Case No. 81604

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.

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APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable DAVID JONES, District Judge
District Court Case No. A-19-790150-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

Respondent SFR Investments Pool 1, LLC ("SFR") is a privately held limited liability company and there is no publicly held company that owns 10% or more of SFR's stock.

In District Court, SFR was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana S. Ebron, Esq., Karen L. Hanks, Esq. and Jason G. Martinez, Esq. of Kim Gilbert Ebron. The same attorneys represent Appellant on appeal.

DATED: April 21, 2021.

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ROUTING STATEMENT

While SFR agrees this matter is retained by the Nevada Supreme Court Nevada Supreme Court because the issues presented raise "as a principal issue a question of first impression involving the United States or Nevada constitution or common law," SFR disagrees with the Bank's characterization of the principal issue as being whether the mere recording of a Notice of Default can render a loan "wholly due" for the purposes of NRS 106.240.[1] Contrary to the Bank's implication, it was the *specific language* in the Notice of Default—not the mere recording of the Notice—by which the Bank explicitly elected its contractual remedy of acceleration of the underlying debt under the deed of trust and made it "wholly due" *before* the execution of the Notice, or at the latest, on the *day of* its execution on April 29, 2008.[2]

[1] AOB at 1.

[2] 2AA_0253 (stating that the beneficiary "has declared and does hereby declare all sums secured thereby immediately due and payable….")

ISSUE PRESENTED

1. Whether the District court correctly determined the Bank triggered the ten-year clock under NRS 106.240 when, in 2008, it declared all sums secured by the deed of trust immediately due and payable?

2. Whether the district court correctly determined the Bank never reinstated the loan to an installment contract when the bank never executed a loan modification and the Bank admitted as much during argument?

STATEMENT OF THE CASE

SFR purchased 4946 Droubay Drive, Las Vegas, Nevada 89122 (the "Property") at an Association foreclosure sale on September 19, 2012, which extinguished the deed of trust as a matter of law.[3] The Bank of New York Mellon (the "Bank") waited nearly six years to file a quiet title claim in federal court[4] to challenge the effect of the association foreclosure sale. The Bank's quiet title claim against SFR was dismissed as time-barred on October 1, 2018, forever barring the Bank from challenging the Association sale and SFR's record title.[5] The Bank did not appeal.

Ignoring the effect of the sale, its failed quiet title claim, and the fact the deed of trust was no longer a valid encumbrance, the Bank proceeded with non-judicial foreclosure on the Property. To prevent the Bank from foreclosing, SFR filed a complaint asserting two claims: (1) cancellation of the Bank's two notices of default, based on a lack of authority to foreclose (no possession of note and date of pooling and servicing agreement); and (2) cancellation of deed of trust by operation of NRS 106.240.[6] The District Court granted SFR a temporary restraining order and

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[3] 2AA_0226 (Deed of Trust ("DOT")).

[4] U.S. District Court, District of Nevada, Case No. 2:18-cv-00599-APG-CWH ("USDC Case").

[5] 1AA_0073.

[6] 1AA_0081:22-84:23.

injunction,[7] and thereafter granted summary judgment in favor of SFR finding that by operation of NRS 106.240, the deed of trust was terminated.[8] This Court should affirm.

STATEMENT OF FACTS

I. THE BANK STARTED THE NRS 106.240 CLOCK, AND BY ITS OPERATION THE DEED OF TRUST WAS TERMINATED.

The deed of trust was recorded on November 22, 2006 and assigned a maturity date for the underlying debt of December 1, 2046.[9] However, the originating lender unilaterally drafted and inserted an acceleration clause in Section 22 of the deed of trust, which provides if borrower defaults, "Lender…may invoke the power of sale, including the right to accelerate full payment of the Note…"[10]

On April 29, 2008, exercising its remedies under the deed of trust, the Bank recorded a notice of default ("NOD #1") stating borrower failed to make installment payments on the underlying debt that became due on January 1, 2008 and after.[11] According to NOD #1, the Bank had exercised its right to accelerate the debt **prior** to the preparation and filing of the NOD #1—*i.e.*, sometime between the January 1,

[7] 1RA_0001 (Order on temporary restraining order and preliminary injunction).

[8] 2AA_0400-404.

[9] 2AA_2226-227.

[10] 2AA_0239 (Sec. 22).

[11] 2AA_0253.

2008 date of the missed payment and the April 29, 2008 NOD #1 execution and recording—declaring the beneficiary "**has declared** and does hereby declare all sums secured thereby immediately due and payable."[12] This acceleration triggered the ten-year period under NRS 106.240, making the trigger date April 29, 2008 at the *latest*.

The Bank even recorded a notice of sale on August 4, 2008.[13] But rather than foreclose or otherwise take action to protect its interest, the Bank simply did nothing. More importantly, the Bank did not even bother to attempt to decelerate the debt, and never recorded a rescission of NOD #1, distinguishing this case from this Court's unpublished *Glass* decision.[14] Having accelerated the underlying debt and making it "wholly due," the ten-year period under NRS 106.240 ran out on April 29, 2018 at the latest, terminating the deed of trust, and triggering the conclusive and unrebuttable presumption that the underlying debt was regularly satisfied and the lien discharged.

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[12] *Id*. (emphasis added).

[13] 2AA_0256.

[14] *See* AOB at 10 (*citing Glass v. Select Portfolio Servicing, Inc*., 466 P.3d 939, 2020 WL 3604042 (Nev. 2020) (unpublished)).

