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IN THE

# Supreme Court of Florida

Case No. SC14-1265
(consolidated with Case Nos. SC14-1266 and SC14-1305)

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**LEWIS BROOKE BARTRAM; PATRICIA J. BARTRAM; and THE PLANTATION AT PONTE VEDRA, INC.**

**Petitioners,**

***vs.***

**U.S. BANK, NATIONAL ASSOCIATION,**

**Respondent.**

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*On appeal from the judgment of the Fifth District Court of Appeal*
*L.T. Case No. 5D12-3823*

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## RESPONDENT'S ANSWER BRIEF

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## I. **Introduction**

The Fifth District Court of Appeal (the "Fifth District") correctly held that an ineffective loan acceleration could not start the five-year statute of limitations for the lender to initiate a foreclosure action based on the borrower's subsequent and independent defaults.

In the underlying action, Petitioner Lewis Bartram ("Mr. Bartram") sought a declaration that a note and mortgage held by Respondent U.S. Bank, National Association ("U.S. Bank") was null and void, and Mr. Bartram sought to quiet title to the property on the ground that the five-year statute of limitations had purportedly expired on U.S. Bank's unconsummated acceleration claim such that U.S. Bank had no further right to enforce the note and mortgage.

The Fifth District correctly held that there was no statute-of-limitations bar preventing U.S. Bank from enforcing the mortgage for defaults that followed the first foreclosure action, and it properly reversed the circuit court's declaration in Mr. Bartram's favor.

This Court's recent authority, the plain language of Mr. Bartram's mortgage, logic and simple fairness compel the conclusion that an incomplete loan acceleration does not negate the well-established legal rule that each required payment in an installment contract presents a new opportunity for default and accrual of the five-year statute of limitations. Mr. Bartram; his former wife,

Patricia Bartram; and The Plantation at Ponte Vedra, Inc. (collectively, "Petitioners"), challenge the Fifth District's result by building a legal fiction with no basis in the law or the mortgage. They tell the Court that, once U.S. Bank accelerated the mortgage in 2006, it had to take some affirmative step to "decelerate" it and give Mr. Bartram notice of "deceleration" in order for Mr. Bartram's installment obligations to "resume." Petitioners then expend considerable energy arguing that no "deceleration" occurred. But Petitioners' argument rests on the false premise that the 2006 attempted acceleration was effective and enforceable in the first instance. It was not.

This Court's decision in *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004), the language of the mortgage itself and common sense demonstrate that Petitioners are wrong; no court issued an order entering a foreclosure judgment against Petitioners and thus the first acceleration never became legally enforceable under Florida law. Accordingly, there was no need to "decelerate." Mr. Bartram's note and mortgage remain in effect, and the Fifth District reached the correct result.

The Fifth District also certified the following question to this Court:

> Does acceleration of payments due under a note and mortgage in a foreclosure action that was dismissed pursuant to rule 1.420(b), Florida Rules of Civil Procedure, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on all payments defaults occurring subsequent to dismissal of the first foreclosure suit?

U.S. Bank respectfully urges that a modest rewording of the certified question would more precisely capture the issue before the Court. U.S. Bank suggests the following:

> Does acceleration of payments due under a note and mortgage in a foreclosure action that was dismissed *for any reason*, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on all payments defaults occurring subsequent to dismissal of the first foreclosure suit?

Regardless of the wording of the certified question, the answer is clearly "no," and this Court should affirm the Fifth District.[1]

## II. Nature of the Case, Course of Proceedings, and Disposition Below

In February 2005, Mr. Bartram executed an installment note (the "Note") secured by a 30-year mortgage (the "Mortgage") with U.S. Bank's predecessor in interest. R. II:248–64; R. III:474–90, 500–504.[2] Through a series of transactions, U.S. Bank became the successor in interest to the Note and Mortgage. R. III:474–504; R. VI:609–10. The recorded maturity date of the Mortgage is March 1, 2035. R. II:249; R. III:475.

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1 Petitioners assert that this Court should apply a *de novo* standard of review. U.S. Bank agrees that this is the proper standard of review for the questions of law posed in this appeal. *See Shotts v. OP Winter Haven, Inc.,* 86 So. 3d 456, 461 (Fla. 2011).

2 Record ("R.") citations are to the volume and page numbers in the record on appeal before the Fifth District. The form "X:Y" refers to the record volume ("X") and page number(s) ("Y").

Mr. Bartram defaulted on his obligation to make his January 1, 2006, payment as required under the Note and Mortgage. R. III:469. On May 16, 2006, U.S. Bank instituted a foreclosure action against Petitioners in the circuit court. R. III:469–473.[3] The trial court dismissed the foreclosure action with prejudice on May 5, 2011, after U.S. Bank failed to appear at a case management conference. R. III:433–34, 441–42.[4]

While U.S. Bank's foreclosure action was still pending, on March 23, 2011, Patricia Bartram filed a foreclosure action against the other Petitioners and against U.S. Bank, based on her own mortgage interest in the property. R. I:1–5. In that action, Mr. Bartram filed a cross-claim against U.S. Bank seeking (1) a declaration that U.S. Bank was forever barred by the statute of limitations from enforcing the Note and Mortgage; and (2) an order quieting title in the property free of the Mortgage. R. I:168–72.

