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.

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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 REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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ROUTING STATEMENT AND INTRODUCTION

Even though it disagrees with a major part of the unpublished order in *Glass v. Select Portfolio Servicing, Inc.*,[1] the Bank urges the Court to route this case to the Court of Appeals, claiming *Glass* resolves this matter. It should not. As SFR stated in its Opening Brief, this Court should be retained by this Court.

The briefs in the *Glass* case omitted several very important federal and state statutes. This resulted in the Court inadvertently reaching a decision that conflicts with those statutes. Had the *Glass* court been able to make use of the full array of applicable federal and state statutes it would have been compelled to reach a different conclusion. For this reason, the Glass decision is radioactive and no other court should venture near it.

In *Glass*, the issue turned on whether a particular Rescission of the Notice of Default decelerated a loan that all parties agreed had previously been accelerated. The *Glass* court merely glanced at the title of Rescission of the Notice of Default and decided that, based on the title of the document, that the rescission caused a deceleration of the loan. The court failed to actually analyze the entire contents of the rescission, including the entirety of the sentence on which it relied. Not all rescissions are the same. Lenders use different rescissions for different purposes. Lenders commonly limit the scope of their rescissions. Had the

[1] 466 P.3d 939, 2020 WL 3604042 (Nev. 2020) (unpublished)

parties focused the *Glass* court on the full language of the rescission, it would have noticed that the rescission was not a full rescission, but in fact, was a limited rescission. Instead, the *Glass* order puts a period in the middle of in the middle of the sentence without acknowledging the rest of the sentence or document that goes on to limit what was rescinded, and what was not. That fact that the unpublished order did not analyze all of the words in the sentence, led to the faulty conclusion that the acceleration was cancelled even though the plain language of the document clearly states the Bank's intention to only cancel the election to sell.

This interpretation, that ignores and contradicts the language in the recorded rescission, would potentially contribute to violations of state and federal laws.

Unfair, deceptive, or abusive acts and practices (UDAAP) can cause significant financial injury to consumers, erode consumer confidence, and undermine the financial marketplace. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive, or abusive act or practice. The Dodd-Frank Act granted rulemaking authority regarding unfair, deceptive, or abusive practices to the Consumer Financial Protection Bureau (CFPB).

In the present case, the recession states that the bank merely canceled the sale and nothing more. The bank is now claiming that it did much more. This means

that the bank either lied to the borrower or lied to SFR, or both. By lying, the bank has committed a UDAP. The banks claims it did something materially different than what was stated in the rescission. This means that the bank is admitting that is mislead the borrower about the true status of the loan. This violates the Dodd Frank Act. The Bank claims it did something materially different than what was stated in the rescission. This means that the bank is admitting that is mislead the borrower about the true status of the loan. This violates CFPB regulations.

The representation, omission, act, or practice must be considered from the perspective of the reasonable consumer. A reasonable consumer or their attorney who read the contents of the partial rescission would believe that the loan remained accelerated which would mean that the borrower would not able to make partial payments in attempt to cure the default. In determining whether an act or practice is misleading, one also must consider whether the consumer's interpretation of or reaction to the representation, omission, act, or practice is reasonable under the circumstances.

In other words, whether an act or practice is deceptive depends on how a reasonable member of the target audience would interpret the representation. When representations or marketing practices target a specific audience, such as older Americans, young people, or financially distressed consumers, the communication must be reviewed from the point of view of a reasonable member of that

group. Moreover, a representation may be deceptive if the majority of consumers in the target class do not share the consumer's interpretation, so long as a significant minority of such consumers is misled. When a representation conveys more than one meaning to reasonable consumers, one of which is false, the person making the representation is liable for the misleading interpretation.

In addition, NRS 111.320 requires that subsequent purchasers be able to rely on the content of recorded documents, not just the title. Yet, the Bank is disclaiming that not just the language in the rescission the preserves acceleration, but it also argues that "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**."[2] If a foreclosure notice that specifically says all sums secured by the loan are immediately due and payable and that the property will be sold does not signal intent to accelerate and to sell, it is unclear what would. The *Glass* order that ignores a large portion of the words in the rescission gives the Bank a green light to play fast and loose with its representations in the public record and leaves the public confused or defrauded. As explained above, this violates Nevada and federal law. Any further analysis should be done while reconciling these laws.

Both the district court and the *Glass* court found that acceleration, not just maturity date, fall within the meaning of "wholly due" as required to trigger the ten-

[2]RAB, 26 (Emphasis added).

year period that terminates a deed of trust pursuant to NRS 106.240. Although banks, including U.S. Bank, have repeatedly represented to this Court that "wholly due" can include either acceleration or maturity date when it suits them—most recently in the briefing for the Certified Question regarding statute of limitations (*Thunder Properties*) and in the *Facklam* briefing, in this case it is singing a different tune. The Court should hold the Bank to its previous, more logical, representations.

The Court should follow the plain language of the NRS 106.240 to hold that (1) the ten years runs from the time a bank makes the entire debt due under the note "wholly due," including accelerated the promissory note; (2) acceleration takes place when the borrower is informed the debt is wholly due; and (3) nothing tolls or interferes with the running of NRS 106.240 once the note is accelerated; it can only be stopped by reinstatement of installment payments, not just acceptance of such payments but the unfettered right to make them without further concern of liability.

NRS 106.240 is a statute of repose. Neither law suits nor actual notice of a potential lawsuit stop the clock. The very purpose of NRS 106.240 is to quiet title and allow the person whose title is being challenged to obtain finality, certainty, and vest in them the right to repose, at which time no further liability ran with the note or lien, and provide certainty of title. Nothing in the statute provides any exception to the running of the time and without one, no exception can be read into it. Deceleration by reinstating the absolute right to make installment payments was the

only means to stop the clock, something fully within the Bank's control. It failed. Nothing stood in its way other than its own choices to limit the rescission to the power of sale, and to not reinstate monthly installment. Just as rights as to the property in *Pro-Max* were at issue during the running of the clock, so were they here. And yet, the clock continued to run in *Pro-Max*, as it did here. The Bank provides no citation to any authority for tolling the running of the statute of repose where no express provision exists within its language. This Court's job is to interpret the plain words of the statute, dispassionately and without amendment.

Every argument raised by the Bank fails. This Court should reverse and remand the district court's judgment and remand with instructions to enter judgment in favor of SFR and deem the Deed of Trust forever terminated.

