IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1671

VINCENT CRAVERO, et al.,

Petitioners/Defendants,

v.

LLP MORTGAGE LTD., f/k/a LOAN PARTICIPANT PARTNERS, LTD., a TEXAS LIMITED PARTNERSHIP,

Respondent/Plaintiff.

BY DISCRETIONARY JURISDICTION FROM
THE FOURTH DISTRICT COURT OF APPEAL
Lower Tribunal Case No. 4D02-2443

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case.

This is a mortgage foreclosure case in which the Plaintiff, LPP Mortgage, Ltd. ("LPP")[1] seeks to foreclose two residential mortgages on the homestead property of the Defendants, Vincent P. Cravero and Dorothy C. Cravero ("the Craveros" or "the Guarantors"). The subject mortgages were collateral of guarantees executed by the Craveros. The guarantees assured the payment of promissory notes executed by a business. The guarantees are not enforceable by virtue of the applicable statute of limitations. R1:11-14, 19-22.[2]

In 1992, as a consequence of Hurricane Andrew, Cravero Brothers Produce Company ("Cravero Brothers") accepted two Small Business Administration ("SBA") loans, and, accordingly, executed two promissory notes evidencing such obligations (the "Notes"). Defendants Vincent P. Cravero and Dorothy C. Cravero, husband and

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[1]For reasons unknown to Defendants and not articulated in the record, Plaintiff began to refer to itself on appeal as LLP Mortgage Ltd. ("LLP"), instead of its name in the trial court pleadings and the documents, LPP Mortgage Ltd. ("LPP"). Thereafter, briefs and other filings of both parties have carried the LLP designation for Plaintiff. Defendants have reverted in this Brief to "LPP," because this appears to be the correct designation.

[2]Unless otherwise specified, references to the Record shall be to the Index of Volume on Appeal provided by the Clerk of the Circuit Court of the Seventeenth District to the Clerk of the Fourth District Court of Appeal. References to the Record shall be designated by "R," followed by the volume and the page number.

wife, executed guarantees of the loans (the "Guarantees") and executed mortgages on their homestead property as collateral for the Guarantees (the "Mortgages"). R1:1-24, 77-86. Thereafter, Cravero Brothers ceased conducting business and defaulted on the loans. R1:146.

The Notes and Guarantees were accelerated by written letters of acceleration in 1995. R1:111-13, 117-19, 155, 159-60. SBA thereafter assigned the loans to LPP, a Texas limited partnership, which ultimately brought a foreclosure action against the Craveros after expiration of the period permitted for real property foreclosures under the applicable Florida statute of limitations. R1:1-24, 155.

B. Course of the Proceedings.

LPP brought an action for a residential mortgage foreclosure. R1:1-24. The Craveros asserted, *inter alia*, an affirmative defense of the statute of limitations, and they sought and obtained summary judgment in the trial court. R1:77-86, 180. LPP appealed, and the Craveros advanced four arguments as to why the Fourth District Court of Appeal should affirm the decision of the trial court. Any of the four arguments was sufficient to affirm the trial court decision. Fourth DCA Docket 24:5-23. The Fourth District entered a decision reversing the trial court in which the Fourth District explicitly discussed and rejected one of the four arguments of Petitioner and failed to discuss the remaining arguments. Fourth DCA Docket 28:1.

The issue addressed explicitly by the Fourth District was whether the assignee of a mortgage from an agency of the federal government is subject to any statute of limitations in its right to foreclose the mortgage. The Fourth District held that no state statute of limitations applied to the non-public transferee of the mortgage, and it reversed the trial court without examining the relevant collateral questions of (i) whether the relevant federal Statute preempted Florida's statute of limitations regarding foreclosure, and (ii) whether the application of the federal statute of limitations for any particular cause is dependent on the Florida law regarding the availability of the remedy sought. The Fourth District also failed to address the fact that LPP's failure to register with the Florida Department of State disqualified it from filing and prosecuting this case.

C. Disposition in the Lower Tribunal.

This is an appeal from the Fourth District Court of Appeal of a residential mortgage foreclosure case in which the trial court granted summary judgment in favor of the defendant property owners, the Craveros. R1:180. The mortgagee, LPP, appealed, and the Fourth District reversed. Fourth DCA Docket 28:1.

SUMMARY OF ARGUMENT

The Court should reverse the Fourth District Court of Appeal for each of the following five reasons. Any one of such reasons is sufficient for reversal.

First, the Fourth District Court of Appeal held, in relevant part, that the federal government and its transferee (LPP) has an unlimited period for foreclosure of real property, because the federal statute of limitations does not apply to actions to establish title to real property and state statutes of limitation are inapplicable due to sovereign immunity. This decision is contrary to the well-settled proposition that a private assignee of a government claim is not entitled to rely on the government's sovereign immunity to the statute of limitations when the private assignee has received the claim to enforce for its private benefit.

Second, the federal statute of limitations does not apply for several reasons. Application of the statute in the manner suggested by LPP would create an unlimited restraint on alienation in violation of public policy. In addition, the rationale of the case on which the Fourth District relied was undermined by a 1995 United States Supreme Court opinion holding that state statutory law, rather than "federal common law," must be applied in the absence of an applicable federal statute. Furthermore, the legislative history explicitly limits the application of the federal statute of limitations to (i) government claimants, as opposed to private claimants, and (ii) claims of adverse

possession against the government, as opposed to claims of foreclosure on behalf of the government. Accordingly, the Court should find that the private claimant is subject to the Florida statute of limitations and is barred from pursuing foreclosure.

Third, the decision of the Fourth District is contrary to the settled law that requires an analysis of whether a state statute of limitations is preempted by a federal statutory scheme before discarding the state statute. The state statute of limitations was not preempted, and cannot be discarded, in the instant case, because none of the three factors for preemption was even arguably present in this case.

Fourth, the Fourth District's decision required application of what the Fourth District understood to be the federal statute of limitations without regard to whether the remedy sought, foreclosure, was then available under Florida law. This Court has held that a remedy must first be available under Florida law before undertaking the analysis of whether to apply the applicable federal statute of limitations. Because, in this case, the collateral to be foreclosed is not collateral of the Notes, but collateral of unenforceable Guarantees, the remedy of foreclosure is not available under Florida law, so the issue of the applicability of the federal statute of limitations is never reached. Foreclosure is simply not available.

Finally, because of LPP's failure to register with the Florida Department of State, LPP was barred from bringing this suit. Accordingly, LPP's suit should be

dismissed.

ARGUMENT

The Fourth District Court of Appeal held, in relevant part, that "the federal statute of limitations does not apply to actions to establish title to real property," resulting in an unlimited period for foreclosure of real property by both the federal government and its transferees. *LLP Mortgage, Ltd. v. Cravero*, 851 So.2d 897 (Fla. 4th DCA 2003). The Fourth District's decision also provided that the holder of a real property mortgage that is collateral of an unenforceable guaranty of a legally uncollectible note can foreclose the mortgage, even though the federal statute of limitations admittedly operates to prevent the note-holder from suing on the guaranty. *Id.* The Fourth District made its ruling without engaging in the preemption analysis required prior to deciding that a Florida Statute is preempted by federal legislation, and it made its ruling without determining that the remedy of foreclosure was even available to LPP under Florida law, which is a prerequisite to application of the federal statute of limitations, rather than the Florida statute of limitations. *Id.*

I. STANDARD OF REVIEW

Summary judgment should be granted when no genuine issue of material fact exists. "Summary judgment is appropriate where material facts are not in dispute and the judgment is based on the legal construction of the documents." *Palm Beach County v. Trinity Industries, Inc.*, 661 So.2d 942 (Fla. 4th DCA 1995). An appeal

from an order granting summary judgment is reviewed *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (Fla. 2000).