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[3] Mr. Bartram asserts in his statement of the case in this Court that, in the 2006 action, he did not deny that he defaulted and that he did not challenge acceleration. *See* Mr. Bartram's Br. at 5. The statement is incorrect. In his answer to the 2006 foreclosure complaint, Mr. Bartram specifically denied that he was in default on his mortgage payments. That answer is a matter of record on the trial court's docket and, so, is available to this Court. *See* R. III:511 (12/12/2006).

[4] U.S. Bank notes that, during the proceedings in the Fifth District, it erroneously believed that the dismissal was without prejudice. U.S. Bank's further review of the trial court's orders demonstrates, however, that the dismissal was in fact with prejudice.

On July 31, 2012, the trial court granted summary judgment on the cross-claim in Mr. Bartram's favor. R. IIII:443–45.

However, the Fifth District reversed and remanded, holding that the statute of limitations does not bar subsequent foreclosure actions based on subsequent defaults. *See U.S. Bank Nat'l Ass'n v. Bartram*, 140 So. 3d 1007, 1014 (Fla. 5th DCA 2014). This Court accepted review, consolidating the cases for appellate purposes.

## III. Summary Of Argument

This Court should affirm the Fifth District's holding, soundly based on *Singleton*, that the running of the statute of limitations based on U.S. Bank's ineffective acceleration in 2006 does not bar U.S. Bank from seeking to enforce the Note and Mortgage based on subsequent defaults.

First, as the Fifth District correctly determined, it does not matter that U.S. Bank attempted to accelerate the entire balance in the 2006 foreclosure action. *Singleton* had already determined that the mere election by the mortgagee to accelerate does *not* "place[] future installments at issue." 882 So. 2d at 1007 (parenthetically quoting *Olympia Mortgage Corp. v. Pugh*, 774 So. 2d 863, 866 (Fla. 4th DCA 2000)). As defaults under such future obligations create a new cause of action, they are not barred by the doctrine of *res judicata*. *Id*. at 1008. The Fifth District properly reasoned, based on the holdings of *Singleton*, that

because the continuing defaults by Mr. Bartram on the Note and Mortgage were not at issue in the 2006 foreclosure action, the statute of limitations continues to accrue with the failure to pay each subsequent installment. Further, *Singleton* implicitly (and correctly) holds that until there is an adjudication on the merits of a default, the mortgagee is not entitled to the accelerated loan balance and there can be no completed acceleration. *See id.* at 1007. Therefore, U.S. Bank is not time-barred from bringing another foreclosure action based on a subsequent default and, in that future action, attempting to accelerate the balance as a result of such default (or to enforce any other continuing obligations such as taxes, insurance and reporting requirements).

Second, although *Singleton* should control the outcome of this case, there is another basis—apart from *Singleton*—for the Court to affirm and endorse the Fifth District's ultimate holding. The plain language of the Mortgage itself establishes that it is still in effect and *not* null and void. The Mortgage allows Mr. Bartram, to this day, to stop any attempted acceleration in its tracks simply by paying the presently due installments at any time before a final judgment. Because final judgment was never entered on the Mortgage, its terms still control the parties' obligations arising from the contract. Thus, wholly apart from *Singleton*, the Mortgage itself mandates that an attempted acceleration would impose an immediate obligation on Mr. Bartram to pay all of those future obligations *only if*

final judgment were ultimately entered without his having cured the existing defaults. Because the 2006 foreclosure action was dismissed before final judgment, the acceleration never was completed such that Mr. Bartram continues to owe installment payments and each of his defaults causes the statute of limitations to accrue for that default.

Third, equity does not favor rewarding Mr. Bartram with a free house. Mr. Bartram borrowed a significant sum of money ($650,000) in 2005. He agreed to pay his debt in installments due monthly for 30 years. In 2006, U.S. Bank began but never completed the process of accelerating Mr. Bartram's debt based on his previous defaults and foreclosing on his house. Because the circuit court dismissed U.S. Bank's 2006 action, Mr. Bartram did not, merely as a result of the commencement of that action, face either a judgment on an accelerated debt or foreclosure. Thus, U.S. Bank's incomplete 2006 foreclosure action imposed no new or changed legal obligations on Mr. Bartram. Yet Mr. Bartram comes before this Court to argue incorrectly that the Court should read the law to void his Mortgage and allow him a free house despite the facts that he has serially defaulted on his loan obligations and that he never actually faced—much less made any payment on—an accelerated loan obligation.

Accordingly, the Fifth District's opinion that the statute of limitations does not bar U.S. Bank from bringing another foreclosure action and holding Mr.

Bartram accountable for any subsequent defaults is entirely correct and should be affirmed.

Finally, U.S. Bank maintains its mortgage lien on the property until March 1, 2040 pursuant to Florida's statute of repose (Section 95.281). Contrary to Petitioners' contention, the duration of U.S. Bank's lien is not affected by Florida's statute of limitations (Section 95.11).

## IV. Argument

The Fifth District correctly held that the statute of limitations does not bar U.S. Bank from bringing another foreclosure action because future installments were not at issue in the initial action. Therefore, U.S. Bank is entitled to enforce subsequent defaults by Mr. Bartram. *See Bartram*, 140 So. 3d at 1014 ("Based on *Singleton*, a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed . . . ."). As discussed below, the Fifth District's reliance on *Singleton* was correct because *Singleton* squarely resolves the core issues raised by this appeal. The certified question should be answered "no."

