IN THE SUPREME COURT OF THE STATE OF NEVADA

THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK, AS TRUSTEE, FOR THE CERTIFICATEHOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-25, Appellant, vs. SFR INVESTMENTS POOL 1, LLC, Respondent.	**Supreme Court No. 81604** District Court Case No. A790150 Appeal from the Eighth Judicial District Court, Clark County, Nevada

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed.

The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of CWABS, Inc. Asset-Backed Certificates, Series 2006-25 ("BNYM") is a New York Banking institution. The Bank of New York Mellon Corporation, a Delaware corporation, owns 100% of BNY Mellon.

The following have an interest in the outcome of this case or are related to entities interested in the case:

- The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of CWABS, Inc. Asset-Backed Certificates, Series 2006-25
- Specialized Loan Servicing LLC

There are no other known interested parties.

ZBS Law, LLP fka Zieve, Brodnax & Steele, LLP fka Law Offices of Les Zieve has represented Bank of New York Mellon in this matter since its inception.

DATED this 20th day of January, 2021

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ISSUES PRESENTED

1. Whether the District Court erred when it ruled that that BNYM made the loan "wholly due" as contemplated by NRS 106.240 byrecording a Notice of Default and Election to Sell Under Deed of Trust on April 29, 2008.
2. Whether the District Court erred when it ruled that a 2008 loan modification failed to cure any default with the Borrower's loan and did not reinstate the loan as an installment loan.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter, as it is an appeal from a final judgment, whereby the district court entered summary judgment in favor of Appellee SFR Investments Pool 1 LLC. ("SFR") on July 22, 2020. NRS 2.090; NRAP 3A(b)(1). (*See*, Notice of Entry of Order, Appendix Vol. II, p. 405).

ROUTING STATEMENT

Pursuant to NRAP 28(a)(5), this matter is presumptively retained by the Nevada Supreme Court because the issues presented herein raise "as a principal issue a question of first impression involving the United States or Nevada constitution or common law." NRAP 17(a)(13). The principal issue here is whether a loan was made "wholly due" as contemplated by NRS 106.240 by virtue of a lender's recordation of a Notice of Default/Election to Sell Under Deed of Trust.

STATEMENT OF THE CASE

The underlying District Court action involved a claim for cancellation of instrument concerning a first position deed of trust encumbering real property located at 4946 Droubay Drive, Las Vegas, Nevada 89122 [APN: 161-26-111-133] (the "Property") following a homeowners association's lien foreclosure sale (the "lien sale") conducted on September 19, 2012. (*See*, Complaint, Appendix Vol. I, p.79). Non-party Alessi & Koenig, LLC ("A&K") conducted the lien sale on behalf of Squire Village Homeowners Association ("HOA" or "Squire Village"). (*See*, Federal Court Complaint, Appendix Vol. 1, p. 2).

On April 4, 2018, The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2006-25 ("BNYM" or "Appellant") filed a complaint for quiet title/declaratory relief in the United States District Court, District of Nevada (Case No. 2:18-cv-00599-APG-CWH). (*See*, Federal Court Complaint, Appendix Vol. I, p. 1). In the complaint, BNYM asserted that its deed of trust was not extinguished by way of the HOA's September 19, 2012 lien sale due to a pre-sale tender of the superpriority lien amount. *Id*. at p. 3.

On June 11, 2018, SFR Investments Pool 1, LLC ("SFR" or "Appellant") filed a motion to dismiss pursuant to FRCP 12(b)(6) and FRCP 12(b)(7). (*See*, Motion to Dismiss, Appendix Vol. I, p. 58). In the motion, SFR argued that BNYM's

complaint was time-barred under the four-year catchall statute of limitation found in NRS 11.220. *Id*. at p. 2. Ultimately, the district court agreed and dismissed BNYM's complaint as time-barred, as it was filed more than four years after the HOA's lien sale. (*See*, Order, Appendix Vol. I, p. 76). Importantly, the district court's order contained no declaration as to the effect of the HOA's lien sale on BNYM's deed of trust. *Id*. at p. 78.

Because the loan underlying BNYM's deed of trust remained in default, on January 15, 2019, Sables, LLC, as trustee for BNYM, recorded a Notice of Breach and Default and Election to Sell the Real Property Under Deed of Trust. (*See*, Complaint, Appendix Vol. I, p. 81). On February 27, 2019, SFR filed its complaint for cancellation of instrument under NRS 106.240 - Nevada's ancient mortgage statute that sets a 10-year time period in which a lien is presumed expired after the underlying loan's maturity date. *Id*. at p. 79.

