IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1265
(Consolidated with Case Nos.
SC14-1266 and SC14-1267)

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

Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION
and PATRICIA J. BARTRAM,

Appellees.

On Appeal From the Fifth District Court of Appeal of Florida
L.T. Case No. 5D12-3823

AMICUS BRIEF OF MORTGAGE BANKERS ASSOCIATION

Robert M. Brochin
Joshua C. Prever
Brian M. Ercole

Morgan, Lewis & Bockius LLP
200 South Biscayne Boulevard, Suite 5300
Miami, Florida 33131-2339
Telephone: 305.415.3456
Attorneys for Mortgage Bankers Association

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CONCISE STATEMENT OF IDENTITY OF AMICUS CURIAE AND ITS INTEREST IN THE CASE

The Mortgage Bankers Association ("MBA") is a national association representing various interests of the real estate finance industry. The MBA consists of more than 2,200 companies that engage in various aspects of real estate finance for commercial and residential properties. MBA members include mortgage companies, mortgage brokers, mortgage servicers, commercial banks, real estate investment trusts, and others in the mortgage lending field. The MBA's mission is to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. Members of the MBA employ more than 280,000 people in every community in the country, including a great many that work and live in the State of Florida.

The MBA submits this brief in support of Respondent U.S. Bank National Association ("U.S. Bank"). The Fifth DCA's decision should be affirmed because of the "continuing obligations" rule established by this Court in *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004), which makes clear that mortgagors have a continuing contractual obligation to make monthly payments until the loan is paid in full. It would be unfair—and undermine an untold number of contractual agreements between borrowers and lenders and the certainty of

enforcement in the event of breach—if this Court were to recede from *Singleton* after the mortgage industry has relied on its holding for more than a decade.

STANDARD OF REVIEW

The MBA submits its brief as a "friend of the court" and "for the purpose of assisting the [C]ourt" in a case that is of great public interest and importance. *See Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So. 2d 522, 523 (Fla. 4th DCA 1996). The standard of review for the issues on appeal is *de novo*. *See Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013).

SUMMARY OF THE ARGUMENT

More than ten years ago, this Court rendered its seminal decision in *Singleton.* Through *Singleton*, this Court clarified Florida law and procedure that the mortgage industry had been acting under and relying upon in shaping its lending and servicing relationships with borrowers and in deciding what actions and litigation strategies, if any, are appropriate when borrowers default on their mortgage loan contracts. *Singleton* announced the "continuing obligations" rule for mortgage contracts: that *any* unsuccessful foreclosure action automatically places the parties back into the "same contractual [mortgage loan] relationship, with the "same continuing [mortgage loan] obligations," and that this occurs "*regardless of* whether or not the mortgagee sought to accelerate payments on the note in the first suit." 882 So. 2d at 1007, 1008 (emphasis added). Thus, each

monthly default of a payment "create[s] *a new and independent right* in the mortgagee to accelerate payment on the note in a subsequent foreclosure." *Id.* at 1008 (emphasis added).

While standard mortgages contain the contractual right to accelerate the balance of the loan upon notice and default, *Singleton* makes clear that *exercising this contractual right does not terminate the contract or the parties' obligations under the contract.* Under *Singleton*, an unsuccessful foreclosure action does not terminate the bargained for contractual rights and obligations in the mortgage contract. Thus, the borrower remains contractually obligated to re-pay in monthly installment payments the borrowed monies under the mortgage loan, and the parties' contractual rights and obligations are not modified or terminated as a result of the lender's unsuccessful foreclosure action. *Id*. (holding parties to mortgage contract have "same contractual [mortgage loan] relationship," with the "same continuing [mortgage loan] obligations").

In announcing this rule applicable to mortgage contracts, the Court iterated that "foreclosure is an equitable remedy" and stressed the "*unique nature* of the mortgage obligation and the *continuing obligations of the parties in that relationship*." *Id.* at 1007, 1008 (emphases added). And this Court rightly determined that any contrary holding or ruling "*would result in unjust enrichment or inequitable results*." *Id.* at 1007 (emphasis added).