ARGUMENT

I. THE DISTRICT COURT MISAPPREHENDED NRS 106.240 AND *PRO MAX*

A. The Bank Does Not Even Try to Defend the District Court's Flawed Interpretation that NRS 106.240 Cannot Apply to SFR.

As explained in SFR's opening brief, the district court reasoned that the Nevada Supreme Court told us in *Pro Max* that "we're not here to protect third parties" with NRS 106.240. AOB, 18. The district court twisted the holding in *Pro Max* that NRS 106.240 does not require BFP status to instead find that NRS 106.240 cannot apply to a BFP. The Bank does not defend the district court's ruling that "[a]s a non-party to the note not subject to personal liability on the

obligation, NRS 106.240 does not apply to SFR." As such, the Bank concedes that this interpretation is without merit.

B. The Bank's Own Authority Confirms Plain Language of a Statute Controls In the Face of Notice and Lawsuits.

The district court erred when it found that the Bank did not need to do anything else to protect the DOT after it filed a lawsuit without decelerating the loan underlying the DOT. Nothing in the statute suggests a lawsuit regarding a homeowner's association foreclosure sale stops the operation of NRS 106.240. As the Nevada Supreme Court held in Pro Max, NRS 106.240 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."3 In fact, divorce proceedings were pending while clock was running. The fact that the divorce case dealt with the promissory notes and deeds of trust did not toll the NRS 106.240 clock. Even though most of the shareholders voted to amend the due date and reinstate notes because of NRS 106.240, the statute was not tolled.

In its brief,[4] the Bank cited to in *Cunningham v. Haley*,[5] a case that bolsters this Court's interpretation in *Pro Max*. In *Cunningham*, the court held that even though the parties or their predecessors in title had been in prior litigation

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[3] *Pro-Max Corp. v. Feenstra*, 16 P.3d 1074, 1077, 1079 (Nev. 2001) (emphasis added).
[4] RAB, 14.
[5] 501 So 2d 649, 652 (Fla. Dist. Ct. App. 1986)

regarding the validity of encumbrances to the property, that did nothing to protect the subject of the litigation from being extinguished under a statute which ran during the litigation, one, like NRS 106.240, that is intended to clear title. "[A]ctual notice does not suffice to protect use restrictions created prior to a root of title from being extinguished by [the statute]."[6] In other words the operation of the statute had nothing to do with the disputes over the validity of the land restrictions. The only question was whether the statutory requirements were met to preserve the use restrictions from extinguishment pursuant to the statute.

The same is true here. In this case, the question is not whether the Bank was involved in a lawsuit over the validity of the deed of trust . The question is simply, has ten years passed since the loan was declared wholly due without anything being done to extend that time? Nothing else, not notice, BFP status or even lawsuits matter. Like the parties in *Cunningham*, the Bank here had the ability to follow the requirements of the statute to preserve the DOT. Once it declared the loan underlying the DOT wholly due, it needed to foreclose or decelerate within ten years. It failed to follow the steps and the DOT was terminated.

II. BANKS, INCLUDING U.S. BANK, HAVE JUDICIALLY ADMITTED THAT "WHOLLY DUE" MEANS EITHER "ACCELERATION" OR "MATURITY"

While it is true, NRS 106 does not define "wholly due," the words are plain

[6] *Id.*

and the meaning clear: "wholly due" means the entire debt is payable now.[7] "Wholly" means "[n]ot partially; fully; completely."[8] "Due" means "[o]wing or payable; constituting a debt."[9] Yet the Bank argues that the Court would have to add words to the statute to hold that the meaning of the term "wholly due" includes both "acceleration" and "maturity date" instead of just "maturity date." But the Bank's interpretation requires the Court to strike out "wholly due" and replace it with "maturity date." The Bank's interpretation also ignores the fact that "according to the terms" of the DOT, the installment payments under the note and secured by the DOT can be accelerated, making the loan wholly due. Contrary to the position the Bank takes in this case, the Bank's counsel in this case, as well as others, have judicially admitted that "wholly due" means either acceleration or maturity date.

In the briefing for the Certified Question from the United States Court of Appeals for the Ninth Circuit, Case No. 17-16399, U.S. Bank and its current counsel[10] attempt to use the ten-year limitation in NRS 106.240 to make an unlimited time to challenge the effects of an Association foreclosure sale more palatable. In doing so, the Bank admits that the maturity date is the trigger for

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[7] *See Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) (noting where a law's language is "plain and its meaning clear, the courts will apply that plain meaning").
[8] BLACK'S LAW DICTIONARY 1832 (Tenth Ed. 2014).
[9] *Id.* at 609.
[10] At least two of which are counsel of record in this appeal.

NRS 106.240 only when there is no evidence in the complaint or in the public record of acceleration. "The deed of trust remains valid and enforceable until ten years after the note becomes fully due. NRS 106.240. There is no evidence in the complaint or in the public records that the due date has been accelerated, so the deed of trust remains enforceable until ten years after the maturity date[.]"[11]

Similarly, in trying to avoid a six-year limitation, the bank in *Facklam* instead urged that it had ten years after accelerating to non-judicially foreclose under NRS 106.240. It expressly argued, "[i]n the context of enforcement by non-judicial foreclosure of a loan secured by a deed of trust, there is a 10-year statute of limitations triggered upon affirmative acceleration of the total loan debt under NRS § 106.240. **If the debt is not accelerated**, the statute runs from the date of maturity." *Facklam v. HSBC Bank USA*, Case No. 70786, RAB, 9-10 (citing Pro-Max Corp v. Feenstra, 117 Nev. 90, 94, 16 P.3d 1074, 1077 (2001) (emphasis added)).

In addition, Bank's counsel from this case argued in another case, "[e]ven if a declaratory relief action based on the enforceability of the deed of trust were subject to a limitations, **NRS 106.240 confirms the statute of limitations on enforcement of the deed of trust ends ten years from acceleration or**

[11] *U.S. Bank, N.A. v. Thunder Properties, Inc.*, Certified Question from the United States Court of Appeals for the Ninth Circuit, Case No. 17-16399, Nevada Supreme Court No. 81129, Opening Brief, 19.

maturity."[12]

In yet another case, Bank's counsel argued NRS 106.240 "[a]t face value, the statute would prevent a lender form foreclosing on a property secured by a mortgage or deed of trust more than ten years after the term of the mortgage loan, or after it became **wholly due at an earlier time, such as by acceleration**."[13] [14]

What is more, Bank's counsel, during closing arguments in another trial, argued the following:

> MR. STERN: 240 says that a deed of trust remains valid ten years after the loan is fully mature. So if you reach maturity or perhaps acceleration and the loan is wholly due -- that's the actual language in the statute, wholly due -- the deed of trust remains valid and, therefore, can be foreclosed for ten years after that.

See French v. Sweetwater Homeowners' Association, Inc. Case No. A-12-677931-C, May 4, 2018 transcript from closing arguments.

