Case No. 81293

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant/Cross-Respondent, vs. U.S. BANK N.A., A NATIONAL BANKING ASSOCIATION, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE LXS 2006-4N TRUST FUND, ERRONEOUSLY PLED AS U.S. BANK, N.A., AND NATIONSTAR MORTGAGE, LLC, A FOREIGN LIMITED LIABILITY COMPANY Respondents/Cross-Appellants.	Electronically Filed Oct 18 2021 07:29 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

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

PETITION FOR REHEARING

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I. INTRODUCTION

Ultimately this case is about whether Nevadans can rely on the language in recorded documents as required by NRS 111.320. It is also about whether regulated financial institutions can record documents, stating very clear and unambiguously that they intend the documents' effects to be limited, and then later, for self-serving purposes, attempt to change that plain language. And do so in the face of no statute that prevents them from using the limiting language in the first place and a governing document, the Deed of Trust, which allows it. This Court should grant rehearing because it both overlooked facts and points of law related to the Deed of Trust, Notice of Default and Rescission recorded in this case.

Here, the Panel relied solely on the unpublished disposition in *Glass*[1] to dispose of this case, without acknowledging the distinguishable position of the parties as to when acceleration occurred, and without providing any analysis or reasoning as to why the plain language present in the Notice of Default regarding prior acceleration, and the plain limiting language in the Rescission should be ignored, as if it does not exist in the document. While the language in *Glass* and here are the same, *Glass* cannot provide an answer because the *Glass* court quoted the

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 July 1, 2020) (unpublished disposition).

Rescission as if the language was absent. The Court cannot and should not simply erase parts of sentences and rule without providing a full analysis as to why those words have no meaning. Upon full consideration of the plain language in the Deed of Trust, the Notice of Default, and the Rescission, this Court should grant rehearing, and enter an order reversing and remanding for the District Court to enter judgment in favor of SFR, and that the Deed of Trust was extinguished by operation of law pursuant to NRS 106.240.

II. STANDARD FOR REHEARING

NRAP 40(a) requires a petition for rehearing to state "with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended."[2] Under NRAP 40(c)(2), the court may consider petitions for rehearing when a material fact in the record or a material question of law in the case has been overlooked or misapprehended, or when a controlling authority has been overlooked, misapplied, or not considered.[3]

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[2] NRAP 40(a)(2).
[3] NRAP 40(c)(2); *see also Lavi v. Eighth Jud. Dist. Ct.*, 130 Nev. 344, 346, 325 P.3d 1265, 1267 (2014)

III. *GLASS* DID NOT ADDRESS THE ARGUMENTS RAISED HERE – AND THE COURT HAS NOT EXPLAINED WHY THE LIMITING WORDS IN THE RESCISSION DOCUMENT HAVE NO MEANING.

A. *Glass* is distinguishable.

While the rescissions considered in the unpublished disposition of *Glass* and here are similar, the facts in the cases are not. The Panel overlooked a material fact – that the Parties here, unlike in *Glass* – do dispute whether the Notice of Default ("NOD") was the document that "accelerated the loan making the balance immediately payable."[4] This alone should have precluded summary judgment in favor of the Bank. Further, the issues raised by SFR in this appeal were not addressed by the court in *Glass* because they were not presented or developed in that case.[5] And, it was not this Court's job or responsibility to develop arguments for the parties, especially those not raised below. Specifically, the language in the Deed of Trust allowing for acceleration prior to the Notice of Default, and the fact that nothing in the Deed of Trust, nor the statute, preclude the Bank from selecting its remedies, or limiting its decision of which remedies it chose to rescind. The Panel, instead,

[4] *Compare Glass v. Select Portfolio Servicing, Inc.*, 466 P.3d 939, at *1 (Nev. July 1, 2020) *with* instant record, Amended 7JA_1538-1550, 1601, 1605.

[5] SFR recognizes it raised this argument in a slightly different way in its amicus brief on Glass's Petition for En Banc Reconsideration, but also recognizes this was an argument raised for the first time by an amicus and, in any case, does not change the fact that *Glass* failed to even acknowledge the language at issue. The issues here were raised in the district court and are properly before this court. See Amended 7JA_1538-1550, 1601-1608.

summarily dismissed any discussion of the plain language of the Rescission notice, other than the few words it chose to acknowledge in *Glass*: "'does hereby rescind cancel and withdraw the Notice of Default and Election to Sell.'"[6] But, this quotation makes it appear as if that is the end of that sentence in the rescission and that there are no other words that modify the intent. But there are, as in this case.[7] As set forth fully below, because the *Glass* court failed to consider, analyze, or even address the remainder of that sentence, the same fully sentence as in this case, the holding in that case should have no persuasive value on the outcome of this case.