Since 2004, nearly all federal and state appellate courts in Florida have recognized and applied *Singleton*'s "continuing obligations" rule when a foreclosure action is dismissed or otherwise unsuccessful, regardless of whether the dismissal is with or without prejudice or made voluntarily by the plaintiff. Thus, each failure by the borrower to make a monthly payment constitutes a new and separate breach of contract, subject to the right to demand the balance of the loan and seek a foreclosure judgment in that amount. And for each such breach of contract, a separate cause of action arises triggering a new five-year limitation period to foreclose. Any departure from *Singleton* would impair the contractual and property rights of lenders.

If this Court rescinds or changes *Singleton*'s "continuing obligations" rule—which the MBA urges the Court *not* to do—it should apply this change of law prospectively. For more than a decade, lenders and borrowers have acted with the understanding that should a foreclosure action be dismissed or withdrawn for whatever reason, the parties' contractual obligations and rights remain, and the borrower is obligated to continue to make monthly payments. Relying on *Singleton,* for example, lenders have and continue to voluntarily dismiss foreclosure actions without prejudice, often to give lender and borrower more time to reach a mutually beneficial alternative to foreclosure. Lenders use this flexible approach because they believe that if an alternative cannot be reached, each failure

to make a monthly payment gives rise to a new and separate cause of action and provides a new and separate basis to foreclose. It would be grossly unfair to now conclude that a new and separate cause of action does not arise, thus holding that lenders are time-barred from enforcing and obtaining the benefits of the mortgage contract.

It is well-settled that new rules of law should be applied prospectively when substantial injustice or undue hardship would result to those who relied on prior law. Because lenders bargained for, entered into, and enforced mortgage contracts based upon *Singleton*'s "continuing obligations" rule, it would be unfair to now penalize them for their reliance on this and other Courts' rules of law and decisions. Any newly-announced rule should apply only to foreclosures that are dismissed *after* the Court renders any decision that modifies its well-established "continuing obligations" rule. Prospective application will allow the mortgage industry reasonable time to adjust its practices and decisions based on any different rule of law.

ARGUMENT

As a matter of law and policy, this Court should answer "NO" to the certified question.[1] This Court's decision in *Singleton* commands such a result, and doing so will make clear that a dismissal of a foreclosure action of any kind—voluntary, involuntary, or with or without prejudice—does not modify or terminate the parties' bargained-for contractual rights and obligations, and that each subsequent failure by the borrower to make a monthly payment constitutes a new and independent cause of action, with each breach of contract subject to a new five-year limitations period. If, however, the Court recedes from *Singleton*, the Court should apply any new rule prospectively to avoid impairing the contractual and property rights of parties to Florida mortgages.

A. Mortgage Loans Are Unique Installment Contracts.

In *Singleton*, this Court recognized the "unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship." *Singleton*, 882 So. 2d at 1007. The "unique nature" of mortgage loans stems both

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[1] The certified question before this Court is:

> 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 the dismissal of the first foreclosure suit?

from their terms as a long-term installment contract with a fixed maturity date and their significance to the economy as a whole.

When a lender loans money to a home buyer, the parties bargain for and agree to two different documents and obligations: (1) a promissory note evidencing the debt obligation, and (2) a mortgage contract granting the mortgagee a lien and secured interest in the property as collateral for the debt owed by the borrower. The essence of the parties' contractual relationship is the borrowers' promise to pay their debt in monthly installments over the life of the loan—often thirty (30) years. As this Court held some thirty years ago, the "*[f]ailure to make timely payment* is not a mere technical breach of covenant intended to preserve the security; it *goes to the heart of the agreement* between a mortgagor and mortgagee." *David v. Sun Fed. Savs. & Loan Ass'n*, 461 So. 2d 93, 96 (Fla. 1984) (emphasis added) (citing *Guynn v. Brentmoore Farms, Inc.*, 253 So. 2d 136 (Fla. 1st DCA 1971)). Moreover, the lender agrees to make the loan based on this contractual promise and the understanding that if the borrowers fail to make their monthly payments, the lender may foreclose to obtain the collateral pledged and collect the full balance of the monies owed. *See, e.g., Morris v. Waite*, 160 So. 516, 518 (Fla. 1935) ("The mortgagor enters into the contract, not only agreeing to pay the debt, but further agreeing as an evidence of his good faith and intention to pay the debt that, if the debt is not paid at maturity, the mortgagee shall have the

right to enforce his pledge and to have the property described in the mortgage sold to pay the debt, or so much thereof as the pledged property will produce.").

