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Case Nos. SC14-1265, SC14-1266 & SC14-1305
Lower Tribunal Case No. 5D12-3823

To be argued by:
Paul Alexander Bravo

In the Supreme Court of Florida

Lewis Bartram, Patricia Bartram & The Plantation at Ponte Vedra, Inc.,

Petitioners,

v.

U.S. Bank, N.A.,

Respondent.

On Appeal from the Fifth District Court of Appeals

Patricia Bartram's Initial Brief

Paul Alexander Bravo
Florida Bar No. 38275
pabravo@pabravo.com

Jason Bravo
Florida Bar No. 17525
jbravo@pabravo.com

P.A. BRAVO
17 Sevilla Ave
Coral Gables, FL 33134
305.209.9019
service@pabravo.com

P.A. Bravo
www.pabravo.com

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STATEMENT OF THE CASE AND FACTS

I. Introduction

This is a case of first impression that turns on the timeliness of a claim by a creditor holding a defaulted mortgage to foreclose out the timely filed claims of two secured creditors and the title interest of an owner of residential real estate in Florida. Resolution of the certified questions in this case will require the Court for the first time to opine on the interplay between the exercise of a contractual acceleration clause and the concepts of "accrual" and "tolling" as those words are used in Chapter 95 of the Florida Statutes. The Court will also be required to determine for the first time the effect of the Florida Legislature's shortening of the statute of limitations for mortgage foreclosures from 20 years to 5 years, and its inclusion of a provision in the statute providing that all equitable remedies in Florida are barred in any case where the corollary legal remedy is barred, both of which it did in 1974 when it enacted a set of sweeping amendments to Chapter 95.

The Court's task is not an enviable one. Many of the legal principles involved are ancient. Some can even be characterized as antiquated, if not anachronistic. The issues are further convoluted by the relative equities inherent in disputes between borrowers and creditors, and the often seemingly contradictory rules that courts have applied from time to time to arrive at just results in particular cases. But the decision is necessary. It will bring much needed certainty to the law of real estate, negotiable

instruments, and secured lending. And it will clarify the relationship between statutory and judicial bars to prosecution of otherwise potentially meritorious claims. Finally, the decision will likely be determinative of hundreds, if not thousands, of ongoing disputes between lienholders and owners of Florida real estate, most of which are currently pending before the state courts of Florida.

Despite the seeming complexities involved, the Court's decision will ultimately turn on its interpretation of just two statutory provisions. The first is section 95.11(2)(c), which was enacted in 1974 and states plainly and simply that "[a]n action to foreclose a mortgage" must be commenced within 5 years. The second provision is found in section 95.281[1] and states that the "lien of a mortgage or other instrument encumbering real property . . . shall terminate after the expiration of the following periods of time …." It then defines the periods of time as 5 years "[i]f the final maturity of an obligation secured by a mortgage is ascertainable from the record of it" and 20 years "[i]f the lien of the mortgage is not ascertainable from the record of it."

The provisions are seemingly at odds. On the one hand, the law appears to be that the holder of a mortgage has 5 years to bring a foreclosure claim after it accrues.

[1] The provision was substantially revised and renumbered as part of the 1974 amendments but was originally enacted in 1945 and previously found in section 95.28.

On the other, the time periods referred to in section 95.281 turn on the recording date of the mortgage, and the maturity date (if any) appearing on its face, not on the date a foreclosure claim may have accrued. Several lower appellate courts have had the opportunity to consider the relationship between the two provisions, and these courts seem to be in agreement that one is a "statute of limitations" and that the other is better understood as a "statute of repose." But none of the opinions to date have fully explained how each is to be properly applied to a particular set of facts in light of the other.

As argued in this brief, the Court's resolution of this case necessarily requires that it fill this void in the law by reading each provision together in light of the law as it existed in 1974 – the year 95.11(2)(c) was enacted and 95.281 was substantially revised and renumbered. As the venerable Oliver Wendell Holmes, Jr. observed over a hundred years ago: "The rational study of law is still to a large extent the study of history."[2] A careful analysis of the history behind these provisions not only indicates that they were intended to complement one another in pursuit of the same legislative goals, but it also suggests that the most coherent and just outcome in this case was initially arrived at by the trial court when it cancelled U.S. Bank's mortgage.

[2] OLIVER W. HOLMES, THE PATH OF THE LAW 20 (Applewood Books) (1897).

II. Statement of the Issues

The Fifth District Court of Appeals relied on this Court's decision in *Singleton v. Greymar,* 882 So. 2d 1004 (Fla. 2004), to reverse the trial court's entry of a declaratory judgment finding enforcement of the mortgage held by U.S. Bank to be barred by the statute of limitations and striking it from the public record. After doing so, the lower court 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 payment defaults occurring subsequent to dismissal of the first foreclosure suit?

There are two primary problems with this particular characterization of the novel issues involved in this case. First, the question begs its own answer because it explicitly assumes that there can in fact be "payment defaults" after the acceleration of *all* future payments due under a note and mortgage. Second, the answer to the question, however phrased, only resolves one of the issues necessary to decide this case – whether or not the dismissal of an action to foreclose an accelerated mortgage can serve as the basis for avoiding the statute of limitations in a subsequent suit. In other words, the question asks only if a mortgage that's been accelerated for more than 5 years can still be foreclosed if it was accelerated as part of a failed foreclosure attempt. But the Court needs to go a step further to fully resolve this case. Because

the declaratory judgment in this case found the mortgage to be unenforceable and struck it from the public record, the Court also must determine if a mortgage that is barred by the statute of limitations can survive as a valid encumbrance under Florida law; and, if not, whether a trial court has the authority to enter a declaratory judgment cancelling the mortgage as a matter of record after finding that the statute of limitations has expired.

As a result, Petitioner, Patricia Bartram, respectfully submits that answers to the following two questions are necessary in order to fully resolve this case:

(1) Can the successful acceleration of all future installment payments due under a promissory note and mortgage be reversed so that the loan is reinstated without the consent of (or even explicit notice to) the borrower in order to avoid the absolute bar to recovery of a money judgment on the note and foreclosure of the mortgage provided by the statutes of limitations in section 95.11(2)(b) and section 95.11(2)(c) of the Florida Statutes?;

and,

(2) Once the five year statute of limitations in § 95.11(2)(b) and § 95.11(2)(c) have expired on an accelerated promissory note and mortgage, is the mortgage a valid encumbrance under Florida law (Or does it become a legal nullity subject to judicial cancellation as a cloud on title upon adjudication that the statutes of limitations have expired)?

The answer to both of these questions is flatly no. The law in Florida since January 1, 1975 (the day the 1974 amendments to Chapter 95 went into effect) has been that once the remedy for breach of a promissory note is barred at law, the

corresponding remedy on a mortgage securing its repayment is similarly barred. Additionally, in 1974, when Chapter 95 was completely overhauled by the Florida legislature,[3] the law had long been settled that the exercise of an optional acceleration clause would "accelerate the *maturity* of the debt" and that "the institution of a suit for foreclosure *is* the exercise of the option of the mortgagee to declare the whole of the principal sum and interest secured by the mortgage due and payable."[4] And not a single appellate decision existed in the state of Florida holding that acceleration could be reversed under any circumstances, much less in order to avoid the absolute bar of a statute of limitations. As a result, the legislature could not possibly have anticipated that section 95.11(2)(c) would be applied in a way that allows a claimant to extend or otherwise avoid the statute of limitations by allowing an accrued claim for foreclosure to be dismissed.

Since the enactment of the 1974 amendments, every decision of this Court has approached a question regarding its application in the same way – by seeking to interpret it in accordance with legislative intent. And in doing so, the Court has

[3] *See* A114, CS/HB 895 Section Summary ("Section 7 Limitations other than for the recovery of real property. – This section is the heart of the bill. It contains all the time periods for limitations other than for the recovery of real property."). Add. 2 at Pg. 4.

[4] *Kreiss Potassium Phosphate Co. v. Knight*, 98 Fla. 1004, 1013-1015 (1929) (emphasis added).

consistently found that once a cause of action accrues, the *only* way the "clock" started at the moment of accrual can be stopped, is by showing the existence of one of the reasons in the exclusive list set forth in section 95.051. That provision, which was also enacted as part of the 1974 amendments, explicitly states that "[a] disability or other reason does not toll the running of any statute of limitations except those specified in this section …."[5] Because the exhaustive list in 95.051 does not include dismissal of a claim, or the occurrence of any event in the sole control of the plaintiff, the first question can safely be answered in the negative.

The answer to the second question also requires the Court to consider legislative intent in light of the law as it existed in 1974. And as is the case with the first question, long-standing and well-settled precedent from this Court provides the answer: once the remedy of mortgage foreclosure is barred, the lien ceases to exist as a matter of law and the mortgage holder has no claim against (or any right to) the property. This conclusion follows from the simple fact that this Court has interpreted Florida law to follow the lien theory of mortgages, which simply means that a mortgage is merely a type of personal property (sometimes described as a "chose in action") providing the right to have the real estate security auctioned off in satisfaction of the underlying debt once the mortgage is adjudicated to be

[5] § 95.051(2), Fla. Stat. (2014)

enforceable by a Florida court. So once a claim for foreclosure of an accelerated mortgage has been found to be barred by the statutes of limitations, the mortgage (which is merely a right to a judicially sanctioned foreclosure sale) can no longer be said to exist and serves no legal purpose whatsoever.

