

IN THE SUPREME COURT OF THE STATE OF NEVADA

SPANISH HEIGHTS ACQUISITION
COMPANY, LLC; SJC VENTURES
HOLDING COMPANY, LLC,

Appellants

vs.

CBC PARTNERS I, LLC; CBC
PARTNERS, LLC; 5148 SPANISH
HEIGHTS, LLC; KENNETH ANTOS
AND SHEILA NEUMANN-ANTOS;
DACIA, LLC

Respondents.

Case No. 82868

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APPEAL

from a decision in favor of Respondent
entered by the Eighth Judicial District Court, Clark County, Nevada
The Honorable Elizabeth Gonzalez, District Court Judge
District Court Case No. A-20-813439-B

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Spanish Heights Acquisition Company, LLC (“SHAC”) is a private, single member Nevada limited liability company which is 100% owned by SJC Ventures Holding Company, LLC, d/b/a SJC Ventures, LLC. No publicly held corporation owns a 10% or greater stock interest in SHAC.
2. SJC Ventures Holding Company, LLC, d/b/a SJC Ventures, LLC (“SJC Ventures”) is a private, Delaware limited liability company which is 100% owned by a family trust which benefits Jay Bloom and other beneficiary family members. No publicly held corporation owns a 10% or greater stock interest in SHAC.

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3. Attorneys who have appeared or are expected to appear for Petitioners:
Joseph A. Gutierrez, Esq. and Danielle J. Barraza, Esq. of Maier Gutierrez
& Associates;

DATED this 10th day of November 2021

Respectfully submitted,

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/s/ Danielle J. Barraza

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JURISDICTIONAL STATEMENT

This appeal is from an Eighth Judicial District Court ruling/order on injunctive relief with respect to foreclosure of the Property at issue, with notice of entry of order entered on April 20, 2021. On April 29, 2021, Appellants filed their notice of appeal.

Under NRAP 3A, an appeal may be taken from an “order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction.” NRAP 3A(b)(3). Thus, this appeal is timely pursuant to NRAP 4(a)(1), and this Court has jurisdiction to hear this appeal pursuant to NRAP 3A(b)(3).

ROUTING STATEMENT

This case originated in business court and should therefore be retained by the

Nevada Supreme Court pursuant to NRAP 17(a)(9).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the district court err in issuing findings of fact and conclusions of law on the issue of an injunction, when the trial that formed the basis of those findings of fact and conclusions of law was conducted in violation of 11 US Code § 362 (the automatic stay of litigation under the Bankruptcy Code)?

Did the district court err in failing to issue an injunction against Respondents with respect to Respondents' efforts to foreclose on the Property at issue?

STATEMENT OF THE CASE

This dispute involves a homeowner (Spanish Heights Acquisition Company, LLC) ("SHAC") and its tenant ("SJC Ventures Holding Company, LLC"), both of which are managed by Jay Bloom, who resides at the home with his family, having to endure constant attempts from Respondents to foreclose on the Property. The foreclosure attempts have not only been in violation of a Bankruptcy stay of litigation, but without any grounds to do so, as it became clear during discovery that Respondents do not own a valid third-position Deed of Trust, as their purported Deed of Trust is not supported by any valid consideration.

At the district court level, SHAC and SJC Ventures had to file for (and were granted) multiple TROs and preliminary injunctions, due to Respondents continuing to attempt to wrongfully foreclose on the Property (including in 2020 in blatant

violation of the foreclosure moratorium). When the latest motion for preliminary injunction was filed, the district court determined that it was going to advance a bench trial on “legal issues” surrounding the executed contracts, along with a preliminary injunction hearing at the same time.

Respondents proceeded with the bench trial in violation of the Bankruptcy stay of litigation (SHAC filed for bankruptcy protection prior to the end of the trial), and the district court compounded the error by not only issuing findings of fact and conclusions of law stemming from that bench trial, but failing to grant outright injunctive relief to Respondents. This appeal follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action involves the residential property located at 5148 Spanish Heights Drive, Las Vegas, Nevada 89148, with Assessor’s Parcel Number 163-29-615-007 (“Property”). AA0002-3. The original owners of the Property were Kenneth and Sheila Antos, with the deed recorded in April 2007. AA0210-213.

On October 14, 2010, a Grant, Bargain, Sale Deed was recorded, transferring the Property to the Kenneth and Sheila Antos Living Trust (“Antos Trust”). AA0215-218. The Antos’ obtained a construction loan for the Property, which was then converted to a loan secured by a first-position Deed of Trust through City National Bank, followed by a second-position Deed of Trust through Northern Trust Bank. AA3621-3622.

