is clear and unambiguous. That being the case, no further interpretation is required or permissible." *Pro-Max*, 117 Nev. at 95, 16 P.3d at 1078 (rejecting a creditor's argument that NRS 106.240 should only protect bona fide purchasers).

Just as this court refused to read a bona fide purchaser limitation requirement into NRS 106.240 in *Pro-Max*, this court should likewise not read into NRS 106.240 a reduction of the ten-year period upon acceleration of the debt underlying the deed of trust where no such language appears in the statute. According to the plain language of the statute, no instrument other than the deed of trust or a written, recorded extension thereof can affect the determination of the loan obligation as "wholly due". *Firestone*, 120 Nev. at 16, 83 P.3d at 281 (explaining the court will attribute the plain meaning to an unambiguous). To permit a notice of default or any other document to reset the "wholly due" date of a debt secured by a deed of trust under NRS 106.240 amends the statute without proper legislative action.

The legislative intent of NRS 106.240 confirms the point. "When construing a statute, the legislative intent is controlling." *Szydel v. Markman*, 121 Nev. 453, 456, 117 P.3d 200, 202 (2005). The law, originally enacted in 1917, was amended

in 1965 to include more documents (deeds of trust in addition to mortgages, and recorded extensions in addition to both) as potential triggers. If the legislature intended to add a notice of default or unrecorded letters to the list it would surely have done so. "When the language of a statute is clear on its face, this court will deduce the legislative intent from the words used." *Id.* Likewise, had the legislature intended "wholly due" to mean advancement of the date through acceleration, it would have included language to that effect.

This reading is also consistent with the structure of the statute. "Where the legislative intent cannot be discerned, a statute can be interpreted according to the entire statutory scheme." *State Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 1123, 946 P.2d 179, 184 (1997). Nevada Revised Statute 106.240 appears in the chapter governing recorded instruments.[6] If an unrecorded letter changes the "wholly due" date for purposes of NRS 106.240, as SFR contends, then courts will have to look *outside* the title record to calibrate the ten-year clock. Reading NRS 106.240 broadly enough to mean these events affect the date on which the ten-year clock starts would

[6] The subsections surrounding NRS 106.240 set clear and explicit requirements as to when certain types of documents have effect upon recordation. Nevada Revised Statute 106.220 makes explicit an instrument subordinating or waiving the priority of a deed of trust must be recorded and sets conditions for such recording. Nevada Revised Statute 106.260 similarly sets requirements for the recording of an instrument discharging or releasing a mortgage or lien, including that such recording can be done in the margin of the record itself.

defeat the statute's purpose—it would be impossible to determine from the record alone when the timeframe would expire. It is far more sensible, and far more consistent with the text, structure, and purpose of 106.240, to read it as adopting the maturity date stated in the deed of trust or a recorded extension—the only documents the legislature mentioned—as the date the loan becomes "wholly due" for purposes of triggering the ten-year clock.

At least one treatise interprets the "wholly due" language as referring to the date of loan maturity. *See* 3 Patton & Palomar on Land Titles § 567 (3d ed.) § 567 - Mortgages, deeds of trust, and release. The interpretation makes sense because the statute addresses when the debt is presumed satisfied. *See* NRS 106.240. The only point in time that can provide the certainty to support that presumption is the stated date of maturity. After maturity, the only way to satisfy a loan is through payment in full. In contrast, a lender can decelerate an accelerated loan at any time before maturity.

The statute's purpose is not served by allowing a debt to be presumptively extinguished ten years after acceleration. To hold otherwise would eviscerate Nevada authority finding no statute of limitations exists to conduct a nonjudicial foreclosure. *Facklam v. HSBC Bank USA*, 133 Nev. 497, 499, 401 P.3d 1068, 1070 (2017) (en banc) (rehearing denied) ("lenders are not barred from foreclosing on

mortgaged property merely because the statute of limitations for contractual remedies on the note has passed.").

2. The Loan Never Became "Wholly Due" Because the Borrower Could Reinstate It

Even assuming NRS 106.240's "wholly due" language could mean acceleration, the loan was not accelerated because the borrower retained the right to reinstate the initial terms of her mortgage by making a timely partial payment. Under black-letter contract law, an obligation that becomes fully or wholly due cannot be satisfied or altered by partial rather than complete performance. *See generally Effect of Performance as Discharge and of Non-Performance as Breach*, Restatement (Second) of Contracts § 235 (updated Oct. 2019). For a loan to become "wholly due" as the term is commonly used, payment in full must be the borrower's only non-breaching option.

