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 / CROSS-RESPONDENT SFR INVESTMENTS POOL 1, LLC'S RESPONSE TO BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY

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INTRODUCTION

Amicus curiae the Federal Housing Finance Agency ("FHFA") adds nothing of merit to the issues before the Court. Apart from needless repetition of issues already addressed by parties, the FHFA's remaining arguments are meritless. The 10-year clock impose by NRS 106.240 is unequivocal. Any person looking at the public record will know that ten years after the underlying debt became wholly due, any remaining lien of record that has not been extended or reconveyed on the record, no longer exists. The statute has no exceptions: no exception exists for pending litigation. The FHFA's strained attempts to manufacture one in the form of completely unrelated statute found at NRS 108.260, and its other desperate attempts to rewrite the statute, are risible. NRS 106.240's language is plain, clear, and unambiguous. The FHFA's arguments boil down to one thing, its dissatisfaction with the effect of the statute's simple and clear operation.

Similarly, the FHFA's arguments that the subject loan can only be made "wholly due" by maturity, its rejection of the idea that a debt can be made "wholly due" by acceleration, its argument that "wholly due" is substantively different from "due in full," and its other arguments seeking to avoid the fact that the notice of default in this case sufficiently memorialized an acceleration that triggered NRS 106.240, are all likewise meritless.

The FHFA's invocation of *Glass*,[1] *Pro-Max*,[2] *CPERS*,[3] and NRS 107.080 to undermine the operation of NRS 106.240 and to improperly introduce equitable exceptions to the statute of repose that is NRS 106.240 also fail; instead they support reversal in this case. And even if this Court were to improvidently apply equity to the operation of NRS 106.240, the analysis would still favor reversal in favor of SFR.

Every argument raised by the FHFA and the Bank[4] fails. This Court should reverse and remand to 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.

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[1] *Glass v. Select Portfolio Servicing, Inc.*, 466 P.3d 939, 2020 WL 3604042 (Nev. 2020) (unpublished).

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

[3] *California Public Employees' Retirement System v. ANZ Securities, Inc*., 137 S. Ct. 2042 (2017) ("*CPERS*").

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

ARGUMENT

I. NRS 106.240 HAS NO EXCEPTIONS FOR PENDING LITIGATION

While FHFA may wish it were so,[5] NRS 106.240 provides no exception for pending litigation. Its arguments all lack merit.

A. The FHFA's Argument Concerning the Statutory History of NRS 106.240 is Waived.

The FHFA's arguments concerning the statutory and legislative history were not raised below,[6] and were not raised in Appellants' opening brief, and are therefore waived and should not be entertained by this Court.[7]

B. This Court's Has Already Determined That Pending Litigation Has No Effect on NRS 106.240.

As pointed out in its reply/answering brief, this Court's decision in *Pro-Max* puts an end to the FHFA's contention that NRS 106.240 was somehow intended to

[5] Amicus Brief at 6-12.

[6] *Id*. at 6-9.

[7] *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (arguments not raised below are waived on appeal); *see also Powell v. Liberty Mut. Fire Ins. Co*., 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (issues not raised in appellant's opening brief are waived). *See also*, *Select Portfolio Servicing, Inc. v Dunmire*, 456 P.3d 255, n.4 (Nev. Jan. 27, 2020) (refusing to consider arguments and legislative history presented by amicus which were waived by the party).

not operate in the face of pending ligation.[8] In *Pro-Max*, divorce proceedings concerning the same notes and deeds of trust were in fact pending while the NRS 106.240 clock was running, and even though the shareholders voted to amend the due date and reinstate notes because of NRS 106.240, the statute was not tolled to nullified in any manner. The FHFA simply ignores this fact, conceding its merit and putting an end to the issue.

C. The FHFA Cannot Use Legislative History, Statutory History, or Legislative Intent to Avoid the Plain Language of NRS 106.240; the Statute Clear and Unambiguous and Affords No Exception for Pending Litigation.

Apart from being waived, the FHFA's arguments concerning the "statutory history" and purported legislative purpose of NRS 106.240 are meritless. Without waiving the waiver, SFR responds as follows.[9]

1. NRS 106.240 is clear and unambiguous.

This Court has found that "the conclusive presumption contained in NRS 106.240 clearly and unambiguously **applies without limitation to all debts secured**

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[8] *See* SFR's May 18, 2021 Amended Reply Brief on Appeal and Answering Brief on Cross-Appeal ("RA Brief") at 7 (discussing *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 16 P.3d 1074 (2001)).