On or around June 22, 2012, Kenneth Antos' restaurant company, KCI Investments, LLC, obtained a \$300,000 loan from CBC Partners I, LLC, which was memorialized through a "Secured Promissory Note." AA0220-252. Kenneth Antos served as the managing partner for a group of investors in KCI Investments, LLC. AA3618. Mr. Antos testified that the initial promissory note between KCI Investments, LLC, and CBC Partners I, LLC was "for a commercial loan for operating expenses for the company [KCI Investments, LLC]." AA3618.

That "Secured Promissory Note" contained a "Security Agreement," which made no reference to the Property at issue. AA00238-252. Further, only KCI Investments, LLC and CBC Partners I, LLC were signatories to that initial "Secured Promissory Note." AA0235. Kenneth and Sheila Antos did sign a personal guarantee on the "Secured Promissory Note," but only in their individual capacities, not in their capacities as trustees to the Antos Trust. AA0277-287. *See also*, AA3623-3624.

Thereafter, several modifications were made to the "Secured Promissory Note," the reason being to "obtain additional funding for the business." AA3624; AA0293-348. Crucially, none of those amendments mention the Antos Trust, and none of them were executed by either Kenneth Antos or Sheila Antos in their capacities as trustees for the Antos Trust. *Id.*; AA3625-3628. Indeed, Kenneth Antos testified at trial that "there was no business directly" between the Antos Trust and

CBC Partners, I, LLC. AA3629.

Nevertheless, on December 29, 2014, years after the initial commercial loan to KCI Investments was made by CBC Partners I, LLC, a third-position purported “Deed of Trust” was recorded in the Property records, in which the Antos Trust – a non-party and a non-guarantor to the commercial loan or any of its amendments – purported to provide a deed of trust to CBC Partners I, LLC. AA0350-372.

Subsequently a First Modification to Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing was recorded in the Property records through the Clark County Recorder’s Office on December 19, 2016. AA0374-379.

The CBC Partners I, LLC “Deed of Trust” on the Property specifically mentions that it is securing that Promissory Note dated June 22, 2012, as modified, that was executed “by KCI Investments, LLC, a Nevada limited liability company, and Preferred Restaurant Brands, Inc., a Florida corporation (individually and collectively, “Borrower”). AA0353. Kenneth and Sheila Antos executed this “Deed of Trust” on behalf of the Antos Trust. AA0371. In other words, the Antos Trust attempted to provide a Deed of Trust to CBC Partners I, LLC in order to secure a Promissory Note that the Antos Trust never executed or even guaranteed and with which it had no nexus whatsoever.

When asked whether the Antos Trust received any actual benefit in return for CBC Partners I, LLC loaning money to KCI Investments, LLC and its affiliated

restaurant brands, Kenneth Antos testified “No, no cash or anything like that. No.” AA3632. Further, CBC Partners, I, LLC is the entity that drafted the original “Secured Promissory Note,” as well as all amendments thereto and all guarantees to the note. AA3632-3633.

Kenneth Antos also confirmed in his testimony that the Antos Trust did not receive any consideration whatsoever in return for signing a Deed of Trust to CBC Partners I, LLC. AA3636-3638.

As reflected by a Deed of Sale recorded on November 3, 2017, Appellant SHAC purchased the Property from the Antos Trust, and has remained the owner through present day. AA0381-383. Pursuant to its Operating Agreement, SJC Ventures has a 51% membership interest in SHAC and is deemed the “Investor Member,” and Kenneth Antos has a 49% interest in SHAC and is deemed the “Seller Member.” AA2441. The “SHAC” LLC was created for purposes of purchasing the Property from the Antos Trust.

As documented by a real property lease, SJC Ventures is the lawful tenant of the Property, with SHAC being the lawful Landlord. AA0385-416.

Accordingly, the Property is now owned by SHAC pursuant to a recorded deed, and leased by plaintiff SJC Ventures pursuant to a valid lease agreement. Jay Bloom, who serves as a manager for SHAC and SJC Ventures, uses the Property as his primary residence where he lives with his family, including his elderly

octogenarian in-laws.

Respondents CBC Partners I, LLC and its purported successor-in-interest 5148 Spanish Heights, LLC (“Defendants”) claim to hold an interest in the Property purportedly secured by the contested third-position Deed of Trust referenced above. AA0350-372.

