IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1920
L.T. CASE NO. 3D14-3114

WVMF FUNDING, as successor to ONEWEST BANK, FSB,
Petitioner,

v.

LUISA PALMERO, et al.,
Respondent.

REPLY BRIEF OF PETITIONER

WILLIAM P. MCCAUGHAN, ESQ.
LAW OFFICE OF WILLIAM P. MCCAUGHAN
511 South Mashta Drive
Key Biscayne, FL 33149
Tel: 305-588-1664
Co-Counsel for Petitioner

JOSHUA H. THREADCRAFT, ESQ.
BURR & FORMAN LLP
420 N. 20th Street
Suite 3400
Birmingham, AL 35203
Tel: 205-251-3000
Co-Counsel for Petitioner

JONATHAN B. MORTON, ESQ.
MALLORY M. COONEY, ESQ.
JOSHUA C. CARPENTER, ESQ.
K & L GATES LLP
200 S. Biscayne Blvd. Ste. 3900
Miami, FL 33131
Tel: 305-539-3300
Co-Counsel for Petitioner

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INTRODUCTION[1]

Respondent provides no more than lip service in defense of the reasoning used by the majority in *Palmero II*—that the trial court should not have considered the other Loan Documents—most likely because she recognizes that the reasoning conflicts with the well-established case law. Instead, Respondent's arguments are primarily based upon a legal theory not addressed in *Palmero II* (or *Palmero I* for that matter): that this Court's longstanding rules of interpretation governing multi-document transactions somehow do not apply to reverse mortgages. This position, which finds no support in the law, would turn well-reasoned and time-honored tenets of contractual interpretation on their head. This Court should reject Respondent's request for such an exception and uphold its longstanding rules of contract interpretation by reversing *Palmero II* with instructions to enter judgment in favor of WVMF in a manner consistent with the terms of the Loan Documents, as factually determined by the trial court.

[1] References to the parties are the same as those contained in the Initial Brief. The Third District Court of Appeal's decision in *OneWest Bank, FSB v. Palmero*, 43 Fla. L. Weekly D827 (Fla. 3d DCA Apr. 18, 2018), is referenced as "*Palmero I*." The Third District's decision in *OneWest Bank, FSB v. Palmero*, 283 So. 3d 346 (Fla. 3d DCA 2019) is referenced as "*Palmero II*."

ARGUMENT

I. This Court should not categorically exempt reverse mortgages from this Court's longstanding precedent governing rules of contract and mortgage interpretation.

In its Initial Brief, WVMF cited an unbroken line of cases from this Court dating back over a century that all stand for the same proposition: Courts should examine all documents in a multi-document transaction when determining the intent of the parties, especially when the documents include a note *and* mortgage.

Respondent seeks an exception to these well-established principles of contract interpretation on the basis that reverse mortgages are somehow different or "unique." *See* Answer Br. at 14–19. Respondent's position is untenable because a mortgage is merely a security instrument that secures a debt created by a note. A mortgage standing alone without reference to the obligation created by the note is like an empty bank vault: it serves no purpose. The fact that the remedy provided in a reverse mortgage differs from some conventional mortgages is not a legitimate basis to ignore longstanding principles of contract interpretation. Reverse mortgages are merely another common subset of multi-document transactions that should follow the same well-reasoned and time-honored rules of contract interpretation established by this Court and applied to all such transactions to honor the parties' intentions.

Respondent asserts that this case is strictly limited to these unique facts and will not have a large impact on Florida real estate or jurisprudence. *See id*. at Part

IV. But Respondent is incorrect. If this Court creates an exception to the general, longstanding rules of multi-document transactions and holds that the terms of a note should not be considered when determining the intent of the parties, that exception will apply to thousands of reverse mortgages throughout the state and likely to other non-recourse loans as well.[2] Such a decision would have wide-ranging consequences that will have an adverse, lasting impact on the Florida real-estate market, most notably for lenders and borrowers who have relied upon longstanding law when entering into transactions. Thus, this Court should reaffirm the application of its longstanding, broadly applicable rules of contract interpretation and clarify that such rules apply to reverse mortgages and the facts of this case.[3]