II. THE BANK'S PRIOR FAILED QUIET TITLE CLAIM AGAINST SFR.

On September 19, 2012, SFR purchased the Property at an association foreclosure sale.[15] Nearly six years after the sale, on April 4, 2018, the Bank filed a complaint for quiet title, declaratory relief, and unjust enrichment in the USDC Case seeking a declaration the sale did not extinguish the deed of trust.[16]

Because the complaint was filed more than five years after the September 19, 2012 foreclosure sale, SFR moved to dismiss the Bank's complaint based on the statute of limitations.[17] The court in the USDC Case granted SFR's motion. [18] The Bank did not appeal the decision in the USDC Case.

III. THE BANK'S IMPROPER ATTEMPT TO FORECLOSE.

On January 16, 2019, despite the fact the deed of trust was extinguished by the Association sale and the Bank was forever barred from challenging the effect of such sale based on the USDC Case's Order, and despite the fact the deed of trust terminated in April 2018 by operation of NRS 106.240, the Bank recorded a second notice default and election to sell ("NOD #2"), threatening to foreclose on the Property when it had no legal interest in it whatsoever.[19]

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[15] 2AA_0262.

[16] 1AA_0006.

[17] 1AA_0058.

[18] 1AA_0075:11-77:11.

[19] 2AA_0269.

On February 27, 2019, SFR filed its complaint alleging two causes of action against the Bank: (1) cancellation of instrument (as to the NOD #1, NOD #2) based on the Bank's lack of authority to foreclose (no possession of note and date of pooling and servicing agreement) and (2) cancellation of instrument (as to the deed of trust) based on NRS 106.240.[20]

The Bank and SFR filed cross-motions for summary judgment. In its Motion, SFR argued (1) the Bank failed to produce the original wet-ink promissory note and thus had no authority to foreclose, but also, (2) the operation of NRS 106.240 terminated the deed of trust as late as April 2018.[21]

The district court ruled in SFR's favor, finding *inter alia*, that NOD #1 made the loan wholly due at the latest on April 29, 2008, that the two modification agreements the Bank attempted to rely on showed no evidence the loan was ever decelerated because they were either not executed or not performed, that at no time after the April 29, 2008 NOD #1 did the borrowers cure the default or the Bank reinstate/decelerate the wholly due loan back to an installment loan, and therefore the deed of trust was terminated, expired and extinguished.[22]

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[20] 1AA_0079. The third claim related to NRS 107.028 was against Sables, LLC, which later filed a declaration of non-monetary status, and as a result it was no longer required to participate in the case pursuant to NRS 107.029. 2AA_402:19-20.

[21] 2AA_0207, 297:19-300:1, 348:11-351:4, 395:3-396:14.

[22] 2AA_0400.

SFR disputes any and all factual references to tender or any other issues or defenses raised by the Bank in the USDC Case.

STANDARD OF REVIEW

Questions of statutory construction are reviewed *de novo* by this Court.[23] Whether claim preclusion applies is a question of law reviewed de novo.[24]

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment in favor of SFR. The Bank accelerated the underlying debt thereby making the loan wholly due on or before April 29, 2008 (date of the NOD #1.) Thus, the ten-year period under NRS 106.240 ran on April 29, 2018, terminating the deed of trust and creating a conclusive presumption the underlying debt was satisfied and the lien discharged. The Bank's arguments that NRS 106.240 does not mean what it plainly says fail, and its attempt to usurp the Legislature by inserting the term "maturity date" into the statute also fails. Acceleration makes the underlying debt wholly due, and the Bank having never decelerated the debt, NRS 106.240 operated against the deed of trust and terminated it.

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[23] *Torres v. Goodyear Tire & Rubber Co*., 130 Nev. 22, 25, 317 P.3d 828, 830 (2014).

[24] *G.C. Wallace, Inc. v. Eighth Jud. Dist. Ct. of State, ex rel. Cty. of Clark*, 127 Nev. 701, 705, 262 P.3d 1135, 1137 (2011).

The Bank has no claims in this matter, so any attempt by the Bank to have this Court grant affirmative relief as to the validity of the Association sale, without either a claim or any cogent argument, is not only procedurally improper, but also substantively improper.

ARGUMENT

I. BY OPERATION OF NRS 106.240, THE DEED OF TRUST TERMINATED IN 2018.

A. NRS 106.240's Operation is Not Limited to Old or Obsolete Mortgages.

First, the Bank never raised this argument in the district court; it is waived and should not be entertained by this court. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (arguments not raised below are waived on appeal). Without waiving the waiver, SFR responds as follows.[25]

NRS 106.240 has been on the books since 1917, having only been slightly modified in 1965. Its 78 words are simple and straightforward, and leave no room for misinterpretation:

> [t]he lien…created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and

[25] 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*, 591 F.3d 1062, 1068 (9th Cir.2010) ("Norwood waived the defendants' waiver by

> discharged of record, shall at the expiration of 10 years after the debt secured by the…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.

NRS 106.240.

The statute produces three effects ten (10) years after the underlying debt becomes "wholly due": (1) the lien created by the deed of trust is "terminated;" (2) the lien is "conclusively presumed" to be "discharged," and (3) the underlying debt is "conclusively presumed" to have been "regularly satisfied." Nothing in the plain language of the statute invites the limits the Bank insists the Court re-write.

The Bank's attempt to couch NRS 106.240 as an ancient mortgage statute with a singular purpose is contrary to the plain language of NRS 106.240 and *Pro-Max*. *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 95, 16 P.3d 1074, 1077 (2001) ("We conclude that [NRS 106.240] is clear and unambiguous. That being the case, no further interpretation is required or permissible.") While one effect of NRS 106.240, includes clearing title after the lapse of the 10-year period without the need for judicial action to quiet title, this is not the only effect. *Pro-Max* makes this clear. In *Pro-Max*, the Pro-Max board "became aware of NRS 106.240 and its effect of extinguishing the notes." *Id.* at 1077. As a result, the Pro-Max board approved an

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addressing the claim on the merits *without also making a waiver argument*.") (Emphasis added).

offer to amend and reinstate the notes and waive the application of 106.240. *Id.* In other words, the deed of trust at issue in *Pro-Max* was neither obsolete nor ancient, and yet this Court still found NRS 106.240 operated to terminate the deed of trust.