II. A PRIVATE ASSIGNEE OF A GOVERNMENT CLAIM IS NOT ENTITLED TO RELY ON THE GOVERNMENT'S SOVEREIGN IMMUNITY TO THE STATUTE OF LIMITATIONS WHEN THE PRIVATE ASSIGNEE RECEIVES THE CLAIM FOR ITS PRIVATE BENEFIT

A. Sovereign immunity does not extend to a private assignee enforcing a claim for private benefit.

The First District Court of Appeal has held, in a venerable case cited in other jurisdictions, that a private assignee attempting to enforce a claim that it received from the government may not rely on the government's immunity from the statute of limitations:

> The general rule that both the United States and a state are immune from the operation of a statute of limitations is applicable where the government is the real party in interest. The right to assert sovereign immunity from the operation of the statute of limitations does not extend, however, to its assignee or transferee where the suit is brought for the private benefit, and to enforce the rights of a private person. . . . Plaintiff seeks to enforce rights which it holds purely for its private benefit. The sovereign has no further interest. . . . Limitation will not operate to deprive the sovereign of title to land but it will operate against its grantee who holds the land in a purely private capacity.

Lovey v. Escambia County, 141 So.2d 761, 764-65 (Fla. 1st DCA 1962), *cert. denied*, 147 So.2d 530 (Fla. 1962). "The law appears to be well-settled, however, that an assignee of a government claim may not rely upon the government's immunity to the

statute of limitations where it is intended to enforce the claim for private benefit." *McCloskey & Company, Inc. v. Wright*, 363 F. Supp. 223 (E.D. Va. 1973), citing *Lovey*.

The concept that the government is not subject to statutes of limitation, unless self-imposed, is expressed at common law by the frequently-recurring phrase in this context, "*nullus tempus occurrit regi*," meaning "time does not run against the king." The phrase, and the context, admit of two obvious limitations. First, the phrase, itself, explicitly benefits only the sovereign. Second, in a constitutional republic that does not have an individual as a sovereign, the determination of the application of this phrase has to be by reference to whether the entity invoking the phrase is acting as or for the sovereign.

The limitation that the sovereign's shields and protections extend only to those situations in which the actor is acting as, or on behalf of, the sovereign has consistently been applied, both (i) to deny the protections when the government is acting as a private entity, rather than advancing a public purpose, and (ii) to extend the protections when a non-sovereign actor is acting on behalf of the sovereign. Examples of the former abound.

> As a general matter, the doctrine of *nullum tempus* typically applies where the government acts as a sovereign and seeks to vindicate public, not private, rights. *Securities and Exchange Commission v. Lorin*, 869 F.Supp 1117, 1127

(S.D.N.Y. 1994) (applies where "government is pursuing a public right or interest").

Williams v. Infra Commerc Anstalt, 131 F.Supp.2d 451, 457 (S.D.N.Y. 2001), citing numerous examples in both federal and state courts.[3] The restriction to the government's vindication of public interests of the federal government's immunity to statutes of limitation has been recognized in both the state and federal courts in Florida. *See, e.g.*, *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997), *cert. denied* 552 U.S. 1075, 118 S.Ct. 852, 139 L.Ed.2d 752, *reh. denied*, 523 U.S. 1041, 118 S.Ct. 1341, 140 L.Ed.2d 501; *General Properties Co. v. Rellim Inv. Co.*, 9 So.2d 295, 151 Fla. 136 (1942).

LPP is a private party attempting to enhance its own coffers. It is neither the "king," nor acting on behalf of the "king" to provide either real property or money to the government. It is not vindicating any public right. As such, LPP is not entitled to claim sovereign immunity and is subject to Florida's statute of limitations.

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[3] *See also City of Philadelphia Lead Ind. Ass'n, Inc.*, 994 F.2d 112, 118 (3d Cir. 1993) (The rationale of *[nullum tempus]* is that the Commonwealth, as plaintiff, seeks the vindication of public rights and the protection of public property."); *Dole v. Local 427*, 894 F.2d 607, 610 n. 6 (3d Cir. 1990) (*nullum tempus"* derives from the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers"); *Mayor and Council of Wilmington v. Dukes*, 157 A.2d 789, 794, 52 Del. 318 (1960) (*nullum tempus* applies when a state is suing in its sovereign capacity"). *Williams, supra.*

B. The government is subject to state statutes of limitation when the government is enforcing a private benefit.

Numerous decisions in other jurisdictions have repeatedly and consistently maintained that even the government, when acting in a private capacity, is subject to the respective state's statute of limitations. *See, e.g.*, *Kansas Public Employees Retirement System v. Blackwell, Sanders, Metheny, Weary & Lombardi, L.C.*, 114 F.3d 679 (8th Cir. 1997); *City of Wichita, Kansas, v. U.S. Gypsum Co.*, 72 F.3d 1491 (10th Cir. 1996); *Champaign City Forest Preserve District v. King*, 683 N.E.2d 980, 291 Ill.App.3d 197 (Ill. App. 4th Dist. 1997).

If the sovereign itself is subject in such circumstances to the state statute of limitations, then, *a fortiori*, a transferee from the sovereign is also subject to the same statute. This restriction on the applicability of sovereign immunity exists for two reasons. First, the transferee can acquire no rights greater than its transferor. *Dubbin v. Capital National Bank*, 264 So.2d 1, 3 (Fla. 1972) ("An assignee of a mortgage receives only those rights and benefits as are available to its assignor."), cited by the Fourth District in its opinion below. Second, sovereign immunity is a personal right inhering in the sovereign, not a contract right or even a statutory right. *Wamco, III LTD v. First Piedmont Mortgage Group*, 856 F.Supp. 1076, 1086 (E.D. Va. 1994). {"[U]nless a contrary intention is manifested or inferable, an assignment ordinarily

carries with it all rights, remedies and benefits which are incidental to the thing assigned, "*except those which are personal to the assignor and for his benefit only*," 6A C.J.S. Assignments § 76 (emphasis added)}.

The Fourth District's decision, following LPP's position below that a private transferee from the sovereign always succeeds to the sovereign immunity of the sovereign, proves too much. Most of the privately-held parcels of land in the United States were obtained, usually mediately, through grants or deeds from the sovereign. Neither the transferred parcels of land, whether from a federal sovereign or a state sovereign, nor the recipients, come clothed with, and continue to maintain to this day, sovereign immunity. *See, e.g., Whaley v. Wotring*, 225 So.2d 177 (Fla. 1st DCA 1969).

> Public lands cease to be public and become private lands after they have been entered at a land office and a certificate of entry or patent certificate is issued. At that point such lands are subject to taxation by the state, subject to adverse possession, or assignment of interest.

Id. at 180. An owner of property subject to state taxation and adverse possession no longer has sovereign immunity with respect to the property. Accordingly, upon transfer of the interest in this case (the Mortgages) from the SBA to LPP, LPP no longer had the right to claim sovereign immunity with regard to the Mortgages.

LPP in the instant case seeks foreclosure for its own benefit, not the benefit of

the government or the public. LPP passes neither an organizational nor an operational test for determining a public benefit. *See, e.g., Williams, supra,* holding, *inter alia,* that a suit for the benefit of an insurance company's policyholders, stockholders, and creditors is to enforce "private rights," and that there are no sovereign or governmental rights involved in the action. *Id.* at 458. Organizationally, LPP is in the business of investing in mortgages. R1:1-7. It is not organized as a not-for-profit organization that could claim an intended benefit for society generally or the sovereign specifically. R1:1-7. Operationally, loan foreclosures will financially benefit the company and its investors and owners. They will not benefit the public or the revenue of the sovereign.