On January 30, 2020, BNYM filed a Motion for Summary Judgment, contending that the debt underlying its deed of trust was not made "wholly due" as contemplated by NRS 106.240 simply by recording a Notice of Default and Election to Sell Under Deed of Trust, (the "Notice of Default"), as contended by SFR. (*See*, BNYM's Motion for Summary Judgment, Appendix Vol. I, p. 100). Rather, BNYM argued that the ten-year time period contemplated by NRS 106.240 is controlled by the maturity date of the loan, as stated in the loan documents. *Id*. at 100-101. In this

case, the maturity date of the loan, as set forth in the note and deed of trust was December 1, 2046. *Id*.

On March 23, 2020, SFR filed a Motion for Summary Judgment, arguing that the deed of trust was void under NRS 106.240, as more than ten years had passed since BNYM's predecessor-in-interest recorded a Notice of Default on April 29, 2008. (*See*, SFR's Motion for Summary Judgment, Appendix Vol. II, p. 208).

On July 22, 2020, the District Court entered its Findings of Fact, Conclusions of Law, and Judgment (the "Judgment"). In the Judgment, the court below concluded that "[BNYM] and/or its predecessor made the loan wholly due by virtue of the Notice of Default recorded on April 29, 2008." (*See*, Order, Appendix Vol. II, p. 410). The District Court further found that an August 2008 loan modification agreement did not cure the loan's default status, nor did it reinstate the loan as an installment loan. *Id*.

The District Court erred in making these rulings, as the plain language of NRS 106.240 calls for discharge of the debt and lien "at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof…become wholly due." NRS 106.240. As such, the undisputed record below clearly establishes that BNYM's the district court's judgment should be reversed.

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STATEMENT OF FACTS

I. FACTUAL BACKGROUND

On or about November 17, 2006, Nelson and Susan Pritz (the "Borrowers") financed ownership of the Property by way of a loan in the amount of $232,200.00 secured by a deed of trust (the "Deed of Trust") recorded on November 22, 2006. (*See*, Deed of Trust, Appendix Vol. I, p. 12). The Borrowers stopped paying on their loan and on April 29, 2008, BNYM's predecessor-in-interest, Countrywide Home Loans, Inc. ("Countrywide") recorded a Notice of Default in the Clark County Recorder's Office. (*See*, SFR's Motion for Summary Judgment, Appendix Vol. II, p. 208). On August 12, 2008, the Borrowers and Countrywide entered into a Loan Modification Agreement, curing any default and reinstating the loan. (*See*, Loan Modification Agreement, Appendix Vol. II, p. 293-294). The deed of trust was subsequently assigned to BNYM via an assignment of deed of trust recorded against the property on November 29, 2011. (*See*, Assignment of Deed of Trust, Appendix Vol. I, p. 195).

The HOA, through A&K, recorded a notice of delinquent assessment lien ("Notice of Lien") against the property on February 6, 2009. (*See*, Notice of Delinquent Assessment Lien, Appendix Vol. I, p. 198). On May 1, 2009, A&K, as agent for the HOA, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien. (*See*, Notice of Default and Election to Sell Under

Homeowners Association Lien, Appendix Vol. I, p. 200). On December 18, 2009, A&K, as agent for the HOA, recorded a Notice of Trustee's Sale. (*See*, Notice of Trustee's Sale, Appendix Vol. I, p. 202).

On January 12, 2010, Miles, Bauer, Bergstrom & Winters, LLP ("MBBW"), counsel for Countrywide, issued correspondence to A&K, requesting a payoff ledger detailing the superpriority amount of the HOA's lien by providing a breakdown of nine months of HOA assessments. (*See*, Correspondence, Appendix Vol. I, p. 127). On February 11, 2010, A&K provided the payoff demand to MBBW, demonstrating that the HOA's monthly assessments were $84.00 and there were no nuisance abatement or maintenance charges associated with the Borrowers' account. (*See*, Payoff Demand, Appendix Vol. I, p. 130-132).

On February 18, 2010, MBBW, on behalf of Countrywide, tendered a check to A&K in the amount of $756.00 to satisfy the super-priority portion of the HOA's lien as well as for an estimation of reasonable collection costs. (*See*, MBBW Tender Correspondence, Appendix Vol. I, p. 134-136). A&K rejected the aforementioned tender and returned the $756.00 check to Miles Bauer on or about March 22, 2010. (*See*, MBBW Prolaw Screenshot, Appendix Vol. I, p. 125).