Thus, the Bank's reliance on statutes from different states, which include completely different language, namely the word maturity, and operate in completely different manners, is unavailing. NRS 106.240 is truly unique. It ties the trigger date to when the loan is wholly due, which includes acceleration and maturity, but is not limited to maturity. NRS 106.240 terminates the deed of trust and creates an unrebuttable presumption of satisfaction and discharge, which has nothing to do with commencing an action, and nowhere uses the term maturity date.

B. Wholly Due Does Not Mean Only Maturity

The Bank's assertion that the Nevada Legislature could not have intended notices of default to trigger NRS 106.240 is meritless, and cuts against both *Coit* and *Glass*. *See First Am. Title Ins. Co. v. Coit*, 134 Nev. 938, 412 P.3d 1088, 2018 WL 1129810 at *1 n.1 (2018) (unpublished) (unpublished) ("we question the merit of that argument in light of the March 2010 notice of default that declared the loan due in full."); *Glass*, 466 P.3d at 2020 ("The parties do not dispute that the Notice of Default accelerated the loan and made the balance immediately due. Thus, this started the ten-year period present in NRS 106.240.")

The use of the term "wholly due" was purposeful, and includes acceleration by definition. Acceleration clauses in notes have been prevalent since the mid-1800s and had reached the U.S. Supreme Court before the turn of the century.[26] The Nevada Legislature was surely aware of them in 1917 when NRS 106.240 was first drafted and in 1965 when it was amended. Acceleration clauses making notes wholly due had reached this Court by 1866, long before the original passage of NRS 106.240, and regularly thereafter.[27] This Court addressed a mortgage with an acceleration clause in 1916, *before* the original passage of NRS 106.240, continued to do so prior to the 1965 amendments, and still does so today.[28] When NRS 106.240 first appeared in 1917, "wholly due" meant then what it means now, and clearly included accelerated debts.

This Court recently recognized a lender triggers the time under NRS 106.240 when it accelerates a loan balance via a notice of default. *See Glass, supra.*[29] Thus,

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[26] *See*, *e.g.*, *Building & Loan Ass'n of Dakota v. Price*, 169 U.S. 45, 48-49 (1897).

[27] *See*, *e.g.*, *McLane v. Abrams*, 2 Nev. 199, 203, 1866 WL 1616, at *1 (1866) (… and if said interest is not so paid, then the whole sum, principal and interest, shall become at once due, payable, and collectible."); *Winnemucca State Bank & Trust Co. v. Corbeil*, 178 P. 23, 23 (Nev. 1919) (same); *Robertson v. Robertson*, 180 P. 122, 122–23 (Nev. 1919) (same); *W.M. Barnett Bank v. Chiatovich*, 232 P. 206, 208 (Nev. 1925) (same).

[28] *See Southern Pac. Co. v. Miller*, 154 P. 929, 930 (Nev. 1916); *Cornell v. Sagouspe*, 295 P. 443, 444 (Nev. 1931); *Lubritz v. Circus Circus Hotels, Inc.*, 693 P.2d 1261, 1262 (Nev. 1985)

[29] To the extent the Bank tries to distinguish this fact based on the parties stipulation in that case, it stands to reason if a notice of default could not accelerate the loan and

irrespective of the statute's intent the only relevant question here is, did the Bank trigger the ten-year period by way of its notice of default recorded on April 29, 2008, and the answer is yes.

While it is true, Chapter 106 does not define "wholly due," the words are plain and the meaning clear; "wholly due" means the entire debt is payable now. *See Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) (noting where a law's language is "plain and its meaning clear, the courts will apply that plain meaning"). But the Bank is wrong to argue it can only mean "maturity." For one, as this Court recognized, "[a] court has only the 'right and the duty…to interpret the [legislative document' not 'to rewrite the words." *Doe Dancer I v. La Fuente, Inc*., 137 Nev. Adv. Op. 3, 481 P.3d 860, 872 ((*quoting* Edward H. Levi, *The Nature of Judicial Reasoning*, 32 U. Chi. L. Rev. 395, 404 (1965)). *See also, Zenor v. State, Dep't of Transp.*, 134 Nev. 109, 111, 412 P.3d 28, 30 (2018). Additionally, to change the words "wholly due" to "maturity" violates the canon of construction '*expressio unius est exclusion alterius*,' the expression of one thing is the exclusion of another."

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trigger NRS 106.240 as a matter of law, the Court would have said as much, and the parties could not have stipulated around law. The argument is also directly contrary to NRS 107.080(3), which provides a lender "[t]he notice of default and election to sell…may contain a notice of intent to declare the entire unpaid balance due if acceleration is permitted by the obligation secured by the deed of trust."

Thomas v. Nev. Yellow Cab Corp., 130 Nev. 484, 488, 327 P.3d 518, 521 (2014) (*quoting Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967)).

Most importantly, this Court has already determined NRS 106.240 is "clear and unambiguous," and "no further interpretation is required or permissible." *Pro-Max,* 16 P.3d at 1077. As this Court noted in *Pro-Max*, where a statute is plain and unambiguous, "there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Id.* (*quoting Erwin v. State of Nevada*, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995)).