Furthermore, this limitation on the scope of sovereign immunity extends even to the federal government. *See, e.g., United States v. California,* 507 U.S. 746, 113 S.Ct. 1784, 123 L.Ed.2d 528 (1993), concluding that the right of the United States to recover on a claim of subrogation from a private actor is subject to the state's statute of limitations. *Id.* 507 U.S. at 756-59, 113 S.Ct. at 1790-91, 123 L.Ed.2d at 539-41. If the United States has no right to claim sovereign immunity to avoid a state's statute of limitations when enforcing a private right, then, *a fortiori*, a private actor would have no such right.

Not only is the Fourth District's decision contrary to those decisions cited above, it is in direct conflict with the First District decision in *Lovey*. Affirming the

opinion below would require rejecting *Lovey*, despite broad reliance on *Lovey*, even in other jurisdictions. Such a decision would put Florida at odds with a number of both state and federal courts that have decided the question of the scope of the applicability of sovereign immunity to a private transferee asserting a private benefit.[4]

C. The Fourth District's reliance on *Matthias* was misplaced.

The Fourth District relied on "only one case involving this precise issue, *UMLIC VP LLC v. Matthias*, 234 F.Supp.2d 520 (D.V.I. 2002)." *Cravero*, *supra*. However, that case has at least one critical factor fatally distinguishing it from the instant case. Under Florida law, claims on a note, a mortgage, and a guarantee are considered different claims, so it is possible to bar one and not the others. *Swanson v. Bennett*, 25 So.2d 207 (Fla. 1946). *Matthias*, the case on which the Fourth District relied, arose in the Virgin Islands, where, following the Restatement (Third) of Property, Mortgages, the Court found that there is no concept of separation of the promissory note and the guarantees from the mortgage. *Matthias* at 523. The *Matthias* Court then determined that the applicable statute of limitations was what it found to be the federal statute of limitations applicable to mortgages, explicitly eschewing 28 U.S.C. § 2415(a), the federal statute governing contracts and written obligations. *Id.* at 524.

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[4]See note 3, above.

In the instant case, 28 U.S.C. § 2415(a), which establishes a six-year statute of limitations on a contract claim, and Section 95.11 of the *Florida Statutes*, which provide for a five-year statute of limitations on actions other than for recovery of real property, had already been exceeded prior to the commencement of suit, so a claim for a money judgment was not available to LPP against either the maker of the notes or the guarantors. Accordingly, LPP did not sue for a money judgment. R1:1-7.

The *Matthias* Court then asserted that "an assignee stands in the shoes of its assignor," *id*. at 524, without determining whether the assignee was seeking the asset for a public, rather than a private, purpose. Accordingly, the Court's analysis centered solely on the question of whether to apply the local or the federal statute of limitations, rather than on whether sovereign immunity extended to the assignee. This failure to analyze the question of extension of sovereign immunity to a private assignee is critical, because the only basis for asserting the applicability of the federal statute of limitations is that the assignor was an agency of the federal government. Otherwise, the Court recognized that the local statute of limitations would have been applicable. *Id*. at 524 n. 6.

The fact that the *Matthias* Court, construing Virgin Islands law, could not separate the notes, guarantees, and mortgages, fatally distinguishes *Matthias* from the instant case. It also distinguishes our case from most of the cases on which *Matthias*

relies, because most of the cases were concerned with collecting a note or obligation, or were concerned with Resolution Trust Corporation rights, rather than an SBA mortgage securing an unenforceable guaranty of an uncollectible note. *Id.* at 524.

This same approach (failing to distinguish between collection of a note, collection of a guaranty, and foreclosure of a mortgage that was solely collateral of the unenforceable guarantee) affected the cursory opinion of the Fourth District, as well. *See Cravero*, *supra* [explicitly relying on the cases, such as *F.D.I.C. v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993), and *Cadle Co. II v. Stamm*, 633 So.2d 45 (Fla. 1st DCA 1994), that concern the assignment of notes, rather than mortgages].

It is, in fact, odd that the Fourth District should have relied on *Matthias*. The Court in *Matthias* explicitly relied on what it found to be a federal statute of limitations regarding mortgages. *Matthias* at 524. The Fourth District explicitly found that there was no applicable statute of limitations, due to the extension of the government's sovereign immunity to the private assignee. *Cravero*, *supra*.

Ultimately, reliance on *Matthias* in this case is misplaced, because, unlike in *Matthias*, mortgages are different than notes for purposes of the statute of limitations. This difference has two important ramifications. First, the Mortgages in this case were collateral of unenforceable guarantees of time-barred notes, raising the question of whether they remained available to the mortgagee's successor. Second, Florida

provides different statutes of limitation for notes than for mortgages, and federal law provides a statute of limitations for notes, but, as will be discussed below, explicitly does not provide a separate federal limitations period for mortgages.

III. SUIT IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

A. The Florida statute of limitations is five years.

Section 95.11, *Florida Statutes*, states the limitations period for actions other than for the recovery of real property:

> **95.11 Limitations other than for the recovery of real property.**--Actions other than for recovery of real property shall be commenced as follows:
> . . . .
> (2) WITHIN FIVE YEARS--
> . . . .
> (b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument, . . .
> (c) An action to foreclose a mortgage.

However, Section 95.281, *Florida Statutes*, specifies the statute of limitations for instruments encumbering real property. *Monte v. Tipton*, 612 So.2d 714 (2d DCA 1993). This Statute provides:

> (1) The lien of a mortgage or other instrument encumbering real property, herein called mortgage, . . . shall terminate after the expiration of the following periods of time:
> (a) If the final maturity of an obligation secured by a mortgage is ascertainable from the record of it, 5 years after the date of maturity.
> . . . .
> (3) If the record of the mortgage shows that it secures an obligation payable in

> installments and the maturity date of the final installment of the obligation is ascertainable from the record of the mortgage, the time shall run from the maturity date of the final installment.

Under either Statute, at the time of recordation the statute of limitations on a mortgage is five years from maturity of the underlying obligation. However, under both Statutes, when a mortgage or note is accelerated, the five-year statute of limitations begins to run on the date of acceleration. *Monte, supra,* at 716; *Locke v. State Farm Fire and Casualty,* 509 So.2d 1375 (Fla. 1st DCA 1987); *Conner v. Coggins,* 349 So.2d 780, 782 (1st DCA 1977).

B. The Mortgages' acceleration clauses declare them to be due when the Notes are due.

The acceleration clause in each of the Mortgages in this case ties them directly to the acceleration of the underlying debt by providing for acceleration with the Notes. Paragraph 3 of each Mortgage states, "[T]he entire indebtedness hereby secured shall immediately become due, payable, and collectible without notice, at the option of the mortgagee." The indebtedness to which they refer are the Notes.[5]

Because of the distinct reference of the mortgage acceleration clause to the Notes, the mortgagee accelerated the Mortgages in 1995, when it accelerated the

[5] The last paragraph on the first page of each Mortgage identifies the secured indebtedness. It says that "[T]his instrument [the Mortgage] is given to secure a Guaranty for the payment of a promissory note . . . ."

Notes. R1:111-13, 117-19, 155, 159-60.

C. The Notes and Mortgages are construed together.

LPP's argument below that the acceleration clauses in the Notes and Mortgages are to be construed separately is incorrect, because the acceleration clauses are explicitly inter-related, not separate. As explained below, time-barred debt action does in fact defeat an action to foreclose a mortgage securing that debt when the mortgage specifically states that it does. In this case, the Notes, Guarantees, and Mortgages, each with an acceleration clause, are read together in *pari materia,* so that acceleration of the Notes is also acceleration of the Guarantees and the Mortgages.

