Filing # 20909259 Electronically Filed 11/24/2014 12:52:42 PM

RECEIVED, 11/24/2014 12:53:42, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

Case No. SC14-1265
L.T. CASE NO.: 5D12-3823

v.

U.S. BANK NATIONAL ASSOCIATION,

Respondent.

BRIEF OF AMICI CURIAE
FLORIDA ALLIANCE FOR CONSUMER PROTECTION, BREVARD COUNTY LEGAL AID,
AND
CONSUMER UMBRELLA GROUP OF FLORIDA LEGAL SERVICES

IN SUPPORT OF PETITIONER LEWIS BROOKE BARTRAM

Alice Vickers
Florida Bar No. 0402631
FLORIDA ALLIANCE FOR CONSUMER PROTECTION
623 Beard Street
Tallahassee, FL 32303
(850) 556-3121
alicevickers@flacp.org
Counsel for Florida Alliance for Consumer Protection

John G. Crabtree
Florida Bar No. 886270
George R. Baise Jr.
Florida Bar No. 0111805
Brian C. Tackenberg
Florida Bar No. 0107224
CRABTREE & ASSOCIATES, P.A.
240 Crandon Boulevard, Suite 234
Key Biscayne, Florida 33149
Telephone (305) 361-3770
Facsimile (305) 437-8118
Counsel for Amici Curiae

Kimberly Sanchez
Florida Bar No. 17465
COMMUNITY LEGAL SERVICES OF MID-FLORIDA
122 E. Colonial Drive, Suite 200
Orlando, Florida 32801
kimberlys@clsmf.org
Counsel for Consumer Umbrella Group of Florida Legal Services

Peter Sleasman
Florida Bar No. 367931
FLORIDA LEGAL SERVICES, INC.
14260 W. Newberry Road #412
Newberry, Florida 32669
peter@floridalegal.org
Counsel for Consumer Umbrella Group of Florida Legal Services

Sarah E. Mattern
Florida Bar No. 92876
BREVARD COUNTY LEGAL AID, INC.
1038 Harvin Way, Suite 100
Rockledge, Florida 32955
sarahmattern@brevardlegalaid.org
Counsel for Brevard County Legal Aid

TABLE OF CONTENTS

TABLE OF CONTENTS

Cases **Page**

<u>Other Sources</u>

STATEMENT OF IDENTITY OF AMICI CURIAE AND INTEREST IN THE CASE

- The Florida Alliance for Consumer Protection (FLACP) is a statewide, not-for-profit organization that was formed to address consumer protection and tenants' rights issues. It was formed by individuals who provide legal services to consumers and who act as advocates for consumers in the public policy arena as well as other individuals that are concerned about protecting Florida's consumers.

- Brevard County Legal Aid is a not-for-profit agency that provides legal assistance to the working poor, the elderly, and communities of color within Brevard County. The agency's attorneys represent the disadvantaged in a wide array of civil cases, including foreclosure proceedings.

- The Consumer Umbrella Group of Florida Legal Services, Inc. (Consumer Umbrella Group) is a statewide, not-for-profit organization comprised of approximately one hundred legal service and legal aid attorneys. The attorney members of each of these groups represent homeowners facing foreclosure and, through legislative action, fight to protect the rights of consumers in the foreclosure process.

Based on the current state of Florida law, the factual differences present within cases analogous to *Bartram* can be determinative of the question certified to this Court by the Fifth District Court of Appeal. Accordingly, the interests of the amicus groups center on ensuring that the Court is aware of this material factual diversity. In short, the groups believe it is imperative that the Court be made aware of and take these factual differences into account when deciding this case because its decision will, ultimately, have a broad impact on consumers and families around the state, and will reach beyond the immediate concerns of the parties in this action.

SUMMARY OF ARGUMENT

During the recession, in the face of unprecedented economic circumstances, many homeowners struggled to make their mortgage payments. A fair percentage, especially among the working poor and elderly, defaulted on their mortgages. In response, lenders filed foreclosure proceedings en masse. Given the number of actions filed, the law firms hired to prosecute these foreclosures struggled to keep up. Across the state, foreclosures languished on court dockets for years at a time and, ultimately, many were dismissed either voluntarily by the parties or involuntarily by the courts.