### A. In the course of reaching its conclusion in *Singleton*, the Court set forth two holdings that control the outcome of this case.

While the ultimate legal issue in *Singleton* was whether the doctrine of *res judicata* barred the lender's action, it cannot be distinguished on that basis. In *Singleton,* the Court reached two holdings that are important in the statute-of-

limitations context: (1) notwithstanding the mortgagee's attempt to accelerate the entire balance due under the note and mortgage, the filing of a foreclosure action only places at issue the defaults asserted in the action and does not place future installments or obligations at issue; and (2) unless a court adjudicates the mortgagee's entitlement to the accelerated balance of the loan, the attempted acceleration will not be complete. *See Singleton*, 882 So. 2d at 1007-08.

Petitioners argue at some length that *Singleton* is somehow distinguishable because, in that case, the Court was considering the potential effect of *res judicata* on a lender's right to pursue a second or subsequent foreclosure action, while this case involves the potential effect of the statute of limitations on that right. Petitioners' simplistic attempt to distinguish *Singleton* from this case fails.

To determine whether *res judicata* applied, the Court in *Singleton* had to decide whether the first and second foreclosure actions relied on the same defaults such that the actions were identical. To resolve that question, the Court had to determine which defaults were placed at issue in the first attempted foreclosure action. The second foreclosure action relied on defaulted installment payments due subsequent to the first foreclosure action. Thus, if the first foreclosure put at issue not only past, defaulted payments but also future payments (*i.e.,* the loan was successfully accelerated), there would have been identity of claims, and *res judicata* would have barred the second action. *See Singleton,* 882 So. 2d at 1007.

The Court decided *res judicata* did not bar the second action because the first foreclosure attempt did not place at issue those future installment payments. *Id.* at 1007-08.

The holdings in *Singleton*—that (1) a mortgagee's mere election to exercise an optional acceleration right does not itself place future installment payments at issue; and (2) the mortgagee's attempted acceleration is not effective unless and until there is a final judgment that there has been a default and that the mortgagee has a right to accelerate the future payments—provide the controlling authority that should govern the outcome of this case.

***1. The statute of limitations does not bar U.S. Bank from bringing a new foreclosure action based on separate and distinct defaults that were not at issue in the 2006 foreclosure action.***

In *Singleton,* the Court soundly rejected the notion that "an election to accelerate puts all future installment payments in issue and forecloses successive suits." *Id*. at 1006, 1008; *see also Olympia*, 774 So. 2d at 866 (rejecting argument that "when [the mortgagee] elected to accelerate payment on the note in the first and second foreclosure actions, it placed the entire balance of the note at issue...").
The Court explained that "the subsequent and separate alleged default created *a new and independent right* in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." *Singleton*, 882 So. 2d at 1008 (emphasis added).

*Singleton*'s reasoning applies with equal force to the statute-of-limitations context of this case.[5] As the Fifth District correctly held, "[i]f a 'new and independent right to accelerate' exists in a res judicata analysis, there is no reason it would not also exist vis-à-vis a statute of limitations issue." *Bartram*, 140 So. 3d at 1013. The Fifth District further reasoned that "*new defaults* presented *new causes of action*," regardless of whether the mortgagee had previously attempted to accelerate. *Id*. (emphasis added). In other words, a cause of action cannot accrue until the default occurs. *See Ros v. Lasalle Bank Nat. Ass'n*, No. 14-22112, 2014 WL 3974558, at *3 (S.D. Fla. July 18, 2014) (citing *Allie v. Ionata*, 503 So. 2d 1237, 1242 (Fla. 1987)) ("The statute of limitations cannot be utilized to eliminate the contractual rights of parties before an actual breach occurs."). The Fifth District also observed that the application of *Singleton* to the statute-of-limitations context has found favor in federal courts. *Bartram*, 140 So. 3d at 1012-13 (citing *Kaan v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1271 (S.D. Fla. 2013) and *Dorta v. Wilmington Trust Nat'l Ass'n*, No. 5:13-cv-185, 2014 WL 1152917 (M.D. Fla. Mar. 24, 2014)). Subsequent to *Kaan and Dorta*, at least *16* other Florida decisions from April 2014 through December 2014 (three state decisions and

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[5] Like U.S. Bank, the mortgagee in *Singleton* "sought" to accelerate the entire balance. *Singleton*, 882 So. 2d at 1005 n.1. Also, like U.S. Bank, the *Singleton* mortgagee's first foreclosure action was dismissed for failure to appear at a case-management conference. *Id*.

thirteen federal decisions) have likewise applied *Singleton* in the statute-of-limitations context.[6]

### 2. *Singleton establishes that U.S. Bank's attempted acceleration of the Mortgage never became effective and U.S. Bank retains a new and independent right to bring a new cause of action against Mr. Bartram based on subsequent defaults.*

Pursuant to *Singleton* and *Olympia*, unless a foreclosure action concludes with a judgment in favor of the mortgagee that the mortgagor actually defaulted, the mortgagee cannot enforce acceleration of the loan balance. *See Singleton*, 882 So. 2d at 1007 (recognizing that the court must first determine whether acceleration is appropriate); *Olympia*, 774 So. 2d at 866 ("[t]he issue is whether