[9] As this Court has noted, "[i]t is well-established that a party can waive waiver." *TRP Fund IV, LLC v. Bank of Am., N.A.*, 461 P.3d 159 (Nev. 2020) (unpublished) (*quoting Bourne Valley Court Tr. v. Wells Fargo Bank, NA*, 832 F.3d 1154, 1158 n.3 (9th Cir. 2016)). However, once the waiver argument is raised, alternatively addressing a claim on the merits does not waive the waiver. *See Norwood v. Vance*,

by deeds of trust on real property," and that "no further interpretation is required or permissible."[10]

The FHFA's arguments as to legislative intent, statutory history, legislative purpose and avoiding absurd results are inapposite. The need to examine legislative intent and purpose and to delve into statutory history only appears when interpreting an *ambiguous* statute,[11] *i.e.*, one "capable of two or more reasonable but inconsistent interpretations."[12] Because this Court has found NRS 106.240 to be clear and unambiguous, courts are "not permitted to search for its meaning beyond the statute itself" and have no basis to delve into legislative intent, or engage in the FHFA's dubious tea leaf reading masquerading as "statutory history."[13] This alone should put an end to the FHFA's argument that NRS 106.240 contains some sort of hidden or unwritten exception that nullifies the statute or tolls its operation if litigation concerning a property is commenced.

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591 F.3d 1062, 1068 (9th Cir.2010) ("Norwood waived the defendants' waiver by addressing the claim on the merits *without also making a waiver argument*.") (Emphasis added).

[10] *Pro-Max*, 117 Nev. at 97, 16 P.3d at 1079 (emphasis added) .

[11] *Chanos v. Nev. Tax Common*, 181 P.3d 675, 681 (Nev. 2008).

[12] *United States v. State Eng'r*, 27 P.3d 51, 54 (Nev. 2001).

[13] *State, Div. of Insurance v. State Farm*, 995 P.2d 482, 485 (Nev. 2000))

2. NRS 106.240 contains no exceptions for pending litigation.

Nevertheless, the FHFA argues that the statute that became NRS 108.260, which simply places a 10-year expiration of the effectiveness of a notice of pendency of an action, is somehow supposed to be read as exception to the completely unrelated NRS 106.240, which places a 10-year repose period on mortgage liens and the debt secured thereby.[14] This assertion has absolutely no support in ANY version of EITHER statutes, from the present all the way back to the 1917 originating statute. Nothing in the completely separate statute concerning notices of pendency found at NRS 108.260 in any way states that NRS 106.240 or its originating statute is not to apply to pending litigation or is to be affected by the filing of a notice of pendency. The original statute simply provided three documents which terminate at the end of ten years – nothing other than the same time to repose bound the three documents together then, or now.

The current language of NRS 106.240 and NRS 108.260 demonstrate this. NRS 106.240, the statute of repose at issue here, terminates the lien created by a deed of trust 10 years the underlying debt becomes wholly due, and creates conclusive presumption that the underlying debt is satisfied and lien discharged after that time:

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[14] *See* SFR's Supplemental Statutory Addendum, SSA_0002 (codified text of NRS 106.240).

> 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, shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.[15]

On the other hand, NRS 108.260 renders notices of pendency of no force and effect 10 years after they are filed, with no mention whatsoever of NRS 106.240 and no mention of any effect of NRS 108.260's on NRS 106.240 operation or effect on deeds of trust or the underlying debt:

> Notice of the pendency of any action shall not constitute notice or be of any force or effect after the expiration of 10 years from the time of the filing of the notice.[16]

The plain language of these statutes demonstrate that they have nothing to do with each other: one addresses liens created by deeds of trust, and the other addresses notices of pendency. They do not reference each other in any manner. And tellingly, they have been codified in completely different chapters of the NRS, further demonstrating that they have absolutely nothing to do with each other.

The FHFA wishes that a statute existed somewhere that says something like, "the 10-year period under NRS 106.240 is tolled upon the filing of a notice of pendency under NRS 108.260," but such language does not exist in either NRS

[15] *See* SSA_0002 (NRS 106.240 (2021)).

[16] *See* SSA_0011 (NRS 108.260 (2021)).

106.240 or NRS 108.240, *and in fact does not exist anywhere in Nevada law*.

The FHFA's proposed rewriting of NRS 106.240 is of the kind that this Court has rejected for well over a century:

> The question is one of intention upon the part of the legislature, but of intention to be ascertained under the established rules for the interpretation of statutes. **The courts are not permitted to speculate as to whether the legislature had a certain state of facts in view at the time of the enactment of a statute**, or as to whether, if it had, the statute would not have been drawn differently; **but, where the language is clear, we must suppose that the lawmakers intended just what they have said, in every aspect of the case that they ought to have had in mind**.[17]

In fact, as recently as last year, this Court rejected the very sort of rank speculation and rewriting of statutory language that the FHFA proposes here, refusing to read in statutory language and legislative intention that are not there.[18]

3. The "statutory history" of NRS 106.240 confirms its plain language and the absence of any exceptions to its operation.