The question in this case is whether lenders can initiate subsequent foreclosure actions against homeowners despite having already accelerated the underlying debt in a prior action. Several state and federal courts have already addressed this issue, determining in large part that this Court's decision in *Singleton* alters the application of the statute of limitations in the mortgage foreclosure context. None of these courts, however, have undertaken more than a cursory analysis of *Singleton*, and all have failed to grasp how the factual underpinnings of a case can affect the resolution of the question presented.

A more exacting analysis of *Singleton* shows that the Court's decision in that case was cabined to a very specific factual scenario: where a dismissal acts as an adjudication of the validity of the default underlying the initial foreclosure action. It is only where the dismissal invalidates the initial default that the putatively-accelerated debt is no longer deemed accelerated, and the accrual of the five-year statute of limitations is thus avoided.

The amici curiae, organizations that represent individuals affected by foreclosure and are intimately familiar with the array of factual permutations that exist amongst foreclosure cases, submit that if the Court concludes *Singleton* speaks to the effect of a dismissal on acceleration, then the Court must determine *how* these factual differences affect the *Singleton* analysis.

There are four factors that affect the question presented: (1) whether the dismissal of the original foreclosure action was with, or without, prejudice; (2) whether the dismissal was voluntary or involuntary; (3) whether the bank's acceleration occurred prior to—versus through—the filing of the bank's initial foreclosure action, i.e., the timing of the bank's acceleration; and (4) whether the underlying debt was automatically accelerated. Based upon the interplay of these factual permutations, there are nine generic classes of foreclosure cases. Each of these classes requires a unique *Singleton* analysis. Accordingly, the Court should take these factual differences into account in deciding this case and hold that the statute of limitations does indeed bar the enforcement of notes and mortgages five years after a bank effectively accelerates the underlying debt.

Additionally, in light of precedent incorrectly holding that a mortgage lien can be enforced where the debt is invalidated, amici curiae submit that the statute of repose independently invalidates these mortgage liens. Because a mortgage's accelerated maturity date is ascertainable from the record of that mortgage, the five-year statute of repose applies and—just like the statute of limitations invalidates the debt—invalidates the lien.

ARGUMENT

I. Resolution of the Certified Question is Dependent on the Facts of Each Case

The broad issue in this case is whether the statute of limitations bars a bank from initiating a second foreclosure action if more than five years have passed since the bank accelerated the debt and brought an earlier foreclosure action that was ultimately dismissed. Although several state and federal courts have analyzed this issue, not a single court addressed whether the *factual* underpinnings of the case affect the ruling on the question presented. Amici curiae believe they do.

Amici curiae represent countless homeowners affected by foreclosure. Through this representation, they have gained insight into the mortgage lending industry and observed the importance of the factual differences that underlie each case. Given their practical experience, amici curiae are in a unique position to explain to the Court exactly why these factual permutations matter.

A. Genesis of the Factual Differences

During the financial crisis, in response to the growing number of individuals defaulting on their mortgage payments, banks began to retain large foreclosure mill law firms to prosecute the resulting foreclosures. Often, these firms agreed to undertake the foreclosures pursuant to low-cost, flat fee structures, which incentivized speed-driven representation. Indeed, the banks themselves actively sought counsel based on their speed and efficiency. As one commentator explained:

> The business model is simple: to tear through cases as quickly as possible. . . . Rather than billing hourly, they receive a predetermined flat fee for the foreclosure—typically around $1,000—plus add-ons for all the side services. The more they foreclose, the more they make. As a result . . . even families who have been foreclosed upon illegally—and can afford to make good on their mortgages—end up getting steamrolled. "It's 'How fast can I turn this file?'" says Ira Rheingold, executive director of the National Association of

> Consumer Advocates in Washington, DC. "For these guys, the law is irrelevant, the process is irrelevant, the substance is irrelevant."[1]

Ultimately, these unsustainable business practices left many foreclosure mills unable to effectively prosecute their foreclosure actions and, in some instances, resulted in firms simply walking away from their outstanding cases. This systemic problem resulted in many foreclosures sitting idle for years and ultimately being dismissed en masse—either voluntarily by the banks or involuntarily by the courts.

Many of the factual differences at issue in cases analogous to *Bartram*, thus, arose as a direct result of the prosecuting bank's failure to diligently pursue the initial foreclosure action. As one circuit court judge explained:

> [C]ourts are at the mercy of plaintiffs in moving the cases. Many times, a judge approves a foreclosure, and then the bank delays the final sale. In some cases, lenders seek cancellation of a sale, which reopens a case. Sometimes plaintiffs don't push cases. 'There is not the urgency on the part of the plaintiffs to move these cases to a conclusion that there used to be. I don't presume to know why. It could be the sheer volume. We see a lack of paperwork, a lack of preparedness.'[2]

---

[1] Andy Kroll, *Fallen Foreclosure King David J. Stern Disbarred*, MOTHER JONES (Jan. 13, 2014, 12:19 PM), www.motherjones.com/mojo/2014/01/foreclosure-lawyer-david-stern-disbarred-florida.