B. Publically Recorded Documents Must Provide Notice to All of the Contents Therein.

When there is no conflicting statute to the contents of publically recorded documents, then the public is on notice of the contents and may rely on it unless there is evidence to suggest otherwise. NRS 111.320 states that documents recorded regarding a property put the public on notice of its contents and that any future purchasers or encumbrancers are on constructive notice:

> **Filing of conveyances or other instruments is notice to all persons: Effect on subsequent purchasers and mortgages**. Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, **must** from the time of filing the same with the Secretary of State or recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and

[6] *See Glass, 466 P.3d 939 at *1*; see also Order.
[7] *See Glass*, Case No. 78325, IIIJA_340; *see also* instant case Amended 9JA_2104.

mortgages shall be deemed to purchase and take notice.

(Some emphasis added). That means purchasers, like SFR, "must" take notice of the contents of the Deed of Trust and of the Notice of Default and the Rescission. Unlike the mortgage protection clause in a Deed of Trust, which was nullified by NRS 116.1104,[8] nothing in the NRS nullifies the Bank's right to accelerate the loan prior to recording the Notice of Default pursuant the Deed of Trust or of its right to limit the rescission of its recorded NOD to one of the remedies elected within the NOD. Thus, this Court is bound by both NRS 111.320 and the actual language of the documents. Otherwise, it is telling the citizens of Nevada that Banks can write whatever they choose into their recorded documents, and no one can rely on them. Deviating from the "must" language and the words of the documents raises the specter of potential violations of NRS 1.030 and separation of powers issues.

Neither the Panel here nor the *Glass* court addressed the full language of the NODs, the Rescissions, and their interplay with statute and the Deeds of Trust. The words have meaning and should not have been dismissed out of hand or written out of the documents with no explanation.

C. Acceleration Can Occur Before Recording the Notice of Default.

As discussed above, unlike the appellant in *Glass*, SFR disputes that

[8] *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 757-758, 334 P.3d 408, 419 (2014).

acceleration occurred with the NOD. The Deed of Trust ("DOT") states acceleration can occur if the lender gives written notice to the borrower of acceleration following a transfer of the property, and only has to allow 30 days for "payment of all sums secured by [the DOT]" before exercising any other remedies it has.[9] The DOT also provides that a borrower can "reinstate after acceleration" if it pays all sums due as if acceleration had not occurred along with various expenses and fees incurred.[10] And, the DOT prescribes the manner in which notice must be given to accelerate—including the **"right to reinstate after acceleration."**[11] In other words, the Bank can notify the borrower of acceleration prior to recording the NOD and subsequently reinstate recurring payments, all without going through the formal recording process. And nothing in NRS 107.080(3) states that the NOD is the only means of accelerating. In fact, it contemplates other times and documents to do so, as it states the NOD "**may** contain a notice of intent to declare the entire unpaid balance due. . . ." (Emphasis added.) As this Court has recognized on multiple occasions, the plain language of the Deed of Trust, if clear and unambiguous, must be enforced unless there is some law preventing the same.[12]

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[9] *See* DOT, 1JA_0086 at Sec. 18.
[10] *Id*. at Sec. 19.
[11] *Id.*, 1 JA_0088 at Sec. 22.
[12] *See, e.g., Southern Trust Mortgage Co. v. K&B Door Co., Inc*., 104 Nev. 564, 568, 763 P.2d 353, 355 (1988) (holding a deed of trust had priority because the agreement language was plain); *Skyland Water Co. v. Tahoe-Douglas District*, 95 Nev. 289, 292, 593 P.2d 1066, 1067-68 (1979) (clear and unambiguous language in a deed "is

The NOD here stated the beneficiary of the DOT "has declared and does hereby declare all sums secured thereby immediately due and payable **and** has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby."[13] The Bank chose or approved of the language used. The use of past tense infers prior acceleration. This Court is not free to ignore it.

But, even assuming *arguendo* the NOD was the document accelerating the loan, nothing changes the fact that that document does two functions: (1) accelerate, and (2) invoke the power of sale. Thus, this Court must explain why SFR or public at large was not entitled to rely on the express limiting language in the rescission, which the Panel never quoted, analyzed, or even acknowledged in *Glass* or here.

D. Nothing in the NRS or the DOT Precludes Limiting the Rescission.

As noted above, the DOT allows for acceleration, and for reinstatement of periodic payments after fully paying off the amount due. Nothing in the DOT, however, states that if the lender decides to not proceed to sale, it must decelerate the loan without full payment. And, nothing in the statute requires that either.