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6 *See, e.g., Lacroix v. Deutsche Bank Nat'l Trust Co.*, No. 2:14-cv-431, 2014 WL 7005029, at *2 (M.D. Fla. Dec. 10, 2014); *St. Louis Condo. Ass'n, Inc. v. Nationstar Mortg. LLC*, No. 14-CIV-21827, 2014 WL 6694780, at *2 (S.D. Fla. Nov. 26, 2014); *Rodriguez v. Bank of America, N.A.*, No. 13-CIV-23980, 2014 WL 4851777, at *2 (S.D. Fla. Sept. 30, 2014); *2010-3 SFR Venture, LLC v. Garcia,* 149 So. 3d 123, 125 n.2 (Fla. 4th DCA 2014); *Smathers v. Nationstar Mortg., LLC,* No. 5:14–cv–415, 2014 WL 4639136, at *3 (M.D. Fla. Sept. 16, 2014); *Diaz v. Deutsche Bank*, No. 14-22583, 2014 WL 4351411, at *3 (S.D. Fla. Sept. 2, 2014); *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So. 3d 954, 956 (Fla. 4th DCA 2014); *Garcia v. BAC Home Loans,* 145 So. 3d 217, 219 (Fla. 5th DCA 2014); *Espinoza v. Countrywide Home Loans Servicing, L.P.,* No. 14–20756–CIV, 2014 WL 3845795, at *3 (S.D. Fla. Aug. 5, 2014); *Verdecia v. Bank of New York as Tr. for the Certificate Holders CWABS, INC., Asset–Backed Certificates, Series 2006–13,* No. 13–62035–CIV, 2014 WL 3767668, at *3 (S.D. Fla. July 31, 2014); *Torres v. Countrywide Home Loans, Inc.*, No. 14-20759, 2014 WL 3742141, at *4 (S.D. Fla. July 29, 2014); *Matos v. Bank of New York,* No. 14–21954–CIV, 2014 WL 3734578, at *2-3 (S.D. Fla. July 24, 2014); *Ros*, 2014 WL 3974558, at *2; *Poole v. Aurora Loan Servs., LLC,* No. 8:13–cv–2548, 2014 WL 3378344, at *4 (M.D. Fla. June 30, 2014); *Lopez v. HSBC Bank USA, Inc.*, No. 14-cv-20798, 2014 WL 3361755, at *2 (S.D. Fla. Apr. 29, 2014); *Romero v. SunTrust Mortg., Inc.*, 15 F. Supp. 3d 1279, 1283-84 (S.D. Fla. 2014).

there has already been a default which *if decided in favor of the mortgagee*, *would entitle the mortgagee to ... accelerate* and foreclose in accordance with the note and mortgage.") (emphasis added).

This holding—that the mortgagee cannot actually accelerate the entire balance until the court makes a determination that the mortgagor defaulted on the alleged installment or obligation—has significant statute-of-limitation implications.[7] Until it has been determined that the acceleration was proper, the installment nature of the obligation remains. This conclusion is compelled by Florida law, which mandates that a mortgagee must obtain a judicial determination of the existence of a default by the mortgagor before the mortgagee is entitled to the accelerated loan balance and thus a final judgment of foreclosure on that balance. *See* FLA. STAT. § 702.01 ("All mortgages shall be foreclosed in equity."). Florida is not a deed-of-trust state wherein the lender is only required to assert a

[7] U.S. Bank recognizes that some courts have reached the same conclusion U.S. Bank urges here but through a slightly different analysis that presumes that an acceleration did occur but that it was essentially eradicated by the dismissal of the action. *See, e.g., Bartram*, 140 So. 3d at 1009; *St. Louis*, 2014 WL 6694780, at *3; *Rodriguez*, 2014 WL 4851777, at *3; *Espinoza*, 2014 WL 3845795, at *1. The difference between U.S. Bank's analysis and the analysis employed by those courts is immaterial to the ultimate conclusion: whether an acceleration was ever in effect or an acceleration was in effect but was rendered ineffective, the fact that the earlier foreclosure action was dismissed meant that the parties reverted to the *status quo ante*—*i.e.*, the borrower owed the installment payments he had owed before the lender took action. Indeed, Petitioners place great emphasis on the fact that the Fifth District followed that alternative analysis. But, because the Fifth District's analysis and the one U.S. Bank sets out here support the same ultimate conclusion, the modestly different analyses help Petitioners not at all.

default in order to obtain title to the property. In other words, the mortgagee's assertion of the existence of a default and claim to entitlement to the full accelerated loan balance is only the first step in the foreclosure process that can only be completed by a judicial determination that the mortgagee's acceleration is well founded. *See Haberl v. 21st Mortg. Corp.*, 138 So. 3d 1192, 1192-93 (Fla. 5th DCA 2014) (reversing final judgment of foreclosure where notice of default did not comply with mortgage provision's requirements); *Ramos v. Citimortgage, Inc.*, 146 So. 3d 126, 128-29 (Fla. 3d DCA 2014) (same); *Kurian v. Wells Fargo Bank, N.A.*, 114 So. 3d 1052, 1055 (Fla. 4th DCA 2013) (same).[8]