[2] Gary Blankenship, *Courts Get Another $5 Million to Help Move Foreclosure Cases*, THE FLA BAR NEWS (February 15, 2013), www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/7638452efbecc9fa85257b080048e2b3!OpenDocument.

In practice, this confluence of factors left many homeowners in limbo—unsure of the legal status of their mortgages and confused about the consequence of the initial dismissals.

Amici curiae have seen firsthand the factual diversity of mortgage foreclosure cases. Although it is not possible to illustrate this diversity fully, one can imagine cases arising under the following circumstances, as described in amici curiae's motion to file this amicus brief:

- An elderly couple, each with health problems, fights the foreclosure of their home for four years, despite making payments pursuant to a reinstatement. The plaintiff bank realizes that it mistakenly filed the foreclosure action and that another entity is the proper plaintiff. Rather than hold the required evidentiary hearing to substitute plaintiff, the bank voluntarily dismisses the lawsuit and then re-files after the statutory five-year limitation period. The case sits for over 120 days without service on the homeowners. Over a year later, the case still sits pending a motion to dismiss for failure to properly serve.

- A single woman in her sixties faces two or three "owners" of her mortgage and note, and four or five "servicers", all of which provide her with contradictory information about which entity to pay. Two different servicers file foreclosure. The cases are combined, but the plaintiff voluntarily dismisses the case before trial. The court never made a determination as to which entity the homeowner should pay, so the woman waits in limbo as her mortgage approaches the statutory five-year limitation period.

- A central Florida couple defaulted on a home loan and the bank filed foreclosure. The unemployed couple sought relief through the Florida Supreme Court's mediation process. This mediation was not successful, and efforts to seek a loan modification are ongoing. The case was involuntarily dismissed by the circuit court in 2013 because the parties failed to file a joint status report.

- A north Florida woman retired after working for the State of Florida for twenty-five years. After retirement, she kept a fast food job to make ends meet. However, she was injured on the job and could not work for a period of time. After depleting her savings to pay the mortgage, she defaulted. The bank accelerated the note and initiated foreclosure in 2007; the bank then took no action in the case until it voluntarily dismissed its suit in 2011. The homeowner periodically attempted to make a subsequent payment, but the bank always declined the payments. In June 2013—more than five years after acceleration, and six years after the alleged default—the bank filed a new foreclosure action.

B. Why the Factual Differences Matter in the Context of the Question Presented

To resolve the certified question in this case, the Court will need to take into account the factual genus of each foreclosure action. A comparison of the Fifth

District's decision below (*U.S. Bank National Ass'n v. Bartram*), with this Court's decision in *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004), illustrates why.

Below, the Fifth District held 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 . . . provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period." 140 So. 3d at 1014. The Fifth District based its holding largely on this Court's decision in *Singleton*, 882 So. 2d at 1014.

Although *Singleton* did not directly address the application of the statute of limitations (and this Court may accordingly determine that *Singleton* is completely inapplicable to this case), *Singleton* does provide some guidance on the effect that a dismissal has on a bank's choice to initially accelerate debt.

In *Singleton*, the Court explained that its decision was dependent upon the existence of a "subsequent and separate alleged default," i.e., a default apart from the initially-pled default underlying the bank's first foreclosure action (and accompanying acceleration). 882 So. 2d at 1008. Logically though, the Court's holding in *Singleton* should not apply to cases in which a lender validly accelerated a debt because, by definition, acceleration "advanc[es] . . . a loan agreement's maturity date so that payment of the entire debt is due immediately." BLACK'S LAW DICTIONARY, 12-13 (9th ed. 2009). Thus, in cases where there is an effective acceleration, no subsequent defaults can occur because no future installments are required.

