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

Respondents-Cross-Appellants.

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SFR INVESTMENTS POOL 1, LLC'S PETITION FOR EN BANC RECONSIDERATION

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INTRODUCTION

SFR hereby petitions the Court for en banc reconsideration of this matter pursuant to Rule 40A because this case involves a substantial precedential, constitutional, and public policy issue. At issue is whether Nevadans can rely on language in recorded documents about the acceleration of a debt as contemplated by NRS 111.320, NRS 47.240(2) and NRS 47.250(2). Also at issue, is whether Nevada is a state that allows regulated financial entities to record documents, with clear and unambiguous language as to a given fact, but later, for self-serving purposes, allow that entity to claim "we didn't mean what we said." The issue in this case affects anyone who has already purchased or will purchase real property in Nevada.

Here, the Panel acknowledged the language in the Notice of Default "served to redeclare Countrywide's acceleration of the loan," but then held limiting language in the notice of recission still rescinded acceleration because the notice of default was "the document that accelerated the loan." But if the Bank "redeclared acceleration" it means the Bank had previously declared acceleration, and thus the notice of default could not serve as the document that accelerated the loan.

Additionally, rather than accept the plain language in the recission, the Panel held the Bank could not have intended what it said misconstruing NRS 107.080 as requiring a 35-day right to cure each time a lender records a notice of default. This is not what NRS 107.080 requires. Instead, if and only if a lender opts to accelerate

a loan in the first instance by way of the notice of default, then and only then must a 35-day cure period be provided prior to acceleration occurring. But nothing in NRS 107.080 requires a lender to use a notice of default to accelerate a loan and to hold as such violates the contracts clause of the Constitution, not to mention ignores the option of judicial foreclosure.

ARGUMENT

I. CONTENTS IN A PUBLICLY RECORDED DOCUMENT PROVIDE NOTICE TO THE WORLD AND ARE CONCLUSIVELY PRESUMED TRUE.

When there is no conflicting statute to the contents of publicly recorded document, then the public is on notice of the contents in that document and may rely on its content. NRS 111.320 states in relevant part, "every…instrument of writing…recorded…must from the time of filing the same…impart notice to all persons of the contents thereof…" Additionally, NRS 47.240(2) provides the following conclusive presumption, "the truth of the fact recited, from the recital in a written instrument…" Further NRS 47.250(2) provides a rebuttable presumption, "that a person intends the ordinary consequences of that person's voluntary act." In

the present case, there are three documents at issue: (1) the Deed of Trust;[1] (2) the Notice of Default;[2] and (3) the Recission.[3]

A. Deed of Trust Provides Acceleration Can Occur Via Written Notice

The Deed of Trust ("DOT") states acceleration can occur via written notice from the lender if borrower transfer the property without the lenders prior written consent or if the borrower breaches any other covenant in the DOT.[4] The DOT further states lender only has to allow 30 days for "payment of all sums secured by [the DOT]" before exercising any other remedies, such as the power of sale.[5] The DOT also provides a borrower can "reinstate after acceleration" if she pays all sums due as if acceleration had not occurred along with various expenses and fees incurred.[6] Finally, the DOT prescribes the manner in which notice must be given to accelerate—including the "right to reinstate after acceleration."[7] 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

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[1] 8JA_1772-1797.
[2] 9JA_2101-2102.
[3] 9JA_2104.
[4] 8JA_1772-1797 at Sec. 15, 18, 22.
[5] *Id.* at Sec. 18, 22.
[6] *Id*. at Sec. 19.
[7] *Id.* at Sec. 22.

recording process. 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.[8]

B. Notice of Default Notified the World the Loan was Already Accelerated.

The Notice of Default states the beneficiary "has declared and does hereby declare all sums secured thereby immediately due and payable…"[9] The Bank chose this language. The use of past tense notifies the world of prior acceleration. In fact, the Panel recognized as much when it held the "does hereby declare" language "served to **redeclare** Countrywide's acceleration of the loan."[10] It is axiomatic one cannot re-do something unless it has already, previously done it. But the conceptual space between the phrase "has and does" does not mean the Bank abandoned and

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[8] *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 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).

[9] 9JA_1201-1202.

[10] Decision at page 7. (Emphasis added.)

then re-started acceleration. Simply re-affirming a prior act does not abandon the prior act and/or re-set the act.

C. The Recission Notified the World Acceleration Remained, But the Power of Sale was Canceled.

The rescission states as follows:

> [Countrywide] does hereby rescind, cancel and withdraw the Notice of Default and Election to Sell hereafter described, ***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 [Notice of Default]***, 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 Deed of Trust, nor modify, nor alter in any respect any of the terms, covenants, conditions or obligations contained therein.[11]

Again, the Bank chose this language. The language is not unclear; in fact, it is quite clear. The Bank qualified what the recission did by stating provided, however, it shall not be construed as affecting default, and shall only be deemed to cancel the election of sale. The Panel, however, in derogation of Nevada law, basically held the qualifying language can be ignored because the Bank generally stated *before* all the qualifying language, it rescinded the Notice of Default. In that regard, the Panel treated a general phrase as governing over the more specific, and

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[11] 9JA_2104.

qualifying phrases within the notice. But the scope of the recission can only be determined by its entire content; not through cherry-picking only the phrases that fit the outcome a given party desires. The rescission in this case is not a full rescission; by its clear and unequivocal language it only rescinded the power of sale, and in that regard it is a partial recission. Both state and federal consumer protection laws require clear and unequivocal language. But the Panel's decision invites uncertainty because it allows a court to pick and choose what language to give effect to while ignoring other language. This also invites abuse.