Courts in cases of this nature have read the two documents together. "When the promissory note secured by the 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 or the stated date of maturity, whichever is earlier." *Grady v. Smith v. FDIC,* 61 F.3d 1552, 1561 (11th Cir. 1995). "The rule is also settled that when a mortgage in terms declares the entire indebtedness due upon default of certain of its provisions or within a reasonable time thereafter, the Statute of Limitations begins to run immediately the default takes place or the time intervenes (citation omitted)." *Harmony Homes, Inc. v. U.S.*, 936 F.Supp. 907, 911 (M.D. Fla.

1996). "[W]here two or more documents are executed by the same parties, at or near the same time, in the course of the same transaction, and concern the same subject matter, they will be read and construed together." *International Ship Repair & Marine Services, Inc. v. Del Valle*, 469 So.2d 817, 818 (Fla. 2d DCA 1985), citing *J.M. Montgomery Roofing Company v. Fred Howland, Inc.*, 98 So.2d 484 (Fla. 1957).

The Loans, including the Notes and Guarantees, were accelerated on February 15, 1995, by letter. R1:111-13, 117-19, 155, 159-60.[6] Therefore, the statute of limitations began to run on February 15, 1995, and the limitations period ended on February 15, 2000. Because this suit was not filed until September 7, 2001, the state statute of limitations on this action had run prior to suit, and the suit was barred.

The SBA typed language on to each of the Mortgages changing the purpose of each Mortgage from security for a Note to security for one of the Guarantees.[7]

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[6]Notification of exercise of acceleration triggers the limitation period of a SBA loan. *United States v. Gilmore*, 698 F.2d 1095 (10th Cir. 1983), and cases cited at 1097. *See, e.g., Smith v. F.D.I.C.*, 61 F.3d 1552 (11th Cir. 1995), and cases at 1561 and note 17 applying the same decision to other federal and non-federal loans.

[7]See the last paragraph on the first page of each of the Mortgages. R1:11-14 and 19-22. This change was consistent with the language in the Guarantees affirming that its respective Mortgage was security for such Guaranty. See Section VI of this Brief, below, for the specific language used in the Guarantees.

Nonetheless, the acceleration clause in each Guaranty referenced its respective Note, so that acceleration of the Note constituted acceleration of the corresponding Guaranty.[8] Similarly, acceleration of the Guaranty constituted acceleration of SBA's right to foreclose on the collateral.[9]

Furthermore, the cases LPP cited below do not stand for its proposition that acceleration of the Notes in this case did not also accelerate the Mortgages. LPP cited *Loiacono v. Goldberg,* 240 A.D.2d 476 (NY Sup.Ct.1997), in which a New York court, construing New York law, was faced with an optional acceleration clause in a mortgage that it held was not automatically exercised with the automatic acceleration clause in a note. These are not similar facts to the present case. The Notes and Mortgages all contain optional acceleration clauses that were exercised, *because the*

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[8]"[T]he Undersigned hereby unconditionally guaranties to Lender, its successors and assigns, the due and punctual payment when due, whether by acceleration or otherwise, in accordance with the terms thereof, of the principal and interest on and all other sums payable, or stated to be payable, with respect to the note of the Debtor." Guaranty at 1 (emphasis added). R1:122-25.

[9]"The term 'collateral' shall mean any . . . property or rights [which are] mortgaged by or on behalf of . . . the Undersigned or any other party to Lender [as security] for the performance of this guaranty. . . . The Undersigned hereby grants the Lender full power . . . to deal in any manner with the Liabilities and the collateral, including . . .

(e) In the event of the nonpayment when due, whether by acceleration or otherwise, of any of the Liabilities, . . . to realize on the collateral . . . by foreclosure or otherwise." Guaranty at 1 (emphasis added). R1:122-25.

acceleration clause in each Mortgage references its respective Note, asserting that the Mortgages are due when the Notes are due.

LPP also cited *KRC Enterprises, Inc. v. Soderquist,* 553 So.2d 760 (Fla. 2d DCA 1989), in which the court was again construing conflicting language in mortgage and note acceleration clauses and did not mention anything about the effect of statutes of limitations on the mortgage. There is no such conflicting language in the present case. The clauses are harmonious.

Finally, LPP cited *Grier v. MHC Realty Corp.*, 274 So.2d 21 (Fla. 4th DCA 1973), which states, "Unquestionably, plaintiff can sue on the note without foreclosing the mortgage, as they are distinct agreements (citation omitted). But where there are provisions in two instruments, simultaneously executed and pertaining to the same transaction, which limit, explain or otherwise affect the provisions of the other, they should be construed together so that the intent of the parties can be determined and carried out." *Id.* at 22. *Grier* further emphasizes that, when the documents in a single transaction can be read in harmony, they should be. That is what the trial court correctly decided in the present case, but was reversed by the Fourth District on grounds of sovereign immunity.

IV. THE FEDERAL STATUTE OF LIMITATIONS DOES NOT APPLY

A. Background.

Although deciding that the central issue before the Court was whether an assignee of the government is entitled to sovereign immunity,[10] the Fourth District nonetheless engaged in an analysis of the applicability of a purported federal statute of limitations contained in 28 U.S.C. § 2415. LPP did not make this argument before the trial court and did not otherwise preserve it. Issues not raised in the trial court are not reviewable. *Natural Solutions Corporation v. Torrabind International, Inc.*, 840 So.2d 387 (Fla. 4th DCA 2003); *Dudash v. State*, 787 So.2d 105 (Fla. 2d DCA 2001). Nonetheless, the Fourth District adopted this argument as the basis of its opinion.

As explained in Section IIB, above, Florida law is the appropriate governing standard to be applied in a Florida foreclosure case of a private party seeking a private benefit. The federal statute of limitations has no relevance to this action, because, (i) as explained in this Section, the relevant federal Statute explicitly states that its only purpose is to confirm that the provisions of the Statute limiting the period for bringing an action for money damages [Section (a) of the Statute] are not applicable to actions to establish, *inter alia*, title to real property, and (ii) as explained in Section IV(C)6, below, the Congressional Record clarifies that the Statute was enacted for the purpose of protecting the federal government from claims of adverse possession. Under the

[10] "The question we must decide is whether an assignee of the government has the same protection from statutes of limitation that the government had." *Cravero*, *supra*.

O'Melveny doctrine described below, in the absence of a federal statute specifying the limitations period, the Court is required to look for a state statute specifying the limitations period.

B. Section 2415 applies to the United States as a sovereign.

Despite the issue of a federal statute of limitations not having been preserved, the Fourth District's decision depended on its analysis of the federal statute of limitations contained in 28 U.S.C. § 2415, which states in relevant part:

> **§ 2415. Time for commencing actions brought by the United States**
>
> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . .
>
> . . .
>
> (c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

This Statute is part of Chapter 161 of Title 28 of the United States Code, which is entitled "United States as Party Generally." There is nothing about this Chapter stating or implying that it applies to, or benefits, assignees of the United States.

An analysis of Section 2415 must begin with Congress's stated purpose for the Statute.

> Many of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government. Therefore, it is only right that the law should provide a period of

> time within which the Government must bring suit on claims just as it now does as to claims of private individuals. The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity.
> . . .
> In recommending this legislation, the committee feels that it will provide a greater fairness as regards private individuals who deal with the Government while adequately providing for the interests of the Government. The Government will be barred from asserting old and stale claims in the courts and the necessity for the early assertion of claims will require increased efficiency in Government claims proceedings.

112 Cong. Rec. 14,379-80 (daily ed. June 27, 1966) (House Comm. on the Judiciary) (regarding H.R. 13652, which, when enacted, created 28 U.S.C. § 2415).