The "statutory history" of NRS 106.240 and 108.260 does nothing to further the FHFA's argument; it undermines it. The original 1917 statute simply created

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[17] *State v. Bd. of Comm'rs of Washoe Cty*., 22 Nev. 203, 37 P. 486, 487 (1894); *see also City of Los Angeles, Cal. v. Eighth Jud. Dist. Ct*., 58 Nev. 1, 67 P.2d 1019, 1023 (1937) ("The intention of the Legislature should be derived from the sections mentioned, and we should not speculate beyond the reasonable import of words.")

[18] *See Clark Cty. Off. of Coroner/Med. Exam'r v. Las Vegas Rev.-J.*, 136 Nev. 44, 61, 458 P.3d 1048, 1061 (2020) ("We decline to speculate as to whether the Legislature conceived of specific privacy-based or other causes of action when enacting NRS 239.012's immunity provision.")

three provision, each separately delineating a 10-year expiration period for (i) liens created by a writ of attachment (Sec. 1); (ii) liens created by mortgages (deeds of trust) (Sec. 2); and (iii) notices of pendency (Sec. 3).[19] The 1917 statute addressing the 10-year termination of mortgages (Sec. 2) is the same as it is codified today at NRS 106.240, with the exception of the 1965 addition of clarifying language to include deeds of trust with mortgages, and to address extensions of the underlying debt.[20] The 1917 statute addressing the 10-year termination of notices of pendency is in fact identical to the statute now codified at NRS 108.260. The language of both statutes was clear in 1917 as it is now, and nothing in either statute, then or now, indicated any intention by the legislature to have the operation of NRS 106.240

[19] *See* SSA_0004.

[20] *Compare* SSA_0004 (Statutes of Nevada 1917, Ch. 37, Sec. 2) ("The lien heretofore or hereafter created of any mortgage upon any real estate, appearing of record, and not otherwise satisfied and discharged of record, shall at the expiration of ten years after the debt secured by said mortgage according to the terms thereof become wholly due, terminate, and it shall be conclusively presumed that said debt has been regularly satisfied and said lien discharged") *with* SSA_0002 (NRS 106.240) (current version) ("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, shall at the expiration of 10 years after the debt secured by **the mortgage or deed of trust** according to the terms thereof **or any recorded written extension thereof** become wholly due, terminate, and it shall be conclusively presumed that **the** debt has been regularly satisfied and **the** lien discharged.") (Changes from 1917 statute in bold). Note that the original 1917 statute was recodified in 1919 and 1929 with no change in language. SSA_0006-7 (Revised Laws of Nevada (1919), Page 3352), 8-9 (Nevada Compiled Laws (1929) §§ 9410, 9411).

affected by the filing of a notice of pendency under NRS 108.260 or its predecessor, or to have such a notice or the existence of pending litigation affect the operation of NRS 106.240 or toll or stop its 10-year termination period. In fact, when the 1917 statue was separated into multiple statutes, the Legislature put an entire chapter between the two provisions with no reference to the other, further evidencing the independence of one from the other.

The language of NRS 106.240 is clear and undeniable—neither pending litigation nor a notice of pendency affect the 10-year period. The fact that the Nevada Legislature did not include the exceptions imagined and wished for by the FHFA, and the fact that neither NRS 106.240 nor any other statute identifies *any exception whatsoever* to NRS 106.240's operation, proves beyond any doubt that the Legislature never intended for any such exceptions. The operation of NRS 106.240 in the instant case terminated the lien created by the deed of trust and created an unrebuttable conclusive presumption that the underlying debt is satisfied and the lien

D. There is Nothing "Absurd" About Following the Plain Language of NRS 106.240

The FHFA contends that following the plain meaning of NRS 106.240 leads to absurd results.[21] However, the FHFA fails to identify *why* or *how* following the Legislatures chosen language results in the alleged absurdity. Instead, the FHFA

[21] Amicus Brief at 9-12.

engages in transparent logical fallacies to avoid the saying the truth out loud, *i.e.*, that the FHFA simply does not like the Legislature's decision of how NRS 106.240 is to operate.

1. NRS 106.240's "purpose" is found in its the plain meaning.

The FHFA's use of a fabricated "purpose" to usurp the legislative power and rewrite the statute fails.[22] The "purpose" of NRS 106.240 is clearly expressed in its plain language, as discussed in Section I(C), *supra*. As the Supreme Court has noted, it is not a reviewing court's job to "speculate upon [legislative] motive," and that even if it were to do so, "the best evidence for that would be found in the statute."[23] This Court echoed this sentiment many years ago, noting that "[i]t is not the province of courts to confound by construction what the Legislature has made clear,"[24] and more recently reiterated that "[o]pponents of a valid statute must look to the Legislature rather than the judiciary to amend the law."[25]

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[22] *Id*. at 10-11.