CBC Partners I, LLC also purports to have secured certain remedies in the event of a default on the Note through a Forbearance Agreement dated September 27, 2017, and an Amendment to Forbearance Agreement dated December 1, 2019 (collectively the “Forbearance Agreement”) which acknowledged and extended SHAC’s purported obligations under the Secured Promissory Note through March 31, 2020, and recognized the SJC Lease Agreement and subsequent extensions. AA0418-442; AA0444-452.

One of the purported remedies under the Forbearance Agreement that Defendant CBC Partners I, LLC claims to have is a right to exercise a pledged membership interest in SHAC, through a separately-executed Pledge Agreement dated September 27, 2017. AA0454-462. Notably, SJC Ventures, which purportedly “pledged” its interest in SHAC, never actually executed the Pledge Agreement. AA0461-462.

On March 29, 2020, before SHAC’s purported financial obligations under the Forbearance Agreement came due, Nevada Governor Sisolak issued Declaration of

Emergency Directive 008, issued on March 29, 2020 in response to the coronavirus/COVID-19 pandemic, which states as follows:

No lockout, notice to vacate, notice to pay or quit, eviction, foreclosure action, or other proceeding involving residential or commercial real estate based upon a tenant or mortgagee's default of any contractual obligations imposed by a rental agreement or mortgage may be initiated under any provision of Nevada law effective March 29, 2020, at 11:59 p.m., until the state of emergency under the March 12, 2020 Declaration of Emergency terminates, expires, or this Directive is rescinded by order of the Governor.

See State of Nevada, Executive Department, Declaration of Emergency Directive 008.¹

Through correspondence dated April 1, 2020, CBC Partners I, LLC claimed that SHAC was in breach of the Forbearance Agreement, and elected to select its claimed remedy by seeking to exercise its purported rights under the Pledge Agreement and having the pledged collateral shares of SHAC transferred to CBC Partners I, LLC's nominee and alter ego company, CBC Partners, LLC. That letter states that "on April 15, 2020, CBC Partners I, LLC will exercise its rights under the Pledge Agreement by transferring the pledged collateral to CBC Partners I, LLC's." AA0464.

Sometime after receiving the April 1, 2020 correspondence from CBC Partners I, LLC, representatives of the Antos Trust purportedly assigned any right, title, interest, and membership interest they had in SHAC to CBC Partners, LLC –

¹ Available at http://gov.nv.gov/News/Emergency_Orders/2020/2020-03-29_-_COVID-19_Declaration_of_Emergency_Directive_008/.

thus effectuating CBC Partners I, LLC's remedy selection. AA0466-469.

On April 3, 2020, even though it had just selected its remedy of attempting to become a partial legal owner of the Property, in satisfaction of its commercial note alleged to have been so secured, CBC Partners I, LLC then attempted to select an additional equitable remedy by issuing a Notice to Vacate to SJC Ventures, which demanded that SJC Ventures vacate the Property (again, in the midst of the pandemic in April of 2020). AA0471.

On April 9, 2020, with Respondents attempting to foreclose on the Property in the midst of the COVID-19 pandemic (and in violation of the foreclosure moratorium in effect at the time), SHAC and SJC Ventures initiated litigation in the district court. AA0001-10. The district court swiftly granted a TRO precluding foreclosure, and prohibited CBC Partners I, LLC from violating the foreclosure moratorium. AA0012-14. This was followed by an order granting SHAC and SJC Ventures' motion for preliminary injunction on a limited basis. AA0082-84.

A first amended complaint was filed on May 15, 2021. AA0046-65. CBC Partners I, LLC and 5148 Spanish Heights, LLC (the entity that CBC Partners I, LLC contends it sold the Secured Promissory Note to) asserted counterclaims against SHAC, SJC Ventures, and Jay Bloom individually. AA0022-45.

SHAC and SJC Ventures' causes of action are as follows: (1) declaratory relief as to violation of the eviction moratorium; (2) declaratory relief as to CBC

Partners I, LLC's lack of foreclosure rights; (3) declaratory relief as to the One Action Rule; (4) declaratory relief as to the Doctrine of Merger; (5) declaratory relief as to SHAC's manager; (6) injunctive relief against CBC Partners I, LLC and 5148 Spanish Heights, LLC; (7) declaratory relief as to the membership interest in SHAC; (8) breach of contract as to the Forbearance Agreement; (9) contractual breach of the covenant of good faith and fair dealing; (10) declaratory relief as to SHAC's lack of liability regarding alleged property disturbances at a different property; (11) indemnity against Dacia, LLC; (12) Contribution against Dacia, LLC.

