IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant/Cross-Respondent

vs.

US BANK, N.A., A FOREIGN LIMITED LIABILITY COMPANY, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE LXS 2006-4N TRUST FUND, ERRONEOUSLY PLED AS U.S. BANK, N.A., AND NATIONSTAR MORTGAGE, LLC

Respondents/Cross-Appellants

Supreme Court Case No. 81293

APPEAL

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

CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
DONNA M. WITTIG, ESQ.
Nevada Bar No. 11015
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Attorneys for Respondents/Cross-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The court should resolve this appeal under *Glass* in the bank's favor. The bank rescinded the notice of default with the same language this court validated in that case. SFR mischaracterizes the statute and ignores its plain language. NRS 106.240 is simply intended to clear title by presumptively extinguishing mortgage liens that have otherwise been satisfied or discharged. SFR's attempt to expand and weaponize NRS 106.240 to extinguish valid liens based unrecorded documents must fail. Whether a loan is "wholly due" under NRS 106.240 is not to be ascertained by litigation and discovery invading the lender-borrower relationship, that would turn the statute—meant to minimize and simplify title litigation—on its head.

SFR's attempt to circumvent *Glass* does not stop at its unreasonable reading of the statute. It expands its claims to include issues it did not raise below—arguing the bank "judicially admitted" acceleration as the relevant trigger to NRS 106.240 and the bank "appears" to have violated federal consumer law. SFR waived these vague claims when it failed to raise them below. And they fail because judicial admissions applies to *facts* not legal theories, and the federal law SFR purports the bank "appears" to have violated does not provide for a private right of action.

Alternatively, this court should affirm because the district court correctly applied equitable tolling. Because NRS 106.240 is not a statute of repose, tolling applies. SFR prolonged the timeline by pursuing litigation to challenge the deed of

trust despite the bank's tender. SFR now wants to be rewarded for its delay-causing litigiousness. The district court was correct to toll under these circumstances. Equity demands affirmance.

ARGUMENT

I. *Glass* Correctly Held a Rescinded NOD Also Rescinds Any Acceleration

SFR accuses the court of indolence in deciding *Glass* by "fail[ing] to actually analyze the entire contents of the rescission, including the entirety of the sentence on which it relied." SFR Reply Br. (**RB**) at 1; *see also* RB at 35. But SFR's charge ignores the on-point precedent *Glass* relied upon to support its holding. *Glass*'s holding that a rescission "renders moot" a previously recorded NOD, including any acceleration, broke no new ground and comports with Nevada statute.

A. *Glass* Correctly Applied Precedent to Reach Its Holding

SFR argues the court wrongly decided *Glass* because it did not analyze the rescission's substance to determine whether the rescission also decelerated any prior loan acceleration. Contrary to SFR's assertion, *Glass* did consider the rescission's substance. SFR reads *Glass* too narrowly, ignoring the broader—and more relevant—issue, namely NRS 107.080's impact on deceleration. SFR ignores *Holt.*

Glass relies on 2011 precedent, *Holt v. Regional Trustee Servs. Corp.*, 127 Nev. 886, 266 P.3d 602, for the proposition "a rescission of a Notice of Default render[s] challenges to the Notice of Default moot." *Glass*, 466 P.3d 939, 2020 WL 3604042 at *1 (citing *Holt*). *Glass*, relying on *Holt*, correctly focuses on the act of

rescinding an NOD as the meaningful action rather than parsing the language of the rescission to reach its conclusion, with good reason. As *Holt* explains, "[r]escission and renotice are not . . . without lender consequence." 127 Nev. at 892, 266 P.2d at 606 (citing NRS 107.080). Rescinding the NOD—alone—renders moot the dispute underlying its recording, which in turn necessarily rescinds any prior acceleration.

Ignoring *Holt*, SFR argues the bank limited its rescission to its election to sell, not any prior acceleration. But the NOD, by statute, incorporates a lender's election to sell, and a rescission of the NOD concurrently rescinds the lender's selection to sell. Even if a lender's election to sell could be separated from default language, SFR misconstrues the rescission's non-waiver language. Not waiving the borrower's default does not mean the loan remained accelerated, even assuming the NOD accelerated the loan in the first instance. *But see* discussion *infra* § II.D.

1. The Rescission's Non-Waiver Language Does Not Mean the Loan was Not Decelerated

NRS 107.095(3)(b) allows a lender to rescind an NOD before a sale. Despite this statutory permission, SFR argues the rescission's non-waiver language—"shall not be construed as waiving, curing, extending to, or affecting any default . . . and it is and shall deemed to be, only an election without prejudice not to cause a sale . . ."—means the bank preserved the loan acceleration. RB at 35-36 (quoting the rescission, 9JA_2104). SFR misinterprets the scope and purpose of this language.