As a contract, a Florida mortgage is subject to contractual legal principles and the parties to the mortgage contract rightfully rely on the ability to enforce its terms if and when they are breached. *See David*, 461 So. 2d at 95 (A mortgage is a contract that creates rights and obligations.). Parties to mortgage contracts are entitled to obtain the benefit of the bargain reached in the mortgage contract, and if they do not, the rule of law provides the contracting parties with an effective means to enforce its remedies provided so that they do receive the benefit of their bargain. *Id*.

The mortgage contract provides for various remedies if obligations under the contract are breached. One contractual remedy is the lender's right to accelerate the debt secured by the mortgage and to "require immediate payment in full" of that mortgage debt. (R. II:261 ¶ 22; R. III:487 ¶ 22.) In discussing a lenders' *right* to accelerate the payments due, this Court confirmed that "[i]t is well established in this state that an acceleration clause or promise in a mortgage *confers a contract right* upon the note or mortgage holder which he *may elect* to enforce upon default" and that "[*s]afeguarding the validity of such contracts, and assuring the right of enforcement [of the mortgage contract] is an obligation of the courts which has constitutional dimensions*." *David*, 461 So. 2d at 95 (emphases added)

(citations omitted); *see also Campbell v. Werner*, 232 So. 2d 252, 256 (Fla. 3d DCA 1970) ("*A contract for acceleration of a mortgage indebtedness should not be abrogated or impaired, or the remedy applicable thereto denied*, except upon defensive pleading and proof of facts or circumstances which are regarded in law as sufficient grounds to prompt or support such action by the court." (emphasis added)).

This contractual *right* to recover the collateral to repay the entire amount of the debt may be exercised in the foreclosure complaint itself.[2] Inherent in the lender's contractual right to accelerate the debt, of course, is the lender's contractual right to withdraw such a demand, or for that matter, to choose not to accelerate at all.[3]

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[2] The right to accelerate the demand for the monies owed by the borrower is a remedy that may be affirmatively exercised with the filing of the complaint. *See Rones v. Charlisa, Inc.*, 948 So. 2d 878, 879–880 (Fla. 4th DCA 2007) (collecting cases and while noting that acceleration can occur at different points, holding that in the instant case the filing of the complaint was the point the mortgagee "clearly elected to accelerate"). It stands to reason that dismissal of the same complaint acts to withdraw that demand. Moreover, whether a loan is deemed "accelerated" by the demand in the complaint, by entry of a final judgment on the foreclosure complaint, or otherwise is not material to whether the borrower has a "continuing obligation" to make monthly payments, such that the failure to do so gives rise to a new and separate cause of action even if the initial foreclosure action is unsuccessful.

[3] The mortgage contract makes clear that the mortgage lien shall be released only upon payment of all mortgage debt. (R. II:261 ¶ 23; R. III:487 ¶ 23.)

Mortgage loans and home ownership are important to a vibrant and stable economy. The real estate market depends upon lending. As recognized by this Court, there is a "national policy to protect the financial stability of mortgage lenders" because the "shortage of mortgage money benefits neither buyers and sellers of Florida real estate nor the Florida economy as a whole." *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985). The integrity and validity of the mortgage contract—and the certainty that the parties will obtain the benefit of the mortgage contract, and if not, that Florida courts will enforce that right—is critical to the right to contract and to parties lending money to Floridians wishing to purchase a home. To recede now, particularly with a retroactive effect, from the "continuing obligations" rule in *Singleton* would significantly undermine the contractual and property rights of lenders while simultaneously harming the Florida real estate market.

B. *Singleton* Announced A Rule That Ensures The Integrity Of The Mortgage Loan Contract And Provides Certainty To Borrowers And The Mortgage Industry.