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[2] A 2019 *Naples Daily News* article states that at that time, there were 650,000 outstanding reverse mortgages nationwide, with roughly 85,000 (13%) in the State of Florida. Melanie Payne, *Reverse Mortgages: 15,000 Older Florida Homeowners at Risk of Foreclosure and Homelessness*, NAPLES DAILY NEWS (June 12, 2019), https://www.naplesnews.com/story/news/local/2019/06/12/seniors-florida-lose-homes-reverse-mortgage-foreclosure-thousands-risk-homeless/1192702001/.
The Amicus Brief submitted by the AARP contradicts Respondent's Answer Brief by agreeing that in 2006, reverse mortgages with one borrower "had become widespread and routine." *See* Amicus Br. at 14. Oddly, the Amici then argue that this pervasive single-spouse-lending practice should have "created the reasonable expectation that a surviving spouse is protected from foreclosure following the death of her spouse." *Id*. at 11, Part II. Common sense would seem to dictate the opposite.

[3] Respondent raises the argument that WVMF is not entitled to maintain the instant action unless it is registered with the Secretary of State. Answer Br. at 10, n 5. WVMF disputes this characterization of the statute, but nonetheless represents to the Court that it is now authorized to do business in Florida.

a. The Note and Mortgage must be read together because the Mortgage merely secures a debt created by the Note.

Respondent argues that reverse mortgages are "unique instruments distinct from conventional mortgages," largely because they are nonrecourse loans that do not result in personal liability for the borrower or provide remedies for the lender apart from foreclosure on the mortgaged property. Answer Br. at Part II.a–b. However, this is a distinction without a difference for purposes of contract interpretation.

Although the remedy and specific terms of repayment differ between some conventional mortgages and reverse-mortgage loans, both are transactions that rely on a note that "constitutes the written evidence of the indebtedness," with a mortgage "given to secure the payment according to the true intent and meaning of the note." *Graham v. Fitts*, 43 So. 512, 513–14 (Fla. 1907). A reverse mortgage requires an underlying note evidencing a debt just as surely as a conventional mortgage. *See In re Michaud*, 548 B.R. 582, 583–84 (Bankr. S.D. Fla. 2016) ("Reverse mortgages create a security interest in a borrower's principal residence securing future advances payable to the borrower during his lifetime."); *Reverse Mortg. Sols., Inc. v. Nunez*, 598 B.R. 876, 878 (S.D. Fla. 2019) ("The Security Instrument secures the repayment of the debt evidenced by the Note.").

Indeed, an examination of the Mortgage terms makes it exceedingly clear that the Mortgage merely secures a debt evidenced by the Note, and that the two

documents must be read in conjunction with one another to have any effect. First, the opening line of the Mortgage defines the Mortgage document as the "Security Instrument." The Mortgage goes on to specifically reference and incorporate the terms of the Loan Agreement and Note. A. 7 at 32. The second page of the Mortgage document similarly requires that "Borrower shall pay when due the principal of, and interest on, the debt evidenced ***by the Note***." A. 7 at 33 (emphasis added).

Respondent argues that the rules should be different (and only the Mortgage should be considered) because this is a nonrecourse loan, but the Note also specifies the nonrecourse nature of the debt. *Id.* at 26, ¶4(c). Simply put, the Mortgage without the Note is unenforceable. Without both, a lender could not collect its debt or foreclose on the security interest. The nonrecourse nature of the underlying debt is not a significant distinction or reason to ignore the Note, which is the sole evidence of the underlying debt that is secured by the Mortgage.

b. "Borrowers" and "Mortgagors" play distinct and separate roles and do not need to be the same people.

Respondent argues that she cannot be "mortgagor" without being a "borrower," and a holding that determines she is not a borrower under the terms of the Loan Documents would create a catch-22 that also ensures she did not mortgage or release her interest in the subject property. *See* Answer Br. at 26–28. This is an incorrect statement of the law that conflates the different rights and obligations created by notes and mortgages, respectively.