U.S. Bank's 2006 foreclosure action was dismissed in May 2011 without the circuit court deciding—much less entering a judgment—that Mr. Bartram had defaulted on the previous installment payments or any other obligation. The dismissal of the 2006 action before entry of a final judgment precluded an effective acceleration of the loan and, as this Court explained in *Singleton,* the dismissal placed the parties "in the same contractual relationship with the same continuing obligations": Mr. Bartram remained obligated to pay future installments as they became due (and to fulfill his other contractual obligations), and U.S. Bank

[8] As U.S. Bank notes in Footnote 3, *supra,* Mr. Bartram in fact filed an answer to the 2006 foreclosure action in which he denied his default. That fact underscores why acceleration should not be considered effective until final judgment since, before that time, the default that gave the lender the right to accelerate has not been determined.

maintained its right to enforce the note and mortgage based on subsequent payment defaults (or other breaches of the note and mortgage). *See Singleton*, 882 So. 2d at 1007 ("the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations" and the mortgagee should not be barred from bringing "a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven.").[9] Nothing occurred here that could have amended the parties' contract such that all of Mr. Bartram's future payment obligations under the note became legally void; only a foreclosure judgment could have had that impact, but indisputably no judgment was entered.

Moreover, U.S. Bank's complaint seeking acceleration and a judgment of foreclosure in 2006 concerned only Mr. Bartram's previous defaults. Because the future installments and other obligations were not placed at issue in that lawsuit, Mr. Bartram remained obligated to pay them as they came due. Each time Mr. Bartram failed to make an installment payment (or breached his other continuing contractual obligations such as taxes and insurance and reporting requirements), a cause of action on that default accrued and a separate five-year limitations period

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[9] *See also Broward Cnty. v. 8705 Hampshire Drive Condo., Inc.*, 127 So. 3d 853, 854 (Fla. 4th DCA 2013) (dismissing foreclosure action based on running of statute of limitations, but finding that certain requirements are "continuing duties under the mortgage" and a subsequent breach of those duties could restart the statute of limitations and lead to another foreclosure action).

for an action to foreclose a mortgage under Section 95.11(2)(c) began to run. FLA. STAT. § 95.031 ("the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues."); FLA. STAT. § 95.031(1) ("[a] cause of action accrues when the last element constituting the cause of action occurs.").[10] Because Mr. Bartram's installment-payment obligations continue until 2035, R. II:249; R. III:475, 500, the statute of limitations is no bar to a foreclosure action.

U.S. Bank notes that at least one district court of appeal has considered it material whether the earlier action was dismissed with or without prejudice. *See*

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[10] Petitioners make two arguments that warrant only brief response.

First, they argue that the Fifth District violated separation of power principles by creating a judicial exception to the five-year requirement under Section 95.11(2)(c). *See, e.g.*, Mr. Bartram's Br. at 26-27. The argument is without merit. The statute dictates how soon after a cause of action "accrues" a claim must be filed. The statute does not set forth when a cause of action accrues in the circumstances presented in this case, and so the Fifth District's decision did not conflict in any way with the statute. Moreover, as this Court is well aware, courts are frequently called upon to determine when various causes of action accrue.

Second, they argue that the Fifth District's decision somehow unconstitutionally impaired Mr. Bartram's contract rights. *See, e.g., id*. at 34-36. Of course, to argue that something impairs a contract right, one must first identify the right alleged to have been impaired. In *David v. Sun Fed'l Sav. & Loan Ass'n,* 461 So. 2d 93 (Fla. 1984), the Court referred to the mortgage *holder's* right to avoid abrogation of its contractual right to accelerate. In his brief, Mr. Bartram struggles to find some right of his own that he claims was impaired. He settles on his "right to hold U.S. Bank to its acceleration under the contract . . . ." *Id*. at 35. But Mr. Bartram points to no contract term that grants him a right to insist that the lender's optional right to accelerate must be enforced. Moreover, there is considerable irony in Mr. Bartram's claiming a right "of a constitutional dimension" to an accelerated debt that he made no effort to pay.

*Deutsche Bank Trust Co. Americas v. Beauvais,* No. 3D14-575, 2014 WL 7156961 (Fla. 3d DCA Dec. 17, 2014) (petitions for rehearing and rehearing en banc pending). While such a distinction would do no harm to U.S. Bank's position in this case since the circuit judge dismissed the first foreclosure action with prejudice (as was the case in *Singleton*), it is worth noting here that the distinction is in fact irrelevant. As demonstrated above, the issue is not the presence of a particular form of dismissal but the absence of a final judgment holding that a default exists. If the earlier foreclosure action did not result in a final judgment of default entitling the lender to acceleration and foreclosure, it does not matter what prevented the judgment. As the Fifth District correctly determined below, the distinction between a dismissal with prejudice and a dismissal without prejudice "is *not material* for purposes of the issue at hand." *Bartram*, 140 So. 3d at 1013 n.1 (emphasis added); *see also Espinoza*, 2014 WL 3845795, at *4 (concluding that the distinction between "without prejudice" and "with prejudice" is "*irrelevant*" and finding no persuasive reason why it should "impact the enforceability of the underlying debt.") (emphasis added); *Dorta*, 2014 WL 1152917 at *5-7 (explaining that "even where a mortgagee initiates a foreclosure action and invokes its right of acceleration, *if the mortgagee's foreclosure action is unsuccessful for whatever reason,* the mortgagee still has the right to file later

foreclosure actions—and to seek acceleration of the entire debt—so long as they are based on separate defaults.") (emphasis added).

