IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

DEUTSCHE BANK TRUST COMPANY AMERICAS, AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE INVESTMENT TRUST 2006-2,

Appellant,

CASE NO.: 3D14-575
LT. NO.: 12-49315

v.

HARRY BEAUVAIS, and AQUA MASTER ASSOCIATION, INC., a Non-Profit Florida Corporation,

Appellees.
_____/

UNOPPOSED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Fla. R. App. P. 9.370, Community Association Institute (CAI) moves for leave to file the attached amicus curiae brief in this matter in support of Appellees and states:

1. This Motion is unopposed by the parties to this action and the proposed brief is attached hereto.
2. Community Associations Institute ("CAI") is an international organization with over 33,000 members and 60 chapters across the United States, dedicated to serving community associations.

3. CAI's interest in the appeal now before the Court stems from its concern for community association members and property owners throughout South Florida.
4. Industry data from the Community Associations Institute show that in 2013 nearly 66 million individuals in the United States lived in association-governed communities and individual housing units within those communities. With these numbers continuing to grow, associations shoulder a substantial and increasing level of responsibility on behalf of their members.
5. CAI should be heard on this important matter due to its large representation of community associations across the State of Florida and nationwide.
6. The Supreme Court of Florida has permitted CAI to file an amicus brief in the pending *U.S. Bank v. Bartram*, which deals with similar issues being confronted by this Court.
7. CAI's members have ample experience and perspective on the fact pattern outlined in this case. When lenders fail to pursue their rights in a timely fashion, community associations suffer in the form of abandoned properties, unpaid dues and plummeting property values.
8. The immediate issue addressed by the Court is the impact of the concept of "deceleration" which is at the heart of this case.

9. A reversal of the panel's decision and failure to uphold the statute of limitations as delineated by the legislature will materially affect our member community associations.

10. For reasons described in the attached brief, the concept of automatic deceleration should be rejected.

11. The overwhelming weight of authority supports upholding the statute of limitations based on the clear and unambiguous language contained therein.

12. Undersigned counsel has contacted counsel for all parties and there is no objection to the filing of the amicus brief by CAI. The proposed amicus brief is attached hereto.

WHEREFORE, CAI respectfully requests that this Court grant this motion and accept the attached brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via electronic mail and or mail this 1st day of October, 2015, to: Major B. Harding, Esq., and Ausley McMullen P.O. Box 391 Tallahassee, Fl 32302-0391; John R. Hargrove, Esq. JRH@Hargrovelawgroup.com, The John Hargrove Law Group, 21 Southeast 5th St Suite 200 Boca Raton, Fl 33432; Todd L. Wallen, Esq., todd@wallenlawfirm.com, The Wallen Law Firm, P.A., 255 Aragon Ave., Second Floor, Coral Gables, Florida 33134; Steven Siegfried, Esq., ssiegfried@srhl-law.com, Nicholas Siegfried, Esq., nsiegfried@srhl-law.com, Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars, & Sobel, P.A., 201 Alhambra Circle, 11th Floor, Coral Gables, Florida 33134; William P. McCaughan, Esq. William.mccaughan@klgates.com, Steven R. Weinstein, Esq. steven.weinstein@klgates.com, Stephanie N. Moot, Esq. Stephanie.moot@klgates.com, K&L Gates, LLP, Southeast Financial Center, 200

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/s/ Matthew Estevez
Matthew Estevez
Fla. Bar No.027736

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Appellant,

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Appellees.
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AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLEES

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IDENTITY AND INTEREST OF AMICUS CURIAE

This brief is filed on behalf of Community Associations Institute ("CAI"), an international organization with over 33,000 members and 60 chapters across the United States, dedicated to building and inspiring professional, informed and harmonious community associations by providing information, education and resources to all community association constituents, including community managers, volunteers, homeowners, leaders, contractors, developers, attorneys and other community leaders who provide services to community associations. CAI submits this brief to address the following central issue: Is a second foreclosure action barred by the applicable statute of limitations after five years from a lender's exercise of an acceleration clause in a first foreclosure action, which action was dismissed without prejudice? This brief also answers the questions posited by the Court in its Order dated August 3, 2015, addressed to amicus curiae:

1. Where a foreclosure action has been dismissed with the note and mortgage still in default:

    a. Does the dismissal of the action, by itself, revoke the acceleration of the debt balance thereby reinstating the installments terms?
    b. Absent additional action by the mortgagee can a subsequent claim of acceleration for a new and different time period be made?
    c. Does it matter if the prior foreclosure action was voluntarily or involuntarily dismissed, or whether the dismissal was with or without prejudice?
    d. What is the customary practice?

