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IN THE SUPREME COURT OF FLORIDA

LEWIS BROOKE BARTRAM, etc.,

Petitioners,

v.

U.S. BANK NATIONAL ASSOCIATION, etc., et al.,

Respondent.

_______________________________/

Consolidated Case Nos. SC14-1265, SC14-1266, SC14-1305

L.T. No. 5D12-3823

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

AMICUS BRIEF OF UPSIDE PROPERTY INVESTMENT, LLC, ET AL., IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

This brief is filed on behalf of Upside Property Investment, LLC, Signature Land, Inc., Upside Property Enterprises, Inc., and The Lynne B. Preminger Living Trust (collectively, the "Investor Amici"), who are entrepreneurs that invest in "zombie properties," *i.e.*, those that have been vacated by the homeowners, typically pending a foreclosure action and sale, but for various reasons are not foreclosed, sold, leased, or otherwise maintained by the foreclosing entities for years on end. In some cases, zombie properties remain vacant and decaying for five years or more. These properties serve as a breading ground for criminal activity, adversely impact community safety and neighborhood property values, and significantly reduce the ad valorem tax base of Florida's local governments.

The Investor Amici provide immediate stability to the property and to the community, in addition to assisting the financially troubled homeowner by assuming his or her liability as it relates to the existing lien on the vacant home. They identify the property, purchase the homeowner's interest, make a substantial investment of $50,000 to $150,000 to rehabilitate the deteriorating property, resolve any outstanding property tax or homeowner association fee arrearages, find a suitable tenant to maintain the condition and security of the property, and litigate the foreclosure and/or title case on the merits. The Investor Amici have invested close to $1 million in six zombie properties in the greater Jacksonville area, have an additional ten properties in the pipeline, and seek to expand their portfolio to 100 properties in the next few years.

The Investor Amici focus on zombie properties in which the lender's ability to foreclosure is significantly hampered by various legal problems associated with enforcement of the note and mortgage, not the least of which is the expiration of the statute of limitations. These legal impediments are crucial because they reduce the risk associated with making a sizeable investment in an abandoned, dilapidated property whose title remains clouded by a stale mortgage lien.

The Investor Amici submit this brief to address the adverse consequences of the Fifth District's decision, which allows foreclosing entities to re-accelerate a note long after the statute of limitations on the first acceleration has expired. Specifically, the Investor Amici will explain how public policy discourages such a result where it will completely dissuade entities from making the substantial, up-front financial investment needed to refurbish these homes and clear the title, thereby inhibiting the alienability of real property and impeding the substantial benefits that these investments bring to local communities.

SUMMARY OF ARGUMENT

Zombie properties are those that were abandoned after the lender pursued foreclosure but continue to sit vacant (and deteriorate) for three years or more while the lender fails to resolve the foreclosure on the merits. Florida leads the nation with over 35,000 zombie properties, representing a third of the nation's total and three times more than the second highest state on the list. Five of the ten worst metropolitan areas nationwide for zombie properties are in Florida. This is a massive derivative problem of Florida's foreclosure crisis.

The large volume of abandoned homes is a recipe for disaster, especially considering the growing problems they create for local communities. Zombie properties are a major source of crime and blight because they are unsecured. They quickly deteriorate in Florida's humid climate because they are unmaintained. As a result, they significantly drag down neighborhood property values (disproportionately in lower-income and African American communities) and sharply reduce the tax base of local governments, which lost about $400 million in the second quarter of 2014 alone. And, because title remains clouded by a stale mortgage in many cases, they are unmarketable. The problems continue to mount because no entity assumes responsibility for the care and security of the home.

The Investor Amici, however, are working to solve the problem. They provide immediate stability to the home and community by investing $50,000-$150,000 to rehabilitate the property, leasing to a qualified tenant who will care for and secure the home, and resolving all tax and homeowner fee arrearages, in addition to resolving the marketability problem by litigating the foreclosure and quiet title actions on the merits, which the existing homeowners often lacked the resources to accomplish. To achieve these benefits, the Investor Amici specifically target zombie properties with legal impediments to enforcement of the mortgage, including in particular the expiration of the statute of limitations.