### *3. The cases on which Petitioners rely to argue for a different accrual date pre-date* **Singleton** *and, thus, do not remain good law.*

Petitioners point to Florida cases holding that when the mortgage being foreclosed contains an optional acceleration clause (such as the Mortgage here), the statute of limitations begins to run when the last payment is due (*i.e.*, the maturity date) or when the mortgagee exercises its right to accelerate, whichever is earlier. *See, e.g., Greene v. Bursey*, 733 So. 2d 1111, 1114-15 (Fla. 4th DCA 1999); *Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1973).

However, as the Fifth District correctly concluded in this case, *Greene*, *Monte* and similar cases pre-date *Singleton* and therefore are no longer controlling. *See Bartram*, 140 So. 3d at 1010.[11] Cases like *Greene* and *Monte* are necessarily premised on the antiquated assumption that once the mortgagee commences an acceleration of the full balance (including all future installments), the installment nature of the obligation is immediately and irrevocably terminated. To the contrary, both *Singleton* and *Olympia* have stated clearly, "We disagree that the election to accelerate place[s] future installments at issue." *Singleton*, 882 So. 2d

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[11] Moreover, the Fourth District Court of Appeal has implicitly rejected its own decision in *Greene*. Specifically, in *Evergrene*, the Fourth District Court of Appeal applied *Singleton* to hold that the statute of limitations did not bar an action for subsequent defaults; the court did not even mention *Greene*. 143 So. 3d 954.

at 1007 (parenthetically quoting *Olympia*, 774 So. 2d at 866). Moreover, even if they had not been superseded by *Singleton,* none of the district court of appeal cases Petitioners cite could be controlling on this Court.

Therefore, as the Fifth District correctly held, U.S. Bank is not barred by the statute of limitations from commencing another action to attempt again to accelerate and collect upon all future installments.

**B. The express language of the Mortgage provides an additional basis to conclude that there was no effective acceleration in 2006 because there was no final judgment.**

While *Singleton* should resolve the certified question, there is another reason for the Court to conclude that the statute of limitations is no bar here. By the plain terms of the Mortgage, U.S. Bank cannot effectuate its demand for acceleration of the loan balance and thus terminate the installment nature of the Note and Mortgage until a final judgment is entered. The Mortgage itself demonstrates that the 2006 acceleration attempt was not effective.

Section 19 of the Mortgage includes the following:

> Borrower shall have the right to have enforcement of this [Mortgage] *discontinued* at any time *prior to . . . entry of a judgment* enforcing this [Mortgage]. . . . *Upon reinstatement by Borrower, this [Mortgage] and obligations secured hereby shall remain fully effective as if no acceleration had occurred.*

R. II:259-260 at ¶ 19; R. III:485-86 at ¶ 19 (emphasis added).[12] In other words, while the lender might intend to accelerate and start the process to do so, the borrower retains the ability to stop the acceleration (and foreclosure) at any time before final judgment simply by satisfying the payment alleged to be in default. If the borrower does so, the attempted acceleration evaporates and the parties return to the *status quo* that existed before the attempted acceleration; the borrower is to make periodic installment payments as though no acceleration had ever been contemplated. Thus, the acceleration cannot be deemed effective and its obligation imposed on the borrower prior to final judgment because the borrower always has the power until then to cure the alleged default and to continue with the installment payments.

Petitioners seek to misconstrue the plain language of Section 19 in two ways. Petitioners first argue that Section 19 has no application because Mr. Bartram did not in fact exercise his right to reinstate. But that argument misses the mark. The point is not whether Mr. Bartram exercised the right but whether that right existed. Because it indisputably existed, Mr. Bartram undeniably had the right to preclude the acceleration from becoming effective unless and until there was a final judgment. Since there never was a final judgment, Mr. Bartram never

[12] The reinstatement provision in the Mortgage is common in the industry, as it is consistent with the form Fannie Mae/Freddie Mac document that is universally used. If this Court were to determine that a demand for acceleration divests borrowers of their contractual right to reinstate, the impact would be enormous.

lost that right and the acceleration never ripened into a legal obligation to pay the accelerated balance.

Petitioners next argue that Section 19 somehow supports their position because it provides Mr. Bartram with a right to reinstate but does not provide the same right to the lender. From that, Petitioners apparently contend that U.S. Bank's forbearance in the 2006 action could not prevent acceleration and leave in place the installment obligations. That argument, too, misses the mark. The lender has no need for an express, contractual right to head off acceleration. It need only stop its efforts to obtain a judgment of default and it will necessarily have prevented the acceleration from becoming effective. The Mortgage provides such a right to the borrower, not because the ability to stop an attempted acceleration is somehow uniquely the borrower's, but because the lender can achieve the same result by simply dismissing (or allowing the dismissal of) the foreclosure action before there is a final judgment.

Therefore, the plain language of the Mortgage establishes that there was never a completed acceleration by U.S. Bank and, thus, no resultant triggering of the statute of limitations on subsequent payments. Put another way, under both *Singleton* and the plain language of the Mortgage, the lender's demand for acceleration awaits validation by judgment of the court. Until that time, the five-

year statute of limitations accrues on each subsequent default as the payments become due.[13]

### C. Petitioners' assertion that U.S. Bank was required to take some affirmative step to "decelerate" the installment payments rests on a false premise.