A borrower's ongoing default and a lender's recording of an NOD or rescission are mutually exclusive actions. The borrower's default occurs regardless of and separate from the lender's recording actions. Certainly, lenders rescind NODs where the borrower cures the default, but also when the borrower does not. For example, a lender can agree to rescind an NOD upon the borrower starting a repayment plan. If that borrower breaches his plan, the lender should not bear the far-reaching consequence of having excused borrower's prior non-payment simply by rescinding the NOD. The rescission's non-waiver language bears no relation to acceleration.

2. NRS 107.080 Requires a Deceleration Finding

NRS 107.080 deserves due consideration in the deceleration discussion, which SFR ignores. SFR contends "NRS 107.080 does not change the fact of acceleration" because it merely provides a "[NOD] *may* contain a notice of intent to declare the entire balance due and accelerate." RB at 33 (emphasis in original). SFR elaborates, arguing NRS 107.080 applies only "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 the [NOD]." RB at 33 (emphasis in original). SFR maintains the bank accelerated the loan before recording the NOD, such that the NOD merely confirms its acceleration. SFR ignores the relevant portion of NRS 107.080. A broader read of NRS 107.080 confirms a rescinded NOD decelerates the loan (assuming it was accelerated).

NRS 107.080 requires recording of an NOD as a precondition to acceleration. Acceleration cannot occur until 35 days after the lender mails the NOD to the borrower. NRS 107.080(3). The 35-day post-recording period prevents acceleration when the bank recorded the NOD. Relatedly, NRS 107.080(2)(b) requires a lender to include, in the NOD, its election to sell. A rescission of the NOD therefore necessarily includes a rescission of both the default and the lender's election to sale. NRS 107.080(2)(b). Here, the NOD specifies the bank "does hereby rescind, cancel and withdraw the Notice of Default *and Election to Sell*." (9JA_2104) (emphasis added.) By rescinding the NOD, the bank not only cancels the sale but also the *dispute* (not the borrower's breach, as discussed above) over the default the NOD identifies. *Glass*, 2020 WL 3604042 at *1.[1]

Rescinding an NOD requires the lender to take the further action of re-recording it to "reset the right-to-cure and other time periods provided for by law for the debtor's protection . . . at the lender's expense." *Holt*, 266 P.3d at 606, 127 Nev.

[1]Nevada statute does not allow a lender to elect to withdraw its election to sell independent of its rescission of the NOD. Had the bank merely withdrawn its option to conduct a sale, as SFR contends, it necessarily follows it could merely notice the sale. SFR identifies no allowable procedure under NRS chapter 107 allowing a lender to proceed to sale after rescinding its NOD. The NOD contains the bank's election to sell. *See* NRS 107.080(2)(b) ("The power of sale must not be exercised, however, until . . . [t]he beneficiary . . . first executes and causes to be recorded . . . a notice of the breach and of the election to sell or cause to be sold the property to satisfy the obligation."); *see also* NRS 107.0805(1) (setting forth the requirements for a power of sale "[i]n addition to the requirements set forth in NRS 107.080") and NRS 107.0805(3) (also requiring compliance with NRS 107.080).

at 892 (citing NRS 107.080(2)(b), (3)). With the right-to-cure reinstated, the lender's ability to accelerate 35 days after it records and mails the NOD must restart. *See* NRS 107.080; *Holt*, 266 P.3d at 606, 127 Nev. at 892.

Glass and *Holt* correctly interpret NRS 107.080 to hold a rescission of an NOD necessarily rescinds any prior acceleration. *Glass* fully resolves this appeal.

3. Deceleration Reaches Any Prior Acceleration

In another attempt to avoid *Glass*'s application, SFR surmises that if the rescission decelerates the loan for nonjudicial foreclosure purposes, the loan remains accelerated for all other defaults for which the bank exercised its right to accelerate. RB at 23-24, and n.41. SFR's argument is a red herring, still ignoring NRS 107.080's application. And it simply makes no sense. [2]

First, SFR submits no evidence acceleration outside the nonjudicial foreclosure context occurred.[3] Second, even if it did, NRS 107.080 still applies.

---

[2]SFR confusingly argues the NOD did not accelerate the loan—but rather it must have been accelerated *earlier* by letter, and that the NOD only provides notice of that acceleration to the "world." RB at 28-31; *see also* RB at 24. SFR relies on the language in the deed of trust stating the "Lender shall give notice to the Borrower prior to acceleration." The NOD *is* such notice, and statutorily, acceleration cannot occur until after it is mailed. That the NOD states it "has declared and does hereby declare" all sums are due does not mean the loan had already been accelerated—it means the prerequisite notice of acceleration has, at the very least, been provided. The 35-day statutory right-to-cure period prior to acceleration still applies.