Section 95.281 does not change the analysis because that provision only provides an outside date beyond which a mortgage can be considered unenforceable as a matter of public record. The purpose of the provision, which was enacted almost 20 years before the legislature enacted the Marketable Record Titles to Real Property Act ("MRTA"), was simply to provide certainty in real estate transactions by extinguishing stale or abandoned liens by operation of law without the necessity for multiple lawsuits to quiet title. Although the passage of MRTA, which extinguishes all claims to real estate recorded more than 30 years before root title, arguably made 95.281 superfluous in many cases, the legislature made a conscious decision in 1974 to retain the provision in Chapter 95. But it only did so after shortening the period after maturity that a mortgage survives under 95.281 from 20 years to 5 years to align it with the 5 year statute of limitations added to 95.11. This indicates that the legislature intended that the two provisions work together towards the same purposes of eliminating stale claims to real estate, encouraging diligent enforcement of defaulted mortgages, and ensuring certainty in real estate transactions.

III. Procedural History

A. U.S. Bank's Failed Foreclosure

The mortgage at issue in this case went into default on January 1, 2006.[6] On May 16, 2006, Respondent, U.S. Bank, filed a complaint in St. John's County, Florida, in which it explicitly stated that it was exercising its option to accelerate the due date of all future payments otherwise due under the note and mortgage so that they were all immediately due and payable. (A1 at ¶ 9). On December 12, 2006, Lewis Bartram filed an answer to the complaint, and on December 19, 2006, U.S. Bank moved for final summary judgment of foreclosure of its mortgage. (A37). Although the motion does not appear to have been denied, over two years later, on February 23, 2009, U.S. Bank filed a renewed motion for summary judgment. (A46). After the renewed motion was denied on March 24, 2009, (A56) U.S. Bank filed a third motion for summary judgment on February 2, 2010, nearly four years after it filed the complaint. (A57). The third summary judgment motion would never be heard. On May 5, 2011, nearly 5 years to the day after the case was filed, the trial

[6] As of the filing of this brief, more than 8 years after Lewis Bartram's initial default, no payments have been made on the mortgage.

court dismissed the case without prejudice as a result of U.S. Bank's failure to appear at a noticed status conference.[7] U.S. Bank did not appeal the dismissal.

B. The Pending Lien Foreclosures

On January 11, 2011, more than 5 years after U.S. Bank's mortgage went into default, Petitioner, The Plantation at Ponte Vedra Homeowners' Association (the "Association"), filed a complaint seeking to foreclose its claim of lien for homeowners' assessments and other charges.[8] Then, on April 1, 2011, Patricia Bartram, initiated a separate action by filing a complaint seeking to foreclose a mortgage she received from Lewis Bartram in connection with their divorce proceedings.[9] According to her complaint, Lewis Bartram defaulted when he failed to satisfy the mortgage by paying the balance of $156,954.64 in full by August 31,

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[7] *See* A73. Because the dismissal order does not state if it is with or without prejudice, it is presumed to be without prejudice. *See* Fla. R. Civ. P. 1.420.

[8] The Association has not received any payments since the U.S. Bank Mortgage went into default. *See* A74. The amount owed to the Association now exceeds $200,000.00.

[9] *See* A75. The mortgage received by Patricia Bartram was given as security for her equity in the former marital home. *See* A88 at ¶ 4. Patricia Bartram never received payment from Lewis Bartram on the mortgage and did not obtain any benefit from it until it was purchased from her by the current owner, Gideon Gratsiani, after the lower court issued its opinion. Gratsiani filed a motion to substitute party with the Fifth District Court of Appeals, which was denied without opinion. Although Gratsiani is the current holder of the mortgage, the petition is being prosecuted in the name of Patricia Bartram (with her express consent) in accordance with rule 1.260(c) of the Florida Rules of Civil Procedure.

2006, in accordance with the final judgment dissolving the marriage. (A76 at ¶ 6-7). On February 4, 2012, Patricia Bartram's foreclosure action was transferred to the same judicial division where the Association's foreclosure was pending, which is the same court that had dismissed U.S. Bank's foreclosure. On April 26, 2012, Lewis Bartram filed a cross-claim against U.S. Bank in Patricia Bartram's foreclosure action seeking a declaratory judgment finding U.S. Bank's mortgage to be unenforceable under the statute of limitations found in section 95.11(2)(c) and cancelling it as an illegitimate cloud on title. On July 31, 2012, the trial court entered final summary judgment in Lewis Bartram's favor on his cross claim. On September 12, 2012, after the trial court denied U.S. Bank's motion for rehearing, U.S. Bank appealed the entry of final judgment to the Fifth District Court of Appeals.[10]

C. The Fifth District's Decision

On April 25, 2014, the Fifth District Court of Appeals issued its opinion and mandate. The court reversed the entry of final judgment after concluding "that a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations found in section

[10] Since this appeal was filed, the Association has obtained a final judgment on count II of its complaint for money damages. The March 4, 2013 judgment liquidated damages for assessments in the principal amount of $134,008.81 but did not determine attorneys' fees or foreclose the Association's lien.

95.11(2)(c), Florida Statutes, provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period."[11] The court based its decision on its interpretation of this Court's opinion in *Singleton*, where this Court approved a Fourth District Court of Appeals decision ruling that a foreclosure action that had been refiled after dismissal of a prior action to foreclose the mortgage *with* prejudice but less than 2 years after the defendant's initial default was not barred by res judicata. In its opinion, the *Bartram* court explicitly stated "that there is no question of the Bank's successful acceleration of the entire indebtedness on May 15, 2006." But it found that "[b]ased 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 on its merits."[12] Based on this reasoning, the court reversed the trial court's entry of summary judgment, certified the question set forth in section I above, and remanded the case. All of the parties adversely affected by the lower court's decision timely invoked this Court's jurisdiction, and on September 11, 2014, the Court entered an order accepting jurisdiction and setting a briefing schedule.

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[11] *U.S. Bank, N.A., v. Bartram*, 140 So. 3d 1007, 1014 (Fla. 5th DCA 2014).
[12] *See id.* Although the sole footnote in the opinion seems to indicate that the dismissal of U.S. Bank's foreclosure was *with* prejudice, as explained in footnote 7 above, the dismissal was actually without prejudice.

IV. Standard of Review

The applicable standard of review is de novo.[13]

SUMMARY OF THE ARGUMENT

The lower court's decision is based on a misapplication of the law as it has existed since January 1, 1975, and on an apparent misapprehension of this Court's decision in *Singleton*. The lower court arrived at its decision without considering the legislature's intent when it enacted section 95.11(2)(c) as part of the extensive changes it made to Chapter 95 in 1974. As of that year, this Court had determined over 100 years before that even though a promissory note was barred by the 5 year statute of limitations on written contracts the corresponding mortgage could be foreclosed in equity for a period of 20 years after accrual of the causes of action.[14] In 1945 the legislature recognized this result when it enacted section 95.28 (the

[13] *See, e.g., Raymond James Fin. Servs., Inc. v. Philips,* 126 So. 3d 186, 190 (Fla. 2013) (applying a de novo standard of review in a case turning on the Court's construction of section 95.011, which was enacted as part of the 1974 amendments to Chapter 95).

[14] This result was based on this Court's conclusion that the statute of limitations for instruments under seal was applicable to mortgage. *See, e.g., Ellis v. Fairbanks,* 21 So. 107, 109 (Fla. 1897) (finding that it had been "settled beyond any doubt or cavil in [Florida] that the fact that the remedy at law is barred by the statute of limitations upon promissory notes secured by a mortgage under seal does not affect the lien of the mortgage."). Importantly, the limitations period in that provision was based on *accrual* of a cause of action on a written instrument under seal, unlike section 95.281 (formerly 95.28), which has *always* been based on the date of recording.

precursor to 95.281), which was intended to extinguish mortgages from *the public record* by operation of law after 20 years from the maturity date of the mortgage and 20 years from recording of the mortgage if no maturity date was provided.[15]

But by 1974 the legislature had experienced an apparent "change of heart," which is expressed through its enactment of section 95.11(2)(c) and revisions to section 95.28 (which it moved to 95.281).[16] The nature of the changes, and the available legislative history,[17] indicate that they were intended to overrule the prior result of this Court's decisions by harmonizing the limitations periods applicable to promissory notes and mortgages (both with respect to accrual and by reference to

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[15] *See* Chapter 22560, Laws of Fla. (1945); *see generally, H.K.L. Realty Corp. v. Kirtley*, 74 So. 2d 876, 877 (Fla. 1954) (comparing the statute as amended in 1945 to its prior version).

[16] In *Philips*, 126 So. 3d at 192, the Court noted that "examining the history of the legislation is a helpful tool in determining legislative intent." And, in fact, the Court has recognized the usefulness and validity of this approach for many years. *See, e.g., McDonald v. Roland*, 65 So. 2d 12, 14 (Fla. 1953) (discussing rules of statutory construction and stated that "[i] is equally settled, however, that courts will consider, among other things, the history of the enactment of a statute in aid of determining the legislature's intent.").

[17] *See*, *e.g.*, A114, Florida Law Revision Council, Project on Statutes of Limitation, Some Policy Considerations, (April 8, 1972) ("A logical application of limitations policy suggests that the statute should extinguish the right of action as well as it (sic) remedy. Not to do so encourages self help after the statute has run which in turn threatens the security and stability of human affairs.").

the public record),[18] and by enacting 95.11(6), which explicitly made the limitations periods in section 95.11 applicable to equitable causes of action by providing that laches bars any relief "concerning the same subject matter." With the enactment of these amendments, every provision of the Florida Statutes affecting both the timeliness and enforceability of mortgages had been changed to reduce the time of enforceability after maturity from 20 years to 5 years.[19]

It did not take long after the 1974 amendments for its effects to be felt. Prior to enactment of the 1974 amendments, there was a surprising dearth of case law since the Court's late nineteenth century decisions finding the 20 year statute of limitations on instruments under seal to be applicable to mortgages.[20] But just two

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[18] *See, e.g., Brown v. Griffin*, 229 So. 2d 225, 228 (Fla. 1969) (explaining that "[i]n arriving at the legislative intent in amending the statute under consideration it is appropriate to consider the prior judicial construction of the statute which was amended as well as the practical operation of that statute before and after the amendment.").