In *Singleton*, this Court resolved a conflict regarding the impact of a dismissal of a foreclosure action (following acceleration of the debt) on a subsequent foreclosure action under the same mortgage loan. The Fourth DCA held that the dismissal with prejudice of a previous foreclosure action does not bar a future lawsuit where a new and subsequent breach of the monthly payment

occurs despite the dismissal of a prior foreclosure. *See Singleton v. Greymar Assocs.*, 840 So. 2d 356 (Fla. 4th DCA 2003); *see also Olympia Mortg. Corp. v. Pugh*, 774 So. 2d 863, 866 (Fla. 4th DCA 2000) ("By voluntarily dismissing the suit [without prejudice], Olympia in effect decided not to accelerate payment on the note and mortgage at that time.").

This Court agreed with the Fourth DCA's refusal to adopt a "*stricter and more technical view of mortgage acceleration.*" *Singleton*, 882 So. 2d at 1006 (emphasis added). Instead, this Court adopted the "continuing obligations" rule. *Id.* at 1007 (citing *Pugh* with approval and quoting "*[w]e disagree that the election to accelerate placed future installments at issue*" (emphasis added)). Thus, each time the borrower fails to make a monthly payment, the non-breaching party may demand full payment (accelerate) and file a new foreclosure action, even if a previous foreclosure based on a different breach of the same mortgage contract was dismissed. *Id.*

Whether the dismissal of the foreclosure action is with or without prejudice, involuntary or voluntary, has no bearing on whether the mortgagee and mortgagor have the "same contractual relationship with the same continuing obligations." *Id.* As a matter of Florida law, the dismissal of the pending foreclosure action for any reason does not modify or terminate the parties' contractual rights and obligations. To hold otherwise would create a perverse and absurd reality in regard to the

borrowers' contractual obligation to make monthly payments: a plaintiff-mortgagee in a foreclosure action would prefer to lose on the merits of its foreclosure complaint, and obtain a dismissal of the action *with prejudice*. This makes no sense.[4]

Likewise, *Singleton*'s "continuing obligations" rule is not tethered to principles of *res judicata*. As Judge Hodges explained in dismissing a quiet title claim nearly identical to that at issue here:

> To be sure, *Singleton* limits its discussion to the application of the doctrine of res judicata—however, the analysis applies with equal effect to the arguments before this Court. Ms. Dorta contends that Wilmington's (through its predecessor Citibank) unsuccessful attempt to foreclose on the Note and the Mortgage based on a September 1, 2007 default forever barred Wilmington from bringing any further foreclosure proceedings because the statute of limitations had run. *Singleton* directly refutes this argument, holding that even where a mortgagee initiates a foreclosure action and invokes its right of acceleration, *if the mortgagee's foreclosure action is unsuccessful for whatever reason*, the mortgagee still has the right to file later foreclosure actions—and to seek acceleration of the entire debt—*so*

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[4] This was the paradoxical holding of the Third DCA's recent decision in *Deutsche Bank Trust Company Americas v. Beauvais*, 2014 WL 7156961 (Fla. 3d DCA Dec. 17, 2014), which reasoned that the dismissal without prejudice of the first foreclosure action alone does not "decelerate" the debt, but that the borrower's contractual obligations to make monthly mortgage payments are terminated. *Beauvais* conflicts with *Singleton* by imposing some affirmative act other than the withdrawal or dismissal of the lender's demand to seek full payment, and it directly conflicts with *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So. 3d 954 (Fla. 4th DCA 2014). The Third DCA in *Beauvais*, however, did not determine that the lien was ineffective or otherwise invalid. Under *Beauvais*, lenders may maintain and have valid liens on the property as collateral for the repayment of debt, but those lien holders may not be able to enforce those liens by foreclosure should a borrower continue to breach her mortgage contract. This is nonsensical.

> *long as they are based on separate defaults*. . . . And at the very least, for purposes of this quiet title action, *Singleton* can be interpreted to show that an unsuccessful foreclosure action does not subsequently render a mortgage forever invalid and unenforceable.

Dorta v. Wilmington Trust Nat'l Ass'n, 2014 WL 1152917, at *3–4 (M.D. Fla. Mar. 24, 2014) (emphases added).