In fact, federal law prohibits a lender from requiring a spouse to be a co-signor—that is, to execute a note or guaranty—if the borrowing spouse, alone, qualifies for the loan. 12 C.F.R. § 202.7(d)(1). Notwithstanding that the lender may not require the spouse to execute the note under such facts, when required by state law, the lender *can* require the non-borrowing spouse to execute the mortgage as a means for the lender to perfect a security interest in the property given as security for the loan. *Id*. at (d)(4). Additionally, a litany of courts in Florida and around the country have correctly determined that a spouse holding an interest in the subject property (i.e., a "mortgagor") can still be a non-borrowing spouse (i.e., not a "borrower") for purposes of a reverse-mortgage loan. *See, e.g.*, *Nationstar Mortgage Co. v. Levine*, 216 So. 3d 711, 716 (Fla. 4th DCA 2017) (holding that the trial court was required to examine other loan documents to determine whether the wife on a reverse mortgage was a "borrower" or a "non-borrowing spouse" despite having a property interest); *Estate of Jones v. Live Well Fin., Inc.*, 902 F.3d 1337, 1341 (11th Cir. 2018) (holding that the bank could foreclose on a reverse mortgage because although the property was held and mortgaged by the married couple jointly, only the husband was a "borrower"); *Jeansonne v. Generation Mortg. Co.*, 644 Fed. Appx. 355, 357 (5th Cir. 2016) ("[W]hile HUD may have violated § 1715z–20(j) by insuring a reverse mortgage that failed to protect Evelyn Jeansonne as the non-borrowing spouse, this would not affect Generation's right to foreclose under the

terms of the contract it executed with [her husband].").[4] That is because a "borrower" (i.e., the one receiving payment from the lender) can be separate and/or distinct from the "mortgagor" (i.e, the one giving a security interest in real property as collateral to secure the loan to the borrower). *See Can Fin., LLC v. Krazmien*, 253 So. 3d 8, 10 (Fla. 4th DCA 2018) ('"A mortgage is an interest in real property that secures a creditor's right to repayment."') (quoting *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991)). It is clear that a person can be a "mortgagor" (who provides an interest in real property as collateral to secure a loan) without being a "borrower" (which is the person who is actually entitled to the proceeds from that loan).

As pointed out in WVMF's Initial Brief, Florida's constitutional homestead protections merely require a spouse's signature on the mortgage to subordinate any interest that a non-borrowing spouse may have in the mortgaged property. *See* Fla. Const. art. X, § 4(a)(1)(c) (1998) ("The owner of homestead real estate, joined by the spouse if married, ***may alienate the homestead by mortgage***, sale or gift . . .") (emphasis added). Nothing in Florida's homestead provisions requires both spouses

[4] *See also, e.g., Melgarejo v. Bank of Am., N.A.*, 418CV00087ALMCAN, 2019 WL 1548912, at *9 (E.D. Tex. Feb. 14, 2019), *report and recommendation adopted*, 4:18-CV-87, 2019 WL 1349396 (E.D. Tex. Mar. 26, 2019) ("Based on the foregoing jurisprudence, it appears 'there is nothing that precludes [the lender] from seeking foreclosure against Plaintiff as the non-borrower surviving spouse.'"); *Pikaart v. Fin. Freedom*, No. 1:17-cv-363, 2017 WL 5624747, at *4 (W.D. Mich. Oct. 31, 2017) (holding that lender was entitled to foreclose against non-borrowing spouse under the terms of the mortgage contract).

to borrow money together, merely to consent to the mortgage of homesteaded property, which Respondent did by signing the Mortgage. A. 7 at 39–40.

Because a mortgage merely secures a debt created by the note, a mortgagor can consent to their property being a security interest for a debt created by a separate borrower. As a result, Respondent's argument does not provide a principled basis for this Court to deviate from the well-established rules of interpretation designed to determine the intent of the parties.[5]

c. Longstanding contractual interpretation rules are the best evidence of the parties' intent when interpreting all contractual documents, including reverse mortgages.