In those cases, it was convenient and beneficial to the Bank to argue that "wholly due" includes both acceleration and maturity date. In this case, it is not.

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[12] *Carrington Mortgage Services, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:18-CV-00414-APG-VCF (D. Nev.), [ECF No. 13, at pg. 6:20-22] (emphasis added.)

[13] *See Fitzwater v. Bank of America, N.A.*, Case No. 2:16-CV-00285-RFB-NJK (D. Nev.) , [ECF No. 26], BANA's Reply in support of its Motion to Dismiss; see also Order granting Motion to Dismiss at [ECF No. 30].

[14] *See BNYM v. SFR Investments Pool 1, LLC*, Case No. 2:17-CV-02699-APG-BNW (D. Nev.) [ECF No. 26 at pp. 8-9].

The Bank should be held to these representations it has made before this Court.

III. THE BANK CONCEDES A STATUTE OF REPOSE CANNOT BE TOLLED; DESPITE THE BANK'S NARROW READING, NRS 106.240 IS STATUTE OF REPOSE

Although the Bank argues that NRS 106.240 is not a statute of repose, it concedes that a statute of repose cannot be tolled. RAB, 8, fn.1 ("[NRS 106.240] is not a statute of repose and consequently may be tolled.").

The Bank constricts the plain meaning of words to try to fit its narrative that NRS 106.240 is not a statute of repose. Moreover, characterizing NRS 106.240 as an "ancient mortgage statute intended to clear old liens"[15] does not transform NRS 106.240 into anything other than a statute of repose.

A. Statutes of Repose Apply to More Than Just Civil Actions; Ancient Mortgage Lien Statutes are Statutes of Repose

The Bank argues that "[a] statute of repose pertains only on the right to bring a civil action." RAB, 15. While it is true that a statute of repose can affect the ability to bring a cause of action, the effect of a statute of repose is not so narrow. "The statute of repose limit is not related to the accrual of any cause of action"[16] Rather, the operative characteristic and purpose of a statute of repose is the legislature's decision to destroy the underlying right, not whether the statute

[15] RAB, 14.

[16] *Fed. Deposit Ins. Corp. for Colonial Bank v First Horizon Asset Sec. Inc.*, 291 F Supp 3d 364, 373 (SDNY 2018)(citing *CTS Corp. v Waldburger*, 573 US 1, 17, 134 S Ct 2175, 2187, 189 L Ed 2d 62 (2014).)

contains express language barring commencement of cause of action after a certain time period as the means to carry out that destruction. "[S]tatutes of repose affect the availability of the underlying right: That right is no longer available on the expiration of the specified period of time." [17]

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. Rightly understood, NRS 106.240 is a statute of repose in its purest sense, in that it destroys the underlying right with no reference whatsoever to the time in which to commence an action.

In explaining Florida's ancient lien mortgage statute, one court explained, "[a] 'statute of limitations' is a procedural statute that prevents the enforcement of a cause of action that has accrued. Conversely, a 'statute of repose'—like that of § 95.281(1)—establishes an ultimate date when the lien or mortgage terminates and is no longer enforceable whether a claim has accrued by that date or not."[1819] The

[17] Calvin W. Corman, *Limitation of Actions*, § 1.1, at 4-5 (1991).
[18] *Matos v Bank of New York*, 14-21954-CIV, 2014 WL 3734578, at *3 (SD Fla July 28, 2014)(internal citations omitted).
[19] Fla Stat Ann § 95.281, provides in part:
95.281. Limitations; instruments encumbering real property
(1) The lien of a mortgage or other instrument encumbering real property, herein called mortgage, except those specified in subsection (5), shall terminate after the expiration of the following periods of time:

Matos court confirmed that Florida's ancient mortgage lien statute "establishes an ultimate date when the lien of the mortgage terminates and is no longer enforceable" even though the ability to bring a foreclosure action or other lawsuit was cut off at an earlier date through a statute of limitations.[20] In the time between the running of the statute of limitations and the statute of repose, "the holder of the note had 'recourse' 'to enforce the lien in the event' the borrower attempted to sell the property."[21] If statutes of repose could only apply to bar lawsuits, Florida's ancient lien statute would not be a statute of repose, but as the *Matos* court explained, it is.

This makes sense because, as the U.S. Supreme Court explained, "the purpose of a statute of repose is to create 'an absolute bar on a defendant's

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(a) If the final maturity of an obligation secured by a mortgage is ascertainable from the record of it, 5 years after the date of maturity.
(b) If the final maturity of an obligation secured by a mortgage is not ascertainable from the record of it, 20 years after the date of the mortgage, unless prior to such time the holder of the mortgage:
1. Rerecords the mortgage and includes a copy of the obligation secured by the mortgage so that the final maturity is ascertainable; or
2. Records a copy of the obligation secured by the mortgage from which copy the final maturity is ascertainable and by affidavit identifies the mortgage by its official recording data and certifies that the obligation is the obligation described in the mortgage;
in which case the lien shall terminate 5 years after the date of maturity.

[20] *Matos*, 2014 WL 3734578 at *3.
[21] *Id.* (*citing Houck Corp. v. New River, Ltd.*, 900 So.2d 601, 603 (Fla. 2d DCA 2005).)

temporal liability,'"[22] "The primary consideration underlying a statute of repose is 'fairness to a defendant,' the belief that there comes a time when the defendant 'ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations....'"[23]

"In recognizing the absolute nature of a statute of repose, we have explained that 'while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.'"[24] The Bank's DOT has been terminated. The destruction of the underlying right happened at the time period set forth in NRS 106.240.

B. SFR's Property is Free of Liability and the Slate Has Been Wiped Clean of The DOT

The Bank seeks to avoid NRS 106.240 from being a statute of repose by narrowly defining "liability" as the "state of being bound or obliged in law or justice to do, pay or make good something; legal responsibility." RAB, 16.

[22] *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) ("CPERS") (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014)).
[23] *R.A.C. v P.J.S., Jr.*, 927 A2d 97, 105 (N.J. 2007)(internal citations omitted)(emphasis added).
[24] *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v Rankin*, 307 S.W.3d 283, 286-87 (Tex 2010) (internal citations omitted).

But "liability" is not limited to debt for which SFR is legally responsible to pay.[25] And liability is not limited to companies or people, it also applies to land.[26] While the Bank may not be trying to hold SFR personally liable under the note, SFR's property is not "free from liability" if it must take title subject to the DOT. Indeed, the value of the Property to SFR—its equity in the Property—is directly impacted by any lien or encumbrance, like the DOT.[27] Because it has been more than ten years since the loan underlying the DOT was declared wholly due, as evidenced in the publicly recorded NOD, SFR and its property have a substantive right to be free of liability under the DOT.