CBC Partners I, LLC and 5148 Spanish Heights LLC's claims for relief are as follows: (1) breach of contract as to the Forbearance Agreement; (2) breach of the covenant of good faith and fair dealing; (3) unlawful detainer per NRS 40.250; (4) fraud in the inducement; (5) abuse of process/fraud upon the Court; (6) breach of fiduciary duty; (7) breach of contract (Operating Agreement); (8) breach of the covenant of good faith and fair dealing (Operating Agreement); (9) breach of contract (Pledge Agreement); (10) breach of the covenant of good faith and fair dealing (Pledge Agreement); (11) unjust enrichment; (12) declaratory relief.

After Respondents continued attempting to wrongfully foreclose on the Property in the middle of litigation, SHAC and SJC Ventures sought, and were granted, another temporary restraining order, issued on January 5, 2021, which precluded Respondents from moving forward with any foreclosure sale, pending the

district court's evidentiary hearing on the preliminary injunction, along with a "trial" on related legal issues. AA1805-1833; AA1834-2144; AA2145-2168; AA2169-2171; AA2172-2177; AA2178-3213; AA3552-3580; AA3581-3585.

To be clear, the parties specifically and explicitly requested a jury trial, and all of the district court's scheduling orders reflected that. However, no jury trial has ever been conducted. Instead, the district court *sua sponte* ordered the parties to submit a stipulation on the "legal issues" that the district court would decide on its own, prior to the jury trial. AA3590-3591. The parties followed the district court's orders, and the stipulation specifically indicates that it is being submitted "as requested by the Court." *Id.*

The five legal issues that the parties stipulated (upon orders of the district court) to be heard at the bench trial are as follows:

- (1) Contractual interpretation and/or validity of the underlying "Secured Promissory Note" between CBC Partners I, LLC and KCI Investments, LLC and all modifications thereto;
- (2) Interpretation and/or validity of the claimed third-position Deed of Trust and all modifications thereto, and determination as to whether any consideration was provided in exchange for the Deed of Trust;
- (3) Contractual interpretation and/or validity of the Forbearance Agreement, Amended Forbearance Agreement and all associated documents/contracts;

(4) Whether the Doctrine of Merger applies to the claims at issue; and

(5) Whether the One Action Rule applies to the claims at issue.

AA3591.

The preliminary injunction evidentiary hearing and combined bench “trial” on the legal issues commenced on February 1, 2021. AA3592-3701. On February 3, 2021, before completion of the trial, SHAC filed for bankruptcy in the United States District Court for the District of Nevada. *See, e.g.* AA4153-4164.

On February 3, 2021, before any trial proceedings began for the day, SHAC’s counsel informed the district court of SHAC’s bankruptcy filing. AA3969. When the district court referenced that the bankruptcy stay would not apply to co-plaintiff SJC Ventures, counsel for SHAC and SJC Ventures clarified that the claims against SJC Ventures “are intertwined with SHAC and also the claims against them are separate and apart from this proceeding and . . . are subject to a jury trial.” AA3970. Specifically, counsel noted that “we had filed a motion for preliminary injunction on the foreclosure sale of the house owned by SHAC . . . and then we agreed to this proceeding as far as these issues that would affect that foreclosure sale, and that’s why I think the filing of the bankruptcy stays this proceeding.” AA3971. Counsel further argued, “I think we’ve been really focusing on this injunction hearing that deals with the sale of the – the foreclosure sale on the property. That is owned by SHAC, and that’s now subject to the bankruptcy court.” AA3971.

The district court initially stayed the proceedings for until March 15, 2021, during which time Respondents attempted to get the bankruptcy case dismissed. AA3973-3977. By March 15, 2021, the Bankruptcy Court had not ruled on Respondents' request to have the stay lifted. AA3984. Nevertheless, the district court indicated it was inclined to continue with the trial "only against those entities who are not subject to the bankruptcy petition. However, my factual findings may relate to the conduct of [SHAC] because it relates to the findings I need to make related to the parties who have not filed for bankruptcy protection." AA3984.

In response, counsel for SHAC and SJC Ventures again lodged an objection to proceeding with the preliminary injunction hearing and trial on the legal issues, arguing that "proceeding in any manner, because of how these claims are intertwined, would be a violation of the stay. . . this hearing was related specifically to legal issues to prevent a foreclosure on the Spanish Heights Property that's owned by [SHAC], the debtor. And the determination of those legal issues would affect the debtor, [SHAC], and the [bankruptcy] court has not ruled on lifting that stay and I believe if we proceeded in any way today would violate that stay because the claims involving the other parties, Your Honor, are subject to a jury trial and those aren't really subject to the proceeding we have today." AA3984-3985.

