IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC16-1680

2nd DCA CASE NO.: 5D15-3186

LOWER TRIBUNAL NO.: 13-CA-708

BOLLETTIERI RESORT VILLAS CONDOMINIUM ASSOCIATION, INC.,

Petitioner/Appellant,

vs.

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE HOLDERS OF THE CERTIFICATES, FIRST HORIZON MORTGAGE PASS-THROUGH CERTIFICATES SERIES FHAMS 2007-FA4, et al.,

Respondent/Appellee,

AMICUS CURIAE BRIEF OF ENRIQUE AREVALO, FILED IN SUPPORT OF THE PETITIONER/APPELLANT

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STATEMENT OF INTEREST

COMES NOW, ENRIQUE AREVALO, who is a homeowner within Miami-Dade County, Florida, and is a defendant in a residential foreclosure lawsuit pending in the Eleventh Judicial Circuit, with Case Number of 2016-16439 (CA 01). The action is a residential foreclosure lawsuit filed on June 28, 2016, based on a "default under the terms of the Note and Mortgage for failure to pay the payment due on May 1, 2009, and all subsequent payments." The issue raised by the certified conflict presented here between *Bollettieri*, *Hicks*, and *Collazo*, is the precise issue raised in AREVALO's Answer and Affirmative Defenses in the underlying action and therefore AREVALO has a substantial interest in the ruling of this Court.

ARGUMENT

I.
THE BREACH LETTER REQUIRED BY PARAGRAPH 22 OF THE STANDARD MORTGAGE REQUIRES THE LENDER TO SPECIFY THE DEFAULT UPON WHICH ITS COMPLAINT FOR FORECLOSURE WILL BE BASED; WHERE LENDER'S CAUSE OF ACTION FOR THAT MONTHLY INSTALLMENT IS BARRED BY THE STATUTE OF LIMITATIONS, THE PROPER REMEDY IS DISMISSAL WITH PREJUDICE. LENDER MUST THEREAFTER SEND A VALID BREACH LETTER BASED UPON A DEFAULT OCCURRING WITHIN THE LIMITATIONS PERIOD.

Mortgage lenders, like the Appellee in the instant case, would like this Court to adopt a standard under which once a borrower defaults on a payment, he or she is in a "continuing state of default". However, a continuing state of default is a fiction.

The standard Fannie Mae mortgage securing a promissory note requires that any payment made by borrower be first applied to any past-due installment. Here, Paragraph 2 of the Uniform Covenants of the Mortgage directs the manner of application of the payments due under the subject Note as follows:

> 2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. *Such payments shall be applied to each Periodic Payment in the order in which it became due.* Any remaining amounts shall be applied first to

> late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of me Note.

Record on Appeal, Vol. 1, Page 10 (emphasis added).

The premise of a "continuing state of default" unnecessarily broadens the definition of a default. Under that scenario, a lender need only plead a borrower's generic failure to comply with the terms of the subject note and mortgage. Doing so would effectively eliminate the statute of limitations as a viable affirmative defense. For example, where the lender alleges that the borrower failed to pay the September 1, 2007 monthly installment due under the note, the borrower could raise the affirmative defense that he or she had made that payment. Lenders would now like this Court to eviscerate the statute of limitations as s defense. Where a borrower can now sustain the affirmative defense by proving tender and acceptance of the alleged defaulting payment, the lenders would still like to proceed on the theory that a borrower failed to make "all subsequent payments." That is the essence of the continuing state of default scenario that mortgage lenders want this Court to make.

This Court's answer must be a resounding "No" to this attempt to narrow the statute of limitations defense.

Paragraph 22 of the standard Fannie Mae mortgage, which is the mortgage used in this case and in most others in this State, provides:

> **22. Acceleration; Remedies, Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (hut not prior to acceleration under Section 18 unless Applicable Law provides otherwise), The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence**.

Paragraph 22 of the Mortgage, Record on Appeal, Volume 1, Page 20 (**emphasis in original**). The boldness is not added here for effect.

The procedural requirements of Paragraph 22, as a negotiated term of the contract, cannot be overlooked or waived. The emboldening of the text underscores its primacy with respect to the acceleration remedy. The very purpose of this provision is to provide protections *for the defaulting party*.

A Homeowner is a party to a contract of adhesion, and as such, has been provided the protection of Paragraph 22, because it was anticipated that a Homeowner would not have the equal ability to dispute a Lender's accounting, or to question application of payments, or imposition of forced-placed insurance, or any of the other grounds for default alleged by Lender.