[19] The 1974 amendments also removed any reference to a contracts or "liability founded upon an instrument of writing under seal" from section 95.11(1), which this Court had formerly relied on as a basis for allowing a mortgage to be enforced for 20 years. *See 1974* Supplement to 1973 stat.

[20] This Court in particular appears to have only decided three cases during that period where the statute of limitations applicable to mortgages was involved. In *Travis Co. v. Mayes*, 36 So. 2d 264 (Fla. 1948), the Court affirmed a judgment denying a foreclosure brought 17 years after the mortgage's maturity date based on laches but did not decide the issue of whether the mortgage had been accelerated so that it would also have been barred by the former version of section95.281. In *H.K.L. Realty Corp. v. Kirtley*, 74 So. 2d 876 (Fla. 1954), the Court applied the former version of 95.281 to reverse a judgment of foreclosure in a case filed more

years after the amendments became effective, the first Florida court to interpret the new shorter statute of limitations handed down an opinion. In *Conner v. Coggins*, 349 So. 2d 780 (Fla. 1st DCA 1977), the First District Court of Appeals considered sections 95.11(2)(c) and 95.281 together but determined that even though the mortgage at issue had been in default for more than five years, because it did not contain an acceleration clause it "did not fully mature until there was a default in payment of the final installment."[21] Over the next 35 years, the second,[22] third,[23] fourth,[24] and fifth[25] districts also had the opportunity to interpret section 95.11(2)(c), and each of those courts interpreted the provision the same way – it only bars installments not coming due within 5 years *unless* the mortgage holder elects to

than 20 years after maturity. And in *Hubbard v. Tebbetts*, 76 So. 2d 280, 281 (Fla. 1954), the Court reversed the entry of a declaratory judgment finding a mortgage time-barred and declaring it a void cloud on title after finding that the plaintiff failed to plead the non-satisfaction of a condition precedent but otherwise agreed that "the result reached below was correct." In *Putzer v. Homeridge Props.*, 57 So. 2d 848 (Fla. 1952), the Court did find a mortgage to be unenforceable, but that was in the context of a quiet title action brought by the holder of a tax deed.

[21] *See Conner*, 349 So. 2d at 782.
[22] *See USX Corp. v. Schilbe,* 535 So. 2d 719 (Fla. 2d DCA 1989); *Monte v. Tipton*, 612 So. 2d 714 (Fla. 2d DCA 1993); *Layton v. Bay Lake Ltd. P'ship*, 818 So. 2d 552 (Fla. 2d DCA 2002); *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601 (Fla. 2d DCA 2005).
[23] *See Spencer v. EMC Mortg. Corp*., 97 So. 3d 257 (Fla. 3d DCA 2012).
[24] *See Greene v. Bursey*, 733 So. 2d 1111 (Fla. 4th DCA 1999).
[25] *WRH Mortgage, Inc. v. Butler*, 684 So. 2d 325 (Fla. 5th DCA 1996).

accelerate future installment payments, in which case the entire claim is barred. In fact, it wasn't until the lower court here relied on portions of this Court's *Singleton* opinion that a Florida court ever found that 95.11(2)(c) does not apply *even when* the mortgage holder indisputably accelerated the full mortgage debt.[26]

The lower court's misguided opinion resulted from its failure to consider the limited nature of the *Singleton* holding and the fundamental differences between the doctrine of res judicata and the statute of limitations, including in particular the fact that one is judicially created while the other is legislatively enacted.[27] The *Singleton* decision was explicitly limited to the defense of res judicata and its *holding* was narrow – the Court simply ruled that "[w]e approve the decision in *Singleton* and hold that a dismissal with prejudice in a mortgage foreclosure action does *not necessarily* bar a subsequent foreclosure action on the same mortgage."[28] The decision was based on the equitable nature of foreclosure proceedings and the

[26] *See Bartram*, 140 So. 3d at 1009 (noting that "there is *no question* of the Bank's *successful acceleration* of the entire indebtedness on May 15, 2006.") (Emphasis added).
[27] *See, e.g., Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075 (Fla. 2001). (explaining that "fixed limitations on actions are predicated on public policy and are a product of modern legislative, rather than judicial, processes).
[28] *Singleton*, 882 So.2d at 1005. (Emphasis added). The lower court itself described the Court's holding in *Singleton* parenthetically as "holding that dismissal with prejudice in a mortgage foreclosure action does not necessarily bar, on res judicata grounds, a subsequent foreclosure action on the same mortgage even if the mortgagee accelerated the note in the first suit." *See Bartram*, 140 So. 3d at 1010.

uncontroversial and well-settled rule that res judicata should not be applied inflexibly where it would cause an injustice.[29] But nothing in the opinion suggests that the Court's discussion in dicta of the relationship between acceleration and a cause of action for foreclosure should be extended beyond the confines of the doctrine of res judicata and the particular facts before the Court.[30]

By failing to consider the differences between the defenses of res judicata and the statutes of limitations, the lower court failed to inspect the language of the statute and did not conduct an analysis of legislative intent. [31] Once this Court takes those differences into consideration and examines the language and history of the statute, it will conclude that: (1) the legislature could not have intended that the *Singleton* reasoning be applied to 95.11(2)(c) as it is presumed to know the law when it enacts a statute and no cases applying anything like *Singleton*'s reasoning existed in1974,[32] (2) a claim for foreclosure of a mortgage payable in installments accrues at the latest

[29] *See id.* at 1008.
[30] Where a second foreclosure action was brought within two years of the initial default and the first foreclosure was dismissed for failure to appear at a status conference as opposed to on the merits of the claim.
[31] Instead, the court simply stated that "that *Singleton*'s analysis is equally applicable to the statute of limitations issue." *See Bartram*, 140 So. 2d at 1013.
[32] *See, e.g., Holmes County School Bd., v. Duffell,* 651 So. 2d 1176, 1179 (Fla. 1995) (noting that "[t]he legislature is presumed to know existing law when it enacts a statute.").

at the time of acceleration;[33] (3) once the statute of limitations begins to run on the entire debt, the only way the statute won't bar *any* action on mortgage is a finding that one of the conditions in 95.051 occurred;[34] (4) the equitable principles supporting the result in *Singleton* are not relevant to this case because the intent of the 1974 amendments was to simultaneously bar equitable and legal remedies on the same subject matter and because statutes of limitations have always been applied without regard to particular equities;[35] and (5) the equities in this case do not favor U.S. Bank anyhow (or any party that has not timely enforced an accrued right at the expense of others that have).[36]

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[33] *See, e.g., Mayes*, 36 So. 2d at 265 (noting that "[t]he 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.").

[34] *See*, *Hearndon v. Graham*, 767 So. 2d 1179, 1185 (Fla. 2000) (acknowledging that "the tolling statute specifically precludes application of any tolling provision not specifically provided therein.").

[35] *See, e.g., Kirtley*, 74 So. 2d at 878 (reversing a judgment foreclosing a mortgage barred under the former version of section 95.281 after finding that "a court of equity will apply the statute of limitations in an equity suit with the same substantial effect and same construction as it would receive in a court of law."). *But see, Morsani*, 790 So. 2d at 1080 (holding "that the 'tolling' proscription in section 95.051, Florida Statutes (1991), does not embrace the common law doctrine of equitable estoppel, for equitable estoppel is not a 'tolling' doctrine" but limiting its "holding to the narrow issue framed by the certified question . . . .").

[36] It has long been the rule in Florida that when "one of two innocent parties must suffer through the act or negligence of a third person, the loss should fall upon the

After determining that enforcement of U.S. Bank's mortgage is barred by section 95.11(2)(c), the Court need only confirm that the trial court had the power to enter the final judgment on appeal to fully resolve this case. Although there is no appellate precedent in Florida directly on point, well-settled legal principles regarding the nature of a mortgage in Florida support affirming the final judgment declaring U.S. Bank's mortgage to be an unenforceable cloud on title. It is anticipated, however, that U.S. Bank will argue that section 95.281 prevents that result because the 5 year time period set forth in that provision is measured from the date of maturity shown on the face of the recorded mortgage – a day that won't arrive for nearly 30 years. That position is not only untenable, it turns section 95.281 on its head because the purpose of that provision is to encourage timely enforcement of defaulted mortgages by extinguishing them from the public record by operation. In other words, the provision is intended to remove all doubt that a mortgage is dead by killing it as a matter of law. Yet U.S. Bank's argument would require this Court interpret section 95.281 in a way that, while not necessarily giving it life, keeps the unenforceable mortgage on life-support until its inevitable day of reckoning with

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one who by his conduct created the circumstances which enabled the third party to perpetuate (perpetrate) the wrong or cause the loss." *Commercial Credit Co. v. Parker*, 132 So. 640, 642 (Fla. 1931). And this Court has gone as far as stating that "[n]o rule is better settled than that equity aids the vigilant and not the indolent." *Lanigan v. Lanigan*, 78 So. 2d 92, 96 (Fla. 1955).

section 95.281. As is the case with section 95.11(2)(c),

U.S. Bank's tortured interpretation of the statute is not supported by well-settled Florida law, which holds that mortgages are merely liens securing repayment for their underlying debts. Additionally, the mortgage itself becomes a legal nullity without the remedy of foreclosure because Florida law is clear that a mortgage is nothing more or less than a "claim" or "right" to a judicially sanctioned public auction. Finally, if section 95.11(2)(c) is found to apply to bar foreclosure of a particular mortgage, then section 95.11(2)(b) necessarily bars enforcement of the note as well. So, from that point on, not only is the mortgage not much of anything, but it also secures nothing because the underlying debt evidenced by the note is also barred. Not even the most strained construction of section 95.281 supports allowing the mortgage to continue to cloud a title holder's property. The provisions of the declaratory judgment statute was enacted for the very purpose of providing relief in circumstances such as this.[37]

ARGUMENT

I. U.S. Bank's mortgage is barred by the plain language of section

[37] *See, e.g., Second Nat'l Bank of N. Miami v. G.M.T. Props., Inc.*, 364 So. 2d 59, 61 (Fla. 3d DCA 1978) (affirming denial of reformation of mortgage and entry of final judgment cancelling mortgage from the public record as a result of fraud by the previous holder of the mortgage and confirming that "[t]he relief granted by the trial judge is appropriate to the situation and is approved under the circumstances . . . ."