Not surprisingly, Florida courts repeatedly have held that *Singleton*'s "continuing obligations" rule defeats the exact claims brought by the Petitioner here—that is, a quiet title action based upon the alleged expiration of Florida's five-year statute of limitations.[5] The same reasoning in *Singleton* mandates this result. If an affirmative defense, such as *res judicata* or statute of limitations, "prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. . . . Clearly, *justice would not be served if the mortgagee was barred from challenging the subsequent default payment*

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[5] *See, e.g.*, *Evergrene Partners, Inc.*, 143 So. 3d at 956; *Lacroix v. Deutsche Bank Nat'l Trust Co.*, 2014 WL 7005029 (M.D. Fla. Dec. 10, 2014); *St. Louis Condo. Ass'n v. Nationstar Mortg. LLC*, 2014 WL 6694780, at *2 (S.D. Fla. Nov. 26, 2014); *Rodriguez v. Bank of America, N.A.*, 2014 WL 4851777, at *2–3 (S.D. Fla. Sept. 30, 2014); *Romero v. SunTrust Mortg., Inc.*, 15 F. Supp. 3d 1279, 1284 (S.D. Fla. 2014); *Espinoza v. Countrywide Home Loans Servicing, L.P.*, 2014 WL 3845795, at *3 (S.D. Fla. Aug. 5, 2014); *Verdecia v. Bank of N.Y. as Trustee for Certificate Holders CWABS, Inc.*, 2014 WL 3767668, at *2 (S.D. Fla. July 31, 2014); *Dorta*, 2014 WL 1152917, at *6–7; *Amador v. Bank of N.Y., Inc.*, 2013 WL 6157932 (S.D. Fla. Nov. 8, 2013); *Kaan v. Wells Fargo Bank, N.A.*, 2013 WL 5944074, at *3 (S.D. Fla. Nov. 5, 2013); *Romero v. Suntrust Mortg., Inc.*, No. 13-cv-22861-UU (S.D. Fla. Sept. 3, 2013), ECF No. 12 (Order on Mot. to Dismiss).

solely because he failed to prove the earlier alleged default." *Singleton*, 882 So. 2d at 1007–08 (emphasis added). Reaching a different result ten years later is unwarranted and would jeopardize the contractual basis behind secured loans.

Under current Florida law, a borrower knows that if she defaults on a monthly payment, she is subject to foreclosure, and, if that foreclosure is later dismissed, she remains contractually obligated to make the monthly payments. If, however, this Court refuses to apply *Singleton*'s "continuing obligations" rule to a statute of limitations defense, borrowers will be incentivized to delay foreclosure proceedings and abandon their obligations to make payments on their mortgage loans. Thus, overturning or receding from *Singleton*'s rule will not only impair existing mortgage contracts, it will add to the mortgage foreclosure actions already clogging the Florida court system—and further delay the resolution of those cases.[6]

Singleton's "continuing obligations" rule controls the outcome of this appeal and the Fifth DCA properly held that there is no basis to quiet title to the property or to enter a declaratory judgment in favor of Mr. Bartram. As such, this Court should affirm the Fifth DCA.

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[6] The Florida Foreclosure Initiative Workgroup determined that "an estimated 680,000 additional foreclosure cases will be filed between FY 2012/13 and FY 2015/16" in Florida. In 2013 alone, more than 269,649 properties had a foreclosure filing in Florida. Realty Trac, 2013 Year End US Foreclosure Report, available at http://www.realtytrac.com/content/news-and-opinion/2013-year-end-us-foreclosure-report-7963 (listing Florida filings for 2013). Although these numbers are declining, the overall number of foreclosures in Florida is still significant.

C. A Ruling That *Singleton* Does Not Apply To Statutes of Limitations Defenses Should Be Limited To Prospective Only Application.

If this Court recedes from its holding in *Singleton* and announces a new rule of law, then this Court should expressly hold that such a decision operates prospectively. In particular, any such decision should apply only to those unsuccessful foreclosure actions that take place after the Court's decision. This Court may—and should—make any new rule prospective. *See, e.g., Fla. Forest & Park Serv. v. Strickland*, 18 So. 2d 251, 253 (Fla. 1944) (giving decision "a prospective operation only"); *Tampa v. G. T. E. Automatic Elec., Inc.*, 337 So. 2d 844, 845 (Fla. 2d DCA 1976) ("That the court is empowered to make a decision prospective in effect only cannot be denied.").