[23] *Riegel v. Medtronic, Inc*., 552 U.S. 312, 326 & n.5 (2008); *see also Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978) ("[I]t is not our prerogative to substitute our judgment for that of the legislature.")

[24] *W. Indies, Inc., v. First Nat. Bank of Nev*., 214 P.2d 144, 154 (Nev. 1950).

[25] *Williams v. State*, 50 P.3d 1116, 1122 (Nev. 2002).

2. ***The FHFA admits NRS 106.240 operates with no exceptions.***

The FHFA admits that NRS 106.240 operates exactly as its plain meaning dictates, with no exceptions for pending litigation, *i.e.*, that "[i]t says nothing about whether it would function to terminate a lien whose validity is the subject of timely, properly noticed litigation."[26] That is the point. For example, NRS 106.240 "says nothing about" whether it would function to terminate the lien created by a deed of trust recorded on a Thursday, but that does not "prove" that such a "Thursday" exception exists. The absence of an exception means the Legislature intended no exception, no matter how many exceptions a creative imagination could dream up and wish to insert into the statute.

3. ***The FHFA's erroneous categorizations cannot save the terminated deed of trust.***

The FHFA employs multi-layered category error in its attempt to rewrite Nevada law. It falsely implies that any and all statutes that can in any way fall under the most generalized definition of "ancient-lien" statutes operate in the same way and MUST operate in the same way. To accomplish this transition, it begins with a generalized description of "ancient-lien" statutes from authorities unrelated to Nevada law.[27] It then cites to a Massachusetts case for the proposition that such so-

[26] Amicus Brief at 10.

[27] *Id*. at 10 n.7 (citing, *inter alia*, California Law Revision Commission Study H-401 - Marketable Title (Ancient Mortgages and Deeds of Trust), CA Mem. 81-32, at 3

called "ancient lien" have the purpose of "clearing titles of old and obsolete mortgages,"[28] and even goes so far as to assert that "there is no legislative history describing the purpose of NRS 106.240" and that "there is no reason to think the Nevada Legislature enacted the statute with any other purpose in mind."[29] But this chain of inferences is built on faulty reasoning. The first evidence of this faulty reasoning is the Nevada Legislature's choice to use words different than are found those statutes: "wholly due" rather than "maturity." But even without this obvious difference, FHFA's reasoning fails.

SFR agrees that *one* of the *effects* of NRS 106.240—whether you call it an "ancient-lien" statute, "ancient mortgage" statute, or something else—is that affected deeds of trust are effectively cleared from the record after the lapse of the 10-year period without the need for judicial action to quiet title. However, that "clearing title" is generally *one* of the *effects* of NRS 106.240 does not mean that all so-called "ancient-lien" statutes are the same or must operate in the same way. Nor does it mean that this is the *only* effect of NRS 106.240, or that NRS 106.240 is somehow constrained in its operation by other completely different statutes from

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(Jun. 10, 1981) ("CLRC Study"), available at http://www.clrc.ca.gov/pub/1981/M81-32.pdf.

[28] *Id*. at 10-11 (*citing LBM Fin. LLC v. Shamus Holdings, Inc*., No. CIV. 09-11668-FDS, 2010 WL 4181137 (D. Mass. Sept. 28, 2010) ("*Shamus Holdings*")).

[29] *Id* at 11 n.7.

other states that fall under the same generic label of "ancient-lien" statutes. Moreover, FHFA assertion that there is no legislative history describing the purpose of NRS 106.240 is, in a word, false. The only court to have looked at the legislative history very clearly determined that NRS 106.240 is not limited to merely disposing of "old and obsolete mortgages" but is in fact a means of quieting title.[30]

4. "Old and obsolete" ≠ "abandoned or forgotten"

Equally disingenuous is the FHFA's shift of reference between "old and obsolete mortgages" to "abandoned" and "forgotten" liens.[31] For this latter pair of adjectives, the FHFA quotes from no authorities whatsoever.[32] This fabrication is pernicious and deceptive for several reasons.

First, the FHFA implies that for NRS 106.240 to operate, a bank must have had some affirmative intent to "abandon" a deed of trust, or that its operation must be based on some sort of mistake where a bank "forgot" about its deed of trust.[33] This Court already determined that is not the case in *Pro-Max*.

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[30] RA Brief at 24 (*citing 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.)).

[31] Amicus Brief at 11.

[32] *Id*. at 10 n.7. The CLRC Study cited by the FHFA to support its use of the terms "abandoned" and "forgotten" in fact nowhere uses either of these terms. *See* n.27, *supra*.

[33] *Id*. at 6, 11.

