IN THE SUPREME COURT OF FLORIDA

Case No.: SC14-l265
(Consolidated with Case Nos.
SC14-l266 and SC14-1305)

L.T. Case No.: 5D12-3823

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

Petitioners,

vs.

U.S. BANK NATIONAL ASSOCIATION,

Respondent.
_____/

REPLY BRIEF OF PETITIONER THE PLANTATION AT PONTE VEDRA, INC.

Joel S. Perwin, P.A.
169 E. Flagler Street
Suite 1422
Miami, FL 33131
Tel.: (305) 779-6090
Fax: (305) 779-6095
E-Mail: jperwin@perwinlaw.com

By: Joel S. Perwin
Fla. Bar No.: 316814

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JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

TABLE OF AUTHORITIES

Cases

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

Other Authorities

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

I.
INTRODUCTION

U. S. Bank has reformulated its argument, and its reformulation inadvertently underscores the important differences between the doctrine of res judicata on the one hand, and a Statute of Limitations on the other. In its Answer Brief, for the first time, U.S. Bank has deviated from its prior contention that for purposes of the Statute of Limitations, a Mortgagee can accelerate and later retract its acceleration, just as *Singleton* held that in proper cases an acceleration can be retracted for purposes of res judicata.[1] U.S. Bank now contends, for the first time, that if no Final Judgment of Foreclosure has been entered, there has been no acceleration in the first place. Thus U.S. Bank advances the remarkable contention that in *Bartram*, "future installments were not at issue in the initial action" (Brief at 8).[2]

This change of position is designed to circumvent two serious problems with U.S. Bank's position: 1) that under Florida law, an acceleration starts the Statute of Limitations (*see* Plantation's Brief at 1 n. 1); and 2) that under Florida law, the pendency of the first action does not toll the Statute of Limitations (*see id.* at 5 n. 2).

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[1]*Singleton v. Greymar Associates, Inc.*, 882 So. 2d 1004 (Fla. 2004).

[2]*See* U.S. Bank's Brief at 9 ("the filing of a foreclosure action only places at issue the defaults asserted in the action and does not place future installments or obligations at issue"); 15 ("future installments were not placed at issue in [the first] lawsuit").

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

But the Bank's attempt to rescue its position is plainly unavailing. As noted (Plantation Brief at 2-3), the Bank's first Complaint repeatedly invoked its right to accelerate, alleging that Bartram had defaulted "under the terms of the note and mortgage for January 1, 2006 payment *and all payments due thereunder*" ((R. 470, ¶7) (emphasis added). The Bank also sent Bartram a separate notice of acceleration (*see* Plantation Brief at 36-37); and the District Court found "no question of the Bank's successful acceleration of the entire indebtedness on May 16, 2006." *U.S. Bank Nat'l Ass 'n v. Bartram*, 140 So. 2d 1007, 1009 (Fla. 5th DCA), *review granted*, 2014 WL 4662078 (Fla. Sept. 11, 2014). The Bank's newly-contrived contention--that "future installments were not at issue in the initial action" (Brief at 8)--is a good indication of the vulnerability of its entire argument.

Perhaps sensing that the foregoing position goes nowhere, the Bank also invokes its prior position--that in proper cases the failure of the first lawsuit retracts an acceleration that indeed has taken place. This position is more consistent with *Singleton*, which acknowledges the initial acceleration, and focuses (for res judicata purposes) upon the outcome of the first lawsuit in determining whether the prior acceleration can be rescinded. Thus, U.S. Bank also argues that an admitted acceleration will be ineffective (Brief at 12, 13), and legally unenforceable (Brief at 1, 2), if it was "unconsummated" (Brief at 1) and therefore "not completed" (Brief at

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

7). It says repeatedly that an acceleration is only effective when a Final Judgment of Foreclosure is entered (*see* Brief at 6, 7, 9, 12, 13, 14, 17, 20-21). And it derides the "antiquated assumption that once the mortgagee commences an acceleration of the full balance (including all future installments), the installment nature of the full balance is immediately and irrevocably terminated" (Brief at 18). Apart from the irony of the Bank's scorn for its own prior position, the Bank is correct in pointing out (contradicting its first argument) that *Singleton* acknowledged that an acceleration had indeed taken place, but found that it could be nullified in some circumstances (for res judicata purposes) because of the outcome of the first case.