A rule should be applied prospectively when substantial injustice or undue hardship would result to those who relied on the prior decision. *Martinez v. Scanlan*, 582 So. 2d 1167, 1175 (Fla. 1991); *Gulesian v. Dade Cnty. Sch. Bd.*, 281 So. 2d 325, 326 (Fla. 1973). Such prospective application is particularly appropriate when, as here, there are property or contractual rights that have vested and accrued under the prior judicial decision. *Strickland*, 18 So. 2d at 253; *Int'l Studio Apt. Ass'n v. Lockwood*, 421 So. 2d 1119, 1122 (Fla. 4th DCA 1982).

This Court's decision in *Florida Forest and Park Service v. Strickland*, 18 So. 2d 251 (Fla. 1944), illustrates these principles. There, relying upon existing

Florida law, a claimant appealed an adverse worker's compensation claim. During the appeal, this Court overruled its prior precedent and held that the workers compensation claimant must take additional steps. *Id.* at 252. Indeed, "[p]rior to the overruling decision it would have been considered by the Bench and Bar of Florida—and properly so—that the steps which had been taken by the compensation claimant . . . accorded with statutory procedure judicially approved." *Id.* at 253. Applying the "common sense" principle that a new rule will not be applied retroactively to impair property or contractual rights, the Court stressed that employees should not have their contractual rights impaired when relying upon "prevailing judicial interpretation" of how to appeal workers' compensation orders. *Id*; *see also Dep't of Revenue v. Anderson*, 389 So. 2d 1034, 1038 (Fla. 1st DCA 1980) (applying *Strickland* to affirm judgment not giving retroactive effect to change in law because company relied upon then existing law in not collecting taxes from customers when it contracted with them).[7]

Just as it would have been unfair in *Strickland* to penalize the compensation claimant for relying upon controlling Supreme Court law when pursuing his

[7] The *Strickland* Court emphasized that "such valuable potential property or contract right to compensation should not be cut off by [a] subsequent overruling court decision given a retrospective operation. . . . To hold otherwise would be, in effect, to deprive the claimant of a potentially valuable claim accruing by reason of his contract. . . . This is so for the reason that it is now too late for him to go back to the Florida Industrial Commission and there exhaust his administrative remedy, if he must follow the construction now placed on the statute by the overruling decision . . . ." 18 So. 2d at 254.

appeal, it would be unfair to penalize lenders who relied on this Court's "continuing obligations" rule and exercised their right under Rule 1.420 to unilaterally dismiss a foreclosure action without prejudice. Since announcing the "continuing obligations" rule in *Singleton*, Florida law, as understood and adopted by virtually every Florida appellate and federal court, has been that if a foreclosure action is unsuccessful for any reason, each default would give rise to a new and independent cause of action, and another foreclosure suit would not be barred by the limitations period if it is filed *within five years of the new and separate default*. Relying upon this rule of law, the mortgage industry crafted and implemented strategies and procedures on how to best to address defaulting borrowers in the state of Florida. This includes if and when to file a foreclosure action. The rule also informed lenders whether they should seek, agree to, or contest a dismissal of a case with or without prejudice. If this Court announces a new rule that does not apply prospectively, lenders will be wrongly and unjustly penalized for relying on existing Florida law and following its rules of procedure as pronounced by this Court and other Florida appellate and federal courts.

Thousands of foreclosure actions have been dismissed without prejudice in reliance on *Singleton*'s "continuing obligations" rule. Lenders, as permitted by Rule 1.420(a), routinely voluntarily dismiss foreclosure complaints without prejudice to allow defaulting mortgagors the opportunity to modify their loans,

pursue loss mitigation measures, or otherwise resolve borrower defaults and breaches. Often, when foreclosure judgments are entered and a foreclosure sale date is set, the sale date needs to be delayed to allow lenders and borrowers the necessary time to discuss loan modifications or other alternatives to foreclosure. In Florida, however, a postponement of a sale may only occur through Court order and Courts often will not postpone the scheduled property sale date for the sale. Thus, the only way to postpone the sale of a borrower's home to allow time for the parties to discuss settlement is to dismiss the foreclosure action. Relying on the "continuing obligations" rule, lenders have been willing to dismiss actions to engage with borrowers seeking alternatives to foreclosure, knowing that if such efforts prove fruitless, a new foreclosure action could be commenced based on a subsequent default date. It would be patently unfair for this Court to hold that lenders who dismissed foreclosure cases, so that the borrowers' homes would not be sold on the courthouse steps while loan modifications and foreclosure settlements could be explored with the borrowers, are now barred by the statute of limitations from foreclosing when those borrowers subsequently default on their monthly payment obligations.[8]