[3]SFR's argument the loan was accelerated prior to the NOD also improperly relies on letters from an entirely different case—*Calico Creek*. RB at 28-31; *see* Appellant's Supp. App'x (**ASA**). SFR cannot rely on documents from another case to determine whether the loan here was accelerated or decelerated. The Court should

SFR ignores Nevada's one action rule requiring the bank to recover on the collateral before other remedies. *See* NRS 40.455(3). NRS 107.080 thus applies to any breach for which the lender exercises its acceleration power. Third, just as SFR cannot parse the bank's election to sell from the NOD, it cannot parse decelerations based on the alleged type of acceleration. An acceleration is an acceleration. A deceleration is a deceleration. SFR cites no authority a loan may be accelerated for one purpose but not another or decelerated for one purpose and not another. Nor does the DOT allow for such distinction. *See* RB at 23 n.41.

4. The Ninth Circuit Overruled *Madeira Canyon*

SFR further relies on *Madeira Canyon* to support its interpretation of the rescission language and NRS 106.240. SFR RB at 36 n. 67 (citing *Bank of Am., N.A. v. Madeira Canyon Homeowners' Assn.*, 423 F. Supp. 3d 1029 (D. Nev. 2019).) *Madeira Canyon* found the rescission there to constitute only a rescission of the sale, not any acceleration. The Ninth Circuit reversed. *Bank of Am., N.A. v. Madeira Canyon Homeowners' Assn.*, No. 19-17445, 2021 WL 2206540 (9th Cir. Jun. 1, 2021). It held the "rescission notice decelerated the demand for full payment [and]

---

not consider the pre-NOD and post-rescission letters from *Calico Creek* which have no bearing on the loan's acceleration in this case.

the notice rendered NRS 106.240 inapplicable." *Id.* at *2 (following *Glass* as persuasive authority).[4]

Even without the Ninth Circuit's overruling, *Madeira Canyon*'s reasoning does not survive scrutiny. First, the ruling issued before *Glass*. Second, it contains no analysis—or mention—of *Holt* or NRS 107.080. Finally, it fails to analyze NRS 106.240's unambiguous language in any detail.

II. NRS 106.240's Plain Language Confirms Its Scope and Purpose to Clear Old Liens

Alternatively, a straightforward interpretation of NRS 106.240 resolves this appeal. Though SFR claims NRS 106.240 is unambiguous, it does not conduct even a cursory review of the statute's text or give meaning to all its words. SFR focuses only on "wholly due," leading it to wrongly conclude the phrase means "acceleration" and a review of unrecorded documents—not the two recorded documents the statute identifies—determines NRS 106.240's application.

NRS 106.240's plain text shows otherwise. Examination of the statute's full text reveals: (1) only two documents—the deed of trust or a recorded written extension—are relevant to NRS 106.240's analysis, and (2) "wholly due" means maturity date.

[4]The judge who decided *Madeira Canyon* now follows *Glass*. *See 121 Sourcing & Supply LLC v. Bank of New York Mellon*, No. 2:19-cv-01466-RFB, 2021 WL 2383221 (D. Nev. June 9, 2021).

"When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Coast Hotels and Casinos, Inc .v. Nevada Labor Com'n*, 117 Nev. 835, 840, 34 P.3d 546, 551 (2001) (citation omitted). "Under established principles of statutory construction, when a statute is susceptible to but one natural or honest construction, that alone is the construction that can be given." *Id.* at 117 Nev. at 841, 34 P.3d at 551 (citation omitted). Further, "courts must construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." *Id.* (citation omitted).

A. NRS 106.240 Requires Satisfaction and Discharge of The Debt

NRS 106.240's introductory language outlines its limiting scope. It starts: "The lien heretofore or hereafter created of any mortgage or deed of trust upon any real property, appearing of record, ***and not otherwise satisfied and discharged of record*** . . . ." NRS 106.240 (emphasis added). The phrase "otherwise satisfied and discharged" refers back to the term "lien," which lien was "created of" either a mortgage or deed of trust. An "otherwise satisfied and discharged" lien occurs when a loan is paid in full, like when the borrower repays the loan in full or after a refinance when the new loan pays off the original loan. "Of record" simply means recorded, which is typically a recorded reconveyance to signal the borrower's obligations owed to the lender are satisfied in full and his obligations discharged.

The statute applies where there appears no recorded reconveyance.