2. If an affirmative act is necessary by the mortgagor to accelerate a mortgage, is an affirmative act necessary to decelerate?

3. In light of *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004), is deceleration an issue or is deceleration inapplicable if a different and subsequent default is alleged?

CAI's Florida chapters have devoted a significant amount of resources to helping community associations weather the foreclosure crisis facing Florida. Associations have been on the front lines of dealing with dilatory banks, which have accelerated the entire loan balance, but failed to foreclose their lien interest within the five year legislative mandate. Consequently, community associations in their fiduciary roles have often times moved to foreclose upon their liens, and often take title at auction. Because of lenders' dilatory tactics in foreclosing mortgages, many communities have suffered, particularly minority communities.

These undue societal and financial costs would be reduced if lenders would simply exercise their rights within the five year time limit established by the Florida legislature for lenders to foreclose. If a dilatory lender is allowed to sit on its rights indefinitely, assessments go unpaid resulting in deterioration of communities with vacant and abandoned properties. This forces associations to take action to maintain the property, usually at the expense of other homeowners, who are forced to pay the shortage with higher assessments. In the end, the outcome of this case critically impacts the interests of CAI constituents and the public-at-large.

SUMMARY OF THE ARGUMENT

When lenders fail to pursue their rights in a timely fashion, community associations suffer. Although equity is not a factor in the proper application of statute of limitations, the non-payment of over $70,000 (for which a judgment was entered) in maintenance fees owed to the Appellee is difficult to ignore. The effects of dilatory practices by lenders have far reaching consequences for communities across Florida, adversely affecting neighborhoods, lowering property values and property tax collection.

The central question in this case is whether a lender can initiate a second foreclosure action five years after it has accelerated the entire debt in the first foreclosure action, which was dismissed without prejudice. The answer is 'no.' The case law in Florida and overwhelmingly across the United States favors the Appellee. As soundly outlined in the panel's opinion, "the involuntarily dismissal without prejudice of the foreclosure action did not by itself negate, invalidate or otherwise decelerate the lender's acceleration of the debt in the initial action. The lender's acceleration of the debt triggered the commencement of the statute of limitations, and because the installment nature of the loan payments was never reinstated following the acceleration, there were no 'new' payments due and thus there could be no 'new' default following the dismissal without prejudice of the

initial action. The filing of the subsequent action, after expiration of the statute of limitations, was therefore barred." 2014 WL 7156961 at *1.

Moreover, absent an agreement between the lender and the borrower reinstating the loan after the involuntary dismissal without prejudice of the initial action, the second foreclosure action alleging a new default date after five years is barred by the mandates of the legislature as codified under Section 95.11(2)(c), Fla. Stat. The lender's reliance upon *Singleton*, a res judicata case, is inapplicable to a statutory framework on limitation of actions.

Finally, after the statute of limitations has expired, the mortgage lien should be extinguished in order to facilitate alienation of property rights and transferability of title. Allowing a lien to cloud title, when the underlying debt has expired as a matter of law, creates the objectionable and damaging result of clouding title based on an unenforceable lien for decades.

ARGUMENT

1. COMMUNITY ASSOCIATIONS WILL BE MATERIALLY PREJUDICED IF THE PANEL'S DECISION IS REVERSED.

When homeowners fail to pay association dues and dilatory lenders sit on their foreclosure rights, the rest of the association's homeowners have to make up for the lost revenue. After waiting years for the bank to prosecute its lien interest in this case, Aqua Master Association proceeded to foreclose on the subject property and took title on February 22, 2011. Since then, the association repaired

and maintained the property to the benefit of the community. The association should not be punished for taking action. Reversing the panel's proper decision in this case will de-incentivize and materially prejudice associations. A reversal would spawn abandoned, deteriorating properties that elicit crime, reduce tax revenues and lower property values, hurting community associations and society-at-large.

2. EQUITY SHOULD NOT BE A CONSIDERATION IN A STATUE OF LIMITATIONS CONTEXT; IF IT IS, EQUITY FAVORS THE APPELLEE AND PUBLIC POLICY INTERESTS.