C. The Court is Powerless to Modify the Limits of a Statute of Repose.

Regardless of the label given to NRS 106.240, it must be strictly applied

[25] *Xtra, Inc. v Commr. of Revenue*, 402 N.E.2d 1324, 1326 (Mass. 1979)**(**"[t]his court has found the term 'liabilities' to include more than the narrow field of debts presently owed[.]")

[26] *See, e.g., Virginia-Carolina Joint Stock Land Bank v. Watt*, 178 S.E. 228, 230 (**N.C.** 1935) (discussing statutes that "impose **liability upon the land**") (emphasis added); *City of Richmond v Gibson*, 44 S.W. 1130, 1130 (Ky 1898)("**The land is liable** for municipal tax.") (emphasis added); *Dehaven v Roscon Bldg. & Loan Ass'n, ,* 164 A. 69, 69 **(Pa Super Ct** 1933)("When the mortgagor is in possession, and neglects to pay taxes which are a lien on the land, the mortgagee may pay… in reliance that **the land is liable**[.]")(internal citations omitted) (emphasis added); *Connally v Hardwick*, 61 **Ga.** 501, 501 (1878)("Though the exempted **land is liable** …for its purchase money, it is not liable for money expended… for work and labor done upon the premises.)(emphasis added).

[27] *See Bolt v. Merrimack Pharm., Inc.*, 503 F3d 913, 916 (9th Cir 2007)("[A] balance sheet generally involves only three basic accounting elements-assets, liabilities, and equity-and equity by definition equals the residual interest in the assets after subtracting liabilities.")

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 the U.S. Supreme Court in *CPERS*—a case the Bank failed to address in its answering brief—NRS 106.240's plain language "displaces the traditional power of courts to modify [its] statutory time limits …."[28]

IV. THE "STATUTORY HISTORY" AND "LEGISLATIVE HISTORY" OF NRS 106.240 SUPPORT TERMINATION OF THE DOT.

A. The Legislative History Shows NRS 106.240 was a Basis for "Clearing a Title," Not Just a Mechanism for Removing Old and Obsolete Mortgages.

The only analysis done to date of the legislative history of NRS 106.240 appears in the U.S. District Court *Bergenfield* ruling.[29] Contrary to the Bank's contention, NRS 106.240 was not designed to merely dispose of "old and obsolete mortgages," but was in fact itself a means of quieting title:

> This legislative history establishes that NRS 106.240 was not intended simply to "allow county clerks to clean the books," …. The heading of the original 1917 bill makes clear that it provides a means to "quiet title." After the 1965 amendments, the bill provides for quieting title as to both mortgages and deeds of trusts. The plain meaning is thus that it unburdens a property of any obligations pursuant to these types of written instruments.[30]

The 1965 comments before the Nevada Assembly Committee on the Judiciary

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[28] *CPERS*, 137 S.Ct. at 2050-51, 2055 (2017) (emphasis added).
[29] *Bergenfield v. U.S. Bank Nat'l Ass'n*, No. 2:16-CV-01691-RFB-PAL, 2017 WL 4544422, at *4 (D. Nev. Oct. 10, 2017) (Boulware, J.)).
[30] *Id*.

note the statute "is a basis for **clearing a title**," not just a mechanism for removing old and obsolete mortgages from the public record.[31] To the contrary, and despite the Bank's repeated use, the terms "old" and "obsolete" appear nowhere in the statute or in the legislative history.

B. Statutory History Support the Fact that Acceleration Triggers NRS 106.240.

The use of the term "wholly due" was purposeful, clearly includes acceleration by definition, and the Legislature never intended to limit triggering of the statute to the maturity / extension date although it could have done so.

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.[32] 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.[33] This Court addressed a mortgage with an acceleration

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[31] Minutes of Meeting, Committee On Judiciary, 53rd Legislature, March 13, 1965, in complied legislative history, pdf page 7 (emphasis added), available at: https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1965/AB426,1965.pdf (accessed 5/17/21).

[32] *See*, *e.g.*, *Building & Loan Ass'n of Dakota v. Price*, 169 U.S. 45, 48-49 (1897).

[33] *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.

clause in 1916, *before* the original passage of NRS 106.240, continued to do so prior to the 1965 amendments, and still does so today.[34] When NRS 106.240 first appeared in 1917, "wholly due" meant then what it means now, and clearly included accelerated debts.

The Bank cites to a case interpreting a Massachusetts statute and a case interpreting a Florida statute for the proposition that the purpose of NRS 106.240 "is not served by 'changing the enforceable period of the mortgage as a result of the acceleration of the note.'"[35] Because both of these statutes specifically include "maturity date" instead of "wholly due", they defeat the Bank's arguments, and reinforce the fact the Nevada Legislature chose to have NRS 106.240 operate differently.

The Bank's plea that this Court use foreign statutes to rewrite and override the Nevada Legislature's explicit choice of language and methodology for NRS 106.240 must be summarily rejected. Such a usurpation of the Nevada Legislature's legislative power by judicial rewriting is strictly forbidden and completely

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122, 122–23 (Nev. 1919) (same); *W.M. Barnett Bank v. Chiatovich*, 232 P. 206, 208 (Nev. 1925) (same).

[34] *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)

[35] RAB, 14, (citing Jr. v Wells Fargo Bank, N.A., 17-CV-10460-RGS, 2017 WL 1199768, at *1 (D Mass Mar. 30, 2017) and Cunningham v. Haley, 501 So.2d 649, 652 (Fla. App.1986).

unsupported.

C. Wholly Due Does Not Mean Only Maturity.

The Bank spends pages attempting to argue that NRS 106.240 can only operate after the maturity date of the DOT.[36] The argument is meritless.

1. Pro-Max *Does Not Address the Issue of Acceleration.*

The Bank's proffer of *Pro-Max* for the notion that NRS 106.240 can only operate after maturity of the DOT is inapposite. *Pro-Max* did not concern acceleration. Instead, *Pro-Max* concerned a loan that ran to its ultimate due date (maturity), *i.e.*, it concerned "notes [that] were executed on May 11, 1982, and became due two years later on May 14, 1984," resulting in the notes being "extinguished by operation of the statute on May 14, 1994."[37]

2. This court has already rejected the Bank's contention that "wholly due" can only mean the DOT maturity date.

In *Glass*, this Court has recognized a lender triggers the time under NRS 106.240 when it accelerates a loan balance, where it found that "the Notice of Default accelerated the loan and made the balance immediately due. Thus, this started the ten-year period present in NRS 106.240."[38] Thus, irrespective of the statute's intent, the only relevant question here is, did the Bank trigger the ten-year

[36] RAB at 18-23.
[37] *Pro-Max*, 117 Nev. at 92, 16 P.3d at 1076).
[38] *Glass v. Select Portfolio Servicing, Inc.*, 466 P.3d 939, 2020 WL 3604042 (Nev. 2020) (unpublished).

period as memorialized in its notice of default recorded on January 22, 2008, and the answer is yes.