In *Pro-Max*, the Pro-Max board "became aware of NRS 106.240 and its effect of extinguishing the notes."[34] As a result, the Pro-Max board approved an offer to amend and reinstate the notes and waive the application of 106.240.[35] In other words, the deed of trust at issue in *Pro-Max* was neither obsolete, ancient, abandoned, nor forgotten, and yet this Court still found NRS 106.240 operated to terminate the deed of trust.

Moreover, while the FHFA relies on an unpublished U.S. District Court case interpreting Massachusetts Mass. Gen. Laws ch. 260 § 33,[36] the Bankruptcy Appellate Panel rejected this notion outright in a published opinion dismissing the notion that Mass. Gen. Laws ch. 260 § 33 "applies only to defunct or inactive mortgages," finding that, as applies here equally to NRS 106.240 generally, **"[h]ad the [L]egislature intended the … statute to have a more narrow application, ... it was certainly capable of drafting the statute accordingly**."[37]

Second, the FHFA then ignores this Court's application of NRS 106.240 to an obviously not "abandoned" or "forgotten" lien in *Pro-Max*, and seeks to impose its linguistic distortions as if they were an operation of law. The FHFA's assertions

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[34] *Pro*-Max, 117 Nev. at 93, 16 P.3d at 1077.

[35] *Id*.

[36] Amicus Brief at 11-12, (*citing Shamus Holdings*, 2010 WL 4181137 at *1 (addressing Mass. Gen. Laws ch. 260 § 33) (2010)).

[37] *In re 201 Forest St., LLC*, 422 B.R. 888, 892 (B.A.P. 1st Cir. 2010).

of "nonsense" and contradiction of the statute's purpose have no connection to the plain language and meaning of NRS 106.240,[38] which contains no limitation as to "abandoned" or "forgotten" liens.

And as already noted, the FHFA even goes so far as to falsify the contents of the CLRC Study, asserting it stands for the proposition that the purpose of "ancient-lien" statutes is "to make title marketable by clearing liens that appear from the record to have been abandoned or forgotten …." However, the words "abandoned" and "forgotten" appear nowhere in this document.[39]

5. ***The only "incentives" this court need focus on are those for servicers to do their jobs or find themselves liable to Fannie Mae and FHFA.***

The FHFA argues that this Court should rewrite NRS 106.240 to preclude its operation when litigation is initiated concerning the DOT before the expiration of the ten-year period, based on allegations of "undesirable incentives," "abusive practices," and "delay tactics."[40] The arguments cannot be taken seriously.

The only abusive practices here are those of the Bank. The Bank was and is fully in control of both acceleration and deceleration, just as it is of the "maturity date" and any extensions. Nothing SFR or anyone else did or could do would change

[38] Amicus Brief at 6, 10, 11.

[39] *See* n.27 and 32, *supra*.

[40] Amicus Brief at 11-12.

the outcome, which was completely in the Bank's hands. As the Notice of Default ("NOD") shows, the Bank accelerated the debt secured by the deed of trust on or before executing and recording the NOD on January 22, 2008, rendering the debt "wholly due."[41] All the Bank had to do was unequivocally decelerate the debt within ten years of first accelerating it. It could have done so at any time, including during the pendency of the instant litigation, but refused to. The March 20, 2008 rescission expressly and specifically insisted that it "shall not" be construed as the default being cured or waived.[42] In other words, the Bank made a business decision to leave acceleration in place while choosing to only rescind the sale. The FHFA's attempt to lay blame on anyone else is groundless.

II. MEMORIALIZATION OF A DEBT BEING ACCELERATED AND "WHOLLY DUE" IN A NOTICE OF DEFAULT TRIGGERS NRS 106.240.

The FHFA asserts that "NRS 106.240 Does Not Allow a Notice of Default to make a Deed of Trust 'Wholly Due," and that instead, "wholly due" can only refer to the loan maturity date.[43] The arguments fail and have already been disposed of.

First, the FHFA's assertion is a straw man: the NOD as a document does not make the loan wholly due, but rather memorializes the acceleration already carried

[41] 9JA_2101-2102.

[42] 9JA_2104.

[43] Amicus Brief at 12-16.

out by the Bank,[44] as evidenced here by the language in the NOD that the Bank "**has declared** and does hereby declare all sums secured [by the deed of trust] immediately due and payable…."[45]

Second, this Court in *Glass* has already rejected the FHFA's contention that the Legislature did not intend and NOD to provide the evidence of acceleration and the debt being "wholly due" necessary to trigger NRS 106.240.[46] The FHFA fails to address this fact, conceding the issue.