95.11(2)(c), which was enacted with the specific intent that equitable principles no longer affect the timeliness of foreclosure claims, and every court interpreting the provision prior to the lower court here found that the statute begins to run upon accleration.

A. Prior to January 1, 1975, Florida law provided that mortgages could be foreclosed in equity for 20 years after maturity regardless of whether the promissory notes they secured were barred by the shorter 5 year statute of limitations applicable to written contracts.

In 1974, the law had long been settled that even though enforcement of a promissory note was barred by the statute of limitation on written contracts now found at section 95.11(2)(b), an action to enforce the separate and distinct remedy of foreclosure could be pursued in equity. This Court first found this to be the law in Florida over 100 years ago in the seminal case of *Browne v. Browne*, 17 Fla. 607 (Fla. 1880). In what was a monumental decision in the development of our young state's law, the Court affirmed a trial court order allowing a mortgage foreclosure to go forward despite the fact that the related promissory note was barred under the statute of limitations. In reaching its conclusion, the Court rejected the defendant's argument that Florida's first mortgage statute (enacted in 1853) required that a debt be recoverable at law in order for a mortgage to be foreclosed in equity.

The Court's decision was based explicitly on the common law notion that a promissory note provided the basis for the legal remedy of a money judgment only,

and that the remedy of foreclosure was an equitable remedy that was founded upon the separate mortgage security instrument. On that basis, the Court ruled that because there were two distinct remedies available to the holder of a promissory note secured by a mortgage, the fact that one of the remedies was barred did not extinguish the other remedy. From that premise, the Court then followed New York law in ruling that mortgages securing repayment of promissory notes were instruments under seal under the relevant Florida legislative act, and, as was the case in New York, the legislature had in fact explicitly set forth a 20 year statute of limitations on instruments under seal.

The *Browne* decision was revisited by the Florida Supreme Court eight years later in the case of *Jordan v. Sayre*, 3 So. 329 (Fla. 1888). In another oft-cited opinion, the Court approved of the decision in *Browne* after engaging in an extensive discussion of the nature of mortgages in Florida after the legislature abrogated the common law regarding mortgages and their foreclosure in 1853. In what has become horn-book law in the state, the *Jordan* Court succinctly explained how this Court had interpreted the legislature's initial venture into the realm of the law governing secured real estate transactions:

> "Originally, at common law, a mortgage conveyed the legal estate to the mortgagee and upon the mortgagor's default in paying the debt at the time specified for such payment, the estate became vested absolutely in the mortgagee. Equity, regarding the mortgage as security

> for a debt, rather than a sale of the land, came to the relief of the mortgagor, and permitted him to redeem by paying the debt . . . It also gave the mortgagee a remedy by foreclosure, through which a limit to the right of redemption might be fixed by decree; and, if the redemption was not made as decreed, the mortgagor's equity was extinguished, and the estate was absolute in the mortgagee. This was called a strict foreclosure. This kind of foreclosure fell into disuse, and the practice of decreeing a sale of the mortgaged property at public outcry to the highest bidder has long obtained . . . ."
>
> "In Florida a mortgage is not only in equity merely a lien, but under our statute it is nothing more than this at law. . . ."

By the time *Ellis v. Fairbanks*, 21 So. 107 (Fla. 1897) was decided nine years later, the Court was sufficiently satisfied with the stability of its precedent in *Browne* and *Jordan* to declare that the issue had been "settled beyond any doubt or cavil." The Court's interpretation of the 1853 statute had withstood the test of time, and the law in Florida was that mortgages could be foreclosed in equity without regard for whether or not the promissory notes they secured had been timely enforced. But the Court's decisions left a number of unresolved questions regarding the relationship between the mortgage and the note, and the status of the debt after a note becomes time barred.[38] And although the legislature enacted section 95.28 in 1945, that

[38] For instance, in *Bank of Wildwood v. Kerl*, 189 So. 866, 868 (Fla. 1939) this Court cited *Fairbanks* for the settled proposition that mortgages could be foreclosed even when the debt they secured was barred at law, but was faced with a question of first impression regarding whether a deficiency judgment could be obtained where the mortgage could still be foreclosed but the note had been barred. The Court answered the question in the negative after finding that "the debt

provision did not address the timeliness of an *accrued* claim for foreclosure. Instead, it provided an outside date of 20 years from maturity (or recording) for enforcement - often referred to as a repose period - after which no cause of action *could* ever accrue. As explained in more detail later, section 95.28 (and now 95.281) was more akin to today's Marketable Real Property Title Act, Chapter 712, Florida Statutes (which was had still not been enacted at the time) than it was to any of the statutes of limitations in existence at the time of its passage, including 95.11(1), the limitations period on instruments under the seal this Court had been applying to mortgages since its decision in *Browne*.

B. The 1974 amendments to Chapter 95 were intended in part to change Florida law so that mortgages would become unenforceable at the same time as their related promissory notes – 5 years after "accrual" of the causes of action on each.

The 1974 amendments, which went into effect on January 1, 1975, were enacted as Chapter 75-234, Laws of Florida. The amendments repealed or amended every provision of Chapter 95 and were enacted with the specific intent and purpose of remediating the patent incongruence in the availability of legal and equitable relief

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evidenced by the promissory note has become barred by the running of the statute upon the note . . . [i]t follows that no deficiency decree or personal judgment can be entered . . . ."

for the same harm in Florida.[39] The legislature's intent is manifested by the following changes to Chapter 95: (1) the shortening of the period from maturity referenced in section 95.28 (now 95.281) from 20 years to 5 years, the enactment of section 95.11(6), which explicitly states that "[l]aches shall bar any action unless it is commenced within the time provided for legal actions concerning the same subject matter"; the limitations periods in section 95.11 applicable to equitable causes of action (2) the enactment of section 95.11(2)(c) and removal of any mention of instruments under seal, which the Court had previously interpreted as allowing mortgages to be foreclosed in equity for 20 years after accrual of a claim; (3) the enactment of section 95.051, which, for the first time in Florida, statutorily enumerated an *exclusive* list of "disabilities" that could be applied to toll any of the statutes of limitations in 95.11. The legislative history behind the 1974 amendments further support the conclusion that the legislature intended to completely remove equity from the statute of limitations equation. According to the available legislative materials, the amendments were intended to modernize the statute, shorten the

[39] *See* A114, CS/HB 895 Section Summary ("Section 7 Limitations other than for the recovery of real property. – This section is the heart of the bill. It contains all the time periods for limitations other than for the recovery of real property."). Add. 2 at Pg. 4.

longest limitations periods, and close what the legislature perceived to be a loophole in the law allowing parties to avoid the statute using principles of equity.[40]

C. Prior to the lower court's decision here, every Florida court that interpreted Chapter 95 after the 1974 amendments correctly found that acceleration matures the mortgage and begins the running of the statute of limitations against enforcement of the entire mortgage debt.

Prior the lower court opinion in this case, every district court of appeals in Florida had interpreted section 95.11(2)(c) to bar foreclosure of a mortgage more than 5 years after acceleration. Each of the district courts have decided at least one case, and the second district has decided four. And although most of these courts have not applied section 95.11(2)(c) to bar foreclosure, it is *only* because the mortgages in those cases had *not* been accelerated for more than 5 years. Four of the cases are of particular note, including the fifth district's opinion in *Central Home Trust Co. v. Lippincott*, 392 So. 2d 931 (Fla. 5th DCA 1980). In that case, the Fifth District Court of Appeals gave examples of effective acceleration that included

[40] *See* A114, Florida Law Revision Council, Project on Statutes of Limitation, Some Policy Considerations, (April 8, 1972) ("Many jurisdictions allow foreclosure of a lien securing property for a debt which has been barred by the statute of limitations. This is accomplished in some cases because the statute is inapplicable in equitable actions. Apparently this is the law in Florida. It is questionable whether the objectives of the statute of limitations are forwarded by such practice. It seems to be a way of avoiding the statute.").