Although equity should not be a consideration in the context of the statute of limitations, any equitable considerations (which are plainly the misplaced emphasis of Deutsche Bank, the lender here) clearly favor Aqua Master Association. Trial courts are often confronted with valid, just and equitable actions that are forever barred due to the statute of limitations, including rape, child molestation, financial fraud and attempted murder. By reversing the rationale of the panel's holding, the statute of limitations –as it pertains to foreclosures cases- would be essentially obliterated since lenders can re-file dismissed cases with impunity and with no restriction during the life of the installment loan, no matter how many times the lender has accelerated the debt in prior actions, and disregarding the fact that such an acceleration, as a matter of settled law, eliminates the installment nature of the mortgage contract.

3. THE CASE LAW IN FLORIDA AND ACROSS THE UNITED STATES FAVORS THE APPELLEE.

Under Florida law, once a bank accelerates the balance due on the note and mortgage, the five year statute of limitations begins to run. *See Travis Co. v. Mayes*, 36 So. 2d 264, 265 (Fla. 1948) ("The rule is also settled that when a mortgage in terms declares the indebtedness due upon default of certain provision or within a reasonable thereafter, the statute of limitations begins to run immediately after the default takes place or the time intervenes.") *American Bankers Life Assurance Co. of Fla. v. 2275 West Corp*., 905 So. 2d 189 (Fla. 3d DCA 2005) (reversing foreclosure judgement and remanding with instruction to grant judgment for homeowners based on the statute of limitations); *Central Home Trust Company of Elizabeth v. Lippincott*, 392 So. 931 (Fla. 5th DCA 1980) ("The statute of limitations may commence running earlier on an installement note for payments not yet due, if the holder exercises his right to accelerate the total debt because of a default or other reason…. To constitute an acceleration after default, where the holder has the *option* to accelerate, the holder or payee of the note must take some clear and unequivocal action indicating its intent to accelerate all payments under the note, and such action apprise the maker of the fact that the option to accelerate has been exercised."); *Greene v. Bursey*, 733 So. 2d 1111 (Fla. 4th DCA 1999) (where the installment contract contains an optional acceleration clause, the statute of limitations may commence running earlier on payments not

yet due if the holder exercises his right to accelerate the total debt because of default.)

Across the United States, the clear majority of judicial foreclosure states, like Florida, that have considered statute of limitations for foreclosure actions strongly support the position taken by the panel.

A. New York

New York law is well established and mandates proper reinstatement of an accelerated mortgage before there can be an action for a subsequent installment payment breach. Indeed, New York courts explicitly and consistently reject the basis for automatic, unilateral and un-communicated reinstatement relied upon by Deutsche Bank here – dismissal without prejudice of its first action. *See, e.g.*, *Clayton Nat'l, Inc. v. Guldi*, 763 N.Y.S.2d 493, 494 (N.Y. App. Div. 2003) (affirming dismissal of foreclosure action on statute of limitations grounds because the dismissal of a prior foreclosure action for lack of personal jurisdiction "did not constitute an affirmative act by the lender to revoke its [original] election to accelerate"). *See also Secured Equities Invs., Inc. v. McFarland*, 753 N.Y.S.2d 264, 266 (N.Y. App. Div. 2002) (directing summary judgment against lender due to expiration of statute of limitations where it failed to submit admissible evidence to support its contention that the earlier foreclosure action that it dismissed was a nullity because there had been no proper acceleration).

B. Nebraska, Louisiana and Connecticut

It is not just New York that supports the panel's views. *See Jones v.Burr*, 389 N.W.2d 289, 293 (Neb. 1986) ("[o]nce the purchase price was accelerated, unless the parties entered into some other valid agreement waiving the acceleration, or unless the sellers took some positive action which would in law constitute a waiver, the entire amount under the contract remained due").

Louisiana adheres to the same reasoning. In *Harrison v. Smith*, 814 So. 2d 42 (La. Ct. App. 2002), the court held that, "[w]here steps are taken to accelerate a note more than five years before the institution of a suit, a promissory note is not enforceable because it proscribes." *Id.*at 45. The court flatly rejected the argument that a voluntary dismissal of a foreclosure action made the acceleration of the indebtedness disappear. "We find no legal basis to construe this principle of restoring matters to their former status upon dismissal of a suit without prejudice to mean that a note once accelerated will be reinstated as if it were not accelerated." *Id.* at 46.