On August 21, 2012, A&K, as agent for the HOA, recorded that certain Notice of Foreclosure Sale ("Notice of Sale") as Book and Instrument number 20120821-0001940 in the Official Records. (See, Notice of Sale, Appendix Vol. I, p. 204).

On September 19, 2012, A&K, on behalf of the HOA, conducted a lien foreclosure sale of the Property, where SFR was the highest bidder, purchasing the property for $5,356.00. (See, Trustee's Deed Upon Sale, Appendix Vol. I, p. 206).

On September 17, 2013, BNYM's loan servicer, Specialized Loan Servicing LLC, sent the Borrowers correspondence indicating that their "[f]ailure to pay the total amount due under the terms and conditions of your Deed of Trust/Mortgage by 10/20/13 may result in acceleration of the entire balance outstanding under the note, including, but not limited to, the principal, interest and all other outstanding charges and costs, and commencement of foreclosure of the Trust Deed/Mortgage which is security for your Note. (*See*, Notice of Default and Notice of Intent to Foreclose, Appendix Vol. I, p. 160-161).

II. PROCEDURAL HISTORY

On April 4, 2018, BNYM filed a complaint for quiet title/declaratory relief in the United States District Court, District of Nevada (Case No. 2:18-cv-00599-APG-CWH). (*See*, Federal Court Complaint, Appendix Vol. I, p. 1). In the complaint, BNYM asserted that its deed of trust was not extinguished by way of the HOA's September 19, 2012 lien sale due to a pre-sale tender of the superpriority lien amount. *Id*. at p. 3.

On June 11, 2018, SFR filed a motion to dismiss pursuant to FRCP 12(b)(6) and 12(b)(7). (*See*, Motion to Dismiss, Appendix Vol. I, p. 58). In the motion, SFR

argued that BNYM's complaint was time-barred under the four-year catchall statute of limitation found in NRS 11.220. Id. at p. 2. Ultimately, the district court agreed and dismissed BNYM's complaint as time-barred, as it was filed more than four years after the HOA's lien sale. (*See*, Order, Appendix Vol. I, p. 76). Importantly, the district court's order contained no declaration as to the effect of the HOA's lien sale on BNYM's deed of trust. *Id*. at p. 78.

Because the Borrowers' loan remained in default, BNYM commenced nonjudicial foreclosure proceedings on under the note and deed of trust on January 15, 2019. (*See*, Complaint, Appendix Vol. 1, p. 81). Shortly thereafter, on February 27, 2019, SFR filed suit in the Eighth Judicial District Court, seeking to cancel BNYM's 2008 and 2019 Notices of Default and deed of trust pursuant to NRS 106.240. Id. at p. 81-82. SFR also named BNYM's foreclosure trustee, Sables, LLC ("Sables") as a Defendant for recording the 2019 Notice of Default on behalf of BNYM. *Id*. at p. 83. On May 28, 2019, Sables filed a Declaration of Non-Monetary Status pursuant to NRS 107.029, which SFR did not object to. (*See*, BNYM's Motion for Summary Judgment, Appendix Vol. 1, p. 96). As a result, Sables was no longer required to participate in the litigation. NRS 107.029.

On January 30, 2020, BNYM filed a Motion for Summary Judgment, contending that the debt underlying its deed of trust was not made "wholly due" as contemplated by NRS 106.240 simply by recording a Notice of Default and Election

to Sell Under Deed of Trust, (the "Notice of Default"), as contended by SFR. (*See*, BNYM's Motion for Summary Judgment, Appendix Vol. I, p. 100). Rather, BNYM argued that the ten-year time period contemplated by NRS 106.240 is controlled by the maturity date of the loan, as stated in the loan documents. *Id*. at 100-101. In this case, the maturity date of the loan, as set forth in the note was December 1, 2046. *Id*.

On March 23, 2020, SFR filed a Motion for Summary Judgment, arguing that the deed of trust was void under NRS 106.240, as more than ten years had passed since BNYM's predecessor-in-interest recorded a Notice of Default on April 29, 2008. (*See*, SFR's Motion for Summary Judgment, Appendix Vol. II, p. 208).