Third, the notion that a specific document such an NOD had to be listed in NRS 106.240 for the statute to be triggered by it defies the plain language of the statute. "Wholly due" is the graven of the condition triggering the statute. Acceleration clauses that make the underlying debt wholly due were a well know phenomenon long before the 1917 passage of the law that became NRS 106.240, and wholly due has always meant what it says, and clearly included accelerated debts.[47]

The FHFA even admits that acceleration clauses predated the 1917 passage of what became NRS 106.240, but absurdly haggles over whether an acceleration provision actually makes the underlying debt wholly due, and tries to convince this

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[44] RA Brief at 28-31.

[45] RA Brief at 21-22; 9JA_2101.

[46] *Id*. (discussing *Glass v. Select Portfolio Servicing, Inc*., 466 P.3d 939, 2020 WL 3604042 (Nev. 2020) (unpublished)).

[47] *Id*. at 18-20; *see also* AOB at 27-30.

Court of a substantive difference between "wholly due" as used in NRS 106.240 and "due in full" as used in *Coit*.[48] All the while, the FHFA ignores the obvious fact if acceleration clauses do not make a loan "wholly due" for the purposes of NRS 106.240, they likewise fail to make it "wholly due" for the purposes of bank's foreclosure, rendering virtually every bank foreclosure ever made in Nevada illegal.

Fourth, SFR provided multiple examples of banks, including Appellant U.S. Bank, admitting that "wholly due" means *either* acceleration of the underlying debt or its maturity.[49] The FHFA has no answer for this, conceding the issue.

III. *GLASS* AND NRS 107.080 DEFEAT THE FHFA'S ARGUMENTS.

The FHFA argues that *Glass* and NRS 107.080 support affirmance here. This is incorrect.

First, as already noted, while SFR agrees with this Court's holding in *Glass* that acceleration of the loan makes it "wholly due,"[50] the finding in *Glass* that the rescission of the notice of default there "effectively cancelled the acceleration" is flawed because the *Glass* court did not analyze the full rescission document or the full sentences it quotes.[51] A more fulsome analysis should be used, which leads to

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[48] Amicus Brief at 15-16 (discussing *First Am. Title Ins. Co. v. Coit*, 412 P.3d 1088 (Table), 2018 WL 1129810, at *1 (Nev. 2018) (unpublished)).

[49] RA Brief at 9-12.

[50] *See* n.46, *supra*, and accompanying text.

[51] RA Brief at 34-39.

the undeniable conclusion that the language of the rescission at issue here neither withdrew nor cancelled the prior acceleration, but rather only limited the rescission to its effects on the power of sale.[52]

Second, as already noted, and contrary to the FHFA's contentions, nothing in NRS 107.080 suggests that it was intended to impair the Bank's ability to exercise its right to accelerate the loan outside of the non-judicial foreclosure sale process.[53] NRS 107.080(3) does not limit acceleration to only after an NOD is mailed and record. Rather, it NRS 107.080(3) states that if a bank has not previously accelerated the debt and chooses to use the NOD to give its *first notice of intent to accelerate*, it must then give the borrower the 35 days' notice set forth in NRS 107.080(2)(a)(2) to pay any deficiency and costs before the actual acceleration.

IV. THE FHFA'S ARGUMENTS CONCERNING EQUITABLE CONSIDERATIONS FAIL.

The FHFA argues that the Court can consider the equities, and that they somehow favor the Bank.[54] This is incorrect on both counts.

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[52] *Id*.

[53] *Id*. at 23-24.

[54] Amicus Brief at 17-26.

A. ***Pro-Max*** **Does Not Open the Door to Equitable Considerations.**

The FHFA asserts that *Pro-Max* stands for the proposition that equity can be used to nullify the operation of NRS 106.240, because the Court remanded for consideration of evidence relating to estoppel.[55]

Pro-Max—a case based on division of assets in a divorce proceeding—does not open the door to equity. The remand in *Pro-Max* was not based on the Court invoking exceptions to NRS 106.240. Instead, remand was ordered because some of the shareholders involved in the underlying transaction explicitly agreed to accept Pro-Max's offer to "waive the application of NRS 106.240."[56] However, two shareholders, Feenstra and "Peter B., Inc.," did not so agree. The remand had nothing to do with how NRS 106.240 operates or whether it was subject to equitable exceptions. The error that was the basis for the remand was the lower court not allowing these two shareholders to come to court and address the details of the offer and whether or not they accepted it. It is also worth noting that the judge who rendered the original challenged decision "later testified that had he known the notes were unenforceable [by operation of NRS 106.240], he would have structured the division of the community assets … differently."[57]

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[55] Amicus Brief at 18-19.

[56] *Pro-Max*, 117 Nev. at 93, 16 P.3d at 1077.

[57] *Pro-Max Corp. v. Feenstra*, 8 P.3d 831, 834 (Nev. 2000), *opinion superseded on reh'g*, 16 P.3d 1074 (Nev. 2001), *opinion reinstated on reh'g* (Jan. 31, 2001).