Connecticut is also part of the prevailing view. Applying the statute of limitations, the court in *Cadle Co. v. Prodoti*, 716 A.2d 965, 967 (Conn. Super. Ct. 1998), found that for purposes of accrual of the statute of limitations, there can be no reinstatement once there has been acceleration, holding that "[i]t is undoubtedly true that the statute of limitations clock begins to run ***irreversibly*** when an optional

acceleration clause is exercised by a demand of full payment before all installments become due." (emphasis added).

C. Res judicata decisions from the highest courts of Ohio, Maine and Kentucky support the panel's decision.

Even in the distinguishable, judicially conceived context of res judicata, other states reject the concept of automatic and unilateral deceleration that has been wrongly attributed to *Singleton*. A thorough analysis was undertaken by the Ohio Supreme Court in *U.S. Bank Nat'l Ass'n v. Gullotta*, 899 N.E.2d 987 (Ohio 2008). There, summary judgment in favor of the lender was reversed. The lender filed and voluntarily dismissed two foreclosure actions, both of which purported to accelerate the debt. *Id.* at 988. After the filing of a third foreclosure action, the Ohio Supreme Court deemed it barred by res judicata, concluding that the loan had never been reinstated. *Id.* at 990. Once the lender "invoked the acceleration clause of the note, the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note." *Id.* at 992.

The highest courts in other states apply the same reasoning. In *Johnson v. Samson Constr. Corp.*, 704 A.2d 866 (Me. 1997), a foreclosure action on an accelerated debt had been dismissed with prejudice for failure to file a conference report. When a second foreclosure action was then brought, it was ruled to be barred by res judicata, even though the lender – like Deutsche Bank here –

attempted to rely on payment defaults subsequent to the filing of the first complaint. *Id.* at 868. Affirming a trial court's summary judgment, the Maine Supreme Judicial Court held that the lender "cannot avoid the consequences of his procedural default in this second lawsuit by attempting to divide a contract which became indivisible when he accelerated the debt in the first lawsuit." *Id.* at 869. *See also Hamlin v. Peckler*, 2005 WL 3500784, at *2 (Ky. Dec. 22, 2005) (in dictum, stating that "when the mortgagee sought recovery of the entire unpaid indebtedness and sought to subject the real property upon which the mortgage lien had been granted to payment of the indebtedness, a default was asserted with respect to every installment of the debt, foreclosing assertion of some subsequent claim of default").

This Court should affirm the panel's decision in line with the overwhelming majority of rulings from the rest of the United States which favors the Appellee.

4. THE FIRST INVOLUNTARY DISMISSAL WITHOUT PREJUDICE DID NOT SERVE TO REVOKE THE ACCELERATION OF THE DEBT BALANCE, THEREBY REINSTATING THE INSTALLMENT NATURE OF THE MORTGAGE TERMS AND OBLIGATIONS.

Paragraph 18 of the subject mortgage provides that the note and mortgage can be reinstated following acceleration, if, and only if, the contractual prerequisites for reinstatement are met by the borrower. Neither the note nor the mortgage provides that an involuntary dismissal (or a voluntary dismissal) without

prejudice (or one with prejudice) of the foreclosure action would negate the acceleration of the debt or otherwise reinstate the installment nature of the loan. Reversal of the panel would impermissibly serve to re-write the terms of the mortgage.

There is no evidence in the record in this case that the borrower Beauvais tried to have the acceleration of the debt (or enforcement of the mortgage) halted, discontinued or modified, nor is there any evidence that the borrower reinstated the installment nature of the payments or met any of the conditions necessary for reinstatement prior to the foreclosure action or after the dismissal without prejudice. Therefore, in the instant case, the involuntary dismissal without prejudice of the foreclosure action, the panel correctly held, "did not by itself negate, invalidate or otherwise decelerate the lender's acceleration of the debt in the initial action." 2014 WL 7156961 at *1.