The Court stated in *Singleton*, however, that the lender in that case had in fact accelerated the underlying debt previously. *Singleton*, 882 So. 2d at 1005 n.1. Accordingly, the Court's decision depended on the circuit court's involuntary *merits* dismissal of the initial foreclosure action acting as "an adjudication denying acceleration." *Id.* at 1007. Clarifying, the Court explained that when an initial foreclosure is dismissed on the merits, "the mortgagor and mortgagee are simply placed back in the same contractual relationship *with the same continuing obligations*." *Id.* (emphasis added). Accordingly, the Court's holding in *Singleton* can only apply to cases in which (at least as a matter of court adjudication) a lender is deemed to have failed to validly accelerate a debt. After all, if the debt were properly accelerated, there could be no subsequent default.

In short, *Singleton* requires that where a dismissal acts as a *merits* adjudication of the validity of the underlying default, an acceleration tethered to that invalidated default is also rendered invalid by the merits adjudication. In these limited instances, the statute of limitations does not accrue upon the bank's initial acceleration of the debt because—as a matter of court adjudication—the acceleration never validly occurred.

By the same logic, however, a dismissal *without* prejudice does not undo a valid acceleration. Such a dismissal does not adjudicate *anything*; so it can neither unwind the alleged default nor, more importantly, invalidate the acceleration tethered to that default.

Other Factual Differences that Affect an Initial Acceleration

Aside from whether a dismissal is with or without prejudice, there are three other common factors that affect the validity of an initial acceleration, and thus, the question presented in this case. These are: (1) whether the dismissal of the original foreclosure action was voluntary or involuntary; (2) the timing of the bank's acceleration—i.e., whether the bank's acceleration occurred prior to—versus through—the filing of the bank's initial foreclosure action; and (3) whether the underlying debt was automatically accelerated.

Whether a Dismissal is Voluntary or Involuntary

Because a lender must take affirmative action to accelerate a debt, some courts have concluded that a lender may de-accelerate a debt by taking subsequent affirmative action. The difference between incurring a voluntary or involuntary dismissal becomes important only if the Court concludes that a voluntary dismissal illustrates such an intent on the bank's behalf to de-accelerate the debt. We submit, however, that the Court should not adopt such an interpretation. Indeed, multiple courts have said otherwise. *See, e.g., Cadle Co. II, Inc. v. Fountain*, 281 P. 3d

1158 (Nev. 2009) ("a deceleration, when appropriate, must be clearly communicated by the lender/holder of the note to the obligor. . . . The voluntary dismissal did not decelerate the mortgage because it was not accompanied by a clear and unequivocal act memorializing that deceleration."). That said, if the Court were to find that voluntary dismissals evince an intent to de-accelerate a debt, the same could not logically be said about an involuntary dismissal—as such a dismissal is, by definition, done against the will of the plaintiff bank. *See, e.g., Wood v. Fitz-Simmons*, 2 CA-CV 2008-0041, 2009 WL 580784 (Ariz. Ct. App. 2009) ("where a debt has been accelerated by the filing of a lawsuit, a trial court's dismissal of the action is not by itself sufficient to revoke the acceleration and extend the limitations period.").

Timing of the Bank's Acceleration

Where a bank accelerates the debt before filing a foreclosure complaint, the acceleration exists independently of the foreclosure suit, and the bank's voluntary dismissal of the subsequent suit simply places the parties back to their pre-suit positions, i.e., with a default and an acceleration. Thus, if the Court were to give a de-acceleration effect to *voluntary* dismissals, such an effect should not logically extend to situations where a bank accelerates the debt before filing the foreclosure suit. Amici would like the Court to be aware that **pre-suit accelerations are quite common in Florida**—perhaps more the rule than the exception.

Whether a Mortgage has an Automatic Acceleration Clause

Another (albeit far less common) factual scenario turns on whether a mortgage contains an automatic acceleration clause. Where a mortgage agreement contains an automatic acceleration clause the underlying debt is accelerated automatically upon the occurrence of a contractually defined default. This is important because, even when a dismissal renders an underlying default invalid, there would be—pursuant to the terms of the contract—a subsequent default immediately after the invalidated default, which would automatically trigger acceleration as a matter of contract and, thus, the running of the statute of limitations. Such contracts are not the norm, but do exist with sufficient frequency that amici would like for the Court to be aware of them in answering the question presented.