Section (a) of the Statute, regarding a claim by the government for money damages founded upon a contract, was of no benefit to LPP, because more than six years had elapsed prior to LPP filing the instant suit. Accordingly, by the explicit terms of the Statute, LPP was barred from suing on the Notes and the Guarantees.[11]

As the court noted in *U.S. v. Copper*, 709 F.Supp. 905 (N.D. Iowa 1988), although 28 U.S.C. § 2415 bars the government from bringing a civil action to enforce a debt, that Statute is construed not to limit the U.S. government's ability to foreclose a mortgage given to secure the debt. *Id*. This is due to the "long-standing rule that the United States is exempt from the consequences of its laches, and from the operation

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[11]*See, e.g., United States v. Begin*, 160 F.3d 1319 (11th Cir. 1998), reiterating the established position that even the federal government may not seek money damages against a borrower under a SBA loan.

of statutes of limitations." *U.S. v. Alvarado*, 5 F.3d 1425 (11th Cir. 1993). LPP claimed applicability of this rule because the original loans were secured from the Small Business Administration ("SBA"), a federal governmental agency. In fact, Plaintiff identifies itself in its Complaint as a Texas limited partnership. R1:1-7. However, other than acquiring these loans from the SBA, Plaintiff claimed no affiliation with the United States government.

In *Wamco, supra,* the Court engaged in an extensive analysis of the effect of the federal statute of limitations of an assignment from a federal governmental agency to a private assignee. After confirming that "the common law maxim that the assignee stands in the shoes of the assignor" is circumscribed by the "fundamental component" that excepts those rights, remedies, and benefits that "are personal to the assignor and for his benefit only," the Court required an examination of the relevant statute to determine if "the incident of the assignment" was personal. *Id.* at 1086. The Court's analysis of the statute of limitations under the Act at issue, FIRREA,[12] was that, by its terms, the six-year statute of limitations in FIRREA was applicable only to actions brought by the Resolution Trust Corporation, not its assignees.

Similarly, the statute of limitations in 28 U.S.C. § 2415 explicitly applies only to

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[12]The Federal Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183. *See* 12 U.S.C. § 1821.

"the United States or an officer or agency thereof." 28 U.S.C. § 2415(a). Accordingly, the time for maintaining actions under 28 U.S.C. § 2415 was personal to the federal government, and LPP is not entitled to rely on 28 U.S.C. § 2415.

In *United States v. Thornburg*, 82 F.3d 886 (9th Cir. 1996), the Ninth Circuit permitted the Small Business Administration to claim the benefit of the longer six year statute of limitations, rather than the shorter state limitations period, under circumstances in which the Small Business Administration assigned a loan to a bank for collection purposes, and then received the loan back, after which the Small Business Administration filed suit. The Court held that the state statute of limitations did not cause the right to enforce the Note to expire while it was being held on behalf of the United States by the bank. *Thornburg* at 891-92. The Court distinguished this situation from one in which the government sold its right to collect to the bank, and the Court reinforced that it is the United States as a sovereign that is not subject to statutes of limitations unless it chooses to be subject. *Id.* at 892-93.

In the instant case, LPP had no government right to enforce. The SBA retained no rights to the return of the Mortgages or their proceeds. R1:15-16 and 23-24. Therefore, it was not entitled to the benefit of the federal six year statute of limitations, even if the time for filing under the Statute had not previously expired.

C. No court, other than the Court in *Matthias*, has extended the U.S. government's nonlimitation on foreclosure actions to a private assignee.

1. The Fourth District's decision, in reliance on *Matthias*, creates an unlimited restraint on alienation in violation of public policy.

LPP argued below, and the Fourth District adopted, that anyone receiving a loan assigned by the U.S. government has an unlimited period of time to foreclose on it. *Cravero, supra.* That argument proves too much. It creates a complete restraint on alienation for the subject properties *with no time limit or duration*. It is one thing to allow the sovereign, who is presumed to be operating for the benefit of the public, to have an extended period for foreclosure, but it is quite another to extend *in perpetuity* that right to all succeeding private holders of the mortgage, whether direct or subsequent assignees, simply because at one time the mortgage was held by a governmental agency. The result violates public policy, which abhors permanent restrictions on alienation. *Iglehart v. Phillips*, 383 So.2d 610 (Fla. 1980) (citing cases at 614-15 generally providing that lengthy restrictions on alienation are unreasonable and invalid, unless the subsequent transfer will be for market value). *See, e.g.*, *Camino Gardens Ass'n v. McKim,* 612 So.2d 636 (Fla. 4th DCA 1993), citing *Iglehart* for the "generally accepted rule that 'a fixed price repurchase option of unlimited duration . . . is an unreasonable restraint.' *Id.* at 615." *McKim* at 641.

Although an assignee may generally stand in the shoes of an assignor, the effect of importing the government's immunity from the statute of limitations to an assignee private bank that acquires a loan from the government would be to allow the private bank to hold the loan for one hundred years and then foreclose. There is no precedent for such an argument. Under such an argument at its extreme, a loan could change hands numerous times, through many years, and still carry no statute of limitations because it was initially given by, or once, however briefly, fell into the hands of, the U.S. government. This would be an outrageous result, and it is not the law in Florida. Instead, Florida courts have stated, in a case cited by LPP below, "The general rule that an assignee occupies the same position as the assignor is subject to the qualification that equitable principles, such as estoppel, may be applied to alleviate harsh operation." *State v. Family Bank of Hallandale*, 667 So.2d 257, 259 (1st DCA 1995) [quoting *Finesmith v. Singer*, 216 So.2d 39, 40 (Fla. 3d DCA 1968)].

2. The District Court relied on *Bledsoe*, the rationale of which has been severely questioned and which only applied to actions for monetary damages.

In another case cited below by LPP and cited by the Fourth District, the court in *FDIC v. Bledsoe,* 989 F.2d 805 (5th Cir. 1993), held that a private assignee received the benefit of the six-year statute of limitation when it took the assignment of a note from a government agency. This decision was expressly disapproved in *Wamco, III,*

LTD. v. First Piedmont Mortgage Group, 856 F.Supp. 1076 (E.D.Va. 1994), because the *Bledsoe* court relied on a Comment to Section 336 of Chapter 15 of the Restatement (Second) of Contracts, despite the fact that Chapter 15 is expressly "modified by the principles of the law of commercial paper and negotiable instruments" and "does not apply to . . . negotiable instruments." *Wamco* at 1087. Furthermore, *Bledsoe* only addresses the statute of limitations on money damages [28 U.S.C. § 2415(a)]. It does not and cannot speak to a nonlimitation on foreclosure actions, as there was no mortgage collateralizing the obligation.[13] Nonetheless, the Fifth Circuit speaks out against an infinite time period. "To prevent the possibility of an infinite period of limitations the FDIC cannot receive a new six year period every time it re-receives a note." *Id.* at 811 n. 8. Although still dealing with the money damages Statute, the Court indicates it will not tolerate an infinite statute of limitations for a private company.

3. The District Court relied on *Bledsoe*, which has been undermined by the

[13]Courts have found that, because § 2415 applies to money damages and does not contain a limitation on foreclosure actions, the federal government currently has no time limitation on such actions. *See, e.g., U.S. v. Alvarado*, 5 F.3d 1425, 1428 n.9 (Fla. 11th Cir. 1993), which (i) applies solely to federal government actions, and (ii) fails to construe or determine the effect of Section 2415(c). Section 2415(c) states: "Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property." See Sections IV(C)5 and IV(C)6 of this Brief for amplification of this issue.

United States Supreme Court's decision in *O'Melveny.*

Bledsoe's rationale is based upon *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942),[14] which has been undermined by the Supreme Court decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed. 67 (1994). *D'Oench* had used what it found to be federal common law to fill in statutory gaps in order to conclude that a government agency was not bound to secret agreements between private parties. The United States Supreme Court in *O'Melveny* held that *there is no such federal common law*, undermining the basis for the decision in *Bledsoe*, on which the Fourth District relies.