A. **INTERPRETING THE FLORIDA STATUTE OF LIMITATIONS**

The Florida statute of limitations to foreclose a mortgage is clear and unambiguous, and therefore, should be given its plain and obvious meaning without resorting to the rules of statutory construction and interpretation. "In construing a statute we are to give effect to the Legislature's intent." *State v. J.M.*, 824 So. 2d 105, 109 (Fla. 2002). In attempting to discern legislative intent, we first look to the actual language used in the statute. *Joshua v. City of Gainesville*,

768 So. 2d 432, 435 (Fla. 2000); *accord Bell South Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003); *Daniel v. Florida Dept. of Health*, 898 So. 2d 61, 64 (Fla. 2005).

Florida Statutes § 95.11 sets forth the applicable five year limitations period for an action to foreclose a mortgage, with the last element under § 95.031 being "written demand for payment." Section 95.051 provides an exclusive list of situations that can toll or suspend the running of the statute of limitations. Since dismissal without prejudice of an action is not enumerated as suspending the statute of limitations by the Legislature, and the Legislature left no discretion in this regard, courts have no power to extend, modify, or limit the determination of the Legislature and should decline the lender's invitation to add grounds for tolling not present in the statute.

Decisions such as *Evergrene Partners, Inc. v. Citibank,* 143 So. 3d 954 (Fla. 4th DCA 2014), and *Dorta v. Wilmington Trust, N.A.*, 2014 WL 1152917 (M.D. Fla., March 24, 2014), suggesting that dismissal of a foreclosure action for any reason reinstates the installment contract, simply are not consistent with Florida law. An acceleration clause contained in a mortgage or note which by its terms requires payment in installments "confers a contract right upon the mortgagee which he may elect to enforce, upon a default." *Campbell v. Werner*, 232 So. 2d 252, 255 (Fla. 3d DCA 1970). When a mortgage contains an acceleration clause,

the statute of limitations commences when the lender exercises this option and invokes the acceleration clause. *See Greene*, 733 So. 2d at 1115 (noting that in an installment contract with an optional acceleration clause, "the entire debt does not become due on the mere default of payment; rather, it become[s] due when the creditor takes affirmative action to alert the debtor that he has exercised his option to accelerate"); *Monte v. Tipton*, 612 So. 2d 714 (Fla. 2d DCA 1993); *Smith v. FDIC*, 61 F.3d 1552, 1561 (11th Cir. 1995) ("when the promissory note secured by a mortgage contains an optional acceleration clause, the foreclosure cause of action accrues, and the statute of limitations begins to run, on the date the acceleration clause is invoked").

The prior complaint filed in 2007 specifically declared the full amount payable under the note and mortgage to be due. Deutsche Bank exercised its right of acceleration, and did "require immediate payment in full of all sums secured by the Security Instrument without further demand" and did seek to "foreclose this Security Instrument by Judicial proceeding." 2014 WL 7156961 at *10. Acceleration of the debt serves as the last act necessary for the accrual of a lender's cause of action (and commencement of the statute of limitations), converting the mortgage (*i.e.*, installment loan) into a single payment of the balance due on the note and mortgage.

Therefore, the five year statute of limitations commenced on January 23, 2007. Thereafter, on December 6, 2010, the original foreclosure action was dismissed without prejudice and since the borrower did not reinstate the loan and there was no judicial determination that the acceleration was ineffective or had not occurred, the statute of limitations continued to run. *See Snow v. Wells Fargo Bank, N.A.*, 156 So. 3d 538, 542 (Fla. 3d DCA 2015) ("[T]he limitations period commenced when Wells Fargo filed the March 12, 2008 foreclosure complaint, expressing in clear and unequivocal language that it was exercising its option and accelerating the debt…. Thus, the statute of limitations would have expired March 12, 2013.")

5. ABSENT AN AGREEMENT BETWEEN THE LENDER AND BORROWER REINSTATING THE LOAN AFTER THE INVOLUNTARY DISMISSAL WITHOUT PREJUDICE, THE STATUTE OF LIMITATIONS BARS THE SECOND FORECLOSURE ACTION

There is no evidence, in the record or otherwise, suggesting that the borrower or the lender treated the trial court's dismissal without prejudice as if the acceleration had faded away and monthly payments could therefore be resumed by the borrower post dismissal. In fact, it is a customary practice in the banking system that, once acceleration occurs, short of the borrower reinstating the loan by complying with specific conditions outlined in the mortgage contract, the bank will

not accept monthly payments and demands instead full payment of the entire accelerated loan balance.