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not subject to interpretation and must be enforced as written."). Other jurisdictions agree. *See, e.g.*, *Puryer v. HSBC Bank, USA, N.A.*, 419 P.3d 105, 110 (Mont. 2018) (plaint language of deed of trust required notice for acceleration); *Leahy v. Quality Loan Service Corp. of Washington*, 359 P.3d 805, 809 (Wash. Ct. App. 2016) (holding loan servicer complied with plain language of deed of trust); *Estates in Eagle Ridge, LLLP v Valley Bank & Trust*, 141 P.3d 838, 842 (Colo. Ct. App. 2005) (plain language of deed of trust expresses parties' notice intentions).

[13] Amended 9JA_1201 (Emphasis added).

As explained above, the NOD accomplishes two things: (1) it notifies of default and potentially acceleration, if not done prior, and (2) it elects the power of sale. But the rescission in this case, and in *Glass*, did not simply rescind the NOD. Despite the way the rescission in *Glass* was quoted, the sentence did not end with "does hereby rescind, cancel and withdraw the [NOD]."[14] Rather, that sentence continues in both that NOD and the one here. The rescissions include language clearly and unambiguously limiting what the Bank intended to do with the rescission, and that was to only rescind the election to go to sale. The exact language following the part quoted in *Glass* is as follows:

> . . . **provided, however**, **that this rescission** shall not be construed as waiving, curing, extending to, or affecting any default, whether past, present or future, . . . or as impairing any right or remedy thereunder, and it **shall be deemed to be, only an election without prejudice not to cause a sale to be made pursuant to such [NOD]**, and it shall not in any way alter or change any of the rights, remedies or privileges secured to the Beneficiary and/or Trustee under such [DOT], nor modify, nor alter in any respect any of the terms, covenants, conditions or obligations contained therein.

(Emphasis added.)[15]

Neither the *Glass* court nor this Panel have addressed this language. Rather, for all intents and purposes, the language has been erased from the document without explanation. No analysis, nothing to give the public any reason why it cannot and should not rely on NRS 111.320 and the plain words of the Bank; the Bank intended

[14] *Id.*, *Glass*, Case No. 78325, IIIJA_340
[15] *Id.*

only to stop any movement towards a sale, not to decelerate the loan or forgive a default. Nothing in the rescission suggests deceleration. And, as this Court has held, acceleration must be clear and unequivocal,[16] which the NOD includes: "has declared and does hereby declare **all** sums secured [by the DOT] immediately due and payable." Even if this Court were to actually hold that the NOD were the accelerating documents, which SFR does not concede, the rescission was recorded more than 35 days after the NOD, thereby accelerating the loan by the NOD's plain language.[17] There is no clear and unequivocal language decelerating. And it cannot be inferred as the Bank itself has expressly, clearly, and unambiguously limited the rescission only to sale. Only if the Bank recorded a reinstatement of periodic payments would the limit on the rescission, then, at that date, become no longer effective.

The only court to do a full and detailed analysis of the language existing here and in *Glass* recognized the two elections in the NOD, to accelerate and to sell, and that the rescission was specifically limited its election to sell.[18] Other courts, like here, have simply blindly accepted the unpublished, non-binding, incomplete

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[16] *Clayton v. Gardner*, 107 Nev. 468, 471, 813 P.2d 997, 999 (1991).
[17] *See* NRS 107.080(2)(a)(2) and NRS 107.080(2)(a)(3) (2007). The NOD was recorded January 24, 2008, making February 28, 2008 35 days later. The rescission was recorded March 20, 2008. *See* Amended 9JA_2101, 2104.
[18] *Bank of Am., N.A. v Madeira Canyon Homeowners Assn.*, 423 F Supp 3d 1029 (D.Nev, 2019).

analysis of *Glass*.

This Court cannot and should not continue to ignore the very limiting language the Bank chose to incorporate in its own documents. It should explain why the analysis by the court in *Madeira Canyon* was incorrect. Nothing in statute or the DOT prohibits this limit. The Bank made a business decision—to choose and limit its remedies a la carte—and this Court should hold it subject to any consequences.

III. CONCLUSION

This Court should grant rehearing and enter an order reversing and remanding for judgment to be entered in favor of SFR because the Bank made the business decision to limit its rescission and the loan was accelerated in 2008 and by operation of law the DOT in this case was extinguished in 2018 pursuant to NRS 106.240.

DATED this 18th day of October, 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 40(3) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 10 pages long and contains 2514 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 this 18th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18th day of October, 2021. Electronic service of the foregoing **Petition for Rehearing** shall be made in accordance with the Master Service List.

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