4. In the absence of federal common law, state law must be applied.

Since *O'Melveny*, courts have used the *O'Melveny* decision to conclude that, due to federal statutory silence, and in the absence of federal common law, state statute of limitations governed an assignee's use of a federal claim. *Federal Financial Company v. Hall*, 108 F.3d 46, 49 (4th Cir. 1997); *Remington Investments, Inc. v. Kadenacy*, 930 F.Supp. 446, 450-51 (C.D.Cal. 1996); *Global Financial Services, Inc. v. Duttenhefner*, 575 N.W. 2d 667 (N.D. 1998); *Federal Financial Co. v. Gerard*,

[14]*D'Oench* does not address statute of limitations, but, rather, whether secret agreements that accompany negotiable instruments are binding when a government agency receives them as receiver. The Court used "federal common law" to find that they were not binding.

949 P.2d 412 (Wash. App. 1998).

In the absence of a federal statute governing limitations, the court is to apply "the limitations period governing the state cause of action bearing the closest substantive resemblance to the federal claim." *Diamond v. Lamotte,* 709 F.2d 1419, 1422 (11th Cir. 1983). In the instant case, the closest statute of limitations is the statute governing mortgage foreclosure. Because, in the instant case, the acceleration clauses in the Mortgages reference the unenforceable Notes, application of state law must result in a finding that the foreclosure suit by this private investor is time-barred under the Florida statute of limitations.

5. Section 2415(c) explicitly states that Section 2415 does not address the statute of limitations on foreclosure and, therefore, Section 2415 cannot preempt state law.

There is no preemption of states' statutes of limitation in 28 U.S.C. § 2415. Section 2415(c) states as follows: "Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property." It is explicitly silent regarding a statute of limitations for foreclosure actions by the United States. Although some Courts have construed this Statute to state that there is no statute of limitations for the U.S. government regarding foreclosure actions under federal law,[15] those cases do not resolve the issue of whether the explicit

[15]*See, e.g., Alvarado, supra.*

statement that § 2415 does not limit the time to bring a foreclosure action can be construed as a preemption of all state laws on the subject.

There can be no preemption by a statute's silence regarding an issue. *Lee County Elec. Coop., Inc. v. Jacobs*, 820 So.2d 297, 301 (Fla. 2002); *See also Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 111 S.Ct. 2475, 115 L.Ed.2d 532 (1991); *Carter v. Brown & Williamson Tobacco Corp.*, 778 So.2d 932 (Fla. 2002). The failure of some cases to address this issue can only be due to a failure of the litigants to raise it timely before the several courts.

6. Section 2415(c) is limited to the federal government's right to protect its already existing real and personal property.

The purpose of Section 2415(c) is to protect the federal government from squatters who would attempt to assert a right by prescription to federal property. This Section does not, and was not intended to, address foreclosure of a mortgage given to a federal government agency.

> Subsection (c) makes it clear that no one can acquire title to Government property by adverse possession or other means. This is done by providing that there is no time limit within which the Government must bring actions to establish title to or right of possession of real or personal property of the United States. In other words, there is no statute of limitations applying to Government actions *of this type*.

112 Cong. Rec. 14,379 (daily ed. June 27, 1966) (House Comm. on the Judiciary) (regarding H.R. 13652, which, when enacted, created 28 U.S.C. § 2415).

The Congressional history clarifies the limited purpose and scope of Subsection (c). In purpose, it is solely to protect the Government from having to bring an action within a limited period of time to retrieve real or personal property that was already the Government's. Technically, its purpose was to prevent the government from losing an affirmative defense to a claim of the loss of title or possession of property in which it already had title; it was not to create a weapon to take title to property it did not have. In scope, it was meant only to apply to similar proceedings in which the failure of the Government timely to bring such an action would result in a loss to the public of such property.

Not only was the scope of the Subsection limited to adverse possession and similar proceedings, it was plainly and, in the Congressional Record, explicitly intended to be limited to the government. Nothing about the Congressional history implies that an assignee would succeed to the government's position, nor would any public benefit, right, or position be vindicated by allowing it to do so. The Subsection affords only the government an extended period to reject an adverse possession claim made by a private entity.

In the instant case, the Craveros have title to the subject property. They do not claim ownership by adverse possession or by taking it while the government was not looking; they owned it before the government ever became involved with them. Using

Subsection (c) as the basis for an affirmative argument for permitting a private entity to strip the Craveros of title to their home far exceeds both the explicit terms of the Subsection and the purpose and scope of the subsection, as expressed by Congress.

D. Cases addressing 12 U.S.C. § 1821, the RTC receiver statute, are irrelevant and are not uniform.

LPP previously analogized the instant case to *WRH Mortgage, Inc. v. Butler*, 684 So.2d 325 (Fla. 5th DCA 1996), which concerns 12 U.S.C. § 1821's preemption of a state limitations statute, for the proposition that there is no applicable statute of limitations. However, Section 1821 is a statute of limitations enacted specifically for the Resolution Trust Corporation ("RTC") (a federal government agency) as Receiver, which is not germane to this non-RTC case, and, even if germane, is not uniformly held to benefit non-governmental assignees.

In *Wamco, supra*, the Court, in a case regarding the applicability of 12 U.S.C. § 1821's preemption of the state limitations statute, rejected application of even the six-year statute of limitations, rejected *Bledsoe*, and found that the statute of limitations is personal to the government and does not transfer with a loan assignment. *Id.* at 1087.

The Cadle Company II, Inc. v. Stamm, 633 So.2d 45 (Fla. 1st DCA 1994), on which the Fourth District relied, suffers from all of the infirmities outlined above: it is based on the discredited *D'Oench* decision, it concerns only 12 U.S.C. § 1821 (the

RTC receiver statute), and the loan was received from the FDIC, which has a different statutory structure than the SBA.

E. Conclusion.

The federal statute of limitations, 28 U.S.C. § 2415, which self-evidently is dealing only with money damages and explicitly eschews addressing "an action to establish the title to, or right of possession of, real or personal property," does not preempt state law in the present case. State law governs, because there is no federal statute of limitations on SBA mortgage foreclosures, and because, since *O'Melveny*, the courts have recognized that, in the absence of federal statutory law, there is no federal common law, and the courts must refer to state law.

The Fourth District cited only to *Matthias* for its decision that assignees of loans from the U.S. government are entitled to an infinite statute of limitations on their foreclosure actions. There is no precedent for such a broad decision, as both the cases cited in *Matthias* and the remaining cases cited in the Fourth District's opinion are inapposite or fail to address the relevant issues of sovereign immunity or lack of preemption. Affirming the Fourth District would require this Court to stretch far beyond what any court before it has decided and to find no statute of limitations for a private assignee, based on the absence of a statute. LPP is not asking this Court to allow it to take advantage of a longer, governmental statute of limitations in a federal

statute, because LPP failed to file even within that longer limitations period. It is asking the Court to recognize that a private entity is to be treated as the federal government, as having no statute of limitations on a mortgage foreclosure, because the governing statute is silent as to the limitations period, explicitly addresses only money damages (not foreclosure or any other equitable relief), and explicitly states that it *does not* address the issue of time limitation for an action affecting title to real property.