Furthermore, there is no evidence that Beauvais sought to have the acceleration of the debt (or other enforcement of the mortgage) modified, halted or sought reinstatement the contract or met any of the numerated conditions required for reinstatement. While the record does provide an unauthenticated letter, dated November 2, 2012, declaring that Deutsche Bank intended to accelerate the debt and proceed with a foreclosure action if Beauvais failed to pay the accelerated debt of $796,161.19 by December 7, 2012, the letter has no relevance because it was sent long after the expiration of the statute of limitations (on January 22, 2012) and thus the right to foreclose on the note and mortgage had been extinguished. Even if the letter had been sent prior to expiration of the limitations period, it did not inform the borrower that the bank had rescinded acceleration or that the involuntary dismissal had decelerated the loan.

6. *SINGLETON* DEALT WITH RES JUDICATA, WHICH IS A COMMON LAW DOCTRINE, AND DID NOT ADDRESS THE STATUTE OF LIMITATIONS, WHICH IS A LEGISLATIVE MANDATE

The Florida Supreme Court's ruling in *Singleton* dealt with res judicata and was completely silent on what effect expiration of the statute of limitations would have on a foreclosure proceeding. *Singleton* involved an involuntary dismissal *with prejudice* of the initial action, whereas the case against Beauvais was

involuntarily dismissed *without prejudice*. The dismissal with prejudice in *Singleton* operated as an adjudication on the merits. By contrast, the trial court's dismissal in the instant case was expressly entered without prejudice, which did not operate as an adjudication on the merits. This distinction makes the *Singleton* analysis inapplicable here.

Singleton is a measured, narrowly cast res judicata decision. As the Florida Supreme Court held:

> We conclude that the doctrine of res judicata does not *necessarily* bar successive foreclosure suits, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit. *In this case*, the subsequent and separate default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.

Singleton, 882 So. 2d at 1007-08 (emphasis added).

Here, unlike *Singleton*, there has been no adjudication on the merits, nor a finding that the acceleration was invalid or not executed. As a result, even applying the *Singleton* analysis, the lender's exercise of its option to accelerate Beauvais' debt survives dismissal without prejudice.

In addition to the important distinction regarding the absence of an adjudication on the merits here, *Singleton* invokes and relies upon the equitable considerations that underlie a judge-made doctrine—res judicata. In contrast, the statute of limitations is a creation of the legislature, within the legislature's

prerogatives. There is nothing in *Singleton* that is inconsistent with the conclusion that a mortgage-foreclosure claim that is not barred by the doctrine of res judicata is still subject to the statute of limitations triggered by the initial acceleration.

Moreover, *Singleton*'s res judicata-based equitable concerns have no pertinence to this situation. The dismissal with prejudice in *Singleton* meant that the particular claim, based upon payments due between September 1, 1999 and February 1, 2000, could not be brought again. However, the second foreclosure action was based on a default date in April 2000 – **well within the five year statute of limitations period** – with the Court reaching an equitable conclusion that res judicata cannot be used so strictly to cause an unjust ruling. On the other hand, a dismissal without prejudice does not have res judicata effect, and the identical action can be brought again since the first action was not adjudicated on the merits. The lender merely must comply with a legislatively determined limitations period. That is the controlling distinction that must be drawn between *Singleton* and the instant case.

In contrast with res judicata, a statute of limitations defense is governed by legislative intent where equitable considerations have no bearing.[1] There are

[1] Even if they did, as explained above, equity is not with the bank but instead with Aqua Master Association, which has been materially prejudiced by the bank's dilatory actions that have cost the association (unit owners of the community) over $70,000 (judgment entered), not to mention the ill effects on society the bank's

important policies supporting the Legislature's determination that "once a claim is extinguished by the statute of limitations, it cannot be revived." *Williams v. Jones,* 326 So. 2d 425, 429 (Fla. 1975). As the United States Supreme Court said in *Wood v. Carpenter*, 101 U.S. 135, 139 (1879):

> *Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. They stimulate to activity and punish negligence.*

The purpose of a "statute of limitations is in providing repose for potential defendants and in avoiding stale claims." *Tulsa Professional Collection Services, Inc. v. Pope* 485 U.S. 478, 487 (1988). It protects against "tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses." *Major League Baseball v. Morsani,* 790 So 2d. 1071, 1075-76 (Fla. 2001). It actually creates a "constitutionally protected property right to be free from the claim." *In re Estate of Smith,* 685 So. 2d. 1206, 1210 (Fla.), *cert. denied sub nom. Scruggs v. Wilson,* 520 U.S. 1265 (1997). *Accord, Wood v. Eli Lilly & Co.,* 701 So. 344, 346 (Fla. 1997); *Wiley v. Roof,* 641 So. 2d 66, 68 (Fla. 1994).