Critically, however, a Statute of Limitations is based solely on the timeliness of *filing* the *second* case, not the *outcome* of the *first*. As noted, the pendency of a prior action does not toll the Statute of Limitations (*see* Plantation Brief at 5 n. 2). Enforcement of the Statute of Limitations thus is unaffected by how an earlier action came out. And its operation is the Legislature's province--not a Court's. These are fundamental, qualitative differences, under which the Bank's argument collapses. The Bank has not attempted to justify the application of *Singleton* to a Statute of Limitations; it has simply posited by fiat that "Singleton's reasoning applies with equal force to the statute-of-limitations context of this case" (Brief at 11). But its own discussion demonstrates the opposite. The two doctrines--one judicial, one

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

Legislative--operate at different times in the life of different lawsuits. There is nothing incongruous about the notion that an action that is not barred by the doctrine of res judicata is nonetheless time-barred.

II.
ARGUMENT

A. *Singleton (Plantation Brief at 14-19).* Before returning to the arguments advanced in the initial Brief, it is important to note that U.S. Bank has not confronted most of the underlying points that we made. For example, U.S. Bank cannot disagree that by its terms, the Court's holding in *Singleton*, even for purposes of res judicata, was not absolute or universal. To the contrary, *Singleton* says repeatedly that its holding applies only in a limited category of cases. And U.S. Bank does not disagree that in all of the hypothetical scenarios that the Court posited in *Singleton* in which an acceleration could be retracted, and in *Singleton* itself, the resolution of the first suit was with prejudice, constituting an adjudication on the merits. U.S. Bank also does not disagree that *Singleton* invoked equitable principles appropriate to application of the court-made doctrine of res judicata (*see* Plantation Brief at 21 & n. 4), while a Statute of Limitations is a Legislative prerogative (*see* Plantation Brief at 21-23). U.S. Bank does not disagree that *Singleton* provides no information as to whether, when, or in what form the Mortgagee might have given notice that it wanted

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

to revoke the acceleration. Finally, U.S. Bank does not disagree that *Singleton* did not address the contracting parties' right to make their own agreement concerning acceleration. As noted in the arguments below, these are important factors distinguishing *Singleton* from the present case, which are not addressed by U.S. Bank.

B. Argument.

1. Even in Cases in Which Singleton Applies, and the First Foreclosure Action Does Not Preclude the Second Under the Doctrine of Res Judicata, the Action Still Has to Be Timely Filed (Plantation Brief at 20-26). The doctrine of res judicata focuses on the outcome of the first lawsuit, while the Statute of Limitations focuses on the filing of the second lawsuit. *Singleton* says only that if a second action is filed, it is not necessarily barred by the doctrine of res judicata. *Singleton* says nothing about the timeliness of the second action, given that the first action does not toll the Statute of Limitations.

But that question *is* discussed in one of the important cases that we cited (Plantation Brief at 20)--a case never mentioned by U.S. Bank--*Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 23 (Fla. 1974). In *Lasky* the Court held that the first dismissal for lack of jurisdiction--based on the failure to meet the $1000 medical-expense threshold of §627.732(2), Fla. Stat.--was without prejudice to re-filing after the threshold was met, "*so long as it is within the statute of limitations*" (emphasis

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

added). There could not be a more clear recognition that a claim not barred by the doctrine of res judicata may still be time-barred. But the Bank simply ignores *Lasky*.

Singleton was a judicial decision informed by equitable considerations. On the other hand, a Statute of Limitations is informed by Legislative policy considerations reflecting the importance of repose, which include both the quiescence of controversies and the elimination of stale claims--policies that embrace Constitutionally protected rights (*see* Plantation's Brief at 21-23). These rights apply to cases worth $5 or $5 million--to contracts lasting 20 days or 20 years. The Bank's cries of injustice and unfairness (*see* Brief at 7) could be made by any party whose assertedly-valid claims are time-barred. And here, the equities are all on one side, given the Bank's blatant and repeated dereliction in not timely filing the action (*see* Plantation Brief at 24). The Bank has no one to blame but itself. As noted (Plantation Brief at 24-25 & n. 9), this Court has repeatedly declined to interfere with the Legislature's prerogatives on this issue.