On July 22, 2020, the District Court entered its Judgment, concluding that "[BNYM] and/or its predecessor made the loan wholly due by virtue of the Notice of Default recorded on April 29, 2008." (*See*, Order, Appendix Vol. II, p. 410). The District Court further found that an August 2008 loan modification agreement did not cure the loan's default status, nor did it reinstate the loan as an installment loan. *Id*. Written notice of entry of the District Court's Judgment was filed on August 5, 2020. (*See*, Notice of Entry of Order, Appendix Vol. II, p. 405).

On August 6, 2020, BNYM appealed the judgment. (*See*, Notice of Appeal, Appendix Vol. II, p. 412).

SUMMARY OF THE ARGUMENT

This appeal involves an issue relating to the application of NRS 106.240 – specifically: (1) whether a deed of trust is conclusively presumed satisfied and a note discharged ten years after a lender records a Notice of Default and Election to Sell under a deed of trust, or (2) whether the maturity date as stated in the loan documents, including recorded extensions thereto, or a recorded acceleration of the maturity date provides the trigger date for purposes of a ten-year analysis under NRS 106.240.

BNYM notes that in this instance, no Notice of Rescission of the Notice of Default was recorded as this Court has recently discussed in *Kristal Glass v. Select Portfolio Servicing, Inc. et. al*, Nevada Supreme Court Case No. 78325, Order of Affirmance dated July 1, 2020, request for En Banc Reconsideration denied on November 6, 2020, and *Dean Johnston v. U.S. Bank, N.A., et. al*, Nevada Court of Appeals Case No. 78278-COA.

In summary, BNYM's arguments are as follows: First, the District Court erred in concluding that BNYM and/or its predecessor made the loan wholly due as contemplated by NRS 106.240 simply by recording a Notice of Default on April 29, 2018, thus ignoring the maturity date as stated in the loan documents.

Second, the District Court erred in concluding that no genuine issues of material fact existed with respect to whether the August 12, 2008, Loan Modification

Agreement between the Borrowers and Countrywide cured the loan's default and thus reinstated the loan.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews summary judgment orders *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed in a light most favorable to the non-moving party, demonstrates that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. *Id.* Conclusory statements fail to create issues of fact. *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 833, 897 P.2d 1093, 1094-95 (1995). NRCP 56(c)'s plain language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (adopted by *Wood*, 121 Nev. at 731, 121 P.3d at 1031).

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II. THE DISTRICT COURT ERRED WHEN IT RULED THAT BNYM'S DEED OF TRUST WAS EXTINGUISHED BY OPERATION OF NRS 106.240.

A. Statutory Background of NRS 106.240.

NRS 106.240 - a one-sentence provision enacted in 1917 and revised slightly only once since then, in 1965 - is Nevada's "ancient-lien" statute. "The obvious purpose and effect of [such] statute[s] is to clear titles of old and obsolete mortgages, without the need of obtaining a discharge." *In re 201 Forest St., LLC*, 422 B.R. 888, 892 (B.A.P. 1st Cir. 2010). Practically speaking, they "enable a person to rely on the record in determining marketability of real property burdened by an ancient mortgage or deed of trust of record" through "automatic clearing of ancient mortgages and deeds of trust from the record after lapse of the statutory period without the necessity of judicial action to quiet title or remove a cloud." *See* Study H-401 - Marketable Title (Ancient Mortgages and Deeds of Trust), CA Mem. 81-32, at 3 (June 10, 1981), http://www.clrc.ca.gov/pub/1981/ M81-32.pdf ("CA Mem. 81-32").

NRS 106.240 provides that liens created by deeds of trust "appearing of record, and not otherwise satisfied and discharged of record," will terminate at the expiration of ten years after the debt becomes "wholly due" under "the terms [of the deed of trust]" or "any recorded written extension thereof." The statute does not otherwise define "wholly due."

B. NRS 106.240 Does Not Allow a Notice of Default to Make a Loan Secured by a Deed of Trust "Wholly Due."

Neither the Nevada Legislature nor the Nevada Supreme Court has defined the term "wholly due," as used in NRS 106.240. However, the only plausible reading of "wholly due" is the maturity date stated in a deed of trust, or, if applicable, a recorded written extension of that date. Such a reading would comport with the text of N.R.S. 106.240, the structure of Chapter 106, the statutory history, and the overall purpose of ancient-lien statutes.