"alleging acceleration in a pleading filed in a suit on debt."[41] The court only declined to apply section 95.11(2)(c) to bar the foreclosure claim after finding that "there is no basis to conclude in this case that the note was accelerated."[42]

In *USX Corp. v. Schilbe*, 535 So. 2d 719 (Fla. 2d 1989), the second district interpreted sections 95.11(2)(c) and 95.281, and the tolling provisions of section 95.051, and ultimately concluded that the pendency of the defendant's bankruptcy did not toll the statute because it was not included in the exclusive list in 95.051. In *Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257 (Fla. 3d 2012), the Third District Court of Appeals interpreted 95.11(2)(c) as applying to bar enforcement of a mortgage foreclosure claim not filed within 5 years of acceleration.[43] In a special concurring opinion, Senior Judge Schwarz concluded that "the record contains unrebutted affirmative evidence from the plaintiff's representative that a prior owner of the

[41] *Lippincott*, 392 So. 2d at 933.
[42] *Id.*

[43] *See Spencer*, 97 So. 2d at 260. The court did not reach the statute of limitations issue because it found that the case should have been dismissed for failure to prosecute but it indicated that the case would likely have been barred. *Id.* (explaining that "[it] appears on the face of the existing record, then, that acceleration likely occurred over five years before this lawsuit was filed in late November 2002. . . . But for the dismissal for failure to prosecute, Ms. Spencer would be entitled to a remand for fact-finding regarding the date of acceleration, a date which plainly occurred before the maturity date of the note and mortgage (September 2008).").

mortgage had appropriately accelerated it, thus triggering the limitations period under section 95.11(2)(c), Florida Statutes (2012), well more than five years before the commencement of this action."[44] Finally, in a case discussed in more detail later in this brief, in *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601 (Fla. 2d 2005), the second district interpreted sections 95.11(2)(c) and 95.281 together and concluded that the foreclosure claim was untimely but that because section 95.281 had not yet terminated the lien, the plaintiff "had no legal recourse to collect the debt secured by the mortgage; its only recourse would have been to enforce the lien in the event New River attempted to sell the property . . . ."[45]

II. This Court's limited holding and opinion in *Singleton* was not intended to be applied to a statute of limitations analysis as this Court has consistently recognized that statute of limitations are to be applied in accordance with legislative intent and *Singleton* did not mention or address any statute.

A. This Court's limited holding in *Singleton* was based on the facts before the Court and on well-settled principles that are specific to the application of the defense of res judicata and inapplicable to the defense of statute of limitations.

The holding in *Singleton* was explicitly based on the well-settled principle in

[44] *Spencer*, 97 So. 3d at 262.

[45] *Houck Corp.*, 900 So. 2d at 605-606. The court did not give any indication of how it envisioned enforcement of lien without the use of foreclosure (or any other court afforded remedy).

Florida that "the doctrine [of res judicata] will not be invoked where it will work an injustice," [46] and on the equitable nature of foreclosure proceedings.[47] The Court carefully[48] limited its holding by concluding *only* "that the doctrine of *res judicata* does *not necessarily* bar successive foreclosure suits . . . ."[49] The limited nature of the holding suggests that the Court had a case-by-case analysis in mind.[50] Not only did the Court say nothing about whether another defense (such as the statute of

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[46] *Singleton*, 882 So. 2d at 1008 (quoting *deCancino v. Eastern Airlines, Inc*., 283 So. 2d 97, 98 (Fla. 1973)).

[47] *Id.* (noting that "foreclosure is an equitable remedy and there may be some tension between a court's authority to adjudicate the equities and the legal doctrine of res judicata.").

[48] Though admittedly not as careful as it was in *Garden v. Frier*, 602 So. 2d 1273, 1277 (Fla. 1992), where the Court went out of its way to emphasize the limited nature of its holding:

> We limit the definition of 'professional' set forth above to the context of the professional malpractice statute. It is not our intent that this definition be applied to any other reference to 'professionals' or 'professions' elsewhere in the Florida statutes, regulations, or rules, or in court cases that deal with issues other than the statute of limitations at issue here. We recognize that there may be occasions when courts, legislators, rulemaking authorities, and others may use the terms 'profession' and 'professional' more broadly or more narrowly than we do here today."

[49] *Id.* (emphasis added).

[50] It is worth mentioning that most of the Court's discussion regarding acceleration was hypothetical. *See Singleton*, 882 So. 2d at 1007 (explaining in general terms that "[f]or example, a mortgagor may prevail . . . in those instances . . . under those circumstances" and "[f]or example, we can envision many instances in which the application of the Stadler decision would result in unjust enrichment or other inequitable results.").

limitations) would bar successive foreclosure suits, but the holding even leaves room for the application of res judicata to bar successive suits under the proper circumstances.

The lower court's misplaced reliance on the *Singleton* reasoning appears to have arisen from the almost natural yet familiar tendency in the interpretation of law to apply the meaning of a word or concept as it used with respect to one legal rule to another legal rule without regard for the differences in history, purpose, and application of each rule. In other words, the lower court was led a stray because it treated the statute of limitations as *in pari materia* with res judicata, which resulted in the court overlooking the "discrete offices of those concepts." [51] In fairness to the lower court, and the other courts that have ruled the same way, it is a mistake repeated so often by practitioners and jurists alike that the Supreme Court of the United States recently called the following passage from a 1933 Yale Law Journal article by Walter Cook "a staple of our opinions":[52]

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs through all

[51] *Wachovia Bank, NA v. Schmidt*, 546 U.S. 303, 318 (2006) (holding that by "[t]reating venue and subject matter jurisdiction prescriptions as *in pari material*, the Court of Appeals majority overlooked the discrete offices of those concepts" and made an error of law in its interpretation of the word "located").
[52] *Gen. Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004).

> legal discussions. It has all the tenacity of original sin and must constantly be guarded against."[53]

By assuming "that *Singleton*'s analysis is equally applicable to the statute of limitations issue," the court decided the case without conducting an analysis of legislative intent[54] and therefore did not consider the separate but related concepts of "accrual" and "tolling."[55] It also failed to recognize the two fundamental differences between the defenses of res judicata and statutes of limitations – history and policy. Those seemingly innocuous differences are outcome determinative in this case.

Res judicata is a judicially created doctrine "founded on the sound proposition

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[53] Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 337 (1933).

[54] In fact, the court did not even mention the statutory provision at issue in this case (other than in a block quote to a federal district court order of dismissal) until the second to last paragraph as part of its holding that "a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations found in section 95.11(2)(c) . . . ." *Bartram*, 140 So. 3d at 1014.

[55] *See, e.g., Hearndon*, 767 So. 2d at 1184-1185 (explaining that the "determination of whether a cause of action is time-barred may involve the separate and distinct issues of when the action accrued and whether the limitation period was tolled …we extrapolate, therefore that while accrual pertains to the existence of a cause of action which then triggers the running of a statute of limitations, tolling focuses directly on imitations periods and interrupting the running thereof" and that "both accrual and tolling may be employed to postpone the running of a statute of limitations so that an action would not become time barred should not cause confusion between these distinct concepts").

that there should be an end to litigation and that in the interest of the State every justiciable controversy should be settled in one action."[56] Statutes of limitations are legislative enactments "designed to protect defendants from unusually long delays in the filing of lawsuits and to prevent prejudice to defendants from the unexpected enforcement of stale claims."[57] And, unlike with res judicata,[58] courts are not free under our constitutional system to allow exceptions to the intended application of statutes of limitations because they reflect the will of the people through the democratically elected and representative branch of government.[59] Additionally, the

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[56] *Gordon v. Gordon*, 59 So. 2d 40 (Fla. 1952).

[57] *Caduceus Props., LLC v. Graney*, 137 So. 3d 987, 992 (Fla. 2014).

[58] For instance, in *Craig v. Ocean & Lake Realty Co.*, 133 So. 569, 573-574 (Fla. 1931), res judicata would have barred an equitable remedy but a statute allowed recovery of a money judgment at law. In holding that its own rule would have to yield to the law of the legislature, the Court stated:

"It is the duty of the courts to give effect to the legislative intention as thus shown, even though it infringes to some extent upon the doctrine of res judicata. Statutes should, when reasonably possible, be so construed as not to conflict with the Constitution or with long and well settled legal principles, but the language of this statute, considering it as a whole, cannot be given its apparent meaning and purpose without upsetting to some extent the principle of res judicata, and thus creating a somewhat anomalous situation, which will in some cases require a circuit judge to grant to a party a judgment at law on a cause of action, which, sitting as chancellor in a court of equity, he had already held such party was not, in equity and good conscience, entitled to enforce."

[59] As this Court elegantly put it in *Ponder v. Graham*, 4 Fla. 23, 25 (1851) (internal citations omitted):

policies of each defense are not always implicated together.[60] For instance, a plaintiff could hypothetically file 2, 3, 4, 5, etc., lawsuits within the statute of limitations and only the policies supporting res judicata would be applicable in determining whether or not there was a good defense to the second, third, fourth, or fifth attempt to yet again drag the defendant into court unwillingly to answer the same allegations. Another plaintiff could file just one complaint many years after the acts giving rise

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"The fundamental principle of every free and good government is, that these several co-ordinate departments forever remain separate and distinct. No maxim in political science is more fully recognized than this. Its necessity was recognized by the framers of our government, as one too invaluable to be surrendered, and too sacred to be tampered with. Every other political principle is subordinate to it — for it is this which gives to our system energy, vitality and stability. Montesquieu says there can be no liberty, where the judicial are not separated from the legislative powers. Mr. Madison says these departments should remain forever separate and distinct, and that there is no political truth of greater intrinsic value, and which is stamped with the authority or more enlightened patrons of liberty."

[60] In fact, there are many examples of situations where one defense was applicable but the other wasn't. For instance, in *Laksy v. State Farm Insurance Company*, 296 So. 2d 9, 23 (Fla. 1974), this Court ruled that the bar of res judicata could be forgiven but warned that the statute of limitations was absolute:

"To allow the earlier dismissal of the complaint with prejudice to stand would have the effect of depriving the appellants of their rights under the statute by virtue of dismissal of an action that had not accrued as of the time of dismissal. Under such an interpretation, the dismissal in the instant cause would bar all recovery despite qualification thereafter to sue. We find such a construction untenable and hold that the plaintiff may sue for such damages once the 'threshold' has been crossed, *so long as it is within* the statute of limitations." (Emphasis added).

to the defendant's alleged liability, and only the policies supporting the statute of limitations would be applicable in determining whether the defendant was entitled to be free of whatever liability might have otherwise attached.