C. Interplay of the Various Factual Differences (Chart)

In order to aid the Court, we have included the following chart, which illustrates the interplay of the above referenced factual scenarios:

Scenario 1 - Pre-suit Acceleration and Involuntary Dismissal (without prejudice)
Acceleration Should be Valid and Unaffected by Dismissal

Because the court dismissed the case without prejudice, the dismissal does not constitute an adjudication of the validity of the underlying default and does not invalidate the bank's initial acceleration. Moreover, because the court—and not the bank—dismissed the suit, the dismissal could not be construed as an affirmative act illustrating the bank's intent to de-accelerate the debt.	**Illustrated by:** *Espinoza v. Countrywide Home Loans Servicing, L.P.*, No. 14–20756–CIV, 2014 WL 3845795 (S.D. Fla. Aug. 5, 2014)
Scenario 2 - Pre-suit Acceleration and Voluntary Dismissal	
Acceleration Should be Valid and Unaffected by Dismissal	
A voluntary dismissal is presumed to be without prejudice. Thus, a voluntary dismissal does not act as an adjudication of the validity of the underlying default and does not nullify the accompanying acceleration. Moreover, as explained above, even if this Court concludes that a voluntary dismissal represents an affirmative act de-accelerating debt, this would not apply where the debt was accelerated pre-suit.	**Illustrated by:** *Romero v. SunTrust Mortgage*, 1:13-CV-24491-UU, 2014 WL 1623703 (S.D. Fla. Apr. 22, 2014)
Scenario 3 - Pre-suit Acceleration and Involuntary Dismissal (with prejudice)	
Acceleration May be Rendered Invalid by Dismissal	

An involuntary dismissal rendered by the court without specifying that the dismissal is without prejudice is presumed to constitute an adjudication on the merits. *See* Fla. R. Civ. P. 1.420(b). Under *Singleton*, this adjudication could render the alleged default invalid and nullify the acceleration predicated on that default. However, because the acceleration occurred pre-suit, the Court could conclude that such an acceleration occurred outside of the dismissed case and is unaffected. Given *Singleton's* limitation on the effect of Rule 1.420(b) dismissals in the context of the res judicata doctrine, the Court could similarly find that the legislatively-imposed statute of limitations for mortgages trumps the any res judicata doctrine effect from Rule 1.420(b).	**Illustrated by:** *Diaz v. Deutsche Bank Nat. Trust Co.*, No. 14–22583–CIV, 2014 WL 4351411 (S.D. Fla. Sept. 2, 2014)
Scenario 4 - Acceleration Undertaken through Foreclosure Complaint and Involuntary Dismissal (without prejudice)	
Acceleration Should be Valid and Unaffected by Dismissal	
Just as in scenario one, where a dismissal is without prejudice, such a dismissal does not act as an adjudication of the validity of the underlying default and thus has no effect on the acceleration tethered to that default. The fact that the debt was accelerated through the foreclosure complaint does not alter this result, and the bank took no action to de-accelerate the debt.	**Illustrated by:** *U.S. Bank Nat. Ass'n v. Bartram*, 140 So. 3d 1007 (Fla. 5th DCA 2014); *Lopez v. HSBC Bank USA, N.A.*, No. 14–cv–20798–UU, 2014 WL 3361755 (S.D. Fla. April 29, 2014).
Scenario 5 - Acceleration Undertaken through Foreclosure Complaint and Voluntary Dismissal	
Acceleration Should be Valid and Unaffected by Dismissal	

<table>
<tr><td>The analysis for scenario two is applicable here and is not altered because the debt was accelerated through the foreclosure complaint. The only difference is that if the Court determines that a voluntary dismissal could be construed as an affirmative act illustrating the bank's intent to de-accelerate the debt, then the voluntary dismissal could have that effect.</td><td>Illustrated by:

Evergrene Partners, Inc. v. Citibank, 143 So. 3d 954 (Fla. 4th DCA 2014); Kaan v. Wells Fargo Bank, N.A., 981 F. Supp. 2d 1271, 1274 (S.D. Fla. 2013).</td></tr>
<tr><td colspan="2" align="center">Scenario 6 - Acceleration Undertaken through Foreclosure Complaint and Involuntary Dismissal (with prejudice)</td></tr>
<tr><td colspan="2" align="center">Acceleration May be Rendered Invalid by Dismissal</td></tr>
<tr><td>This is the scenario most akin to Singleton. As explained above, if this Court determines that the Singleton analysis applies in this context, the initial involuntary dismissal acts as an adjudication of the validity of the underlying default and the acceleration tethered to that default would be invalidated.</td><td>Illustrated by:

Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004); Rodriguez v. Bank of America, N.A., No. 13–Civ–23980, 2014 WL 4851777 (S.D. Fla. Sept. 30, 2014).</td></tr>
<tr><td colspan="2" align="center">Scenario 7 - Automatic Acceleration and Involuntary Dismissal (without prejudice)</td></tr>
<tr><td colspan="2" align="center">Acceleration Should be Valid and Unaffected by Dismissal</td></tr>
<tr><td colspan="2">Just as in scenarios one and four, the dismissal without prejudice does not invalidate the underlying default.</td></tr>
<tr><td colspan="2" align="center">Scenario 8 - Automatic Acceleration and Voluntary Dismissal</td></tr>
<tr><td colspan="2" align="center">Acceleration Should be Valid and Unaffected by Dismissal</td></tr>
<tr><td colspan="2">Just as in scenarios two and five, the voluntary dismissal does not invalidate the underlying default.</td></tr>
<tr><td colspan="2" align="center">Scenario 9 - Automatic Acceleration and Involuntary Dismissal (with prejudice)</td></tr>
</table>

Acceleration Should be Valid and Unaffected by Dismissal
As explained above, where automatic acceleration is at issue, even where an adjudication on the merits renders an initially pled default invalid, acceleration occurs as a matter of contract based on the next missed payment.

II. If the Statute of Limitations Invalidates an Accelerated Debt, the Statute of Repose Prohibits Enforcement of a Mortgage Lien that Secures that Invalidated Debt

In similar litigation, banks have argued that even where they are prohibited from enforcing a note, they may still independently enforce the mortgage lien. *See Romero*, 2013 WL 8451525, at *2 ("The statute of limitations cited by Plaintiffs in their Complaint provides a time-bar defense against '[a]n action to foreclose a mortgage' brought five years after accrual. Fla. Stat. § 95.11(2)(c). However, 'section 95.11(2)(c) does not affect the life of the lien or extinguish the debt; it merely precludes an action to collect the debt after five years.' ") (quoting *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 603 (Fla. 2d DCA 2005)); *Kaan*, 981 F. Supp. 2d at 1274 ("Even if the statute of limitations barred foreclosure due to payment defaults within the last five years, the lien would still be enforceable if Plaintiff breaches or defaults in other ways."). Based on this logic, lenders have wielded the statute of repose as a sword, asserting that it is another hurdle for homeowners.

Common law precedent from around the country cuts against this argument.[3] However, in anticipation of the bank raising a similar argument in this case—and given that the Appellate Court Rules do not permit amici curiae a right of reply—amici curiae submit that the statute of repose independently prohibits enforcement of a mortgage lien that does not secure a valid debt.

Florida's statute of repose sets forth two different time limitations depending on whether the "final maturity date" of the note is "ascertainable from the record of it." If the final maturity date is ascertainable from the record of the note, the mortgage terminates as a matter of law five years from that date. Fla. Stat. § 95.281(1)(a).

---

[3] *See, e.g.*, *Cnty. of Keith v. Fuller*, 452 N.W.2d 25, 30 (Neb. 1990) ("It has long been the rule in this state that a mortgage is a mere security and has no efficacy if unaccompanied by a debt or obligation."); *Hendrie v. Hendrie*, 94 F.2d 534, 535 (5th Cir. 1938) ("As between the parties, the note is unenforceable, and, since there can be no lien without a debt, the mortgage falls with it.") (citing *Richardson v. Richardson*, 36 N.E. 608 (Ill. 1893)). Amici curiae recognize that in 1897 this Court stated: "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, and that such lien is only affected by the longer term which by the statute is applied to sealed instruments." *Ellis v. Fairbanks*, 21 So. 107, 109 (Fla. 1897). However, in related contexts, the Court later seemed to move away from this 1897 precedent. *See Nelson v. Stockton Mortg. Co.*, 130 So. 764, 766 (Fla. 1930) ("[i]t is well settled in this and other jurisdictions that there can be no mortgage unless there is a debt to be secured thereby or some obligation to pay money."); *see also Downing v. First Nat. Bank of Lake City*, 81 So. 2d 486, 488 (Fla. 1955) ("A mortgage executed as security for the payment of a negotiable promissory note is a mere incident of and ancillary to such note.").

The "final maturity date" is the date the bank accelerated the debt. *See Casino Espanol de la Habana v. Bussel*, 566 So. 2d 1313, 1314 (Fla. 3d DCA 1990) (citing *Erwin v. Crandall*, 175 So. 862, 863 (Fla. 1937)) ("[w]hen a lender elects to accelerate payment on a note, the lender accelerates the maturity of the note itself."). So, the question is whether that accelerated "final maturity date" is ascertainable from the record of the mortgage.