The polestar for all contract interpretation (including notes and mortgages) is to discern and honor the intentions and mutual agreement of the parties thereto. *Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp*., 302 So. 2d 404, 407 (Fla. 1974). This should be obvious—courts attempt to honor the terms of the bargain to which the parties agreed. *See Mizell Live Stock Co. v. J.J. McCaskill Co.*, 51 So. 547, 550 (Fla. 1910) ("We have held that parties are free to make what contracts they please, so long as no fraud or deception is practiced and there is no infraction of law, and the fact that one of the parties made a rather hard bargain would not avoid the contract."). It is unclear how this bedrock principle of contract

[5] Further belying this argument is the statement made in the Amicus Brief that it was common practice to use only one borrower and there was an oral understanding the other spouse would be included as a borrower later. Amicus Br. at 7–8.

interpretation would be vindicated or advanced if the Court were to adopt Respondent's suggestion of ignoring everything but the Mortgage for all reverse-mortgage transactions. All of the Loan Documents were a significant part of the Parties' transaction, and only by looking at all of the Loan Documents collectively can courts properly determine the parties' intent. *James v. Gulf Life Ins. Co.*, 66 So. 2d 62, 62 (Fla. 1953) ("An isolated sentence of the policy should not be construed alone, but it should be construed in connection with other provisions of the policy in order to arrive at a reasonable construction to accomplish the intent and purpose of the parties."); *Johnson*, 84 So. 2d at 725 ("When the agreement between the parties consists of several instruments, it is proper to insist that all of the documents be placed before the court as establishing the rights of the parties thereto.").

Indeed, the ***only*** way to honor the Parties' intentions—and the bargain they struck in this case—is to examine the Loan Documents collectively and reverse *Palmero II* with instructions to allow WVMF to foreclose. The documentation in this case is clear: the Palmeros initially applied for this loan as a couple, A. 1 at 5–7; they engaged in loan counseling with an independent HUD advisor, A. 2 at 9; they signed documents indicating their complete understanding of the risks and benefits of naming only one spouse as a borrower, A. 3 at 11; and, finally, they affirmatively chose to designate Mr. Palmero as the sole borrower in order to receive a higher loan

amount, A. 4 at 13–17; A. 5 at 19–24; A. 6 at 26–30.[6] The Palmeros knew that the risk of making Ms. Palmero a non-borrowing spouse included foreclosure in the event of Mr. Palmero's death, and they took that risk in exchange for higher payment (*see* Non-Borrower Spouse Ownership Interest Certification). A. 3 at 11. It would be completely unfair to undo that bargain now by changing the terms of the parties' bargain by providing the Palmeros with the benefit of the higher payment without the consequences of the bargain they struck.

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[6] Ms. Palmero argues that this characterization is "wholly unsupported by the Record," Answer Br. at 9, but that is incorrect. The record amply supports the inescapable conclusion that the Palmeros made a calculated decision to name Mr. Palmero as the sole "Borrower" in the Loan Documents in order to receive a higher loan amount than the Palmeros would have received if they applied jointly. Chief Judge Emas explained this reasoning in detail in his dissenting opinion in *Palmero II*:

> The evidence at trial established that, because Mr. Palmero was the only borrower under the terms of the loan agreement, he qualified for—and received—a higher amount than would have been paid had Ms. Palmero been a co-borrower. At the time of the agreement, Mr. Palmero was 83 years old; Ms. Palmero was 71. The bank's representative testified that when spouses apply as co-borrowers, the bank uses the age of the youngest spouse to calculate the amount of the payment made to the borrowers. The Palmeros knew that, because Mr. Palmero was the only borrower, the bank paid out a higher amount on the reverse mortgage than it would have paid had Mr. Palmero and Ms. Palmero been co-borrowers under the agreement.

Palmero II, 283 So. 3d at 357 n.14 (Emas, C.J., dissenting); *see also Plunkett v. Castro*, 67 F. Supp. 3d 1, 6 (D.D.C. 2014) ("[M]arried couples often took out [reverse mortgages] only in the name of the older spouse in order to receive a bigger loan amount up front."). Moreover, the Amicus Brief confirms this was a widespread practice at the time.

d. Federal HUD provisions do not mandate a different result.