The Bank's single rejoinder on this point, reserved for a footnote (Brief at 16 n. 10), is that "courts are frequently called upon to determine when various causes of action accrue." That is correct. Courts are charged to determine the Legislature's intentions, and have consistently construed §95.11(2)(b), Fla. Stat., to start the five-year Statute of Limitations at the point of acceleration (*see* Plantation Brief at 1

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

n. 1). When the relevant Statute of Limitations was revamped in 1974 (*see* Plantation Brief at 25-26), the Legislature is presumed to have been mindful of prior judicial interpretations, and to have intended to retain the interpretation of Statutory language not changed.[3]

As the District Court ruled, "there is no question of the Bank's successful acceleration of the entire indebtedness on May 15, 2006." 140 So. 3d at 1009. Under established law, that started the Statute of Limitations. The first action did not toll the Statute, irrespective of its preclusive effect in the second. As this Court held in *Lasky*, even if the first action here did not bar the second action (more accurately, did not bar the defense asserted by the Bank in the second action), the second assertion of the claim still had to be timely. Nothing in *Singleton* abrogated *Lasky*, or the other cases cited, or the principle they enforced.

2. Even If the Singleton Holding Were Applicable to a Statute of Limitations, the Instant Case Does Not Fall Within the Singleton Rubric (Plantation Brief at 27).

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[3]"The Legislature is presumed to know the judicial construction of a law when amending that law, and the Legislature is presumed to have adopted prior judicial constructions of law unless a contrary intention is expressed." *Florida Dept. of Children and Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004), *quoted in Zommer v. State*, 31 So. 3d 733, 754 (Fla.), *cert. denied*, 131 S. Ct. 192 (2010).

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

a. Singleton Only Applies to a Dismissal with Prejudice (Plantation Brief at 27). As noted (Plantation Brief at 29 n. 11), a dismissal with prejudice is a necessary but not sufficient condition for the application of *Singleton.* Other requirements are that the revocation be communicated to the Mortgagor, and that the Contract not foreclose such a revocation. *See infra.*

1) Singleton's Limitation to Cases That Are Dismissed with Prejudice (Plantation Brief at 28-29). Singleton was a dismissal with prejudice. All of the examples it posited involved a final disposition against the Mortgagee on the merits, leaving no uncertainty in the mind of the Mortgagor that the foreclosure and acceleration were not successful. Only in this context did the Court in *Singleton* invoke equitable principles of unjust enrichment.

In contrast, a dismissal without prejudice has no res judicata effect in the first place, and provides no repose to the Mortgagor, who could be sued again on the same claim. By definition, it is outside the *Singleton* rubric. *See Deutsche Bank Trust Co. Americas. v. Beauvais*, 2014 WL 7156961 (Fla. 3d DCA Dec. 17, 2014):

> [W]here, as here, there has been no adjudication on the merits, nor a determination that the acceleration was invalid or ineffectual, the lender's exercise of its option to accelerate the debt survives a dismissal without prejudice. And because the accelerated nature of the debt was unaffected by the order of dismissal without prejudice, and the parties never reinstated the installment terms of the

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

> repayment of the debt, it necessarily follows that the statute of limitations on the accelerated debt continued to run.

The Bank has two responses (Brief at 4 n. 4,16-17). First, without citing the Record, the Bank says that the first dismissal in the instant case was with prejudice; that its own statement to the contrary in the District Court was erroneous; and that "further review of the trial court's orders"--the same Orders that the Bank had reviewed earlier--shows that the first dismissal was with prejudice. But the trial Court's Order of Dismissal quotes its prior Order declaring that the failure to appear at the case management conference would result in a dismissal "without prejudice," and then dismisses the case (*see* R. 434-35). It is unclear what the Bank's "further review" revealed, but the Order does not seem ambiguous. Had the Bank timely re-filed, of course, the issue might have been tested, but the Bank did not do so.