A residential foreclosure is a drastic remedy. Paragraph 22 stands as a safeguard so that, if a lender is going to pursue that remedy, the borrower must be given clear and concise information of not only what caused the alleged breach, but the exact procedure by which he or she can cure the default and avoid acceleration and foreclosure. The contractual language in Paragraph 22 has a plain and unambiguous meaning, creating mandatory conditions precedent to acceleration and foreclosure. *Lazuran v. Citimortgage, Inc*. 35 So. 3d 189 (Fla. 4th DCA 2010).

The Second District, the same Court that issued the *Bollettieri* decision under review, previously held in *Konsulian v. Busey Bank, N.A.*, 61 So.3d 1283, 1285 (Fla. 2d DCA 2011), that "[u]nder Florida law, contracts are construed in accordance with their plain language." The *Konsulian* court reversed entry of a final summary judgment because the bank had not addressed the defendant's affirmative defenses regarding insufficiency of the required notice provisions of Paragraph 22 of the mortgage. In noting the mandatory nature of Paragraph 22, the *Konsulian* Court held that "[t]he language of the mortgage is clear and unambiguous. The word 'shall' in the mortgage created conditions precedent to foreclosure, which were not satisfied." *Id.* at 1285.

In *Judy v. MSMC Venture, LLC*, 100 So. 3d 1287, 1289 (Fla. 2d DCA 2012, the Second District also reversed a summary judgment in favor of a lender, finding that

> [a]lthough MSMC argues that it provided the Judys with proper notice of default, *the notices failed to specify the breach. Instead, the notices generally alleged that the Judys committed a breach. And failure to specify the default as required by the mortgage terms requires reversal because MSMC did not meet its burden in refuting the Judy's affirmative defense of insufficient notice of default.*

(*Emphasis added*). The Second District, in *DiSalvo, III v. SunTrust Mortgage, Inc.*, 115 So. 3d 438 (Fla. 2d DCA 2013) again reversed a lender's final summary judgment, finding that the lender had not proven satisfaction of the conditions precedent. That court specifically held that "a mortgagee's right to the security for a mortgage is dependent upon its compliance with the terms of the mortgage contract, and it cannot foreclose until it has proven compliance." *Id.* at 439. In *Green Tree Servicing, LLC v. Milam*, 177 So. 3d 7, 14-15 (Fla. 2d DCA 2015), the Second District Court of Appeal explained that:

> Applying these principles to paragraph twenty-two, then, when the content of a lender's notice letter is nearly equivalent to or varies in only immaterial respects from what the mortgage requires, the letter substantially complies, and a minor variation from the terms of paragraph twenty-two should not preclude a foreclosure action. *Where, on the other hand, the lender's notice letter varies from paragraph twenty-two in a way that goes to the essence of the parties' bargain, the variation is material and the lender has failed to satisfy a condition precedent to the foreclosure action.***"**

(*Emphasis added*).

Applying this general concept of pre-suit notice of default to the statute of limitations, the court in *Broward County v. 8705 Hampshire Drive Condominium, Inc.*, 127 So.3d 853 (Fla. 4th DCA 2013), in affirming a final summary judgment denying foreclosure based upon expiration of the statute of limitations, held that affirmance "is therefore without prejudice to a subsequent foreclosure action alleging future breaches of the covenants at issue in this case, if they occur *and if the county provides proper notice of acceleration in accordance with the mortgage terms*." *Id.* at 854 (*emphasis added*). In *Sill v. JPMorgan Chase, N.A.*, 182 So.3d 851, 852 (Fla. 4th DCA 2016), the Fourth District cited its earlier opinion of *Schindler v. Bank of N.Y. Mellon Trust Co.*, 190 So.3d 102 (Fla. 4th DCA 2015) in support of the holding that when a foreclosure plaintiff alleges the same default date in a later lawsuit, it is not required to provide a new Breach Letter, because the subsequent complaint alleges the same cause of action as the prior complaint.

Paragraph 22 is the glue that binds these decisions together. The constant thread running through all the cases is that notice of default must specify the default and that relying on a generic allegation in a foreclosure complaint that a borrower failed to make "all subsequent

payments" does not satisfy the provision that both parties to the mortgage clearly and unequivocally agreed to. To permit a lender to proceed on such a general allegation of default would deny borrowers their due process rights under law, and would ignore the protections guaranteed by Paragraph 22. The ends simply cannot justify the means. There is no body of legal precedent which would support the disregard of the clear and unambiguous protections of Paragraph 22.