Contrary to both precedent and the language of the Mortgage, Petitioners argue at some length that, once U.S. Bank indicated an intention to accelerate in 2006, the acceleration was a *fait accompli* unless U.S. Bank took some affirmative step to "decelerate" the payment obligations and gave notice to Mr. Bartram that it had done so. Their argument continues that, without "deceleration," Mr. Bartram's payment obligations all came due at once in 2006 and the statute of limitations for foreclosure expired five years later.

Petitioners have built a house of cards on a faulty foundation. While necessarily conceding that no accelerated payments were made and no foreclosure judgment was entered, Petitioners characterize U.S. Bank's attempted acceleration in the 2006 action as completed. One need not "decelerate" that which has not been accelerated. For all the reasons described above, Mr. Bartram's loan never was effectively accelerated.

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[13] It is worth noting that, notwithstanding the continuing accrual of causes of action with each subsequent default, there is a point at which the statute of limitations would terminate any right of foreclosure: five years after the date of the loan's maturity. *See* FLA. STAT. § 95.11(2)(c).

There is another reason Petitioners' "deceleration" argument fails. It reads into the Mortgage terms that are not there. Nothing in the Mortgage requires U.S. Bank to take some affirmative step to forego its right to accelerate. The Mortgage includes no obligation, for example, that U.S. Bank notify Mr. Bartram that it was no longer pursuing acceleration. Furthermore, there would be no need for such a requirement. Mr. Bartram would necessarily know from the dismissal of the foreclosure action that U.S. Bank was not moving forward with acceleration. As stated in *Olympia*: "By voluntarily dismissing the suit, [the lender] in effect decided not to accelerate payment on the note and mortgage at that time." 774 So. 2d at 866.

Moreover, the Mortgage affords U.S. Bank an *optional* right of acceleration. It would be peculiar indeed to suggest that a lender, which has the unilateral option to commence acceleration of a mortgage, does not likewise have the unilateral right to halt its pursuit of acceleration.[14]

In short, contrary to Petitioners' arguments, as there was never a completed acceleration, there was no affirmative step necessary by U.S. Bank to "decelerate" anything.

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[14] This unilateral right is the complement of the borrower's unilateral right to resume installment payments. There is symmetry in the obligations and rights.

### D. Equity and sound policy weigh in favor of U.S. Bank's right to enforce the Mortgage.

As noted above, the law compels the result U.S. Bank urges. So do equity and sound policy.

It would be a windfall to the borrower to dissolve a lender's right to the balance due under the note and mortgage—and to permit a borrower to ignore his obligation to make *future* installments—simply because a *prior* attempt to accelerate and prove *prior* defaults was unsuccessful. Under Petitioners' interpretation, an attempted exercise of the optional acceleration provision would give the lender only one opportunity for a legal remedy and would prevent a successive action on a future, separate and distinct default, notwithstanding any multitude of continuing and distinct obligations on the mortgage. As this Court cautioned in *Singleton*, "justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default." *Singleton*, 882 So. 2d at 1008.

In *Singleton,* the Court foresaw just the sort of unjust enrichment inherent in the result Mr. Bartram seeks. Mr. Bartram borrowed $650,000, and he agreed to pay it back in monthly payments over the course of 30 years. Within months, Mr. Bartram defaulted on his obligations. While U.S. Bank started the acceleration process in 2006, Mr. Bartram never in fact confronted a judgment on any part of his debt—much less the full, accelerated debt. But he now suggests to this Court

that equity supports his being allowed to escape his obligation. He ironically invokes equity to suggest that U.S. Bank was not sufficiently aggressive in its efforts to get him to pay a debt he has made essentially no effort to repay.

U.S. Bank had the right to start the acceleration process, and it had the right to stop it. None of that harmed Mr. Bartram in any way, yet he hopes to use it to avoid his obligation and end up with a free house at U.S. Bank's expense. Equity compels rejection of Mr. Bartram's attempt.

So, too, do sound policy considerations. The result Mr. Bartram seeks would likely harm both lenders and borrowers. The lender would plainly be prejudiced because, even though an attempted acceleration did not successfully result in a judgment in its favor, the lender would be forever precluded from seeking repayment. *See Singleton*, 882 So. 2d at 1007-08 ("[t]he adjudication of the earlier default would essentially insulate [the borrower] from future foreclosure actions on the note—merely because she prevailed in the first action.").

The borrower would be harmed because a lender that might otherwise have an incentive to postpone a foreclosure action in order to negotiate some more accommodating resolution might well be dissuaded from doing so because a prior dismissal might bar any future foreclosure action if the negotiated resolution failed. *See U.S. Bank Nat'l Ass'n v. Gullotta*, 899 N.E. 2d 987, 997 (Ohio 2008) (O'Donnell, J., dissenting). It is common for a lender to give notice of acceleration

and commence a foreclosure action but, before judgment is entered, to work with the borrower to resolve the action through some loss-mitigation option (for example, there are loan modifications, special forbearance agreements and other, similar options).

The outcome of this appeal should be consistent with a policy that is intended to reduce the number of foreclosure actions rather than one that would discourage loan servicers and investors from providing borrower assistance at the risk of losing their ability to enforce the note in the future.