B. NRS 106.240 Defines "Wholly Due" as "Terminate"

The statute's next section reveals the consequence of failing to record a reconveyance, the type of documents to which NRS 106.240 refers and the statute's applicable time period, stating: "shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due, terminate." NRS 106.240. First, the phrase "shall at the expiration of 10 years" simply supplies the statute's applicable time period. Second, the phrase "debt secured by the mortgage or deed of trust" means the borrower's underlying loan obligation. Third, the "according to the terms thereof" refers to the deed of trust's terms, and "or any recorded written extension thereof" refers to the terms of any recorded extension of the deed of trust's terms. Fourth, the statute next uses the phrase "become wholly due, terminate." The statute's selective placement of "terminate"—immediately after "wholly due" but before the statute continues in substance—reveals its purpose to define "wholly due." "Wholly due" means "terminate." That "terminate" defines "wholly due" harmonizes with the statute's introductory phrase discussing "otherwise satisfied and discharged." All mean the loan's end date.

Examining NRS 106.240's language thus far, the statute forecasts what occurs "10 years" after "expiration of" the "deed of trust or recorded written extension['s],"

"terms" relating to the "wholly due, [or] terminat[ion]" date on which the "lien" would be "otherwise satisfied and discharged of record." The statutory presumption applies 10 years after the maturity date stated in either the deed of trust or recorded extension—and not before that.[5]

C. NRS 106.240 Serves to Extinguish Loans "Regularly" Satisfied

NRS 106.240's closing language further confirms the statute's purpose to extinguish unreleased and otherwise satisfied deeds of trust from the recorder's roll, concluding: "and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged." This portion of the statute conveys two purposes. First, "it shall be conclusively presumed" means the law is simply assuming an act occurred. Second, the presumed act is "that the debt has been regularly satisfied and the lien discharged." "Regularly satisfied" refers to the in the normal course in which a borrower satisfies his loan obligations, generally payment in full or refinance. "And the lien discharged" refers to the reconveyance, which normally occurs after the "debt secured by the mortgage or deed of trust according to the terms thereof" is "regularly satisfied."

[5]SFR argues NRS 106.240's use of the phrase "terms thereof" expands beyond only the DOT's maturity date. RB at 22. But, SFR fails to explain how any other DOT term is consistent with NRS 106.240's plain language. SFR gives no meaning to the statute's use of the phrase "*otherwise satisfied* and discharged." (emphasis added).

Reading the statute in its entirety and giving meaning to all its words and context, the only reasonable interpretation of NRS 106.240's purpose is to deem extinguished as a matter of law, after 10 years, those mortgage liens or deeds of trust not otherwise discharged following a borrower's regular satisfaction of his loan.

D. Absurdity Would Result if NRS 106.240 is Expanded Beyond its Plain Text

When giving all the statute's words meaning, it becomes abundantly clear NRS 106.240's purpose is simply to ensure forgotten mortgage liens do not remain recorded against a borrower's property in perpetuity. The only relevant documents are the deed of trust and any recorded written extension of the maturity date, not an unrecorded letter. The parties in *Glass* "did not dispute the [NOD] accelerated the loan." *Glass*, 466 P.3d 939, 2020 WL 3604042 at *1. Nor did they need to dispute it, as the rescission decelerated it. The issue was moot.

But, had *Glass* specifically analyzed whether an NOD triggers NRS 106.240's 10-year time period via acceleration, it should have found it does not. Finding an NOD accelerates a loan (ignoring the NRS 107.080 implications discussed above, *supra*, §I.A.2) does not fulfill NRS 106.240's function, scope and purpose outlined in its unambiguous text. *See Pro-Max Corp. v. Feenstra*, 16 P.3d 1074, 1076, 1079 (Nev. 2001) (finding NRS 106.240 "clear and unambiguous" and "no further interpretation is required or permissible"). For a loan to be "regularly" "satisfied and discharged" after the lender records an NOD in pursuit of nonjudicial foreclosure

requires the lender be able to foreclose. Cutting off a lender's foreclosure rights ten years after an acceleration not only contradicts NRS 106.240's plain meaning but rewards the borrower—and incidentally, a stranger to the loan, like SFR—by extinguishing a loan without repayment and without allowing the lender a means to recover from the collateral. This result is absurd. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *Hunt v. Warden*, 903 P.2d 826, 827 (Nev. 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."). No credible argument can be made NRS 106.240 exists to weaponize a lender's collection efforts against it.

A more absurd outcome results if an unrecorded letter can serve as NRS 106.240's trigger. Not only does such an interpretation of NRS 106.240 again conflict with the statute's text, it leads to at least two additional unintended consequences. First, it deprives a stranger to the mortgage loan, like SFR, the simplicity of determining from the recorded documents, alone, whether a deed of trust remains a lien. Second, it invites a stranger to the mortgage loan, again like SFR, to invade the lender-borrower relationship to fish for whether a loan was

accelerated, requiring litigation. It is inconceivable the Nevada legislature intended either result, including *encouraging* litigation when NRS 106.240 creates a presumption for the specific purpose of *avoiding* litigation by extinguishing liens as a matter of law after a set date. *See Griffin*, 458 U.S. at 575; *Hunt*, 903 P.2d at 827.