The "continuing state of default" doctrine that lenders would like this Court to adopt goes much further than the statute of limitations defense. For example, this doctrine could also undermine the issue of whether a lender has standing. Under the continuing state of default, a lender could simply proceed on the theory that, even if it acquired standing *after* the filing of a foreclosure complaint, subsequent monthly installments occurring after the lender acquired the note and mortgage would permit it to proceed to foreclosure. Under the position put forward by lenders, they would always prevail in every foreclosure lawsuit, regardless of whatever defenses their borrowers put forward.

This Court must reject the demand that it wholly upend years of precedent. Paragraph 22 must, instead, be given its plain, mandatory

meaning. In a case where a lender has based its complaint (and its breach letter/notice of intent to accelerate) upon the failure to pay a particular monthly installment that is barred by operation of the statute of limitations, the proper remedy, as decided by the court in *Hicks v. Wells Fargo Bank, N.A.*, 178 So.3d 957, 959 (Fla. 5th DCA 2015), is dismissal with prejudice. A lender would still be able to foreclose, but would first need to comply with Paragraph 22 of the subject mortgage, send the homeowner a new breach letter/notice of intent to accelerate based upon a valid default date occurring within the limitations period. If the homeowner fails to cure the new default, then, and only then, should a lender be able to proceed to foreclosure.

Justice Lewis' opinion in *Bartram v. U.S. Bank Nat. Ass'n*, --- So.3d ----, 2016 WL 6538647 (November 3, 2016), concurring in the result only, refers to "the concern raised by this Court and others regarding the need to avoid encouraging delinquent borrowers from abusing the lending process by remaining in default after an initial foreclosure action is dismissed." *Id.* at 15. The goal of encouraging reinstatement after a failed foreclosure attempt is not served by a Lender filing a subsequent foreclosure lawsuit based upon a default *occurring outside the limitations period*, yet permitting that lender to

continue to final judgment and sale of the property. Instead, this Court should insist that a lender's complaint be based on a specific default occurring within the limitations period and failing that, require dismissal of the complaint as barred by operation of the statute of limitations, as held by *Hicks* and *Collazo v. HSBC Bank USA, N.A.*, --- So.3d ----, 2016 WL 6246446 (Fla. 3d DCA October 13, 2016). The lender would still be able to foreclose by sending a new breach letter/notice of intent to accelerate based on a default occurring within the limitations period. If the borrower then failed to cure the proper default alleged, then Lender can proceed to accelerate and file suit to foreclose its mortgage.

In *Bartram***,** this Honorable Court gave the example that "[b]y the express terms of the reinstatement provision, if, in the month after the dismissal of the foreclosure action, Bartram began to make monthly payments on the note, the bank could not have subsequently accelerated the entire note until there were future defaults." *Id*. at 14. The only way to give weight to this example would be to require Lender to have issued a new breach letter/notice of intent to accelerate, and only upon the failure to cure this subsequent default would a lender have "the right to file a subsequent foreclosure

action—and to seek acceleration of all sums due under the note—so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default." *Id.* at 11. It would be unjust to permit Lender to re-file its foreclosure complaint based on a default and cause of action that, at the time of the filing of the lawsuit, was already barred by operation of the statute of limitations.

In its opinion in this case below, the Second District justified its affirmance of the final judgment of foreclosure, including interest and monthly installments due from September 1, 2007, by quoting from *Hummer v. Adams Homes of NW Fla., Inc.*, 198 So.3d 750 (Fla. 2d DCA 2016) stating that dismissal of "a complaint based on the expiration of the statute of limitations should be granted only in extraordinary circumstances in which the facts pleaded in the complaint conclusively establish that the statute of limitations bars the action as a matter of law." *Bollettieri Resort Villas Condo Ass'n, Inc. v. Bank of New York Mellon,* 198 So.3d 1140, 1141 (Fla. 2d DCA 2016). However, a closer look *Hummer* reveals a tenuous argument at best, as the case dealt with a *pro se* plaintiff's complaint alleging damages to his home and personal injuries resulting from defective drywall used in the

construction of the home. In *Hummer*, the trial court had granted defendants' motions to dismiss the complaint as being barred by various statutes of limitation applicable to both the property damage claims, and the personal injury claims. The Second District reversed the dismissal as to the personal injury claims only, holding that:

> …we are not convinced that the date of the accrual of his personal injury causes of action can be established beyond dispute from his *pro se* pleading. A trial court's authority to dismiss a complaint on an affirmative defense of statute of limitations is limited to situations in which "the complaint affirmatively and clearly shows the conclusive applicability of such defense as a bar to the action." *Alexander Hamilton Corp. v. Leeson*, 508 So. 2d 513, 513 (Fla. 4th DCA 1987)

Hummer, 198 So.3d at 751.