But the Fifth District's decision renders reliance on the statute of limitations a far too risky endeavor because it permits the lender to indefinitely sit on its rights and re-accelerate long after the statute of limitations has run. That result is contrary to public policy because it precludes investors – who are the only entities willing to assume the responsibility for restoring these abandoned homes – from benefiting local communities, it gives lenders a windfall by allowing them to re-assert their stale rights on the backs of the investments made by the Investor Amici, and it indefinitely impedes the alienability of real property. As such, this Court should answer the certified question in the affirmative.

ARGUMENT

THE RULE ESPOUSED BY THE FIFTH DISTRICT IS CONTRARY TO PUBLIC POLICY BECAUSE IT WORSENS FLORIDA'S GROWING ZOMBIE PROPERTY CRISIS AND RESTRICTS THE ALIENABILITY OF REAL PROPERTY.

Standard of Review. Review of an order granting summary judgment, particularly as to the proper interpretation of the statute of limitations, is reviewed de novo. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Likewise, rulings concerning the proper interpretation and application of the statute of limitations are also reviewed de novo. *Caduceus Props., LLC v.*

Graney, 137 So. 3d 987, 991 (Fla. 2014).

The Investor Amici seek to help this Court understand some of the indirect consequences of the Fifth District's decision permitting a foreclosing entity to accelerate the full principal of a note and mortgage, sit on their rights for years while refusing to maintain vacant and deteriorating homes, and then attempt to re-accelerate the note long after the statute of limitations on the original acceleration has expired. The Petitioners have thoroughly briefed the legal arguments for why the certified question should be answered in the affirmative, so the Investor Amici will not rehash them. Instead, the purpose of this amicus brief is to discuss why the Fifth District's holding violates public policy, specifically as it relates to a massive derivative problem of Florida's foreclosure crisis – zombie properties.

While a precise definition may be difficult to ascertain, zombie properties are often "abandoned properties that have started the default process but have not yet been repossessed by the bank." Josh Salman, *Foreclosures that simply won't die*, Herald-Tribune, Oct. 30, 2014, *available at* http://www.heraldtribune.com/article/20141030/ARTICLE/310309990/2055/www.heraldtribune.com/article/20141030/ARTICLE/310309990/2055/NEWS. Whether the unintentional byproduct of a lengthy foreclosure process or the intentional delay by lenders who refuse to move the cases forward because completing the process is not financially viable, commentators note that abandoned properties attain the "zombie" distinction when the foreclosure process has been pending for about three years or more. Alison Fitzgerald & Jared Bennett, *'Zombie' homes haunt Florida neighborhoods*, Center for Public Integrity (Sep. 15, 2014), http://www.publicintegrity.org/2014/09/15/15519/zombie-homes-haunt-florida-neighborhoods; Brian Bandell, *Florida leads nation in 'zombie foreclosures,' RealtyTrac says*, South Florida Business Journal, Mar. 13, 2014, *available at* http://www.bizjournals.com/southflorida/blog/morning-edition/2014/03/florida-leads-nation-in-zombie-foreclosures.html.

As a study by the Center for Public Integrity noted, "many homeowners walked away from their properties when they got their initial foreclosure notices, seeking to avoid being evicted, not realizing that the process could take years. Others would stay for a time but then move for a new job or to be closer to family." Fitzgerald & Bennett, *supra* pg. 6. But whatever the reason for the abandonment, the intentional and unintentional delays in moving foreclosure cases through the system has created a serious crisis in Florida. The problem is so wide-spread that it has been referred to as "Florida's zombie foreclosure apocalypse." Bandell, *supra* pg. 6.

Florida leads the nation with the most zombie properties of any state. Brian Honea, *Despite Q3 Decline, Zombie Foreclosure Problem Lingers In Many Areas*, DSNews (Oct. 31, 2014), http://dsnews.com/news/10-31-2014/despite-q3-decline-zombie-foreclosure-problem-lingers-many-areas [hereinafter Honea (Q3)]; Salman, *supra* pg. 5. According to October 2014 quarterly estimates by RealtyTrac, a source for nationwide housing data, Florida had the most zombie properties of any state with 35,913, as compared to a nationwide total of 117,298. *RealtyTrac Q3 2014 Zombie Foreclosure Report*, RealtyTrac (Oct. 30, 2014), http://www.realtytrac.com/content/foreclosure-market-report/realtytrac-q3-2014-zombie-foreclosure-report-8176. That means Florida has "nearly one-third of the nation's total" and three times the amount in New York (12,683), the state with the second-highest total of zombie properties nationwide. *Id.*; Honea (Q3), *supra* pg. 6; Paul Owers, *'Zombie' foreclosures linger in South Florida*, Sun Sentinel (Oct. 30, 2014), *available at* http://www.sun-sentinel.com/business/realestate/fl-zombie-foreclosures-20141030-story.html; Salman, *supra* pg. 5. Florida has maintained its nation-leading status since June 2014, when RealtyTrac estimated that Florida had roughly 48,630 zombie properties. Fitzgerald & Bennett, *supra* pg. 6.