Moreover, the FHFA's contention that a narrow reading of *Pro-Max* would somehow conflict with *Shadow Wood* is likewise incorrect.[58] *Shadow Wood* was itself an extremely narrow ruling. Recall that *Shadow Wood* addressed a situation where the conclusive presumption as to default was "in fact" *uncontradicted* by an undisputed default, but which nevertheless led this Court to rewrite the statutory presumptions in *obiter dictum* in favor of an assumption about effects it believed were unintended by the Legislature: "while it is possible to read a conclusive recital statute like NRS 116.31166 as conclusively establishing a default justifying foreclosure when, in fact, no default occurred, such a reading would be 'breathtakingly broad' and '**is probably legislatively unintended**.'"[59] Based on this narrow recasting of NRS 116.31166 from facts unrelated to the case, this Court extrapolated an even narrower conclusion:

> …. that the Legislature, through NRS 116.31166's enactment, did not eliminate the equitable authority of the courts to consider quiet title actions when an HOA's foreclosure deed contains conclusive recitals. **We therefore reject** Shadow Wood's and Gogo Way's contention **that NRS 116.31166 defeats, as a matter of law, NYCB's action to set aside the trustee's deed and to quiet title in itself**.[60]

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[58] Amicus Brief at 19 (discussing *Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc*., 132 Nev. 49, 366 P.3d 1105 (2016)).

[59] *Shadow Wood*, 132 Nev. at 57, 366 P.3d at 1110.

[60] *Id*., 132 Nev. at 60, 366 P.3d at 112.

In short, *Pro-Max* simply cannot be read to contain an equitable exception to the operation of NRS 106.240, especially in light of the fact that the statute nowhere contemplates such an exception.

B. NRS 106.240 is a Statute of Repose And Not Subject to Equitable Exception.

As detailed previously, NRS 106.240 is a statute of repose and is not subject to equitable extension.[61] The FHFA takes issue with the fact but only half-heartedly, essentially conceding the fact while raising a host of meritless arguments.[62]

1. CPERS directly applies in the instant case.

First, FHFA's contention that *CPERS* is irrelevant because it was a "federal-law case" is nonsensical.[63] *CPERS* gives a detailed and extensive analysis of statutes of limitations and statutes of repose, which clearly are both persuasive and controlling here. That the law at issue in *CPERS* was federal is irrelevant to the foundational legal principles discussed there.

Second, as already discussed, *Pro-Max* did not open a door to equitable consideration in the operation of the statute of repose found at NRS 106.240.[64] This

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[61] AOB at 23-27; RA Brief at 12-17.

[62] Amicus Brief at 19-22.

[63] *Id*. at 19-20 (discussing *California Public Employees' Retirement System v. ANZ Securities, Inc*., 137 S. Ct. 2042 (2017)).

[64] *See* Section IV(A), *supra*.

is especially true because this Court in *Pro-Max* was not even considering the question of whether or not the statute was a statute of repose and the effect this might have, given the well-settled law that statutes of repose are not subject to equitable extension. Similarly, the FHFA's middling claims that NRS 106.240 "may well not be a statute of repose" because this Court "declined" to describe it as such in *Glass* in light of a suggestion in an amicus brief is deceptive and nothing more than wishful thinking.[65] Neither the cited brief nor the Court's final ruling in *Glass* address the question of whether as statute of repose is subject to equitable exception, and in fact the neither even reference the word "equity" or any version of it.[66]

Third, the FHFA's reading of *CPERS* is both misleading and incorrect. The FHFA claims that *CPERS* "acknowledges that equitable considerations are not off limits when applying statutes of repose."[67] But this is incorrect. The *CPERS* Court actually stated that "[c]onsistent with the different purposes embodied in statutes of limitations and statutes of repose, it is reasonable that the former may be tolled by equitable considerations even though the latter in most circumstances may not. *See*

[65] Amicus Brief at 21.

[66] Br. of Amicus Curiae TRP Fund VIII, LLC, 2020 WL 5548894 (Aug. 13, 2020).

[67] Amicus Brief at 21.

supra, at 2050 – 2051."[68] The FHFA hangs its hat on the "in most circumstances" language, but neglects to address the Supreme Court's analysis in the cited pages.

An examination of pages "2050-2051" referenced by the Supreme Court in *CPERS* reveals that the FHFA's argument is incorrect. There, the Supreme Court reveals two exceptions to the operations of statutes of repose, neither of which apply here. One is "if the statute of repose itself contains an express exception, this demonstrates the requisite intent to alter the operation of the statutory period."[69] The other is that "where the legislature enacts a general tolling rule in a different part of the code—*e.g.*, a rule that suspends time limits until the plaintiff reaches the age of majority—courts must analyze the nature and relation of the legislative purpose of each provision to determine which controls."[70]

Neither of these situations exist nor apply here. NRS 106.240 does not "itself contain[] an express exception" to its operation. Likewise, there is no "general tolling rule" in some other part of the NRS that conflicts with NRS 106.240. While the FHFA points to NRS 108.260 to try to fit this bill, that argument has already been disposed of as meritless.[71] Moreover, this Court's determination that NRS

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[68] *CPERS*, 137 S. Ct. at 2053.