"Wholly due" does not mean acceleration. Nor can either an NOD or unrecorded letter trigger NRS 106.240's time period. NRS 106.240's purpose—as derived from its unambiguous text—is clearing forgotten mortgage liens.

E. NRS 106.240's Ten-Year Time Period Does Not Transform It into a Statute of Repose

While SFR disputes NRS 106.240 is an ancient mortgage statute, instead labelling it statute of repose, it nonetheless argues ancient mortgage statutes are statutes of repose. RB at 12-15. This court has never described NRS 106.240 a statute of repose. This court declined to interpret it as such despite one HOA purchaser's request for the same. *See Glass*, No. 78325, Br. of Amicus Curiae TRP Fund VIII, LLC, 2020 WL 5548894, at *2 (filed Aug. 13, 2020).

SFR ignores NRS 106.240's substance and purpose in labeling it a statute of repose. NRS 106.240 is a means of clearing abandoned mortgage liens. It ensures an already "satisfied and discharged" mortgage lien is rightfully extinguished if the lender neglects to release it. With a mortgage loan "satisfied and discharged" through payment, the statute's need makes sense, as the lender-borrower relationship ends upon full satisfaction of the loan. It avoids the borrower having to find his

lender or having to file suit to clear title if the lender had since ceased business. The statute further benefits a party like SFR by allowing it to look at one specific piece of information in the recorded documents—the loan's maturity date—to determine whether a deed of trust remains enforceable without having to file a lawsuit and then intrude into the lender-borrower relationship.

Undeterred, SFR argues "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." RB at 13. Just because NRS 106.240 contains a time period does not transform it into a statute of repose. SFR errs in describing NRS 106.240 as extinguishing an "underlying right." An "underlying right" in the statute of repose context flows from a plaintiff's rights "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); *see also Davenport v. Comstock Hills-Reno*, 118 Nev. 389, 391-92, 46 P.3d 62, 64 (2002). Following the occurrence or discovery of an injury, statutes of repose serve to "put[] an outer limit on the right to bring a civil action." *CTS Corp v. Waldburger*, 573 U.S. 1, 8 (2014). For example, a statute of repose may cut off a construction defect claim at some point after completion of construction even if the defect is not discovered until after the repose period—in that scenario, the claim would be in repose even before it arises for purposes of the statute

of limitations. The statute of repose terminates the right to sue even if the claim remains timely under a limitations statute. NRS 106.240 does not work like this.

No occurrence or discovery of an injury underlies NRS 106.240. Nor does it affect any "underlying right." RB at 12-13. Again, NRS 106.240's purpose clearing otherwise "satisfied and discharged" liens. It does not affect any "underlying right" of the bank to nonjudicially foreclose. In fact, because the bank has the right to foreclose nonjudicially, no statute of repose—whether NRS 106.240 under SFR's incorrect analysis, or some other provision—can apply because statutes of repose only affect the right to bring a civil action. Also, if NRS 106.240 operates as a statute of repose, and assuming the 10-year time period has expired as SFR asserts, then NRS 106.240 would necessarily bar SFR from asking this court to determine whether the deed of trust is, indeed, extinguished. A statute of repose bars everyone's right to sue. If SFR is allowed to obtain a legal determination after it claims a statute of repose applies, then the court would eradicate the entire purpose of a statute of repose to bar lawsuits.

Nor does the *Matos* case on which SFR relies in support of its statute of repose argument help its point. In *Matos*, an unpublished Florida case, the court explained its state's mortgage lien statute "establishes an ultimate date when the lien of the mortgage terminates and is no longer enforceable." RB at 14 (citing *Matos v. Bank of New York*, 2014 WL 3734578 (S.D. Fla. Mar. 31, 2015) (unpublished)). A closer

reading of *Matos* supports the bank's argument that NRS 106.240 is not a statute of repose. First, nowhere does *Matos* label its statute an ancient mortgage statute or conduct any analysis of whether it qualifies in substance as a statute of repose. It merely labels it as one, without explanation. Second, and significantly, the context of *Matos* was a ***judicial*** foreclosure, not a nonjudicial foreclosure. Judicial actions have limitations and, occasionally, repose periods. *Matos* does not discuss the statute's application to a nonjudicial foreclosure sale.