Keeping the respective policy goals in mind, it's not difficult to see why this Court declined to rule that the trial courts of Florida are *required* to deny enforcement of an otherwise valid mortgage lien in cases like the one before it in *Singleton*, where the *only* reason the defendant prevailed in the first case is because the plaintiff failed to appear at a status conference and then failed to appeal the inexplicably harsh dismissal with prejudice that resulted. Doing so would not only have unjustly enriched the defendant, but it would have effectively extinguished the mortgage lien before the expiration of the statute of limitations. And because there had been no "true" adjudication of the rights of either party in the first lawsuit, the mortgage foreclosure claim would have been lost without the plaintiff even having had its proverbial "bite at the apple," which due process requires and upon which the bar of res judicata is founded.[61] This Court has never applied res judicata so

[61] *See Universal Const. Co. v. City of Fort Lauderdale*, 68 So. 2d 366, 370 (Fla. 1953) (finding "that simple justice demands there be an unquestionable, direct and official adjudication of [this vitally important] question."); *see also Chandler v. Chandler*, 226 So. 2d 697, 699 (Fla. 4th DCA 1969) (stating that "[i]n order for the doctrine of res judicata to apply the same parties and issues must be before the court and a full hearing on the issues must be granted with a final determination of the issues.").

inflexibly.[62] The way in which the Court has historically applied the statutes of limitations in discussed in the next section.

B. Reading the plain language of the relevant provisions of Chapter 95 together with one another in light of the history of the statute, and resolving any ambiguities in favor of an interpretation that effectuates its purpose, precludes the application of *Singleton*'s reasoning in this case.

(1) Construction of Statutes of Limitations in General

This Court has consistently applied statutes of limitations in accordance with their legislative intent in light of the unique policy goals that underlie them.[63] The Court's commitment is rooted in over 150 years of decisions[64] recognizing that statutes of limitations are legislatively determined and serve an invaluable purpose

[62] *Id.* at 369 (finding that "when a choice must be made we apprehend that the State, as well as the courts, is more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation.").

[63] *See, e.g., Employers' Fire Ins. Co. v. Continental Ins. Co.*, 236 So. 2d 177, 181 (Fla. 1976) (finding that "[w]ith respect to the statute of limitations, a different set of considerations apply" because "[s]tatutes of limitations are enacted to bar claims which have been dormant for a number of years and which have not been enforced by persons entitled to enforcement.").

[64] In a case reported in the first volume of the Florida Reports, this Court described statutes of limitations in the following way: "The Courts do not now, unless compelled by former decisions, give a strained construction to evade their effect. By requiring those who complain of injuries, to seek redress by action within a reasonable time, a salutary vigilance is imposed and an end is put to litigation." *Bennett v. Herring*, 1 Fla. 387 (1847).

in our society.[65] In fact, even before the enactment of section 95.051, this Court had consistently refused to disregard statutes of limitations irrespective of the equities between the parties.[66] And the reasons given by this Court have been just as unwavering – the Court is not free to add words to a statute,[67] irrespective of its view of the underlying merits of a case, or to interpret it in a way that undermines its

[65] *See, e.g., Nardone v. Reynolds*, 333 So. 2d 25, 36-37 (Fla. 1976) (explaining that "[t]he statutes are predicated on the reasonable and fair presumption that valid claims which are not usually left to gather dust or remain dormant for long periods of time. . . . [t]o those who are unduly tardy in enforcing their known rights, the statute of limitations operates to extinguish the remedies; in effect, their right ceases to create a legal obligation and in lieu thereof a moral obligation may arise in the aid of which courts will not lend their assistance.").

[66] *See, e.g., Erickson v. Ins. Co. of N. America*, 63 So. 716, 716 (Fla. 1913) (holding that "[a]s equity follows the law, and as the alleged causes of action accrued in 1903 . . . and as these suits were begun in 1912, the five-year statute of limitations applicable to . . . contracts in writing not under seal, is a bar to these suits; *see also, Gillespie v. Florida Mortgage & Inv. Co.*, 117 So. 708, 709 (Fla. 1928) (explaining that "[i]n the absence of a saving clause, a statute of limitations runs against all persons, whether under disability or not" and that "[w]hen a statute of limitations begins to run, no subsequent disability will prevent it from running.").

[67] *See, e.g., Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952) (emphasizing that "[w]e cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof."); *Carey v. Beyer*, 75 So. 2d 217, 218 (Fla. 1954) (explaining that "[t]he general rule is that unless a statute of limitations contains a saving clause, relief from its provisions account of disability will not be granted" and that "[w]hen the legislature refuses to write exceptions into the act the courts have consistently refused to do so.").

purpose.[68]

Following the approach this Court has consistently taken when presented with issues of statutory interpretation of statutes of limitations in light of the history behind the 1974 amendments that brought 95.11(2)(c) into existence leads to the inevitable conclusion that the *Singleton* reasoning cannot be extended to apply to a statute of limitations analysis. To begin, a reading each of the relevant provisions together leads to the conclusion that section 95.11(2)(c) applies on its face to bar foreclosure of U.S. Bank's mortgage. And, even assuming the lower court's extension of *Singleton*'s reasoning to the statute of limitations would otherwise be sound, nothing in the *Singleton* opinion can affect the outcome because the legislature would not have been aware of it in 1974.

(2) The Plain Meaning of the Relevant Provisions

Section 95.11 plainly states that "[a]ctions other than for recovery of real property shall be commenced as follows: . . . WITHIN FIVE YEARS. – . . . (c) an action to foreclose a mortgage." Section 95.031 states that "the time within which an action shall be begun under any statute of limitations runs from the time the cause

[68] The Court just recently declined to adopt an interpretation of sections 95.011 and 95.03, which were part of the 1974 amendments, because doing so was "contrary to the very purpose of the statute of limitations to discourage stale claims." *Phillips*, 126 So. 3d at 192.

of action accrues. (1) A cause of action accrues when the last element constituting the cause of action occurs." Reading the plain language of these two provisions does not suggest any facial ambiguity regarding the applicability of 95.11(2)(c) to the facts of this case. The word "accrue" is defined in section 95.011, and every Florida court that has evaluated a mortgage payable in installments has agreed that the foreclosure claim accrues upon acceleration. There is no dispute regarding the meaning of either "foreclose" or "mortgage," and there is nothing in the record to suggest that any of the tolling provisions in 95.051 apply, so there is no ambiguity regarding any of the words in that provision.

At this point in the analysis, it's reasonably safe to conclude that the only doubt or ambiguity that can fairly be said to exist with respect to the any of these provisions as applied to the facts of this case results from the decision of the lower court. But because the court did not make any findings as to accrual or tolling, it's not possible to say with any degree of certainty how the court would support its holding if it were to conduct an analysis of legislative intent confined by the normal principles of statutory construction, particularly in light of the exclusivity language in section 95.051. Even so, nothing in *Singleton* the opinion can properly be used as part of an effort to construe any of these provisions for the simple fact that the opinion did not exist when they were enacted in 1974. And, because the reasoning

is inconsistent with the Court's pre-1974 pronouncements on acceleration, there is no reason to assume that the legislature would have seen it coming.[69]

As this Court explained in *Baskerville-Donovan Eng's, Inc., v. Pensacola Exec. House Condominium Ass'n, Inc.*, 581 So. 2d 1301, 1302-1303 (Fla. 1991), "statutes should be construed with reference to the common law, and we must presume that the legislature would specify any innovation upon the common law." In that case, the Court ruled that its opinions issued after the statute under consideration was enacted could not be relied on in interpreting the statute because "[t]o the extent our recent cases may have applied a different gloss to the concept of privity for these limited circumstances, the legislature would have been unaware of it when enacting the law in 1974."

Ironically, one of the few opinions discussing the effect of an optional acceleration clause with respect to a cause of action for mortgage foreclosure was *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d 468 (Fla. 2d 1963).[70] But, like *Singleton*, that case did not address the statute of limitations. So it appears that the

[69] The Court in fact explicitly acknowledged that its opinion was at "seeming variance from the traditional law of res judicata." *Singleton*, 882 So. 2d at 1007.

[70] That court applied *res judicata* to bar a second action on the same mortgage after finding that "[t]here can be no doubt that the accelerated balance was at issue and that the prayer of the complaint sought, not one interest installment, but the entire amount due." *Stadler*, 150 So. 2d at 472.

closest controlling case on point in 1974 was arguably *Travis Co. v. Mayes*, 36 So. 2d 264 (Fla. 1948). In that case, this Court approvingly noted that "[t]he 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."[71] Additionally, the accepted rule in Florida at the time was that the filing of a complaint alleging acceleration is an effective exercise of the option.[72] Consequently, the common law in Florida the legislature would have been aware of in 1974 was in accord with the general rule expressed by the post-1974 amendment/pre-*Bartram* district courts of appeals.[73] And under that iteration of the

[71] *Mayes*, 36 So. 2d at 265.

[72] *Jaudon v. Equitable Life Assur. Soc. of United States*, 136 So. 517 (Fla. 1931) (stating that "filing of suit to enforce the mortgage by foreclosure may sufficiently show his election to exercise his option to accelerate."); *Seligman v. Bisz*, 167 So. 38 (Fla. 1936) (holding that "the institution of a suit for foreclosure is the exercise of the option to declare the whole of the principal sum and interest secured by the mortgage to be due and payable") (internal citations omitted); *T. & C. Corp. v. Eikenberry*, 178 So. 137, 138-139 (Fla. 1938) (referring to allegations in the complaint and holding that [t]hese paragraphs sufficiently allege breach of the covenant of the mortgage, the right of acceleration in the mortgagee, and the exercise of the option to accelerate").