In fact, in *Glass*,[39] this Court rejected the Bank's argument that the Nevada Legislature did not intend a notice of default to provide evidence of acceleration or trigger NRS 106.240. There, the Court held that "[t]he parties do not dispute that the Notice of Default accelerated the loan and made the balance immediately due."[40] If a notice of default could not accelerate the loan and trigger NRS 106.240 as a matter of law, the parties could not have agreed to make it so.

The Bank's argument that NRS 106.240 is silent as to acceleration likewise misses the point. Acceleration is just one means by which a lender can make the debt "wholly due." It is not the only means, but neither is maturity. The Bank's argument that only a deed of trust or any written extension thereof are the only two written instruments that matter, equally misses the point. The notice of default is just the conduit by which the Bank memorialized and/or actually exercised the remedy of acceleration; a remedy/term which stems from the **DOT itself**.

When the Bank claims the "terms thereof" only means the maturity date in the DOT, the Bank asks this Court to ignore all the other terms of the DOT, namely the acceleration remedy at Paragraph 22. Paragraph 22 of the deed of trust allows the

[39] *Id.*
[40] *Id.*

lender to accelerate the loan maturity date when the borrower defaults, thus when the borrower defaulted here, and the Bank exercised its remedy under paragraph 22 and made the debt immediately due and payable, by the "terms" of the DOT. This is precisely what the Bank states in the NOD, *i.e.*, that it "**has declared and does hereby declare** all sums secured thereby immediately due and payable." This is entirely consistent with NRS 106.240.

3. Any argument that NRS 107.080 prohibits acceleration outside of a notice of default fails.

Acceleration is a contractual remedy provided for in the Bank's DOT.[41] A lender may wish to accelerate the loan underlying the DOT outside of the non-judicial foreclosure process. Nothing in NRS 107.080 suggests that the Nevada legislature intended to impair the Bank's ability to exercise its right to accelerate the loan outside of the non-judicial foreclosure sale process.

Further, according to the DOT, notice of acceleration and acceleration can be invoked *before* the filing of the NOD as took place here, or the lender can use the

[41] The originating lender unilaterally drafted and inserted an acceleration clause in Section 22 of the DOT stating that if the borrower defaulted, or for any other breach of the DOT terms, "Lender … may invoke the power of sale, including the right to accelerate full payment of the Note…." Paragraph 18 of the DOT also permits the Lender to "require immediate payment in full of all sums secured [by the DOT]" if any part of the Property or interest in the Property was sold or transferred without the Lender's consent."

NOD to give notice of its intent to accelerate for the first time.[42] Here, the language of the NOD states that the beneficiary under the DOT "**has declared** and does hereby declare all sums secured thereby immediately due and payable." Thus, here, the Bank accelerated the debt *prior* to the filing of the NOD, and memorialized that prior acceleration in the language of the NOD itself. And even ignoring the plain meaning of the "has declared" language, the latest acceleration took place was with the January 22, 2008 execution and recording of the NOD.

To be clear, SFR did not and does not argue the NOD, in and of itself, accelerated the loan. Instead, the NOD is the document that establishes, by the "has declared" (past tense) language contained therein, that the Bank had *previously* accelerated the loan. This is permitted by the terms of the DOT. Paragraph 22 simply states "Lender shall give notice to Borrower prior to acceleration…."

Worst case, even if the "has declared" language is ignored, the NOD expresses an intent to accelerate, something NRS 107.080(3) expressly permits so long as the terms of the deed of trust permit acceleration. Again, the NOD states, "beneficiary…**does hereby declare** all sums secured thereby immediately due and

[42] *See* NRS 107.080(3) ("…. The notice of default and election to sell **must** describe the deficiency in performance or payment and **may** contain a notice of intent to declare the entire unpaid balance due if acceleration is permitted by the obligation secured by the deed of trust.") If a bank chooses to use a notice of default to give the first notice of its intent to accelerate, it must give the borrower 35 days set forth in NRS 107.080(2)(a)(2) to pay any deficiency and costs before acceleration. *See* NRS 107.080(3).

payable."[43] Thus, at the *latest*, the debt would have been wholly due 35-days after January 22, 2008.

4. **Facklam** ***Does Not Shield the Bank from NRS 106.240.***

The Bank argues that the purpose of NRS 106.240 is not served by allowing a debt to be presumptively extinguished ten years after acceleration because any other holding would "eviscerate Nevada authority finding no statute of limitations exists to conduct a nonjudicial foreclosure." RAB, 23 (citing *Facklam v. HSBC Bank USA*, 133 Nev. 497, 499, 401 P.3d 1068, 1070(2017)(en banc) (rehearing denied.) *Facklam* did not find that there were no limitations on enforcing a DOT via non-judicial foreclosure. *Facklam* did not cite any public policy or sacred purpose in allowing non-judicial foreclosure when the six-year statute of limitations to enforce the note had run. Instead, it merely states that "statutes of limitations only apply to judicial actions, and a nonjudicial foreclosure by its very nature is not a judicial action." *Id.* at 497. Enforcing the plain language of the statute of repose in NRS 106.240 does not "eviscerate" any statute of limitations or lack thereof.

5. ***The Bank's arguments concerning notices of default and acceleration are nonsensical.***

The NOD clearly states that the beneficiary under the DOT "**has declared** and does hereby declare **all sums** secured thereby **immediately due and payable**" and

[43] 2AA_0253.

"**has elected** and does hereby elect **to cause the trust property to be sold**[.]"[44]

Shockingly the Bank argues that this "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**." RAB, 26 (Emphasis added). Yet, the Bank used its notices of default and sale to tell the public and the borrower that it was intending to *foreclose on the entire amount due under the DOT*. Apart from the fact that the Bank's current arguments represents a flagrant misrepresentation as against the publicly recorded documents and runs afoul of *Clayton*[45] and *Coit*[46] threatening a borrower with foreclosure of the *entire amount due under the DOT* when in fact the Bank is now claiming the language in the NOD is not seeking to foreclose on the full amount due under the DOT—but rather only the installments due to date or not at all—appears to violate federal law under the Dodd-Frank Wall Street Reform and Consumer Protection Act.[47]

In addition, the Bank seeks to support it maturity date argument by quoting

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[44] (9JA_2101-2102.)(emphasis added.)
[45] *Clayton v. Gardner*, 107 Nev. 468, 813 P.2d 997 (1991).
[46] *First Am. Title Ins. Co. v. Coit*, 134 Nev. 938, 412 P.3d 1088 (2018) (unpublished) ("*Coit*").
[47] *See* 12 U.S.C. § 5336(a)(1)(B) ("It shall be unlawful … to engage in any unfair, deceptive, or abusive act or practice."); *See also* CFPB Consumer Laws and Regulations, Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) at 5-6 for list of deceptive acts or practices that appear to be covered by the Bank's representations herein, available at: https://files.consumerfinance.gov/f/documents/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf (last accessed April 15, 2021)

language from the NOD stating that "in addition, the entire principal amount will become due as a result of the maturity of the obligation on the maturity date."

