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 SUPPLEMENTAL REPLY BRIEF

Respectfully Submitted by:
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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.

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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 10th day of June, 2022

ZBS LAW, LLP

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I. CLAIM PRECLUSION DOES NOT PREVENT BNYM FROM ASSERTING ITS AFFIRMATIVE DEFENSE OF TENDER.

In its Supplemental Brief, SFR concedes that its claims for cancellation of instrument could not have been raised in the Federal Court Action "because they were not ripe at that time." Supp. Brief at p. 5. SFR continues by noting that "the issue of whether NRS 106.240 operated was not decided by the federal court. Thus, without question, neither issue nor claim preclusion applies to SFR's claims." *Id*. Despite these concessions, however, SFR argues that BNYM's tender defense is somehow precluded. It is not.

In the Federal Court Action, BNYM argued that its lien remained valid and enforceable following the HOA's foreclosure because its loan servicer issued a valid tender of the HOA's superpriority lien amount prior to SFR taking title; the court made no finding whatsoever regarding the impact of the HOA's foreclosure on BNYM's deed of trust.

Under the doctrine of claim preclusion, this Court set forth the following three-part test for determining whether claim preclusion should apply: 1) The parties or their privies are the same; 2) the final judgment is valid, and 3) the subsequent action is based on the same claim or any part of them that were or could have been brought in the first case. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 712-713 (2008).

Here, SFR's claim sounds exclusively in NRS 106.240, and this claim was

clearly not asserted in the Federal Court Action by BNYM. As such, since BNYM did not file a claim in the Federal Court Action contending that its lien was no longer valid and enforceable pursuant to NRS 106.240, the third prong of the *Five Star* test is not met, and the doctrine of claim preclusion simply cannot bar BNYM from defending against SFR's lawsuit.

II. ISSUE PRECLUSION DOES NOT APPLY BECAUSE THESE ISSUES WERE NOT LITIGATED IN THE FEDERAL COURT ACTION.

The general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid, final judgment, the determination is conclusive in a subsequent action between the parties. *Executive Mgmt v. Ticor Title Ins. Co.,* 114 Nev. 823, 835, 963 P.2d 465, 473. As noted above, SFR concedes that "…the issue of whether NRS 106.240 operated was not decided by the federal court. Supp. Brief at p. 5. Since this particular issue was not actually and necessarily litigated, SFR's argument that BNYM is handcuffed from raising any defenses whatsoever in the lower court proceedings is illogical at best.

In the Federal Court Action, BNYM asserted a single claim for quiet title/declaratory relief, which "does not require any particular elements." *Res. Grp., LLC, as Tr. of E. Sunset Rd. Tr. v. Nevada Ass'n Servs., Inc*., 135 Nev. 48, 51 (2019) (en banc). In this case, SFR asserted two claims against BNYM, both reliant upon NRS 106.240, neither of which were raised or litigated in the Federal

Court Action. For that reason alone, issue preclusion does not apply here to either SFR's claims or BNYM's defenses. In ruling otherwise, the district court essentially ruled that BNYM could not argue the plain fact that the HOA's foreclosure did not contain a superpriority amount. This ruling was erroneous and must be reversed.

III. THE DEFENSE OF TENDER REMAINS VALID, AS IS BNYM'S DEED OF TRUST.

As noted in prior briefing, BNYM asserted the affirmative defense of tender in its Answer to SFR's Complaint, and this Court has acknowledged that a lender may preserve its interest by determining "the precise super priority amount" and tendering it "in advance of the sale…" *SFR Investments Pool 1 v. U.S. Bank,* 130 Nev. 742, 757 (2014). BNYM's predecessor-in-interest protected the deed of trust by making such a tender, and equity demands the district court's order to be reversed.

Moreover, as a general rule, statutes of limitations do not apply to defenses and the affirmative defense of payment is no exception. *SFR Invs. Pool 1, LLC v. Bank of New York Mellon*, No. 76644, 2020 WL 5634162, at *1 (Nev. Sept. 18, 2020), citing *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 798-99, 801 P.2d 1377, 1381-82 (1990) (reasoning that a party could raise an affirmative defense despite the statute of limitations based on equitable considerations); *Dredge Corp. v. Wells Cargo, Inc.*, 180 Nev. 99, 102, 389 P.2d

394, 396 (1964) ("Limitations do not run against defenses."); *see also City of Saint Paul v. Evans*, 344 F.3d 1029, 1033-34 (9th Cir. 2003). While it is true that the *City of Saint Paul* court found that on rare occasion, a defense that is masquerading as a claim may be precluded, that finding applied within the context of a single lawsuit. That did not happen here, and SFR's claim based on NRS 106.240 was not at issue in the Federal Court Action. In short, the dismissal of the Federal Court Action had no bearing on BNYM's deed of trust, which was preserved by way of a valid tender. As such, BNYM's foreclosure efforts were entirely proper pursuant to the Note and deed of trust.

As courts have recognized that a deed of trust holder may assert the validity of the lien defensively – where a quiet title action may have been time-barred by a statute of limitations – the district court's decision here was in error. *Bank of New York Mellon v. The Springs at Centennial Ranch Homeowners Ass'n*, No. 2:17-cv-01673-JAD-GWF, 2019 WL 1532859, at *4-*5 (D. Nev. Apr. 8, 2019) (unpublished disposition).

CONCLUSION

BNYM's defenses of tender in this matter is not barred by the doctrines of claim preclusion or issue preclusion because SFR's NRS 106.240-based claims were not brought in the Federal Court Action and were likewise not actually litigated and decided. BNYM's defenses are similarly not barred under the rare

carve-out set forth in *City of Saint Paul v. Evans*, because SFR's claim for cancellation of instrument was not brought in the Federal Court Action. Finally, since BNYM's affirmative defense of tender is not subject to a statute of limitations analysis given the facts at hand, the district court erred by not finding that BNYM's deed of trust survived the HOA's foreclosure and remained a valid and enforceable lien on title.

DATED: June 10, 2022. ZBS LAW, LLP

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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 1,045 words.

FINALLY, I HEREBY CERTIFY that I have read this **APPELLANT'S SUPPLEMENTAL REPLY 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: June 10, 2022

ZBS LAW, LLP

By: /s/ J. Stephen Dolembo
J. Stephen Dolembo, Esq.
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Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of ZBS LAW, LLP, and that on this **10** day of June, 2022, and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **APPELLANT'S SUPPLEMENTAL 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;

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Docket Number and Case Title: 81604 - THE BANK OF NEW YORK MELLON VS. SFR INVS. POOL 1, LLC

Case Category Civil Appeal
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Electronic notification will be sent to the following:
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/s/ Sara Hunsaker
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