[73] *See, e.g., Lippincott*, 392 So. 2d at 931 (explaining that "[e]xamples of acceleration are a creditor's sending written notice to the debtor, making an oral demand, and alleging acceleration in a pleading filed in a suit on the debt").

law, U.S. Bank's mortgage is plainly barred by section 95.11(2)(c).[74]

(3) Other Principles of Statutory Construction

Although an examination of the plain language of the relevant statutory provisions suggests that section 95.11(2)(c) applies on its face, even in light of the Court's opinion in *Singleton,* consideration of other principles of statutory construction lend support further support to that conclusion. The most simple, common-sense, reason for that conclusion is that allowing the *Singleton* reasoning in this context would completely eviscerate section 95.11(2)(c) because it is almost impossible to envision a scenario where it would ever apply as intended,[75] and it would stack the deck in favor of creditors by giving them the ability to get around

[74] And, in accordance with the plain language in section 95.11(6), arguably under 95.11(2)(b) (or, perhaps more accurately stated, laches).

[75] The result contravene this Court's unbroken line of decisions holding that statutes are to be interpreted so that they effectuate their purpose, and this Court has repeatedly found that among the primary purposes of statutes of limitations is to discourage stale claims. *See, e.g., Driver v. Van Cott*, 257 So. 2d 541, 541 (Fla. 1971) (noting that "[t]he constant standard of our authorities through the years has been that statutory enactments are to be interpreted so as to accomplish rather than defeat their purpose"); *Florida Sugar Distribs. v. Wood*, 184 So. 641, 645 (Fla. 1938) (declaring that "the rule is well settled that where two or more interpretations can reasonably be given to a statute, the one that will sustain its validity should be given and not one that will . . . defeat its purpose"); *City of Miami v. Romfh*, 63 So. 440, 441 (Fla. 1913) (finding that "[a]n interpretation of the language of a statute that leads to absurd consequences should not be adopted when, considered as a whole, the statute is fairly subject to another construction that will aid in accomplishing the manifest intent and the purposes designed").

the statute by their own unilateral acts.[76] When this reality is considered together with the arguable notion (though this brief argues otherwise) that *Singleton* eliminates the defense of res judicata in foreclosure cases, defendants are left with no protection against successive, and perhaps vexatious, never-ending lawsuits – it simply is not reasonable to conclude that the legislature intended to leave room for that result.[77] And, because the reasoning would apply equally to section 95.11(2)(b)

[76] Allowing the avoidance of the statute of limitations based solely on the acts of a plaintiff would produce a result that is entirely foreign to American jurisprudence. *See generally, Davis v. Combination Awning & Shutter Co*., 62 So. 2d 742, 744-745 (Fla. 1953) (finding that "while it is held that during the pendency of litigation provoked by defendant's own acts, limitations do not run against plaintiff, this rule does not ordinarily apply where the legal proceedings relied on to toll the statute were provoked or promoted by the plaintiff"); *see also, Riddlesbarger v. Hartford Insurance Company,* 74 U.S. 386 (1869) (holding that "[t]he failure of a previous action from any cause cannot alter the case" because the "contract declares that an action shall not be sustained, unless such action, not some previous action, shall be commenced within the period designated."); *Richards v. Maryland Ins. Co.,* 12 U.S. 84, 93 (1814) (holding that "in no case of a voluntary abandonment of action, has an exception to the statute been supported").

[77] And this Court has held that if "the meaning of a statute is at all doubtful, the law favors a rational, sensible construction" and that "[s]tatutes must be construed, if possible, to make them practicable." *See, e.g., Realty Bond & Share Co. v. Englar*, 143 So. 152, 156 (Fla. 1932) (interpreting a 1925 act amending the professional regulations statute and finding that "[a]n interpretation that would require us to hold that a real estate broker or salesman may not enforce payment of his commission for making a sale . . . would be so unreasonable, unjust, and oppressive pressive (sic) that we cannot think that the Legislature intended that the act should receive such a construction.").

(given the intended effect of the 1974 amendments), creditors would also be free to pursue money judgments on accelerated promissory notes for years on end simply by filing and dismissing successive actions.[78] All of these results are repugnant to American notions of fairness and the orderly administration of justice, and they undermine fundamental principles of due process, which require that rights be finally adjudicated, that litigation come to an end, and that disputes be resolved in a fair and efficient manner.[79] In the words of this Court, "[c]onstruction of a statute which

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[78] Benjamin Franklin was apparently not too far off the mark when he wrote that "[c]reditors have better memories than debtors." Benjamin Franklin, The Way to Wealth, 58 (1758). A Federal Trade Commission Study noted that recent estimates of the size of the secondary debt market in the United States range from $72.3 to $90 Billion in face value, and that debt buyers pay an average of just 4 cents on the dollar overall (the median price for mortgages in the FTC study was 10 cents on the dollar). *See* A163. The structure and Practices of the Debt Buying Industry at 7-13. The 2013 study explained that "[a]s the debt buyer industry has expanded, the Commission also has seen a significant rise in the number of debt collection complaints it received directly from consumers." *Id* at 1. As a result of seemingly abusive practices by debt collectors that result in 90% of consumers sued on time-barred debt having default judgments entered against them, the "FTC recommended that states change their laws to require collectors to prove that debts are not time-barred, rather than placing on consumers the burden of raising the defense of the running of the statute of limitations." *Id.* at 45.

[79] In the words of this Court:

"The principal function of courts is to resolve controversies in accordance with law. But the American sense of justice is not satisfied merely with having controversies resolved. So we have established two important goals which serve as guidelines to be sought and followed in settlement of all litigation. They are: first, that justice be as exact and as free from error as human fallibility of judgment

would lead to an absurd result should be avoided."

In light of the above, there are really only two questions left to consider on the with respect to the interpretation of section 95.11(2)(c). One, is there is any reason to find that plaintiff's that exercised acceleration outside of the context of a court proceeding should be treated any differently than one that effectuated acceleration through the filing of a complaint, as the lower court implicitly did so by ruling that the dismissal lifted the statutory bar that would otherwise apply?[80] And two, does the existence of section 95.281 and its longer "statute of repose" change anything about the analysis? Given the above analysis, the answer to the first question appears to be no.[81] The answer to the second question is discussed in the

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permits; and, second, that litigation be finally terminated as quickly as due process and necessary reflection allows." *Kippy Corp. v. Colburn*, 177 So. 2d 193, 196 (Fla. 1965)."

[80] This implicit assumption is apparent even in the question that was certified to this Court, which referred to rule 1.420 of the Florida Rules of Civil Procedure. A practicable, doctrinally consistent, answer to the questions presented by this case should not depend on the filing and subsequent dismissal of an action. This would turn the statute of limitations on its head by placing control of its application in the hands of the plaintiff, which "would make the statute perpetuate in part the very evil it was conceived to remedy." *Spencer v. McBride*, 14 Fla. 403 (1874). Statutes "should be construed in light of the evil to be remedied and the remedy conceived by the legislature to cure that evil." *Brown*, 229 So. 2d at 227.

[81] New York and Texas appear to reach the same result under their six and four year statutes, respectively. For instance, in *Fed. Nat'l Mortgage Ass'n v. Mebane*, 208 AD 2d 892, 894 (App. Div. 2nd Dep't 1994), a New York court of appeals held:

next section.

III. Once enforcement of a mortgage is barred by the statute of limitations is ceases to have any legal effect and the owner of the real estate encumbered by the mortgage is entitled to have a Florida court exercise its statutory authority under the Declaratory Judgment Acts and its equitable powers to enter a judgment declaring the mortgage to be unenforceable and striking it from the record as a void cloud on title.

Once the Court determines that section 95.11(2)(c) only allows enforcement of a mortgage for a period of 5 years from the date of acceleration irrespective of how acceleration was effectuated, it need only answer one more question to fully resolve this case: Does a mortgage barred by the statute of limitations have any legal

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"[P]laintiff made a failed attempt in 1991 to revive the prior foreclosure action, and, in fact, in its complaint in the instant action commenced in 1992, the plaintiff continues to seek recovery of the entire mortgage debt pursuant to the acceleration clause" Once the mortgage debt was accelerated, the borrowers' right and obligation to make monthly installments ceased and all sums became immediately due and payable. Therefore, the six-year Statute of Limitations began to run at that time. Consequently, this foreclosure action is time-barred."

In *Holy Cross Church of God in Christ v. Wolf*, 44 SW 3d 562, 57 (Tex. 2001), the Texas Supreme Court held:

"Therefore, the trial court correctly concluded that the Church's evidence conclusively established the date its note was accelerated and thus the date Wolf's cause of action accrued. And, because we further conclude that the cause of action accrued after the FDIC had assigned the note, we also hold that the Texas four-year statute of limitation applicable to foreclosure actions governs this case. Accordingly, we reverse the court of appeals' judgment and render judgment for the Church."

effect? If the Court's answer to that question is no, then there can be no legitimate doubt that the trial courts of Florida have the authority to strike the mortgage from the public record. As this Court has long recognized and affirmed, trial courts afforded broad powers by Chapter 86 of the Florida Statutes to enter declaratory judgments on issues of both fact and law.[82]

U.S. Bank has argued in this case that section 95.281 prevented the trial court from entering a final judgment striking its mortgage from the public record and releasing the lien. But U.S. Bank's position is fundamentally flawed because it assumes (without explanation) that a mortgage is something more than a right to a foreclosure sale. As already mentioned, one Florida court has found (though arguably in dicta) that a mortgage barred under section 95.11(2)(c) can survive as an encumbrance on the property. According to the court in *Houck Corp.*, the plaintiff "had no legal recourse to collect the debt" but he could "enforce the lien in the event [the property owner] attempted to sell the property" before the mortgage expired by

[82] Section 86.011 provides original jurisdiction to enter a declaration "on the existence, or nonexistence" of "any immunity, power, privilege, or right" or of "any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend" and to determine "any question of construction or validity arising under [a] statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing . . . ." § 86.011 at (1)-(2), Fla. Stat. (2014). It also provides that the declaration "has the force and effect of a final judgment." *Id.*

operation of law.[83] The *Houck* court not only apparently misinterpreted section 95.281, but it overlooked one of the most basic tenants of law – the law does not recognize rights for which there are no legal remedies.[84] And because a mortgage is nothing in Florida if not a "right," a mortgage barred by section 95.11(2)(c) ceases to exist as far as the law is concerned.[85] The existence of section 95.281 doesn't change the result because the only mandate emanating from its plain language is that every mortgage recorded in Florida ultimately be extinguished by it.[86]

This Court first explained the function of declaratory judgments over 80 years ago when it interpreted the originally enacted Declaratory Judgment Statute, Chapter 7857, Law of Florida (1919) to be in abrogation of the common law rule that required injury because "a declaratory decree contemplates that parties may be in doubt as to

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[83] *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 606 (Fla. 2d 2005).