In this analysis, the word "ascertainable" is of particular import. According to Merriam-Webster's Collegiate Dictionary (11th ed. 2009), the word "ascertain" means "to learn or find out (something, such as information or the truth)." The suffix "able" modifies "ascertain," and is defined separately as "capable of, fit for, or worthy of (being so acted upon or toward)." *See id.* Taken together, the word ascertainable, as used within section 95.281, can logically be defined as "something that is capable of being learned or found out, such as information or the truth."

Upon initiating its foreclosure action in May 2006, the bank (like virtually every foreclosing lender) presumably recorded a lis pendens at the county records office, and that notice was accessible alongside the recorded mortgage. The Florida Supreme Court has previously stated that "[t]he general rule is that lis pendens is notice of all facts apparent on the face of the pleadings and such other facts as the pleadings would necessarily put the purchaser on inquiry and of the contents of exhibits filed and proved if they are pertinent to the matter in issue or the relief sought." *De Pass v. Chitty*, 105 So. 148, 150 (Fla. 1925).

The recorded lis pendens stated that the property was the subject of a foreclosure action and—as required by Florida Statute Section 48.23—expressly identified that foreclosure action. *See* Fla. Stat. 48.23(1)(c) (stating that in order to constitute a valid lis pendens, the recorded document must contain the following information: "a. the names of the parties; b. the date of the institution of the action, the date of the clerk's electronic receipt, or the case number of the action; c. the names of the court in which it is pending; d. a description of the property involved or to be affected; e. a statement of the relief sought as to the property").

Once directed to the foreclosure action, a review of the complaint filed therein—which is also public record and readily available—openly discloses the accelerated final maturity date of the debt. Therefore, an individual could readily ascertain the final maturity date of the note by reading the record of the mortgage; hence the five-year statute of repose bars enforcement of the bank's mortgage lien.

CONCLUSION

The Court should take the factual differences that exist between foreclosure cases into account when determining what effect *Singleton* has on the question presented.

Respectfully Submitted,

/s/ John G. Crabtree
John G. Crabtree

CERTIFICATE OF SERVICE

Kimberly Sanchez
COMMUNITY LEGAL SERVICES OF MID-FLORIDA
122 E. Colonial Drive, Suite 200
Orlando, Florida 32801
kimberlys@clsmf.org
Counsel for Consumer Umbrella Group of Florida Legal Services

Alice M. Vickers
FLORIDA ALLIANCE FOR CONSUMER PROTECTION
623 Beard Street
Tallahassee, FL 32303
(850) 556-3121
alicevickers@flacp.org
Counsel for Florida Alliance for Consumer Protection

Sarah E. Mattern
BREVARD COUNTY LEGAL AID, INC.
1038 Harvin Way, Suite 100
Rockledge, Florida 32955
sarahmattern@brevardlegalaid.org
Counsel for Brevard County Legal Aid

Heidi J. Weinzetl
Michael D. Starks
Baker, Donelson, Bearman, CALDWELL & BERKOWITZ, PC
Bank of America Center
390 North Orange Avenue
P.O. Box 1549
Orlando, Florida 32802
hweinztl@bakerdonelson.com
mstarks@bakerdonelson.com
tzasada@bakerdonelson.com
tgoff@bakerdonelson.com
Counsel for U.S. National Bank

T. Geoffrey Heekin
Hunter Malin
Catherine R. Michaud
HEEKIN, MALIN, & WENZEL, P.A.
P.O. Box 477
Jacksonville, Florida 32201
gheekin@jax-law.com
hmalin@jax-law.com
cmichaud@jax-law.com
Counsel for the Plantation at Ponte Vedra, Inc.

Paul Alexander Bravo
17 Sevilla Avenue
Coral Gables, Florida 33134
pabravo@pabravo.com
service@pabravo.com
Counsel for the Plantation at Ponte Vedra, Inc.

Joel S. Perwin
JOEL S. PERWIN, P.A.
169 E. Flagler Street
Suite 1422
Miami, Florida 33131
jperwin@perwinlaw.com
Counsel for the Plantation at Ponte Vedra, Inc.