Facklam v. HSBC Bank USA, 133 Nev. 497, 499, 401 P.3d 1068, 1070 (2017) (en banc) (rehearing denied) confirms a Nevada nonjudicial foreclosure is not an action to which a statute of limitation applies. The same analysis compels the conclusion that a statute or repose does not apply to nonjudicial foreclosures. SFR essentially argues NRS 106.240 cuts foreclosure rights off after 10 years following an NOD. *See* RB at 24-25. Even to the extent NRS 106.240 does serve in some manner to cut off a lender's foreclosure rights at some future point in time (*i.e.*, 10 years after the loan's maturity date), it still does not qualify as a statute of repose because it does not bar a judicial action. Also, NRS 106.240's conclusive presumption is the underlying mortgage "debt has been regularly satisfied and the lien discharged." Under the statutory presumption, a lender loses nothing, its lien already satisfied. There would be no reason to foreclose so it makes sense the statute does not say a lender cannot foreclose judicially.

SFR also complains its "liability" derives from its property being subject to the deed of trust, going so far to say it has "a substantive right to be free of liability under the deed of trust." RB at 15-16. That is no "liability" at all. The district court found SFR purchased the property subject to the deed of trust following superpriority tender. SFR does not challenge that finding in this appeal. It is difficult to see how SFR is a victim here. SFR is getting exactly what it purchased—a property subject to an existing deed of trust. "Liability" does not derive from the bank enforcing its deed of trust—SFR bought the property subject to the deed of trust. SFR "loses" nothing when the bank forecloses, it simply gets what it bought.[6]

F. NRS 106.240's Legislative History Confirms Its "Basis for Clearing Title"

SFR disputes NRS 106.240's legislative history supports the statute's purpose as a means of clearing title, yet committee member Mr. Hale specifically commented "this [statute] says ten year ***and is a basis for clearing title***." NRS 106.240 Legis. History, A.B. 426, Minutes of Meeting, Committee on Judiciary, 53rd Legislature, March 13, 1965, compiled and available at https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1965/AB426,1965.pdf (last visited Jun. 10, 2021).

[6]Not only does SFR not lose anything, SFR is the only side of this lawsuit advantaged. While the bank has spent years litigating over the enforceability of its deed of trust, SFR has most likely been collecting rents—mortgage free—since the HOA sale in January 2014.

Rather than deferring to the legislator's comment on the purpose of NRS 106.240 spelled directly out in its history, SFR instead speculates the Nevada legislature "was surely aware of [acceleration clauses] in 1917 when NRS 106.240 was first drafted and in 1965 when it was amended." RB at 18. SFR then deduces because Nevada courts were "aware" of acceleration clauses since at least 1916, somehow the legislature "clearly" intended "wholly due" means acceleration. SFR does not cite a single case defining "wholly due" as acceleration. The cases to which SFR cites merely discuss calling a loan due. None even use the terms "wholly due" or "acceleration." *See* RB at 19 n. 33, 34 (and cases cited therein). Nor does SFR point to any particular part of the legislative history for its sweeping and unsupported conclusion Nevada's legislative history confirms "wholly due" means "acceleration" in the context of NRS 106.240. SFR's entire argument lacks the most basic foundation—it is nothing more than fanciful speculation.

Nor does SFR point to any other jurisdiction in this country whose ancient mortgage statute includes the term "wholly due." NRS 106.240's legislative history does not answer why the legislature chose that phrase. As the only jurisdiction in this country to use the term "wholly due," and with the very limited legislative history, the court should defer to the limited history supporting NRS 106.240's purpose as a "basis for clearing title." Clearing title is another way of saying clearing "otherwise satisfied and discharged" liens. Such interpretation also aligns with the

purpose of ancient mortgage statute, generally. *See Junior v. Wells Fargo Bank, N.A.*, 2017 WL 1199768, at *1 (D. Mass. Mar. 30, 2017) (explaining ancient mortgage statutes serve to "streamline conveyancing and provide remedies to clear title blemished by mortgages").

In an attempt to avoid the court finding NRS 106.240 an ancient mortgage statute, SFR cites a U.S. district court case that concludes the "heading of the original 1917 [NRS 106.240] bill makes clear that it provides a means to 'quiet title.'" *Bergenfield v. U.S. Bank, N.A.*, No. 2:16-cv-01691-RFB-PAL, 2017 WL 4544422, at *4 (D. Nev. Oct. 10, 2017). Without explanation or specific reference to any particular portion of NRS 106.240's history, the *Bergenfield* court concludes "the bill provides for quieting title as to both mortgages and deeds of trust." *Id.* Nowhere in NRS 106.240's text or legislative history is "quiet title" mentioned.

Though NRS 106.240 is titled "Extinguishment of lien created by mortgage or deed of trust upon real property," "extinguishment" does not mean "quiet title" in its colloquial sense. Typically, quiet title refers to a court's resolution of a dispute over property. *See McKnight Family, L.L.P. v. Adept Mgmt.*, 129 Nev. 610, 616, 310 P.3d 555, 559 (2013). But NRS 106.240 does not outline a cause of action. It simply creates a "presumption" a deed of trust is extinguished by operation of law 10 years after its "wholly due" or "terminat[ion]" date. It presumes the loan was "otherwise satisfied and discharged."