Simply put, this Court cannot insert the word "maturity" into the statute; the Legislature chose a different term, "wholly due." If the Legislature wanted to use "maturity," as did statutes in other jurisdictions,[30] it would have. While the phrase

[30] **Massachusetts** Mass. Gen. Laws ch. 260, § 33 (providing that no proceeding or action permitted 5 years after maturity date listed in the mortgage, or if date unascertainable, 35 years from recording), while **California**'s Cal. Civ. Code § 880.020 limits a proceeding or action on lien created by mortgage allowed 10 years after maturity date, or if unascertainable, 60 years after recording of deed of trust. *See also*, *e.g.*, **Conn**. General Statutes § 49-13 (setting time for mortgagor to commence action to have mortgage declared null, void, and discharged based on "the expiration of the time limited in the mortgage for the full performance of the conditions thereof ….," *i.e.*, maturity date); **Iowa** Code Sec. 614.21 (no action to foreclose or enforce can be maintained 20 years after recording the deed of trust or 10 years after maturity date); **Missouri** Rev. Stat. § 516.150 (no action under power of sale can be maintained after expiration of statute of limitation, or 20 years after the maturity date); **Rhode Island** General Law 1956 § 34-26-7 (no action for power of sale, entry, or possession 35 years after recording or mortgage or 5 years after maturity date); Code of **Virginia**, Section 5827 (1922) ("No deed of trust or mortgage … shall be enforced after twenty years from the time when the obligation last maturing thereby secured shall have become due and payable."); **New Jersey**

"wholly due" can include maturity, it does not mean only maturity. But this is what the Bank postures. Acceleration of a loan, ordinarily payable in installments, is not a foreign concept. *See 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."). The deed of trust at play here (specifically Section 22) includes acceleration as a remedy should the borrower default. (2AA_0239.) Here, the borrower defaulted on January 1, 2008, and as a result, the Bank, per the terms of the deed of trust exercised its remedy of acceleration making the debt immediately due and payable. *See generally, Boyes v. Valley Bank of Nevada*, 701 P.2d 1008, 1009-10 (Nev. 1985) ("Valley Bank corresponded with the Boyeses and demanded that they pay in full their promissory note in accordance with the 'due-on-sale' clause contained in paragraph 17 of the deed of trust.")

Statutes Annotated § 2A:50-56.1 (foreclosure actions limited to "[s]ix years from the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note, bond, or other obligation secured by the mortgage."); **Fla**. Stat. § 95.281(1) (lien of mortgage terminates 5 years after maturity date specified in deed of trust, or if unascertainable, 20 years after date of mortgage); **Maryland** Code § 7-106(c) (presumption of payment of mortgage 12 years after last payment date stated in instrument or maturity date, or if no such date can be ascertained, 40 years after recording, and lien terminates if no action is brought to enforce in these time periods).

Thus, the question here is not when was the loan set to mature by its normal terms, but rather did the Bank accelerate the due date thereby making the loan wholly due and thus triggering the ten-year period under NRS 106.240. In the present case, the Bank exercised its remedy of acceleration under the deed of trust, when it (or its predecessor in interest) recorded a NOD # 1 against the Property on April 29, 2008. NOD #1 states the beneficiary "has declared and does hereby declare all sums secured thereby immediately due and payable…" (2AA_0253.) Therefore "according to the terms [of the deed of trust]" the Bank made the loan "wholly due." *See* NRS 106.240.

C. The Term Wholly Due Includes Acceleration

The Bank's argument that NRS 106.240 is silent as to acceleration likewise misses the point. Acceleration is just one means by which a lender can make the debt "wholly due." It is not the only means, but neither is maturity. The Bank's argument that only a deed of trust or any written extension thereof are the only two written instruments that matter, equally misses the point. The notice of default is just the conduit by which the Bank memorialized and/or actually exercised the remedy of acceleration; a remedy/term which stems from the deed of trust itself. When the Bank claims the "terms thereof" only means the maturity date in the deed of trust, the Bank asks this Court to ignore all the other terms of the deed of trust, namely the acceleration remedy at Section 22. Section 22 of the deed of trust allows the lender

to accelerate the loan maturity date when the borrower defaults, thus when the borrower defaulted here, and the Bank exercised its remedy under Section 22 and made the debt immediately due and payable, by the "terms" of the DOT. This is precisely what the Bank states in NOD #1, *i.e.*, that it "has declared and does hereby declare all sums secured thereby immediately due and payable." This is entirely consistent with NRS 106.240.

D. NRS 107.080 Has No Bearing on NRS 106.240.

Equally unavailing is the Bank's argument that NRS 107.080—enacted roughly ten years *after* to NRS 106.240—somehow proves "wholly due" does not include acceleration. Apart from its chronological absurdity, the argument fails in several ways.

First, acceleration is a contractual remedy provided for in the Bank's deed of trust. According to the deed of trust, notice of acceleration and acceleration can be invoked *before* the filing of a notice of default,[31] or the lender can use the notice of default to give notice of its intent to accelerate for the first time.[32] Here, the language

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[31] 2AA_0237, 239 (Sections 18 and 22 of the deed of trust).

[32] *See also* NRS 107.080(3) which provides "the notice of default… **may** contain a notice of intent to declare the entire unpaid balance due if acceleration is permitted by the obligation secured by the deed of trust.") If a bank chooses to use a notice of default to give the first notice of its intent to accelerate, it must give the borrower 35 days set forth in NRS 107.080(2)(a)(2) to pay any deficiency and costs before acceleration. *See* NRS 107.080(3).

in NOD #1 states the beneficiary under the DOT "**has declared** and does hereby declare all sums secured thereby immediately due and payable."[33] Thus, here, the Bank accelerated the debt *prior* to the filing of the notice of default, and memorialized that prior acceleration in the language of NOD #1 itself. And even ignoring the plain meaning of the "has declared" language, the latest acceleration took place was with the April 29, 2008 execution and recording of the NOD #1.[34]

To be clear, SFR did not and does not argue NOD #1, in and of itself, accelerated the loan. Instead, NOD #1 is the document that establishes, by the "has declared" (past tense) language contained therein, that the Bank had *previously* accelerated the loan. This is permitted by the terms of the deed of trust. Section 22 simply states "Lender shall give notice to Borrower prior to acceleration…."[35]

Second, even if the "has declared" language is ignored, at a minimum NOD #1 expresses an intent to accelerate, something NRS 107.080(3) expressly permits so long as the terms of the deed of trust permit acceleration.[36] Again, NOD #1 states, "beneficiary…**does hereby declare** all sums secured thereby immediately due and payable."[37] Thus, at the *latest*, this language serves as the Bank's notice of intent to

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[33] 2AA_0253.