Second, the Bank argues that it is irrelevant whether the first dismissal is with or without prejudice, because either way no Final Judgment of foreclosure was entered (Brief at 17). If this were correct, one would think that at least one of the hypothetical examples posited in *Singleton* would have been a dismissal without prejudice. The *Singleton* holding is that the res judicata doctrine is inapplicable in some cases--not all--and this qualification undermines the Bank's contention that *Singleton* applies whenever there is no Final Judgment of foreclosure. As argued, the

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

distinction seems clearly and logically to be based in part on whether the dismissal was with or without prejudice. In the instant case, it was without prejudice.

2) The Cases (Plantation Brief at 30-34). The Bank only relies upon the overbroad attribution to *Singleton* in such cases as *Dorta v. Wilmington Trust Nat'l Ass 'n,* 2014 WL 3734578, *6 (M.D. Fla. March 24, 2014) that *Singleton* applies to a dismissal "for any reason" (*see* U.S. Bank's Brief at 10-12 & n. 6, 17). However, as noted, the Bank cannot deny that *Singleton* itself says otherwise. *Dorta* and other cases make no attempt to address or explain the limitation repeatedly emphasized in *Singleton.* Nor does the Bank. Nor does the Bank offer any substantive discussion of the decisions on this issue--in Florida and elsewhere. It does not address the reasoning of *Spencer v. EMC Mortgage Corp.*, 97 So. 2d 257 (Fla. 3d DCA 2012) (*see* Plantation's Brief at 30-32), recently endorsed in *Deutsche Bank Trust Co. Americas v. Beauvais*, 2014 WL 7156961 (Fla. 3d DCA Dec. 27, 2014), *citing Cadle Co. II, Inc. v. Fountain*, 281 P. 3d 1158 (Nev. 2009). Petitioner Bartram has surveyed the non-Florida cases, which on several bases favor the Petitioners' position (*see* Bartram Brief at 24-34).

b. Any Attempt to Retract an Acceleration Must Be Promptly and Clearly Communicated (Plantation Brief at 35-38). At best, U.S. Bank's argument is that the Mortgagee has the *option* to revoke an acceleration--not that any

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

event does so automatically. As noted (Plantation Brief at 35 & n. 16), it is settled that the decision to accelerate has to be clearly communicated, and similarly, if a retraction does stop the Statute of Limitations, the Mortgagor needs to know it. This is especially true in a case like this one, in which the Mortgagee sent a Notice of Acceleration apart from its Complaint, which it never retracted (*see* Plantation's Brief at 36-37). The Bank is incorrect in contending (Brief at 25) that the Mortgagor is not prejudiced. As noted (Plantation Brief at 35), adequate notice gives the Mortgagor a chance to pay past-due installments at a non-default rate, or at least to make future payments as they come due, rather than, as here, relying upon the Mortgagee's forbearance for years, only to have the entire balance asserted against him.

U.S. Bank responds first (Brief at 22) that it has no duty to "decelerate" because it never accelerated in the first place. As noted, that is simply incorrect. U.S. Bank did not prevail in the first lawsuit, but it certainly and explicitly accelerated the Mortgage. It argues second that the Mortgage agreement does not require such affirmative steps. But U.S. Bank's position is not based on the Mortgage agreement, nor could it be, given that the Mortgage agreement does not authorize the Mortgagee to revoke an acceleration in the first place--only the Mortgagor. *See* discussion *infra*. Instead, U.S. Bank relies upon *Singleton*, which in turn is based on "equitable principles" and the "ends of justice." 882 So. 3d at 1008. One such equitable

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

consideration is the necessity of informing the Mortgagor of any effort to retract an acceleration.