The quoted language from the NOD is simply supplementing the statement of the breach. It has nothing to do with acceleration noted in the subsequent paragraph. It merely states that in addition to the borrower being liable for the past due installments that created the breach, the borrower is also liable for the full amount the DOT secures at the maturity date. This has no effect on, and has nothing to do with the clear and plain language of acceleration in the subsequent paragraph that state the Bank "has declared and does hereby declared" all sums due under the DOT. But the Bank's argument here highlights the absurdity of its position *that it cannot accelerate the debt and foreclose on the entire debt*.

The entire underlying argument of the Bank's brief, nonsensical as it may be, is that acceleration is irrelevant, that notices of default and acceleration do not and cannot make a loan "wholly due," and that a loan cannot be wholly due until the maturity date listed on a deed of trust. Recall that, according to the Bank, "the loan could not become 'wholly due' by acceleration…," that "the only time that all amounts owed are certain, and therefore 'wholly due,' is at maturity, and not following acceleration," and that the Nevada legislature did not intend acceleration to trigger NRS 106.240.

In *Coit*, this Court confirmed that acceleration of a note referenced in a notice

of default made the debt wholly due for the purposes of NRS 106.240.[48] In bank in *Coit* tried to argue exactly what the Bank argues here, *i.e*., that the trigger date under 106.240 was the maturity date.[49] This Court rejected this notion, stating "we question the merit of that argument in light of the March 2010 notice of default that declared the loan due in full. *Cf. Clayton v. Gardner*, 107 Nev. 468, 470, 813 P.2d 997, 999 (1991 ('[W]here contract obligations are payable by installments, the limitations statute begins to run only with respect to each installment when due, *unless the lender exercises his or her option to declare the entire note due*' (emphasis added))".[50]

In short, the Bank is arguing that it cannot accelerate the debt, and that the NOD was not accelerating the debt or giving notice of such acceleration. Under this reasoning, the Bank could *never* accelerate the debt, and could therefore *never* foreclose, or at least could only foreclose on unpaid installments up until the point of foreclosure. This defies the terms of the DOT itself that permit acceleration.

V. THE BANK'S ARGUMENTS THAT THE LOAN WAS NOT ACCELERATED AND WHOLLY DUE BY THE TIME IT RECORDED THE NOD DEFY REALITY.

Rarely, if ever, will the notice of default be the event that accelerates the loan. This is so because industry standard is to send a letter of intent to accelerate,

[48] *See Coit*, *supra* at *1 n.1. .
[49] *See* Appellants' Reply Brief on Appeal at 8, *Coit*, 412 P.3d 1088, 2017 WL 3184376 (filed June 26, 2017).
[50] *Coit*, at *1 n.1.

to the borrower, before the notice of default issues, as required by the terms of the Deed of Trust. Specifically, Paragraph 22 of the Deed of Trust in this case reads, "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument…" (Emphasis added.) This is standard language found in nearly every deed of trust used in Nevada.

The fact the Deed of Trust mandates notice prior to acceleration, proves the Notice of Default cannot be the document which first accelerates the loan. Otherwise, the lender would have breached the terms of the Deed of Trust because it requires prior notice, not simultaneous notice. Instead, the lender usually sends a letter to the Borrower noticing the borrower of its intent to accelerate. One such letter used by Bank of America, N.A., and produced in one of SFR's cases, proves this.[51]

[51] ASA_036-039(Notice of Intent to Accelerate admitted as Trial Exhibit 194 in *Lampman v. Red Rock Country Club HOA, et al*, Case No. A-13-686522-C (8th Jud. Dist. Ct. Nev.) ("*Calico Creek*"), *Bank of New York Mellon v. SFR Inves. Pool 1, LLC*, Nevada Supreme Court Case No. 80832.); *see id*. at 001-003 (Findings of Fact, Conclusions of Law and Judgment). SFR has included a supplemental appendix (ASA) which includes documents which can be found filed in other cases, and asks it to take judicial notice of these documents, as they directly refute the Bank's assertions and arguments which arose after the district court made its decision. *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)(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.")

As evidenced by the Notice of Intent to Accelerate, BANA explains the loan is in default, and then provides the borrower a date certain to cure the default.[52]

It then explains if default is not cured by the date certain, "the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full."[53] Just like the present case, a few months after issuing this letter, BANA recorded a substantively identical notice of default and election to sell. And just like the present case, the language in the notice of default included the phrase "beneficiary… has declared and does hereby declare all sums secured thereby immediately due and payable." The "has declared" refers to the earlier letter.

Additionally, just like this case, BANA tried to argue a later rescission of the notice of default (which is identical in pertinent part to the rescission in the present case) decelerated the loan, but the trial court rejected this argument noting the Notice of Intent to Accelerate Letter was the document that accelerated the loan, and no language in the rescission withdrew this prior acceleration.[54]

Furthermore, after sending the Notice of Intent to Accelerate, BANA's loan file contained several subsequent letters which told the borrower "Your loan is

[52] *Id.*
[53] *Id.* (emphasis in original.)
[54] ASA_001-003, 004-005; 036-039.

currently in default and has been accelerated."[55] But BANA went further, making this same representation in several of the same letters post-dating the rescission of the notice of default recorded by BANA. Thus, the rescission did not and could not have deaccelerated the loan. Like the rescission recorded by BANA in that case, the one recorded in the present case has the same language; it only cancelled the election to sell, not the acceleration. It bears noting, the note in *Glass* was owned by Countrywide *i.e.* BANA.