Respondent argues that the Court should not consider the Note and other Loan Documents because courts are "compelled to construe a contract consistent with specific statutes that regulate and govern the contract." *See* Answer Br. at 28.[7] Specifically, Respondent argues the Court should not consider the Note or other Loan Documents because federal regulation 12 U.S.C. § 1715z–20(j) and other advisory materials from the federal Department of Housing and Urban Development ("HUD") prohibit a lender from foreclosing on a HUD insured reverse mortgage if a surviving spouse is still living in the mortgaged property. *See* Answer Br. at 28, 31–32. However, this is completely incorrect. The regulations and advisory materials Respondent cited have no application on the enforceability of the Mortgage at issue. In 2006, when the transaction at issue occurred, the federal government was insuring reverse mortgages where only one spouse signed the mortgage as provided by 24 C.F.R. § 206.27(c)(1) (2006). *See Palmero I* at 8. This is most likely why the *Palmero II* court did not cite the HUD provisions as a basis for invalidating the foreclosure.

[7] Respondent cites to *Smith v. Reverse Mortg. Solutions, Inc.* as support for her argument. The dissent in *Smith* correctly points out that until 2015, the Secretary of HUD through rulemaking was promoting single-borrower reverse mortgages. 200 So. 3d 221, 232 (2016). Thus, at the time the Palmeros' reverse mortgage was signed (2006), there was a conflict between statute and the HUD rules which did not prohibit foreclosure against the nonborrower spouse. *Id.* at 233.

Regardless, state and federal courts across the country have unanimously held that the HUD regulations and letters cited by Respondent (and relied upon by the trial court) merely refer to the requirements for a reverse mortgage to be federally insured and have no bearing whatsoever on the contractual relationship between the lender and the borrower. *See, e.g. Estate of Jones* 902 F.3d at 1338 (holding that the HUD regulation "cannot be construed so broadly. Because the statute addresses and limits only the Secretary's authority—specifying the types of mortgages that HUD 'may not insure'—it does not alter or affect the rights that a lender independently possesses under a reverse-mortgage contract."); *Nunez*, 598 B.R. at 885 ("Similarly, the HUD Mortgage Letter does not apply because it addresses issues related to the insurance program. The Court therefore finds that the federal regulations and the HUD Mortgage Letter are not applicable and should not control interpretation of the loan documents here"); *see also In Re D'Alessio,* 587 B.R. 211 (Bnkr. Ct. Mass. 2018) (confirming that HUD regulations have no bearing on the terms of a contract between a lender and borrower and citing *Palmero I* with approval).

Moreover, the HUD Mortgagee Letter 2015-15 Respondent references, which is applicable to pre-2014 reverse mortgages (like the Palmeros' reverse mortgage in this case) makes very clear that it does not affect the rights of mortgagees to foreclose consistent with their existing rights. https://www.hud.gov/sites/documents/15-15ML.PDF at 1 ("Nothing in this Mortgagee Letter or any other document interferes

with the rights retained by mortgagees to exercise their rights under the mortgages and contract of mortgage insurance as originally entered into.").

In summary, the federal HUD regulations have no bearing whatsoever on the outcome of this case. The argument is simply a "red herring" meant to confuse the real issues of multi-document contract interpretation. *See Melgarejo*, 2019 WL 1548912 at *8 ("Plaintiff's [HUD regulation] argument is a red herring."). The trial court was incorrect in ruling that WVMF could not foreclose based on HUD provisions, and Respondent's arguments are similarly misguided.[8]

II. Respondent's ambiguity arguments find no support in the law or facts because the mutual construction doctrine requires consideration of all documents in a transaction regardless of ambiguity.

Respondent also argues that courts may only consider other documents in a multi-document transaction (like the Note and Mortgage) if one of the documents is ambiguous. This argument fails for two key reasons: (1) long-established case law does not require ambiguity in order to consider other documents in a multi-document transaction; and (2) the Mortgage in this case ***is*** internally ambiguous regarding the identity of the "Borrower," and requires consideration of the other Loan Documents to understand the terms.