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[8] Lenders also have elected to voluntary dismiss cases without prejudice to address or cure other issues, such as challenges to necessary conditions precedent or standing of the foreclosing plaintiff. Under Rule 1.420, it is perfectly appropriate to unilaterally dismiss cases with prejudice in order to address pleading or other curable deficiencies. *See, e.g., Ormond Beach Assocs. v. Citation Mortg.,*

If the Court applies new substantive and procedural rules that modify borrowers' continuing obligations under their mortgage loans, many valid liens on property securing valid debt will effectively become unenforceable. Mortgagees that had their foreclosure actions dismissed without prejudice would no longer be entitled to the benefit of their bargain to accelerate receipt of the remaining mortgage payments. The mortgagee would have no remedy if and when the borrower stops making payments. The key means of vindicating the mortgagee's vested property and contractual interest in the mortgage loan would be lost. *See, e.g.*, *Scanlan*, 582 So. 2d at 1175–76 ("Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969))). Awarding a breaching borrower a property free and clear of his or her contractual obligations is an inequitable windfall that should be avoided.

To avoid this injustice, any new rule of law that the Court announces should be limited and should only apply prospectively. The Court should expressly hold that *Singleton*'s "continuing obligations" rule applies to all unsuccessful

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Ltd., 835 So. 2d 292, 295 (Fla. 5th DCA 2002) (holding that under Rule 1.420 "a party seeking affirmative relief has nearly an absolute right to dismiss his entire action once, without a court order, by serving a notice of dismissal"). Many of these cases may also be time-barred if the "continuing obligations" rule is not applied.

foreclosures—whether dismissed with or without prejudice—that occurred *before* the Court's decision. Only prospective application of any new change in settled Florida law will avoid impairing the contractual and property rights of mortgagees at a time when the Florida economy as a whole, including the housing market, is recovering.

CONCLUSION

The Court should answer "NO" to the certified question and make clear that *Singleton*'s "continuing obligations" rule applies to dismissals of any kind. If, however, the Court recedes from *Singleton* and therefore announces a new rule of law (which it should not), any such ruling should only apply prospectively.

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Respectfully submitted,

s/Robert M. Brochin
Robert M. Brochin
Joshua C. Prever
Brian M. Ercole
Morgan, Lewis & Bockius LLP
200 South Biscayne Boulevard
Suite 5300
Miami, Florida 33131-2339

CERTIFICATE OF COMPLIANCE

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

s/Robert M. Brochin
Robert M. Brochin

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2015, a true and correct copy of the foregoing was sent via email pursuant to Fla. R. Jud. Admin. 2.516 onto the parties on the attached service list.

/s/ Robert M. Brochin
Robert M. Brochin

SERVICE LIST

Kendall Coffey
kcoffey@coffeyburlington.com
Jeffrey B. Crockett
jcrockett@coffeyburlington.com
Daniel Blonsky
dblonsky@coffeyburlington.com
COFFEY BURLINGTON
2601 South Bayshore Drive, PH
Miami, Florida 33133

Counsel for Lewis Brooke Bartram

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

Counsel for Lewis Brooke Bartram

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.

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

Counsel for American Legal and Financial Network

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.`

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

Counsel for American Legal and Financial Network

Jason Bravo, Esq.
Paul Alexander Bravo
P.A. Bravo, P.A.
P.O. Box 1965
Hallendale, FL 33008
pabravo@pabravo.com
jbravo@pabravo.com

Counsel for Patricia Bartram

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
lsarvey@rasflaw.com
Counsel for American Legal and Financial Network

Elizabeth R. Wellborn
350 Jim Moran Blvd., Suite 100
Deerfield Beach, FL 33442
ewellborn@erwlaw.com

Counsel for ALFN

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

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

Ceci Culpepper Berman
BRANNOCK & HUMPHRIES
100 South Ashley Drive, Suite 1130
Tampa, FL 33602
cberman@bhappeals.com
eservice@bhappeals.com

Counsel for Lewis Brooke Bartram

Joel S. Perwin, Esq.
jperwin@perwinlaw.com
Joel S. Perwin, P.A.
169 E. Flagler Street
Suite 1422
Miami, FL 33131

Counsel for The Plantation Ponte Vedra, Inc.