Additionally, Fannie Mae and Freddie Mac require its servicers to send acceleration letters within specified timeframes. Fannie Mae's Guide requires an acceleration/breach letter be sent 45-62 days after payment due date.[56] Similarly, Freddie Mac's Guide requires servicers issue a "notice of acceleration for all Mortgages no later than the 75th day of Delinquency."[57]

Thus, based on the industry practice, in comport with contractual obligations in the deed of trust, coupled with servicing requirements, it is the acceleration letter that makes the whole amount of the loan due, not the notice of default. In fact, by

[55] ASA_006-034 (Letters admitted as Trial Exhibit 218 in *Calico Cree*k (emphasis added)).
[56] *See* Fannie Mae Servicing Guide publicly available at https://singlefamily.fanniemae.com/media/23346/display, Section D2-2-06 Sending Breach or Acceleration Letter at p. 314. (last accessed 5/17/2021).
[57] *See* Freddie Mac Servicing Guide publicly available at https://guide.freddiemac.com/app/guide/content/a_id/1001163, Section 9101.2(b) (last accessed 5/17/2021).

its plain language the notice of default is merely providing notice to the world of actions already taken *i.e*. acceleration and election of sale.

VI. REINSTATEMENT, WHEN IT DOES NOT HAPPEN, HAS NO EFFECT ON THE LOAN BECOMING WHOLLY DUE.

The argument is based on the notion that the right to reinstatement and to cure acceleration is indefinite, which is demonstrably false.[58] By the terms of the DOT, and basic logic and common sense, the right to reinstatement does not alter the fact of *prior* acceleration or that *prior* acceleration renders the debt wholly due.[59] This is also why the Bank's citation to the Restatement is inapposite.[60] For one, reinstatement contemplates acceleration having already occurred. Put differently, if the loan can never be made wholly due, then what exactly is a borrower reinstating? Reinstatement refers to placing the loan *back* into an installment contract as opposed to the whole loan being due. But just because the borrower has a limited window to reinstate the loan and avoid the loan remaining wholly due, does not mean acceleration did not take place. One of the DOT's conditions for such payment

[58] DOT, Sections 19 & 22, setting time limits on right to reinstatement and to cure default.
[59] DOT, Sections 18, 19, & 22.
[60] *See* RAB, 24 (citing Restatement (Second) of Contracts § 235 and claiming that it "means that 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.") This provision has nothing to do with the instant case. As the NOD states on its face, the borrower had *already* breached the DOT when the NOD was drafted and recorded. *See* NOD, ("NOTICE IS HEREBY GIVEN THAT … a breach of, and default in, the obligations for which such Deed of Trust is security has occurred ….")

destroys the Bank's argument—*i.e.*, that the borrower "pays Lender all sums which would be due under this Security Instrument and the Note **as if no acceleration had occurred**." Thus, the reinstatement clause confirms that if the right to reinstatement exists, acceleration has already occurred in the first instance.

Additionally, the NOD confirms that ***before*** **the notice of default was prepared and recorded**, the Bank had already given the borrower 30-days' notice of default and right to cure and reinstate, but the borrower failed to cure or exercise the remedy of reinstatement, and the Bank fulfilled the other conditions under the DOT to accelerate the underlying debt in full and did in fact accelerate the debt. This is why the NOD states the beneficiary under the DOT "**has declared** and does hereby declare all sums secured thereby immediately due and payable."—*i.e.*, *already* fully accelerated in compliance with all applicable law and the DOT. To accept the Bank's argument, the Court has to also accept the Bank knowingly made a false statement in a recorded document. Contrary to the Bank's reliance on the implied *falsehood* of this statement in the DOT, this recitation of a **prior fully-consummated** acceleration is conclusively presumed to be true, and is unrebuttable.[61]

Also, the statutory right of reinstatement under NRS 107.080 does not change the fact of acceleration. While NRS 107.080(3) states that a notice of default *may*

[61] *See* NRS 47.240(2) (conclusive presumption of facts recited).

contain a notice of intent to declare the entire unpaid balance due and accelerate, this only applies if the unpaid balance had *not already* been accelerated and the conditions under NRS 107.080 had *not already* been fulfilled *prior* to the filing of notice of default. Here, the NOD states the debt was already accelerated.[62] Again, to refute this, admits fraud on the part of the Bank's predecessors.

Similarly, the Bank's argument that even *after* the notice of default was issued, "the borrower retained the right to bring the loan current by making a partial payment…. In this case, that right has not yet expired," is likewise demonstrably false. As noted above, the NOD states that all the conditions required for acceleration had **already** been fulfilled by the time the NOD was prepared and recorded. The absurdity of the Bank's argument is further highlighted by the language in the NOD that the agent for the beneficiary "has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby." Those "obligations" are the full amount of the "obligations" secured by the DOT mentioned in the same sentence, *i.e.*, the entire amount due under the DOT. Otherwise, again, the Bank is taking the absurd position that it is only foreclosing on missed installments, which the Bank has never asserted, and contradicts the plain language of the NOD itself.

VII. THE RESCISSION WAS A LIMITED RESCISSION; IT DID NOT DECELERATE THE LOAN

[62] *Id.;* NRS 47.250(16) (disputable presumption that law has been obeyed).

The Bank asks this Court to adopt the portion of *Glass* that held rescinding a NOD, "effectively retracted the NOD and "'restored the parties to the prior status they had before' the notice of default had been recorded."[63]While SFR agrees with the *Glass* court's finding that acceleration of the loan makes it "wholly due," the idea that a limited rescission of the NOD that specifically states it is only cancelling the sale while reserving all other rights, "effectively cancelled the acceleration" should not be followed here. The parties in *Glass* did not focus on all of the language in the rescission causing the *Glass* court to stop short in its analysis.

The unpublished *Glass* order states: "SPS's rescission clearly states that it "does hereby rescind, cancel and withdraw the Notice of Default and Election to Sell."[64] The *Glass* court then concluded, "[t]herefore, by explicitly cancelling this Notice of Default, SPS effectively cancelled the acceleration."[65]

The problem is, the *Glass* court did not analyze the full rescission document, or even the full sentence that it quotes. Instead, it puts a period in the middle of the sentence without acknowledging the rest of the sentence or document that goes on to limit what was rescinded, and what was not. Something the parties failed to bring to the Court's attention. Thus, hat fact that the *Glass* court did not analyze all of the words in the sentence led it to the faulty conclusion that the acceleration was

[63] RAB, 12.
[64] *Glass*, 466 P3d at 939.
[65] *Id.*

cancelled when nowhere in the rescission does the Bank rescind or cancel the acceleration of the loan; instead, it only canceled the election to sell. In fact, the rescission goes so far as to explicitly exclude any alteration of the default, which includes acceleration. Specifically, the rescission reads in pertinent part:

> Beneficiary does hereby rescind, cancel and withdraw the Notice of Default and Election to Sell hereinafter described, **provided however**, that **this rescission shall not be construed as waiving, curing, extending to, or affected any default**…**and** it is and **shall be deemed to be, only an election without prejudice not to cause a sale**…[66]