NRS 106.240's sparse legislative history comports with the bank's interpretation of the statute "as a basis for clearing" abandoned mortgages.

III. The Bank Made No Judicial Admissions Regarding "Wholly Due"

A. Judicial Admissions Apply Only to Facts

SFR argues the bank judicially admitted "wholly due" in NRS 106.240 means acceleration. Judicial admissions are limited to facts, not law. *See Paradise Harbor Place Tr. v. U.S. Bank Nat'l Ass'n*, No. 75256-COA, 2019 WL 4317022, at *2 (Nev. App. Sept. 11, 2019) ("A judicial admission is a 'deliberate, clear, unequivocal statement[ ] by a party about a ***concrete fact*** within that party's knowledge.'" (quoting *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011)) (emphasis added).) SFR cites no authority for expanding judicial admissions to legal arguments made in a prior case.

B. SFR Waived Its Judicial Admission Argument by Not Raising It

Never before this appeal did SFR raise its judicial admission argument. SFR waived this argument. "A point not urged in the trial court, unless it goes to the jurisdiction of the court, is deemed to have been waived and will not be considered on appeal." *Gholson v. State*, No. 76926-COA, 2019 WL 2714779, at *3 (Nev. App. June 20, 2019) (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). *See also Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (parties may not raise new theories on appeal different from those raised below).

C. The Bank Did Not Judicially Admit Anything

SFR's accusations the bank previously "admitted" wholly due means acceleration is overstated. For example, in the trial statement SFR cites, counsel stated, "[i]f you reach maturity or ***perhaps*** acceleration and the loan is wholly due—the deed of trust remains valid and, therefore, can be foreclosed for ten years after that." RB 11. Legal argument not only is categorically excluded from being a "judicial admission" the quoted statement further fails to affirmatively state the acceleration date triggers NRS 106.240. If anything, the bank has only taken that position in the alternative—as any party to litigation is entitled to do—to its position "wholly due" means the loan's maturity date.

IV. Equitable Tolling Alternatively Applies

If the court does not resolve this appeal under *Glass* or the statute's plain text, it may alternatively affirm because the district court correctly found the bank's August 2015 quiet title action tolled NRS 106.240's ten-year timeframe. SFR argues tolling does not apply because NRS 106.240 is a statute of repose, but even if it could apply, the bank has not met the requirements to show entitlement. RB 39-40.

Pro-Max is instructive. 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 (Nev. 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.* 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, where failing to toll the statute would reward SFR for prolonging litigation over the validity of the deed of trust until the eve of the 10-year period's expiration. SFR has done so in this case despite unequivocal evidence of tender.

SFR asserts it did not "prolong" litigation because tender was made in "secret" and never publicly recorded, and it did not learn of tender until later in the litigation. RB 39-40. SFR then shockingly asserts perhaps if the bank had produced tender evidence sooner the litigation could have concluded sooner—although SFR notably refers to the payment as a "conditional partial payment" and no doubt would have (and continues to) litigated the deed of trust's validity regardless of any tender evidence the bank produced.[7] SFR ignores the fact the bank had no legal obligation to record its tender—and that this court has found any "conditions" attaching to the payment were conditions upon which the bank had a right to insist. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 609, 427 P.3d 113, 118-19 (2018), *as amended on denial of reh'g* (Nov. 13, 2018). SFR's continued insistence on labelling the tender a "conditional partial payment" signals it would have made no concessions had it known of the tender earlier.

Tolling the statute here also is more broadly equitable in advancing the public interest in clear and reliable land records. Assignments of the deed of trust were

[7]SFR disingenuously ignores the fact it forced the case to trial despite tender evidence being produced in discovery.

recorded in 2011 and in 2013, indicating the bank still intended to protect and pursue its lien even after rescinding the notice of default. (2JA_430-31, 440.) 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. Failing to toll the statute would result in an absurdly inequitable result—allowing SFR—on notice of these recorded documents—to gain more through protracted litigation than it acquired at the sale. The court should alternatively find NRS 106.240 equitably tolled during the litigation's pendency.

V. SFR's Unfair Trade Practices Claims Must Fail

Apparently in an attempt to throw it all at the wall and see what sticks, SFR asserts the bank "appears to violate federal law under the Dodd-Frank Wall Street Reform and Consumer Protection Act." RB 26; *see also* RB 2, 38. It also passively asserts the Nevada Deceptive Trade Practices Act might be implicated. RB 37-38 (citing NRS 598.092). These unfair trade practices claims must fail.