[8] The Amicus Brief argues that the Court should reject extraneous documents that alter material terms of model contracts. This argument, which was not raised by the Respondent, does not have any application to this transaction because the applicable HUD regulations permitted reverse mortgages with a non-borrowing spouse.

a. Ambiguity is not required to consider the other documents in a multi-document transaction.

Respondent argues that courts cannot consider other documents as "extrinsic evidence" when there is no ambiguity in the underlying document, but all of the cases she cites for that proposition are single-document cases where the parol evidence rule applies. *See* Answer Br. at Part II.a. However, there is no support for this argument in the multi-document context, and frankly, it would not make any sense to apply the rule in these circumstances.

First, as argued in the Initial Brief and above, a mountain of case law requires notes and mortgages to be interpreted collectively as one, with any conflicting terms resolved in favor of the note (*see* Initial Br. at Part I) and also more general holdings that require all documents in a multi-document transaction to be considered (*see* Initial Br. at Part II). Indeed, in formulating and explaining the mutual construction doctrine, this Court has specifically held that an internal ambiguity is ***not*** required to consider other transaction documents:

> This rule is not necessarily confined to instruments executed at the same time by the same parties for the same purpose; instruments entered into on different days, but concerning the same subject matter, may under some circumstances be regarded as one contract and interpreted together. At the very least, the existence of the other contract of the same dignity, executed almost simultaneously with that of the plaintiff by the same official of the defendant, served to cast some doubt upon the meaning of the 'ventilation' provision of the plaintiff's contract and to render ambiguous a contract that otherwise would not have been so; and we think that, in these circumstances, parol evidence may properly

> be admitted to clarify the matter and show the true intention of the parties.

J. M. Montgomery Roofing Co. v. Fred Howland, Inc., 98 So. 2d 484, 486 (Fla. 1957); *see also In re Alford*, 381 B.R. 336, 341 (Bankr. M.D. Fla. 2007) ("If separate documents comprising a single transaction are inconsistent with one another, for example, 'the ambiguity created by the mutual repugnance of the instruments requires consideration of such evidence, parol or otherwise, as the parties may present on the question of the intent of the parties.'") (quoting *Saco Dev., Inc. v. Joseph Bucheck Constr. Corp.*, 373 So.2d 419, 421 (Fla. 1st DCA 1979)).[9]

Second, the Mortgage specifically references and incorporates the Note, which makes the Note part of the contract that should be considered when interpreting the Mortgage—not "extrinsic evidence" subject to exclusion under the parol evidence rule. *See, e.g.*, *OBS Co., Inc. v. Pace Const. Corp*., 558 So. 2d 404,

[9] A document that appears unambiguous on its face, but is made ambiguous by some external fact or circumstance is classically said to have a "latent ambiguity," which ***requires*** the Court to consider evidence of that extrinsic ambiguity, as opposed to a "patent ambiguity," which does not. *RX Sols., Inc. v. Express Pharmacy Servs., Inc.*, 746 So.2d 475, 476 (Fla. 2d DCA 1999) (emphasis added). ("[W]hen a contract is rendered ambiguous by some collateral matter, it has a latent ambiguity, and *the court must hear parol evidence to interpret the writing properly*.") (emphasis added). The Fourth District Court of Appeals in *Levine*, while agreeing with the above general proposition, concluded that there was a patent ambiguity in the mortgage, stating that "despite the general prohibition against using extrinsic evidence to clarify patent ambiguities, an exception to the rule applies where the patent ambiguity at issue concerns identity, capacity, or other the parties' relationship with one another.'" *Levine*, 216 So. 3d 711, 715 (Fla. 4th DCA 2017).

406 (Fla. 1990) ("It is a generally accepted rule of contract law that, where a writing expressly refers to and sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing."). The first substantive clause on the first page of the Mortgage document references and incorporates the Note and Loan Agreement as follows:

> Borrower has agreed to repay to Lender amounts which Lender is obligated to advance, including future advances, ***under the terms of a Home Equity Conversion Loan Agreement dated the same date as this Security Instrument ("Loan Agreement")***. The agreement to repay is ***evidenced by Borrower's Note dated the same date as this Security Instrument ("Note")***.