NRS 106.240 - enacted over 100 years ago and last amended in 1965 - provides that a deed of trust "appearing of record, and not otherwise satisfied and discharged of record," terminates "ten years after the debt secured by ... the deed of trust become[s] wholly due" under "the terms thereof or any recorded written extension thereof." NRS 106.240. The text of the statute makes clear that only two types of written instruments are relevant in determining when the obligation a lien secures becomes "wholly due" for purposes of NRS 106.240 - (1) the "deed of trust" itself, and (2) "any recorded extension thereof." NRS 106.240. Had the Nevada legislature intended notices of default or acceleration to trigger NRS 106.240, it could have made that intention explicit in the statute as the legislature is obviously aware of notices of default given its comprehensive regulation of their form and content. *See*, NRS 107.080 (requiring a trustee to record a notice of default prior to

initiating power of sale); *See also*, NRS 107.087 (providing requirements for content, recording, and posting of notices of default).

The statutory history of NRS 106.240 and the Nevada provisions governing notices of default confirm the point. Nevada's legislature enacted the precursor to NRS 106.240 in 1917 - a time when Nevada had not yet enacted any statute mandating or addressing the recording of notices of default. *See*, Nevada Laws 1917, c. 37 § 2. Simply put, the Legislature could not have intended notices of default to trigger the ancient lien statute when it was first enacted, as notices of default did not even exist under Nevada law at the time. Nevada enacted its first statute addressing notices of default ten years later, in 1927. Nevada Laws 1927, c. 173, § 1.

Had the Legislature at that time intended notices of default to be treated as documents that could trigger the ancient-lien statute, it could easily have said so, but it did not. Nor did it do so in 1949, 1957, 1959, or 1961 when it amended the statutory provisions governing notices of default, or enacted new ones. *See*, Nevada Laws 1949, at 70, c. § 1; 1957 Statutes of Nevada, at 631, c. 356 § 1; 1959 Statutes of Nevada, at 10, c. 11 § 1; 1961 Statutes of Nevada, at 23-24, c. 23 § 1; id. at 74-75, c. 67 § 1.

Moreover, in 1965, when the Legislature amended NRS 106.240 to include more documents as potential triggers – deeds of trust in addition to mortgages, and

recorded extensions in addition to both – if it had intended to add notices of default, or recorded notices of acceleration, to the list it would surely have done so.

Importantly, although Nevada made sweeping changes to the laws governing foreclosures following the 2008 housing crisis – particularly with regard to the type and form of notice required to be given to borrowers – NRS 106.240 remained untouched, in much the same form in which it has existed since 1917. This history refutes any contention that the Nevada Legislature intended silent permission to allow notices of default – a statutory creation – to trigger the ten-year period under NRS 106.240, a statute that for more than a century has conspicuously omitted any mention of them.

At least one Court in the Eighth Judicial District has rejected the argument that other events can make the loan "wholly due" for NRS 106.240 purposes before the stated maturity date. That court reasoned that "[t]he plain meaning of [N.R.S. 106.240] states that the due date can be extended upon a recorded written document extending the terms. However, the statute does not say that the debt's due date can be accelerated." *Hofele v Deutsche Bank Nat'l Trust, Co*., No. 17-A-752664, 2018 WL 4760698, at *4 (Nev. Dist. Ct. Aug. 28, 2018).

Based on the above, the court below erred in ruling that "BNY Mellon and/or its predecessor made the loan wholly due by virtue of the Notice of Default recorded

on April 29, 2008," (*See*, Order, Appendix Vol. II, p. 410). The lower court's judgment should be reversed accordingly.

C. The Presumption Under NRS 106.240 Would Not Occur Until December 1, 2056, at the Earliest.

SFR's cause of action for Cancellation of Written Instrument asserts simply that "[b]etween January 1, 2008, but no later than April 24, 2008, the loan was accelerated via the NOD #1 making all sums under the Note wholly due and immediately payable." (*See*, Complaint, Appendix Vol. I, p. 82). SFR next counts forward ten years from 2008 and contends that "[b]y virtue of the acceleration, pursuant to NRS 106.240, the Deed of Trust was terminated/discharged as early as January 1, 2018, but no later than April 24, 2018. *Id*. at p. 83.