While the Panel claimed it was not "self-evident from any of the remaining language that Countrywide was trying to rescind the document that accelerated the loan while also keeping the loan accelerated," this statement conflicts with footnote 5 in which the Panel observed the Bank knows how to abandon/cancel acceleration with its words. This also begs the question, then what *is* meant by all the qualifying language? It certainly is not superfluous; it has some meaning. But again, rather than give the plain and clear meaning and effect to the words, the Panel disregarded them or treated them as having no meaning in violation of Nevada law.

II. PERPETUAL ACCELERATION DOES NOT VIOLATE NRS 107.080(3)

In a further attempt to give no meaning to the plain language in the recission, the Panel held the intent would leave the borrower in a perpetual state of acceleration thus eliminating NRS 107.080(3)'s 35-day right to cure period. But this is a gross misinterpretation of NRS 107.080. This section does not limit acceleration to a notice of default; instead, it merely provides a lender "may" include a notice of intent to accelerate in the notice of default, *and if, and only if*, it opts for this, acceleration cannot occur until 35 days from the date of notice. In other words, the purpose of NRS 107.080(3) is to ensure that if the notice of default is the first time a lender has notified a borrower of its intent to accelerate, the borrower is afforded a 35-day grace period to cure and avoid acceleration. But by no means does NRS 107.080(3) supplant the lender's contractual right to accelerate via written notice outside of a notice of default. Again, this contractual right is found in Paragraph 22 of the Deed of Trust and provides for a 30-day grace period to cure. To read NRS 107.080 as the Panel did violates the contracts clause of the Constitution.

It also ignores the fact judicial foreclosure is still an option in Nevada. If a lender chooses this route, no notice of default ever issues. What is more, the Panel seemingly believed perpetual acceleration somehow harms the borrower, but in reality allowing a court, after the fact, to cherry pick what language to give legal

effect to while ignoring other language, harms a borrower and any other person relying on a given document, far worse.

Take for instance, NRS 104.3118(1). Under Nevada law, "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within 6 years after the due date or dates stated in the note or, if a due date is **accelerated**, within 6 years after the **accelerated due date**." NRS 104.3118(1) (emphasis added.) A home loan consists of two documents: the promissory note and the deed of trust. *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 512, 286 P.3d 249, 254 (2012). The note is the promise to pay the debt, while the deed of trust is the lien on the property which secures the debt under the promissory note. *Id.* In *Coit*, this Court recognized due in full language as language which makes the entire note due and therefore changes the date upon which the statute of limitations runs. *First Am. Title Ins. Co. v. Coit*, 412 P.3d 1088 (Nev. 2018) (unpublished). The *Coit* Court in questioning the merits of a lender's statute of limitations argument stated "we question the merit of that argument in light of the March 2010 notice of default that declared the loan due in full." *Id. citing Cf. Clayton v. Gardner,* 107 Nev. 468, 470, 813 P.2d 997, 999 (1991)("[W]here contract obligations are payable by installments, the limitations statute begins to run only with respect to each installment when due, unless the lender exercises his or her option to declare the entire note due.").

Additionally, in Nevada, judicial foreclosure is governed by the six-year statute of limitations found in NRS Chapter 104 and NRS 11.190(1)(b). *See Facklam v. HSBC Bank*, 401 P.3d 1068, 1070, 133 Nev. 497, 499 (2017). When a borrower defaults, the lender can choose "the judicial process for foreclosure pursuant to NRS 40.430 or the 'nonjudicial' foreclosure-by-trustee's sale procedure under NRS Chapter 107." *Edelstein*, 513, 286 P.3d at 254. But applying this Panel's reasoning, a lender can re-set the statute of limitations. Whether a six-year clock (judicial foreclosure) or a ten-year clock (non-judicial foreclosure) is at play, a borrower or some other person almost certainly will benefit from a "perpetual" acceleration because once the 6 or 10-year clock runs this significantly benefits a borrower or some other person subject to the debt/deed of trust.

The Panel's decision is therefore based on a false paradigm that "perpetual" default/acceleration is illegal or always harmful. The bottom line is a lender has the contractual right to accelerate the loan outside of a notice of default and further has the legal right to maintain the remedy of default/acceleration until such time as the 6 or 10-year clocks run.

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CONCLUSION

The Bank carefully and intentionally chose the language in both the notice of default and recission. The Panel ignored Nevada law in choosing to give meaning to some words, but not all the words. The Bank must be held its own words. En banc reconsideration is warranted, otherwise, this Court is telling Nevada citizens, Nevada law does not matter, and lenders can write whatever they choose into a recorded document, and the meaning given to those plain words, will be ignored, and therefore, no one can rely on the language contained in the document.

DATED this 6th day of June, 2022.

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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 is 10 pages and contains 2,217 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 6th day of June, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 6th day of June, 2022. Electronic service of the foregoing **SFR Investments Pool 1, LLC's Petition for En Banc Reconsideration** was made pursuant to the Master Service List.

Dated this 6th day of June, 2022.

/s/ Candi Fay
an employee of Hanks Law Group