U.S. Bank also argues (Brief at 23) that Bartram should have known what the dismissal of the first action meant. But even accepting U.S. Bank's argument, at best it means that U.S. Bank had the *option* to treat the Mortgage obligations as continuing--not that they automatically did so. The Mortgagor knows nothing until the Bank says something. *Singleton* is based on equitable principles. Simple fairness requires that the Mortgagor communicate any retraction of the acceleration. *See* cases cited, Plantation Brief at 36 n. 18. Here the Bank did nothing.

c. Even Where Singleton Applies, It Is Grounded in the Equities of a Given Case, and the Equities Here Overwhelmingly Favor the Mortgagor (Plantation Brief at 12-13,24,38). We need not repeat the litany of U.S. Bank's derelictions. Everything that happened in this case to forego U.S. Bank's remedy for Bartram's default was its own fault. *Singleton* is grounded in the equities of a given case, which in the instant case are not close.

d. Even If Singleton Would Otherwise Apply, the Parties Can Make Their Own Contract on the Question of Acceleration (Plantation Brief at 38-42). Even if all of the foregoing arguments were rejected, the Mortgagor and Mortgagee are still free to make their own agreement about the consequences of an

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

acceleration. *Singleton* says nothing to forestall their right to do so, nor does U.S. Bank, nor could it, given the Constitutional prohibition against impairing contracts (*see* Plantation Brief at 39-40). Here the Mortgage gives the Bank the right to accelerate and the Mortgagor the right to reinstate (*see* R. 259, ¶19; R. 261, ¶22). It does not give the Bank a unilateral right to revoke an acceleration. The omission of any such right in the Bank is significant (*see* Plantation Brief at 41).

U.S. Bank responds, citing no authority, that because "U.S. Bank had the right to start the acceleration process . . . it had the right to stop it" (Brief at 25; *see id.* at 23). It cites no authority because there is none. Absent express contractual language, the Contract means what it says. U.S. Bank also says (Brief at 16 n. 6) that Bartram has no standing to raise this point under the Contract, because only the Mortgagee has the right to accelerate, and therefore the Bank's change of mind is none of Bartram's business. That is absurd. The Bank's actions caused severe prejudice to Bartram, and he is a party to the Contract that the Bank violated.

Singleton says nothing that would excuse U.S. Bank of its contractual obligations. It has no right to revoke an acceleration under the Contract.

JOEL S. PERWIN, P.A.
Alfred I. DuPont Building, 169 East Flagler Street, Suite 1422, Miami, FL 33131 • Tel. (305) 779-6090 • Fax (305) 779-6095 • jperwin@perwinlaw.com

III.
CONCLUSION

It is respectfully submitted that the decision of the District Court should be disapproved, and the Judgment of the Circuit Court should be approved.

Respectfully submitted,

Joel S. Perwin, P.A.
169 E. Flagler Street
Suite 1422
Miami, FL 33131
Tel.: (305) 779-6090
Fax: ((305) 779-6095
E-Mail: jperwin@perwinlaw.com

By: s/Joel S. Perwin
Joel S. Perwin
Fla. Bar No.: 316814

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner The Plantation at Ponte Vedra, Inc. has been served via e-mail upon all counsel on the attached Service List on this 10th day of March, 2015.

By: s/Joel S. Perwin
Joel S. Perwin
Fla. Bar No.: 316814

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this computer-generated Brief is in compliance with the font requirements of Rule 9.210(a)(2), Fla. R. App. P. as submitted in Times New Roman 14-point.

By: s/Joel S. Perwin
Joel S. Perwin
Fla. Bar No.: 316814

SERVICE LIST

Counsel for U.S. National Bank

Michael D. Starks, Esq.
James A. Talley, Esq.
Kelly Overstreet Johnson, Esq.
Eve A. Cann, Esq.
Baker, Donelson, Bearman
Caldwell & Berkowitz, PC
Bank of America Center
390 North Orange Avenue
P.O. Box 1549
Orlando, FL 32802
mstarks@bakerdonelson.com
jtalley@bakerdonelson.com
kjohnson@bakerdonelson.com
ecann@bakerdonelson.com
lcapplis@bakerdonelson.com
kdalton@bakerdonelson.com

William P. McCaughan, Esq.
David R. Fine, Esq.
Stephanie N. Moot, Esq.
Karen P. Finesilver, Esq.
K&L Gates LLP
Southeast Financial Ctr., 39th Floor
Miami, FL 33131
william.mccaughan@klgates.com
steven.weinstein@klgates.com
stephanie.moot@klgates.com
olivia.kelman@klgates.com
maxine.lewis@klgates.com

Counsel for the Plantation at Ponte Vedra, Inc.