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inaction has caused.

7. ONCE A DEBT IS RENDERED UNENFORCEABLE BY THE STATUTE OF LIMITATIONS, THE MORTGAGE SECURING THAT DEBT IS INVALIDATED BY THE STATUTE OF REPOSE.

Florida's statute of repose sets forth two different time limitations depending on whether the "final maturity date" of the obligation (note) is "ascertainable from the record of it." Fla. Stat. §95.281(1)(a). If the final maturity date is ascertainable from the record of the obligation of the note, the mortgage terminates as a matter of law five years from that date. *Id.*

In this analysis, the word "ascertainable" is of particular saliency. According to Merriam-Webster's Collegiate Dictionary (11th ed. 2009), the word "ascertain" means "to learn or find out (something, such as information or the truth)." The suffix "able" modifies "ascertain," and is defined independently as "capable of, fit for, or worthy of (being so acted upon or toward)." *See id.* Strung together, the word ascertainable, as used within § 95.281, can logically be defined as something that is capable of being learned or found out, such as information or the truth.

Upon filing its foreclosure action in December 2007, the lender recorded a lis pendens at the county recorder's office; that notice was accessible along with the recorded mortgage. The recorded lis pendens stated that the property was the subject of a foreclosure action and—as required by Florida Statutes § 48.23(1)(c)—expressly identified that foreclosure action. As the lis pendens

expressly directs all to review the complaint filed therein—which is also public record and readily available—it openly discloses the accelerated final maturity date of the debt as stated in the complaint filed on public records.

Therefore, an individual could readily ascertain the final maturity date of the accelerated note by reviewing the public records, since the lender clearly and unequivocally accelerated the entire debt, thus collapsing the installment loan into one lump sum due immediately. Because the second action was initiated beyond five years after acceleration, both the statute of limitations and the statute of repose expired. If this Court were to conclude that the statute of repose allows the lien to still be attached to property despite the underlying debt being unenforceable by the statute of limitations, it will lead to an improper result. The owner of a property, which has an unenforceable debt due to the statute of limitations, will carry a cloud on title for decades that will prohibit marketability of title and restrain alienation of property rights in this state.

CONCLUSION

For the reasons described above, the court should reverse the portion of the order from the panel which prohibited the Association from quieting title and affirm the opinion as it relates to the enforceability and application of the statute of limitations.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via electronic mail and or mail this 1st day of October, 2015, to: Major B. Harding, Esq., and Ausley McMullen P.O. Box 391 Tallahassee, Fl 32302-0391; John R. Hargrove, Esq. JRH@Hargrovelawgroup.com, The John Hargrove Law Group, 21 Southeast 5th St Suite 200 Boca Raton, Fl 33432; Todd L. Wallen, Esq., todd@wallenlawfirm.com, The Wallen Law Firm, P.A., 255 Aragon Ave., Second Floor, Coral Gables, Florida 33134; Steven Siegfried, Esq., ssiegfried@srhl-law.com, Nicholas Siegfried, Esq., nsiegfried@srhl-law.com, Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars, & Sobel, P.A., 201 Alhambra Circle, 11th Floor, Coral Gables, Florida 33134; William P. McCaughan, Esq. William.mccaughan@klgates.com, Steven R. Weinstein, Esq. steven.weinstein@klgates.com, Stephanie N. Moot, Esq. Stephanie.moot@klgates.com, K&L Gates, LLP, Southeast Financial Center, 200 South Biscayne Blvd., Ste. 3900, Miami, Florida 33131; David R. Fine, Esq. david.fine@klgates.com, K&L Gates, LLP, 17 North Second Street, 18th Floor, Harrisburg, PA 17101;, Cfeld@richmangreer.com, Richman Greer, P.A., 250 Australian Ave. South, Suite 1504, West Palm Beach, FL 33401.

/s/ Matthew Estevez
Matthew Estevez
Fla. Bar No.027736

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Matthew Estevez
Matthew Estevez
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