Indeed, in *CCM Pathfinder Palm Harbor Mgmt., LLC v. Gendron*, 198 So.3d 3, 7 (Fla. 2d DCA 2015), the same court held that "[i]n the case of an installment note, the right to foreclose accrues as to each installment on the date the installment becomes due."

Though the court below noted that "the bank affirmatively alleged that Graham has failed to make any subsequent payments due on the note," it then cites to *Singleton v. Greymar Assocs.*, 882 So.2d 1004, 1008 (Fla. 2004), to state that each "'alleged default create[s] a

new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." *Bollettieri*, 198 So.3d. at 1142. It is essential to understand that in the instant case, where Graham failed to pay the monthly installment due September 1, 2007, any attempt by Graham to pay any subsequent monthly installment would have failed, as Paragraph 2 of the Uniform Covenants of the subject Mortgage directs that "Such payments shall be applied to each Periodic Payment *in the order in which it became due*." Record on Appeal, Vol. 1, Page 10 (emphasis added). This means that where the monthly payment due for September 1, 2007 was not paid, but the homeowner attempted to pay the October 1, 2007 monthly installment, the homeowner's payment would instead be applied to the outstanding September 1, 2007 installment. This is the reason why Lender's Complaint for Foreclosure is based upon the failure to pay the September 1, 2007, monthly installment and all subsequent payments. The words "and all subsequent payments" must be considered mere surplusage because the breach letter/notice of intent to accelerate required by Paragraph 22 of the mortgage would specify that the alleged default is the failure to pay the specific monthly installment, in this case, September 1, 2007, and not "all subsequent payments."

CONCLUSION

As this Court held in *Major League Baseball v. Morsani*, 790 So.2d 1071 (Fla. 2001), "a prime purpose underlying statutes of limitation is to protect defendants from unfair surprise and stale claims:

> 'As a statute of [limitations], they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court.'"

Id., at 1075.

It would be resolutely unfair for this Court to permit a lender to base its cause of action (and its breach letter/notice of intent to accelerate), upon a monthly installment that was older than five years from the date of filing a foreclosure complaint, and thus already barred by operation of the statute of limitations. This Court has recently clarified that, regardless of a prior acceleration, a lender has the right to re-file its foreclosure action. The caveat this Court

imposed in *Bartram* is that the re-filed lawsuit must be based upon a default occurring *after* the dismissal of the prior action and it must be based upon a default that has occurred more than five years prior to the filing date of the subsequent action.

To make manifest the holding of *Bartram*, this Honorable Court must approve the Fifth District Court of Appeal's holding in *Hicks*, reverse the final judgment of foreclosure below, and dismiss the foreclosure complaint with Prejudice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed this 28th day of December, 2016, to NANCY M. WALLACE, ESQ. (nancy.wallace@akerman.com). WILLIAM P. HELLER, ESQ. (William.heller@akerman.com), RYAN D. O'CONNOR, ESQ. (ryan.conner@akerman.com), Akerman, LLP, Attorneys for Appellee, Bank of New York Mellon, as Trustee, P.O. Box 48323, Tampa, Florida 33646-0120; SHAWN BROWN, ESQ. (shawn@frazierbrownlaw.com) of Frazier & Brown Law, PLLC, Attorneys for Appellant, 2111 West Swann Avenue, Suite 204, Tampa, FL 33606; and via United States mail on BARRY GRAHAM, 9270 Triana Terrace, Apt. 3, Ft. Myers, FL 33912.

s/ Dennis A. Donet

CERTIFICATION OF TYPE SIZE

The Appellants hereby certify that they have utilized the Times New Roman typeface at a size of 14 points throughout this Amicus Curiae Brief.

s/Dennis A. Donet

DESIGNATION OF EMAIL ADDRESS(ES) FOR SERVICE
(Pursuant to Rule 2.516 Fla. R. Jud. Admin.)
The undersigned attorneys of The Law Office of Dennis A. Donet, P.A., hereby designate the following Email Address(es) for service in the above styled matter. Service shall be complete upon emailing to the following email address(es) in this Designation, provided that the provisions of Rule 2.516 are followed.

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