Lawrence C. Rolfe
Brett H. Burkett
ROLFE & LOBELLO, P.A.
P.O. Box 4400
Jacksonville, Florida 32201
lcr@rolfelaw.com
bhb@rolfelaw.com

Counsel for Patricia Bartram

Jason Bravo, P.A.
P.A. BRAVO, P.A.
P.O. Box 1965
Hallandale, Florida 33008
Jbravo@bravo-llp.com
Counsel for Patricia Bartram

Michael Alex Wasylik
RICARDO & WASYLIK, PL
P.O. Box 2245
Dade City, Florida 33526
service@ricardolaw.com
Counsel for Lewis Brooke Bartram

Thomas R. Pycraft
PYCRAFT LAW, LLC
2825 Lewis Speedway, Suite 107
St. Augustine, Florida 32084
tom@pycraftlaw.com
service@pycraftlaw.com
Counsel for Lewis Brooke Bartram

Dineen Pashoukos Wasylik
DPW LEGAL
P.O. Box 48323
Tampa, Florida 33646
dineen@ip-appeals.com
service@ip-appeals.com
Counsel for Lewis Brooke Bartram

Kendall B. Coffey
Jeffrey B. Crockett
Daniel F. Blonsky
COFFEY BURLINGTON, P.L.
2601 S. Bayshore Drive, PH
Miami, FL 33133
kcoffey@coffeyburlington.com
jcrockett@coffeyburlington.com
dblonsky@coffeyburlington.com
vmontejo@coffeyburlington.com
grogue@coffeyburlington.com
service@coffeyburlington.com
Counsel for Lewis Brooke Bartram

Robert R. Edwards
Johnathan I. Meisels
ROBERSTON, ANSCHUTZ &
SCHNEID, PL
6409 Congress Avenue, Suite 100
Boca Raton, Florida 33487
redwards@rasflaw.com
mail@rasflaw.com
lsarvey@rasflaw.com
Counsel for American Legal and
Financial Network
Shaib Y. Rios
Curtis J. Herbert
BROCK AND SCOTT PLLC
1501 NW 49th Street, Suite 200
Fort Lauderdale, Florida 33309
Shaib.rios@brockandscott.com
Curtis.herbert@brockandscott.co
m
Counsel for American Legal and
Financial Network

Robyn R. Katz
Jane E. Bond
MCCALLA RAYMER, LLC
225 E. Robinson Street, Suite 660
Orlando, Florida 32801
rrk@mccallaraymer.com
jnb@mccallaraymer.com
Counsel for American Legal and
Financial Network

Melissa A. Giasi
Richard S. McIver

KASS SHULER, P.A.
1505 N. Florida Avenue
Tampa, Florida 33602
mgiasi@kasslaw.com
rmciver@kasslaw.com
Counsel for American Legal and Financial Network

Andrea R. Tromberg
GLADSTONE LAW GROUP, P.A.
1499 W. Palmetto Park Road, Suite 300
Boca Raton, Florida 33486
atromberg@gladstonelawgroup.com
Counsel for American Legal and Financial Network

Elizabeth R. Wellborn
ELIZABETH R. WELLBORN, P.A.
350 Jim Moran Boulevard, Suite 100
Deerfield Beach, Florida 33442
ewellborn@erwlaw.com
Counsel for American Legal and Financial Network

Michelle G. Gilbert
Jennifer Lima-Smith
GILBERT GARCIA GROUP, P.A.
John R. Hargrove
HARGROVE PIERSON & BROWN, P.A.
21 S.E. 5th Street, Suite 200
Boca Raton, Florida 33432
eserve@hargrovelawgroup.com
jrh@hargrovelawgroup.com
Counsel for Baywinds Community Association

2005 Pan American Cir., Suite 110
Tampa, Florida 33607
mgilbert@gilbertgrouplaw.com
jlima-smith@gilbertgrouplaw.com
Counsel for American Legal and Financial Network

Peter D. Ticktin
Timothy R. Quinones
THE TICKTIN LAW GROUP, P.A.
600 W. Hillsboro Boulevard Suite 220
Deerfield Beach, Florida 33441
Serv512@legalbrains.com
Serv515@legalbrains.com
Counsel for Bradford Langworthy

John S. Mills
Andrew D. Manko
THE MILLS FIRM
203 N. Gadsden Street, Suite 1A
Tallahassee, Florida 32301
jmills@mills-appeals.com
amanko@mills-appeals.com
service@mills-appeals.com

Counsel for Upside Property Investment

CERTIFICATE OF COMPLIANCE

I prepared this brief in Baskerville 14-point font.

/s/ John G. Crabtree