[34] Calculating 35 days from that date, acceleration occurred on June 3, 2008.

[35] 2AA_0239.

[36] *See* n.32, *supra*.

[37] 2AA_0253.

accelerate and under this scenario, NRS 107.080(3) indicates acceleration cannot occur until the 35-day period to cure the deficiency has passed, *i.e.*, June 3, 2008, making the debt wholly due on June 3, 2008.

The entire underlying argument of the Bank's brief, nonsensical as it may be, is that acceleration is irrelevant, that notices of default and acceleration do not and cannot make a loan "wholly due," and that a loan cannot be wholly due until the maturity date listed on a deed of trust. Recall, according to the Bank, "the loan could not become 'wholly due' by acceleration…,"[38] that "the only time that all amounts owed are certain, and therefore 'wholly due,' is at maturity, and not following acceleration,"[39] and that the Nevada legislature did not intend acceleration to trigger NRS 106.240.[40]

These arguments cannot be taken seriously, and the Bank's reference to the clearly erroneous *Hofele* district court decision proves its position is meritless.[41] In contrast, in *Coit*, this Court confirmed that acceleration of a note referenced in a

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[38] AOB at 18.

[39] AOB at 19.

[40] AOB at 13 ("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 …"); 15 ("if [the Legislature] had intended to add notices of default, or recorded notices of acceleration, to the list [of triggers to NRS 106.240] it would surely have done so."); 18 ("the loan could not become 'wholly due' by acceleration …");

[41] *See* AOB at 15 (*citing Hofele v Deutsche Bank Nat'l Trust, Co*., No. 17-A-752664, 2018 WL 4760698, at *4 (Nev. Dist. Ct. Aug. 28, 2018)).

notice of default made the debt wholly due for the purposes of NRS 106.240. [42] In *Coit*, the bank tried to argue exactly what the Bank argues here, *i.e.*, that the trigger date under 106.240 was the maturity date.[43] This Court rejected this notion, stating "we question the merit of that argument in light of the March 2010 notice of default that declared the loan due in full. *Cf. Clayton*, 107 Nev. at 470, 813 P.2d at 999 ('[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' (emphasis added))".[44]

Yet despite these absurd arguments, the Bank used its notices of default and sale to tell the public and the borrower that it was intending to *foreclose on the entire amount due under the deed of trust*.[45] Apart from the fact that the Bank's current arguments represent a flagrant misrepresentation of the publicly recorded documents and run afoul of *Clayton* and *Coit*, threatening a borrower with foreclosure of the *entire amount due under the deed of trust* when in fact the Bank is now claiming the language in NOD #1 did not seek to foreclose on the full amount due under the deed

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[42] *See First Am. Title Ins. Co. v. Coit*, 134 Nev. 938, 412 P.3d 1088 at *1 n.1 (2018) (unpublished) ("*Coit*").

[43] *See* Appellants' Reply Brief on Appeal at 8, *Coit*, 412 P.3d 1088, 2017 WL 3184376 (filed June 26, 2017).

[44] *Coit*, 2018 WL 1129810 at 1 n.1.

[45] 2AA_253, 256, 269.

of trust—but rather only the installments past due at that time—appears to violate federal law under the Dodd-Frank Wall Street Reform and Consumer Protection Act.[46]

Thus, the operative *characteristic and purpose* of a statute of repose is the legislature's decision to destroy the underlying right. After NRS 106.240's ten-year period runs, the lien is terminated and discharged, and the underlying debt is satisfied. The Nevada Legislature intended it as an absolute bar, not subject to any exceptions/limitations whatsoever.

II. REINSTATEMENT, WHEN IT DOES NOT HAPPEN, HAS NO EFFECT ON THE LOAN BECOMING WHOLLY DUE.

The Bank's arguments concerning "reinstatement" were not raised below, are waived, and are meritless.[47] The argument is based on the notion that the right to reinstatement and to cure acceleration is indefinite, which is demonstrably false.[48] By the terms of the deed of trust, and basic logic and common sense, the right to

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[46] *See* 12 U.S.C. § 5336(a)(1)(B) ("It shall be unlawful … to engage in any unfair, deceptive, or abusive act or practice."); *See also* CFPB Consumer Laws and Regulations, Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) at 5-6 for list of deceptive acts or practices that appear to be covered by the Bank's representations herein, available at:

https://files.consumerfinance.gov/f/documents/102012_cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf (last accessed April 15, 2021)

[47] AOB at 18-19 (Sec. II(D)); *see* note 25, *supra*, and accompanying text.

[48] 1AA_22-24 (deed of trust Sections 19 & 22, setting time limits on right to reinstatement and to cure default.)

reinstatement does not alter the fact of *prior* acceleration or that *prior* acceleration renders the debt wholly due.[49] This is also why the Bank's citation to the Restatement is inapposite. For one, this section of the Restatement has nothing to do with acceleration and only discusses how an obligation cannot be partially satisfied.