Accordingly, on March 15, 2021, the preliminary injunction hearing and bench trial were allowed to continue despite Appellants' objections, and in violation

of the automatic stay of litigation. AA3984-4152. This was particularly concerning because Respondents' claim for breach of the Forbearance Agreement is against not only SJC Ventures, but also the bankruptcy debtor SHAC. This would mean that any analysis of the interpretation of the Forbearance Agreement would affect SHAC's rights. Naturally, as all of Respondents' claims relate to the Property, SHAC, as the property owner, would be adversely affected by an adjudication of any of Respondents' claims.

On the final day of trial, CBC Partners I, LLC and 5148 Spanish Heights, LLC's counsel argued that any injunctive relief should be denied, because "the bankruptcy stay is in place . . . [t]he estate has a stay. They're protected." And, "I am trying to get a straight line to foreclose. As soon as I get the relief that I need from the bankruptcy court, then I'll have that ability to go forward." AA4136.

On April 6, 2021, the district court issued Findings of Fact and Conclusions of Law stemming from that trial ("April 2021 FFCL"). AA4165-4185. The district court specifically ordered that its "temporary restraining order, filed January 5, 2021, will remain in place pending further order of the Bankruptcy Court." AA4184.

Thereafter, the Bankruptcy Court determined that CBC Partners I, LLC and 5148 Spanish Heights, LLC violated the bankruptcy stay by moving forward with the trial on February 3, 2021 and March 15, 2021 despite the fact that SHAC had filed bankruptcy by that time. *See* AA4439-4442, finding that the Defendants

“violated the automatic stay” with respect to issues (a), (b), and (c) of the 4/6/2021 FFCL. Those issues are:

- (a) Contractual interpretation and/or validity of the underlying “Secured Promissory Note between CBC Partners I, LLC, and KCI Investments, LLC, and all modifications;
- (b) Interpretation and/or validity of the claimed third-person Deed of Trust and all modifications thereto, and determination as to whether any consideration was provided in exchange for the Deed of Trust; and
- (c) Contractual interpretation and/or validity of the Forbearance Agreement, Amended Forbearance Agreement and all associated documents/contracts.

See AA4166 at fn. 1. Specifically, the Bankruptcy Court determined as follows:

Despite the absence of a bankruptcy court order granting stay relief, on March 15th, 2021, Creditor nevertheless urged the state court to continue with the hearing and its ruling regarding the state court matter on which stay relief was requested, stating, quote: "I," meaning Mr. Mushkin, "expected her," meaning me, Judge Cox, "to have submitted a ruling, at least to say to go ahead and go forward. But I'm prepared, Judge. I will try and make this as quick as possible, as you expressed your desire for us to hurry and finish."

And while Creditor's counsel made statements during the state court hearings seemingly indicating that it was appropriate to proceed only against non-debtor parties, such comments fly in the case of Creditor's counsel's admission to the state court that, quote, “I am trying to get a straight line to foreclosure. And as soon as I get the relief that I need from the Bankruptcy Court, then I'll have the ability to go forward. That relief will have to go through the Bankruptcy Court, not through this Court, but your TRO should expire.”

And while Creditor's counsel urged the Court to proceed, while acknowledging that this Court had yet to issue its decision, Debtor's Counsel was strenuously objecting to proceeding with the trial. . . .

While it appears that the state court did not actually find the Debtor obligated to Creditor, the ruling forecloses all of Debtor's defenses to liability, making a finding of liability a foregone conclusion.

AA4409-4410. The Bankruptcy Court then went on to determine that Respondents should be sanctioned for having violated the automatic stay. AA4439-4440.

It has long been established that “violations of the automatic stay are void, not voidable.” *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992). This means that the district court’s rulings on contractual interpretation of the aforementioned agreements, as well as its ruling on injunctive relief, are void.

Further, the Property is now at risk of foreclosure as a result of the district court failing to grant injunctive relief outright, and only granting relief “pending further order of the Bankruptcy Court,” which has created problems because the Bankruptcy Court recently lifted the stay of litigation. Respondents’ counsel has identified the bankruptcy stay as the only obstacle preventing immediate foreclosure. Without complete injunctive relief, there is no protection against foreclosure of the Property.

Appellants timely filed their Notice of Appeal related to the April 2021 FFCL on April 29, 2021. AA4210-4237.

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SUMMARY OF ARGUMENT

The district court erred in issuing its April 2021 FFCL with respect to the preliminary injunction, which relied on findings of fact and conclusions of law that were based on a preliminary injunction hearing and trial on the legal issues which violated the bankruptcy stay of litigation.