[69] *Id*. at 2050.

[70] *Id*.

[71] *See* Section I(C), *supra*.

106.240 "clearly and unambiguously applies **without limitation** to all debts secured by deeds of trust on real property," and that "**no further interpretation is required or permissible**,"[72] definitively puts an end to the FHFA's attempt to distort *CPERS* to fit its need. This "without limitation" language eliminates any possible exceptions under *CPERS* or otherwise.

Instead, CPERS is crystal clear on the purpose and effect of the operation of a statute of repose such as NRS 106.240:

> **The purpose and effect of a statute of repose, by contrast, is to override customary tolling rules arising from the equitable powers of courts**. By establishing a fixed limit, a statute of repose implements a " 'legislative decisio[n] that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability.' …. The **unqualified nature of that determination supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles. For this reason, the Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling**.[73]

2. Even if considered, the bank cannot benefit from equitable tolling.

The only equitable relief referenced by the Bank is equitable tolling, and the Bank simply cannot meet this Court's requirements for equitable tolling under *Fausto*, as the Bank did not act diligently, was in control of acceleration and deceleration of the debt the entire time, expressly limited its rescission to apply only

[72] *Pro-Max*, 117 Nev. at 97, 16 P.3d at 1079.

[73] *CPERS*, 137 S. Ct. at 2051 (citations omitted, emphasis added).

to cancelling the sale, never recorded any document decelerating the loan, and failed and refused to foreclose when it had the chance.[74] Knowing the NRS 106.240 clock was running, the Bank did nothing to stop it until it was too late. The secret dealings of Miles Bauer and the Bank's failure to produce evidence of alleged payment until 2018 after discovery closed likewise weigh heavily against the Bank.[75]

The FHFA's attempts to ascribe inequitable conduct to SFR are ridiculous.[76] SFR's litigation concerning this and other properties can never be considered unclean hands. The assertion of potentially valid rights is not unclean hands, but is a rightful exercise of those rights.[77] The FHFA's reference to other parties being admonished for frivolous argument is both insulting and inapposite.[78] The implication that SFR's arguments here are frivolous are squarely rejected, and the FHFA of course offers no argument or evidence to support any contention of frivolous arguments.

SFR purchased the property according to Nevada law, and the sale extinguished the deed of trust as a matter of law. There was no "windfall" but rather

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[74] RA Brief at 39-40 (discussing *Fausto v. Sanchez-Flores*, 137 Nev. Adv Op 11, 482 P.3d 677, 682 (2021)).

[75] *Id*.

[76] Amicus Brief at 22-26.

[77] *Warner Bros., Inc. v. Gay Toys, Inc*., 724 F.2d 327, 334 (2d Cir.1983).

[78] Amicus Brief at 25 n.8.

a lawful public auction of property whose fate would be uncertain because the Bank had wrongfully insisted for years that NRS 116 sales do not extinguish deeds of trust.[79] It was the Bank, not SFR that engaged in years of litigation based on a wrong interpretation of Nevada law.

It bears noting, this alleged "windfall" did not sway this Court in strictly enforcing NRS 106.240 in *Pro-Max*, **where not a single payment was made on the loan in question**.[80] Instead, this Court correctly recognized there was no room for such distortion because NRS 106.240 is clear and unambiguous.[81] Moreover, arguments as to inadequacy of price are limited to allegations of fraud, unfairness, or oppression *involving the sale* which account for and brings about the inadequacy of price.[82] NRS 106.240 has nothing to do with the Association's foreclosure sale, making the price arguments irrelevant.

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

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[79] *Bank of America, N.A. v. Arlington West Twilight Homeowners Association*, 920 F.3d 620, 623-624 (9th Cir.2019).

[80] *Pro-Max*, *supra*.

[81] *Id.*, 16 P.3d at 1079.

[82] *See Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 648-49 (Nev. 2017).

terminated and discharged by January 22, 2018 and quieting title free and clear of the Deed of Trust in favor of SFR.

DATE: July 22, 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 6,689 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.

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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: July 22, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22nd day of July, 2021. Electronic service of the foregoing **APPELLANT / CROSS-RESPONDENT SFR INVESTMENTS POOL 1, LLC'S RESPONSE TO BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY** shall be made in accordance with the Master Service List.

Master Service List

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