The bank's alleged violation of federal law is apparently based on a section of the Dodd-Frank Act prohibiting unfair trade practices. *See* RB 26, n.47. SFR also cites, in passing, to a Nevada statute, NRS 598.092(8), which prohibits a person from "[k]nowingly misrepresent[ing] the legal rights, obligations or remedies of a party

to a transaction." RB 37-38. SFR waived these claims, like its judicial admissions theory, by failing to raise them below. *See Gholson*, 2019 WL 2714779, at *3; *Old Aztec Mine, Inc.*, 97 Nev. at 52; *Schuck*, 126 Nev. at 437.

SFR lacks standing to assert the federal unfair trade practices violation it very vaguely states. RB 26, n. 47. SFR cites 12 U.S.C. § 5536(a)(1)(B)[8], a provision of the Dodd-Frank Act, which states it "shall be unlawful . . . to engage in any unfair, deceptive, or abusive act or practice[.]" But the same statute empowers the Consumer Financial Protection Bureau to enforce it—not individuals, and certainly not third-parties, like SFR, who bear no nexus to the alleged wrong. *See, e.g.*, *Regnante v. Sec. Exchange Officials*, 2015 WL 5692174, at *7 (S.D.N.Y. Sept. 28, 2015) ("The Court is not aware of any language of Dodd–Frank explicitly providing for a private cause of action for unfair, deceptive, or abusive acts or practices. *See* 12 U.S.C. § 5531. Moreover, courts have commonly declined to read private causes of action into provisions of Dodd–Frank that do not explicitly provide for them."); *Leato v. W. Union Holdings, Inc.*, No. 5:19-CV-05020, 2019 WL 1051190, at *4 (W.D. Ark. Mar. 5, 2019) ("Authority to litigate violations of the consumer protection provisions is left to the CFPB." (citing 12 U.S.C § 5564(a)).[9]

[8]SFR actually cites to 12 U.S.C. § 5**3**36(a)(1)(B), but this appears to be a typographical error.

[9]Any action under Dodd-Frank's Consumer Protection Act would also be time-barred. *See Schneider v. Credit Hum. Fed. Credit Union*, No. 4:20-CV-1747, 2021 WL 147050, at *3 (N.D. Ohio Jan. 15, 2021) ("Even assuming Plaintiffs could bring

To the extent SFR raises a state law claim under the Nevada Deceptive Trade Practices Act (NRS 598.092(8)), it also lacks standing to do so. RB 37-38. The NDTPA is enforceable by victims of consumer fraud. NRS 41.600(1); *Bertsch v. Discover Fin. Servs.*, No. 2:18-CV-00290-GMN-EJY, 2020 WL 1170212, at *5 (D. Nev. Mar. 11, 2020), *reconsideration denied*, No. 2:18-CV-00290-GMN-EJY, 2021 WL 325708 (D. Nev. Feb. 1, 2021). SFR is not a consumer—and it cannot be a "victim" of an alleged misrepresentation by the bank to its borrower.

Setting aside standing, SFR's allegations fail to state a comprehensible claim under state or federal law because SFR has not stated a misrepresentation. SFR takes its own incorrect legal conclusion—the rescission "merely canceled the sale"—and applies it to argue the bank "either lied to the borrower or lied to SFR, or both"—because the bank claims the rescission decelerated the loan. RB 3. SFR does not get to unilaterally decide the rescission notice's effect—and then use that determination to claim the bank "lied" and violated unfair trade practices law, particularly where SFR's interpretation of the rescission notice's effect is contrary to this court's precedent. *See Glass*, 466 P.3d at 939 ("However, when [lender] later recorded the rescission, this effectively retracted the Notice of Default and restored

---

a private claim, the only statute of limitations listed in the CFPA is three years[.]" (citing 12 U.S.C. § 5564(g)(1)). The NOD and the rescission notice were both recorded in 2008, over 13 years ago.

the parties to the prior status they held before the Notice of Default was filed.") These claims must fail, even if the court could consider them on the merits.

CONCLUSION

Having lost out under Chapter 116 due to the bank's tender, SFR tries to get the same result from NRS 106.240. This ancient mortgage statute does not apply, is not a statute of repose and was appropriately tolled. The district court's judgment should be affirmed.

DATED June 15th, 2021.

AKERMAN LLP

/s/ Donna M. Wittig
ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
DONNA M. WITTIG, ESQ.
Nevada Bar No. 11015
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Attorneys for Respondents/Cross-Appellants

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 reply 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 **6,995** words.

FINALLY, I CERTIFY that I have read this **Cross-Appellant's Reply 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 June 15th, 2021.

AKERMAN LLP

/s/ Donna M. Wittig
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
DONNA M. WITTIG, ESQ.
Nevada Bar No. 11015
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

I certify that I electronically filed on June 15, 2021, the foregoing **CROSS-APPELLANT'S REPLY 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