The order on the preliminary injunction was interwoven with the surrounding legal issues that the district court determined needed to be determined in order to issue a ruling on the preliminary injunction. The problem is those legal issues specifically dealt with Respondents' counterclaims, making their adjudication a violation of the bankruptcy stay. The order necessarily affected SHAC's rights, and as a bankruptcy debtor, SHAC was entitled to a complete and automatic stay of litigation upon filing for bankruptcy in February of 2021. The district court overrode SHAC and SJC Ventures' counsel's objections to moving forward with the proceedings, and the preliminary injunction hearing and bench trial was allowed to presume, which was an error in law.

The district court also abused its discretion in failing to issue an injunction against Defendants, instead ruling that the temporary restraining order filed on January 5, 2021 "will remain in place pending further order of the Bankruptcy Court." AA4184. This was an error, as counsel for Respondents specifically argued that the Respondents were "trying to get a straight line to foreclose," and that the

bankruptcy debtor SHAC is only protected from foreclosure “because the bankruptcy stay is in place.” AA4136. Pursuant to Respondents’ counsel, once the stay is lifted “I’ll have that ability to go forward [with foreclosure].” AA4136.

ARGUMENT

A. Standard of Review

Generally, this Court reviews preliminary injunctions for abuse of discretion. Questions of law, however, are reviewed *de novo*. *Lab. Com'r of State of Nevada v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 28 (2007).

The first issue of this appeal, whether the district court’s orders on the preliminary injunction should be determined as void because they resulted from a stay of the Bankruptcy Court’s stay of litigation, is a legal question that is subject to *de novo* review.

The second issue of this appeal, whether the district court should have fully granted the request for injunctive relief in the event there is no interference with the stay of litigation, is subject to abuse of discretion review.

B. The District Court’s Orders on the Motion for Preliminary Injunction Are a Result of a Trial that Violated the Bankruptcy Stay of Litigation

The district court proceeded with its preliminary injunction evidentiary hearing and “trial” on the related legal issues that the district court determined needed to be resolved in order to rule on the injunctive relief request, despite SHAC

filing for bankruptcy. This resulted in the April 2021 FFCL, which found that the temporary restraining order preventing Respondents from foreclosing on the Property would only remain in effect pending further order from the Bankruptcy Court. AA4184.

As set forth in Bankruptcy Code, the filing of a Bankruptcy Petition operates as a stay, applicable to all entities, of:

the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 US Code § 362(a)(1). “The automatic stay takes effect on the date the bankruptcy petition was filed, regardless of whether the creditor or other affected entity has knowledge of the bankruptcy and without the necessity of any formal service of process or notice to the creditors.” 9B Am. Jur. 2d *Bankruptcy* § 1698 (2016) (footnotes omitted). Thus, “the automatic stay is effective against the world, regardless of notice.” *Id. LN Mgmt. LLC Series 5105 Portraits Place v. Green Tree Loan Servicing LLC*, 133 Nev. 394, 396, 399 P.3d 359, 360 (2017).

Predictably, shortly after the district court issued its April 2021 FFCL, the Bankruptcy Court determined that Respondents violated the bankruptcy stay with respect to the bulk of the trial and preliminary injunction hearing, including those

portions that directly affected SHAC and involved contractual interpretation. Those portions are:

- (d) Contractual interpretation and/or validity of the underlying “Secured Promissory Note between CBC Partners I, LLC, and KCI Investments, LLC, and all modifications;
- (e) Interpretation and/or validity of the claimed third-person Deed of Trust and all modifications thereto, and determination as to whether any consideration was provided in exchange for the Deed of Trust; and
- (f) Contractual interpretation and/or validity of the Forbearance Agreement, Amended Forbearance Agreement and all associated documents/contracts.

AA4166 at fn. 1. The Ninth Circuit has held that “violations of the automatic stay are void, not voidable.” *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992). This means that the district court’s rulings on contractual interpretation of the documents, which the district court determined needed to be decided in order to rule on the request for injunctive relief, which was not fully granted, are all void.

This case is similar to *Bank of New York Mellon as Tr. for Certificateholders of CWALT, Inc., Alternative Loan Tr. 2005-54CB, Mortg. Pass-Through Certificates Series 2005-54CB v. Enchantment at Sunset Bay Condo. Ass'n*, 2 F.4th 1229, 1230 (9th Cir. 2021) (“*Bank of New York Mellon*”). That case dealt with an analysis of Nevada’s superpriority lien statute (NRS 116.3116) but in a unique fashion, as the

Bank of New York Mellon, as the first deed of trust lienholder, was seeking to set aside a completed superpriority lien foreclosure sale on the grounds that the sale occurred in violation of the automatic stay in bankruptcy proceedings. *Id.* at 1230.