A. 7 at 32 (emphasis added). Shortly thereafter, the Mortgage defines the Mortgage document itself as the "Security Instrument," which "secures to the Lender [] the ***repayment of the debt evidenced by the Note***." A. 7 at 32 (emphasis added). Then, the second page of the Mortgage document states that "Borrower shall pay when due the principal of, and interest on, the debt ***evidenced by the Note***." A. 7 at 33 (emphasis added). The Mortgage document literally cannot be fully read or understood without resorting to the terms of the Note and Loan Agreement, which are part of the same multi-document reverse mortgage transaction.

In short, there is no support for Respondent's argument that there must be an internal patent ambiguity in the Mortgage before courts can consider the other Loan Documents to the transaction. The overwhelming weight of authority requires courts

to consider all of the Loan Documents to determine the Parties' intent whether or not there is an internal ambiguity contained within a certain single document.

b. Even if an internal ambiguity is required, the Mortgage is internally ambiguous.

Purely for argument's sake, even if the court did need to find an ambiguity within the Mortgage to consider the other Loan Documents—though such a finding was unnecessary for the many reasons argued above—the Mortgage here is ambiguous. A contract is ambiguous if the language is "susceptible to more than one reasonable interpretation." *Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013). This is necessarily the case when there is an internal inconsistency or contradiction within the same document. *See Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998).

As it concerns the identity of the "Borrower," the Mortgage in this case is ambiguous because it contains inconsistent or contradictory definitions. Contrary to the interpretation of "Borrower" now advanced by Respondent, the Mortgage incorporates the Note and makes clear that the "Borrower" on the Note is same as the "Borrower" on the Mortgage. A. 7 at 32 ("Borrower has agreed to repay to Lender amounts which Lender is obligated to advance . . . evidenced by Borrower's Note dated the same date as this Security Instrument ('Note')"). In addition, the definition of "Borrower" on the first page of the Mortgage clearly defines Mr. Palmero as the sole Borrower on the Mortgage, and merely goes on to describe his

interest in the mortgaged property (i.e., a life estate unto himself with remainder to his wife and two children). *See Palmero I* at 10. Directly underneath the main signature block, there is a typed statement for execution by the notary saying: "The foregoing instrument was acknowledged before me this 20th day of December, 2006, by Roberto Palmero." A. 7 at 39. Finally, an attachment to the Mortgage labeled "Signature Exhibit" has signatures from Ms. Palmero, as well as the Palmeros' children Idania and Rene, all of whom signed specifically "as remainderman" to subordinate their interests. A. 7 at 40.[10]

This internal inconsistency, by definition, renders the Mortgage ambiguous. Indeed, three Florida courts have now examined this same Mortgage document and reached three separate results: (1) the trial court found that the Mortgage was ambiguous and that the other Loan Documents made clear that Mr. Palmero was the only "Borrower"; (2) the original *Palmero I* panel reviewed all of the Loan Documents and found that Mr. Palmero was the only "Borrower"; and (3) the *Palmero II* court, sitting en banc, held (over multiple dissents) that the Mortgage unambiguously defined Respondent as a "Borrower," so there was no need to review the other Loan Documents. These three conflicting views of the Mortgage and/or

[10] By Respondent's logic, the Palmero children's remainder interest and signature on the Mortgage would make them "borrowers." This makes obvious that a person can mortgage their property interests without being a "borrower" under the Note.

Loan Documents by learned judges provide incredibly strong evidence that the Mortgage is ambiguous.

No ambiguity is required to consider these Loan Documents, but even if it were, the Mortgage document contains internal inconsistencies making it ambiguous and requiring resort to the other Loan Documents to determine the Parties' intent.

c. The principle that ambiguity must be construed against the drafter has no applicability here.