[84] As this Court explained "[t]hose who are unduly tardy in enforcing their known rights, the statute of limitations operates to extinguish the remedies; in effect, *their right ceases* to create a legal obligation and in lieu thereof a moral obligation may arise in the aid of which courts will not lend their assistance." *Nardone v. Reynolds*, 333 So. 2d 25, 36-37 (Fla. 1976).

[85] *See, e.g., Martyn v. First Fed. Sav. & L. Ass'n of W. Palm Beach*, 257 So. 2d 576, 577 (Fla. 4th 1971) (explaining that "Florida has maintained its position in the lien column since 1853. . . . [t]he mortgage lien is itself a species of intangible property. . . . [i]t is a chose in action which creates a lien on the land but not an interest in the land") (internal citations omitted).

[86] It provides that the lien of the mortgage "*shall* terminate . . . ." Nothing in the provision indicates that any lien *shall* survive for any particular period of time.

their rights, and that they may have a judicial determination of them before wrong has been committed or damage done." That version of the Statute was replaced by the uniform Declaratory Judgment Act, chapter 21280, Laws of Florida (1943), which is grants much broader powers, and the statute was later moved to Chapter 86, where it currently resides. This Court recently confirmed that "there has been a 'repeated adherence by Florida courts to the notion that the declaratory judgment statute should be liberally construed.'"[87] Although a liberal construction of the statute is not necessary to support the notion that trial courts have the power to strike a barred mortgage from the public record as an invalid cloud on title, this Court's adherence to liberal application of the statute serves to remove any remaining doubt on the issue.

CONCLUSION

For the reasons set forth in this brief, Petitioner, Patricia Bartram, respectfully requests that the Court answer the certified question in a way that reinstates the final judgment entered by the trial court and affords the most complete relief available under the law.

Dated: November 5, 2014
Miami, FL

Respectfully submitted,

[87] *Higgins v. State Farm Fire and Cas. Co.*, 894 So. 2d 5, 12 (Fla. 2004).

P.A. Bravo, P.A.
17 Sevilla Avenue
Coral Gables, FL
305.209.9019
pabravo@pabravo.com
service@pabravo.com

By: */s/Paul Alexander Bravo*
Paul Alexander Bravo
Florida Bar No. 38275

Certificate of Service

I hereby certify that on November 5, 2014, a true copy of the foregoing was sent via email to the parties on the service list below.

/s/Paul Alexander Bravo
Paul Alexander Bravo

Certificate of Compliance with Font Requirement

I certify that this brief was typed in 14-point Times New Roman font.

/s/Paul Alexander Bravo
Paul Alexander Bravo

SERVICE LIST

Counsel for U.S. National Bank

Heidi J. Weinzetl, Esq.
Michael D. Starks, Esq.
Baker, Donelson, Bearman
Caldwell & Berkowitz, PC
Bank of America Center
390 North Orange Avenue
P.O. Box 1549
Orlando FL, 32802
hweinzetl@bakerdonelson.com
mstarks@bakerdonelson.com
tzasada@bakerdonelson.com
tgoff@bakerdonelson.com

Counsel for the Plantation at Ponte Vedra, Inc.

T. Geoffrey Heekin, Esq.
Hunter Malin, Esq.
Catherine R. Michaud, Esq.
Heekin, Malin & Wenzel, P.A.
P.O. Box 477
Jacksonville, FL 32201
gheekin@jax-law.com
hmalin@jax-law.com
cmichaud@jax-law.com

Paul Alexander Bravo
P.A. Bravo, P.A.
17 Sevilla Ave
Coral Gables, FL 33134
pabravo@pabravo.com
service@pabravo.com

Counsel for Patricia J. Bartram

Lawrence C. Rolfe, Esq.
Brett H. Burkett, Esq.
Rolfe & Lobello, P.A.
P.O. Box 4400
Jacksonville, FL 32201-4400
lcr@rolfelaw.com
bhb@rolfelaw.com

Jason Bravo
P.A. Bravo, P.A.
17 Sevilla Ave
Coral Gables, FL 33134
jbravo@pabravo.com
service@pabravo.com

Counsel for Lewis Brooke Bartram

Micahel Alex Wasylik, Esq.
Ricardo & Wasylik, PL
P.O. Box 2245
Dade City, FL 33526
service@ricardolaw.com

Thomas R. Pycraft, Esq.
Pycraft Law, LLC
2825 Lewis Speedway, Suite 107
St. Augustine, FL 32084
tom@pycraftlaw.com
service@pycraftlaw.com

Dineen Pashoukos Wasylik, Esq.
DPW Legal
P.O. Box 48323
Tampa, FL 33646
dineen@ip-appeals.com
service@ip-appeals.com

SERVICE LIST

Kendall B. Coffey, Esq.
Jeffrey B. Crockett, Esq.
Daniel F. Blonsky, Esq.
2601 S. Bayshore Drive, PH
Miami, FL 33133
kcoffey@coffeyburlington.com
jcrockett@coffeyburlington.com
dblsonky@coffeyburlington.com
vmontejo@coffeyburlington.com
grogue@coffeyburlington.com
service@coffeyburlington.com

Counsel for Florida Alliance for Consumer Protection and Florida Consumer Action Network

Alice M. Vickers, Esq.
Florida Alliance for Consumer Protection
623 Beard Street
Tallahassee, FL 32303
alicevickers@flacp.org

Counsel for Brevard County Legal Aid, Inc.

Sarah E. Mattern, Esq.
Brevard Legal Aid
1038 Harvin Way Ste 100
Rockledge, FL 32955-3254
eservice@brevardlegalaid.org
sarahmattern@brevardlegalaid.org

Counsel for Florida Consumer Umbrella Group of Florida Legal Services, Inc.

Kimberly L. Sanchez, Esq.
Community Legal Services of Mid-Florida
122 E Colonial Dr Ste 200
Orlando, FL 32801-1219
kimberlys@clsmf.org
dulcef@clsmf.org
miam@clsmf.org

Counsel for American Legal and Financial Network

Robert R. Edwards, Esq.
Johnathan I. Meisels, Esq.
Robertson, Anschutz & Schneid, PL
6409 Congress Avenue, Suite 100
Boca Raton, FL 33487
redwards@rasflaw.com
mail@rasflaw.com
lsarvey@rasflaw.com

Shaib Y. Rios, Esq.
Curtis J. Herbert, Esq.
Brock and Scott PLLC
1501 NW 49th Street, Suite 200
Fort Lauderdale, FL 33309
Sahib.rios@brockandscott.com
Curtis.herbert@brockandscott.com

Robyn R. Katz, Esq.
Jane E. Bond, Esq.
McCalla Raymer, LLC
225 E. Robinson Street, Suite 660
Orlando, FL 32801
rrk@mccallaraymer.com

SERVICE LIST

jnb@mccallaraymer.com

Melissa A. Giasi, Esq.
Richard S. McIver, Esq.
Kass Shuler, P.A.
1505 N. Florida Avenue
Tampa, FL 33602
mgiasi@kasslaw.com
rmciver@kasslaw.com

Andrea R. Trombert, Esq.
Gladstone Law Group, P.A.
1499 W. Palmetto Park Road, Ste 300
Boca Raton, FL 33486
atromberg@gladstonelawgroup.com

Elizabeth R. Wellborn, Esq.
Elizabeth R. Wellborn, P.A.
350 Jim Moran Blvd, Suite 100
Deerfield Beach, FL 33442
wellborn@erwlaw.com

Michelle G. Gilbert, Esq.
Jennifer Lima-Smith
Gilbert Garcia Group, P.A.
2004 Pan American Cir., Suite 110
Tampa, FL 33607
mgilbert@gilbertgrouplaw.com
jlima-smith@gilbertgrouplaw.com

Counsel for National Association of Consumer Advocates

Lynn E. Drysdale, Esq.
Jacksonville Area Legal Aid Inc.
126 W Adams St
Jacksonville, FL 32202-3849
Lynn.drysdale@jaxlegalaid.org
jalaconsumer@jaxlegalaid.org

Counsel for Bradford Langworthy

Peter D. Ticktin, Esq.
Timothy R. Quinones, Esq.
The Ticktin Law Group, P.A.
600 W Hillsboro Blvd Ste 220
Deerfield Beach, FL 33441-1610
Serv512@legalbrains.com
Serv515@legalbrains.com

Counsel for Upside Property Investment

John S. Mills, Esq.
Andrew D. Manko, Esq.
The Mills Firm
203 N. Gadsden Street, Suite 1A
Tallahassee, FL 32301
jmills@mills-appeals.com
amanko@mills-appeals.com
service@mills-appeals.com