The Ninth Circuit determined that “any HOA sale in violation of the automatic bankruptcy stay is void under Nevada law.” *Id.* at 1233. In analyzing the issue, the concurring opinion noted that “the difference between the majority and the dissent in this case reduces to whether a transaction in violation of a bankruptcy stay is void, or merely voidable. Our precedent clearly says it is void — like it never happened.” *Id.* at 1238 (emphasis added). Further, “the dissent interprets void to mean void *only as to certain entities* — those related to the debtor's estate — meaning that in the absence of an active debtor, creditors may not challenge ‘void’ transactions. This is just redefining ‘void, not voidable’ as ‘voidable, not void.’ It also ignores the fact that we have consistently reapplied *In re Schwartz* to affirm that any violations of the automatic stay provision are indeed void—full stop.” *Id.* at 1235 (citing *Burton v. Infinity Capital Mgmt.*, 862 F.3d 740, 747 (9th Cir. 2017) (judicial interference); *In re Dyer*, 322 F.3d 1178, 1188 (9th Cir. 2003) (attempt to record deed of trust); *40235 Wash. St. Corp. v. Lusardi*, 329 F.3d 1076, 1080 (9th Cir. 2003) (tax sale).

In this case, instead of moving forward with a straightforward preliminary injunction hearing, the district court indicated that it needed to conduct a bench trial

on certain legal issues which would then form the basis for the preliminary injunction ruling. That is the purpose of the stipulation that the parties then filed on the legal issues, at the specific direction of the district court. AA3591.

Because the bulk of those legal issues are now void (with the Bankruptcy Court ruling that everything except for the findings that the Doctrine of Merger and One Action Rule constitutes a violation of the Bankruptcy stay of litigation), it follows that the order on preliminary injunctive relief should also be deemed void. It is simply impossible to parse the issues out and come to any conclusion other than the logical one: that the injunctive relief ruling was based on the findings of fact and conclusions of law on contract interpretation, which in turn were made as a result of a violation of the Bankruptcy stay of litigation.

The order on injunctive relief should be deemed void, and the issue should be re-litigated now that the bankruptcy stay has been lifted.

C. Injunctive Relief Should Have Been Fully Granted Because There is No Valid Third-Deed of Trust

Alternatively, in the event that the district court made no error in ruling on Appellants' request for injunctive relief, the district court should have granted injunctive relief and prevented Respondents from being able to foreclose on the Property, as there is no valid third-position Deed of Trust affording Respondents (either CBC Partners I, LLC or its claimed successor-in-interest 5148 Spanish

Heights, LLC) the right to foreclose.

The Promissory Note underlying the purported third-position Deed of Trust had nothing to do with the Property but was actually a \$300,000 commercial loan issued to KCI Investments, LLC, which is one of Kenneth Antos' companies that was in the business of operating restaurants. AA0220-252. *See also*, AA3618.

The Promissory Note is secured by a "Security Agreement" dated June 22, 2012, where the security interest included KCI's intellectual property, goods, tools, furnishings, furniture, equipment and fixtures, accounts, deposit accounts, chattel paper, and receivables. AA00238-252. Notably, the Security Agreement does not include the subject real property owned by the Antos Trust, non-party to the commercial loan. *Id.*

Kenneth and Sheila Antos were personal guarantors on the underlying Promissory Note in their individual capacity, but not in their capacity as trustees to the Antos Trust. AA0277-287. *See also*, AA3623-3624.

The Promissory Note was modified several times due to KCI wanting further loan funds from CBC Partners I, LLC. AA3624; AA0293-348.

Attached as AA0293-348 are numerous other loan modifications to the underlying Promissory Note, none of which mention the Antos Trust, and none of which the Antos Trust executed. It therefore follows that the Antos Trust received no consideration whatsoever in return for issuing a Deed of Trust to CBC Partners

I, LLC.

On December 29, 2014, years after the commercial loan to KCI was made, a third position “Deed of Trust” was recorded, in which the Antos Trust, again, a non-party to the commercial loan, purported to provide a deed of trust to CBC Partners I, LLC. AA0350-372.

Subsequently a First Modification to Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing was recorded in the Property records through the Clark County Recorder’s Office on December 19, 2016. AA0374-379.