Breaking the numbers down by locality shows an even worse problem for some of the state's hardest hit communities. Five of the top ten markets for zombie foreclosures nationwide are in Florida, including Miami/Ft. Lauderdale (Second), Tampa/St. Petersburg (Third), Orlando/Kissimmee (Sixth), Jacksonville (Seventh), and Palm Bay/Melbourne/Titusville (Tenth). RealtyTrac, *supra* pg. 7. As to South Florida, Miami-Dade (3,683) and Broward (3,437) Counties, respectively, have the second and third most zombie properties nationally, while Palm Beach County is a close fifth. Owers, *supra* pg. 7.

Central and Northern Florida have not faired much better. Although approximately eighteen percent of all foreclosures nationwide involve zombie properties, the metropolitan areas of Tampa (28%), Palm Bay/Melbourne (28%), Lakeland (27%) all far exceed that national average. Honea (Q3), *supra* pg. 6. As of June 2014, close to thirty percent of homes in the foreclosure process in both Jacksonville and the greater Tampa Bay area were vacant. Fitzgerald & Bennett, *supra* pg. 6. In Manatee and Sarasota Counties, banks have failed to auction off or repossess $199.1 million worth of distressed real estate assets, "ranging from derelict duplex units in urban Bradenton to a $6.2 million Osprey mansion." Salman, *supra* pg. 5.

The sheer volume of zombie properties in Florida alone is staggering. But the issue only becomes more distressing upon considering the substantial and multi-faceted problems these abandoned homes create for local communities. For one, it "has been well documented" that zombie properties "attract vandals and other crime." Brian Honea, *Zombie Foreclosures Result in Millions of Delinquent Tax Revenue Dollars*, DSNews (Oct. 13, 2014), http://dsnews.com/news/10-13-2014/zombie-foreclosures-result-millions-delinquent-tax-revenue-dollars [hereinafter Hones (Taxes)]. According to a recent study by The Furman Center in

New York, research shows that generally "foreclosures lead to increased crime in their immediate surroundings, adding strong evidence to the claims that foreclosures can threaten the stability of hard-hit communities." Furman Center Policy Brief, *Do Foreclosures Cause Crime*, Furman Center for Real Estate and Urban Policy, New York University 4 (Feb. 2013), *available at* [*http:*//furmancenter.org/files/publications/DoForeclosuresCauseCrime.pdf](http://furmancenter.org/files/publications/DoForeclosuresCauseCrime.pdf). In fact, the Furman Report found that more foreclosures in a neighborhood results in a higher incidence of crime – and violent crime – for that neighborhood. *Id.* And the absence of a homeowner only exacerbates the problem because no one is there to guard the property. Spencer Cowan & Michael Aumiller, *Unresolved Foreclosures: Patterns of Zombie Properties in Cook County*, Woodstock Institute 3, Jan. 2014, *available for download at* http://www.woodstockinst.org/research/unresolved-foreclosures-patterns-zombie-properties-cook-county (noting that once the owner abandons the property, it is left vacant and "a potential source of blight and problems for the neighborhood").

To make matters worse, the resulting crime appears to hit the poorest communities the hardest. The Center for Public Integrity conducted a study of the zombie property crisis in Florida and focused in part on the Jacksonville area, which recently created a blight subcommittee to address the health and safety problems with zombie properties and the crime resulting therefrom. Fitzgerald &

Bennett, *supra* pg. 6. The study reported that the problem in Jacksonville is so dire that the first option offered when you call the City's main phone number is to report a blighted property. *Id.* In St. Petersburg, zombie properties are also "heavily concentrated in the poorer, African American neighborhoods." *Id.* (quoting Mike Dove, Dir. of Neighborhood Affairs, St. Petersburg). As the study noted, "[b]y cherry-picking which foreclosures they complete and which they ignore, banks are saddling individual borrowers with a permanent, inescapable debt while helping to create slums in already struggling communities." *Id.*