Respondent argues that if this Court finds ambiguity in the Mortgage, then the Court should apply the secondary rule of construction that ambiguities are construed against the drafter. Answer Br. at 29. However, Respondent admits that this secondary rule should only be used when intent is inconclusive. In this case, the trial court held a nonjury trial, considered all evidence and found that Mrs. Palmero was not a "Borrower." Thus, there is no reason for this Court to apply this secondary principle when the trial court has already found intent as a factual matter based upon review of the Loan Documents and testimony of the witnesses.[11]

[11] The Amici make similar arguments to construe the Loan Documents against WVMF based on standardized agreements and historical lending practices, but these too are last-ditch interpretation tools to be used by the courts only when the intent cannot otherwise be gleaned from the actual documents and actual parties. Notably, the Amicus Brief cites secondary sources in support of these propositions, but not a single Florida case applying these principles in any context, much less in a case where the trial court has already found facts regarding the intent of the parties.

CONCLUSION

This case comes down to one question: Are reverse mortgages subject to the usual longstanding rules of contract interpretation that require courts to examine all of the documents to a multi-document transaction, particularly a note secured by a mortgage? The answer from this Court should be a resounding "yes." The reverse mortgage in this case is no different than any other multi-document transaction that should be interpreted consistent with the terms of those documents and time-honored principles of contract interpretation. This is the only way to properly glean the Parties' intent and to enforce the terms of the Parties' agreement.

The court in *Palmero II* could only reach the conclusion that Respondent was a "borrower" by looking solely to the Mortgage, ignoring those provisions of the Mortgage that contradicted its holding, and refusing to review the other Loan Documents, which make crystal clear that she was not. Because Mr. Palmero was the sole Borrower, all conditions precedent to the foreclosure action have occurred, and WVMF is entitled to foreclosure as a matter of law. The *Palmero II* decision should be quashed with instructions to enter a foreclosure judgment in favor of WVMF.

Respectfully submitted,

/s/ William P. McCaughan
WILLIAM P. MCCAUGHAN, ESQ.
LAW OFFICE OF WILLIAM P MCCAUGHAN
511 South Mashta Drive
Key Biscayne, Florida 33149
Tel: 305-588-1664
Email: wpmlaw@bellsoth.net
Co-Counsel for Petitioner

/s/ Jonathan B. Morton
JONATHAN B. MORTON, ESQ.
MALLORY M. COONEY, ESQ.
JOSHUA C. CARPENTER, ESQ.
K&L GATES LLP
200 S. Biscayne Blvd.
Suite 3900
Miami, FL 33131
Tel: 305-539-3300
Fax: 305-358-7095
Email: jonathan.morton@klgates.com
josh.carpenter@klgates.com
mallory.cooney@klgates.com
Co-Counsel for Petitioner

/s/ Joshua H. Threadcraft
JOSHUA H. THREADCRAFT, ESQ.
BURR & FORMAN, ESQ.
420 N. 20th Street
Suite 3400
Birmingham, AL 35203
Tel: 205-251-3000
Fax: 205-413-8701
Email: jthreadcraft@burr.com
Co-Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of August 2020, a true and correct copy of this document has been furnished to the following parties/persons of record in compliance with Florida Rule of Appellate Procedure 9.420.

Juan M. Carrera, Esq.
Carrera & Amador
221 S.W. 42nd Avenue, 3rd Floor
Miami, FL 33134-1751
juancarreralaw@aol.com
Co-Counsel for Respondents

Jonathan Meisels, Esq.
Robertson, Anschutz & Schneid, P.L.
6409 Congress Avenue, Suite 100
Boca Raton, FL 33487
Jmeisels@rasflaw.com
mail@rasflaw.com
Co-Counsel for Respondents

Jeffrey M. Hearne, Esq.
Jacqueline C. Ledon, Esq.
4343 West Flagler Street, Suite 100
Miami, FL 33134
jhearne@legalservicesmiami.org
jledon@legalservicesmiami.org
erodriguez@legalservicesmiami.org
Co-Counsel for Respondents

/s/ William P. McCaughan
WILLIAM P. MCCAUGHAN, ESQ.