The “Deed of Trust” specifically mentions that it is securing that Promissory Note dated June 22, 2012, as modified, that was executed “by KCI Investments, LLC, a Nevada limited liability company, and Preferred Restaurant Brands, Inc., a Florida corporation (individually and collectively, “Borrower”). PA0855. Kenneth and Sheila Antos signed this “Deed of Trust” on behalf of the Antos Trust. PA0873. In other words, the Antos Trust attempted to provide a Deed of Trust to CBC Partners I, LLC in order to secure a Promissory Note that the Antos Trust never executed or even guaranteed and with which it had no nexus whatsoever. PA0773.

The Antos Trust, as owner of the real property, was not a borrower on the underlying Note, and the Antos Trust was not a guarantor on the underlying Note. Even further, the Antos Trust testified that it had no business relationship whatsoever with CBC Partners I, LLC, making it highly inappropriate for CBC Partners I, LLC

to be attempting to get a “Deed of Trust” from the Antos Trust, as there was no underlying promissory note in which the Antos Trust was involved. PA0774.

As such, because the Antos Trust never actually signed off on the underlying promissory note in any capacity whatsoever, and because the Antos Trust never received any consideration for providing a Deed of Trust to CBC Partners I, LLC, there is a reasonable likelihood that the third position “Deed of Trust” which secures a commercial loan to the Antos’ companies and has nothing to do with the owners of the Property, is neither valid nor enforceable.

“Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration.” *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). A meeting of the minds exists when the parties have agreed upon the contract's essential terms. *Roth v. Scott*, 112 Nev. 1078, 1083, 921 P.2d 1262, 1265 (1996). Further, a party's affirmation of a preexisting duty is generally not adequate consideration to support a new agreement. *See Cty. of Clark v. Bonanza No. 1*, 96 Nev. 643, 650, 615 P.2d 939, 943 (1980).

Nevada has adopted the Restatement of Contracts' view of consideration that “[t]o constitute consideration, a performance or return promise must be bargained for. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.” *Pink v. Busch*, 100 Nev. 684, 691 P.2d 456, 459 (Nev.1984) (quoting

Restatement (Second) of Contracts § 71(1), (2) (1981)). This bargained-for-exchange requires a mutuality of obligation —“unless both parties to a contract are bound, neither is bound.” *Serpa v. Darling*, 107 Nev. 299, 810 P.2d 778, 781 (Nev.1991).

Here, this case is similar to *Mizrahi v. Wells Fargo Home Mortg.*, No. CASE209-CV-01387-RLH, 2010 WL 2521742, at *3 (D. Nev. June 16, 2010), in which prospective borrowers claimed that they had submitted “consideration” to Wells Fargo simply by sending the banking institution all requested financial information. The Court held that “providing the requested documents was simply a part of the application process, which the Mizrahis were willing to complete in the hope that Wells Fargo would modify their loan. Wells Fargo did not promise to do anything in exchange for the requested information because its letters merely informed the Mizrahis of the Borrower Counseling Program and invited them to apply. Although the Mizrahis submitted their financial information as requested, these actions were not sufficient to bind either party. Thus, the parties did not have sufficient consideration or mutuality of obligation to form an implied contract.” *Id.*

Similarly, here, while the Antos Trust agreed to sign off on the Deed of Trust, they were never a party to the underlying Secured Promissory Note, nor were they guarantors on that Note. As such, the bank (CBC Partners I, LLC) was not providing any actual consideration to the Antos Trust, and without consideration, there is no

binding document supporting the mutuality of obligations. There was no actual bargained-for exchange.

As such, without possessing a valid Deed of Trust, there is no legal mechanism for Respondents to foreclose on the Property, and therefore the Appellants' request for injunctive relief should have been granted in full, not subject to any further orders from the Bankruptcy Court.

CONCLUSION

Based on the foregoing, this Court should reverse the district court's April 2021 FFCL accordingly, and clarify their status as void findings of fact and conclusions of law with respect to the preliminary injunction issue.

Alternatively, this Court should rule that the district court erred in tying injunctive relief to any Bankruptcy Court orders instead of outright granting injunctive relief to Appellants with respect to Respondents' attempts to foreclose on the Property.

DATED this 10th day of November, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

I hereby certify that I have read this 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 Rules of Appellate Procedure, and 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. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman. I certify that this brief complies with the page limitations of NRAP 32(a)(7), as this brief contains 7,181 words.

I understand I may be subject to sanctions in the event the brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of November, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 10th day of November, 2021, this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: **APPELLANTS' OPENING BRIEF** and **VOLUMES I – XIX** of the **APPENDIX** shall be made in accordance with the Master Service List as follows:

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