V. THE COURT MUST APPLY A PREEMPTION ANALYSIS PRIOR TO DISREGARDING THE STATE STATUTE OF LIMITATIONS APPLICABLE TO FORECLOSURE OF A MORTGAGE GIVEN AS COLLATERAL IN CONJUNCTION WITH A FEDERAL LOAN

The Fourth District decision reversing the trial court's application of the Florida statute of limitations directly conflicts with the requirement of a preemption analysis, as articulated in *WRH Mortgage, Inc. v. Butler*, 684 So.2d 325 (Fla. 5th DCA 1996), and as applied by courts at every level.[16] *WRH* involved the statute of limitations applicable to a mortgage foreclosure by an assignee of the Resolution Trust

[16] *See, e.g.*, *Medtronic Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996), *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003), *Forum v. Boca Burger, Inc.*, 788 So.2d 1055 (Fla. 4th DCA 2001), and *Hernandez v. Coopervision*, 691 So.2d 639 (Fla. 2d DCA 1997), all of which recognize a presumption against preemption and require reference to the legislative history. In our case, the legislative history confirms that 28 U.S.C. § 2415 is an attempt to conform federal loans to the same requirements as non-federal loans. See the discussion at Sections IV(B) and IV(C)6, above.

Corporation, an agency of the federal government. The Fifth District cited *United States v. Summerlin*, 310 U.S. 414 (1940), also cited below, for the proposition that, when the government is the mortgagee, state statutes of limitation are generally preempted by federal statutes of limitation. The Fifth District then engaged in an analysis of the basis for preemption of the state statute of limitations as a prerequisite to determining whether the state statute was applicable.

In *WRH*, the Court cited *Chatham Steel Corp. v. Brown*, 585 F.Supp. 1130 (N.D. Fla. 1994), in order to clarify the basis for preemption, as follows:

> Under the supremacy clause, a state law can be preempted by federal law in three ways:
> (1) when Congress expressly states that a federal law supersedes relevant state law;
> (2) where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementing state regulation; and
> (3) when state law actually conflicts with federal law and compliance with both federal and state law is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

WRH Mortgage, supra, at 327. The *WRH* court found an explicit, applicable, six-year federal statute of limitations for such loans and held that the state statute of limitations would not apply, unless it were longer. *Id.*

The Fourth District failed to engage in the preemption analysis required in *WRH*. Furthermore, the Fourth District's decision that the state statute of limitations is

inapplicable does not fall within any of the bases for preemption stated in *WRH* and *Chatham Steel.*

The applicable federal statute that discusses the statute of limitations is 28 U.S.C. § 2415(c), which is cited by the Fourth District and provides as follows:

> Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

This Statute does not fulfill any of the prerequisites for preemption cited in *WRH*. It does not explicitly state that it supersedes any state law; it explicitly is not part of a comprehensive federal regulatory scheme leaving no room for supplementary state regulation; and it does not conflict with any state law. In fact, it explicitly states that it is <u>not</u> to be deemed a limitation; therefore, it cannot be construed to create a conflict with or to supersede state laws in the area of title to or possession of property.[17]

The Fourth District's assertion in the present case that "there is no statute of limitations which applies to foreclosure," *Cravero* at 897, conflicts with *WRH* in that, (i) *WRH* requires a preemption analysis before determining whether a state statute of limitations applies in a foreclosure case, and (ii) without finding preemption, it nevertheless finds the Florida statute of limitations on mortgages not to be a bar to the

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[17]As elaborated in detail in Section IV(C)2, above, this Subsection's sole purpose was to clarify that the *government* can bring a claim at any time against an entity that claims title or possession of government property through adverse possession.

foreclosure action. In order to preempt Florida's statute of limitations, *WRH* requires the finding of an applicable federal statute of limitations and an intention to preempt. None exists.

VI. THE PURPORTED UNLIMITED FEDERAL STATUTE OF LIMITATIONS ON FORECLOSURES IS NOT APPLICABLE BECAUSE, UNDER FLORIDA LAW, THE REMEDY OF FORECLOSURE OF A GUARANTOR'S COLLATERAL IS UNAVAILABLE AFTER THE NOTES BECOME UNCOLLECTIBLE

A. The application of the federal statute of limitations for any particular cause is dependent on the availability under Florida law of the remedy sought.

In *Dove v. McCormick*, 698 So.2d 585 (Fla. 5th DCA 1997), a mortgage foreclosure case in which the defendant asserted truth-in-lending defenses, the Fifth District Court of Appeal relied on the principal that the application of the federal statute of limitations for any particular cause is dependent on whether that particular cause or remedy is available to the claimant under Florida law. The *Dove* court cited the holding in *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997), that "under Florida law, an action for statutory right of rescission pursuant to *15 U.S.C. § 1635* may not be revived as a defense in recoupment beyond the three year expiration period contained in Section 1635(f). *Beach v. Great Western Bank*, 692 So.2d at 153." *Dove* at 588.

Foreclosure is not available to LPP as a remedy because of (i) *Florida Statutes*

Section 95.281, the statute of limitations, and (ii) the inability of a note holder to foreclose on collateral of a guarantor of the note after both the note and guaranty become unenforceable. Accordingly, the prerequisite to application of the federal statute of limitations, which is the existence of a Florida remedy, does not exist. Therefore, no determination of the application of a federal statute of limitations is required.

Despite being fully briefed, the Fourth District in its decision in the instant case never discussed the important distinction that the collateral to be foreclosed is not collateral of a note, but is collateral of an unenforceable guaranty. The guaranty is unenforceable because it is beyond the limitations period under both federal and Florida law. *See, e.g., Alvarado*, *supra*, citing *United States v. LaSalle National Trust*, 807 F.Supp. 1371, 1373 (N.D. Ill. 1992), in concluding that both the note and a guaranty on defaulted loans are unenforceable under 28 U.S.C. § 2415(a). *Alvarado* at 1428 n.7. Under *Dove*, because the remedy of foreclosure was not available under Florida law, then the issue of an applicable federal statute of limitations should never have been raised.

B. LPP has no claim against a guarantor, and, therefore, against collateral of the guaranty, once the underlying debt of the debtor is not actionable.

The Guarantees each explicitly state in the first paragraph that they guaranty

payment of one of the Notes, not the indebtedness.[18] R1:122-25. Each Guarantee explicitly states that "[s]uch note, and the interest thereon and all other sums payable with respect thereto are hereafter collectively called "Liabilities." R1:122-25. Accordingly, the guarantors' legal liability under the Guarantees does not extend beyond the Notes. If there is not an action on the Notes, then there is no claim available on the Guarantees.

A guaranty is a contract. *Lockheed Martin Corp. v. Galaxis USA, Ltd.*, 222 F.Supp.2d 1315 (M.D. Fla. 2002). Contract law requires that the guaranty be strictly construed according to its terms. *Scott v. City of* Tampa, 30 So.2d 300 (Fla. 1947), *cert. denied,* 332 U.S. 790, 68 S.Ct. 99, L.Ed.2d 372; *Miami Nat. Bank v. Fink*, 174 So.2d 38 (Fla. 3d DCA 1965). Under Florida law, if a guaranty is free from ambiguity, it is strictly construed in favor of the guarantor; if it is ambiguous, it is construed against the drafter. *F.D.I.C. v. University Anclote, Inc.*, 764 F.2d 804 (11th Cir. 1985). The Court cannot extend the breadth of the Guarantees beyond the extent to

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[18] The Guarantees each state in their first paragraph, "[T]he Undersigned hereby unconditionally guaranties to Lender, its successors and assigns, the due and punctual payment when due, whether by acceleration or otherwise, in accordance with the terms thereof, of the principal and interest on and all other sums payable, or stated to be payable, with respect to the note of the Debtor. . . . As security for the performance of this guaranty the Undersigned hereby mortgages, pledges, assigns, transfers and delivers certain collateral (emphasis added)." Guaranty at 1 (emphasis added). R1:122-25.

which they, by their own terms, apply. *A fortiori*, the Fourth District could not extend the collateral for the Guarantees beyond the scope of the Notes, which is the obligation that the Guarantees secured.