### E. Petitioners' selective survey of decisions from other states does not negate the holdings of *Singleton* or the language of the Mortgage.

The result Petitioners seek contradicts Florida law and would require this Court to contradict the principles of *Singleton*, namely that a "subsequent and separate alleged default create[s] a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." *Singleton*, 882 So. 2d at 1008. Mr. Bartram spends more than 10 pages of his brief describing decisions of courts from other states in an attempt to portray Florida law as simply bad law. *See* Mr. Bartram's Br. at 24-34. But only 10 years ago, in *Singleton,* this Court considered and rejected the same rule of law that Petitioners urge the Court to accept here. *See Singleton*, 882 So. 2d at 1006 (rejecting the Second District Court of Appeal's holding in *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d

468 (Fla. 2d DCA 1963) that "an election to accelerate puts all future installment payments in issue and forecloses successive suits.").

Additionally, the laws of other states advanced by Petitioners are inconsistent with Florida law. For instance, the Supreme Court of Ohio explicitly rejected *Singleton* when it held that *res judicata* barred a successive foreclosure action because in a mortgage "contract with an acceleration clause, a breach constitutes a breach of the entire contract." *Gullotta*, 899 N.E. 2d at 992.[15] Petitioners also rely on other state opinions that implicitly rejected *Singleton*. Petitioners further point to Nevada law despite that Nevada utilizes a completely different framework than Florida for the statute of limitations.[16] Indeed, unlike Florida's statute of limitations which is triggered when the cause of action accrues, Nevada's statute of limitations begins to run upon default.[17]

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[15] The dissent was "persuaded, rather, by the decision of the Supreme Court of Florida in *Singleton*." 899 N.E. 2d at 996 (O'Donnell, J., dissenting).

[16] *See* NEV. REV. STAT. § 11.200 ("[W]henever any payment on principal or interest has been or shall be made upon an existing contract, whether it be a bill of exchange, promissory note or other evidence of indebtedness if such payment be made after the same shall have become due, *the limitation shall commence from the time the last payment was made*.") (emphasis added); *see also Cadle Co. II, Inc. v. Fountain*, 281 P.3d 1158, 2009 WL 1470032, at *1 (Nev. 2009) ("Although the district court found that the statute of limitations began to run when CIT filed its lawsuit on November 18, 1996, we conclude that the statute of limitations began running from the date of the default and therefore expired in February of 2002.").

[17] Other states that Petitioners rely upon, such as Nevada and Arizona, are deed of trust states, which, unlike Florida, do not provide for judicial foreclosure.

Petitioners point to contrary decisions from a handful of other states, but they offer this Court no compelling reason to retreat from the holdings set out in *Singleton*. Instead, Petitioners seek to portray Florida law as an outlier as though this Court should follow the decisions of other states regardless of existing Florida precedent and regardless of whether those other states' decisions are persuasive.

### F. U.S. Bank has a mortgage lien on the property until March 1, 2040, regardless of the statute of limitations for mortgage foreclosure

In her initial brief in this Court, Patricia Bartram argues that, if the statute of limitations indeed expired with respect to U.S. Bank's right to foreclose, the Court should hold that the mortgage and all of the obligations attendant to it have been extinguished.

The Court need not consider that argument.

First, as demonstrated above, the statute of limitations on U.S. Bank's right to foreclose has not in fact expired.

Second, the issue Patricia Bartram raises is irrelevant to the certified question. (If the issue were to become relevant, it would be one for the Fifth District to consider on remand.)

Third, Patricia Bartram waived the argument in any event. She filed no brief in the Fifth District and, so, cannot pursue the argument in this Court. *See Coolen*

*v. State,* 696 So. 2d 738, 742 n.2 (Fla. 1997) (failure to raise an issue in an appellate brief waives the issue).

Fourth, there is no conflict for the Court to resolve regarding this issue. The District Courts of Appeal have consistently rejected Patricia Bartram's argument. *See, e.g., Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 603 (Fla. 2d DCA 2005); *Am. Bankers Life Assurance Co. of Fla. v. 2275 West Corp.*, 905 So. 2d 189, 192 (Fla. 3d DCA 2005) ("The limitations period provided in section 95.11(2)(c) does not affect the life of the lien or extinguish the debt.").[18]

## V. Conclusion

The Fifth District reached the right conclusion, a conclusion supported by *Singleton,* the terms of the Mortgage and equity. Mr. Bartram obtained a significant loan and made promises to repay it. The fact that U.S. Bank began but did not ultimately complete its prior foreclosure action does not bar it from seeking its remedies as a result of continuing defaults under the Note and Mortgage.[19]

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[18] If for any reason the Court were to decide to expand the scope of the certified issues to consider this argument, U.S. Bank suggests that additional briefing would be appropriate.

[19] The foregoing discussion demonstrates that the Court should answer the certified question "no," and conclude that the statute of limitations is no bar. In its *amicus curiae* brief, the Mortgage Bankers Association (the "MBA") offers a compelling discussion of the significant policy reasons that support that legal conclusion. Among other things, a holding contrary to that of the Fifth District would upset lenders' settled expectations with respect to their existing mortgage rights. (With those rights in mind, U.S. Bank agrees with the MBA that any such holding should be applied prospectively only.)

January 22, 2015

Respectfully submitted,

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I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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