Reinstatement contemplates acceleration. Put differently, if the loan can never be made wholly due, then what exactly is a borrower reinstating? Reinstatement refers to placing the loan *back* into an installment contract as opposed to the whole loan being due. But just because the borrower has a limited window to reinstate the loan and avoid the loan *remaining* wholly due, does not mean acceleration did not take place. One of the deed of trust's conditions for such payment destroys the Bank's argument—*i.e.*, that the borrower "pays Lender all sums which would be due under this Security Instrument and the Note **as if no acceleration had occurred**."[50] Thus, the reinstatement clause confirms that if the right to reinstatement exists, acceleration has already occurred in the first instance.

Additionally, NOD #1 confirms that ***before*** it was recorded, the Bank had already given the borrower 30-days' notice of default and right to cure and reinstate, but the borrower failed to cure or exercise the remedy of reinstatement, and the Bank fulfilled the other conditions under the deed of trust to accelerate the underlying debt

[49] *Id*. (deed of trust Sections 18, 19, & 22).

[50] 1AA_0022.

in full and did in fact accelerate the debt.[51] This is why the NOD #1 states the beneficiary "**has declared** and does hereby declare all sums secured thereby immediately due and payable."—*i.e.*, *already* fully accelerated in compliance with all applicable law and the deed of trust.[52] To accept the Bank's argument, is to accept the Bank knowingly made a false statement in a recorded document. This recitation of a **prior fully-consummated** acceleration is conclusively presumed to be true, and is unrebuttable.[53]

Similarly, the Bank's argument that even *after* the notice of default was issued, "the borrower retained the right to bring the loan current by making a partial payment…. In this case, that right has not yet expired," is likewise demonstrably false.[54] As noted above, NOD #1 states all the conditions required for acceleration had **already** been fulfilled by the time the NOD #1 was prepared and recorded.[55] The absurdity of the Bank's argument is further highlighted by the language in NOD #1 that the agent for the beneficiary "has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby."[56] Those

[51] 1AA_0024 (Sec. 22).

[52] 2AA_0253.

[53] *See* NRS 47.240(2) (conclusive presumption of facts recited).

[54] AOB at 19.

[55] 2AA_0253

[56] *Id*.

"obligations" are the full amount of the "obligations" secured by the deed of trust mentioned in the same sentence, *i.e.*, the entire amount due under the deed of trust.[57] Otherwise, again, the Bank is taking the absurd position that it is only foreclosing on missed installments, which the Bank has never asserted, and contradicts the plain language of NOD #1 itself.

Finally, the language from NOD #1 stating that "in addition, the entire principal amount will become due as a result of the maturity of the obligation on the maturity date" does not change the fact the Bank made the loan wholly due. The quoted language simply supplements the statement of the breach. It has nothing to do with acceleration noted in the subsequent paragraph. It merely states that in addition to the borrower being liable for the past due installments that created the breach, the borrower is also liable for the full amount the deed of trust secures at the maturity date.[58] This has no effect on, and has nothing to do with the clear and plain language of acceleration in the subsequent paragraph stating the Bank "has declared and does hereby declare" all sums due under the deed of trust. But the Bank's argument highlights the absurdity of its position; *that it cannot accelerate the debt and foreclose on the entire debt*.

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[57] *Id*.

[58] 2AA_0252.

III. THE BANK'S ARGUMENTS CONCERNING THE UNEXECUTED, NON-PERFORMED LOAN MODIFICATION AGREEMENTS FAIL.

The Bank claims that two loan modification agreements defeat the operation of NRS 106.240.[59] The argument was correctly rejected by the district court.

First, the Bank failed to offer any valid loan modification agreements that show the accelerated loan was decelerated. The district court correctly found the August 23, 2008 document was never signed by Countrywide.[60] Likewise, the Bank never produced *any* version of the purported March 2009 modification signed by Countrywide, and nowhere asserts that it did. At best, an unsigned agreement shows "nothing more than that the parties considered modifying the contract,"[61] and there is no evidence in any modification in the record that shows *an unconditional promise by the Bank that the loan would in fact be modified*.[62]

Worse still, at the November 17, 2020 motions hearing, counsel for the Bank made stunning admissions and obfuscations. First, he admitted "there were two separate efforts at loan modification **that did not go through**," but alternatively and

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[59] AOB at 20-22.

[60] 2AA_401:24-25, 377 (unsigned purported modification agreement).

[61] *United States v. Rollinson*, 629 F. Supp. 581, 586 (D.D.C. 1986), aff'd, 866 F.2d 1463 (D.C. Cir. 1989).

[62] *See*, *e.g.*, *Ellis v. Chase Home Fin., LLC*, No. 14-11186, 2014 WL 7184457, at *7 (E.D. Mich. Dec. 16, 2014) (finding purported modification invalid based on lack of signature from the bank and its lack of any unconditional promise in the agreement that the loan would in fact be modified.)

contradictory refers to these same purported modifications as "final" or "finalized."[63] He even referred to the August 2008 purported modification as "final" and misrepresented to the Court that it was "a signed contract between two parties, between my client and the borrowers,"[64] knowing full well that the purported agreement he placed in the record prior to the hearing was NEVER signed by Countrywide, and he never produced any purported modification whatsoever signed by Countrywide before or since.[65] Bank's counsel even referred to the August 2008 purported modification as "fully executed" in briefing, while knowing that it was never signed by Countrywide.[66] It appears that these misrepresentations had an effect on the district court's factual findings and ruling.

Second, the Bank never produced a single document showing an actual payment of a single purported installment under either alleged modification agreement, or that either alleged agreement was ever consummated via consideration of any kind. There is certainly no evidence of any consideration in the form of payments such that an enforceable contract for modification ever existed between

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[63] *See* RA_0020:7-12(emphasis added), 20:19-20.