Under the January 2008 notice of default, the borrower retained the right to reinstate the loan by paying less than all amounts due. (9JA_2101) (citing NRS 107.080's right to cure.) Under the deed of trust, the borrower retained the "right to reinstate after acceleration" by making a partial payment. (1JA_88) (deed of trust, § 22.) The fact the borrower could bring the loan current by making a timely payment of less than the full amount of the loan means an acceleration does not render the obligation "wholly due" under a reasonable meaning of that term.

3. The Bank Did Not Exercise Its Option to Accelerate

SFR further argues the bank must have accelerated the loan as late as the recording of the January 2008 notice of default because it would not foreclose on less than all amounts due. AOB 3-4, 11, 20-21. SFR's unfair assumption is contradicted by the January 2008 notice of default.

The notice of default cannot evidence acceleration because it expressly confirms—and conveys to the borrower—the loan was not yet due until December 1, 2035. (9JA_2101.) It states: "THE ENTIRE PRINCIPAL AMOUNT WILL BECOME DUE ON 12/01/2035 AS A RESULT OF THE MATURITY DATE OF THE OBLIGATION ON THAT DATE." (9JA_2101) (caps in original.) SFR ignores this critical language proving the loan was not yet "wholly due" as late as January 22, 2008, the date the January 2008 notice of default was recorded. In addition, the January 2008 notice of default reveals if the default is not cured, "the property may there after be sold." (9JA_2101.) At best, this language indicates a future intent to accelerate.

Acceleration must be "exercised in a manner so clear and unequivocal that it leaves no doubt as to the lender's intention." *Clayton v. Gardner*, 107 Nev. 468, 470, 813 P.2d 997, 999 (1991) (quoting *U.S. 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. The language in the January 2008 notice of default does not signify a "clear and unequivocal" intent to either accelerate the loan or sell the property.

4. *Glass* Does Not Contradict the Bank's Argument

SFR may argue *Glass* supports a finding the January 2008 notice of default constituted the bank's acceleration of the loan. It does not. Unlike here where the parties dispute whether the loan was accelerated, the *Glass* parties did not dispute the recorded notice of default constituted an acceleration. *Glass*, 2020 WL 3604042, at *1. ("The parties do not dispute that the Notice of Default accelerated the loan and made the balance immediately due.") In both *Glass* and here, the issue of whether the loan was accelerated is moot because the lender in both cases recorded a rescission within NRS 106.240's ten-year time period.

C. The Ten-Year Period under NRS 106.240 May be Tolled

The district court correctly found the bank's August 2015 quiet title action tolled NRS 106.240's ten-year timeframe. (8JA_1681-82, ¶ O.) SFR disagrees, arguing NRS 106.240 is not subject to equitable tolling because it is a statute of repose. AOB 23-27. As shown, NRS 106.240 is an ancient mortgage statute, not a statute of repose.

Without such tolling, an HOA purchaser like SFR could be rewarded for prolonging litigation over the validity of the deed of trust until the eve of the expiration of the ten-year period. SFR has done so here by continuing to litigate

whether the deed of trust survived the HOA's foreclosure sale despite the unequivocal evidence of tender, which SFR does not even appeal.

This court has shown NRS 106.240's application is not automatic and can be precluded by equitable considerations. In *Pro-Max*, the court found that while the ten-year period under NRS 106.240 had unquestionably passed, NRS 106.240 did not automatically terminate the lien. Instead, the court remanded the case for further proceedings on whether an equitable consideration—there, estoppel—precluded that result. *Pro-Max Corp.*, 117 Nev. at 96-97, 16 P.3d at 1079. Had equitable considerations been entirely off limits, there would have been no basis for remand.

Pro-Max is consistent with Nevada's long line of decisions holding that courts retain the power to fashion equitable remedies in cases involving real property. *See, e.g.*, *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 57-58, 366 P.3d 1105, 1111 (2016). In *Shadow Wood*, the court explained "a person who brings a quiet-title action may, consistent with NRS Chapter 40 and our long-standing equitable jurisprudence, invoke the court's inherent equitable powers to resolve the competing claims to such title." *Id.* at 58, 366 P.3d at 1111. The court held statutorily mandated conclusive presumptions applicable to foreclosure deeds "do not defeat equitable relief in a proper case; rather, such recitals are conclusive, *in the absence of grounds for equitable relief*." *Id.* at 59, 366 P.3d at 1112. (cleaned up; emphasis added). It explained "conclusively establishing" a fact when no such event occurred would

allow for a "breathtakingly broad" reading of the statute and "is probably legislatively unintended." *Id.* at 57, 366 P.3d at 1110 (citation omitted). The court therefore declined to give the conclusive recitals at issue "such a broad and unprecedented reading," and explained "courts retain the power, in an appropriate case, to set aside a defective foreclosure sale on equitable grounds." *Id*.