One court has provided a thorough analysis of a nearly identical notice of default and rescission, and concluded the language neither withdrew nor cancelled the acceleration.[67] In that case, the court recognized the notice of default as specifically making two elections: to accelerate and to sell. But, unlike in *Glass*, the court went further and analyzed the full sentence in the rescission, and determined that the bank was specifically limiting the rescission of its right to only the power of sale. The language highlighted above expressly states the rescission is not intended to and shall not be interpreted to mean it is doing anything else. There were also two rescission in that case. The initial one discussed above and similar to the one in this case, and a second in which BANA included clear and specific language cancelling the prior acceleration. Specifically, the subsequent rescission stated, the present

[66] (emphasis added.)
[67] *Bank of Am., N.A. v Madeira Canyon Homeowners Assn.,* 423 F Supp 3d 1029 (D.Nev, 2019).

beneficiary "does hereby rescind, cancel, withdraw and revoke **without prejudice the acceleration of the Note**, or Deed of Trust, or both, as referenced in the Notice of Default and Election to Sell Under Deed of Trust above."[68] The Court consideredthis act an acknowledgement on the part of the bank that the first rescission was insufficient.[69]

In the previously discussed case, *Calico Creek*, BANA initially recorded a rescission that only canceled the election to sell,[70] and then later recorded a second rescission which included specific language decelerating the loan.[71] Specifically, the second rescission stated,

> present beneficiary, does hereby **rescind, cancel, withdraw and revoke without prejudice the acceleration** of the Note, or Deed of Trust, or both as referenced in the Notice of Default and Election to Sell Under Deed of Trust listed above, **as well as any prior or concurrent acceleration** of the Note or Deed of Trust, whether stated by Beneficiary, Trustee, or any prior Beneficiary or Trustee in correspondence or otherwise.[72]

In both the *Calico Creek* and *Madeira* cases, the subsequent rescissions highlight examples of the type of language that decelerates the loan. Unlike the previous rescissions, there is no qualification on the default; instead, the subsequent

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[68] *Id.* (emphasis added.)
[69] *Id.*
[70] ASA_004-005.
[71] ASA_043-050 (Rescission admitted as trial Exhibit 283 in the *Calico Creek* case.)
[72] *Id.*

rescission language directly addresses acceleration and cancels any prior accelerations. The language in the exemplar subsequent rescissions further shows the contrast in language banks use when they are indeed canceling an acceleration of the loan as opposed to just canceling the election to cause sale. This is the type of language that Nevada should require under the *Clayton* standard because it is affirmative, clear, and unequivocal.[73]

Yet another reason this Court should adopt the affirmative, clear and unequivocal standard is it prevents pitfalls of a borrower who changes his position in reliance on the acceleration. As one court explained, "[w]hen the mortgage was accelerated, the borrower's right and obligation to make monthly installments ceased."[74] In light of this, the *Bernal* Court observed

> While the borrower may have defaulted in the first place due to financial inability, it is certainly plausible that the borrower may have, in the interim, acquired the ability to pay arrears and maintain current, though lacking the ability to pay off the entire debt. Since the borrower may have perceived that the lender would not accept month payments, in order to effectively rescind the acceleration, the lender should have notified the borrower that the borrower's right to monthly payment was restored and that the lender would accept such payments.[75]

Allowing anything less than affirmative, clear and unequivocal, allows banks

[73] *See Clayton v. Gardner*, 813 P.2d 997, 998, 107 Nev. 468, 470 (1991).
[74] *Deutsche Bank Nat. Trust Co. Americas v. Bernal*, 56 Misc.3d 915, 923 (N.Y.S. 2017).
[75] *Id.*

to play fast and loose with not only notice to the borrower, but notice to the world. In fact, anything less contributes to violations of the Dodd-Frank Act and NRS Chapter 598. Specifically, Section 1036 of the Dodd-Frank Act prohibits lenders/servicers from "engag[ing] in any unfair, deceptive, or abusive act or practice." Likewise, NRS 598.092(8), prohibits a person from "knowingly misrepresent[ing] the legal rights, obligations or remedies of a party to a transaction."

VIII. EVEN IF EQUITABLE CONSIDERATIONS COULD BE CONSIDERED, THEY WOULD NOT FAVOR THE BANK.

The only type of equitable relief the Bank references is equitable tolling. But equitable tolling only applies to statutes of limitations. NRS 106.240 is not a statute of limitations and, even if it were, the Bank cannot meet the requirements. "The plaintiff must demonstrate that he or she acted diligently in pursuing his or her claim and that extraordinary circumstances beyond his or her control caused his or her claim to be filed outside the limitations period."[76] Here, the Bank has been in control the entire time. It chose to declare the loan underlying the DOT wholly due in 2008. It chose to draft and record a limited rescission that only canceled the sale, not the acceleration. It did not record any document decelerating the loan. It did not foreclose when it had the chance. For whatever reason, it chose not to stop the NRS

[76] *Fausto v. Sanchez-Flores*, 137 Nev Adv Op 11, 482 P3d 677, 682 (2021).

106.240 clock from ticking until it was too late.

The Bank cries foul claiming that SFR prolonged litigation "by continuing to litigate whether the deed of trust survived the HOA's foreclosure sale despite the unequivocal evidence of tender[.]" What the Bank fails to mention is that Miles Bauer's secret dealings were never publicly recorded, zero evidence of any attempt to pay was produced until 2018 a year after discovery first closed, and the "unequivocal evidence" of a delivered and rejected check was not presented until trial almost ten years after Alessi & Koenig did not accept Miles Bauer's conditional partial payment.

It is undisputed that SFR had no knowledge of this attempt to pay when it bid at the sale. Had the Bank not insisted on hiding its secret payment, SFR would never have bid and litigation could have been completely avoided. If the Bank had disclosed evidence of tender in 2014 when the case was first filed instead of four years later, perhaps the litigation could have concluded sooner. In any case, the Bank cannot fault SFR proceeding with litigation to quiet title in a case where the Bank intentionally misled the public by concealing its secret attempts to pay both before the sale and for years after litigation began. And most importantly, neither SFR nor the litigation prevented the Bank from decelerating the loan before ten years passed. Even if equitable considerations could apply—they cannot—the DOT would still be terminated under NRS 106.240.

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 17th day of May, 2021.

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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, contains 10,160 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 17th day of May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 17th day of May, 2021. Electronic service of the foregoing **Appellant's Reply Brief on Appeal and Answering Brief on Cross-Appeal** 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:	May 17th, 2021 at 10:37 p.m.

Electronic notification will be sent to the following:

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Jacqueline Gilbert
Karen Hanks
Melanie Morgan
Douglas Gerrard
Diana Ebron

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