[64] RA_20:19-21:10 ("This particular loan modification that I attached that went through on August 25th, 2008 was a finalized loan modification. *** It's a signed contract between two parties, between my client and the borrowers. *** It's an effective, valid contract.")

[65] 2AA_0377.

[66] 2AA_0359:13-16, 294.

the borrowers and Countrywide.[67] The unsigned purported August 2008 modification states the monthly payment would be changed to $1,825.48 if the agreement was consummated, and it appears the first scheduled payment date was September 1, 2008.[68] Yet the Bank never produced any document showing that an installment payment in that amount was ever made by the borrowers after the purported August 2008 modification. Similarly, the Bank never produced any evidence in the record of what the new installment amount under the purported March 2009 modification was, and never produced any document showing the payment of any such installment in the alleged new amount.

In short, the Bank did not and does not point to any payment history or any actual payment or payment amounts that show the borrowers made any payments after August 2008 toward *any* purported modification agreement, and have not produced any purported modification agreement signed by Countrywide.

Third, while the two purported modification agreements—neither of which were signed by Countrywide or any predecessor of the Bank—have never been

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[67] *Cain v. Price*, 134 Nev. 193, 195, 415 P.3d 25, 28 (2018) (to be legally enforceable, a contract must be supported by consideration); *see also Dolge v. Masek*, 70 Nev. 314, 268 P.2d 919 (1954) (even if unsigned writing might have reflected the oral understanding of the parties, the agreement was not enforceable since the parties clearly contemplated consummation of a written agreement since real property interests could not be released otherwise).

[68] 2AA_0376.

proven to be legally valid or anything more than mere proposals, the fact that the Bank proffered a purported modification agreement from March 2009, mere months after the August 2008 purported agreement, demonstrates at the very least that the August 2008 agreement was never effective.

Fourth, the Bank's argument that the date installments allegedly became due as made in NOD #1 vs. NOD #2 somehow shows deceleration is meritless.[69] As SFR noted in briefing below, and the Bank did not dispute, the purported March 2009 agreement—of which the Bank never produced a copy signed by both parties—states the first installment would have been due May 1, 2009. But the borrowers obviously never performed as evidenced by the subsequent NOD #2 recorded on January 6, 2019 which indicates a default date of May 1, 2009.[70] This shows no payments were made whatsoever.

And even more to the point, NOD #2 clearly demonstrates that neither of the purported prior loan modifications took effect and that no payments were made under them, and in fact no payments were made by the borrowers since the April 29, 2008 NOD #1. If the March 2009 purported modification agreement uses the same language as the August 2008 agreement, *i.e.*, that the agreement "**amends and**

[69] AOB at 20-21.

[70] 2AA_0395:15-18; 2AA_0269.

supplements" the November 17, 2006 deed of trust,[71] then NOD #2 would have referred to the deed of trust as amended and/or supplemented by one or both of the purported prior modification agreements of August 2008 or March 2009. But NOD #2 has no such language, and instead simply refers to the original November 17, 2006 deed of trust with no mention whatsoever of any modifications, amendments, or supplements to it.[72]

As the Bank itself noted in briefing below, "the January 16, 2019 Notice of Default … also states that **the current amount in default <u>includes</u>** '[t]he monthly installment which became due on 5/1/2009….'"[73] Because the loan was in fact accelerated by the time of NOD #1, it is simply a fact that the full past due amount at the time of NOD #2 *includes* a May 1, 2009 installment, and indeed all other installments that were due and unpaid under the deed of trust.[74] The reference to the May 1, 2009 installment is not evidence of deceleration.

This Court should affirm the District Court's rejection of these unsigned, non-performed modification agreements. At worst, an issue of fact exists.

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[71] 2AA_0376.

[72] 2AA_0385.

[73] 2AA_0370:20-23.

[74] The note makes payments due on the first of each month. 2AA_0365.

IV. THE ASSOCIATION SALE IS NOT AT ISSUE IN THIS CASE.

A. The Bank has Zero Claims in this Matter.

The Bank has no claims in this action, let alone any claims related to the Association sale. Nor could it under the principles of *res judicata*, as discussed more fully below. But without any cogent argument as to its non-existent claim, the Bank asks this Court in its conclusion to grant judgment in favor of the Bank and find the deed of trust "remains a valid and enforceable lien on title."[75] This the Court cannot do.[76] The Bank goes one step farther and even asks this Court to "find SFR purchased – at most a subpriority interest at the sale due to the valid pre-sale tender of the superpriority lien amount."[77] This the Court most definitely cannot do. From a pure procedural perspective, it is axiomatic before a court can grant a party affirmative declaratory relief like that requested by the Bank in its conclusion, there must be a substantive claim to which that relief can be linked.

A "cause of action" has been defined as the "fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial

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[75] AOB at 22.

[76] Irrespective of the missing claim, the Court cannot even do this even if it overturns the district court's ruling as to NRS 106.240 because SFR had a second claim related to the Bank's lack of authority to foreclose which was separate and distinct from the 106.240 issue. Thus, at the very least, this Court should remand for further proceedings as to that claim.

[77] AOB at 22.

relief." *See Meech v. Hillhaven West Inc.,* 776 P.2d 488, 497 (Mont. 1989) (*quoting State v. Preston*, 181 N.E.2d 31, 36 (Ohio 1962)) (A "cause of action" has been defined as the "fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief."). *See also*, *Velazquez v. Mortg. Elec. Registration Sys.*, 2011 WL 1599595, at *3 (D. Nev. Apr. 27, 2011) (holding that a request for one particular remedy such as "declaratory relief is not a separate substantive claim for relief"). But there is no claim before this Court that raises a challenge to the Association foreclosure sale, either from the Bank or from SFR. Thus, from a pure procedural standpoint the Bank's requested relief, unsupported by any cogent argument, to the extent it seeks a declaration the deed of trust was not extinguished by the Association foreclosure sale, is improper as there is no claim to tie such relief to. But even more than that, any attempt by the Bank to insert this issue into this case is barred by *res judicata*.