Pro-Max, *Shadow Wood*, and cases like them confirm equitable considerations can trump the application of NRS 106.240. The court should find they do here. This court should affirm the district court's finding that NRS 106.240's ten-year period was tolled during the litigation over whether the HOA foreclosure sale extinguished the deed of trust.

Tolling the ten-year period is equitable to the public at large, as it would advance the public interest in clear and reliable land records. As SFR points out, years after the 2008 notice of default and rescission were recorded, lender activity occurred on the property, including an assignment of the deed of trust in 2011 and another in 2013, AOB 6, indicating the bank still intended to protect and pursue its lien even after rescinding the notice of default. SFR further acknowledges various other liens encumbered the property, including those of the HOA and Republic Services. AOB 14. No reasonable person or entity could infer from those records that the deed of trust had been satisfied, abandoned, or forgotten; to the contrary, the recorded instruments show unequivocally the bank intended to protect and enforce

its lien and that the deed of trust has not been satisfied, along with the bank's vigorous pursuit of its quiet title action. SFR cannot stick its head in the sand, hiding under a bona fide purchaser designation it never proved before the district court. *Berge v. Fredericks*, 95 Nev. 183, 187, 591 P.2d 246, 248 (1979) (requiring the party claiming bona fide purchaser protection to prove its entitlement); *RLP-Ampus, LLC v. U.S. Bank, N.A.*, No. 71883, 2017 WL 6597148, at *1 (Nev. Dec. 22, 2017) (unpublished) (same).[7]

A finding that the ten-year period under NRS 106.240 continues to run under these circumstances would introduce confusion and uncertainty, not clarity. This court has held equity cuts firmly against applying a statute to "conclusively establish[]" a lien's termination "when, in fact, no [discharge] occurred." *See*

[7] SFR argues the district court found it a bona fide purchaser in its initial summary judgment order and that the finding was not disturbed on reconsideration. AOB 16-17. As SFR acknowledges, this finding was limited to SFR's knowledge of any attempted superpriority payments made before the HOA foreclosure sale to the HOA. AOB 16 (specifying SFR "had no notice of any defects in the [HOA] sale and no notice of any rejected [superpriority] payment nearly three and a half years before the sale.") To the extent SFR implies it is somehow entitled to protection as a bona fide purchaser for not knowing the bank intended to pursue enforcement of its deed of trust, the district court never made such a finding.

Adopting SFR's position, by contrast, would undermine the years of work by Nevada courts, including this court, in resolving the substantial volume of litigation regarding the effect of HOA foreclosures. Allowing NRS 106.240 to terminate the deed of trust here would usher in a wave of new litigation seeking to relitigate and erase those results. The public interest favors resolving title disputes efficiently, not creating incentives for parties to prolong and disturb finality.

Shadow Wood, 132 Nev. at 57, 366 P.3d at 1110. The same equitable considerations should apply here.

Tolling the ten-year period because the lien was being litigated would also comport with NRS 106.240's purpose. Applying a statute intended to clear abandoned and forgotten liens from title when the lien is the subject of active litigation makes no sense—the lien was obviously not abandoned or forgotten—and interpreting the statute to require this lien be cleared would be an absurd result. Terminating a lien under NRS 106.240 whose validity had been the subject of litigation between the lienholder and the titleholder for much of the ten-year period would violate the universally recognized canon against interpreting statutes to require absurd results. As the U.S. Supreme Court has explained, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); *accord Hunt v. Warden, Nevada State Prisons*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995) ("When interpreting a statute, this court resolves any doubt as to legislative intent in favor of what is reasonable, and against what is unreasonable . . . . A statute should be construed in light of the policy and the spirit of the law, and the interpretation should avoid absurd results.") Terminating the bank's lien would conflict with the statute's purpose and conventional notions of fairness and justice.

Applying NRS 106.240 to terminate a lien that is the subject of litigation would contradict that purpose, as no one could plausibly consider the lien abandoned or forgotten. SFR—or anyone checking the land records—cannot plausibly believe the bank abandoned the lien or lacked the intent to enforce its deed of trust. This court should apply equity to preclude application of the statute.

CONCLUSION

The bank requests this court affirm the judgment.

DATED March 18th, 2021.

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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 this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this answering brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 7,470 words.

FINALLY, I CERTIFY that I have read this **Respondents' Answering Brief & Opening Brief on Cross-Appeal** 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 opening brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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

DATED March 18, 2021.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on March 18, 2021, the foregoing **RESPONDENTS' ANSWERING BRIEF & OPENING BRIEF ON CROSS-APPEAL** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

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

/s/ Patricia Larsen
An employee of Akerman LLP