Both in addition to the crime problem, and as a partial result thereof, zombie properties also adversely affect property values. Owers, *supra* pg. 7. The lack of maintenance by either the vacating homeowner or the foreclosing lender directly affects the value of the home itself, which is worse here than in other states because the homes are "left to rot in the heat and humidity." Salman, *supra* pg. 5 (quoting Blomquist, Vice President of RealtyTrac); *see also* Brian Honea, *New York AG Pushing Legislation to Stop 'Zombie Foreclosures,'* DSNews (Sep. 8, 2014), *available at* http://dsnews.com/news/09-08-2014/new-york-ag-pushing-legislation-stop-zombie-foreclosures [hereinafter Honea (New York AG)] ("Because the property is in limbo, no one is keeping it up, and its condition deteriorates – subjecting the property to all kinds of decay, vandalism, and crime."). The deteriorating homes have "a domino effect on the rest of the community, since property values plummet as a result." Honea (New York AG), *supra* pg. 10; *see also* Salman, *supra* pg. 5 (zombie properties "batter property values in neighborhoods where these abandoned homes often attract blight and crime"); *see also* Fitzgerald & Bennett, *supra* pg. 6 (noting vacant homes often attract drug dealers and squatters, which in turn brings down the value of surrounding properties).

Zombie properties also have a profound (and adverse) effect on tax revenue for local communities. Honea (Taxes), *supra* pg. 8 ("With the owner having deserted the distressed property, not only is there no one to maintain the property's outward appearance, but there is no one paying taxes on the property."). RealtyTrac estimates that zombie properties resulted in nearly $400 million in delinquent property tax revenue nationwide in the second quarter of 2014 alone, with Miami-Dade losing $36.3 million as the third worst metropolitan area in the country. Honea (Taxes), *supra* pg. 8. The loss of tax revenue means that most cities do not "have the resources to deal with all of the vacant homes," forcing many to simply demolish deteriorated properties. Fitzgerald & Bennett, *supra* pg. 6. For instance, Jacksonville tore down 113 zombie homes in 2013 and another 60 this year, and St. Petersburg tore down close to 100 this year. *Id.*

Additionally, having zombie status negatively affects the marketability of the property given that the forestalled foreclosure and existing mortgage lien indefinitely cloud the title. Cowan & Aumiller, *supra* pg. 9, at 3. “Because the owner is at risk of losing the property if the servicer ever decides to resume prosecuting the pending foreclosure, the owner has little incentive to invest in maintaining or improving the property even if he or she has the resources.” *Id.* And once the owner vacates during a lengthy and indefinite foreclosure process, there is “no person or entity fulfilling the obligations of ownership, including property maintenance and payment of taxes.” *Id.*

That is where one would think the foreclosing entity would come in, but with zombie properties that simply does not happen. That is because, much like homeowners, foreclosing entities often decide to walk away from a zombie property in the middle of the foreclosure process based on a cost benefit analysis of their own. The analysis can be quite easy − if the amount of money it costs to pursue the foreclosure action through to a final resolution will likely exceed the amount of money the foreclosure sale will generate, then it makes little fiscal sense to carry through with the process. *Id.* Even more troubling is the fact that often times this analysis leads to a walk-away in lower income or distressed areas where the market values are significantly lower as a direct result of the number of zombie properties in the area. *Id.* at 1, 3, 12.

All of these statistics and findings beg the question of how can these multi-faceted and mounting problems be resolved if no one is assuming responsibility for the property. And that is exactly where investors, like the Investor Amici, are critical because they fill the gap left by the foreclosing lenders, where they have either chosen to walk away from the property or cannot successfully assert their rights as a result of other legal impediments to foreclosure.

First and foremost, the Investor Amici provide immediate stability to the property and to the community. They purchase the owner's interest, invest anywhere from $50,000-$150,000 to completely rehabilitate the deteriorating property, lease it to a qualified tenant, and ensure that all arrearages of taxes and homeowner association dues are paid. The property becomes repaired and occupied, removing any blight that had been associated with the abandonment, ensuring that the property is maintained and secured by the tenant, and stabilizing the property values in the surrounding neighborhood. The community associations and local governments are also immediately benefitted by the revenue generated from the payment of any tax or fee arrearages.