William P. McCaughan
Steven R. Weinstein
K&L Gates LLP
200 South Biscayne Blvd.
39th Floor
Miami, FL 33131
William.mccaughan@klgates.com
Steven.weinstein@kl.gates.com

Counsel for U.S. Bank National Association

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

Counsel for ALFN

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

Counsel for Upside Property Investment

Michael D. Starks, Esq.
mstarks@bakerdonelson.com
Heidi J. Weinzetl
hweinzetl@bakerdonelson.com
Baker Donelson Bearman Caldwell & Berkowitz, PC
390 North Orange Avenue
Orlando, FL 32802

Counsel for U.S. Bank National Association

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

Counsel for Lewis Brooke Bartram

Michael Alex Wasylik
RICARDO & WASYLIK, PL
Post Office Box 2245
Dade City, FL 33526
service@ricardolaw.com

Counsel for Lewis Brooke Bartram

Lawrence C. Rolfe
Brett H. Burkett
ROLFE & LOBELLO, P.A.
Post Office Box 4400
Jacksonville, FL 32201-4400
lcr@rolfelaw.com bhb@rolfelaw.com

Counsel for Patricia J. Bartram

David M. Rodstein
PADULA HODKIN, PLLC
101 Plaza Real South, #207
Boca Raton, FL 33432
rodstein@padulahodkin.com
charise@padulahodkin.com

Counsel for Amicus Curiae USFN — America's Mortgage Banking Attorneys

John Granville Crabtree
CRABTREE & ASSOCIATES, P.A.
240 Crandon Boulevard, Suite 234
Key Biscayne, FL 33149
jcrabtree@crabtreelaw.com

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

T. Geoffrey Heekin
Hunter Malin
Catherine R. Michaud
HEEKIN, MALIN & WENZEL, P.A.
Post Office Box 477
Jacksonville, FL 32201
gheekin@jax-law.com
hmalin@jax-law.com
cmichaud@jax-law.com

Counsel for The Plantation at Ponte Vedra, Inc.

Robyn R. Katz
Jane E. Bond
MCCALLA RAYMER, LLC
225 E. Robinson Street
Suite 660
Orlando, FL 32801
rrk@mccallaraymer.com
jnb@mccallaraymer.com

Co-Counsel Amicus American Legal and Financial Network

Steven M. Siegfried
Nicholas D. Siegried
Nicole R. Kurtz
SIEGRIED, RIVERA, HYMAN, LERNER, DE LA TORRE, MARS & SOBEL, P.A.
201 Alhambra Circle. 11th Floor
Coral Gables, FL 33134
ssiegfried@srhl-law.com
nsiegfried@srhl-law.com
nkurtz@srhl-law.com

Counsel for Amicus Curiae CAI

Todd L. Wallen
THE WALLEN LAW FIRM, P.A.
255 Aragon Avenue
Third FL.
Coral Gables, FL 33134
todd@wallenlawfirm.com

Counsel for Amicus Curiae CAI

John R. Hargrove
HARGROVE PIERSON & BROWN P.A.
21 S.E. 5th Street
Suite 200
Boca Raton, FL 33432
eserve@hargrovelawgroup.com
kh@hargrovelawgroup.com

Counsel for Amicus Baywinds Community Association

John L. Pottenger, Jr.
JEROME N. FRANK LEGAL SERVICES ORGANIZATION
133 Wall Street
New Haven, CT 06511
j.pottenger@yale.edu

Counsel for National Association of Consumer Advocates

James C. Sturdevant
THE STURDEVANT LAW FIRM
354 Pine Street
Fourth Floor
San Francisco, CA 94104

Counsel for National Association of Consumer Advocates

Thomas A. Cox
NATIONAL CONSUMER LAW CENTER
Post Office Box 1314
Portland, Me 04104
tac@gwi.net

Counsel for National Association of Consumer Advocates