A plain reading of the statute simply does not support SFR's contention. This Court has weighed in on this issue in *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 16 P.3d 1074, (2001). In that case, this Court considered the effect of NRS 106.240 on notes executed on May 11, 1982, with a maturity date of May 14, 1984 - two years later. *Id*. at 92. In its ruling, this Court held: "it is undisputed that no written agreements to extend the notes and deeds of trust were ever executed or recorded. Therefore, under the plain language of the statute, the deeds of trust were conclusively presumed to have been satisfied in 1994, which is ten years after the notes became due." *Id*., at 94.

The *Pro-Max* decision holds that the notes were extinguished by operation of statute on May 14, 1994 – ten years after the maturity date stated in the terms of the note instruments. *Id*. Importantly, the statute and this Court's holding in *Pro-Max* both refer only to "written agreements to extend the maturity of the notes and deed of trust," but the statute is silent as to notice of acceleration outside the loan documents, and this Court did not make any ruling pertaining to notices of acceleration.

In *Pro-Max*, this Court noted, "[w]here the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Id*. at 95. Notably, NRS 106.240 provides for discharge of the debt and lien "at the expiration of 10 years after the debt secured by the mortgage or deed of trust *according to the terms thereof* … become wholly due." (*emphasis added*). A plain reading of the qualifier "according to the terms thereof" leads one to refer to the loan documents alone for terms setting the maturity date of the loan.

Just as importantly, the statute accounts for written extension of the maturity date, but does not refer to anything else outside of the terms of the note or deed of trust. Here, the deed of trust evidences a loan maturity date of December 1, 2046. (See, Deed of Trust, Appendix Vol. I, p. 12). BNYM did not execute, agree, or record anything to alter the terms of the loan instruments, or the maturity date set

forth therein. Therefore, according to the terms of the loan instruments, NRS 106.240 would not serve to extinguish the deed of trust until ten years after the maturity date as set forth in the note – December 1, 2056.

Because the court below looked to the date the first Notice of Default was recorded to determine the trigger date for NRS 106.240, summary judgment was improperly granted in favor of SFR and the judgment must be reversed.

D. The Notice of Default Did Not Make the Debt "Wholly Due" as Contemplated by NRS 106.240 Because the Deed of Trust Contained a Reinstatement Clause.

Under the terms of the Deed of Trust, the loan could not become "wholly due" by acceleration because the Borrowers retained the right to reinstate the Deed of Trust by making a partial payment. Specifically, the Borrower retained the "Right to Reinstate After Acceleration" by making a timely payment of just the past-due monthly payments without respect to acceleration, plus costs. (*See*, Deed of Trust, Appendix Vol. I, p. 22). Moreover, this right never terminated here. This right to reinstate means that an acceleration does not render the obligation "wholly due" under any reasonable meaning of that term, as the borrower can bring the loan current by making only a partial payment.

Under black-letter contract law, an obligation that becomes fully or wholly due cannot be satisfied or altered by partial rather than complete performance. *See generally*, Effect of Performance as Discharge and of Non-Performance as Breach,

RESTATEMENT (SECOND) OF CONTRACTS § 235 (June 2020). This means that for a loan to become "wholly due" as the term is commonly used, payment in full must be the borrower's only non-breaching option. Here, though, even after the notice of default was recorded in 2008, the borrower retained the right to bring the loan current by making a partial payment. (*See*, Deed of Trust, Appendix Vol. I, p. 22). In this case, that right has not yet expired, as BNYM has not completed its nonjudicial foreclosure. As a practical matter, the only time that all amounts owed are certain, and therefore "wholly due," is at maturity, and not following acceleration.

Perhaps most importantly, the Notice of Default itself contains the following plain, explicit language: "IN ADDITION, THE ENTIRE PRINCIPAL AMOUNT WILL BECOME DUE ON 12/01/2046 AS A RESULT OF THE MATURITY OF THE OBLIGATION ON THAT DATE." (*See*, Notice of Default, Appendix Vol. II, p. 253). This language flies in stark contrast to the District Court's judgment, which concludes that "BNY Mellon and/or its predecessor made the loan wholly due by virtue of the Notice of Default recorded on April 29, 2008." (*See,* Judgment, Appendix Vol. 2, p. 410)." In this case, the District Court's decision was clearly erroneous and the judgment must be reversed accordingly.

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III. THE DISTRICT COURT ERRED WHEN IT RULED THAT TWO LOAN MODIFICATION AGREEMENTS DID NOT REINSTATE THE LOAN AS AN INSTALLMENT LOAN.

A. The August 25, 2008 and March 13, 2009 Loan Modifications Cured the Default, Nullified Acceleration, and Reinstated the Loan.