B. Under the Doctrine of *res judicata* the Bank is Precluded from Challenging the Association Foreclosure Sale.

Again, without any cogent argument, and without any claim, the Bank asks this Court to adjudicate the validity of the Association sale or remand for further proceedings on this non-existent claim.[78] But the Bank already brought its quiet title

[78] The Bank also attempted to resurrect is prior failed quiet title action from the USDC Case in its summary judgment motion below. Like here, SFR argued below that the Bank had no claims, and that it was both procedurally and substantively

claim challenging the Association foreclosure sale in the USDC Case. Said action was dismissed as barred by the statute of limitations, and under principles of *res judicata*, the Bank is barred from raising any claims or issues related to the Association sale below or here.

The Bank attempted the same chicanery below in its summary judgment motion, but like here, SFR argued the Bank had no claims, and that it was both procedurally and substantively improper for the district court to consider anything to do with the Association sale.[79] The district court never reached the issue, instead granting relief to SFR based on NRS 106.240. This Court should do the same, or at a minimum find *res judicata* prohibits any attempt by the Bank to resurrect its already adjudicated quiet title claim as to the Association sale.

C. Under Issue Preclusion, the Bank Cannot Raise any Issues Regarding the Validity of the Association Sale in This Case.

There are two different species of *res judicata*: issue preclusion and claim preclusion. Issue preclusion, also known as collateral estoppel, is implicated when

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improper for the district court to consider anything to do with the Association sale. attempt to resurrect its dead DOT and get a second bite at the apple of its failed attempt to usurp SFR's title and ownership of the Property and challenge the Association sale was barred by res judicata. (2AA_396:16-398:11, 296:8-14, 296:23-27; 300:9-23, 300:24-302:28, 347:12-17, 351:5-353:8. The district court never reached the issue, instead granting relief to SFR based on NRS 106.240.

[79] 2AA_396:16-398:11, 296:8-14, 296:23-27; 300:9-23, 300:24-302:28, 347:12-17, 351:5-353:8.

one or more of the parties to the earlier suit are involved in a subsequent suit on a different claim. *See University of Nevada v. Tarkanian*, 110 Nev. 581, 599, 879 P.2d 1180, 1191-92 (1994). Under issue preclusion, the following four-party test applies:

> "(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; ... (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation"; and (4) the issue was actually and necessarily litigated.

Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008).

First, there is no doubt, in the USDC Case the Bank asked the Court to adjudicate the validity of the sale, and as the basis for challenging the sale, the Bank raised the issue of tender. In this case, the Bank seeks to do the same thing, albeit having never pled a claim, and never making a cogent argument. Again, the Bank only attempts to inject the issue of the Association sale into this case; it is not an issue SFR included as part of any of its claims.

Second, the ruling in the prior federal action was on the merits. The federal court dismissed the Bank's claims as time-barred.[80] While the underlying merits of the substantive claim have not been adjudicated, the running of the statute of limitations precludes testing whether the claim would otherwise have been valid, and thus for *res judicata* purposes a dismissal on statute of limitations is treated as a

[80] 1AA_0075-77.

dismissal on the merits.[81] In fact, the Restatement has abandoned the "on the merits" terminology because, as it explains, "[i]ncreasingly ... judgments not passing directly on the substance of the claim have come to operate as a bar." Restatement (Second) of Judgments § 19 cmt. a (1982); *see also* 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4441 (1981); *EFCO Corp. v. U.W. Marx, Inc.,* 124 F.3d 394, 398 (2nd Cir.1997).

Third, the judgment in the USDC Case was against the Bank.

Fourth, for all the same reasons the dismissal was on the merit, the issue was actually and necessarily litigated.

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[81] *See Ellingson v. Burlington Northern Inc.,* 653 F.2d 1327, 1330 n.3 (9th Cir.1981) ("[a] judgment based on the statute of limitations is 'on the merits' "); *see also Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.,* 185 F.2d 196, 205 (9th Cir.1950); *see also Plaut v. Spendthrift Farm*, 514 U.S. 211, 228 (1995) ("The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits."); *See also Bissell v. Coll. Dev. Co*., 89 Nev. 558, 560, 517 P.2d 185, 187 (1973) (holding that prior ruling in *Bissell v. College Development Co*., 86 Nev. 404, 469 P.2d 705 (1970) dismissing quite title action based on time bar was res judicata for all purposes in subsequent action addressing title to the property, holding, "[t]he several issues presented in this appeal resolve into one, namely whether res judicata bars any further litigation over the title to the property. Our ruling is that res judicata applies and therefore it becomes unnecessary to discuss other raised issues.")

In short, as all four elements of issue preclusion are satisfied, the Bank is precluded from having this Court adjudicate any challenge to the Association foreclosure sale, including tender.

CONCLUSION

For the reasons set forth above, the district court's ruling should be affirmed. Under no circumstance, however, can this Court grant affirmative relief to the Bank by way of ruling the deed of trust is still a valid encumbrance based on its alleged tender or that SFR took the property subject to the deed of trust based on an alleged tender. Any claims/issues related to the Association sale are barred by *res judicata*. Thus, the presumption of extinguishment remains unrebutted and will remain that way forever.

DATED: April 21, 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, is 33 pages long, and contains 8,193 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: April 21, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 21st day of April, 2021. Electronic service of the foregoing **Respondent's Answering Brief** shall be made in accordance with the Master Service List.

DATED: April 21, 2021.

/s/Alexander Loglia
An employee of KIM GILBERT EBRON