Second, the Investor Amici resolve an indefinite marketability problem with a zombie property whose title remains clouded by an existing mortgage lien. Once the property is rehabilitated and occupied by a suitable tenant, the Investor Amici take on the responsibility for resolving any pending foreclosure action or pursuing a quiet title action, which the prior homeowner in many cases lacked the necessary resources and wherewithal to accomplish. If successful, the title to the property is cleared and it can be sold to a third-party. While the Investor Amici hope to turn a profit on their initial investment through the sale, their actions have more importantly allowed the title to once again become marketable, which directly enhances the value of the property itself and also stabilizes the surrounding neighborhood's values. Thus, the end result is a title that is once again marketable, and a prior homeowner who finally has a resolution of any pending liability relating to the ownership of a home they vacated many years before.

But to ensure that the substantial financial investment required to rehabilitate a zombie property is protected, the Investor Amici must carefully scrutinize the official and court records of the properties in which they invest. Of particular importance are those with fatal legal impediments to the lender's ability to enforce the mortgage lien, such as standing issues as to the original note and mortgage, the failure to comply with conditions precedent, and fraudulent assignments or transactions. None, however, is more critical than the expiration of the statute of limitations, particularly in cases where a lender has accelerated a note and mortgage but failed to follow through with the foreclosure for more than five years.

That is precisely why overturning the Fifth District's decision in this case is of such importance to the Investor Amici because the rule it espouses exponentially increases the risks associated with investing in abandoned properties.

Indeed, if a mortgagee can accelerate the mortgage and re-accelerate again after losing its foreclosure case and sitting on its rights for more than five years (and without expending a dollar to rehabilitate the property), investors who expended money to rehabilitate an abandoned property would be unable to recoup their investment. Without any assurance that they could ascertain when the statute of limitations has expired or that they could succeed in quieting the title to the property, investors will simply decide not to make the investment at all because it is too risky.

The indefinite and unresolved cloud on the title thus makes it difficult for current owners to sell the property, Cowan & Aumiller, *supra* pg. 9, at 3, and it dissuades prospective buyers from engaging in a far too risky investment. The cloud on the title is left in perpetual limbo until the mortgagee decides whether it wants to attempt to re-accelerate and pursue foreclosure a second time, resulting in an unreasonable restraint on the alienability of property in direct contravention to Florida's public policy. *See Rybovich Boat Works, Inc. v. Atkins*, 585 So. 2d 270, 270-72 (Fla. 1991) (citing section 95.11 for proposition that public policy of Florida encourages alienability of real property); *Admiral Sec. & Inv. Co. v. Curtis*, 804 So. 2d 354, 354-55 (Fla. 4th DCA 2001) (same); *see also* § 95.11(5)(a), Fla. Stat. (providing that foreclosure must be commenced within five years of default).

Moreover, the Fifth District's decision gives the foreclosing lender a second bite at the apple on the coat-tails of the investor, who expended the resources necessary to rehabilitate an abandoned property while the foreclosing entity sat silent. In such circumstances, the lender is permitted to allow the investor to expend its substantial resources to make the property marketable and later decide, after sitting on its rights far beyond the statute of limitations, to come back a second time once the tide has changed and the property is worth something. That results in an improper windfall and will discourage, rather than encourage, foreclosing entities from assuming responsibility to maintain these blighted properties. The benefits to the community that directly result from the actions of investors should outweigh a rule enabling foreclosing entities to avoid the requirements of the statute of limitations, sit on their rights indefinitely, and allow properties and communities to vanquish, only to come back years later on the backs of investors and belatedly try to assert those rights a second time.

In short, if no investment is made, the status quo will be maintained – the foreclosing lenders will continue to avoid assuming responsibility for maintaining the homes and the substantial benefits derived from the actions of investors will never occur. Public policy should dictate otherwise. *See* Cowan & Aumiller, *supra* pg. 9, at 12 (recommending that lenders and communities make efforts to return zombie properties to productive use, including transferring ownership to developers and third-party buyers); *cf.* Honea (New York AG), *supra* pg. 10 (noting that NY Attorney General proposed legislation to require lenders "to maintain and pay for upkeep on foreclosed properties that have been abandoned by their owners," "to notify homeowners that they do not have to move out until the foreclosure process is complete – which could take months or even years," and "to register the abandoned properties in a statewide registry for localities facing abandoned property issues to access electronically").

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative and quash the Fifth District's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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