The Guarantees were drafted by the SBA (LPP's predecessor) and must be strictly construed against LPP. *Miami Nat. Bank v. Fink, supra*, at 40. The Guarantees could have stated that they secured the indebtedness evidenced by the Notes, or that the defined term "Liabilities" included the underlying indebtedness, but they did not. They only secured payment of the Notes. Once the Notes became unenforceable by virtue of the statute of limitations, the Mortgages became inactionable, because, as collateral of the Guarantees, they solely secured the Notes.

LPP argued below that suit on a note from a debtor is a separate remedy than suit to foreclose collateral of the debtor, and a limitation on one remedy does not operate as a limitation on the other. Appellant's Initial Brief at 8. Even if this is true, LPP would have no right to foreclose in this case, because the Mortgages are not collateral of the debtor, they are collateral of the Guarantees of the Notes. Therefore, the Mortgages are not susceptible to foreclosure once the Notes are time-barred. Even if there is a post-limitation right to foreclose the debtor's collateral, there is certainly no right to foreclose on the Guarantors' collateral, because the debt they guaranteed

is no longer actionable, so the Guarantors no longer have an obligation.[19]

Furthermore, LPP's predecessor accelerated any underlying obligation of the Guarantors by an acceleration letter to the Guarantors on the same date as the acceleration letter to the debtor. R1:77-86, 111-13. The Guarantors, whose obligation is not greater than the debtor, do not have a continuing obligation once the debtor's obligation is non-actionable. The very nature of a guaranty is to guaranty a specified obligation of the debtor, not to exceed it. Even if the debtor's collateral (if there were any) could be foreclosed as a remedy separate than the action on the Notes, the Guarantors' could not, because the Guarantors' obligation is limited by the terms of the Guarantees solely to pay the obligation under the Notes, of which none was actionable.

The Court in *Alvarado, supra,* implicitly recognized this distinction between the various possible remedies, although the different facts (*Alvarado* did not involve guarantees) did not require the Court to address this issue. In *Alvarado,* the Eleventh Circuit noted its responsibility to consider separately each remedy proposed by a mortgagee. *Id.* at 1429. In the instant case, suit on the Notes was barred by 28

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[19]Cases such as *U.S. v. Alvarado, supra,* and *Monte v. Tipton, supra,* that have allowed mortgages to be foreclosed when notes are time-barred have not examined the critical distinction between collateral of the indebtedness and collateral of guaranty of the time-barred note.

U.S.C. § 2415(a). Suit on the Guarantees was also barred by 28 U.S.C. § 2415(a). *United States v. Vanornum*, 912 F.2d 1023 (8th Cir. 1990); *United States v. Frey*, 708 F.Supp. 310 (D.C. Kan. 1988). Because suit on the Guarantees is barred, no basis exists to foreclose the Mortgages, which are collateral only of the Guarantees. By their own terms, and as drafted by the SBA, the Mortgages are not collateral of the indebtedness. If the Guarantees are unenforceable, then the Guarantees' collateral is unenforceable.

Simply put, a note evidences an indebtedness, a guarantee is a contract that a specific, identified item will be paid, and collateral of a guaranty provides security to insure that an obligation under the guaranty is fulfilled. In this case, the Guarantees, drafted by the SBA, stated that they would pay the Notes, not the underlying obligation, and not the indebtedness. When the Notes became unenforceable by virtue of the acceleration of the loans (an affirmative act of the SBA) and subsequent application of the statute of limitations [either 28 U.S.C. § 2415(a) or *Florida Statutes* § 95.11 applied to LPP, it doesn't matter which], the Guarantees became unenforceable, by virtue of (i) the fact that they contracted to pay the Notes, which were no longer enforceable, and (ii) the same statutes of limitation. Because the Guarantees were unenforceable, the collateral of the Guarantees (the Mortgages) no longer had anything to secure.

In this case, the SBA loans made loans to a company, Cravero Brothers. The Guarantees were made by the Defendants below, Vincent P. Cravero and Dorothy C. Cravero. The collateral of the Guarantees was the homestead of Vincent P. Cravero and Dorothy C. Cravero. R1:77-86. When the Guarantees became unenforceable, then collateral of the Guarantees no longer had anything to secure, and LPP no longer had a basis to seek foreclosure of such collateral.

Accordingly, under *Beach* and *Dove*, because the remedy of foreclosure of collateral of an unenforceable guaranty of an uncollectible note is not available to the holder of the note, no determination is to be made regarding which statute of limitations applies. The foreclosure remedy simply does not exist in this context.

VII. SUIT IS BARRED BY LACHES

Laches bars any action not commenced within the time provided for legal actions concerning the same subject matter. *Florida Statutes* § 95.11(6). *See Harmony Homes, supra,* at 914.

Even if the Court finds that a federal statute is to be construed to grant an unlimited limitations period for foreclosure to a governmental creditor,[20] private

[20]Laches has been held to apply even to suits by governmental agencies. *N.L.R.B. v. P*I*E Nationwide, Inc.*, 894 F.2d 887 (7th Cir. 1990); *S.E.C. v. Randy*, 1995 U.S. Dist. Lexis 15609 (N.D. Ill. Oct. 17, 1995).

assignees from the federal government seeking a private benefit have no such right. Laches operates to bar foreclosure suits in Florida more than five years after acceleration. *Florida Statutes* § 95.281.

LPP and its predecessor in interest allowed over six years to elapse after the acceleration of the loans, which commenced the period for foreclosure, without filing suit for foreclosure. Accordingly, LPP is now barred by laches from making a claim for foreclosure.

VIII. LPP'S FAILURE TO REGISTER WITH THE FLORIDA DEPARTMENT OF STATE DISQUALIFIED IT FROM BRINGING THE INSTANT ACTION

LPP describes itself on the face of the Complaint as a Texas limited partnership. Section § 620.169 of the *Florida Statutes* requires a foreign limited partnership to register with the Department of State before transacting business in Florida. LPP is in the business of buying and selling real estate in the State of Florida, as evidenced by the fact that they are suing to own the Florida real estate that is the subject of this action. Furthermore, LPP has admitted to conducting business in Florida without being registered with the Florida Department of State. R1:117-19. Section § 620.179 of the *Florida Statutes* prohibits a foreign limited partnership from maintaining an action, suit, or proceeding in the state courts of Florida until it has registered in

Florida. The Secretary of State has certified that LPP has not registered to conduct business in Florida. R1:116. Accordingly, Plaintiff is not authorized to conduct business or maintain a suit in the State of Florida, and Plaintiff's suit must, therefore, be dismissed.

CONCLUSION

This action is barred by the applicable state statute of limitations, LPP is not entitled to assert sovereign immunity in order to avoid the Craveros' defense of the statute of limitations, no federal statute of limitations applies, the action is barred by laches, and LPP has not qualified to bring suit in Florida. Accordingly, this Court should reverse the decision of the Fourth District and remand the case with instructions to reinstate the decision of the trial court granting the Craveros' Amended Motion for Summary Judgment.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to Anne S. Mason, Esquire, Mason Law, 17757 U.S. 19 N., Suite 500, Clearwater, Florida 33764, this _____ day of _____, 20____.

_____

E. SCOTT GOLDEN, ESQUIRE

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(A)(2)

I HEREBY CERTIFY that the font size used in this Brief is Times New Roman 14 point in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____

E. SCOTT GOLDEN, ESQUIRE

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1671

VINCENT CRAVERO, et al.,

Petitioners/Defendants,

v.

LLP MORTGAGE LTD., f/k/a LOAN PARTICIPANT PARTNERS, LTD., a TEXAS LIMITED PARTNERSHIP,

Respondent/Plaintiff.

BY DISCRETIONARY JURISDICTION FROM THE FOURTH DISTRICT COURT OF APPEAL
Lower Tribunal Case No. 4D02-2443

APPENDIX TO INITIAL BRIEF OF PETITIONERS

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