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

Counsel for Gideon Gratsiani

Paul Alexander Bravo
P.A. Bravo, P.A.
P.O. Box 1965
Hallandale, FL 33008
pabravo@pabravo.com
service@pabravo.com

Counsel for Patricia J. Bartram.

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

Counsel for Lewis Brooke Bartram

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

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

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

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

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

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

John G. Crabtree, Esq.
George R. Baise, Jr., Esq.
Brian C. Tackenberg, Esq.
Crabtree & Associates, P.A.
240 Crandon Blvd., Suite 234
Key Biscayne, FL 33149
jcrabtree@crabtreelaw.com
gbaise@crabtreelaw.com
btackenberg@crabtreelaw.com

Counsel for Brevard County Legal Aid, Inc.

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

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

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

Peter Sleasman, Esq.
Florida Legal Services, Inc.
14260 W. Newberry Road
Suite 412
Newberry, FL 32669
peter@floridalegal.com

Counsel for American Legal and Financial Network

Robert R. Edwards, Esq.
Jessica P. Quiggle, Esq.
Robertson, Anschutz & Schneid, PL
6409 Congress Avenue, Suite 100
Boca Raton, FL 33487
redwards@rasflaw.com
jquiggle@rasflaw.com
e-mail@rasflaw.com

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

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

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

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

Michelle G. Gilbert, Esq.
Jennifer Lima-Smith
Gilbert Garcia Group, P.A.
2005 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

James C. Sturdevant, Esq.
The Sturdevant Law Firm
jsturdevant@sturdevantlaw.com

Counsel for Bradford Langworthy

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

Counsel for Upside Property Investment

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

Counsel for Baywinds Community Association

John R. Hargrove, Esq.
Hargrove Pierson & Brown, P.A.
21 S.E. 5th Street, Suite 200
Boca Raton, FL 33432
jrh@hargrovelawgroup.com
eserve@hargrovelawgroup.com

Major B. Harding, Esq.
John R. Beranek, Esq.
Ausley & McMullen
P.O. Box. 391
Tallahassee, FL 32302
mharding@ausley.com
jberanek@ausley.com

Counsel for Community Associations Institute

Steven M. Siegfried, Esq.
Nicholas D. Siegfried, Esq.
Nicole R. Kurtz, Esq.
Siegfried, Rivera, et al.
201 Alhambra Circle, 11th Floor
Coral Gables, FL 33134
SSiegfried@srhl-law.com
nsiegfried@srhl-law.com
nkurtz@srhl-law.com

Todd L. Wallen, Esq.
The Wallen Law Firm, P.Al
255 Aragon Ave., 3d Floor
Coral Gables, FL 33134
todd@wallenlawfirm.com

Counsel for Jerome Frank Legal Services Organization

J.L. Pottenger, Jr., Esq.
Yale Law School
P.O. Box 209090
New Haven, CT 06520
j.pottenger@yale.edu

Counsel for Mortgage Bankers Association

Robert M. Brochin, Esq.
Joshua C. Prever, Esq.
Brian M. Ercole,Esq.
Morgan Lewis & Bockius, LLP
200 S. Biscayne Blvd., Suite 5300
Miami, FL 33131
rbrochin@morganlewis.com
jprever@morganlewis.com
bercole@morganlewis.com

Counsel for National Consumer Law Center

Thomas A. Cox, Esq
National Consumer Law Center
tac@gwi.net

Counsel for USFN - America's Mortgage Banking

David W. Rodstein, Esq.
Padula Hodkin, PLLC
101 Plaza Real South, #207
Boca Raton, FL 33432
rodstein@padulahodkin.com
charise@padulahodkin.com