In its July 22, 2020, Findings of Fact and Conclusions of Law and Judgment, the District Court found that an August 25, 2008 Loan Modification Agreement between the Borrowers and BNYM's predecessor-in-interest, Countrywide, was not effective because it was not signed by Countrywide. (*See,* Judgment, Appendix Vol. II, p. 408). With respect to a subsequent Loan Modification Agreement dated March 13, 2009, the District Court found that since there was no evidence that the Borrowers made a payment under the agreement, that it was ineffectual as well. Thus, the District Court found that neither modification agreement cured any default or reinstated the loan which would have re-set the ten-year time period set forth in NRS 106.240. *Id*. at 410. This finding was in error and must be reversed.

First, the evidence establishes that the 2008 Loan Modification Agreement was completed, signed by the Borrowers, and reinstated the loan. (*See*, Agreement, Appendix Vol. II, p. 377). To clear any doubt, one need look no further than the two recorded Notices of Default. The first Notice of Default, recorded on April 29, 2008, clearly states a default date of January 1, 2008. (*See*, Notice of Default, Appendix Vol. II, p. 253). The second Notice of Default, recorded on January 16,

2019, notes that the loan was current up to the payment which would have been due on May 1, 2009. (*See*, Notice of Breach and Default, Appendix Vol. 2, p. 257).

Clearly, either the August 25, 2008 modification or the March 13, 2009 modification – or both – were effective for the purposes of curing any default and reinstating the loan. If neither modification reinstated the loan, the last payment due date listed on the 2019 Notice of Default would not have changed from that listed on the 2008 Notice of Default. This fact is further supported by a September 17, 2013 Notice of Acceleration sent to the borrowers by BNYM's loan servicer, Specialized Loan Servicing LLC ("SLS"). In this letter, the borrowers were advised that "[t]he Note on the above-referenced loan is now in default as a result of your failure to pay the 05/01/09 payment and the payments due each month thereafter, as provided for in said Note." (*See*, Appendix Vol. II, p. 379). This letter clearly demonstrates that at least one of the loan modification cured the default and put the loan back in its original posture of installment payments. Subsequent correspondence from SLS to the Borrowers confirms that "[t]he date through which the account is paid is 04/01/2009," and that "The date of the last full payment was received on 07/09/2010." (*See*, May 12, 2016 Correspondence, Appendix Vol. II, p. 382).

As a result, even if this Court finds that the ten-year period set forth in NRS 106.240 is triggered by mere virtue of the lender recording a Notice of Default, the

evidence establishes that loan at issue here had been decelerated and reinstated subsequent to the recording date of April 29, 2008, and that the Borrowers had performed under the modifications up to and including July 9, 2010. Because the District Court found that the default had not been cured at any time after April 29, 2008, the decision was issued in error and must be reversed accordingly.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's granting of summary judgment in SFR's favor and instead find that BNYM's Deed of Trust remains a valid and enforceable lien on title. BNYM further respectfully requests that this Court find that SFR purchased – at most – a subpriority interest at the lien sale due to the valid pre-sale tender of the superpriority lien amount.

Alternatively, this Court should remand this matter back to the district court for further proceedings with respect to the HOA's lien sale conducted on September 19, 2012, and its effect on BNYM's deed of trust.

DATED: January 20th, 2021.

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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 brief has been prepared in Times New Roman and 14-point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 31(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 5,196 words.

FINALLY, I HEREBY CERTIFY that I have read this **APPELLANT'S OPENING 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)(1), which requires every assertion in the brief regarding matters in the record 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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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: January 20, 2021

ZBS LAW, LLP

By: /s/ J. Stephen Dolembo
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of ZBS LAW, LLP, and that on this _20th_ day of January, 2021, and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF**, through this Court's electronic filing system to the following:

(X) by serving the following parties electronically through CM/ECF as set forth below;

Docket Number and Case Title:	81604 - THE BANK OF NEW YORK MELLON VS. SFR INVS. POOL 1, LLC
Case Category	Civil Appeal
Information current as of:	Jan 20 2021 03:08 p.m.

Electronic notification will be sent to the following:

John Dolembo
Jacqueline Gilbert
Karen Hanks
Shadd Wade
Diana Ebron

Notification by traditional means must be sent to the following:

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/s/ Sara Hunsaker
Sara Hunsaker, an employee of
ZBS LAW, LLP